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# Mr. Justice Black's Fourteenth Amendment

Wallace Mendelson\*

## I. INTRODUCTION

What the thirteenth amendment<sup>1</sup> promised, the Black Codes effectively denied. This was the seed bed of the fourteenth amendment. As though recognizing the futility of trying to itemize the evils to be enjoined, the amending fathers resorted to generalities:

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.<sup>2</sup>

Avoiding the strait jacket of precision, they risked ambiguity. And so the fourteenth amendment stands as a trap to test the skill of judges—a Gordian Knot against which a man reveals much of his character and his conception of the judicial process.

After several false starts,<sup>3</sup> Mr. Justice Black found in the principle of “incorporation” an Alexandrian answer to the ambiguities of the fourteenth amendment. As he put it in *Adamson v. California*:

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced.<sup>4</sup>

While the Justice does not say it explicitly, the whole tenor of his opinions in *Adamson* and *Duncan*,<sup>5</sup> as well as the implica-

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1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. CONST. amend. XIII, § 1.

2. U.S. CONST. amend XIV, § 1.

3. See P. FREUND, ON UNDERSTANDING THE SUPREME COURT 30-33 (1949).

4. 332 U.S. 46, 71-72 (1947). As to other “objects” of the fourteenth amendment, see *id.* at 72 n.5. Cf. note 60 *infra*, and accompanying text.

5. *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968).

tion of his *Griswold*<sup>6</sup> holding, make clear his view that the Privileges and Immunities, Due Process, and Equal Protection Clauses mean *no more and no less* with respect to the states than the Bill of Rights means vis-à-vis the national government.<sup>7</sup> Thus the imprecision of the fourteenth amendment's first section would be cured by the "clearly marked . . . boundaries,"<sup>8</sup> the "specific,"<sup>9</sup> and "particular standards enumerated"<sup>10</sup> in the Bill of Rights. To the extent, of course, that the Bill of Rights provides fixed meanings, incorporation would rob the Civil War Amendment of its flexible, or viable—what the Justice calls its "natural law"<sup>11</sup>—quality. Small wonder, then, if Justice Black himself should find such strait jacketing unacceptable in practice.

In a classic article, Charles Fairman concluded that the evidence in support of "incorporation" is negligible.<sup>12</sup> As Mr. Justice Harlan put it in *Duncan*:

The overwhelming historical evidence marshalled by Professor Fairman demonstrates, to me conclusively, that the Congressmen and state legislators who wrote, debated, and ratified the Fourteenth Amendment did not think they were "incorporating" the Bill of Rights and the very breadth and generality of the Amendment's provisions suggest that its authors did not suppose that the Nation would always be limited to mid-19th century conceptions of "liberty" and "due process of law" but that the increasing experience and evolving conscience of the American people would add new [meanings].<sup>13</sup>

Now, some 19 years after the Fairman attack, Mr. Justice Black responds:

I have read and studied this article extensively, including the historical references, but am compelled to add that in my view it has completely failed to refute the inferences and arguments that I suggested in my *Adamson* dissent. Professor Fairman's "History" relies very heavily on what was *not* said in the state legislatures that passed on the Fourteenth Amendment. Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what *was* said, and most importantly, by the men who actually sponsored the Amendment in the Congress. I know from my years in the United States Senate that it is to men like Congress-

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6. *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965).

7. The separate dissent of Justices Murphy and Rutledge in *Adamson* indicates this was their understanding of their Brother Black's position.

8. *Griswold v. Connecticut*, 381 U.S. 479, 525 (1965).

9. *Adamson v. California*, 332 U.S. 46, 82 (1947).

10. *Id.* at 91.

11. *Id.*

12. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

13. 391 U.S. 145, 174-75 (1968).

man Bingham, who steered the Amendment through the House, and Senator Howard, who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered.<sup>14</sup>

If, as charged, Professor Fairman's criticism relies too heavily on "negative" evidence, let us examine Mr. Justice Black's positive data in support of his "separately, and as a whole," no-more-no-less incorporation theory.

## II. JUSTICE BLACK AND THE LEGISLATIVE HISTORY

### A. SENATOR HOWARD

In a 31-page appendix to his *Adamson* opinion, the Justice presents the heart of the historical "evidence" in support of his position. Referring to this material in *Duncan*, he draws from it a May 23, 1866, speech by Senator Howard. Singled out in this manner, the speech—introducing the proposed amendment in the Senate—must be deemed a major bastion of Mr. Justice Black's position. Here is the quotation exactly as the Justice presents it:

Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution [the Senator had just read from the old opinion of *Corfield v. Coryell*, 6 Fed. Cas. 546 (No. 3,230) (E.D. Pa. 1825)]. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

Now, sir, here is a mass of privileges, immunities and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizens solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon

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14. *Id.* at 165.

State legislation.

... The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.<sup>15</sup>

What the Senator here says *inter alia* is that the object of the first section of the proposed fourteenth amendment is to impose upon the states the "guarantees" of (a) the old "privileges and immunities" clause<sup>16</sup> and (b) the first eight amendments. This is not Mr. Justice Black's position at all. He insists that the fourteenth amendment picks up *only* the first eight amendments—the Bill of Rights. The difficulty here is far more than bald discrepancy. For what Howard sought to incorporate includes one of the most ambiguous provisions of the Constitution—the old privileges and immunities guarantees which Howard says "are not and cannot be fully defined in their entire extent and precise nature." Surely then Mr. Justice Black cannot rely upon the Senator for the proposition that the vagueness of the fourteenth amendment is cured by incorporation of the "clearly marked . . . boundaries," the "specific" and "particular standards enumerated" in the Bill of Rights.

This, however, is only the beginning of the difficulty in Mr. Justice Black's position. Examination of Howard's entire speech indicates that, in the portion quoted by the Justice, the Senator was defining *only* the meaning of the proposed *new* Privileges and Immunities Clause.<sup>17</sup> Thus, in Senator Howard's view, the new Privileges and Immunities Clause *and it alone* would incorporate the Bill of Rights *and* the old Privileges and Immunities Clause. But this new clause covers only citizens. That means, as Howard carefully emphasized a few paragraphs prior to the material quoted by Mr. Justice Black, the incorporated protections would apply only to citizens of the United States. Aliens and corporations would still be denied all benefit of the incorporated Bill of Rights. This is emphasized when later in the same speech Senator Howard defined the two remaining generalities of the fourteenth amendment's first section:

The last two clauses of the first section . . . disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legis-

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15. *Id.* at 166-67.

16. U.S. CONST. art. IV, § 2.

17. A few sentences later Senator Howard defined the meaning of its companion Due Process and Equal Protection Clauses. See note 18 *infra*, and accompanying text.

lation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.<sup>18</sup>

Plainly Senator Howard distinguished between the people as well as the interests covered by the new Privileges and Immunities Clause and those covered by the Due Process and Equal Protection Clauses.

These distinctions were in part the basis of the pointed questions Mr. Justice Frankfurter had directed to his Brother Black in *Bridges v. California*:

To say that the protection of freedom of speech of the First Amendment is absorbed by the Fourteenth does not say enough. Which one of the various limitations upon state power introduced by the Fourteenth Amendment absorbs the First? Some provisions of the Fourteenth Amendment apply only to citizens, and one of the petitioners here is an alien; some of its provisions apply only to natural persons, and another petitioner here is a corporation. . . . Only the Due Process Clause assures constitutional protection of civil liberties to aliens and corporations. Corporations cannot claim for themselves the "liberty" which the Due Process Clause guarantees. That clause protects only their property. *Pierce v. Society of Sisters*, 268 U.S. 510, 535. [Mr. Justice Black] is strangely silent in failing to avow the specific constitutional provision upon which [his] decision rests.<sup>19</sup>

Years later the response came in a revealing evasion: The various provisions in question "separately, and as a whole" embrace the Bill of Rights.<sup>20</sup> In effect, Mr. Justice Black homogenized provisions, the meaning of which, his guide, Senator Howard, had treated as separate and distinct. To change the figure, the Justice treats the terms of the different clauses as interchangeable. Borrowing the privileges and immunities language as a reference to the Bill of Rights from one,<sup>21</sup> and the word "persons" to get the desired breadth of coverage from another, he creates a new constitutional provision! Thus we "escape" Senator Howard's explanation that only citizens would be protected by the incorporated Bill of Rights. Of course, the Senator's limitation would be unacceptable to one as concerned as Mr. Justice Black with, for example, freedom of the press since most newspapers are published by corporations.<sup>22</sup>

If, as the Justice holds, one should look to Senator Howard

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18. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

19. 314 U.S. 252, 280-81 (1941).

20. See note 4 *supra*, and accompanying text.

21. *Duncan v. Louisiana*, 391 U.S. 145, 165-66 (1968).

22. See *Times-Mirror Co. v. Superior Court*, 15 Cal. 2d 99, 98 P.2d 983 (1940), *aff'd sub nom. Bridges v. California*, 314 U.S. 252 (1941).

to get "the real meaning" of the fourteenth amendment, one would have to reject the doctrine that the provisions of the first section of the fourteenth amendment "separately, and as a whole" incorporated the Bill of Rights and no more. For it does not appear that the Senator ever in any relevant way altered the views he expressed when introducing the fourteenth amendment in the United States Senate.

#### B. CONGRESSMAN BINGHAM

What, then of Mr. Justice Black's other major witness—Congressman Bingham—whom the Justice calls the James Madison of the fourteenth amendment?<sup>23</sup> The implied comparison seems a slur upon the sharp-minded Father of the Constitution. For Bingham is one who used ringing rhetoric as a substitute for rational analysis. It is he whom Mr. Justice Harlan refers to as one who "effectively demonstrated (a) that he did not understand *Barron v. Baltimore* . . . and therefore did not understand the question of incorporation, and (b) that he was not himself understood by his colleagues."<sup>24</sup>

In February of 1866—prior to the Howard speech quoted above—Bingham introduced in the House this early version of the fourteenth amendment:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several states equal protection in the rights of life, liberty, and property.<sup>25</sup>

Explaining these provisions, Bingham said:

[This] proposed amendment does not impose upon any state of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution [via the Supremacy Clause, art. VI].<sup>26</sup>

In Bingham's view, the Bill of Rights was already binding upon the states. Though he mouthed its crucial language, he apparently either did not understand the *Barron* case—or found it qualified by Daniel Webster.<sup>27</sup> The purpose of the proposed

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23. *Adamson v. California*, 332 U.S. 19, 73-74 (1947).

24. *Duncan v. Louisiana*, 391 U.S. 145, 175 n.9 (1968).

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

26. *Id.*

27. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833). Per Chief Justice Marshall: "These [first eight] amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them." As to Bingham's reliance on Webster, see CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

fourteenth amendment, Bingham explained, was simply to make the Bill of Rights enforceable. For as everyone knew, the officials of eleven states "in utter disregard of these injunctions of your Constitution, in utter disregard of that official oath which the Constitution required [of them], have violated in every sense of the word these provisions of the Constitution. . . ." <sup>28</sup> Thus, as Bingham saw it, the purpose of the proposed fourteenth amendment was not to *incorporate anything*, but to give Congress power to enforce prohibitions *already in the Constitution*. In his view, the only totally new aspect of the proposed amendment was to be found in its opening words: "The Congress shall have power to make all laws which shall be necessary and proper to [enforce existing constitutional provisions]." If the goal was to place constitutional prohibitions upon the states, where are the prohibitory words? Surely under the proposal of February, 1866, the states would be as free as ever until Congress—acting within its new authority—should rule otherwise, and later Congress, by repeal, could certainly restore the *status quo ante*.

The February, 1866, version of the amendment underwent many changes.<sup>29</sup> Bingham's basic ideas did not. Continuing to misunderstand *Barron*, and ignoring the added prohibitory language, he said in his May 10, 1866, final summation:

. . . there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is it? It is the power in the people . . . to do that by Congressional enactment which hitherto they have not had the power to do . . . that is to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person . . . whenever the same shall be abridged or denied by the [already] unconstitutional acts of any State.

Allow me . . . in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power. . . .<sup>30</sup>

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

29. It is worth noting that much—perhaps most—of the pre-enactment discussion quoted in the *Adamson* appendix relates to the February, 1866, draft of the fourteenth amendment—the draft that imposed no constitutional restraints upon the states! In this writer's view, the appendix is misleading because it does not clearly distinguish between Bingham's problem of "securing" enforcement, and Mr. Justice Black's problem of "securing" incorporation.

30. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866). By this time Bingham's "Congress shall have . . . power" approach had been replaced



In the debates on the proposed amendment, Bingham referred more than once to a "bill of rights" which he wanted Congress to have power to enforce.<sup>31</sup> Yet never then did he equate it with the first eight amendments. He seems to have had a unique conception of what the Bill of Rights was. For example, in his introductory address, after discussing the fifth amendment Due Process Clause and the article IV Privileges and Immunities Clause, he referred to them as "these great provisions of the Constitution, this immortal bill of rights."<sup>32</sup> This usage does not seem to be an inadvertent slip of the tongue since it recurs in at least two more instances.<sup>33</sup>

The entire House discussion just mentioned—and penultimate adoption of the proposed fourteenth amendment—occurred prior to Senator Howard's speech on incorporation. Thereafter the measure went back to the House for adoption of the Senate's changes.<sup>34</sup> This was accomplished in a few hours on July 13, 1866, without reference to the Bill of Rights or Senator Howard's incorporation talk. The House seems never to have discussed or considered any version or hint of incorporation.

For all that appears in Mr. Justice Black's Appendix, Bing-

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in section 1 with "No State shall make or enforce any law. . . ." The latter, completely reorienting section 1, apparently was first suggested by Congressman Hotchkiss. *Id.* at 1095.

It is noteworthy that Bingham's final discussion still centered on the grant of power to Congress—now appearing in section 5—as though the "Hotchkiss restriction" upon state authority was unimportant. Surely if in his view incorporation was a major purpose of the proposed fourteenth amendment, he would have referred to the restrictive language that did the incorporating. If he had ever contemplated new constitutional prohibitions upon the states, why did he never say so; why did he constantly talk about the need for congressional power to legislate against state misconduct?

31. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

32. *Id.* at 1034.

33. *Id.* at 1089-91. At one point Bingham did use language that could be read as equating the Bill of Rights with one or more of the early amendments: "A gentleman . . . wanted to know if I could cite a decision showing that the power of the federal government to enforce . . . the bill of rights under the articles of amendment to the Constitution had been denied." *Id.* at 1089. Here, of course, he was paraphrasing the language of another, namely, Congressman Hale, who had clearly referred to the first ten amendments as the Bill of Rights. But Hale had concentrated on and confined the discussion specifically to the fifth amendment, resisting Bingham's attempt to work into the discussion the article IV Privileges and Immunities Clause as a part of the Bill of Rights. *Id.* at 1064. For all that appears, Bingham's language just quoted may have been merely a reference to the fifth amendment which along with article IV, clause 2 seemed to be his "bill of rights."

34. The only change relevant here was the addition of the citizenship clause at the beginning of section 1.

ham did not until after the fourteenth amendment had been ratified expressly equate the first eight amendments with the Bill of Rights, or speak of the new amendment as incorporating it. But even then he adopted Senator Howard's view that it was the new Privileges and Immunities Clause rather than the entire section which brought about this result:

Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment . . . may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States . . . are chiefly defined in the first eight amendments. . . .

Is it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provision of the fourteenth article, that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment. . . ?<sup>35</sup>

If, as Mr. Justice Black holds, legislators look to the sponsors of a measure to find its "real meaning," plainly the two houses did not adopt the same fourteenth amendment. The Senate sponsor said one of its clauses incorporated *something*, although this something was rather different from that described by Mr. Justice Black. The House sponsor thought it incorporated nothing—there being no need to reincorporate what was already in the Constitution. He, of course, later changed his mind, but too late to influence anyone's vote. Moreover, it is far from clear that even then he agreed with the Senate leader as to precisely what was incorporated.

We are asked in effect to believe that Senator Howard's lone reference to some type of incorporation made *another* type so widely understood, so universally accepted as to be taken for granted, *without discussion*, in the House, in the Senate, and in the state ratifying bodies. Only on such a premise can one dismiss Professor Fairman's evidence of what was "not said."

### C. THE OPPOSITION

Mr. Justice Black says legislators "vote for or against a bill based [not only] on what [its sponsors say it means but also on what] those who opposed it tell them it means."<sup>36</sup> There was, of course, substantial congressional opposition to the proposed fourteenth amendment. Nowhere in *Duncan* does Mr. Justice Black direct us to the opposition arguments he has in mind.

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35. CONG. GLOBE, 42d Cong., 1st Sess. App. 84 (1871).

36. *Duncan v. Louisiana*, 391 U.S. 145, 165 (1968).

His *Adamson* Appendix says merely:

Opposition speakers emphasized that the Amendment would destroy state's rights and empower Congress to legislate on matters of purely local concern. [citations omitted]. Some took the position that the Amendment was unnecessary because the Bill of Rights were [sic] already secured against state legislation. [Cong. Globe, 39th Cong. 1st Sess.] 1059, 1066, 1088.<sup>37</sup>

The Justice's use of the word "secured" is confusing. Does he mean some congressmen thought the proposed fourteenth amendment was surplusage because it embraced Bill of Rights provisions already applicable to the states? If that were an opposition argument, it would support the incorporation theory. One finds in the Justice's page references no evidence that any Congressman took that position. No doubt some—including Bingham, as we have seen—thought the "Bill of Rights" was "already secured against State violation," in the sense that it was already binding upon the states. But Bingham's prime concern was that the "Bill of Rights" be "secured against State violation" in a different sense, *i.e.*, by giving Congress an enforcing power.

Congressman Hale of New York seems the most articulate opponent of this aspect of Bingham's measure. His objection was not that the fourteenth amendment was surplusage. He addressed rather the congressional enforcement problem. In his view the proposed language was "extremely vague, loose, and indefinite."<sup>38</sup> The grant of power to Congress was, in effect, ". . . a provision under which all State legislation . . . affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of Congress established instead."<sup>39</sup> But, Hale continued, even if the grant to Congress related only to state laws which fail to give "equal protection to all persons . . . in the rights of life, liberty, and property" as Bingham and Stevens argued, it would still go too far:

Take the case of the rights of married women; did anyone ever assume that Congress was to be invested with the power to legislate on that subject, and to say that married women, in regard to their rights of property, should stand on the same footing with men and unmarried women? There is not a State in the Union where disability of married women in relation to the rights of property does not to a greater or less extent still exist.<sup>40</sup>

Hale noted in passing that he thought the Bill of Rights was

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37. *Adamson v. California*, 332 U.S. 46, 95 (1947).

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

39. *Id.* at 1063.

40. *Id.* at 1064.

judicially enforceable against the states.<sup>41</sup> Bingham answered that the Bill of Rights, while binding upon the states,<sup>42</sup> was not *enforceable* against them.<sup>43</sup> It followed, for him, that Congress must be armed with power to enforce the Bill of Rights.<sup>44</sup> Thus, the crux of Hale's opposition was the scope of that power, its effect upon the federal system, and nothing more.

It comes at last to this: Just as no one supported the "separately, and as a whole," no-more-no-less, incorporation doctrine, no one opposed it. The Black amendment simply was not before Congress!

### III. JUSTICE BLACK AND JUDICIAL HISTORY

*Twitchell v. Pennsylvania*<sup>45</sup> was decided only a few months after the fourteenth amendment had become law—the Court reaffirming and following *Barron*. Neither counsel nor any member of the Court seemed aware of "incorporation," though it might have saved a man's life.

Writing in 1963, Mr. Justice Douglas observed that "ten Justices have felt [the fourteenth amendment] protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights."<sup>46</sup> The Justice recognized, however, that of his six pre-Black judges one ultimately "retreated;" there is some doubt about the beliefs of a second; and three others—as well as the justice who retreated—thought only *citizens* benefited from incorporation.<sup>47</sup> What Mr. Justice Douglas says, then, comes to this: Of the 43 Justices in the era after adoption of the fourteenth amendment until Mr. Justice Black's appointment, only *one* unequivocally felt that all *persons* were protected by an incorporated Bill of Rights.<sup>48</sup>

Except for Justices Black and Douglas, no Supreme Court judge has ever supported the "separately, and as a whole," no-

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41. *Id.*

42. *Id.* at 1090.

43. *Id.* at 1089-90.

44. *Id.* at 1090. It should be noted that it is unclear whether Bingham was referring to *his* version of the Bill of Rights. See notes 23-33 *supra*, and accompanying text.

45. 74 U.S. (7 Wall.) 321 (1869).

46. *Gideon v. Wainwright*, 372 U.S. 335, 345-46 (1963).

47. Three of these six judges were on the *Twitchell* Court. For them the light seems to have come late.

48. Cf. Mr. Justice Frankfurter's observation in *Adamson v. California*, 332 U.S. 46, 59, 62 (1947). Justices Douglas and Frankfurter disagree only on the views of Mr. Justice Clifford, about whom Mr. Justice Douglas plainly and necessarily has doubts.

more-no-less, version of incorporation. Moreover, while Mr. Justice Douglas once did so,<sup>49</sup> he has since changed his mind: "Though I believe that 'due process' as used in the Fourteenth Amendment includes all of the first eight Amendments, I do not think it is restricted and confined to them."<sup>50</sup> Thus, except for the temporary support of one colleague, Mr. Justice Black's view is as unique in Supreme Court history as it was unknown in the 39th Congress.

Does the Court's lone advocate of the Black amendment find it in fact compelling? What in the "clearly marked . . . boundaries," the "specific" and "particular standards enumerated" in the incorporated Bill of Rights requires a ban on vague criminal statutes,<sup>51</sup> the appointment of counsel<sup>52</sup> or the outlawing of geographic representation?<sup>53</sup>

It was only a few months after his *Adamson* dissent that Mr. Justice Black with the Court in *Winters v. New York*<sup>54</sup> found vague criminal statutes to be proscribed by the fourteenth amendment. Though the Court relied on the Due Process Clause, such traditional handling of the problem is not now available to Mr. Justice Black. Drawing his *Adamson* strait jacket tighter and tighter, he insists "due process" is merely a ban on *ex post facto* laws:

The phrase "due process of law" has through the years evolved as the successor in purpose and meaning to the words "law of the land" in Magna Charta which more plainly intended to call for a trial according to the existing law of the land in effect at the time an alleged offense had been committed. Nothing done since Magna Charta can be pointed to as intimating that the Due Process Clause gives courts power to fashion laws in order to meet new conditions, to fit the "decencies" of changed conditions, or to keep their consciences from being shocked by legislation, state or federal.<sup>55</sup>

*Gideon* presents other difficulties.<sup>56</sup> Literally, the sixth amendment, whether or not incorporated, requires not that one

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49. He alone joined in his Brother Black's dissent in *Adamson v. California*, 332 U.S. 46, 68-92 (1947).

50. *Poe v. Ullman*, 367 U.S. 497, 516 (1961). Thus Mr. Justice Douglas shifted *post hoc* from the Black to the Murphy-Rutledge position in *Adamson*. This spared him Mr. Justice Black's difficulties discussed in the next paragraphs of this article.

51. *Winters v. New York*, 333 U.S. 507 (1948).

52. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

53. *Reynolds v. Sims*, 377 U.S. 533, 575-76 (1964).

54. 333 U.S. 507 (1948). See also *Thompson v. Louisville*, 362 U.S. 199 (1960); *Griffin v. Illinois*, 351 U.S. 12 (1956).

55. *In re Gault*, 387 U.S. 1, 59, 62 (1967). See also *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965).

56. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

shall have counsel, but merely the *right* to counsel—just as the Constitution guarantees not that one shall have a railroad ticket, but merely the right to travel to the seat of government.<sup>57</sup> Surely the counsel provision was included in the Bill of Rights merely to kill the common law ban on representation by counsel in non-treason criminal cases.<sup>58</sup> As a matter of *language and history*, then, the sixth amendment means simply that the accused shall be free to *hire* legal assistance. Surely appeal to the Bill of Rights to clarify and stabilize the fourteenth amendment is an empty gesture unless one respects its “clearly marked . . . boundaries.” Since *Gideon*, however, the Justice has found means of curing that difficulty. In *Gilbert v. California*<sup>59</sup> he quotes from the sixth amendment as follows: “. . . the accused shall . . . have the Assistance of Counsel for his defense.” Thus the troublesome words “right to” disappear. But surely the word “have,” which remains, cannot be separated from the omitted words without distorting both grammar and meaning. In short, “to have” is not the equivalent of “right to have.” His *Adamson* strait jacket prevents the Justice from reaching simply and candidly<sup>60</sup> a result that seems to have virtually unanimous professional approval and little or no popular opposition.

Mr. Justice Black insists the amending of the Constitution must be left to Congress and the people in accordance with article V.<sup>61</sup> He presents himself as a “literalist,”<sup>62</sup> lest “natural law” creep into the Constitution by means of judicial legislation.<sup>63</sup> Yet neither the fourteenth amendment nor the Bill of Rights *literally* bans geographic representation in legislatures. Moreover, considering the contexts and the debates which produced them, neither was intended or expected to do so. How can they achieve in combination what neither does separately? If the Bill of Rights does not forbid geographic representation, how can the fourteenth amendment be deemed to do so, since, as we are told, it merely incorporates the Bill of Rights?<sup>64</sup>

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57. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868).

58. See W. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8-44 (1955).

59. 388 U.S. 263, 279 (1967).

60. See Israel, *Gideon v. Wainwright: The Art of Overruling*, 1963 SUP. CT. REV. 211.

61. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667-78 (1966); *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965).

62. See Cahn, *Mr. Justice Black and First Amendment Absolutes: A Public Interview*, 37 N.Y.U.L. REV. 549, 555 (1962).

63. *Griswold v. Connecticut*, 381 U.S. 479, 520-26 (1965).

64. *Reynolds v. Sims*, 377 U.S. 533, 575-76 (1964).

Finally, how can the incorporated Bill of Rights preclude "separate but equal" when the Bill of Rights itself lived side by side with and protected slavery for generations?<sup>65</sup> Indeed, when the Court finally outlawed race segregation in the District of Columbia, it did so by "incorporating" into the Bill of Rights the fourteenth amendment Equal Protection Clause rather than *vice versa*.<sup>66</sup>

It comes, does it not, to this: the first eight amendments, incorporated or not, are as wordless on vague statutes, appointed counsel, geographic representation, and racial segregation as Mr. Justice Black finds them to be on contraceptives and a general right to privacy?<sup>67</sup> Surely it is only what the Justice deprecates as "natural law" that proscribes such things.

#### IV. PROFESSOR CROSSKEY ON INCORPORATION

With some kind words for Mr. Justice Black, Professor Crosskey in 1954 launched a counterattack upon Professor Fairman's anti-incorporationism.<sup>68</sup> The Justice does not allude to Professor Crosskey in his *Duncan* opinion, and the reason seems clear. Crosskey opens his article with this strange assertion:

In *Adamson v. California* . . . Justice Hugo L. Black expressed the view that the Privileges and Immunities Clause of the Fourteenth Amendment ought to be taken as making the first eight Amendments . . . good against the states.<sup>69</sup>

Crosskey then undertakes to prove that the 1868 Privileges and Immunities Clause alone was indeed designed to incorporate the Bill of Rights *inter alia*. But this, of course, was not and is not Mr. Justice Black's position at all. As the Justice sees it, "the provisions of the amendment's *first section*, separately, and as a whole" incorporate the Bill of Rights.<sup>70</sup> If Crosskey proves his own case—incorporation via the Privileges and Immunities Clause—he thereby necessarily disproves Mr. Justice Black's.

A crucial difference between these two versions of history

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65. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

66. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Initially Mr. Justice Black did not seem to recognize abolition of race discrimination or segregation as one of the "objects" of the fourteenth amendment. See *Adamson v. California*, 332 U.S. 46, 72 n.5 (1947).

67. *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965).

68. Crosskey, *Charles Fairman, "Legislative History," and The Constitutional Limitations On State Authority*, 22 U. CHI. L. REV. 1 (1954) [hereinafter cited as Crosskey]. For Fairman's rebuttal, see *A Reply to Professor Crosskey*, *id.* at 144.

69. Crosskey at 1.

70. (Emphasis added). See note 4 *supra*, and accompanying text.

is that one would protect only citizens; the other would protect both citizens and persons, including corporations.<sup>71</sup> But even this discrepancy is not the end of the matter. The heart of Crosskey's position is that Bingham and Howard held

certain constitutional views that are apt to seem remarkable to most lawyers today; views that ran counter to certain earlier decisions the Supreme Court had made, or counter to views that have since come to be unquestioningly accepted. These views, however, Howard and Bingham did not hold alone. For the views in question were the common faith of the [Republican] party to which they belonged. . . .<sup>72</sup>

One element of this "common faith" was that the article IV Privileges and Immunities Clause meant, in 1866-68, not what it means now but that "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens of the *United States* in the several states."<sup>73</sup> In short, the clause recognized or created a national citizenship and protected the privileges and immunities of citizens of the United States which "were those conferred, in specific terms, by other provisions of the Constitution and its various amendments."<sup>74</sup> Thus, Crosskey's position entails a *double* incorporation: in the beginning was the Article IV Privileges and Immunities Clause; it acquired additional meaning by incorporating the Bill of Rights; later still it in turn was incorporated into the fourteenth amendment.

If we accept this remarkable position—apparently Mr. Justice Black could not—it would mean that Bingham simply wanted Congress to have power to *enforce* certain "specific" constitutional provisions, including the Bill of Rights. For, it will be recalled, Bingham was concerned with enforcement, not with reincorporating what he believed to be already binding upon the states. Even if we assume Bingham wanted to incorporate something, Crosskey's view would put him in the position of wanting to incorporate more than the Bill of Rights. After all, the original Privileges and Immunities Clause preceded the Bill of Rights by some two years. It must have initially had some independent meaning. Thus, at best Crosskey here too contradicts Mr. Justice Black, who insists the fourteenth amendment incorporates *only* the Bill of Rights.

If the "common faith" of the Republican Party fixed the meaning of "privileges and immunities" for Bingham and others, it certainly did not do so for Howard. We saw that when the

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71. See text accompanying note 18, *supra*.

72. Crosskey at 11.

73. *Id.* at 12 (emphasis in original).

74. *Id.* at 13.



Senator introduced the proposed fourteenth amendment, he said, "these privileges and immunities, whatever they may be . . . are not and cannot be fully defined in their entire extent and precise nature. . . ." <sup>75</sup> There is no record of anyone rising to clarify the matter by reminding him of a widely held Republican faith. In short, while Howard contemplated incorporation of the Bill of Rights, he also contemplated incorporation of something else—something that he found indefinable. Mr. Justice Black would perhaps call it natural law, and reject the reading of such "mush" <sup>76</sup> into the written Constitution.

Senator Howard's contemporaries on the Supreme Court seem to have shared his unawareness. In the first case arising under the fourteenth amendment, they examined the Privileges and Immunities Clauses at some length and seemed completely unmindful of Crosskey's special lexicography and the alleged Republican "common faith." <sup>77</sup>

## V. DEJA VU

Early fourteenth amendment issues came before a Supreme Court composed of men who had witnessed the Civil War and the resulting constitutional revisions. That Court's understanding of the new amendments is significant:

. . . [N]o one can fail to be impressed with the one pervading purpose found in [all three Civil War amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman. . . . <sup>78</sup>

In a dissenting opinion, Mr. Justice Field took a more spacious view. The fourteenth amendment, he said, had been adopted to give legal effect to the "Declaration of 1776 of inalienable rights." As he put it more fully in a later case:

Among these . . . rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others. . . . <sup>79</sup>

75. See note 15 *supra*, and accompanying text.

76. The word is Mr. Justice Black's. See Cahn, *supra* note 62, at 562.

77. Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873).

78. *Id.* at 71. See also the "strange" views of Roscoe Conkling—one of Bingham's colleagues and twice almost a Justice—on the intentions of the 39th Congress. Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938).

79. Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 757 (1884).

Thus, in Mr. Justice Field's view, the fourteenth amendment incorporated the Declaration of Independence, which in turn embraced laissez-faire as indispensable to the pursuit of happiness. The Justice's intellectual successors eventually carried the day, overplayed their hand, and—in due course—lost everything.

It was against this background that T. R. Powell in his final summation observed:

I think that what I most object to in many Justices is something that springs from a feeling of judicial duty to try to make out that their conclusions came from the [plain meaning of the written] Constitution.<sup>80</sup>

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80. T. POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* 179 (1956).

