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## ORIGINAL INTENT AND THE FOURTEENTH AMENDMENT

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Does the Bill of Rights apply to the states by virtue of the Fourteenth Amendment? Few questions of constitutional law are as vexing or as important as this one. The question is vexing because there is no agreement among legal historians as to whether such a result was the intent of the post-Civil War framers of the Fourteenth Amendment. The question is important because if the Bill of Rights does not apply to the states, then many modern decisions of the Supreme Court—for example, respecting First Amendment religious freedom and free speech, Fourth Amendment search and seizure, and Fifth Amendment criminal procedure, matters the eighteenth-century Founding Fathers left to the states—are without constitutional warrant.

The Supreme Court, in a series of cases decided in the twentieth century, held that most, though not all, of the Bill of Rights are binding on the states as a result of the Fourteenth Amendment. This process of “selective incorporation” began in 1925, in *Gitlow v. New York*,<sup>1</sup> when the Supreme Court recognized that the free speech and press guarantees of the First Amendment are “fundamental rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states.”<sup>2</sup> In its ruling, however, the Court offered no significant historical analysis of either the First Amendment or the Fourteenth Amendment, or their relationship to each other.

The religion clauses of the First Amendment were subsequently embraced by the Supreme Court’s incorporation doctrine. In *Cantwell v. Connecticut* (1940),<sup>3</sup> the Court invalidated a Connecticut statute requiring a license to be obtained before religious groups could solicit funds door-to-door. The Court’s basis for the holding was that the Free Exercise Clause is applicable to the states: “The fundamental concept of liberty embodied in the [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.”<sup>4</sup> The *Cantwell* case was monumental in its effects. Because the Free Exercise Clause was now

binding on the states, it would usher in a new era of federal court jurisdiction over religion in America. As in *Gitlow*, however, the Court offered no analysis of why the incorporation doctrine was applicable.

Seven years later, in *Everson v. Board of Education*,<sup>5</sup> the Court extended the incorporation principle to the Establishment Clause, again without providing a historical or legal rationale for applying the doctrine. Later that year, however, Justice Hugo Black, in a dissenting opinion in *Adamson v. California*,<sup>6</sup> gave an extended exposition of the history of the Fourteenth Amendment, concluding, with fellow justices William O. Douglas, Frank Murphy, and Wiley Rutledge, that one of the chief objects of the Fourteenth Amendment “was to make the Bill of Rights applicable to the states,” thereby casting the protective net of the first eight amendments around persons who were threatened by state action. To support his position, Justice Black appended a thirty-three page summary of the congressional debates leading to the ratification of the amendment in 1868, quoting chiefly the speeches of its primary author, Republican Representative John Bingham of Ohio. Although the Court majority rejected Black's view that the Fourteenth Amendment incorporates all of the first eight of the Bill of Rights, it reaffirmed its allegiance to “selective incorporation.” The Court majority, affirming past decisions, did not root its decision in the intentions of the framers of the Fourteenth Amendment, however, but in the principles of “justice” and “ordered liberty.”<sup>7</sup> In other words, as Justice Benjamin Cardozo had stated it in an earlier case, certain portions of the Bill of Rights had been absorbed in the Fourteenth Amendment on the basis “that neither liberty nor justice would exist if they were sacrificed.”<sup>8</sup>

Whether the Bill of Rights applied as much to the states as to the federal government was a question that could arise only because of the existence of the Fourteenth Amendment. Before its ratification in 1868, there was nothing in the Constitution that could prevent a state from executing religious heretics, from refusing to grant a criminal defendant a trial by jury, or from conducting a frivolous search of one's home. The Bill of Rights was originally added to the Constitution to appease popular fears by restricting the powers of the new federal government; it was not intended to apply to the states. This understanding was clearly affirmed in *Barron v. Baltimore* (1833), where Chief Justice John Marshall held:

Had Congress engaged in the extraordinary occupation of improving the Constitutions of the several states by affording the people additional protection for the exercise of power by their own governments in matters which concerned<sup>9</sup> themselves alone, they would have declared this purpose in plain and intelligible language.

Thus, any restraints on the states derived from state constitutions and common law practices, not from the U.S. Constitution. The point of Justice Black's historical analysis in *Adamson* was that the first section of the Fourteenth Amendment transformed that situation by embracing the Bill of Rights, thereby nationalizing its requirements: what the national government could not do, the various states could not do.

But is this really what the framers of the Fourteenth Amendment intended? This remains an open and heavily debated question. Although dozens of books and hundreds of articles have been written on the subject, scholars still line up on both sides of the debate, and as one noted legal historian stated recently,<sup>10</sup> “historical scholarship on the adoption of the Fourteenth Amendment is now at an impasse.” My own view is that the Fourteenth Amendment's framers intended to overrule *Barron v. Baltimore* and make the Bill of Rights applicable to the states. After all, John Bingham, who authored Section 1 of the amendment, repeatedly said that the amendment would overrule the *Barron* case.<sup>11</sup> Indeed, Bingham said this no less than thirteen times in one day during House arguments. Bingham's testimony is the most compelling evidence for incorporation, but clearly there were other leading figures in the House and Senate who shared the same view, and many of the day's leading newspapers and magazines reported a similar understanding.

This view comports with the plain meaning of the words of the amendment as well as the broader historical context. The Southern states, before and during the Civil War, had violated most all of the Bill of Rights in its maintenance of slavery. The whole idea of the Fourteenth Amendment was to end the abuse of blacks, to be achieved by requiring that blacks, as well as all other persons, were entitled to the most fundamental catalog of rights and freedoms: the Bill of Rights. This is the broader historical context.

But I confess that this view can be challenged. Many of the members of the Thirty-Ninth Congress expressed views that were contrary to Bingham's. Senator Lyman Trumbull, chairman of the Senate Judiciary Committee, held that “the great fundamental rights set forth in this Bill [are] the right to acquire property, the right to come and go at pleasure, the right to enforce rights in the courts, and to make contracts,”<sup>12</sup> rights that

are not specifically named in the Bill of Rights. And indeed the Supreme Court adopted the view (until *Gitlow* in 1925) that the Fourteenth Amendment was intended to protect a very limited category of rights.

Thus the problem does not offer a simple solution. The original intentions of the framers of the Fourteenth Amendment, much like the original intent of so many provisions of the Constitution, are often elusive, to say the least. Aren't there some basic rules of legal interpretation that can help us here? When the constitutional text is unclear, most experts would agree that the task of judges and scholars is to determine, as best they can, how the people of the states who ratified the document understood the text. This approach squares with that of James Madison, who said in 1796 that whenever it is necessary to go beyond the words of the Constitution itself to ascertain its meaning, "we must look for it, not in the General Convention which proposed, but in the State Conventions which accepted and ratified the Constitution."<sup>13</sup> Nevertheless, in the case of the Fourteenth Amendment, this task is an especially difficult one because, as Supreme Court Justice John Harlan noted: "Reports of the debates in the state legislature on the ratification of the Fourteenth Amendment are not generally available."<sup>14</sup> Indeed, a complete record of the ratification proceedings are available from only one state, Pennsylvania.

So, left without clarity of what either the Thirty-Ninth Congress or the state ratifying conventions meant, where do we turn? I would contend that, first, we adopt a somewhat flexible principle of interpretation, one that would entertain some additional factors beyond original intent, and second, that we examine the broader historical context, from which we discover a great deal of evidence that the Fourteenth Amendment was a conscious attempt to "complete" a Constitution that had been "incomplete" from the beginning.

### **Constitutional Interpretation**

In interpreting the Constitution, one should not approach the intent of the framers as being so fixed as to prevent some measure of freedom in determining the meaning of the text. The American Constitution, as amended, would not have survived for more than two hundred years if it was not a flexible document. It has been the peculiar genius of the Constitution that, while its provisions are sufficiently detailed to provide a

necessary element of stability to government, it has nonetheless proved to be broad and general enough to allow for steady growth to meet the altered requirements of an ever changing social order. So, while the American Constitution would someday lose all of its meaning if its primary guardians, the justices of the United States Supreme Court, were not committed to its original meanings, it is also proper to think of the Constitution as a “living document.” Thus, while original intent is always an important starting place in constitutional interpretation, it is not the end of the inquiry.

It is also appropriate, as former Supreme Court Justice William Brennan frequently advocated, to look for “fundamental aspirations” in the Constitution. Brennan once wrote that “the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being. . . . [W]e are an aspiring people, a people with faith in progress. Our amended Constitution is the lodestar for our aspirations.”<sup>15</sup> Moreover, Brennan frequently found justification for the fundamental aspirations approach in the ambiguity of certain provisions of the Constitution. According to Brennan, the “majestic generalities and ennobling pronouncements [of the Constitution] are both luminous and obscure. The ambiguity of course calls forth interpretation, the interpretation of reader and text.”<sup>16</sup>

Thus, according to Brennan, we are free to consult original beliefs, but also free to search for the ideals and aspirations behind certain provisions of the Constitution. It is a process of being true to the original text, but acknowledging that there is room for play in the joints to keep the Constitution “up to date” and reflective of modern values. Constitutional scholar Alexander Bickel has summarized the key factor that constrains us to sometimes look beyond original intent:

[A]s time passes, fewer and fewer relevantly decisive choices are to be divined out of the tradition of our founding. Our problems have grown radically different from those known to the Framers, and we have had to <sup>17</sup>make value choices that are effectively new, while maintaining continuity with tradition.

If the precise meaning of the Fourteenth Amendment cannot be divined, its fundamental aspirations can be. While terms like “privilege and immunities,” “due process,” “life, liberty, and property,” and “equal protection” are not altogether clear, we do know that major changes, some would say a “constitutional

revolution,” were intended as a result of the Fourteenth Amendment. Clearly, the Fourteenth Amendment sought to substantially reduce state sovereignty, so that there would be no recurrence of a Southern secession from the Union. The amendment added power to the national government, facilitating a supremacy over all the states. This seemed the prudent course because the North no longer trusted the South with the duty to secure basic civil rights. In the years leading up to the Civil War, Southern states essentially ignored the idea of a free press, making it a crime to criticize the institution of slavery. Slaves were prevented from bearing arms; slave states freely used dragnet search policies, hunting for weapons owned by blacks. Slaves were denied jury trials, the right to counsel, freedom of religion, the right to assemble, and other basic rights. There were even laws that forbade teaching blacks how to read or write. The aim of the framers of the Fourteenth Amendment was to prevent a recurrence of these violations, and the simplest method was to make the Bill of Rights binding on the states. This was the “fundamental aspiration” behind the adoption and ratification of the Fourteenth Amendment. In Representative Bingham’s words, the purpose of the proposed fourteenth Amendment was “to arm the congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution. It hath that extent--no more.”<sup>18</sup>

Based on other evidence, however, in all probability, there were, additionally, a small group of rights, not identified in the Bill of Rights, that the framers conceivably intended to make binding on the states by the Fourteenth Amendment, but for which the evidence is not clear or extensive. What is clear, though, at least from Bingham’s perspective, was the goal of making the Bill of Rights binding on the states.

That the Supreme Court in this century has seen the need to implement the fundamental aspiration of making most of the Bill of Rights binding on the states, using the Due Process Clause as its vehicle, is an indication that the Court has correctly identified and implemented the basic goals of the Fourteenth Amendment’s framers. To deny the Supreme Court the right to permit the Constitution to evolve over time to protect values not clearly contemplated or specifically enumerated in the Constitution is to deny the Court the right to interpret the Constitution, which virtually everyone understands to be the Court’s primary duty. If the Constitution is to serve its function of protecting fundamental values and unifying society, the

Supreme Court should have substantial discretion in determining the meaning of specific constitutional provisions. This discretion should not be unlimited, however. The fundamental aspiration that a judge perceives in a particular provision of the Constitution should not merely be his or her own, but those of the framers. If judges can give a provision almost any meaning, why have a constitution at all? Accordingly, any judicial interpretation must retain this linkage to the constitutional text. And it is recognized, of course, that the exercise of discretion does not guarantee good results, and thus there always exists a risk of judicial discretion being used to frustrate political and social progress. Nonetheless, it is suggested here that, on balance, judicial discretion in constitutional interpretation is a good thing that is essential to the advancement of society.

This approach to constitutional interpretation is, of course, opposed to strict constructionism. The strict constructionist model of interpretation holds that “judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution.”<sup>19</sup> In modern parlance, this model is often referred to as “interpretivism.” Among contemporary judges, Robert Bork is the best known interpretivist; among scholars, Raoul Berger is perhaps the best known.<sup>20</sup> Strict constructionism, or interpretivism, was spurred in recent times, no doubt, by the wave of liberal decisions handed down by the Warren Court in the 1950s and 1960s. That Court operated on anything but an interpretivist methodology. For example, the ambiguous language of the Equal Protection Clause did not compel the Court to end desegregation in *Brown v. Board of Education*.<sup>21</sup> State-sanctioned prayers in public schools and financial aid to sectarian schools are not explicitly forbidden by the First Amendment.<sup>22</sup> Nothing in the Constitution’s text prevents a state from prohibiting the use of contraceptives or forbidding abortion.<sup>23</sup> The Supreme Court’s authority to invalidate legislative acts is not explicitly in the Constitution, yet it has been accepted as a wise and necessary check on legislative acts.<sup>24</sup> And, of course, the Constitution does not state that the

Bill of Rights must apply to the states; that is a requirement implemented this century based on what the Court deems to be the core values reflected in the Constitution.

An analogy from the world of biblical interpretation might help here to show the wisdom of this flexible approach to constitutional interpretation as compared to the rigidity of the interpretive approach. Christians, Jews, and Muslims, to one degree or another, consider the Bible to be the authoritative Word of God. The Bible clearly countenances the building of houses of worship--temples, synagogues, perhaps even churches. No one I know would deny that there is scriptural authority for such a practice. But what about building seminaries? I know of no biblical text that authorizes the building of seminaries. The strict constructionist could not conscientiously countenance the building and operation of seminaries, since the biblical text does not explicitly allow for it; yet I know of no one who takes such a position. The more flexible approach argued for here, however, would see in the biblical text the fundamental aspiration of propagating the Word of God, which necessarily requires the training of experts. Building seminaries would be embraced by this aspiration, and therefore biblically permissible. I would argue that the Supreme Court used precisely this approach when it interpreted the Fourteenth Amendment to "selectively incorporate" the Bill of Rights.

### **"Completing" the Constitution**

The Supreme Court's decision to make the Bill of Rights binding on the states also makes sense if examined from the perspective of the "Father of the Constitution," James Madison. As is well known, Madison was the architect of the main outlines and chief principles of the Constitution. The Convention of 1787 did not accept everything he proposed, and he accepted his rejected ideas gracefully. But while many of Madison's ideas were preserved in the Constitution, he was particularly concerned about one missing element: the failure of the Constitution to grant Congress a power to veto any law made by a state. As a student of history, Madison believed that all previous federal unions had failed because the member states tended to

encroach on the powers of the central government or on the power of the other member states. He contended that a veto power would allow the Congress, acting as a caring agent of all member states, to review all state legislation.<sup>25</sup> Without this element, he informed his friend Thomas Jefferson by letter, the Union would not last very long.<sup>26</sup> Presciently, Madison saw the states regularly oppressing minorities, and felt the veto power would enable Congress to promote justice and stability within the states, ultimately protecting the states from themselves. The veto power he proposed was strictly negative; it was not a positive legislative power. Thus, he remained committed to federalism.

True to Madison's fears, the Union did not last long. The Civil War is perhaps the best evidence that Madison had properly diagnosed the Constitution's main weakness: its inability to control the states. The Southern states had abused the rights of the slave minority, denying them all manner of rights, even the status of citizens, an atrocity sanctioned by the *Dred Scott* case in 1857. Pure and simple, black people had no rights that whites were legally obligated to respect.

These abuses were the result of an incomplete Constitution. As legal scholar Michael Zuckert notes, "Madison wanted a constitutional order in which there was a clear commitment . . . to the idea that a common principle of political rights pervaded the union and ruled within each state."<sup>27</sup> For Madison, a congressional veto power over state legislation was to supply a way in which that principle was to be made effective in the states. Congress would have the ability, to be exercised only if necessary, to force the states to respect the basic rights of all persons to life, liberty, and the pursuit of happiness as provided in the Declaration of Independence, rights believed to be embodied in the Bill of Rights. It should also be noted that in proposing the First Amendment at the First Congress, Madison urged its extension to the states (i.e., incorporation) because "the State governments are as liable to attack these invaluable privileges as the General Government is, and therefore ought to be cautiously guarded against."<sup>28</sup> The proposal failed, however, since the majority of his colleagues believed that they should "leave the State Governments to themselves."<sup>29</sup> This "incorporation" proposal comes much closer to matching

the Thirty-Ninth Congress's remedy for limiting the states' power, although for Madison it was probably less vital than a congressional veto power over state legislation.

Seen in this broader perspective, the Fourteenth Amendment's framers were seeking merely to complete the Constitution along the lines envisioned by Madison. The mechanism was not quite the same--making binding on the states the Bill of Rights rather than simply giving to Congress a veto power over state enactments--but the result was essentially the same: the states must respect the basic rights of all human beings. *Barron v. Baltimore* perpetuated the incompleteness of the Constitution; the Fourteenth Amendment completed it.

In all probability, the Thirty-Ninth Congress intended for the Privileges and Immunities Clause, not the Due Process Clause, to achieve the incorporation of the Bill of Rights. In Senate deliberations, Jacob Howard called the Privileges and Immunities Clause the most important feature of Section 1 of the Fourteenth Amendment, and he specifically stated that the rights enumerated in the Bill of Rights were privileges and immunities of United States citizens.<sup>30</sup> But this line of interpretation was foreclosed when in the *Slaughter House Cases* (1873),<sup>31</sup> the Supreme Court held that the Amendment's draftsmen could not possibly have intended such an interpretation because it would destroy the basic plan of the Constitution, a plan designed to maintain strong reserved power in the states, while granting only limited power to the federal government. It took another half century before the Court corrected its own misinterpretation concerning the intentions of the Fourteenth Amendment's framers. For the *Gitlow* Court of 1925, making binding on the states the speech and press guarantees had less to do with expanding the power of the federal government than insuring that all states recognized the entitlement of all persons to fundamental rights. That the Court adopted the Due Process Clause, rather than the Privileges and Immunities Clause, as the mechanism to make real the aims of the Fourteenth Amendment's framers is historically inconsequential.

## **Conclusion**

Religious liberty in the United States is closely linked to the incorporation of the Establishment and Free Exercise Clauses, thus making them binding on the states. While state and local governments are not to be automatically distrusted in the advancement of religious liberty, time has proven that parochial attitudes often develop which are insensitive to the religious conscience of some citizens. For example, absent a uniform federal law with respect to religious symbols displayed on public property, it is highly likely that the Christian majority which prevails throughout most regions of the United States would seek to dominate the public square by displaying crosses and the like, and refusing to display the religious symbols of other faiths. Few acts make non-Christian citizens feel more like outsiders. Our system does not eliminate state sovereignty on all matters of religion, but on the major questions, such as the right to display religious symbols on government property, good policy dictates that the Supreme Court establish and uphold uniform laws that are binding on all Americans. In so doing the Court helps us to live out our motto, “E Pluribus Unum” (Out of Many, One), which accords with the intent of the framers of the Fourteenth Amendment, whose paramount goal was a united citizenry whose common and equal rights would be respected.