

JUDGE HAND'S HISTORY: AN ANALYSIS OF HISTORY AND METHOD IN *JAFFREE V. BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY*

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In *Jaffree v. Board of School Commissioners*,¹ the United States District Court for the Southern District of Alabama upheld, against a constitutional challenge, teacher led school prayers. In the companion case of *Jaffree v. James*,² the court upheld the Alabama Prayer Law which permitted state sanctioned prayers in public schools. The religious exercises and the Prayer Law were, of course, unconstitutional when viewed in light of decisions of the United States Supreme Court holding that the first amendment erected a wall of separation between church and state.³ When faced with direct and settled precedent, the lower federal courts generally follow the decisions of the Supreme Court.

The district court, however, was listening to a different drummer. It announced that it should:

attempt to ascertain the intent of the adoptors, and after ascertaining that attempt to apply the Constitution as its adoptors intended it to be applied. . . . Amendment through judicial fiat is both unconstitutional and illegal. Amendment through judicial fiat breeds disrespect for the law and it undermines the very basic notion that this country is governed by laws and not by men.⁴

So the district court set aside decisions of the Supreme Court and looked instead to history. First, the district court concluded that the first amendment, as originally passed, guaranteed to each individual that Congress would not impose a national religion. Since the establishment clause applied only to the federal government the states were free to allow or prohibit religious establishment under their own constitutions and laws. Second, the court concluded that the "historical record" established that "when the fourteenth amendment was ratified in 1868 . . . its ratification did not incorporate the first amendment against the states."⁵ Indeed, the court concluded that *none* of the guarantees in the Bill of Rights limit the states.

As a statement of law, the district court's opinion in *Jaffree* is of little

* A.B. 1964, University of the South; J.D. 1969, University of North Carolina, Member of the North Carolina Bar; partner in the firm Smith, Patterson, Follin, Curtis, James & Harkavy, Greensboro, North Carolina. Copyright 1983 by Michael Kent Curtis. I am indebted to my law partner, Charles A. Lloyd for directing my attention to Blackstone's use of the words "privileges and immunities."

¹ 554 F. Supp. 1104 (S.D. Ala. 1983).

² 554 F. Supp. 1130 (S.D. Ala. 1983).

³ Compare *Jaffree v. James*, 554 F. Supp. 1130, 1131 (S.D. Ala. 1983), with *Engle v. Vitale*, 370 U.S. 421 (1962) and *Abington v. Schempp*, 374 U.S. 203 (1963).

⁴ *Jaffree v. Board of School Comm'rs*, 554 F. Supp. at 1126.

⁵ *Id.* at 1119.

significance. The decision was promptly reversed.⁶ However, the opinion is significant because it exemplifies the recent assault on the legitimacy of federal protection of civil liberties. The opinion is part of a growing body of political opinion which asserts that the federal courts should not be empowered to enforce the limitations of the Bill of Rights on the states. For example, George F. Will, a widely published columnist, has announced that the Supreme Court took "a radically wrong turn when it 'incorporated the First Amendment into the Fourteenth' . . ."⁷ Senator East of North Carolina has proposed a bill which would overturn court rulings holding that the federal courts may protect Bill of Rights liberties against the states.⁸

Those who seek to free the states from the guarantees of the Bill of Rights point to history as their justification and claim that they are dispassionately and scientifically following the evidence where it leads.⁹ The purpose of this article is to analyze the *Jaffree* decision on its own terms—to examine the court's claim that it was merely performing a neutral and dispassionate inquiry into the intent of the framers of the fourteenth amendment.

I. THE AUTHORITIES

In support of its historical analysis, the district court relied almost exclusively on an article written by Charles Fairman¹⁰ as construed in *Government by Judiciary* by Raoul Berger. Although the court concluded that the majority of disinterested observers approved Fairman's analysis rejecting total incorporation of the Bill of Rights,¹¹ the court overlooked a number of scholars who have concluded that the fourteenth amendment was designed to incorporate *all* rights in the Bill of Rights as limits on the states.¹² Even more

⁶ Justice Powell, in his capacity as Eleventh Circuit Justice, granted a stay of the district court's decision on February 11, 1983. *Jaffree v. Board of School Comm'rs*, 103 S. Ct. 842 (1983). Three months later, the Court of Appeals for the Eleventh Circuit reversed the district court's holding in *Jaffree* relating to the first and fourteenth amendment issues. Only the district court's ruling not to grant class certification was affirmed by the court of appeals. *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983).

⁷ G. Will, *A Labored Ruling on Pornography*, Greensboro Record, July 21, 1982, at A-12, col. 3-6.

⁸ S. 3018, 97th Cong., 2d Sess. (1982).

⁹ *E.g.*, R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977) [hereinafter cited as *GOVERNMENT BY JUDICIARY*]. This article deals only with the *Jaffree* court's conclusion about the fourteenth amendment. As to its history of the first amendment, see L. LEVY, *JUDGMENTS* 169-233 (1972). For an interesting analysis of the legitimacy question see L. LUSKY, *BY WHAT RIGHT* (1975).

¹⁰ Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *STAN. L. REV.* 5 (1949) [hereinafter cited as Fairman].

¹¹ *Jaffree v. Board of School Comm'rs*, 554 F. Supp. at 1121 n.28.

¹² *E.g.*, H. ABRAHAM, *FREEDOM AND THE COURT* 40 (1982); I. BRANT, *THE BILL OF RIGHTS* 302-59 (1967); Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 *U. CHI. L. REV.* 1 (1954); Curtis, *The Fourteenth Amendment and the Bill of*

significant, the *Jaffree* court failed to see that Professor Fairman reached a conclusion different from its own. After "brooding" over the fourteenth amendment debates for some time, Professor Fairman "slowly" concluded that the amendment was designed to protect against state action those rights implicit in the concept of ordered liberty.¹³ Since Professor Fairman himself believed that the fourteenth amendment justified *selective* incorporation of rights in the Bill of Rights, the district court's reliance on him to disprove any incorporation was grossly misplaced. Another scholar relied on by the court concluded that the fourteenth amendment was designed to make the establishment clause binding on the states.¹⁴

The *Jaffree* court considered and summarily dismissed the work of W. W. Crosskey, who criticized Fairman's conclusions at length. The work of Professor Crosskey "impresses the Court as being designed to reach a result. Namely, Crosskey was interested in providing a constitutional basis to support the desegregation decision of the United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954)."¹⁵

The fallacy of the courts' approach is obvious. Even if Professor Crosskey wished to support the *Brown* decision, his historical analysis of the intent of the framers of the fourteenth amendment to make the Bill of Rights a limit on the states would be valid or invalid regardless of his motives. By similar logic one could dismiss the court's opinion in *Jaffree* by saying it was "designed to reach a result," namely upholding religious exercises in the public schools. The imputation of motive could be true and the writer's analysis could be wrong or the imputation of motive could be true, but the writer's analysis could be correct. Scholars who support incorporation have opposed the *Brown* decision¹⁶ while supporters of the decision have opposed incorporation.¹⁷

Even if Crosskey's work could be dismissed for the reason advanced by the *Jaffree* court, the court's argument is misplaced. It is misplaced because Professor Crosskey's article replying to Fairman nowhere mentions and, as

Rights, 14 CONN. L. REV. 237 (1982) [hereinafter cited as *The Fourteenth Amendment*]; Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982) [hereinafter cited as *Further Adventures*]; Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1 (1968); Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 368 (1972); J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1965); H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW* 386-438 (1982).

¹³ Fairman, *supra* note 10, at 139.

¹⁴ *Jaffree v. Board of School Comm'rs*, 554 F. Supp. at 1124 n.33.

¹⁵ *Id.* at 1120-21 n.28.

¹⁶ *E.g.*, Avins, *supra* note 12.

¹⁷ Compare *Adamson v. California*, 332 U.S. 46 (1947) (Frankfurter concurring) with *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (in which Justice Frankfurter also concurred).

far as the reader can discern, was not concerned with the *Brown* decision.¹⁸

The *Jaffree* court also dismissed Professor Crosskey's law review article criticizing Fairman on the basis of reviews of Crosskey's book *Politics and the Constitution*, a book which did not contain most of the material set out in Crosskey's article criticizing Fairman's analysis. The court agreed with a critic that Crosskey's "typical analytical method" in *Politics and the Constitution* was "slanderous, *ad hominem* attacks on those historical actors who supported views contrary to those which Professor Crosskey expected to find in the historical record."¹⁹

In this way the court dismissed Professor Crosskey and freed itself of the need to analyze his arguments. If there is a neutral principle to be found in such analysis, it must be that one may safely reject the work of those who make *ad hominem* attacks on historical actors who support views contrary to those they wish to find in the historical record.

The authorities relied on by the court, Raoul Berger and Professor Fairman, both make *ad hominem* attacks on leading advocates of the fourteenth amendment. Both Berger and Fairman faced a difficult task in arguing against incorporation because John A. Bingham, who wrote section one of the fourteenth amendment, and Jacob Howard, who presented it to the United States Senate, made statements indicating an intent to apply the Bill of Rights to the states. For example, in presenting the prototype of the fourteenth amendment to the House of Representatives, Bingham had relied on his argument that the rights in the Bill of Rights were privileges or immunities for citizens of the United States which state officers should be bound to support by their oath to support the constitution.²⁰ However, Bingham noted the provisions of the Bill of Rights were of no effect because the Supreme Court had ruled that the guarantees in the Bill of Rights did not limit the states. "[I]t is equally clear by every construction of the Constitution, its contemporaneous construction, legislative, executive, and judicial, that these great provisions of the Constitution, this immortal Bill of Rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States."²¹ To show why his amendment was necessary, Bingham cited *Barron v. Baltimore*²² and *Livingston v. Moore*²³ to show "that the power of the Federal Government to enforce in the United States courts the Bill of Rights under the articles of amendment to the Constitution had been denied."²⁴ In his final speech on the fourteenth amendment

¹⁸ Crosskey, *supra* note 12.

¹⁹ *Jaffree v. Board of School Comm'rs*, 554 F. Supp. at 1121 n.28.

²⁰ CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

²¹ *Id.*

²² 32 U.S. (7 Pet.) 243, 247-48 (1833).

²³ 32 U.S. (7 Pet.) 469, 551-52 (1833).

²⁴ CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866).

Bingham announced that it would allow the people "to protect by national law the privileges and immunities of all citizens of the Republic and the in-born rights of every person within its jurisdiction whenever the same shall be denied or abridged by the unconstitutional acts of any State."²⁵ It would correct "flagrant violations of the guaranteed privileges of citizens of the United States" such as state imposition of "cruel and unusual punishments."²⁶

In presenting the fourteenth amendment to the Senate, Senator Howard explained that the privileges or immunities clause would secure the

personal rights guaranteed and secured by the first eight amendments to the Constitution: such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the government for a redress of grievances, a right appertaining to each and all of the people; the right to keep and bear arms; the right to be exempted from quartering of soldiers in a house without the consent of the owner; . . .²⁷

In addition, Howard noted that the amendment was necessary to correct court decisions which had held that guarantees of the Bill of Rights did not limit the states.²⁸

Since the intent of the legislature may be gleaned from the statements of leading proponents,²⁹ Fairman and Berger obviously had their jobs cut out for them. Raoul Berger has responded to the problem by describing Bingham as "muddled,"³⁰ "inept,"³¹ as "veer[ing] as crazily as a rudderless ship," and as "unable to understand what he read."³² Professor Fairman suggested that Bingham may have been "intentionally evasive" but that it was more likely that he simply had not thought out the import of the words he had chosen.³³ Following this analysis, the *Jaffree* court concludes that Bingham had no clear idea of what the fourteenth amendment would accomplish.³⁴

Senator Howard meets a similar fate. Fairman's article presented a remark about Howard in such a fashion as to suggest that the Michigan senator was not very bright.³⁵ Berger quoted with approval an historian who suggested that Howard was a "reckless . . . radical," and a "Negrophile."³⁶ By

²⁵ *Id.* at 2542.

²⁶ *Id.*

²⁷ *Id.* at 2765-66.

²⁸ *Id.*

²⁹ GOVERNMENT BY JUDICIARY, *supra* note 9, at 136-37.

³⁰ *Id.* at 145.

³¹ *Id.* at 219.

³² Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine Lived Cat*, 42 OHIO ST. L.J. 435, 450 (1981) [hereinafter cited as *Nine Lived Cat*].

³³ Fairman, *supra* note 10, at 32.

³⁴ *Jaffree v. Board of School Comm'rs*, 554 F. Supp. at 1120.

³⁵ Fairman, *supra* note 10, at 134 n.381.

³⁶ GOVERNMENT BY JUDICIARY, *supra* note 9, at 147.

contrast, Professor Crosskey's article makes no personal criticisms of Republicans in the Thirty-ninth Congress.³⁷

If *ad hominem* attacks can be used to dismiss a scholar, Raoul Berger, the court's chief authority, would have to be dismissed. For example, in replying to one critic Berger says:

His 55 page screed represents an effort to quarrel his way into notice by clawing up the back of one whom he describes as a "distinguished author." Strident invective fills his every page. So gross and reckless are his many misrepresentations that one might attribute them to malice but for his inability to weigh evidence, to comprehend what he reads. For him "a veil of rhetoric supplants proof." On the most charitable view, he was in haste to teach what he had not learned.³⁸

In short, the *Jaffree* court failed to apply the principles it relied upon equally. The court dismissed Crosskey's article for *ad hominem* attacks allegedly made in *another* book by Crosskey.³⁹ It did not apply the same strictures to the authorities on which it relied.

In the final analysis, the district court rests its decision on history. To understand the failure of the district court's analysis it is necessary to look in detail at the history of the fourteenth amendment.

II. THE FOURTEENTH AMENDMENT

A. *Historical Background*

In the years after 1830, as slavery became an increasingly divisive political issue, southern states passed laws which eliminated freedom of speech and press for critics of slavery.⁴⁰ As both Abraham Lincoln and Stephen A. Douglas recognized, Republicans could not proclaim their ideas in the South.⁴¹ As Republicans saw it, other guarantees of the Bill of Rights had been violated by the states as well. Republicans were troubled by the way southern states had dealt with individual liberty.⁴² So there were strong reasons for the Republicans in the Thirty-ninth Congress to believe that the rights in the Bill of Rights should be binding on the states.

The major weakness in the historical examination of the fourteenth

³⁷ Crosskey, *supra* note 12.

³⁸ Berger, *Soifer to the Rescue of History*, 32 S.C.L. REV. 427, 428 (1980).

³⁹ *Jaffree v. Board of School Comm'rs*, 554 F. Supp. at 1120-21 n.28.

⁴⁰ CONG. GLOBE, 38th Cong., 1st Sess. 2979 (1864).

⁴¹ CREATED EQUAL, THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 290-91 (P. Angle ed. 1958).

⁴² See generally Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 60 WAKE FOREST L. REV. 45, 50-64 (1980). *The Fourteenth Amendment*, *supra* note 12, at 241-58.

amendment relied on by the district court is that the analysis ignores the historical background of the amendment and attempts to view Republican purposes and statements in light of the judicial orthodoxy of the times. The judicial orthodoxy of 1866 however, held that blacks were not citizens and had no rights which a white man was bound to respect;⁴³ that the guarantees of the Bill of Rights did not place limits on the states;⁴⁴ and that the privileges and immunities clause of the original Constitution only applied to temporary visitors and did not restrict a state's power to limit rights of permanent residents.⁴⁵

Speeches by Republicans in the Thirty-eighth and Thirty-ninth Congress show that Republicans generally believed that slavery had perverted constitutional law and had produced court decisions which restricted the liberties of the citizens. Leading Republicans asserted that blacks were citizens; that the guarantees of the Bill of Rights did limit the states; and that the privileges and immunities clause of article IV, section 2 established a body of absolute privileges or immunities, including the rights set forth in the Bill of Rights, which states were bound to respect.⁴⁶

These unorthodox legal views were held by Republicans prior to the passage of the fourteenth amendment.⁴⁷ The theories were shared by Republican conservatives and radicals alike.⁴⁸ The issue which divided Republican conservatives and radicals was not application of the Bill of Rights to the states, but suffrage for the newly freed blacks.

B. *The Framing of the Fourteenth Amendment*

In 1866, two months before Congress submitted the fourteenth amendment to the states, Congress passed (over the veto of President Johnson) the Civil Rights Act of 1866. The Civil Rights Act of 1866 provided that "all persons born in the United States" are "citizens of the United States." The Act gave all such citizens the same rights in every state to "make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property and to full and equal benefit of all laws for the security of person and property as is en-

⁴³ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-05 (1857).

⁴⁴ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

⁴⁵ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 422 (1857).

⁴⁶ See generally *The Fourteenth Amendment*, *supra* note 12, at 248-56, 274.

⁴⁷ *Id.*

⁴⁸ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866). (remarks of Senator Cowan indicating a belief that the fifth amendment limited the states. Cowan was a conservative Republican who later deserted the party to support Andrew Johnson). John Bingham, indeed, was one of the more conservative Republicans in the House. E. MCKITRICK, *ANDREW JOHNSON IN RECONSTRUCTION* 257 (1960).

joyed by white citizens."⁴⁹ So strong was the influence of Republican legal theories on Republican legislators that leading Republicans argued the power to pass the Civil Rights Bill could be derived from the power of Congress to enforce the Bill of Rights. This argument was made, for example, by James Wilson, Chairman of the House Judiciary Committee, and by Representative Thayer.⁵⁰

John A. Bingham, on the other hand, took the position that a constitutional amendment was required before Congress would have power to enforce the guarantees of the Bill of Rights against the states.⁵¹ Both the prototype⁵² of the fourteenth amendment drafted by Bingham and the final version of section 1, also primarily drafted by Bingham, were designed to give Congress the power to enforce the guarantees of the Bill of Rights in the states. The final version was also designed to give the courts the power to enforce the guarantees of the Bill of Rights, regardless of what action was taken by Congress. To explain why his prototype of the amendment was necessary, Bingham cited the Supreme Court decisions holding that the Bill of Rights did not apply to the states.⁵³

Bingham's interpretation of the privileges and immunities clause of the original constitution to make the Bill of Rights a limit on the states was consistent with antislavery tradition and was shared by other leading Republicans. Bingham wrote the amendment and was a member of the Joint Committee. His remarks, both on his prototype of the amendment and on the final version, support the conclusion that it was intended to apply the Bill of Rights to the states.⁵⁴

As we have seen, Senator Howard, who presented the fourteenth amendment to the Senate on behalf of the Joint Committee, explained that the privileges or immunities clause was intended to include the personal rights guaranteed by the first eight amendments (most of which Howard listed). Senator Howard also recognized that the court opinions holding that the Bill of Rights did not limit the states meant Congress could not enforce the

⁴⁹ Act of Apr. 9, 1866, 14 Stat. 27.

⁵⁰ CONG. GLOBE, 39th Cong., 1st Sess. 1294 (Wilson), 1153, 1270 (Thayer) (1866).

⁵¹ *Id.* at 1291-92 (Bingham). See generally *The Fourteenth Amendment*, *supra* note 12, at 267-74.

⁵² Bingham's prototype fourteenth amendment provided:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (fifth amendment).

B. KENTRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF 15 ON RECONSTRUCTION* 61 (1914).

⁵³ CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866). See generally *The Fourteenth Amendment*, *supra* note 12, at 258-67.

⁵⁴ See generally *The Fourteenth Amendment*, *supra* note 12, at 246-56, 258-66.

guarantees without a constitutional amendment. Howard concluded: "The great object of the first section of this amendment is, therefore, to restrain the power of the States and to compel them at all times to respect these great fundamental guarantees."⁵⁵

The great contribution made by Professor Crosskey was to focus on the legal ideas held by Republicans, to distinguish them from orthodox legal doctrine, and to show how, read in light of antislavery legal thought, statements by Bingham and other Republicans were substantially consistent.⁵⁶ Professor Fairman's failure to read Republican ideas in light of Republican legal thought reduces those ideas to a hopeless jumble.⁵⁷ A hypothesis that makes sense, instead of nonsense, out of the debates should be preferred.

The privileges or immunities clause was designed to insure that the states would have to respect at least all of the rights of citizens of the United States as set out in the Constitution. In addition to the guarantees of the Bill of Rights, such rights as the privilege of the writ of habeas corpus and the guarantee against *ex post facto* laws would also be protected. In debate in the Thirty-ninth Congress, a number of congressmen and senators explained the amendment by saying that it would provide that all rights of United States citizens must be respected by the states.⁵⁸ No legislator said that the states would not be required to obey the guarantees of the Bill of Rights.

The district court relied on the conclusions of Raoul Berger as set forth in his book, *Government by Judiciary*. Berger, however, takes the position that the intent of the legislature "may be evidenced by statements of leading proponents," and that such intent once found, "is to be regarded as good as written into the enactment."⁵⁹ Two of the three leading proponents of the fourteenth amendment, Bingham and Howard, indicated that the amendment was intended to make the states respect the rights of United States citizens, including those rights set out in the Bill of Rights. In an effort to explain away Howard's clear remarks, the *Jaffree* court quotes statements that Howard was a radical and a "Negrophile."⁶⁰ However, since radical and moderate Republicans were not divided on the issue of application of the Bill of Rights to the states, Howard's radicalism on the issue of black suffrage is hardly a valid reason for discounting his speech. If Howard's statement was wrong why did not Senator Fessenden, who was president,⁶¹ or any other

⁵⁵ CONG. GLOBE, 39th Cong., 1st Sess. 2765-66.

⁵⁶ See Crosskey, *supra* note 12; *The Fourteenth Amendment*, *supra* note 12, at 241-81; Curtis, *supra* note 40, at 88-92; *Further Adventures*, *supra* note 12, at 108-15.

⁵⁷ Fairman, *supra* note 10.

⁵⁸ CONG. GLOBE, 39th Cong., 1st Sess. 3038 (Yates), 3167 (Windom), 3201 (Orth and App.) 256 (Baker) (1866).

⁵⁹ GOVERNMENT BY JUDICIARY, *supra* note 9, at 136-37.

⁶⁰ *Jaffree v. Board of School Comm'rs*, 554 F. Supp. 1104, 1121 n.29 (1983).

⁶¹ See CONG. GLOBE, 39th Cong., 1st Sess. 2768-70 (1866).

member of the Committee correct it? It is seriously inaccurate to suggest, as the district court does, that Howard's statement on incorporation was a "remark" tucked away in the middle of a long speech.⁶²

The district court, again relying on Berger, quotes Senator Poland as saying that the fourteenth amendment secured nothing beyond what was intended by the original privileges and immunities clause of article IV, section 2.⁶³ However, it is clear that leading Republicans who spoke about article IV, section 2, adhered to an unorthodox interpretation of the clause whereby the section protected the fundamental rights of American citizens, wherever those rights might be. James Wilson, Chairman of the House Judiciary Committee in the Thirty-ninth Congress, had interpreted the clause to protect rights of American citizens including freedom of religious opinion and freedom of speech and press. Bingham read the clause to protect the liberties in the Bill of Rights as did Representatives Bromall and Hart.⁶⁴ Raoul Berger himself recognizes that the Republican reading of article IV was unorthodox. Furthermore, Berger ignores the fact that Senator Poland said that article IV had become a dead letter because of the doctrine of State Rights, "induced mainly, as I believe, for the protection of the peculiar system of the South."

When Senator Poland said that the fourteenth amendment privileges or immunities clause secured "nothing beyond what was *intended*" by the provision in article IV, section 2, his remarks indicated a difference between the intent of the clause and the application it had received. Without knowing what Senator Poland thought was originally intended, his remarks are of little significance on the Bill of Rights issue.⁶⁵

The court also relies on Senator Doolittle who, according to the court, made "some additional remarks which were designed to reassure those whose votes had already been won in favor of passage of the fourteenth amendment that indeed the amendment was limited to known objectives, which objectives were not intended to encompass the federal Bill of Rights."⁶⁶ The remark to which the court refers is Doolittle's statement that the Civil Rights Bill "was the forerunner of this constitutional amendment, and to give vitality to which this constitutional amendment is brought forward."⁶⁷ Since

⁶² *Id.* at 1122. Here, as elsewhere, the court repeats as truisms statements by Raoul Berger which are demonstrably erroneous. See Curtis, *supra* note 40, at 92-96; *Further Adventures*, *supra* note 12.

⁶³ Jaffree v. Board of School Comm'rs, 554 F. Supp. at 1122.

⁶⁴ CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (Wilson); 39th Cong., 1st Sess. 1088 (Bingham); 1695 (Hart) 1263 (Bromall) (1866).

⁶⁵ *Further Adventures*, *supra* note 12, at 112-13.

⁶⁶ Jaffree v. Board of School Comm'rs, 554 F. Supp. at 1122. Here again the court falls into a clear factual error by relying on Berger.

⁶⁷ GOVERNMENT BY JUDICIARY, *supra* note 9, at 149.

Doolittle was an opponent of the measure,⁶⁸ his remarks were obviously not designed to reassure supporters. Nor is his statement inconsistent with incorporation.

A number of senators and representatives noted the relationship between the Civil Rights Bill and the fourteenth amendment. Professors Fairman, Berger and the *Jaffree* court rely on this fact to disprove incorporation of the Bill of Rights.⁶⁹ The Civil Rights Bill was quite similar to the fourteenth amendment. The bill conferred citizenship upon blacks and among other things, gave them "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens. . . ."⁷⁰

The *Jaffree* court relied on Professors Fairman and Berger's assumption that the rights enumerated in the Civil Rights Bill excluded guarantees secured by the Bill of Rights.⁷¹ However, by ordinary use of language, "laws for the security of person and property" would include provisions in the Bill of Rights. The Supreme Court has used the phrase to include rights in the Bill of Rights.⁷² Republicans in the Thirty-ninth Congress clearly read the "full and equal benefit of all laws and proceedings for security of person and property" as sufficiently broad as to include rights in the Bill of Rights. When the Freedmen's Bureau Bill was passed, it provided that blacks should have among other things "full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional rights of bearing arms."⁷³

Virtually all Republicans who spoke on the subject assumed that rights in the Bill of Rights were rights of citizens of the United States and limited or should limit the states as well as the federal government. So most of these Republicans probably read the Civil Rights Bill as encompassing protections of the Bill of Rights liberties in the states. Indeed, the Civil Rights Bill had been justified by Congressman Wilson, Chairman of the House Judiciary Committee in the Thirty-ninth Congress, under the power of Congress to en-

⁶⁸ CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866).

⁶⁹ See *Further Adventures*, *supra* note 12, at 1. While most Republicans took a broader view, a few made statements which can be read as saying the act only protected against discrimination. See, CONG. GLOBE, 39th Cong., 1st Sess. 1293. A few others declared the act and the amendment identical. Statements that the act and the amendment were identical are inconsistent with the idea that the act only protected against discrimination—because of the presence of the due process clause. *Further Adventures*, *supra* note 12, at 104-06.

⁷⁰ Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866).

⁷¹ *Jaffree v. Board of School Comm'rs*, 554 F. Supp. at 1122-24.

⁷² See *Dred Scott v. Sandford*, 60 U.S. (19 How.) at 449-50; *Boyd v. United States*, 116 U.S. 616, 635 (1866). See generally *The Fourteenth Amendment*, *supra* note 12, at 267-68.

⁷³ CONG. GLOBE, 39th Cong., 1st Sess. 654, 743, 1292 (1866) (The Freedmen's Bureau Bill, the predecessor to the Civil Rights Bill, was applicable only to the South and was vetoed by President Johnson).

force the Bill of Rights.⁷⁴ Statements that the fourteenth amendment embodied the principles of the Civil Rights Bill tend to confirm, rather than refute, an intent to apply the Bill of Rights to the states.

Both Senator Trumbull, Chairman of the Senate Judiciary Committee, and Congressman Wilson, Chairman of the Judiciary Committee in the House, took the position in the debate on the Civil Rights Bill that there were certain absolute, fundamental rights of United States citizens, including the rights to personal security, personal liberty and to acquire and enjoy property, which no state could abridge. These Trumbull and Wilson identified with article IV, section 2. Both legislators relied on statements from Kent and Blackstone about the rights of personal liberty, personal security and private property.⁷⁵ Blackstone listed the Magna Carta, the Petition of Right, the Habeas Corpus Act and the English Bill of Rights and the Act of Settlement as the declaration of the rights and liberties of Englishmen. The rights defined by "these several statutes," Blackstone said "consist in a number of private *immunities* . . . or else those civil *privileges*, which society hath engaged to provide, in lieu of natural liberties so given up by individuals."⁷⁶ In short, for Blackstone, the rights to personal liberty, personal security, and private property included *all* the privileges or immunities or rights of the British citizen. For Wilson and Trumbull, the rights to personal liberty, personal security and private property seem to have included all fundamental rights of citizens of the United States.

The district court says that only Howard and Bingham said anything which "could be construed as suggesting the result reached by Justice Black and the modern Supreme Court decisions [incorporation of the Bill of Rights.]"⁷⁷ However, a fair reading of the debates and an understanding of Republican political and legal thought shows that the privileges or immunities clause of the fourteenth amendment was designed to protect at least all rights of United States citizens including protection against *ex post facto* laws or involuntary servitude and for the right to habeas corpus, as well as the rights enumerated in the Bill of Rights. A number of senators and representatives made statements indicating that they read the amendment in this

⁷⁴ CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866). See generally *The Fourteenth Amendment*, *supra* note 12, at 251-58.

⁷⁵ CONG. GLOBE, 39th Cong., 1st Sess. 475, 1118-19 (1866).

⁷⁶ 1 W. BLACKSTONE, COMMENTARIES 129 (emphasis added). The Petition of Right listed such rights as the right to the writ of habeas corpus, the right not to have soldiers quartered in private homes and protection against summary trials. B. SCHWARTZ, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 20-21 (1971). The English Bill of Rights contained provisions against excessive bails and cruel or unusual punishment, a statement of the right of the people to bear arms, together with the right to petition the King for redress of grievances. *Id.* at 40-46. The magna carta was read in the colonies as at least protecting the right to trial by jury. II LEGAL PAPERS OF JOHN ADAMS 200-01, 207 (L. Wroth & H. Zobel eds. 1965).

⁷⁷ *Jaffree v. Board of School Comm'rs*, 554 F. Supp. 1104 (S.D. Ala. 1983).

way. For example, Senator Yates said the amendment provided that "rights [of citizens of the United States] shall not be abridged by any State."⁷⁸ The rights of citizens of the United States would include, but not be limited to, those set out in the Bill of Rights. Congressman Windom suggested that the amendment protected "all the rights of citizenship."⁷⁹ Congressman Orth read the amendment to protect "the rights of American citizenship."⁸⁰ Congressman Baker read the amendment to protect "the rights thrown around [the American citizen] by the supreme law of the land."⁸¹ Such statements are consistent with statements made by Bingham and Howard and are inconsistent with the conclusion of the district court.

Almost none of the statements made in the campaign of 1866 and relied on by Professor Fairman and the *Jaffree* court are *inconsistent* with incorporation of the Bill of Rights. The general theme in the campaign of 1866 was that the amendment protected "all the rights of citizens."⁸² Republican supporters of the amendment referred to privileges "conferred on every citizen by the federal constitution,"⁸³ "the full enjoyment of all constitutional rights, among which are the right to free speech and to be secure in their personal property, as well as redress of their grievances,"⁸⁴ "the rights of citizens enumerated in the constitution,"⁸⁵ "the rights of American freemen . . . not the least of which are the rights to speak, to write and to impress their thoughts on the minds of others . . .,"⁸⁶ "every right guaranteed . . . by the constitution"⁸⁷ including the right to petition for redress of grievances and the right to bear arms, and "constitutional rights" including the right to express one's sentiments freely.⁸⁸ Statements by a number of Republicans indicated that all free citizens even prior to the fourteenth amendment, were vested with the privileges provided by the Bill of Rights against state action and that the fourteenth amendment was declaratory on this point.⁸⁹

Senator Trumbull believed that the fourteenth amendment secured "civil liberty to all citizens of the United States" a provision he considered perhaps unnecessary because of the thirteenth amendment and the Civil Rights Bill. "[S]till the Declaration of the great principles of individual freedom and civil

⁷⁸ CONG. GLOBE, 39th Cong., 1st Sess. 3038 (1866).

⁷⁹ *Id.* at 3167.

⁸⁰ *Id.* at 3201.

⁸¹ *Id.* at 256 app.

⁸² *The Fourteenth Amendment*, *supra* note 12 at 282.

⁸³ Dubuque Daily Times, Nov. 21, 1866 at 2, col. 1.

⁸⁴ Dubuque Daily Times, Dec. 3, 1866, at 2, col. 2.

⁸⁵ N.Y. Daily Tribune, Sept. 4, 1866, at 1, col. 4.

⁸⁶ N.Y. Daily Tribune, Sept. 11, 1866, at 5, col. 1.

⁸⁷ Philadelphia Inquirer, Sept. 5, 1866, at 8, col. 3.

⁸⁸ Springfield Daily Illinois St. J., Sept. 21, 1866, at 2, col. 6. *See generally The Fourteenth Amendment*, *supra* note 12, at 281-92.

⁸⁹ *See The Fourteenth Amendment*, *supra* note 12, at 281-92.

liberty cannot be too often repeated. . . ."⁹⁰ Congressman Wilson suggested that the amendment would secure "liberty of speech." Congressmen Allison and Bingham made the same suggestions.⁹¹ In short, the *Jaffree* court, like the scholars on whom it relied, overlooked a substantial portion of the relevant history.

The same is true with regard to state legislative debates. In many states the debates were either not recorded or no statements of substance were made by Republicans. In the Pennsylvania legislature, however, the debates were lengthy and recorded. There, Republicans insisted that the amendment was necessary to secure freedom, including freedom of speech and to secure for citizens "the enjoyment of all their constitutional rights."⁹²

Radicals in the Massachusetts legislature considered the amendment useless because it simply provided what was already provided for in the Constitution, including protection against state infringement of the guarantees of the Bill of Rights. The more moderate view prevailed and the amendment was ratified. The more moderate Republicans did not quarrel with the interpretation that the amendment was designed to secure rights in the Bill of Rights. Rather, they found it a "statement of the true intent and meaning of American citizenship."⁹³

C. *The Blaine Amendment*

The *Jaffree* court's reliance on the Blaine Amendment debates to show that the Thirty-ninth Congress did not intend to apply the Bill of Rights to the states is also misplaced.⁹⁴ The Blaine Amendment, debated in 1876, was designed to prevent any state from making any law respecting the establishment of religion or prohibiting the free exercise of religion.

In the years after the passage of the fourteenth amendment, a number of congressmen and senators said explicitly that the fourteenth amendment was designed to make the states obey those rights conferred in the Bill of Rights. These included Congressman Bingham who authored the amendment, Representative Hoar, Representative Dawes, Representative Monroe, Benjamin Butler, Senator Joseph Fowler of Tennessee, Representative Howard Manard of Tennessee, Representative Lawrence of Ohio, a leading Republican in the Thirty-ninth Congress, Senator Frelinghusen of New Jersey and Senator Sherman of Ohio, all Republicans.⁹⁵ In addition, a number of Democrats including Representative Mills of Texas and Senator Norwood

⁹⁰ *Id.* at 290.

⁹¹ *Id.* at 291-92.

⁹² *Id.* at 295.

⁹³ *Id.* at 297-98.

⁹⁴ *Jaffree v. Board of School Comm'rs*, 554 F. Supp. at 1125.

⁹⁵ *Further Adventures, supra* note 12, at 114-19.

of Georgia accepted the proposition that the fourteenth amendment privileges or immunities clause was designed to make the Bill of Rights apply to the states.⁹⁶

During the debates on the fourteenth amendment and in the early years after its passage, not a single Republican said explicitly that the amendment was *not* designed to make the Bill of Rights binding on the states. Many made statements to the contrary. Most of the debate which took place on the Blaine Amendment and which is cited by the district court in *Jaffree* occurred after the constricted reading of the privileges or immunities clause in the *Slaughterhouse Cases*,⁹⁷ and after the Supreme Court had explicitly rejected application of the Bill of Rights to the states in *United States v. Cruikshank*⁹⁸ and in *Walker v. Sauviert*.⁹⁹ In short, it is not surprising that in the Blaine Amendment debates, congressmen did not say that the privileges or immunities clause of the fourteenth amendment already prohibited the states from establishment of religion. The Supreme Court had quite recently and explicitly held that none of the guarantees applied to the states. Debates, ten years after the fourteenth amendment was framed and after intervening Supreme Court decisions had eviscerated it, shed no light on the purposes of the framers of the fourteenth amendment.

III. CONCLUSION

The *Jaffree* court attempted to justify its disregard for controlling precedent by an historical analysis. Judge Hand said:

If we, who today rule, do not follow the teachings of history then surely the very weight of what we are about will bring the house upon our head, and the public having rightly lost respect in the integrity of the institution, will ultimately bring about its change or even its demise.¹⁰⁰

But at least as far as the fourteenth amendment is concerned, the court's warnings are misdirected because the court's examination of the history of the fourteenth amendment is defective. The *Jaffree* court fails to consider Republican legal, political and philosophical thought in the Civil War period. By neglecting Republican ideas and by reading the debates from a standpoint of legal orthodoxy, the court is simply unable to make sense of what was said.

The district court relied on scholars who failed to note or explain the fact that Republicans who spoke on the subject generally held the unorthodox constitutional idea that the states were, at the time of the congressional

⁹⁶ *Id.*

⁹⁷ 83 U.S. (16 Wall.) 36 (1872).

⁹⁸ 92 U.S. 542 (1876).

⁹⁹ 92 U.S. 90 (1876).

¹⁰⁰ *Jaffree v. Board of School Comm'rs*, 554 F. Supp. at 1130 n.41.

debates on the fourteenth amendment, already required to obey the Bill of Rights. In addition, these scholars and the court have overlooked evidence from the campaign of 1866 which suggests an intent to apply the Bill of Rights to the states. They have also failed to see that leading Republicans interpreted the privileges and immunities clause of the original Constitution to require the states to follow the letter and the spirit of the Bill of Rights.

The scholars relied upon by the *Jaffree* court also fundamentally misunderstand and underestimate the effect of the struggle against slavery on Republican ideology. The fourteenth amendment embodied and affirmed deeply-held Republican legal and philosophical beliefs.

The scholars relied on by the court fail to explain why not a single Republican during the debates in the Thirty-ninth Congress said that the fourteenth amendment was not designed to apply the Bill of Rights to the states. Both Bingham and Howard, leading proponents of the amendment, clearly indicated it would *require* the states to abide by the Bill of Rights. In 1866 no member of the Thirty-ninth Congress contradicted them. However, the *Jaffree* court, following Raoul Berger's analysis, mistakenly characterized Howard's lengthy statement on incorporation of the Bill of Rights as merely a casual remark.

The district court is repeatedly misled by its reliance on Berger. Berger's work is riddled with errors of fact and interpretation. For example, Berger argued that the failure of any major newspaper to report Howard's reference to the Bill of Rights somehow robbed the remarks of authority and that if the framers intended to incorporate the Bill of Rights "honesty required disclosure." In fact, Howard's statement was reported in several major newspapers including the first page of the New York Times.¹⁰¹ And, the intent to incorporate the Bill of Rights was disclosed in the pages of the Congressional Globe in no uncertain terms.

The two scholars opposed to full incorporation and relied upon by the district court, have also suggested that the civil jury trial requirement of the seventh amendment would have been regarded by the country as an intolerable interference with state sovereignty. In the 1830s several states passed personal liberty laws to provide trial by jury and other procedural rights for those claimed as slaves.¹⁰² In *Prigg v. Pennsylvania*, decided in 1842, the Supreme Court held that federal power over fugitive slaves was exclusive. The personal liberty laws were held unconstitutional with the result that blacks in free states could be seized as slaves without any of the procedural guarantees set out in the personal liberty laws.¹⁰³ Finally, Congress

¹⁰¹ N.Y. Times, May 24, 1866, at 1, col. 6. See also GOVERNMENT BY JUDICIARY, *supra* note 9, at 148 n.66 (1977) (Berger's comments).

¹⁰² See generally T. MOORIS, FREE MEN ALL (1974).

¹⁰³ 41 U.S. (16 Pet.) 539 (1842).

passed the Fugitive Slave Act of 1850 which provided explicitly that blacks could be denied the right to testify, to cross-examine and to receive a jury trial before they were delivered to those claiming them as slaves.¹⁰⁴

Opponents of slavery contended that the Fugitive Slave Act was a violation of the fourth, fifth, and seventh amendments.¹⁰⁵ Indeed, the Fugitive Slave Act was repealed by a Republican Congress in 1864.¹⁰⁶ Fresh from their experience with the Fugitive Slave Laws, Republicans thought that trial by jury was one of the precious rights of American citizens. After the passage of the fourteenth amendment, several Republican legislators said the seventh amendment was a limitation on the states.¹⁰⁷

The decision of the district court in *Jaffree*, represents another battle in the seemingly endless war fought to determine how the Constitution should be applied. As C. Van Woodward has noted, political movements in America have always sought to gain control of history. Woodward cites the commissar in George Orwell's book *1984*: "Who controls the past controls the future, who controls the present controls the past."¹⁰⁸ From that perspective, the district court's assertions about the past are clearly relevant to the present and to the future. A careful examination of the history relied on by the district court in *Jaffree* shows, however, that it does not support the court's conclusions.

¹⁰⁴ Fugitive Slave Act of 1850, ch. 60, §§ 1-10, 9 Stat. 462 (1850).

¹⁰⁵ See, e.g., T. MOORIS, *FREE MEN ALL* (1974).

¹⁰⁶ CONG. GLOBE, 38th Cong., 1st Sess. 2919 (1864).

¹⁰⁷ *The Fourteenth Amendment*, *supra* note 12, at 298-300.

¹⁰⁸ AMERICAN ATTITUDES TOWARD HISTORY 1-20 (Oxford 1968), reprinted in *HISTORIAN AS DETECTIVE* 24-38 (1981).

