University of Richmond Law Review

Volume 33 | Issue 2 Article 11

1999

The Concept of Incorporation

Earl M. Maltz

THE CONCEPT OF INCORPORATION

*Earl M. Maltz**

Akhil Amar's new book[1] is by any standard a major contribution to the literature on the Bill of Rights. Amar skillfully combines historical research and legal analysis to give the reader a variety of fresh, important insights into the role that the first ten amendments have played in the evolution of the American constitutional system. Among the many innovative concepts in the book is Amar's treatment of the question of whether the Fourteenth Amendment was originally understood to incorporate the Bill of Rights. Rejecting the traditional dogmas of both incorporation and anti-incorporation theorists, he proposes a new theory—"refined incorporationism"—which focuses, not on the original understanding of the first ten amendments themselves, but rather, on the understanding of those amendments during the Reconstruction Era.[2]

This essay provides an historical context for the evaluation of the import of Amar's theory of incorporation. The essay will not enter the debate over the widely discussed question of whether the Fourteenth Amendment was, in fact, originally understood to incorporate the Bill of Rights. Rather, it deals with the place of incorporation doctrine in subsequent debates over the proper interpretation of the Fourteenth Amendment. In particular, the essay focuses on the abandonment of the idea that incorporation theory can play an important role in constraining the Court and limiting judicial activism.

Although the idea that the Privileges and Immunities Clause incorporated the Bill of Rights was discussed extensively during the early Reconstruction Era, the potential legal implications of the incorporation doctrine were not explored in detail until the debates over what was ultimately to become the Civil Rights Act of 1875.[3] Beginning in 1869, radical Republican Senator

---

* Distinguished Professor of Law, Rutgers University School of Law, Camden. B.A., 1972, Northwestern University; J.D., 1975, Harvard University.

1. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

2. *See id.* at 215-30.

3. The evolution of the Civil Rights Act of 1875 is described in detail in Earl M.

Charles Sumner of Massachusetts repeatedly introduced bills that would not only have barred racial discrimination in the selection of jurors, but would also have outlawed racial segregation by public schools, common carriers, innkeepers, owners of theaters, and churches. When Sumner's bill first reached the Senate floor in early 1872, its supporters vigorously contended that the Fourteenth Amendment vested Congress with authority to adopt the bill. Democrats and some conservative Republicans deployed a variety of arguments in an effort to refute this contention in whole or in part. Most often, they relied on two related contentions. First, they argued that the Privileges and Immunities Clause distinguished between the rights associated with national and state citizenship, respectively, and constitutionalized only the former. Second, they contended that Congress possessed Fourteenth Amendment authority to protect only "civil" rights, while the Sumner bill dealt with "political" and "social" rights.

Democratic Senator Allen G. Thurman of Ohio, however, articulated an even more conservative interpretation of the Privileges and Immunities Clause. Rejecting the claim that civil rights generally were associated with national citizenship, Thurman argued that

> [by looking] to the provisions of the Constitution, we find what are the rights, privileges, and immunities of the people in their character of citizens of the United States. We find them by looking at the prohibitions contained in the Constitution against the infringement of certain rights, privileges, and immunities which belong to the people, and which, by these prohibitions, are recognized as rights that belong to a citizen of the United States, and of which he cannot be deprived.[4]

Among the rights specifically mentioned by Thurman were those contained in the first eight amendments.[5] In short, Thurman essentially relied on incorporation theory to limit the scope of Section 1.

Maltz, *The Civil Rights Act and the* Civil Rights Cases: *Congress, Court and Constitution*, 44 FLA. L. REV. 605 (1992).

4. CONG. GLOBE, 42d Cong., 2d Sess. app. at 25 (1872).

5. *See id.* app. at 25-26.

Republican Senator John Sherman of Ohio immediately rose to challenge Thurman. Sherman did not dispute the proposition that the Privileges and Immunities Clause incorporated the rights protected by the first eight amendments. Instead, he contended that the Fourteenth Amendment also constitutionalized some rights not explicitly enumerated in the Constitution, asserting that "if [Senator Thurman] will turn to the ninth article of amendment he will see that there are other rights beyond those recognized" and that "as the Constitution itself did not enumerate all the rights of citizens we look to the Declaration of Independence and the common law of England."[6]

Sherman's reference to the Ninth Amendment added a new dimension to the Reconstruction Era debate over the scope of the Privileges and Immunities Clause. In prior discussions of the relationship between the Fourteenth Amendment and the Bill of Rights, influential Republicans such as Representative John A. Bingham of Ohio and Senator Jacob M. Howard of Michigan referred only to the incorporation of the first *eight* amendments to the Constitution.[7] Against this background, Thurman quickly responded to Sherman's argument:

> My colleague is entirely mistaken if he supposes that these other rights which are retained by the people [to which the Ninth Amendment refers] are rights that appertain to them in their character of citizens of the United States. It is true they are rights, but they are rights which have never been surrendered to this Government; . . . The people hold them not as citizens of the United States, but so to speak, in despite of the United States.[8]

Sumner's bill was not adopted in 1872. One year later, the Supreme Court decided the *Slaughter-House Cases*.[9] As Amar notes, while Justices Joseph P. Bradley and Noah Swayne ex-

---

6. *Id.* app. at 26.

7. *See* CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1872) (statement of Rep. Bingham); CONG. GLOBE, 39th Cong., 1st Sess. 1765 (1866) (statement of Sen. Howard).

8. CONG. GLOBE, 42d Cong., 2d Sess. app. at 26 (1872).

9. 83 U.S. (16 Wall.) 36 (1873).

pressly endorsed the concept of incorporation,[10] the import of Justice Samuel F. Miller's majority opinion was less certain. The majority opinion clearly gave the Privileges and Immunities Clause a very narrow reading. At the same time, while not explicitly referring to the Bill of Rights as a whole, Miller did cite "[t]he right to peaceably assemble and petition for redress of grievances" as an example of a right of national citizenship protected by the Fourteenth Amendment.[11]

Viewed in isolation, the reference to the First Amendment right of assembly might well be seen as supporting the doctrine of incorporation more generally. Miller described the privileges and immunities of national citizenship as those which "owe their existence to the Federal government, its National character, its Constitution, or its laws."[12] He did not describe the right of assembly as one which owes its existence to the federal government, but instead linked it to the privilege of *habeas corpus* as another example of "rights . . . guaranteed by the Federal Constitution."[13] The most plausible implication is that the other rights explicitly guaranteed by the first eight amendments would be protected by the Fourteenth Amendment as well.

This interpretation would have fit comfortably with the context in which the *Slaughter-House Cases* were decided. By any measure, Miller's interpretation of the Privileges and Immunities Clause was quite conservative; even if interpreted to incorporate the Bill of Rights, the majority opinion would have done no more than embrace the analysis of Thurman—a conservative Democrat. Any more limited view of his opinion, however, would cast Miller as a reactionary whose view of the Fourteenth Amendment was more limited than that of even the most conservative Democrats in Congress. Such an interpretation is particularly unlikely, given the fact that Miller was a Republican, as were three of the remaining four members of his majority.

---

10. *See id.* at 118 (Bradley, J., dissenting).
11. *Id.* at 79.
12. *Id.*
13. *Id.* at 118 (Bradley, J., dissenting).

Moreover, after the decision in the *Slaughter-House Cases*, Democrats in Congress continued to assert that the Privileges and Immunities Clause was coextensive with the first eight amendments. Thus, in 1874, Senator Thomas M. Norwood of Georgia explicitly linked this view with the *Slaughter-House Cases* themselves,[14] and Representative Roger Q. Mills of Texas also espoused the incorporation doctrine.[15] By contrast, no one seems to have suggested that Miller's opinion threatened the theory of incorporation.

In 1875, however, the Supreme Court's decision in *United States v. Cruikshank*[16] dramatically changed the status of the incorporation doctrine. *Cruikshank* involved a challenge to a series of convictions obtained under section 6 of the Enforcement Act of 1870—the Pool amendment.[17] The indictment on which the convictions were based charged that the defendants entered into a conspiracy to deprive two citizens "of African descent and persons of color" of certain rights.[18] Some of the counts of the indictment cited the victims' right to peaceably assemble and to keep and bear arms.[19] Still others alleged a conspiracy to deprive the victims of their lives and liberty without due process of law.[20]

Cruikshank explicitly raised an issue that had greatly disturbed the *Slaughter-House Cases* majority. Defining a right as an incident of national citizenship not only limited state action, but it also implied that Congress possessed plenary authority to reach *private* action which might interfere with the exercise of that right. Thus, any expansive interpretation of the Privileges and Immunities Clause had the potential to dramatically alter the balance of federalism by aggrandizing the authority of the

14. *See* 2 CONG. REC. app. at 242 (1874).
15. *See* 2 CONG. REC. 384 (1874).
16. 92 U.S. 542 (1875). *Cruikshank* is discussed in detail in Earl. M. Maltz, *The Waite Court and Federal Power to Enforce the Construction Amendments*, *in* THE SUPREME COURT AND THE CIVIL WAR 75, 77-78 (Jennier M. Lowe ed., 1996).
17. *See Cruikshank*, 92 U.S. at 548.
18. *Id.*
19. *See id.* at 551.
20. *See id.* at 553.

federal government at the expense of the states. The prospect of undue centralization of authority led even Bradley and Swayne to abandon their previous endorsement of the incorporation principle and to join a unanimous Court in striking down the *Cruikshank* indictment.[21]

Chief Justice Morrison R. Waite, who had joined the Court after the *Slaughter-House Cases* decision, wrote the *Cruikshank* opinion.[22] Waite began his treatment of the issues presented by the indictment with a reaffirmation of the *Slaughter-House Cases* distinction between the respective rights associated with state and national citizenship.[23] He then turned to a more general discussion of his view of the nature of American federalism, declaring that "[t]he people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions."[24] From a purely theoretical perspective, this vision of state/federal relations was hardly novel; indeed, it formed the basis for Joseph Story's approach to many areas of constitutional law, including the fugitive slave question presented in *Prigg v. Pennsylvania*.[25] In Story's hands, however, the theory of separate, exclusive spheres of authority was most often used as the basis for circumscribing the power of state governments. For Waite, by contrast, it became an instrument for restricting the scope of *federal* authority under Section 5 of the Fourteenth Amendment.

The breadth of the exclusive authority of state governments was repeatedly emphasized in Waite's treatment of the provisions of the indictment that charged the defendants with incursions on interests protected by the Bill of Rights. Against the background of the *Slaughter-House Cases* decision, his treatment of the First Amendment right of assembly is particularly significant. The opinion declared that "[t]he right [to assembly] was not created by the amendment; neither was its continuance

21. *See id.* at 569.
22. *See id.* at 548.
23. *See id.* at 549.
24. *Id.* at 550.
25. 41 U.S. (16 Pet.) 539 (1842).

guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States."[26] Waite then implicitly suggested that the apparently contrary language from the *Slaughter-House Cases* referred only to the right "peaceably to assemble for the purpose of petitioning Congress for a redress of grievances," which he conceded to be "an attribute of national citizenship."[27] He also rejected the notion that the Second Amendment right to bear arms was an incident of national citizenship.[28]

Waite viewed the counts charging the defendants with conspiring to deprive citizens of life and liberty without due process as "even more objectionable," and "nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States."[29] While conceding that the rights to both life and liberty were natural rights, Waite declared that "[t]he very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these [rights]" and that "[s]overeignty, for this purpose, rests alone with the States."[30] Based on this vision of federalism, Waite drew a sharp distinction between private action, which was left generally to state control, and state action, which the federal government could constitutionally control.[31] Thus, as Robert C. Palmer has noted, it was the *Cruikshank* Court that moved away from the pure textualist reliance on the Bill of Rights that marked both the majority and dissenting opinions in the *Slaughter-House Cases* and, as we have seen, was accepted by even the most conservative members of Congress during the debate over the Civil Rights Act of 1875.[32]

---

26. *Cruikshank*, 92 U.S. at 552.
27. *Id.*
28. *See id.* at 553.
29. *Id.*
30. *Id.*
31. *See id.* at 554-55.
32. *See* Robert C. Palmer, *The Parameters of Constitutional Reconstruction:* Slaughter-House, Cruikshank, *and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 762-70.

At the same time, however, it would be a mistake to overstate the specific implications of this analysis for the applicability of the Bill of Rights to state action. While rejecting incorporation theory per se, Chief Justice Waite strongly reaffirmed the principle that the Fourteenth Amendment prevents states from interfering with pre-existing fundamental rights, asserting that the Due Process Clause "furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."[33] He declared that:

> The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. *The only obligation resting upon the United States [under the Fourteenth Amendment] is to see that the States do not deny the right. This the amendment guarantees*, but no more.[34]

Rather plainly, Waite viewed rights such as those protected by the First Amendment and the Second Amendment right to bear arms, as the kind of fundamental rights that would be protected under this analysis. At the same time, some of the technical requirements codified in the Bill of Rights might not be viewed as rising to the same level of fundamentality. If the Framers of the Fourteenth Amendment had focused specifically on questions such as the right to indictment by a grand jury prior to trial in a criminal case, they might plausibly have viewed these matters as less important than the substantive interests protected by other aspects of the first eight amendments. Thus, *Cruikshank* might well be viewed as a precursor of the doctrine of "selective incorporation," combined with a commitment to the protection of some other, unspecified rights not explicitly mentioned in the Constitution. Despite the efforts of Justices John Marshall Harlan and Stephen Field, it was this vision which took hold of the Court in the early twentieth century.

---

33. *Cruikshank*, 92 U.S. at 554.
34. *Id.* at 555 (emphasis added).

The *Cruikshank* decision also had long-term implications for the *perception* of the incorporation doctrine. Prior to 1875, the theory of incorporation was not viewed as necessarily linked to a broad vision of Section 1 of the Fourteenth Amendment. Indeed, to some it was an intrinsic element of a textualist theory designed to limit the scope of Section 1 and preserve state autonomy. By contrast, in the ninety years following *Cruikshank*, incorporationists were almost invariably cast as defenders of an expansive view of Section 1 and a concomitant aggrandizement of federal power at the expense of state independence.

In the late nineteenth and early twentieth centuries, however, the implications of this role changed. *Cruikshank* dealt with the scope of congressional power. Thus, a broad interpretation of Section 1 necessarily implied a more limited judicial role. After *Cruikshank*, the focus of the Court's Fourteenth Amendment jurisprudence changed. Rather than dealing with federal legislative power, the cases generally dealt with Section 1 as a limitation on state authority. In this context, expansive views of the Fourteenth Amendment were synonymous with judicial activism.

The import of the changes wrought by *Cruikshank* were clearly apparent in the famous *Adamson* case.[35] There, Justice Hugo Black sought to revive the argument that the Fourteenth Amendment incorporated the Bill of Rights.[36] In responding, Justice Stanley Reed declared that the analysis of *Cruikshank* and its progeny "has become embedded in our federal system as a functioning element in preserving the balance between national and state power" and suggested that incorporationist theory was inconsistent with "the constitutional doctrine of federalism."[37] Justice Felix Frankfurter went even further, contending that the Fourteenth Amendment "should not be imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century" and defending a theory of interpretation based upon "those canons of decency and fairness

35. Adamson v. California, 332 U.S. 46 (1947).
36. *See id.* at 68-123 (Black, J., dissenting).
37. *Id.* at 53.

which express the notions of justice of English-speaking peoples . . . ."[38]

Black's rejoinder was reminiscent of Senator Allen Thurman's response to Senator John Sherman in 1872. Sherman claimed that the privileges and immunities of citizenship protected by the Fourteenth Amendment were to be found in the Declaration of Independence and the common law of England. Thurman, however, saw grave dangers in looking beyond the text of the Constitution itself:

> Every right, every privilege, every immunity that belongs to a man as a citizen of the United States is found in the Constitution. If not, where are we to find them? Where are we able to find a definition of them? [One Senator] finds the definition in the Declaration of Independence; another Senator finds it in something else; and so on to the end of the chapter; and we have nothing certain, nothing definite, nothing upon which any man can rely. Sir, that will not do.[39]

Similarly, in responding to Reed and Frankfurter, Black stated that

> [i]t is an illusory apprehension that literal application of some or all of the provisions of the Bill of Rights to the States would unwisely increase the sum total of the powers of this Court to invalidate state legislation. . . . It must be conceded, of course, that the natural-law-due-process formula, which the Court today reaffirms, has been interpreted to limit substantially this Court's power to prevent state violations of the individual civil liberties guaranteed by the Bill of Rights. But this formula also has been used in the past, and can be used in the future, to license this Court . . . to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government.[40]

In short, like Allen Thurman before him, Black clearly viewed incorporation theory largely as a device to provide

---

38. *Id.* at 66, 67 (Frankfurter, J., concurring).
39. CONG. GLOBE, 42d Cong., 2d. Sess. app. at 26 (1872).
40. *Adamson*, 332 U.S. at 90 (Black, J., dissenting) (footnote omitted).

strong constraints on the interpretation of the Fourteenth Amendment. He also understood and intended incorporationism to restrict the potential scope of federal judicial activism. Initially, however, the critics of Black's jurisprudence almost uniformly characterized incorporationism as a philosophy of judicial activism that would unduly constrain the options of state governments.[41] Given the context in which Black made his arguments, such characterizations were not surprising. In the criminal procedure cases that figured so prominently in Warren Court jurisprudence, the positions of Black and William O. Douglas—the Court's most vociferous advocates of incorporationist theory—were consistently more activist than those of Frankfurter and his ideological soul mate, the second Justice Harlan. Moreover, the *Lochner* era practice of using the Due Process Clause to aggressively protect a wide variety of substantive, nontextual rights was denounced by all of the justices. Thus, from the late 1940s to the mid-1960s, it seemed certain that the abandonment of incorporationism would lead to a more restrained approach to judicial review generally.

Beginning in 1965, however, it became clear that the concerns which Black expressed in *Adamson* were far from illusory. Over Black's strenuous objections, the Court held in *Griswold v. Connecticut*[42] that a state prohibition on the use of contraceptives ran afoul of the Due Process Clause. Speaking for the majority, Justice Douglas sought to avoid the charge of reviving *Lochner*-style jurisprudence by relying on what he described as the "penumbra" of the Bill of Rights.[43] Nonetheless, it was clear to all dispassionate observers that the *Griswold* result could not be persuasively justified in incorporationist terms. Eight years later, in *Roe v. Wade*,[44] the Court abandoned all pretense of relying on the Bill of Rights by placing stringent constitutional restraints on state authority to regulate access to abortions.

---

41. *See generally*, Francis A. Allen, *The* Wolf *Case: Search and Seizure, Federalism and the Civil Liberties*, 45 ILL. L. REV. 1 (1950).

42. 381 U.S. 479 (1965).

43. *See id.* at 484-85.

44. 410 U.S. 113 (1973).

The activism inherent in decisions such as *Griswold* and *Roe* has drawn its share of criticism. A number of critics take the originalist view that the Court should constitutionalize only the specific rights that the Framers of the Fourteenth Amendment understood to be protected by Section 1.[45] In a different context, one might well expect these critics to be attracted by theories such as those advocated by Thurman and Black. By the 1970s, however, incorporationist theory was indissolubly connected with judicial activism in the minds of the justices and most scholars. This link was only strengthened by activist decisions extending provisions of the Bill of Rights well beyond the original understanding—decisions that are also marked by a clear political bias.[46] Thus, references to incorporation became simply one of the devices used by those seeking to create a regime of liberal activism. Against this background, it should not be surprising that originalists have often been the harshest critics of arguments seeking to link the Fourteenth Amendment and the Bill of Rights.[47]

Amar reminds us that incorporationist theory can, in fact, be a vehicle to provide strong constraints on judicial interpretation of the Fourteenth Amendment. One need not agree with all of the conclusions in *The Bill of Rights: Creation and Reconstruction* to appreciate Amar's intellectual candor and willingness to subordinate his political preconceptions to principled legal analysis. His careful treatment of the right to bear arms is particularly admirable in this regard. In short, constitutional scholars and judges—liberal and conservative, supporters of activism and restraint—would do well to follow his example in their treatment of the Fourteenth Amendment.

---

45. *See, e.g.*, Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4 (1971); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

46. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 240 (1972) (holding that the existing methods of imposing the death penalty violate the Eighth and Fourteenth Amendments).

47. *See, e.g.*, RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989).