The Incorporation Doctrine

The Degradation of State Sovereignty and the Ushering of Federal Tyranny

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Abstract

My senior thesis paper will discuss the incorporation doctrine of the Bill of Rights to state governments. The incorporation doctrine has been subject to extensive debate as to the proper relationship between state and federal sovereignty. Proponents of incorporation believe that the incorporation of the Bill of Rights limits state governments from using pre-Civil War practices (such as discrimination and inhumane treatment of persons) and thus would ensure greater liberty to individuals. However, opponents believe that such a transfer of power to the federal government can lead to the demise of state sovereignty and usurpation of national power. In order to have a complete understanding of this doctrine, one must look to the nation's history to exegete the true meanings between state and federal relationships. I will examine the ratification of the Bill of Rights, Supreme Court cases before the Civil War, the context and ratification of the Fourteenth Amendment, Supreme Court cases after the Civil War, and the modern definition of incorporation today.

Introduction

The American Civil War was the bloodiest war in American history, claiming the lives of 624,511 men and fracturing families and communities throughout the country.[1] Amidst the tragedies, hardships, and vicissitudes of the Civil War, people fought and endured the war over the issues of slavery, the economy, and states' rights. After the Union forces secured victory, the nation pursued an active policy in extirpating the evils of states' rights over slavery and the economy which had long plagued politics, society, and individuals since the formation of the colonies in America. On July 9, 1869, what appeared to be the advent of liberty for all Americans was ratified into the U.S. Constitution: the Fourteenth Amendment.

The Fourteenth Amendment consists of five sections that address the problems of the postwar South. The first section of the Fourteenth Amendment is the most foundational to modern American jurisprudence, stating:

> 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 within its jurisdiction the equal protection of the laws.[2]

From the first section, the courts have pinpointed several important clauses which established the bulwark of rights pronounced throughout the decades: the citizenship clause, the equal protection clause, and the due process clause. Both Congress and the Courts have used these clauses in order to counteract state action that would infringe

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[1] Statistics on the Civil War and Medicine, EHistory Archive (Mar. 29, 2012, 1:30pm), http://ehistory.osu.edu/uscw/features/medicine/cwsurgeon/statistics.cfm

[2] U.S. Const. amend. XIV, § 1.

upon individuals' rights.[3] Within sections two through four, the Amendment proscribes rules for new apportionments in Congress, rules barring former confederate leaders from serving in office, and a brief address to legitimate and illegitimate debts of the United States.[4] The last section simply gives "Congress…[the] power to enforce, by appropriate legislation, the provisions of this article."[5]

While the Fourteenth Amendment was noble in its aims to provide citizenship to freedmen and protect their newly enumerated rights, as will later be proven in this thesis, the amendment was ratified unconstitutionally into the Constitution and has been abused in its scope and power to undermine the very principles it originally set out to defend. The effect of the ratification of the Fourteenth Amendment and its misinterpretation has therefore resulted in the degradation of state power and the usurpation of federal power. The prime misinterpretation of the Fourteenth Amendment is commonly known as the "Incorporation of the Bill of Rights to the States" or simply "The Incorporation Doctrine."

The Incorporation Doctrine states that the Due Process clause found in the Fourteenth Amendment incorporates the federal Bill of Rights against state governments to ensure that liberty, justice, and equality prevail at the state level.[6] At first glance, it seems quite logical to assume that the wording of the Fourteenth Amendment permits the federal Bill of Rights to be applied to the states in order to faithfully execute the

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[3] See generally Samuel Issacharoff et al., The Law of Democracy: The Legal Structure of the Political Process, (2008); J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One Party South, 1880-1910, (1975) (an examination of how the South utilized direct disenfranchisement against Blacks and how federal laws struck them down).

[4] U.S. Const. amend. XIV, § 2, 3, 4.

[5] U.S. Const. amend. XIV, § 5.

[6] Richard J. Hunter & Hector R. Lozada, A Nomination of a Supreme Court Justice: The Incorporation Doctrine Revisited, 35 Okla. City U.L. Rev. 365 (2010).

enumerated rights within the amendments; such a line of reasoning has been embraced by Supreme Court justices since the turn of the twentieth century and developed into modern American jurisprudence.[7] However, when one examines the constitutional history surrounding the Incorporation Doctrine, one quickly finds that it was never the intention of the framers for the federal Bill of Rights to be incorporated to state governments. Furthermore, a thorough examination will reveal that the Fourteenth Amendment was unconstitutionally ratified, therefore casting doubt as to the legitimacy of the subsequent court precedent in American jurisprudence. This thesis will examine and address the following areas: First, the author will examine the debates between the Federalists and Anti-Federalists in ratifying the Bill of Rights to establish original context. Secondly, the author will undertake a meticulous investigation to understand early court precedent on Incorporation from the ratification of the Constitution to the introduction of the Civil War Amendments. Thirdly, the context, background, and process of how the Fourteenth Amendment was ratified will be thoroughly dissected. Fourthly, court precedent immediately following the Fourteenth Amendment will be analyzed in relation to Incorporation. Lastly, the author will demonstrate how Incorporation distances itself from American constitutional history in light of the apparent flaws and the chain of causality which defines the Incorporation Doctrine today.

The Context and Ratification of the Bill of Rights

Before the formation of the Constitution, many problems faced the newly independent nation of confederate states. While the purpose of the constitutional convention served as a formal dialogue and resolution to the central government's lack of

[7] David A. Lieber, The Cruikshank Redemption: The Enduring Rationale For Excluding the Second Amendment from the Court's Modern Incorporation Doctrine, 95 J. Crim. L. & Criminology 1079, 1100 (2005).

power, many people contended that the constructs of the newly proposed Constitution gave the "government…sweeping legislative and judicial powers and the authority to make its legislation supreme—displacing any contrary state statutory or constitutional law."[8] Such disagreements eventually formed the prominent historical dichotomy of the Federalist and Anti-Federalist factions.

Federalists, in agreeing with James Madison's development of the Constitution, believed "that a large, diverse nation could control factionalism by bringing diverse factions under a common roof, making it harder for any particular group to dominate the majoritarian machinery."[9] Furthermore, the federalists "took care both to disperse power among the branches of government and to insert the powers of each branch into the other branches [which is also known as checks and balances]."[10] In highlighting an advantage to the Constitution, James Madison emphasized in the Federalist papers that "the federal and State governments . . . [would have] the disposition and the faculty . . . to resist and frustrate the measures of each other."[11] Therefore, Madison and the Federalists saw "no need for an enumerated bill of rights, because the sovereign people had made an explicit, and quite narrow, delegation of power to the central government in the new Constitution."[12] Had the Federalists incorporated a Bill of Rights into the Constitution, they believed there was a great "potential danger… [for] such a document in the

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[8] Calvin R. Massey, The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law, 1990 Wis. L. Rev. 1229, 1236 (1990).
[9] Id. at 1234.
[10] Id.
[11] The Federalist No. 46, at 234 (James Madison) (Lawrence Goldman ed., 2008).
[12] Massey, supra note 8, at 1234.

Constitution."[13] They contended that "any enumeration of fundamental rights might be too limiting, carrying with it the implication that any right not included did not exist."[14]

Anti-Federalists, however, viewed the newly constructed Constitution as a vehicle of tyranny. While Federalists feared that stating particular rights would exclude other rights from existing, Anti-Federalists responded by stating that the rights already mentioned in the Constitution (such as trial by jury, habeas corpus) would have invalidated the Federalists' argument because the fact that they were enumerated carried the inherent ability to exclude other rights.[15] Furthermore, the Anti-Federalists feared the "consolidated nature of the new central government"[16] because the government had "sweeping legislative and judicial powers and the authority to make its legislation supreme—displacing any contrary state statutory or constitutional law."[17] Anti-Federalists believed that the "supremacy clause would render all federal laws 'paramount to State Bills of Rights'," [18] hence leaving states at the mercy of the federal government's restrictions upon their actions. The fact that the Anti-Federalists were concerned over the Constitution's ability to override rights enumerated within state constitutions demonstrates that states already had enumerated rights within their constitutions which they did not want violated; therefore, states wanted to ensure that the federal government would not intrude upon their sovereignty and sought to limit its power by confining it to the rights that reflected states' constitutions. In an era where many were skeptical of big government and its ability to infringe upon people's rights, the Anti-Federalists sought to

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[13] 1791-1991: The Bill of Rights and Beyond 3 (1991).
[14] Id.
[15] Id.
[16] Massey, supra note 8, at 1236.
[17] Id.
[18] Id. at 1235.

set the bar low enough for the most basic of rights to be protected within the Constitution while state governments would expound upon those basic rights and guard them more meticulously and adamantly.[19] The Federalists eventually capitulated to an enumerated Bill of Rights, and in 1791, the first ten amendments were ratified into the Constitution beginning with the phrase "Congress shall make no law."[20]

Early Federal Court Precedent on Incorporation

One of the prime evidences which demonstrate that the Bill of Rights was only intended to apply to the federal government was through court precedent preceding the ratification of the Fourteenth Amendment. Prior to the Fourteenth Amendment, it was commonly held "that the Founders exempted the states from the Bill of Rights."[21] This belief was elucidated in the famous case of Barron v. Baltimore in which the court (as if stating the obvious) starts the opinion by mentioning that "[T]he question thus presented is, we think, of great importance, but not of much difficulty."[22] In a court opinion of a mere five pages, the justices sought to answer a seemingly easy question with constitutional soundness and backing. Explaining the opinion of the court, Justice Marshall emphatically states in his first sentence of reason that "[T]he constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."[23]

Since "each state established a constitution for itself," its people "provided such limitations and restrictions on the powers of its particular government as its judgment

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[19] Id.
[20] U.S. Const. amend. I
[21] Raoul Berger, Incorporation of the Bill of Rights: Akhil Amar's Wishing Well, 62 U. Cin. L. Rev. 1, 5 (1993).
[22] Barron v. Baltimore, 32 U.S. 243, 247 (1833).
[23] Id.

dictated."[24] Therefore, state governments served the "best calculated…interests"[25] of the state population's demands. When constructing a federal government to oversee national affairs, however, "the people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests."[26] Therefore, "[T]he powers they conferred on this government were to be exercised by itself," without any overreaching implications that would apply to "distinct governments, framed by different persons and for different purposes."[27] According to Marshall, the laws created for the purpose of the national government reside within the national government and have no bearing on state governments because they are "framed by different persons and for different purposes."[28]

The only limitation the Court acknowledged for the national and state governments is found within "the ninth and tenth sections of the first article" which creates a "plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the states."[29] Outside of those constitutional boundaries which are explicitly stated within the Constitution, the Court cautiously warned that "some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed."[30] In an attempt to find a constitutional reason for such a departure "from this safe and judicious course in framing the amendments," the court honestly admits that

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[24] Id.
[25] Id.
[26] Id.
[27] Id.
[28] Id.
[29] Id. at 249.
[30] Id.

"We search in vain for that reason."[31] Concluding his opinion, Marshall again notes the obvious in proper constitutional understanding by stating that "in compliance with a sentiment thus generally expressed," "these amendments," "adopted by the states," "contain no expression indicating an intention to apply them to the state governments."[32]

Early State Court Precedent on Incorporation

In addition to the Supreme Court's ruling that the federal Bill of Rights never applied to state governments, one can see further evidence of how states' similarly shared/adhered to the same viewpoints of the Supreme Court. In Nuns v. Georgia, the defendant was convicted of a high misdemeanor by carrying a horseman's pistol in violation of state law.[33] The defendant argued, however, that the statute violated the U.S. Constitution and Georgia Constitution in regards to the right to bear arms. Delivering the opinion of the Court, Justice Lumpkin asserted that "it has been decided, that this [Second Amendment], like other amendments adopted at the same time, is a restriction upon the government of the United States, and does not extend to the individual States."[34] However, the Court does not undermine the importance, value, and role the U.S. Constitution has upon a state's legislative processes because many states "adopted them [Federal Bill of Rights] as beacon-lights to guide and control the action of their own legislatures."[35]

Another case where states negatively viewed the incorporation of the Federal Bill of Rights was in the case of State v. Newsom. The defendant (Mr. Newsom) was arrested, tried, and found guilty for unlawfully carrying a shotgun without having

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[31] Id.
[32] Id. At 250.
[33] Nunn v. State, 1 Ga. 243 (1846).
[34] Id. at 250.
[35] Id. at 251.

obtained a license.[36] When arguing before the Supreme Court of North Carolina, the defendant argued that the law used to prosecute him was unconstitutional according to the Second Amendment of the U.S. Constitution.[37] The Court, however, made a clear stance on the application of the Federal Bill of Rights to state governments, stating that "[T]he Constitution of the United States was ordained and established by the people of the United States, for their own government, and not for that of the different States. The limitations of power, contained in it and expressed in general terms, are necessarily confined to the General Government."[38]

The last case dealing with the Incorporation Doctrine from a state's perspective is Huntington v. Bishop. The defendant (Bishop) was denied a trial by jury after disclosing information to a trustee process brought against him under a Vermont statute.[39] Bishop argued to the Supreme Court of Vermont that his Seventh Amendment right to a trial by jury in civil cases had been violated.[40] The court started its opinion by stating that "It is very doubtful whether this article has any reference to the proceedings of the State Courts."[41] Further into the opinion, the Court reveals that the Seventh Amendment "was designed as a check upon the General Government. It does not, in its terms, apply to the State Governments, and was introduced, as appears…with reference solely to the Courts of the United States."[42]

From the opinions of both federal and state court cases during the time preceding the ratification of the Fourteenth Amendment, legislatures and justices alike have

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[36] State v. Newsom, 27 N.C. (1 Ired.) 250 (1844).
[37] Id. at 251.
[38] Id.
[39] Huntington v. Bishop, 5 Vt. 186 (1832).
[40] Id. at 193.
[41] Id.
[42] Id. at 194.

historically understood the Federal Bill of Rights to only apply to the government of the United States, not the state governments. The deviation from traditional understandings of constitutional law through the passage of the Fourteenth Amendment will demonstrate how state power demised and federal power prevailed.

Context of the Fourteenth Amendment

After enduring four years of gruesome bloodshed, the North wanted to ensure that the brutalities and hardships experienced during the war were not in vain but served the prime purpose of effectively ending slavery in the South. To many politicians (primarily Republicans), the advent of proposing new legislation to end slavery was a "golden opportunity to purge the nation of the legacy of slavery and create a 'perfect republic,' whose citizens enjoyed equal civil and political rights" that would be protected "by a powerful and beneficent national government."[43] In order to form an objective basis for the lines of reasoning, thought processes, and rationales of the Congressmen who constructed and ratified the Fourteenth Amendment, one must look to "the history leading up to the [Fourteenth] Amendment," particularly "understanding… the striking changes in the law of race relations that took place across the North in the two decades before the Civil War began."[44]

Before the Civil war, "[T]he general view of antebellum Northern race relations has been shaped by an odd mixture of progressive and conservative scholarship."[45] While the North had noble ambitions of effectuating civil rights for blacks, "the antebellum

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[43] Eric Foner, The Reconstruction Amendments: Official Documents as Social History, The Gilder Lehrman Institute of American History (Mar. 29, 2012, 3:46pm), http://www.gilderlehrman.org/historynow/12_2004/historian.php

[44] Paul Finkelman, Vision and Revision: Exploring the History, Evolution, and Future of the Fourteenth Amendment: the Historical Context of the Fourteenth Amendment, 13 Temp. Pol. & Civ. Rts. L. Rev. 389, 390 (2004).

[45] Id. at 391.

North was not a paragon of equality" in that "racism, segregation, and other forms of discrimination" were present, thus giving indication that "change did not seem imminent."[46] Some scholars even pointed out that some prominent abolitionists of the time had a hard time deciphering whether blacks were equal or inferior to whites, thereby bringing their own accusations against slavery down on their own heads.[47] Although recognizable forms of racism in the North during the Antebellum Era were evident, the North was home to more enlightened views on civil rights. The North sought proactive measures in creating an equal society which would free blacks from the inhumane yokes of slavery imposed on them by their white owners. More importantly, "if the antebellum North was inherently racist…then the Congress in the 1860s and 1870s could not possibly have meant to create an integrated society."[48] Therefore, it can be safely deduced that while the North viewed blacks as less equal than whites, it "worked hard to alter race relations in order to move toward a more equal society"[49] in which blacks were treated with higher dignity. Indeed, with the ending of the Civil War, Republican congressmen (such as Jacob Howard and Thaddeus Stevens) sought to thwart former confederate states from imposing the same restrictions on African Americans as before the war by protecting the newly granted liberties afforded to African Americans in the former slave states and ensuring the safety of white Northerners who were threatened and attacked by radical southern political groups resisting Reconstruction.[50] Such viewpoints

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[46] Id.
[47] Id.
[48] Id. at 392.
[49] Id.
[50] Paul Finkelman, John Bingham and the Meaning of the Fourteenth Amendment: John Bingham and the Background of the Fourteenth Amendment, 36 Akron L. Rev. 671, 687 (2003).

are what Congressmen brought to the drafting table when constructing the Fourteenth Amendment.

Writers of the Fourteenth Amendment

In a further attempt to understand the context of the Fourteenth Amendment, it is of major significance to examine some of the prominent writers and Congressmen who formed the Fourteenth Amendment. One of the most distinguished and powerful members of the House of Representatives during the Reconstruction Era was Thaddeus Stevens.[51] He has been noted as a man whose "power even eclipsed that of the president" by forming a "[R]adical phalanx" that "ran roughshod over the executive until…his death in 1868."[52] Additionally, "[F]or more than four decades Stevens had been an uncompromising supporter of black rights and racial equality,"[53] having "gained a reputation as an uncompromising, unrelenting abolitionist"[54] while becoming "the embodiment of Northern defiance against what was perceived as a dangerous Slave Power Conspiracy against the liberties of all Americans."[55]

Before his rise to prominence in the House of Representatives, "Stevens regularly took fugitive slave cases for free"[56] in his law practice. Even as an early politician, "Stevens was equally supportive of black rights"[57] amidst the assault on racial equality. On one occasion in his early political career, Stevens served as a delegate to the Pennsylvania Constitutional Convention in order to promote black suffrage against

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[51] Aaron J. Walker, No Distinction Would Be Tolerated: Thaddeus Stevens, Disability, and the Original Intent of the Equal Protection Clause , 19 Yale L. & Pol'y Rev. 265, 269 (2000).
[52] Id.
[53] Finkelman, supra note 44, at 392.
[54] Walker, supra note 51, at 269.
[55] Id. at 270.
[56] Finkelman, supra note 44, at 392.
[57] Id.

Jacksonian Democrats intent on eliminating the black vote; although "Stevens was unsuccessful in this effort,"[58] his failure "only increased his commitment to racial equality."[59] All these experiences helped form the mindset which Stevens would bring to the Joint Committee on Reconstruction when drafting the Fourteenth Amendment; indeed, upon commandeering the ratification process, Stevens wrote "the first draft of the Equal Protection Clause, possessing a veto on its language, and commanding solid party obedience to his command to vote for the entire Fourteenth Amendment" while also being "the primary force moving the clause from inception to ratification."[60]

From the context of his background and experience in drafting the Fourteenth Amendment, one can see that Stevens advocated for civil equality for African Americans by posing some limitations on states in an effort that they not make a mockery of the four years of bloody war to attain those rights. Like many others who drafted legislation in that time period, Stevens was a man who genuinely wanted civil equality for African Americans by creating a constitutional amendment which created some limitations on state governments; those limitations, however, did not mean that the Bill of Rights would be used as an enforcement mechanism to ensure that the states were complying within the parameters of the Fourteenth Amendment. Upon a close examination of some of the literature linked to drafting the Fourteenth Amendment, it has been discovered that

> The debates…do not clearly reveal a near-unanimous understanding among congressmen that the first section would apply the Bill of Rights to the states. Rather, the beliefs most frequently expressed were that the proposal was designed to protect blacks from discriminatory state legislation, and to

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[58] Id. at 393.
[59] Id.
[60] Walker, supra note 51, at 274.

> provide a more substantial constitutional basis for the Civil Rights Act of 1866.[61]

Thaddeus Stevens appears to have supported that observation by stating "This amendment…allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all…Whatever law protects the white man shall afford equal protection to the black man."[62] Further into the debate, Stevens purported:

> I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted in some form or other in our Declaration or organic law. But the Constitution limits only the actions of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all.[63]

Again, there is no doubt that Stevens wanted to rectify the wrongs of the state governments by imposing some limitations; however, as Stevens acknowledged above, "the Constitution limits only the actions of Congress, and is not a limitation on the States." The Bill of Rights is just as much a part of the Constitution as the articles that define the roles of the legislative, executive, and judicial branches; therefore, it was not the prerogative of the writers of the Fourteenth Amendment to incorporate the Bill of Rights to the states but rather to meet the immediate needs of the postwar South in addressing the grievances that led to the Civil War.

Another important writer who contributed significantly to the Fourteenth Amendment was John Bingham. While "Thaddeus Stevens introduced the final version…of the Fourteenth Amendment in the House and spoke in favor of the

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[61] Roald Y. Mykkeltvedt, The Nationalization of the Bill of Rights: Fourteenth Amendment Due Process and the Procedural Rights 7 (1983).
[62] Cong. Globe, 39th Cong., 1st Sess., 2459 (1866).
[63] Id.

Amendment in a way that has relevance and importance,"[64] John Bingham "was the chief advocate and the real floor manager of the Amendment."[65] When looking into Bingham's life, one can see anti-slavery sentiment at a very young age. Since he was a boy, "Bingham was raised in an environment that was congenial to the development of anti-slavery and perhaps even abolitionist doctrines."[66] The impact of Bingham's upbringing is evident in how he would later express his views in a debate with Kentucky Congressman William Henry Wadsworth stating "chattel slavery is an 'infernal atrocity.' I thank God that I learn to lisp it at my mother's knee."[67] Having come from Ohio, a state which was "one of the most racially retrograde states in the North,"[68] Bingham had witnessed much racism, discrimination, and prejudice. After many years of schooling and being admitted to the Bar in Pennsylvania and Ohio in 1840, Bingham was heavily submersed and solidified in abolitionist doctrine to finally bring equality to all men.[69]

Throughout Bingham's early political career, one can see that he took many hardline stances on civil rights issues for African Americans. Some highlights include his opposition to admitting Kansas as a slave state, giving the first definitive pronouncements of anti-slavery views in the Republican Party, and speeches of vindication for many prominent anti-slavery politicians such as Salmon Chase.[70] By the time John Bingham reached the constitutional convention to draft to the Fourteenth Amendment, one can be

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[64] Richard L. Aynes, John Bingham and the Meaning of the Fourteenth Amendment: The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment, 36 Akron L. Rev. 589, 592 (2003).
[65] Id.
[66] Id.
[67] Id. at 608.
[68] Finkelman, supra note 50, at 672.
[69] Aynes, supra note 64, at 598.
[70] Id. at 603.

sure of his goal: "to protect the life, liberty, safety, freedom, political viability and property of the former slaves."[71]

Many of Bingham's speeches showed an understanding of Barron v. Baltimore that "the enforcement of the Bill of Rights fell within the reserved powers of the states, to be enforced by state tribunals."[72] While Bingham was fervent to end the oppression state governments used toward its populace, he still maintained, upon rereading Barron v. Baltimore when writing the second draft of the Fourteenth Amendment, that "it [Barron] was decided, and rightfully, that these amendments [Bill of Rights], defining and protecting the rights of men and citizens, were only limitations on the power of Congress [and not unto state governments]."[73] Furthermore, amid his desire to limit state governments' abuse of civil rights, Bingham asked "that it [Fourteenth Amendment] be enforced in accordance with the Constitution of my country."[74]

Although Bingham sincerely believed that states had "at least a moral duty to respect the Bill of Rights as part of their oath to uphold the federal Constitution,"[75] the states still had "full power to ignore the Bill of Rights under the original Constitution if they chose to do so."[76] Again, one may see the need to limit state governments from attacking the liberties of its citizens; however, to employ the Bill of Rights against the states was an overreaching exercise of power that defied constitutional constructs between state and federal authority. Although Bingham does equivocate on his views concerning the Bill of Rights relationship to state governments, within his knowledge of

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[71] Finkelman, supra note 50, at 691.
[72] Irving Brant. The Bill of Rights: Its Origin and Meaning 330 (1965).
[73] Kurt T. Lash, The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment, 99 Geo. L.J. 329, 425 (2011).
[74] Irving, supra note 72, at 330.
[75] Lash, supra note 73, at 427.
[76] Id.

Barron v. Baltimore (and acceptance of judgment), the desire to enforce restrictions constitutionally, and the general understanding of the Constitution among many senators of the time would suggest that Bingham did not intend the Bill of Rights to be incorporated to state governments.

While it appears that the main writers of the Fourteenth Amendment suggest that the incorporation of the Bill of Rights to the states was not the ultimate intention of the amendment, there are rare instances were congressman gave unequivocal statements as to incorporate the Bill of Rights to state governments. One prominent senator who advocated this view is Howard Jacobs, member of the Joint Committee on Reconstruction. Howards stated "these privileges and immunities…these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution…the great object of the first section of this amendment is…to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[77] While views for incorporation were present during the formation of the Fourteenth Amendment, many senators and congressman appeared not to support this view due to the lack of mention and debate in congressional sessions. What would prove to be more problematic, however, was the ratification process of the Fourteenth Amendment.

Ratification of Fourteenth Amendment

In light of the context of postwar politicians' goals in securing civil rights for African Americans and the presuppositions used to draft the Fourteenth Amendment, the paramount issue perhaps transcending the Fourteenth Amendment itself was the ratification process. The ratification of the "[F]ourteenth Amendment was adopted during

[77] Mykkeltvedt, supra note 61, at 8.

a time of great uncertainty, and with great irregularity"[78] as the victors of the civil war tried to determine the most appropriate means of correcting the wrongs committed by the South in the formation of new constitutional amendments. The ratification of the Fourteenth Amendment would therefore prove to be "a strange and fascinating chapter in constitutional history" due to "the natural confusion…[and] political upheavals accompanying party realignments that resulted from national disruption of power relationships."[79]

Before the Civil War's ending, President Lincoln had already begun drafting plans to institute new civil authority that would govern the southern states.[80] After his assassination, President Johnson followed his mandate in restructuring the southern governments to bring them back into the union.[81] By December of 1865, "all the Southern states had formed constitutions and elected governments which were in full operation."[82] Much debate, however, consumed postwar American politics in determining the validity and legitimacy of the newly formed confederate governments. Some politicians, particularly Charles Sumner, held that "reconstruction left no place for consideration by other than 'loyal' states…only these could be counted in ratifying the amendment."[83] Therefore, the southern states were seen as illegitimate governments because the "very act of seceding destroyed a state and dissolved its lawful government."[84] Others, such as Thaddeus Stevens, espoused that the Southern states were

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[78] Douglas H. Bryant, Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment, 53 Ala. L. Rev. 555, 556 (2002).
[79] Joseph B. James, The Ratification of the Fourteenth Amendment 1 (1984).
[80] Bryant, supra note 78, at 556.
[81] Id.
[82] Id.
[83] James, supra note 79, at 6.
[84] Bryant, supra note 78, at 557.

captured military provinces and devoid of any state representation in reconstruction.[85] Regardless of the many views defining the Southern governments' lawfulness, confusion and ambiguity characterized politics succeeding the civil war. Despite the enigma surrounding the South's validity, on December 18, 1865, Secretary of State William H. Steward announced that the Thirteenth Amendment had been ratified by 27 of the 36 states (including 8 confederate states) and had become the official law of the land.[86] Although the question to the status of Southern governments was still equivocal, the Federal government still abided by constitutional procedures to ratify the Thirteenth Amendment, requiring 27 of the 36 states.[87] Amidst all the objections surrounding the Southern states' constitutionality, "had the Southern governments not been legitimate enough to ratify the Thirteenth Amendment, it could not have been adopted [under the current constitutional guidelines]."[88] Furthermore, one must concede the Southern government's perceived legitimacy in that "[C]ongress would also send these same governments the proposed Fourteenth Amendment in hopes of the South's approval."[89]

Shortly before the ratification of the Thirteenth Amendment, Congress convened on the Thirty-Ninth Congress to continue to address Southern reconstruction.[90] The sentiment brought to the Capital was determination to "avoid allowing restoration to be entrusted to traitors,"[91] therefore blocking Southern representation on Congress. Such an action created a constitutional morass, for the legitimacy of the Southern governments

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[85] Id.
[86] Primary Documents in American History, The Library of Congress (Mar. 3, 2013, 6:31 PM), http://www.loc.gov/rr/program/bib/ourdocs/13thamendment.html
[87] Bryant, supra note 78, at 558.
[88] Id.
[89] Id.
[90] Id.
[91] James, supra note 79, at 9.

had apparently been acknowledged in the ratification of the Thirteenth Amendment but suppressed by the Thirty-Ninth Congress.[92] Furthermore, such a restriction of Southern representation on the Thirty-Ninth Congress created constitutional difficulties in proposing future amendments.[93] Article V of the U.S. Constitution states:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution when ratified by the Legislatures of three-fourths of the several States . . . and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.[94]

When "[T]he final vote on the Fourteenth Amendment in the House" was taken, it "was 120 to 32, with 32 abstentions."[95] The vote, however, excluded southern representation which would have added sixty-one representatives to the house and twenty-two senators to the senate.[96] If these numbers, providing they were added negatively, were figured into the proposal of the Fourteenth Amendment, the house would not have achieved the necessary two-thirds and the senate would have been tied at 33-33 with 5 abstentions.[97] Hence, the amendment would have been defeated in its proposal and would not have any bearing on constitutional law.

It comes as no surprise why the Southern representatives were denied entrance into the congressional hearings of the Fourteenth Amendment: had they been admitted, they would have adamantly and fervently opposed any legislation that would confer

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[92] Bryant, supra note 78, at 559.
[93] Id.
[94] U.S. Const. art. V.
[95] Bryant, supra note 78, at 559.
[96] Id.
[97] Id.

authority to the federal government to meddle in state affairs.[98] Indeed, "[C]omments appearing in papers of the South indicated little regard for the Fourteenth Amendment"[99] because they feared "that state rights, including the right to regulate suffrage, might be lost."[100] After the Fourteenth Amendment was passed in both houses, the amendment was sent to the state governments for ratification, including the "unlawful" southern states. After deliberation in each state government, the results of ratification are as followed: 21 states ratified the Fourteenth Amendment while 16 states rejected it (including 10 southern states).[101] Senator Doolittle of Wisconsin properly captured the sentiment of Republicans after the Fourteenth Amendment's rejection: "The people of the South have rejected the constitutional amendment, and therefore we will march upon them and force them to adopt it at the point of bayonet, and establish military power over them until they do adopt it."[102] Therefore the infamous Reconstruction Acts were enacted, which pronounced southern governments illegitimate while dividing the South into military districts.[103]

Within the Reconstruction Acts, Congress nullified southern government authority in addition to encouraging black male suffrage and discouraging white male suffrage.[104] Moreover, the Reconstruction Acts demanded that "voters in each [southern] state…form new constitutions, to be approved by Congress, and to ratify the Fourteenth Amendment;" only on these conditions were the southern states allowed admittance and

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[98] Id.
[99] James, supra note 79, at 9.
[100] Id. at 50.
[101] David Lawrence, There is No "Fourteenth Amendment," U.S. News & World Report, September 27, 1957, at 140.
[102] Cong. Globe, 39th Cong., 2nd Sess. 1644 (1867).
[103] Bryant, supra note 78, at 566.
[104] Id.

representation in the Union.[105] Furthermore, the Reconstruction Acts "deprived most white voters in the South of their political rights, without due process of law, on a wholesale basis."[106] The constitutionality of these acts, however, were met with fierce resistance from President Johnson. While Congress was proposing, drafting, and awaiting ratification of the Fourteenth Amendment, President Johnson was attempting to mend relations with the South by issuing a Proclamation of Amnesty to former rebels and establishing provisional governments in the South.[107] Furthermore, he campaigned throughout the country under the banner of the National Union Movement in an attempt to garner support for Southern readmission.[108] When learning of the Reconstruction Acts and the overreaching authority possessed within them, Johnson stated:

> Here is a bill of attainder against 9,000,000 people at once. It is based upon an accusation so vague as to be scarcely intelligible and found to be true upon no credible evidence. Not one of the 9,000,000 was heard in his own defense. The representatives of the doomed parties were excluded from all participation in the trial. The conviction is to be followed by the most ignominious punishment ever inflicted on large masses of men. It disfranchises them by hundreds of thousands and degrades them all….[109]

Upon stating his opinion, Johnson immediately vetoed the legislation; however, he was met with an override in both houses of Congress.[110] He would then relay a sobering message to Congress in regards to the constitutionality of the Reconstruction Acts:

> I submit to Congress whether this measure is not in its whole character, scope and object without precedent and without authority, in palpable conflict with the plainest provisions of the Constitution, and utterly destructive of those great principles of liberty and humanity for which our ancestors on both

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[105] Id.
[106] Id. at 568.
[107] Lawrence, supra note 101, at 140.
[108] Bryant, supra note 78, at 566.
[109] Criminal Ignorance, People's Awareness Coalition (Mar. 4, 2013, 6:49pm), http://www.pacinlaw.org/pdf/Criminal_Ignorance.pdf
[110] Lawrence, supra note 101, at 140.

> sides of the Atlantic have shed so much blood and expended so much treasure.[111]

Eventually for Johnson, his stance on the validity of the Reconstruction Acts and his subsequent actions to willfully disobey them due to their unconstitutionality resulted in the near-termination of his presidency via impeachment.[112]

As the constitutional crisis continued, the issue would inevitably find itself in the Supreme Court. The South desperately looked to the Supreme Court as a last resort in fixing the tyranny imposed by Congress. The common disposition in the South saw the Supreme Court as "a barrier to the sweeping progress of Northern fanaticism," as stated in the Little Rock Gazette.[113] After the passage of the Reconstruction Acts, constitutional arguments were brought before the federal courts in determining the constitutionality of the acts.[114] In one particular case, Ex Parte Milligan, the court "held that military trials of civilians in times of peace and outside of war zones were unconstitutional, and stated that 'martial rule can never exist where the courts are open.'"[115] Hence, the court expressed "condemnation of military tribunals operating within an area not involved in actual hostilities while the civil courts were open and functioning."[116] Such a decision infuriated Congress as they condemned the decision as a "piece of judicial impertinence which we are not bound to respect."[117] Congress responded to the court's position by proposing numerous bills, legislation, and amendments to inhibit the Supreme Court's ability to

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[111] Id.
[112] Id.
[113] James, supra note 79, at 204.
[114] Bryant, supra note 78, at 571-573.
[115] Id. at 567.
[116] James, supra note 79, at 122.
[117] Bryant, supra note 78, at 567.

preside over cases relating to the Reconstruction Acts.[118] After many federal cases dealing with the constitutionality of the Reconstruction Acts, the Supreme Court finally was cornered into answering the fundamental question: Are the Reconstruction Acts constitutional?[119]

The case arose from a man named William McCardle, who wrote critical statements about the nature of the Reconstruction Acts. He was then arrested, charged, and imprisoned for libel, inciting political insurrection, and disturbance of the peace.[120] McCardle appealed his case to the Supreme Court due to the Habeas Corpus Act of 1867, which "protect[ed] individuals from injustice in the South by giving them direct access to the Supreme Court through writs of habeas corpus."[121] While arguing the case before the Supreme Court, Congress received word that the Court might strike down the Reconstruction Acts as unconstitutional.[122] At this, Congress quickly reconvened and repealed the Habeas Corpus Act, thus eliminating the Court's jurisdiction over the case.[123] The Court was therefore left with the decision of declaring the act unconstitutional or retreating from the case due to lack of jurisdiction. The Court decided to retreat by stating that "this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."[124] The Supreme Court abided by the jurisdictional limits set by Congress for fear "that if they (the Supreme Court) ruled on the Reconstruction Acts, the

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[118] Id. at 570.
[119] James, supra note 79, at 204.
[120] Bryant, supra note 78, at 572.
[121] James, supra note 79, at 204.
[122] Bryant, supra note 78, at 572.
[123] Id.
[124] Ex Parte McCardle, 74 U.S. 506, 515 (1869).

Republicans in Congress might retaliate by inflicting even more damage upon the Court's institutional independence."[125] Hence, the last hope of the Reconstruction Acts being eliminated became nothing but wishful thinking, for the Court evaded the constitutional question. After its decision, a long and arduous process would follow as Congress set up new governments in the South that would eventually ratify the Fourteenth Amendment under pretentious and irregular circumstances.[126] While the ratification of the Fourteenth Amendment does not speak to incorporation directly, it gives important context to the document that created the incorporation doctrine which changed the trajectory of American jurisprudence. If the constitutionality of the amendment responsible for the incorporation doctrine is in question due to its failure to comply with procedural rules, it warrants a person to examine the amendment carefully and meticulously in abiding to the balance between federal and state sovereignty. This balance was demonstrated in the Supreme Court's ruling in the Slaughterhouse cases in interpreting the Privileges and Immunities Clause in the Fourteenth Amendment.

Immediate Court Precedent Following the Fourteenth Amendment

The last piece of evidence which shows that the federal Bill of Rights was not applied to state governments was in the series of cases known as "The Slaughter House Cases" which succeeded the Fourteenth Amendment. The Supreme Court's decision of the Slaughter House Cases serves as an important indication as to the interpretation of the Fourteenth Amendment since it was decided only five years after ratification. The case involved an ordinance in New Orleans to control waste pollution from butchers to protect

[125] Bryant, supra note 78, at 572.
[126] Id. at 575.

the Mississippi River.[127] Until this time, the city "had been grappling with problems of municipal sanitation for more than half a century"[128] and saw this statute as a means to finally deliver New Orleans from the pangs of pollution, disease, and contamination resulting from the flagrant negligence toward waste disposal.[129] The statute's main point was to "'to Protect the Health of the City of New Orleans, and to Locate the Stock Landings and Slaughterhouses'"[130] in an effort to curtail the ongoing pollution into the Mississippi river. From the passage of this statute, the city delegated power to seventeen individuals who were given the exclusive right to slaughter animals within the city; therefore, butchers could only slaughter animals in designated areas or pay for the slaughter of their own animals.[131] If the butchers failed to abide by the new law, heavy fines were imposed.[132] After the statute's enactment, the ordinance was met with fierce resistance as all the butchers banded together and "fought with tenacity and intensity in a number of state district courts, the Louisiana Supreme Court, the federal District Court, and ultimately the U.S. Supreme Court."[133]

Upon certiorari, the Court set out to define the newly ratified amendment added to the Constitution. Before delving into the constitutional questions, the Court mentioned the main purpose of ratifying the Civil War amendments by stating "in the light of this recapitulation of events… and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in

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[127] Jonathan Lurie, Reflections on Justice Samuel F. Miller and the Slaughter-House Cases: Still a Meaty Subject, 1 NYU J.L. & Liberty 355, 356 (2005).
[128] Id.
[129] Id. at 357.
[130] Id. at 359.
[131] Id.
[132] Id.
[133] Id.

them all… the freedom of the slave race."[134] The court was very careful to examine the context of why the amendments were ratified and how that would lead to proper interpretation.

In addressing the offended parties' claim, the court set out to define the Privileges and Immunities Clause in the Fourteenth Amendment.[135] The butchers argued that the newly enacted statute created "a monopoly and [was] conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans."[136] In addition, they asserted that the statute "deprives a large and meritorious class of citizens—the whole of the butchers of the city—of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families"[137] as a violation of the Privileges and Immunities Clause of the Fourteenth Amendment. Before a violation of the Privileges and Immunities Clause could be determined, the Court went to the citizenship clause of the Fourteenth Amendment to see if the offended parties could bring suit.[138]

The Court found that "the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established" in that a man must "reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union."[139] Therefore, "there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual"

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[134] Slaughterhouse Cases, 83 U.S. 36, 71 (1872).
[135] Id. at 74.
[136] Id. at 60.
[137] Id.
[138] Id. at 73-74.
[139] Id. at 74.

because the rights warranted by the Fourteenth Amendment "speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States."[140] The butchers' Fourteenth Amendment rights in the Privileges and Immunities clause, the court established, affected the rights of United States citizenship, not state citizenship.[141]

Justice Miller further argued that if the rights found within the privileges and immunities clause protected citizens from a state from that state, such a change would give the Federal government control to protect all civil rights traditionally protected by the states.[142] "It would be the vainest show" Miller argued, "to attempt to prove…that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States."[143] Miller continued, "the entire domain of the privileges and immunities of citizens of the States…lay within the constitutional and legislative power of the States, and without that of the Federal government."[144] Seeing further flaws within the plaintiffs' argument, Miller rhetorically asks, "Was it the purpose of the fourteenth amendment, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?"[145] Such a deduction by the plaintiffs would be ludicrous because "no such results were intended by the Congress which proposed these

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[140] Id.
[141] Id.
[142] Id. at 77.
[143] Id.
[144] Id.
[145] Id.

amendments, nor by the legislatures of the States which ratified them."[146] Justice Miller concluded that the Fourteenth Amendment did not serve the "purpose to destroy the main features of the general system"[147] in that "our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights…was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States."[148]

In light of the court's ruling, the justices did not overlook the concerns and problems involved with the necessity to restrict state government power. The court acknowledged that it was legitimate "to impose additional limitations on the States" due to "the pressure of all the excited feeling growing out of the war."[149] Additionally, the court did not deny that the need to limit state power came from the "true danger…of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government."[150] Amidst the surmounting problems against the state governments, the Supreme Court found that there were already constitutional remedies available without need of judicial interference. In its findings on state limitations, the court held that when a state violates the liberties/rights of a person, the "form of expression in the constitutions of nearly all the States" serves as a protection mechanism against state infringement by placing "a restraint upon the power of the States."[151] Furthermore, should the rebel states "not conform their laws to its

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[146] Id.
[147] Id. at 82.
[148] Id.
[149] Id.
[150] Id.
[151] Id. at 81.

[constitutional] requirements" and discriminate "with gross injustice and hardship against" negroes, "then by the fifth section of the article of amendment Congress was authorized to enforce" limitations on state governments through "suitable legislation."[152] The court saw no need to overstep its authority to impose limitations on state governments but opted to confer that authority to constitutional remedies already set in place. The Supreme Court viewed the limitations as safeguards to properly enforce the civil war amendments to the immediate needs of the postwar south. The court dared not to redefine the constitutional balance between the state and federal government because "statesmen seem to have [been] divided on the line which should separate the powers of the National government from those of the State governments."[153] Therefore, to avoid a ruling that would capitulate with "the pressure of all the excited feeling growing out of the war" and cause a departure from constitutional history, the court reminded its readers that

> [T]he adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power…[hence] this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power…[within] the construction of the Constitution.[154]

From the Court's decision of the Slaughter House Cases, one can see that the Court still had a narrow interpretation of the Federal government controlling activities of state governments. Although the Court ruled on the issue of citizenship to the privileges and immunities clause as applied to the National government, this ruling is inextricably linked to the incorporation of the Bill of Rights to state governments in that it put a check

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[152] Id.
[153] Id.
[154] Id. at 82.

on federal power over state affairs. Had the court ruled in favor of the butchers, the Court would have inevitably granted power to the Federal government to employ whatever means to prevent a state's infringement upon individual liberties, resulting in the incorporation of the Bill of Rights to the states.

Departure of Traditional Understandings of the Fourteenth Amendment

One of the first cases which served as a catalyst of the Incorporation Doctrine was Gitlow v. New York. Although Gitlow, in and of itself, did not implement the tenets of incorporation into governmental action, the case established significant precedent which snowballed into the incorporation of most of the Bill of Rights to the states. Benjamin Gitlow was an American radical leftist who was convicted of two counts of criminal anarchy in the state of New York.[155] In the first count, the defendant had "advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force."[156] Within the second count, Gitlow had "printed, published and knowingly circulated and distributed a certain paper called '[T]he Revolutionary Age,' containing the writings set forth in the first count."[157] On trial, it was discovered that Gitlow was an active member of the Left Wing Section of the Socialist party for a few years and was actively engaged within the party's activities of distribution and endorsement of radical leftist views.[158] All the appellate courts within New York State affirmed Gitlow's conviction.[159]

Supreme Court Opinion

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[155] Gitlow v. NewYork, 268 U.S. 652, 654 (1925).
[156] Id.
[157] Id.
[158] Id. at 655, 656.
[159] Id. at 654.

The defendant argued before the Supreme Court that his Fourteenth Amendment rights of due process were violated in correlation to the state statue. The Supreme Court responded to the Fourteenth Amendment challenge in acknowledgement of the defendant's claims of violation of due process. The court explicitly stated "For present purposes we may and do assume that freedom of speech and of the press…are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[160] The court further asserted that "[W]e do not regard the incidental statement in Prudential Ins. Co. v. Cheek, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question."[161] In two sentences, the court effectively disowned 150 years of constitutional understanding by refuting the case of Prudential Ins. Co. v. Cheek while also deciding that the Bill of Rights through the Fourteenth Amendment applies to state governments. In addition, the court did not justify its departure from precedent in any added opinion or rationale; the court seemed to decide on the whim of the moment what the implications of the Fourteenth Amendment meant. The rest of the court opinion dealt with constitutional issues dealing with freedom of expression as it related to court-created tests. Although Gitlow was ultimately convicted and the New York statute upheld, the court inadvertently set forth a precedent that would collapse the pillars of constitutional understanding on which the United States rested.

Public Policy and Future Implications of Decision

The consequences of Gitlow have resonated in twentieth century precedent as the Courts have struck down numerous state laws while also incorporating many rights

[160] Id. at 630.
[161] Id.

against state governments. The snowball has now been pushed and has slowly gained momentum as it careened toward constitutional principles that have long been understood since the nation's founding.

Within two years of the Supreme Court's ruling in Gitlow, the court referenced its decision to adjudicate the case of Fiske v. Kansas. In Fiske, the court maintained that a Kansas statute meant to suppress criminal syndicalism was "an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment."[162] The states were now restricted by the First Amendment prohibitions incorporated through the Fourteenth Amendment from restricting free speech.

Four years later, the Supreme Court found in Near v. Minnesota that "it is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."[163] From the court's statement of "no longer open to doubt," one can see that the Courts have solidified the incorporation doctrine as it becomes more defined in new cases that are decided. The Court now ruled that states cannot restrict press as incorporated through the Fourteenth Amendment.

Such a trend of incorporation continued throughout the twentieth century as more rights from the Bill of Rights were incorporated to state governments. Some examples include: the right of assembly and petition were incorporated in the case of De Jonge v. Oregon in 1937; the right of free exercise of religion was incorporated in the case of Cantwell v. Connecticut; the doctrine of the Separation of church and state was

[162] Fiske v. Kansas, 274 U.S. 380, 387 (1927).
[163] Near v. Minnesota, 283 U.S. 697, 707 (1931).

incorporated in the case of Everson v. Board of Education in 1947; the right for a public trial was incorporated in the case of In re Oliver in 1948; and the protection from unreasonable searches and seizures was incorporated in the case of Wolf v. Colorado in 1949. From the incorporation doctrine, the court has incorporated every right from the Bill of Rights except the grand jury clause of the Fifth Amendment, the Seventh Amendment, the excessive bail clause of the Eighth Amendment, the Ninth Amendment, and Tenth Amendment.

In its public policy context, the Gitlow decision has enabled people to use the Fourteenth Amendment as a means of circumventing crime, promoting political advocacy, and securing more rights for American citizens. Since the Fourteenth Amendment incorporates the same restrictions on state governments as the Federal government, people can virtually use the Fourteenth Amendment on any level of governmental control. Whenever a person is before a court of law, it is considered a legal "no-brainer" to argue the Fourteenth Amendment because the amendment has "a position of constitutional primacy" to have "profound effects upon all three of the structural principles undergirding the Constitution: federalism, individual rights, and separation of powers."[164] The Fourteenth Amendment is now perceived as a constitutional savoir to advocate, save, and defend people from their state governments.

In view of the federal government's authority over state governments, the Gitlow decision has coerced state governments to adopt rights that are foreign to its people, legislation, and representatives. Many cases in constitutional law demonstrate this effect. In Griswold v. Connecticut, the Court found that "specific guarantees in the Bill of Rights

[164] Elizabeth Reilly, Infinite Hope: Introduction to the Symposium: The 140th Anniversary of the Fourteenth Amendment, 42 Akron L. Rev. 1003, 1006-1007 (2009).

have penumbras, formed by emanations from those guarantees that help give them life and substance."[165] This decision therefore equipped the court to find any rights that are found in the "penumbras and emanations" of the Bill of Rights and due process clause of the Fourteenth Amendment. Such a rationale derived from the incorporation doctrine gave the Federal government broad authority to impose its power upon state sovereigns in determining the rights of its people. Some cases that effectuate this decision are Roe v. Wade and Texas v. Lawrence. In Roe v. Wade, the federal government found that "This right of privacy (abortion), whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it… is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[166] The Court disregarded state statutes which reflected the populace's view of prohibiting abortion and took it upon itself to forcefully impose its ruling on all state governments. Another example is the case of Texas v. Lawrence, where the court found state sodomy statutes unconstitutional, claiming:

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.[167]

The Court thus effectively ended sodomy statutes in fifteen states, believing that sodomy is a protected right inherent in the penumbras and emanations of the Bill of Rights through extension of the Fourteenth Amendment.[168] Roe and Lawrence are but two of many examples where unwilling state governments are coerced into adopting laws that

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[165] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
[166] Roe v. Wade, 410 U.S. 113, 153 (1973).
[167] Texas v. Lawrence, 539 U.S. 558, 578 (2003).
[168] Ryan M. Bernstein, Civil Rights: The Supreme Court Strikes Down Sodomy Statute by Creating New Liberties and Invalidating Old Laws, 80 N. Dak. L. Rev. 323, 351 (2004).

run contrary to its laws and public opinion. Even in current events today, the Supreme Court is in the process of deciding the issue of gay marriage, illustrating yet another example of the federal government's authority to infringe upon state sovereignty. When the federal government becomes the supreme arbiter in determining and enforcing laws that run contrary to its notions of justice, state governments will be dissolved and federal tyranny will be ushered in. The effects of the incorporation doctrine via Gitlow have all but set the United States on a trajectory toward a government that characterizes many of the world governments today: the paternal state.

While it is recognized that some good has come through the incorporation of the Bill of Rights to state governments via the Fourteenth Amendment, one must ask how this doctrine stands in the face of constitutional history. If the founders, early Supreme Court justices, state conventions for ratification, and the writers of the fourteenth amendment looked at the ramifications of the Incorporation Doctrine today, would they be appalled at the constitutional direction the nation has set? Seeing how much power the Federal government has over state legislation, affairs, and action, it would be reasonable to conclude that many would look in dismay as the current government resembles that of which Americans fought so desperately to be freed. Indeed, James Madison represents this mentality as he notes:

> Ambitious encroachments of the federal government on the authority of the state governments…would be signals of general alarm. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trail of force would be made in the one case as was made in the other.[169]

[169] Madison, supra note 11, at 236.

James Madison reflects the general sentiment during the days of ratification of the Constitution: no tolerance for federal usurpation would be tolerated for states would have already resisted by armed force. Hence, in light of how the founders and early Americans reacted to the threat of Federal authority, Americans should mirror their reaction by constant vigilance and adherence to the constitutional principles that guided the United States throughout history. Any deviation of such principles should be met with resistance and an aggressive coalition be formed to steer America back to constitutional soundness.

Conclusion

Through understanding the debates between the federalists and Anti-Federalists, early court precedent before the Civil War Amendments, the context and ratification of the Fourteenth Amendment, and court precedent following the ratification of the Fourteenth Amendment, one can see that the Incorporation Doctrine deviates from traditional understandings between the balance of federal and state power. While the Fourteenth Amendment accomplished much good in restoring the postwar South to functional viability, the amendment has been used as a means to effectively deprive state sovereignty. The results would come in a century where states are limited in every dimension from school prayer to marijuana consumption. Hence, it is imperative that future judicial leaders have strict adherence to constitutional principles which have long sustained the United States.