

encyclopedia of

religious freedom

**Catharine
Cookson, Editor**

Religion & Society
A Berkshire Reference Work

CABRINI COLLEGE LIBRARY
610 KING OF PRUSSIA ROAD
RADNOR, PA 19087

ROUTLEDGE
New York London

Ref BV 741 .E47

SELECTION FROM LETTER FROM JAMES MADISON TO THOMAS JEFFERSON, 6 SEPTEMBER 1787.

The Convention consists now as it has generally done of Eleven States. There has been no intermission of its Sessions since a house was formed; except an interval of about ten days allowed a Committee appointed to detail the general propositions agreed on in the House. The term of its dissolution cannot be more than one or two weeks distant. A Governmt. will probably be submitted to the people of the states consisting of a President cloathed with executive power, a Senate chosen by the Legislatures: and another house chosen by the people of the states jointly possessing the legislative power and a regular judiciary establishment. The mode of constituting the executive is among the few points not yet finally settled. The Senate will consist of two members from each state and appointed sexennially: The other, of members appointed biennially by the people of the states in proportion to their number. The Legislative power will extend to taxation trade and sundry other general matters. The powers of Congress will be distributed according to their nature among the several departments. The States will be restricted from paper money and in a few other instances. These are the outlines. The extent of them may perhaps surprize you. I hazard an opinion nevertheless that the plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgusts agst the state governments. The grounds of this opinion will be the subject of a future letter.

Julian P. Boyd, ed.

Source: "Madison to Jefferson, 6 September 1787."
The Papers of Thomas Jefferson, vol. 24.
(Princeton, NJ: Princeton University Press, 1950-1973) 102.

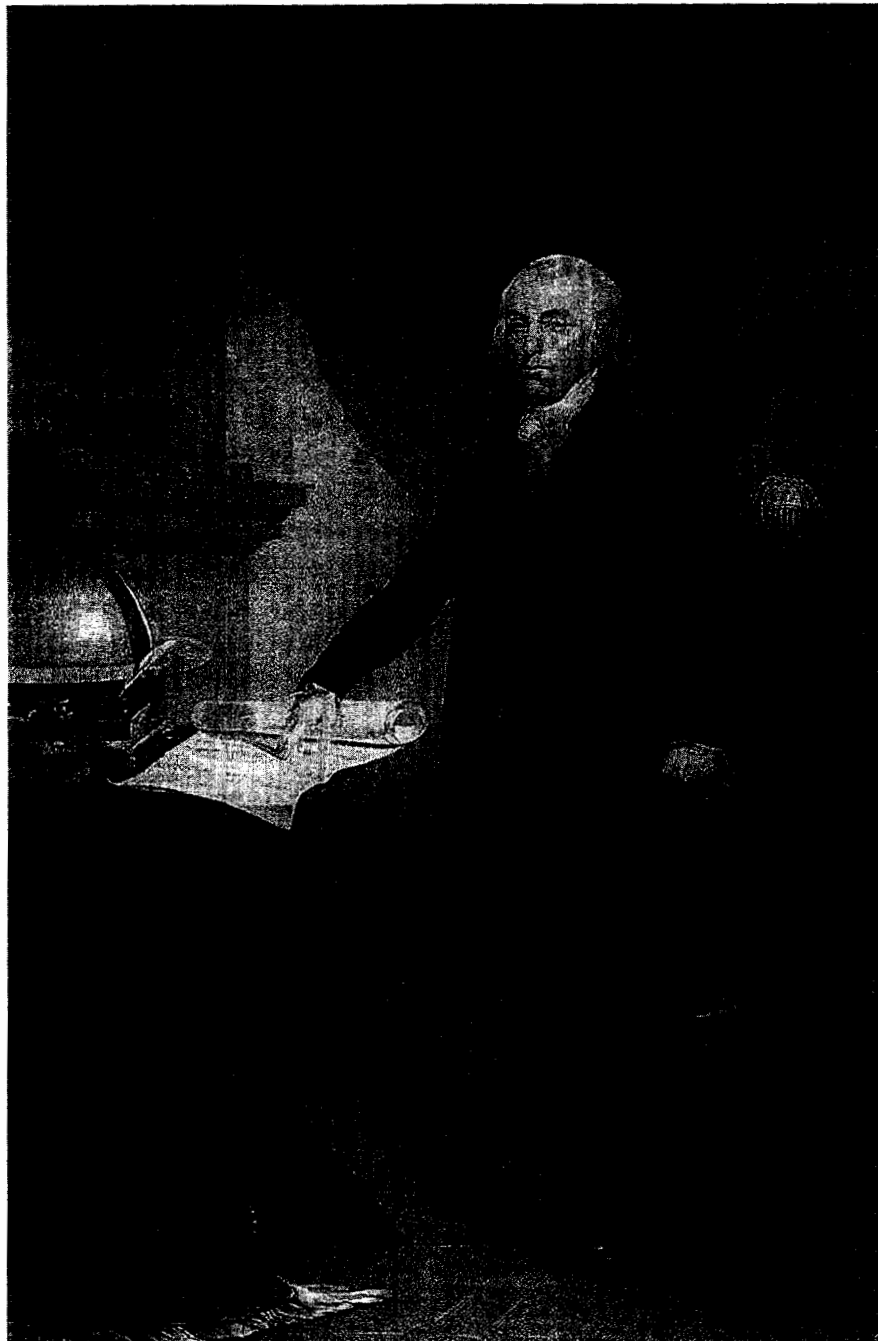
had stated it in an earlier case (*Palko v. Connecticut* [1925]), certain portions of the Bill of Rights had been absorbed in the Fourteenth Amendment on the basis "that neither liberty nor justice would exist if they were sacrificed."

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

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

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

But is this really what the framers of the Fourteenth Amendment intended? This remains an open and heavily debated question. Although dozens of books and hundreds of articles have been written



James Madison (1751–1836), Fourth President of the United States, by David Edwin in Philadelphia between 1809 and 1817. COURTESY OF LIBRARY OF CONGRESS, PRINTS AND PHOTOGRAPHS DIVISION.

on the subject, scholars still line up on both sides of the debate. From one side, it is reasonable to hold that the Fourteenth Amendment's framers intended to overrule *Barron v. Baltimore* and make the Bill of Rights applicable to the states. After all, John Bingham, who authored Section 1 of the amendment, repeatedly said that the amendment would overrule the *Barron* case. Indeed, Bingham said this no less than thirteen times

in one day during House arguments. Bingham's testimony is the most compelling evidence for incorporation, but clearly there were other leading figures in the House and Senate who shared the same view, and many of the day's leading newspapers and magazines reported a similar understanding.

This view comports with the plain meaning of the words of the amendment as well as the broader his-

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

But from another side this view can be challenged. Many of the members of the Thirty-Ninth Congress expressed views that were contrary to Bingham's. Senator Lyman Trumbull, chairman of the Senate Judiciary Committee, held that "the great fundamental rights set forth in this Bill [are] the right to acquire property, the right to come and go at pleasure, the right to enforce rights in the courts, and to make contracts," rights that are not specifically named in the Bill of Rights. And indeed the Supreme Court adopted the view (until *Gitlow* in 1925) that the Fourteenth Amendment was intended to protect a very limited category of rights.

Thus the problem does not offer a simple solution. The original intentions of the framers of the Fourteenth Amendment, much like the original intent of so many provisions of the Constitution, are often elusive, to say the least. When the constitutional text is unclear, most experts would agree that the task of judges and scholars is to determine, as best they can, how the people of the states who ratified the document understood the text. Nevertheless, in the case of the Fourteenth Amendment, this task is an especially difficult one because, as Supreme Court Justice John Harlan noted in a dissenting opinion in *Reynolds v. Sims* (1964): "Reports of the debates in the state legislature on the ratification of the Fourteenth Amendment are not generally available." Indeed, a complete record of the ratification proceedings is available from only one state, Pennsylvania.

So, left without clarity of what either the Thirty-Ninth Congress or the state ratifying conventions meant, where do we turn? If we examine the broader historical context, we discover considerable evidence that the Fourteenth Amendment was a conscious attempt to "complete" a Constitution that had been "incomplete" from the beginning.

"Completing" the Constitution

The Supreme Court's decision to make the Bill of Rights binding on the states makes sense if examined from the perspective of the "Father of the

Constitution," James Madison. As is well known, Madison was the architect of the main outlines and chief principles of the Constitution. The Convention of 1787 did not accept everything he proposed, and he accepted his rejected ideas gracefully. But while many of Madison's ideas were preserved in the Constitution, he was particularly concerned about one missing element: the failure of the Constitution to grant Congress a power to veto any law made by a state. As a student of history, Madison believed that all previous federal unions had failed because the member states tended to encroach on the powers of the central government or on the power of the other member states. He contended that a veto power would allow the Congress, acting as a caring agent of all member states, to review all state legislation. He failed in his efforts to convince his colleagues of the wisdom of this provision, however. Without this element, he informed his friend Thomas Jefferson by letter, the Union would not last very long. Presciently, Madison saw the states regularly oppressing minorities, and felt the veto power would enable Congress to promote justice and stability within the states, ultimately protecting the states from themselves.

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

These abuses were the result of an incomplete Constitution. For Madison, a congressional veto power over state legislation was to supply a way in which that principle was to be made effective in the states. Congress would have the ability, to be exercised only if necessary, to force the states to respect the basic rights of all persons to life, liberty, and the pursuit of happiness as provided in the Declaration of Independence—rights believed to be embodied in the Bill of Rights. It should also be noted that, after the Constitution was adopted by the states, in proposing the First Amendment at the First Congress Madison urged its extension to the states (i.e., incorporation) because "the State governments are as liable to attack these invaluable privileges as the General Government is, and therefore ought to be cautiously guarded against" (*Annals of Congress* 1834, 441). This proposal, however, like his proposal for a

congressional veto power over state legislation, failed, since the majority of his colleagues believed that they should “leave the State Governments to themselves” (*Annals of Congress* 1834, 755). His “incorporation” proposal comes much closer to matching the Thirty-Ninth Congress’s remedy for limiting the states’ power, although for Madison it was probably less vital than a congressional veto power over state legislation.

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

Religious Liberty Implications

Religious liberty in the United States is closely linked to the incorporation of the establishment and free exercise clauses, thus making them binding on the states. While state and local governments are not to be automatically distrusted in the advancement of religious liberty, time has proven that parochial attitudes often develop that are insensitive to the religious conscience of some citizens. Our system does not eliminate state sovereignty on all matters of religion, but on the major questions, such as the right of public school teachers to lead their classes in prayer or the right to display religious symbols on government property, good policy dictates that the Supreme Court establish and uphold uniform laws that are binding on all Americans. In so doing the court helps Americans to live out the motto, *E Pluribus Unum* (Out of Many, One), which accords with the intent of the framers of the Fourteenth Amendment, whose paramount goal was a united citizenry whose common and equal rights would be respected.

Derek H. Davis

Further Reading

- Annals of Congress* (1834). (Vol. 1). Washington, DC: Gales and Seaton.
- Berger, R. (1989). *The Fourteenth Amendment and the Bill of Rights*. Norman: University of Oklahoma Press.

- Berger, R. (1987). *Government by Judiciary: The Transformation of the Fourteenth Amendment* (2nd ed.). Indianapolis, IN: Liberty Fund, Inc.
- Bickel, A. (1982). *The Least Dangerous Branch*. Indianapolis, IN: Bobbs-Merrill.
- Bork, R. H. (1986, February). Original intent and the Constitution. *Humanities* 7, 26–38.
- Boyd, J. P. (Ed.). (1950–1973). *The Papers of Thomas Jefferson*. Princeton, NJ: Princeton University Press.
- Brennan, W. J. (1986). The Constitution of the United States: Contemporary ratification. *South Texas Law Review* 27, 433–435.
- Curtis, M. K. (1986). *No state shall abridge: The 14th Amendment and the Bill of Rights*. Durham, NC: Duke University Press.
- Ely, J. H. (1980.) *Democracy and distrust: A theory of judicial review*. Cambridge, MA: Harvard University Press.
- Farrand, M. (1966). *The Records of the Federal Convention of 1787*. New Haven, CT: Yale University Press.
- Nelson, W. E. (1988). *The Fourteenth Amendment: From political principle to judicial doctrine*. Cambridge, MA: Harvard University Press.
- Zuckert, M. P. (1992, Spring). Completing the Constitution: The Fourteenth Amendment and Constitutional rights. *Publius: The Journal of Federalism* 22, 76–88.

Court Cases

- Adamson v. California*, 332 U.S. 46 (1947).
- Barron v. Baltimore*, 32 U.S. 243 (1833).
- Cantwell v. Connecticut*, 310 U.S. 296 (1940).
- Dred Scott v. Sandford*, 60 U.S. 393 (1857).
- Everson v. Board of Education*, 330 U.S. 1 (1947).
- Gitlow v. New York*, 268 U.S. 652 (1925).
- Palko v. Connecticut*, 302 U.S. 319 (1925).
- Reynolds v. Sims*, 377 U.S. 533 (1964).

Free Exercise Clause

The free exercise clause of the First Amendment of the U.S. constitution states that “Congress shall make no law . . . prohibiting the free exercise [of religion].” As the reference to Congress makes clear, this clause—like the First Amendment generally—was originally designed to constrain the federal government alone. Since the 1940s, however, the Supreme Court has extended the free exercise clause to state