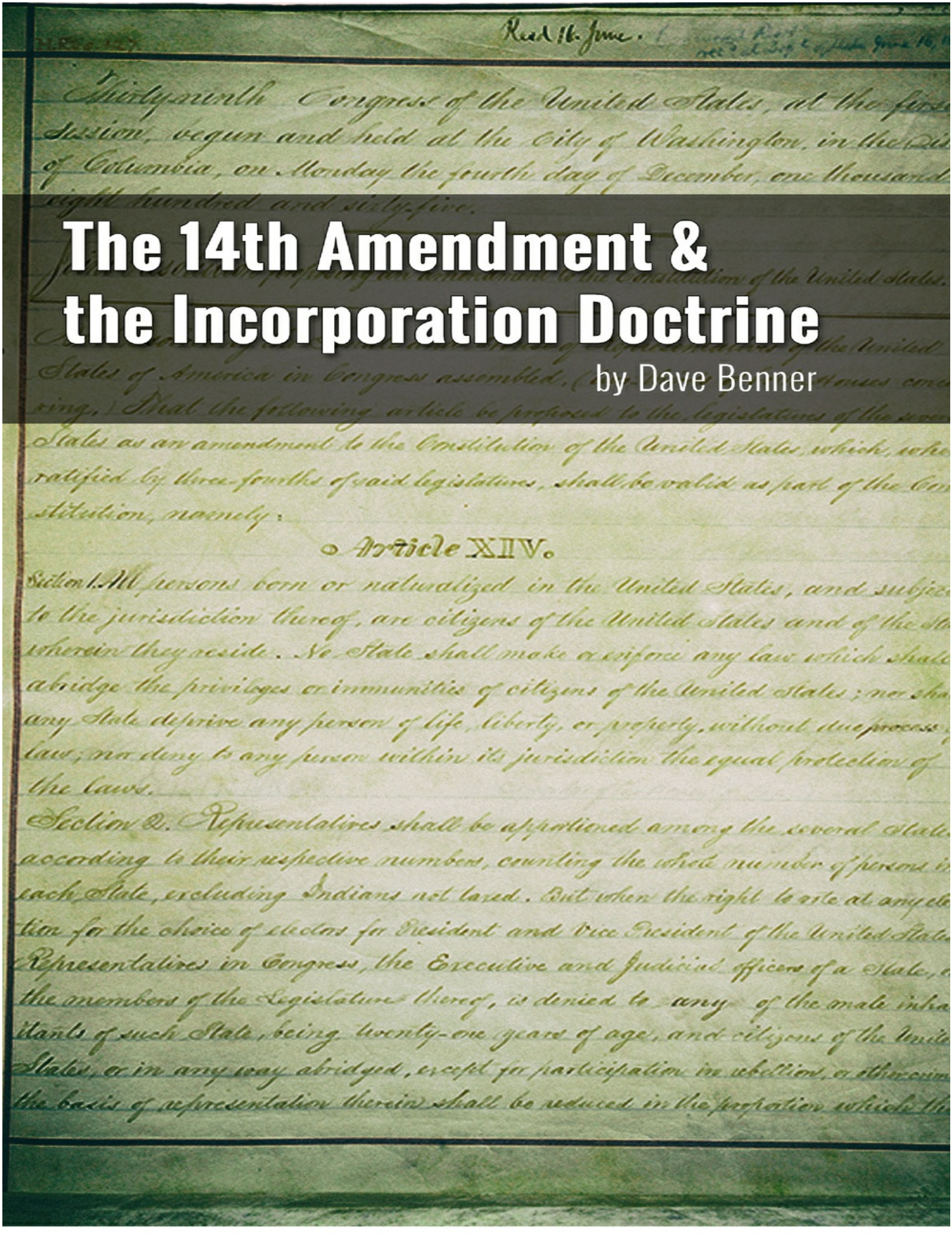

The 14th Amendment & the Incorporation Doctrine

by Dave Benner

INTRODUCTION

Today, most Americans rely on the federal courts to sort out controversial and divisive matters, believing that federal judges rise above the inclinations of mere politicians. But in reality, judges are well-connected lawyers, selected through a political appointment process.

This is particularly true of Supreme Court justices.

They generally represent one of two law schools, subscribe to courtly precedents, and believe mostly in federal supremacy. And despite slight differences between them in legal theory, all uphold a uniform belief in a principle known as the "incorporation doctrine" – a creed they claim was established upon ratification of the 14th Amendment.

Gaining a complete grasp on the 14th Amendment is one of the more mind-boggling and complicated aspects of constitutional interpretation. It is also one of the most important, and anybody embarking on a thorough study of history will likely formulate contempt toward the impulses of modern judicial orthodoxy.

THE BILL OF RIGHTS: PLACING LIMITS ON THE FEDERAL GOVERNMENT

First, it is important to understand the limitations enumerated in the federal Bill of Rights weren't originally intended to act as prohibitions against the states. A careful reading of the preamble to the Bill of Rights makes it clear the amendments were added because the states sought to limit the scope of federal authority.

> "The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution."

Many of the Constitution's ratifiers believed the new general government would usurp powers of the states without additional unambiguous prose. Because of this, many of the state ratifying conventions suggested specific amendments as a way to make these principles overt, and insisted on their inclusion as a condition of ratification.

None of the state ratification ordinances included language asserting that any proposed amendment would inhibit any state powers, nor those of the their fellow states. However, the states did include text that articulated their wishes that amendments provide explicit limitations against the federal authority.

For instance, Massachusetts' 1788 ratification ordinance clarified definitively which government was to be limited by the proposed amendments:

> "And as it is the opinion of this Convention that certain amendments & alterations in the said Constitution would remove the fears & quiet the apprehensions of many of the good people of this Commonwealth & more effectually guard against an undue administration of the Federal Government , The Convention do therefore recommend that the following alterations & provisions be introduced into the said Constitution." [Emphasis added]

New Hampshire's ratification document echoed this sentiment verbatim.

New York's ratification instrument noted fears of ratification would be allayed if specific amendments were adopted. The document went on to list the proposals, all of which designated Congress as the body to be limited. A cursory reading of the ratification announcements from all states reveals the same phenomenon. No state proposed further limitations upon its own sovereign power.

Madison's original proposal for a Bill of Rights clearly indicates it was intended to limit the powers of Congress and the federal judiciary. The bulk of the amendments, including those relating to freedom of the press, freedom of speech and the right to

keep and bear arms were originally to be inserted in Article 1 Sec. 9 between clauses 3 & 4. These are the limitations on Congress. They were only placed in a different document to avoid littering the original text of the Constitutions with insertions.

Furthermore, Madison initially proposed amendment language stating “that no state shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases; because it is proper that every government should be disarmed of powers which trench upon those particular rights.”

This proposal, to expressly limit the states, was rejected.

While there was concern about state governments violating rights, there is simply no evidence to suggest that the people were willing to empower the federal government to police the states. The general consensus was that the states had taken steps to address the rights of the people through their own bills of rights and the federal government should do the same. In fact, Madison alluded to this when he presented the proposed amendments to Congress.

> "But I believe that the great mass of the people who opposed it (constitution), disliked it because it did not contain effectual provisions against encroachments on particular rights, and these safeguards which they have been long accustomed to have interposed between them and the magistrate who exercise the sovereign power. ” [Emphasis added]

The fear was in expanding federal power. The complete silence at the time regarding the application of the Bill of Rights to the States clearly indicates this was not the intent.

In 1830, a suit against the state of Maryland alleged that the Fifth Amendment right to due process extended to inhibit the state governments as well. In Barron v. Baltimore (1833) the John Marshall Court held that the amendments did no such thing – they only limited the federal government. Marshall's reasoning beautifully captures the intended structure of the American political system.

> “The 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. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. 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. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in

the instrument itself; not of distinct governments, framed by different persons and for different purposes.

"If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest."

This opinion remained unchallenged for almost 100 years.

CIVIL RIGHTS ACT OF 1866

After the Civil War, Congress passed legislation to ensure newly freed slaves enjoyed the same basic fundamental rights and privileges as their white counterparts. The Civil Rights Act of 1866 was constructed to enumerate very specific objects. The act affirmed all freedmen possessed the following inherent rights.

"To make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." [1]

Most of these rights and privileges seem self-evident today. Nobody would question a person's right to enter into contracts, own property, and access the courts. But in many areas, black people remained in a state of de-facto slavery, denied even these most basic rights.

This Civil Rights Act of 1866 was incredibly controversial because of its constitutional ramifications. Since it interfered with powers reserved to the states, and conferred citizenship at a time where 11 states remained unrepresented in Congress, Pres. Andrew Jackson vetoed the bill. However, Congress overrode the veto, and the Civil Rights Act of 1866 became law on April 9, 1866.

While the veto override saved the legislation, this law continued to evoke widespread hostility and was politically unpopular among the out-of-power Democrats. Supporters also had concern. Many believed the act would simply be repealed when Democrats took power again, as they inevitably would at some point. There were also fears the federal courts would nullify it based on its dubious constitutionality. As these

uncertainties emerged, Republicans decided to draft a constitutional amendment to constitutionalize the provisions of the Civil Rights Act of 1866.

THE ORIGINAL MEANING OF THE 14th AMENDMENT

Most of the 14th Amendment is not especially controversial today. One provision prevented former Confederates from representing a state in the federal government unless Congress removed the restriction. That was accomplished in the following years. Another provision delegitimized the assumption of the debts incurred by the Confederate States of America and Southern states during the war. And the first part of Section 1 explicitly nullified the Supreme Court decision in Scott v. Sandford that held black people, whether slave or free, were not citizens of the United States.

> "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."

It's the second part of section 1 that forms the root of our contemporary legal controversy, and laid the foundation for the transformation intent of the amendment.

> "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."

The 14th Amendment's chief purpose was to guarantee the new freedmen the same due process rights as white people, and to constitutionalize the 1866 Civil Rights Act. A key proponent of the amendment, West Virginia Representative George Latham, said that the Civil Rights Act "covers exactly the same ground as the amendment." [2] Senator Lyman Trumbull, who made painstaking strides to ensure the bill's passage, recognized the function of the act to be "a reiteration of the rights as set forth in the Civil Rights Bill." [3] On several occasions, Trumbull stated emphatically that the Civil Rights bill that the 14th Amendment was based on had no application to a state that did not discriminate between its citizens on these grounds. Senator John Sherman of Ohio remarked "the first section [of the 14th Amendment] was an embodiment of the [Civil Rights] Act." [4]

Regarding "equal protection under the law" - if a right was not guaranteed to a white citizen in 1866, it wasn't expected to be applied to any group according to the 14th Amendment's advocates. In other words, the 14th did not create any new rights .

Alternative applications of either the Civil Rights Act or the 14th Amendment were never revealed or accepted in the debates. In his groundbreaking work on the subject, Government by Judiciary: the Transformation of the Fourteenth Amendment , historian

and constitutional scholar Raoul Berger summed it up like this:

> "If there was a concealed intention to go beyond the Civil Rights Act, it was not ratified because, first, ratification requires disclosure of material facts, whereas there was no disclosure that the Amendment was meant to uproot, for example, traditional State judicial procedures and practices; and, second, a surrender of recognized rights may not be presumed but must be proved." [5]

In court cases following on the heels of the ratification of the 14th Amendment, the federal courts continued to hold that the Bill of Rights did not apply to state action, and federal opinions failed to mention the amendment at all. [6]

Simply put, passage of the 14th Amendment did not overturn or override the implicit principle, or the explicit verbiage, codified in the Tenth Amendment - that all powers the states did not delegate to the federal government are reserved to the states and the people.

When reading the text of Section 1 of the 14th Amendment, the wording does not seem especially provocative or contentious. However, today's federal judiciary cites this section of the amendment to justify incorporation, or the theory that the federal Bill of Rights now applies as restrictions against the state governments as well as the federal government. This legal theory has become known as the "incorporation doctrine."

Despite this radical judicial transformation, Berger wrote that "no such purpose was entertained" by the ratification of the 14th Amendment. [7]

THE SUPREME COURT CREATES A NEW DOCTRINE

While most legal scholars accept it as an undeniable truth, application of the Bill of Rights to the states through the 14th Amendment was not always an accepted doctrine. In fact, the federal judiciary did not claim the amendment had this effect until more than 55 years after ratification.

In the pivotal Slaughter-House Cases of the 1870s, the Supreme Court specifically rejected the notion that the text applied the Bill of Rights to the state authorities:

> "Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress Shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? We are convinced that no such results were intended by the Congress which proposed

these amendments, nor by the legislatures of the States which ratified them. " [8]

This was the only persuasion held by the federal judiciary for the next several decades. In fact, this understanding was affirmed in 1922 case of Prudential Insurance Company of America v. Cheek , which concerned New York's ability to restrict freedom of speech. In this case, the majority opinion repeated this concept:

> "But, as we have stated, neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech' or the 'liberty of silence'; nor, we may add, does it confer any right of privacy upon either persons or corporations." [9]

It was only in 1925 that the federal judiciary inexplicably discovered that Section 1 of the 14th Amendment effected incorporation.

Even by the mid-20th century, when the incorporation doctrine was fully embraced by the federal judiciary, some justices remained consistent concerning the original intent of the 14th Amendment. In a dissent to the 1938 case of Connecticut General Life Insurance Company v. Johnson , Supreme Court Justice Hugo Black wrote the following:

> "The states did not adopt the Amendment with knowledge of its sweeping meaning under its present construction. No section of the Amendment gave notice to the people that, if adopted, it would subject every state law . . . affecting [judicial processes] . . . to censorship of the United States courts. No word in all this Amendment gave any hint that its adoption would deprive the states of their long recognized power to regulate [judicial processes]." [10]

In the 1959 case of Bartkus v. Illinois , Supreme Court Justice Felix Frankfurter correctly explained:

> "We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such. The relevant historical materials have been canvassed by this Court and by legal scholars. These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States." [11]

THE IMPACT OF INCORPORATION

Rejecting the original understanding, contemporary misapplication of the incorporation doctrine serves as a catalyst for the federal judiciary to exploit and abuse the states. In modern application, this dogma has been used to create a whole host of new “rights” - usually privileges paid for by one class and distributed to others through governmental force. The notion that the 14th Amendment intended to bring about these privileges through 20th/21st century jurisprudential misapplication is demonstrably ludicrous.

Since the 1920s, federal judges have used the incorporation doctrine as a rationalization to:

* Expand state welfare systems according to the wishes of the federal judiciary through Golberg v. Kelly . In this case, the Court held the Due Process Clause of the 14th Amendment guaranteed the “right” to welfare benefits.

* Decide in the 2008 case of Kennedy v. Louisiana , that criminals who rape children have the constitutional right to evade execution through incorporation of the Eighth Amendment.

* Determine local governments could seize land from individuals and provide it to private entities. We find this opinion in the 2005 case of Kelo v. City of New London , where the Supreme Court decided that the incorporation of the Takings Clause of the Fifth Amendment allowed local governments to engage in such behavior.

* Announce in the 1923 case of Meyer v. Nebraska, that all Americans had the “constitutional right” to learn German based on the incorporation doctrine. The Supreme Court forcibly prevented the state from altering its own educational curriculum.

* Contend, via the 1989 case of County of Allegheny v. American Civil Liberties Union , that the display of a menorah in downtown Pittsburgh was constitutional, while a Christian nativity scene in the same area was unconstitutional.

* Decide through the 2005 case of McCreary County v. ACLU of Kentucky that a display of the Ten Commandments at a courthouse was a violation of the Establishment Clause, which according to the court was incorporated through the 14th

* Declare through the 1968 case of Epperson v. Arkansas that state schools must tailor their theistic studies to the interests of the federal government.

* State through the 1975 case of Gross v. Lopez , that public schools must conduct federally-structured hearings prior to subjecting a student to a suspension.

* Establishes through the 1973 case of Roe v. Wade that a woman has a right to privacy

and it extends to the decision to have an abortion. Limits the states' power to regulate abortion.

* Decide through the 1941 case of Edwards v. California that the state must pay welfare to nonresident "indigent persons" on 14th Amendment grounds. California had enacted a statute limiting welfare benefits in order to decrease a bloated budget, but the court invalidated the statute and forced it to expand its welfare system.
Even when the federal judiciary intervenes in matters reserved to the states to protect human liberty, the judges often reserve the authority to impose arbitrary restrictions and regulations concerning the rights in question.

For example, this occurred in the 1925 case of Gitlow v. New York . Here, the court announced that the 14th Amendment prohibited the states from infringing upon an individual's free speech, but that right could not be utilized to challenge the legitimacy of a government or advocate an overthrow. In the 2008 case of District of Columbia v. Heller , the Supreme Court maintained that the Second Amendment affirmed the right to keep and bear arms, but made the following restrictive decree:

> "Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Amendment or state analogues. The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. Miller's holding that the sorts of weapons protected are those "in common use at the time" finds support in the historical tradition of prohibiting the carrying of dangerous and unusual weapons." [12]

Of course, this contention is historically unfounded – the Second Amendment was constructed to prevent the federal government from even so much as approaching the issue, thus voiding the potential for any restrictive firearm legislation. The founders were wise enough to embrace federalism and rely on the states to determine these matters for themselves. If a state carried its own policy to undesirable ends, the people within that state could simply migrate with impunity. Through these types of decisions, the federal courts have systematically negated founding doctrine and supplanted state law with edicts passed down from a nine-member oligarchy.

CONCLUSION

I wrote in my book, Compact of the Republic , that "while the incorporation doctrine

has sometimes acted to preserve individual liberty, in most cases it is just used as a federal excuse to meddle in the business of state law. It has given federal judges the ability to interject their own opinions into state issues, provides the federal government a pretext for policing the entities that built it, and allows the federal courts to redefine rights in a way that it was never meant to..It has made the federal judiciary into a nationalist, untouchable branch of government."

While I often justify my political opinions based the constitutionality of a policy, let's take that out of the equation for a moment. An honest observer may ask – the Constitution notwithstanding - is the incorporation doctrine good for the continuance of human liberty and the preservation of inalienable rights?

I think the answer lies in the fallibility of government and civil officers. If we were ruled by failsafe angels of liberty, I believe the answer may be yes. If federal judges read and understood the Constitution in the same way I do, I might concede that they could act to intervene upon state infringements of liberty.

However, the sad and obvious fact is that they do not. We are not governed by angels that understand human liberty; far from it. If the federal judges cannot fail to see how the NSA surveillance program or federal firearm restrictions are complete violations of constitutionally-recognized rights, how can we trust them to sort such things out at the state level, or even pinpoint state violations of such rights?
Realistically, they can't and won't.

If the incorporation doctrine is embraced to the fullest extent, it would render the need for state bills of rights irrelevant.

Do its advocates really expect us to believe that a person's right to keep and bear arms began only in 1791? At that point, many states had explicit affirmations of such rights that pre-dated the federal counterpart. The idea that the federal Bill of Rights should supersede and override its state counterparts is as big a blow against federalism as any other form of government overreach.

It is no surprise that the incorporation doctrine has a huge effect on lawyers and law schools.

Today, law students concentrate their studies on federal law over state law at a highly disproportionate rate, with the implicit understanding that state law can ultimately be negated by the federal judiciary. In constructing strategy to build cases, these attorneys often appeal to the high courts to overturn the supposed faulty decisions of their state counterparts. By doing so, they empower the federal judiciary and the oligarchy it has become to a degree the founders might never have imagined.

Ultimately, local courts are far closer to the interests of the parties involved in the disputes, and much more aware of state law. These factors work together to make state courts the proper forums for considering local issues. Additionally, many local judges are chosen through republican elections, and are more closely tied to the interests of individuals.

Those who celebrate when a court injects its own opinions on controversial matters may be deeply saddened in due time. If the federal courts can rule simply by decree, their actions will ultimately serve as precedents for the further consolidation of power. At some point, those who find favor with the edicts of today will certainly be oppressed by those that come tomorrow.

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[5] Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment , Second Edition (Indianapolis: Liberty Fund, 1997), 173.

[6] Ibid, 171.

[7] Ibid.

[8] The Slaughter-House Cases, 83 US 36 (1873).

[9] Prudential Ins. Co v. Cheek, 259 US 543 (1922).

[10] Connecticut General Life Insurance Company v. Johnson, 303 US 77 (1938).

[11] Bartkus v. Illinois, 359 US 121 (1959).

[12] District of Columbia v. Heller, 554 US 570 (2008).