

PRIVILEGES OR IMMUNITIES, INDIVIDUAL RIGHTS, AND FEDERALISM

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Today the Supreme Court holds that the Due Process Clause of the Fourteenth Amendment requires the States to obey most guarantees in the Bill of Rights.¹ Although the Fourteenth Amendment was ratified in 1868, the Court at first refused to apply liberties provided by the Bill of Rights to the States.² Only much later did the Supreme Court gradually change its direction.

Today criticism of the rule applying the Bill of Rights to the States—the incorporation doctrine—has become politically fashionable. In addition to academic critics, critics have included the columnist George Will, Raoul Berger, the late Senator East of North Carolina, and—at one time at least—Edwin Meese.³ Criticism is often fervent. For example, a column in the *Wall Street Journal* attacking the incorporation doctrine was entitled *Flim-flam Under the Fourteenth*.⁴

Critics have given two major reasons why they think it is wrong to apply the Bill of Rights to the States. First, they contend that requiring states to abide by the Bill of Rights undermines federalism. Second, critics claim that the doctrine is completely without historical foundation.⁵

The title of this panel is “The Modern Role for the Privileges or Immunities Clause,” but there is almost no modern role for it. I will therefore look at the history of the Fourteenth Amendment; perhaps its future role may be found in the past.

The history surrounding the Fourteenth Amendment and its Privileges or Immunities Clause is deeply intertwined with the history of slavery. After the American Revolution, slavery gradually became a source of formidable economic and political

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1. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1986).

2. See, e.g., *Maxwell v. Dow*, 176 U.S. 781 (1900).

3. See Will, *A Labored Ruling on Pornography*, Greensboro News & Record, July 21, 1982, at A12, col. 3; Alexander, *Squaring Off Over the Constitution*, Greensboro News & Record, Oct. 27, 1985, at E2, col. 3; 128 CONG. REC. S3018, S13297, 13329-30 (1982); E. Meese, address to ABA, July 9, 1985, at 14-16.

4. Rice, *Wall St. J.*, July 31, 1985, at 18, col. 4.

5. See sources cited *supra* note 3.

power. The federal Constitution seemed to offer security to slavery. In state ratification proceedings, Madison and others assured Southerners that the national government had no power over slavery;⁶ so federalism and racism were associated in a way that persisted through much of American history.

In the 1870s, after emancipation and the post-Civil War amendments, blacks were disenfranchised by terrorism later codified as law. The Supreme Court, flying banners of federalism, both contributed to and ratified the relegation of blacks to a status between slavery and freedom.⁷ In the cases of slavery and race, then, federalism did not promote individual rights. This fact has obscured the substantial truth in the relationship Jefferson and others saw between federalism and individual autonomy.

As the slave system grew into a formidable economic and political force, it shaped the life, law, and politics of the South and of the nation. Counting slaves for purposes of representation increased the political power of their owners. In his book on the *Dred Scott* case, Don Fehrenbacher suggests that the political power of slavery was like a holding company: the South dominated Democratic Party politics, and, for years, the Democrats dominated national politics.⁸

As agitation against slavery increased in the 1830s, tensions heightened. Southern States passed laws making criticism of slavery criminal. The South became a closed society. By the time of the Lincoln-Douglas debates, both Lincoln and Douglas recognized that Republicans could not campaign in the South. Southern whites were prosecuted for circulating a book Northern Republicans used as a campaign document. On the floor of the Senate a pro-slavery senator invited an opponent of slavery to come to Mississippi so that he could be lynched.⁹

Supporters of slavery suggested criminal prosecution of anti-slavery activists, and in some cases there were actual criminal prosecutions.¹⁰ Nothing so quickens appreciation of the importance of the rights set out in the Bill of Rights—most of which are directed toward controlling the awesome political power of

6. See M. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 19 (1987).

7. See *id.* at 171-80.

8. See D. FEHRENBACHER, *THE DRED SCOTT CASE* 511-12 (1978)

9. See M. CURTIS, *supra* note 6, at 26-34.

10. See *id.* at 31.

the criminal justice system—as does becoming the actual or potential subject of criminal prosecution.

In addition to being concerned with their own rights, opponents of slavery were concerned with protection of the rights of blacks. Free blacks were in desperate need of legal protection. They had been stripped of basic liberties by the Southern States, by a number of free States, and by the United States Supreme Court. The Oregon Territory, like some Northern States, denied blacks the right to enter Oregon, to own property, or to maintain court actions.¹¹

The courts were of little help to the cause of liberty. In 1833 in *Barron v. Mayor of Baltimore*,¹² the Court held that the guarantees of the Bill of Rights did not limit the States. And in *Dred Scott*¹³ the Chief Justice, relying on a claim of original intent, held that blacks belonged to a degraded class when the Constitution was written and were entitled to none of its privileges, including those in the Bill of Rights. After *Barron*, a couple of state courts held the federal Bill of Rights did limit the States, but the vast majority followed *Barron*.¹⁴

From the 1830s to the 1860s the collisions between the demands of slavery and the demands of a free society increased. When federalism collided with the aims of slavery, federalism often lost out. Congress passed, and the Supreme Court approved, a fugitive slave law that allowed blacks to be seized in the North, where they were typically presumed to be free, and summarily transported to Southern States where the law presumed all blacks were slaves.¹⁵ Northern States' personal liberty laws securing to blacks procedural protections such as the right of confrontation, cross-examination, and jury trial were struck down or preempted.¹⁶ By the 1850s, influential leaders of the pro-slavery faction were suggesting that emancipation laws of Northern States were an unconstitutional taking of property without due process.¹⁷

In response to these events, opponents of slavery developed

11. *See id.* at 59-61.

12. 32 U.S. (7 Pet.) 243 (1833).

13. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

14. *Compare* *Nunn v. Georgia*, 1 Ga. 243, 250 (1846) (extending constitutional protections to the citizens of states under state law) *with* *State v. Newsome*, 27 N.C. 250, 251 (1844) (following *Barron*).

15. *See* M. CURTIS, *supra* note 6, at 40.

16. *See id.*

17. *See id.* at 27.

a legal theory supporting liberty. Free blacks at least were citizens of the United States. All American citizens were protected by the Bill of Rights against state and federal denial of their rights. Laws denying blacks the right to testify deprived them of liberty without due process.¹⁸

The insistence that the Bill of Rights limited the States reflects both a strong commitment to individual rights in American history and the recognition that state action was a major threat to basic rights of opponents of slavery.

Leading Republicans read the Privileges and Immunities Clause of Article IV, section two—which provided that the citizens of each state should be entitled to all privileges and immunities of citizens in the several States—to establish a national body of privileges of citizens which states could not abridge.¹⁹ They read the Bill of Rights to limit the States. Some leading Republicans—including the author of section one of the Fourteenth Amendment and the Chairman of the House Judiciary Committee—indicated that, properly interpreted, Article IV, section two required states to obey guarantees of the Bill of Rights.²⁰

Leading Republicans held these ideas even prior to the framing of the Fourteenth Amendment. If the courts held otherwise, they thought, it was because they had been polluted by slavery and drifted from the old moorings of liberty and human rights.²¹ To these old-time Republicans, the crusade against slavery was a crusade to protect freedom against those who planned to destroy it. The campaign slogan of Republicans in 1856 was “Free Speech, Free Labor, Free Soil, and Fremont.”²²

In the debate on abolition of slavery in 1864, Congressman after Congressman cited Southern States’ violations of the Bill of Rights liberties as proof that slavery subverted constitutional liberty and needed to be eliminated. The Republican Chairman of the House Judiciary Committee insisted that free speech and press had been nullified in the South. He thought these were privileges of citizens of the United States, protected from state

18. *See id.* at 42-56.

19. *See id.* at 61, 38; *see also* U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

20. *See* M. CURTIS, *supra* note 6, at 61, 38.

21. *See id.* at 83.

22. *See* R. SEWELL, *BALLOTS FOR FREEDOM* 284 (1976).

violation by the Privileges and Immunities Clause of Article IV, section two.²³

In 1866, after they lost the Civil War, Southern States and localities passed laws denying blacks many fundamental rights accorded to whites. A Louisiana parish provided that no black could pass within the parish without a permit from his employer; that blacks could not be out after ten o'clock at night without a permit from their employers; that blacks could not own or rent houses in the parish; that blacks could not meet at all after sunset, or before sunset without written permission from the captain of patrol; that blacks could preach or exhort only with a special license from the president of the police jury; and that blacks not in the military could not have weapons without special permission. The parish would punish offenders by placing them in a barrel—but not for more than twelve hours.²⁴

Republicans in Congress criticized these laws as violations of the Bill of Rights. For example, Representative Clark of Kansas complained that the Southern States were more interested in maintaining old prejudices than in “establish[ing] republican liberty.” Alabama had passed a law forbidding blacks from owning firearms. Clark considered the Alabama law a violation of “the right of the people to keep and bear Arms,” a provision of the Bill of Rights he evidently considered binding on the States.²⁵

Representative Hart noted that the Constitution provided for a republican form of government. It was the duty of the nation to guarantee that the rebellious states had such a government, Hart stated that the Constitution guaranteed:

[A] government whose “citizens shall be entitled to all privileges and immunities of other citizens”; where “no law shall be made prohibiting the free exercise of religion”; where “the right of the people to keep and bear arms shall not be infringed”; where “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”; and where

23. See M. CURTIS, *supra* note 6, at 37-40; CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

24. See I. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 279-81 (1960).

25. CONG. GLOBE, 39th Cong., 1st Sess. 1838 (1866); see U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

“no person shall be deprived of life, liberty, or property without due process of law.”²⁶

To deal with the Black Codes, Congress in 1866 passed the Civil Rights Bill, which extended citizenship to blacks and guaranteed them the full and equal benefit of all laws and provisions for the security of person and property as enjoyed by white citizens. Leading Republicans understood the “full benefit of laws for the security of person and property” to include the liberties in the Bill of Rights.²⁷ In fact, some leading Republicans argued that constitutional power to pass the Civil Rights Bill could be found in the power of Congress to enforce the Bill of Rights.²⁸

Not all Republicans agreed that Congress had the power to pass the Civil Rights bill. John Bingham, the future author of section one of the Fourteenth Amendment, insisted that a constitutional amendment was needed. And Bingham indicated that the amendment he wrote would protect Bill of Rights liberties from state violation.²⁹

Except to people who have suffered the handicap of a legal education, the application of the Bill of Rights to the States is suggested by the words of the Fourteenth Amendment. Section one of the amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person in its jurisdiction the equal protection of the laws.³⁰

Prior to the framing of the Fourteenth Amendment there was a long Anglo-American historical tradition in which basic rights like those in the Bill of Rights had been described as “privileges” and “immunities.”³¹

The words of the Fourteenth Amendment are reinforced by the remarks of Congressman Bingham and of Senator Howard

26. CONG. GLOBE, 39th Cong., 1st Sess. 1629 (1866).

27. See M. CURTIS, *supra* note 6, at 74-82.

28. See *id.*

29. See *id.* at 82.

30. U.S. CONST. amend. XIV, § 1.

31. See M. CURTIS, *supra* note 6, at 64.

who presented the amendment to the Senate on behalf of the Joint Committee on Reconstruction.³² Howard listed rights in the Bill of Rights—from free speech to protection against cruel and unusual punishments—as the privileges that would be protected by the amendment.³³ Like some other leading Republicans, Howard also thought that fundamental rights beyond those explicitly set out in the Constitution were protected. On the Bill of Rights question, Howard was clear and unequivocal:

Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.

Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.³⁴

In Congress in 1866 no one contradicted Bingham and Howard. General support for the Bingham-Howard position comes from Republican statements in the campaign of 1866—that the

32. *See id.* at 58-61, 88.

33. *See id.* at 88.

34. CONG. GLOBE, 39th Cong., 1st Sess. 1265-66 (1866).

amendment would protect all rights of citizens, constitutional rights, and rights such as freedom of speech.³⁵ Further support comes from records of later ratification proceedings in Massachusetts and Pennsylvania³⁶ and from statements made in Congress before the Court liquidated the Privileges or Immunities Clause.³⁷ Before the *Slaughter-House Cases*,³⁸ a few early court decisions also suggested that the guarantees of the Bill of Rights limited the States under the Privileges or Immunities Clause.³⁹

The Court, of course, held otherwise. Gradually it has partly corrected its mistake by holding most guarantees of the Bill of Rights to limit the States under the Due Process Clause. But even when it was refusing to apply most of the Bill of Rights to the States, the Court sometimes slipped into using the words of the Fourteenth Amendment in their natural sense. So in *Palko v. Connecticut*⁴⁰ the Court held states could subject criminal defendants to double jeopardy. Some of the privileges and immunities set out in the Bill of Rights, the Court explained, were so basic that the Court had applied them to the States under the Due Process Clause. Other privileges and immunities set out in the Bill of Rights—such as protection against double jeopardy—were of less importance, so states would be allowed to violate them.⁴¹ It was a curious reading of an amendment that said no state shall abridge the privileges or immunities of citizens of the United States.

Attorney General Meese and a host of others have criticized the incorporation doctrine as contrary to original intent and as a constitutionally suspect blow to federalism.⁴² Curiously, many who find application of the Bill of Rights to the States to be a blow to federalism favor federal government regulation of state tort law, federal preemption when the question involves state protection of individuals and workers from toxic chemicals, and federal preemption of state laws protecting individuals from dangerous products. Many of these people support reading ERISA to preempt much state law protecting workers

35. See M. CURTIS, *supra* note 6, at 131-44.

36. See *id.* at 145-53.

37. See *id.* at 154-70.

38. 83 U.S. (16 Wall.) 36 (1873).

39. See, e.g., *United States v. Hall*, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282).

40. 302 U.S. 319 (1937).

41. See *id.* at 326.

42. See sources cited *supra* note 3.

in their employment benefits. They would thereby replace state regulation with a doctrine that transfers the power to make the rules and to decide if they have been violated from the state legislatures to corporations and labor unions, subject only to the mild restraint that these centers of corporate power may not abuse their discretion. When the interests of corporate power and federalism collide, many of those who hold that requiring the States to obey the Bill of Rights is an affront to federalism find federalism should give way to the interests of corporate power.

Madison and Jefferson both believed in natural rights and in the importance of the Bill of Rights. Jefferson saw bills of rights as crucial protections of individual liberty. Both Madison and Jefferson saw the federal Bill of Rights as providing the judiciary with a crucial check on governmental power.⁴³ Around the time of the Fourteenth Amendment, leading Republicans—who also believed in natural rights—saw no contradiction between applying the Bill of Rights to the States and states' rights: no state had a legitimate right to violate the liberties contained in the Bill of Rights.

There may be some correspondence between the attack on the incorporation doctrine and the advocacy of preemption of state laws protecting individual health, safety, and contract rights. The consistent thread is the contraction of the rights of the individual to life, liberty, and the pursuit of happiness.

43. See M. CURTIS, *supra* note 6, at 18-22.

