Christian Faith in the Public Square – Fall 2010 - Lewis
The 14th Amendment & Selective Incorporation

I. SELECTIVE INCORPORATION

A. The Supremacy Clause

1. According to the Supremacy Clause of the U.S. Constitution, when a state law conflicts with a federal law, the federal law is supreme. Thus, if the federal constitution empowers the federal judiciary to decide a question for the states—and the normative constitutional hermeneutic is not specified—and the court has spoken, it is the supreme law of the land.
2. Thus, if the federal government has been given the right to decide questions of religion for the states, states are wrong to disobey the court order.[1]
3. If the federal judiciary has never been given the power to decide the question, then it is a usurper of the jurisdiction of the states to decide the question.

B. The History of the Debate[2]

1. The most ironic part of Chief Justice Roy Moore's saga is that the Ten Commandments are permanently and prominently displayed in the United States Supreme Court building itself. This was noted in a 1984 case, *Lynch v. Donnelly*, where the Chief Justice of the United States Supreme Court, Warren Burger, noted that "The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with the Ten Commandments."[3]
2. In *Lynch*, the case involved a municipality displaying, among other things, a nativity scene during the Christmas. Here, the Supremes held the nativity scene did not violate the Establishment Clause, because it satisfied all of the prongs of the *Lemon v. Kurtzman* test.
3. *Lemon* says a law will pass muster related to the Establishment Clause if, and only if, all elements are satisfied. They are: (1) it has a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster an excessive government entanglement with religion.[4] This is clearly a "Lemon Law."

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[1] See U.S. Constitution, Art. VI, sec. 2.

[2] Most of the historical quotes cited in this syllabus are from David Barton's, *Original Intent* (Aledo, TX: Wallbuilders, 1997).

[3] *Lynch v. Donnelly*, 465 US 668, 677 (1984)

[4] See Generally *Lemon v. Kurtzman*, 403 U.S. 602 (1970). *Lemon* is being exceptioned to the point where a new test is bound to manifest soon. The many pronged and sub-pronged progeny of *Lemon* may be replaced with the "endorsement of religion" test. See Texas *Monthly, Inc. v. Bullock,* 489 U.S. 1 (1989).

4. Ironically, four years prior to *Lynch*, the Supreme Court held in *Stone v. Graham* that the public display of the Ten Commandments in Kentucky schools was a violation of the Establishment Clause.[5] There the court opined that

   "The preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."[6]

II. FEDERALISM, STATES' RIGHTS AND DUAL SOVEREIGNTY

A. The Balance of Power: Federal v. State

1. Juridically speaking, issue spotting what went wrong regarding Establishment/Free Exercise of religion in America is not difficult. It is elementary exercise in the study of constitutional law. The problem is a Lex Rex or Rex Lex issue—is the law the king or the king the law?

2. **Plenary Power of the State**

   a. The states have plenary power. Plenary power means "full or complete authority."

   b. Here, the word "state" is the equivalent of a sovereign nation, such as Canada.

   c. Sovereign, independent states simply do what they require to maintain order in society.

   d. An intrusion into the jurisdiction of a recognized, sovereign state may be grounds for all kinds or remedies, e.g., lawsuits, trade wars among nations, etc.

3. **The Enumerated Powers of the Federal Government**

   a. The Federal government has enumerated powers granted to it by the states.

   b. Enumerated powers are a body of limited, clearly defined powers granted to it by the states. The United States Supreme Court (USSC) has acknowledged this from the beginning of the nation.

   c. One of the most notorious cases ever to be decided by the court explains the relationship. In 1857 in *Dred Scott v. Sandford*, the court explained its dilemma in deciding the case before it. It opined, regarding its own authority:

      "[W]e have said, from the peculiar character of the Government of the United States. For although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon

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[5] See *Stone v. Graham*, 449 U.S. 39, 41 (1980).

[6] *Stone* at p. 41.

it; and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution. And in regulating the judicial department, the cases in which the courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined; and they are not authorized to take cognizance of any case which does not come within the description therein specified. Hence, when a plaintiff sues in a court of the United States, it is necessary that he should * show, in his pleading, that the suit he brings is within the jurisdiction of the court, and that he is entitled to sue there. And if he omits to do this, and should, by any oversight of the Circuit Court, obtain a judgment in his favor, the judgment would be reversed in the appellate court for want of jurisdiction in the court below. The jurisdiction would not be presumed, as in the case of a common-law English or State court, unless the contrary appeared. But the record, when it comes before the appellate court, must show, affirmatively, that the inferior court had authority, under the Constitution, to hear and determine the case. And if the plaintiff claims a right to sue in a Circuit Court of the United States, under that provision of the Constitution which gives jurisdiction in controversies between citizens of different States, he must distinctly aver in his pleading that they are citizens of different States; and he cannot maintain his suit without showing that fact in the pleadings."[7]

In explaining the court's authority in relationship to the states and the original intent of the constitution, the court further stated:

"**The people** were assured by their most trusted statesmen "that the jurisdiction of the Federal Government is limited to certain enumerated objects, which concern all members of the republic," and "that the local or municipal authorities form distinct portions of supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere." Still, this did not content them. Under the lead of Hancock and Samuel Adams, of Patrick Henry and George Mason, they demanded an explicit declaration that no more power was to be exercised than they had delegated. And the ninth and **tenth amendments** to the Constitution were designed to include the reserved rights of the States, and the people, within all the sanctions of that instrument, and to bind the authorities, State and Federal, by the judicial oath it prescribes, to their recognition and observance. Is it probable, therefore, that the supreme and irresponsible power, which is now claimed for Congress over boundless territories, the use of which cannot fail to react upon the political system of the States, to its subversion, was ever within the contemplation of the statesmen who conducted the counsels of the people in the formation of this Constitution? When [*512] the questions that came to the surface upon the acquisition of Louisiana were presented to the mind of Jefferson, he wrote: "I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it blank paper by construction. I say the same as to the opinion of those who

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7[7] *Scott v. Sandford*, 60 U.S. 393, 401-402 (1856).

consider the grant of the treatymaking power as boundless. If it is, then we have no Constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives. It specifies and delineates the operations permitted to the Federal Government, and gives the powers necessary to carry them into execution." The publication of the journals of the Federal Convention in 1819, of the debates reported by Mr. Madison in 1840, and the mass of private correspondence of the early statesmen before and since, enable us to approach the discussion of the aims of those who made the Constitution, with some insight and confidence.[8]

B. Bill of Rights & the Tenth Amendment

1. **The Bill of Rights & the Tenth Amendment**

   a. At the Constitutional Convention in 1787, the party known as the "Anti-Federalists," which included such notable Founders such as Thomas Jefferson, George Mason and Samuel Adams, were the most outspoken advocates for the Bill of Rights. Although a new government had been formed, with only 39 of the 55 delegates voting for the new constitution, there was still a great suspicion that the new government, apart from the clear restrictions of a Bill of Rights, would eventually grow in an unrestrained manner. The state ratifying conventions noted this and demanded additional guarantees that the new Federal government would not be able to intrude on the rights of the States.

   b. Thus the several States ratified the US Constitution with the understanding that a Bill of Rights would immediately follow. It did. The result was twelve proposed amendments to the new constitution, ten of which were ratified. The Bill of Rights explicitly limited the implicitly limited powers of the newly created Federal government. Samuel Adams declared the importance of these Amendments. He said the Amendments were needed so the people "may clearly see the distinction…between the federal powers vested in Congress and the sovereign authority belonging to the several States, which is the Palladium of the private and personal rights of the citizens."[9]

   c. The first eight Amendments specified the rights of the States. But just in case the specific protections were not clear enough from the first eight amendments, the 9th and 10th Amendments made it so.

      (1) The Ninth Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

      (2) The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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[8] *Scott, supra*, at pp. 511-512.

[9] Samuel Adams, *The Writings of Samuel Adams*, Harry Alonzo Cushing, ed. (New York: G. P. Putnam's Sons, 1904), Vol. IV, p. 334: CIB p. 18.

d. In *Kansas v. Colorado*, a water rights case between two states, the USSC explains its understanding of the Tenth Amendment. It opined:

> "by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. It reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The argument of counsel ignores the principal factor in this article, to wit, "the people." Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. [***79] The preamble of the Constitution declares who framed it, "we the people of the United States," not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and [*91] liberally [***80] so as to give effect to its scope and meaning. As we said, construing an express limitation on the powers of Congress, in *Fairbank v. United States*, 181 U.S. 283, 288."[10]

e. In short, the Bill of Rights restricts the Federal Government, not the States.

2. **The Importance of *Barron v. Baltimore***

a. In 1833, the USSC decided the first case regarding the alleged applicability of the Bill of Rights to the states in *Barron v. Mayor & City Council of Baltimore.*

b. There Chief Justice John Marshall, stated in relevant part:

> "The question thus presented is, we think, of great importance, but not of much difficulty. [¶] 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

[10] *Kansas v. Colorado*, 206 U.S. 46 (1907)

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."

After stating that the plaintiff was in the wrong court, the court opined regarding how Barron might obtain a remedy for his problem. It further elucidated:

"Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments: the remedy was in their own hands, and would have been applied by themselves. A convention [*250] would have been assembled by the discontented state, and the required improvements would have been made by itself. *The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of congress, and the assent of three-fourths of their sister states, could never have occurred to any human being as a mode of doing that which might be effected by the state itself.* Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from 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.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government -- not against those of the local governments."[11]

c. In short, the USSC in *Barron* holds that the provisions of the Bill of Rights do not apply to the States.

[11] *Barron v. Mayor & City Council of Baltimore*, 32 U.S. 243, 247, 249-50 (1833).

C. The First Amendment

1. **Original Purpose & Meaning of the First Amendment**

   a. If one asked the average lawyer or layman what the meaning and purpose of the First Amendment was, one will probably hear the response of "separation of church and state."

   b. But this is not the First Amendment, to restate, it says "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

   c. By this, the Founders intended only to preclude the establishment of a national denomination. It was never intended to restrain public religious expressions.[12]

2. **Thomas Jefferson & The First Amendment**

   a. One of the most telling pieces of evidence against the modern understanding of the First Amendment is Thomas Jefferson himself.

   b. The author of the famed "wall of separation" language in his now famous letter to the Danbury Baptists,[13] had some other things to say about the limits of federal power in the relationship between church and the state.

   c. He said regarding the relationship of the First Amendment and the States:

      "I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise or to assume authority in any religious discipline has been delegated to the General government. It must then rest with the States."[14]

3. **Joseph Story & The First Amendment**

   a. Joseph Story (1789-1845) was the founder of Harvard Law School and a Justice of the USSC.

   b. He explained in his important work, *Commentaries on the Constitution,* that because of the First Amendment,

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[12] Barton at p. 24.

[13] Letter to Danbury Baptists.

[14] Thomas Jefferson, *Memoir, Correspondence, and Miscellanies, From the Papers of Thomas Jefferson,* Thomas Jefferson Randolph, ed. (Boston: Gray and Bowen, 1830), Vol. IV, pp. 103-104, to Samuel Miller on January 23, 1808; cited in David Barton, *Original Intent* (Aledo, TX: Wallbuilders, 1997), p. 25.

(1) "…the whole power over the subject of religion is left exclusively to the State governments to be acted upon according to their own sense of justice and the State constitutions."[15]

(2) Story elucidated further regarding the First Amendment that "The real object of the Amendment was not to countenance, much less advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects."[16]

4. **The State Governments & the First Amendment**

a. So how did the state governments exercise their retained authority over religious matters? Besides looking at what the states had in fact been doing for 150 to 200 years, those things that were recently declared "unconstitutional" by the USSC, one can look at the original Constitutions of the several States to see what provisions are made for religion.

b. While the states could have had an established state denomination, they did not. They mostly made provision for the general public teaching and encouragement of religion.

c. For example, the Massachusetts State Constitution read in relevant part:

"As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community but by the institution of the public worship of God and of public instruction in piety, religion and morality: Therefore to promote their happiness and to secure the good order and preservation of their government, the People of this Commonwealth have a right to invest their Legislature with the power to authorize and require . . . the several towns, parishes, precincts, and other bodies politic or religious societies, to make suitable provision at their own expense for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality." [17]

d. The New Hampshire is substantially similar to the Massachusetts Constitution, but adds that "morality and piety [are] grounded in evangelical principles."[18]

e. From these state constitutional provisions, the actual practice of the states for nearly two centuries and the unanimous voice of the Founders and early justices of the

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[15] Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray, and Company, 1833), Vol. III, p. 731, §1873; cited in Barton, *Original Intent*, *supra*, at p. 25.

[16] *Ibid.,* Vol. III, p. 728, 1871; cib at p. 31.

[17] *A Constitution or Frame of Government Agreed Upon By the Delegates of the People of the State of Massachusetts-Bay* (Boston: Benjamin Edes & Sons, 1780), pp. 7-8, Art. III "Declaration of Rights"; cited in Barton at pp. 25-26.

[18] CIB 25.

USSC, the right to determine the extent of the relationship between the church and the state rested solely with the people of the several states.

III. THE DOCTRINE OF SELECTIVE INCORPORATION (SI)

A. Introduction

1. Unfortunately, the modern USSC has ignored the original meaning of the First Amendment and has iteratively forced an increasingly secular micromanaged Federal mode of church-state relations on the States, becoming, in the words Justice Kennedy, "a national theology board." [19]
2. But how did the original vision of the Founders and the States morph into this current system where an unelected federal judicial panel of 5-out-of-9 can by *ex nihilo* fiat create new fundamental rights and national policy? The answer is the juridical theory of Substantive Due Process and Selective Incorporation of the Bill of Rights to the states.
3. As aforementioned in *Barron*, there is a remedy the states have in their respective arsenals of justice to fix national problems not addressed by the U.S. Constitution—the process of Constitutional Amendments. If the states desire to give up a bit of their sovereignty, they may—upon 2/3 recommendation by congress and ¾ of the total number of states ratifying the amendment. If the states have not given authority to the feds to decide a question, the answer must be what it was in *Barron v. Baltimore,* "You're in the wrong court."
4. But the USSC has not been recapitulating the *Barron* holding. Instead, it has invented a judicial theory that allowed it to assume jurisdiction—where it previously had none—to decide religion cases, among other things, reserved for the states, that is, the theory of Selective Incorporation.

B. The 14th Amendment, Substantive Due Process, & Selective Incorporation

1. Anyone who has taken a course in law school or a bar review course, has confronted the phraseology necessary to remember and recite in order to obtain a passing grade on any essay dealing with a Bill of Rights question. That phrase is "the First Amendment Establishment Clause *made applicable to the states by the Due Process Clause of the Fourteenth Amendment."* When the SI doctrine is discussed in law schools, it is usually in a discourse regarding the *extent*, *how* and *when* it was accomplished, not *whether* it was actually permissible.
2. The 14th Amendment was the second of the three "Civil War" Amendments. The 13th Amendment (1865) abolished slavery. When certain states refused to treat the freed slaves as equal citizens of the states in which they resided, the 14th Amendment (1868) was passed to ensure that the freed slaves enjoyed the same rights as all other citizens of

[19] *County of Allegheny v. A.C.L.U.,* 106 L. Ed. 2nd 472, 550 (1989). Justice Kennedy (concurring and dissenting)

the states in which they resided. The 15th Amendment (1870) guaranteed the right to vote to the freed slaves.[20]

3. The 14th Amendment Privilege & Immunities, Due Process, and Equal protection Clauses state:
   a. "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 deny 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."[21]
4. The Federal P & I clause of Article IV, sec. 2, prevents a state from denying citizens of other states the privileges and immunities it grants its own citizens.[22]
5. The original understanding of the 14th Amendment Privilege and Immunities Clause, was that it required the states to recognize the privileges and immunities of federal citizenship. Thus the freed slaves, as citizens of the federal government as well as the respective state governments, had all the P & I of national citizenship.
6. One century after the adoption of the 14th Amendment, Justice Hugo Black, in his dissent in the 1968 case of *Duncan v. Louisiana*, declared that the P & I clause was "an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States."[23]
7. Does this mean that the P & I clause "incorporated" amendments 1-8 to the states? How could it? Since the first eight amendments were never "federal rights," they could not be incorporated to the states. This view is buttressed by the fact that the incorporation theory "found no recognition in the practice of congress, or the actions of state legislatures, constitutional conventions, or courts."[24]
8. In the *Slaughter-House Cases* of 1873, the USSC rejected the plaintiffs' claims that the P & I clause, the due process clause, and the EP clause could be construed to entitle them to the protections in the Bill of Rights, particularly, to protect the right to practice a trade.
   a. They said the 13th and 14th amendments were passed to protect the freed slaves. Period.
   b. And regarding the due process clause, the court held that it was "sufficient to say that under no construction of that provision that we have ever seen, or any that we deem

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[20] See Erwin Chemerinsky, *Constitutional Law* (New York: Aspen, 1997) 546-550.

[21] United States Constitution, 14th Amendment

[22] Chemerinsky at p. 350.

[23] *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black dissenting); CIC 374.

[24] Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights to the States?*, 2 Stan. L. Rev. 132, 137 (1949); CIC 375.

admissible, can the restraint imposed . . . be held to be a deprivation of property within the meaning of the provision."[25]

C. Substantive Due Process and Selective Incoropration: The Modern Understanding

1. Introduction

a. Erwin Chemerinsky notes in his hornbook on constitutional law that since "the application of the Bill of Rights to the States could not be done through the P & I clause" the court in the early 20th century suggested an alternative approach, "finding that at least some of the Bill of Rights provisions are part of the liberty protected from state interference by the due process clause of the Fourteenth Amendment." And once "the Court found that the due process clause. . .protected fundamental rights from state infringement, but there was a major debate over which liberties were safeguarded."[26] Thus, due process was no longer merely procedural in nature, it was substantive as well. So now the court may decide the extent of "fundamental rights" which are the substance of ordered "liberty" contained in the due process clause.

b. Here one should take notice of the fact that *the Justices were the ones looking for a way to "incorporate" the Bill of Rights. It was not by a constitutional amendment.* It was accomplished solely by judicial fiat.

c. Commenting on this judicial feat, in 1970 Justice William Douglas stated that selective incorporation "involved the imposition of *new and far-reaching constitutional restraints* on the states. Nationalization of many civil liberties has been the consequence of the fourteenth amendment, reversing the historic position that the foundations of those liberties rested largely in state law."[27]

2. The Modern Case Law

a. In 1897, the USSC found the 14th amendment prevents states from taking property without just compensation, effectively reversing *Barron v. Baltimore*.[28] In 1925, the court explicitly applied the First Amendment freedom of speech clause through the 14th Amendment due process clause.[29] In 1933, the Sixth Amendment's right to counsel was applied to the states.[30]

b. Thus far, the entire Bill of Rights has been incorporated with the exception of five provisions: the 2nd Amendment right to bear arms, the 3rd Amendment right not to

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[25] *Slaughter-House Cases,* 83 U.S. 36, 80-81 (1873). CIC 376.

[26] Chemerinsky at p. 378, 379.

[27] *Walz v. Tax Commission*, 397 US 664, 701 (1970), Douglas, J (dissenting); CIB 19.

[28] *Burlington & Quincy Railroad Co. v. City of Chicago,* 166 US 226 (1897); CIC at 37x

[29] *Gitlow v. New York*, 268 US 652 (1925).

[30] *Powell v. Alabama*, 287 US 45 (1933).

have soldiers quartered, the 5th amendment right to grand jury indictment, the 7th amendment right to jury trials in civil cases, and the 8th amendment prohibition of excessive fines.

c. The court incorporated the First Amendment Free Exercise Clause in 1940 in *Cantwell v. Connecticut*,[31] and the Establishment Clause in 1947 in *Everson v. Board of Education*[32]

d. Note well that these were incorporated 150 years after the Bill of Rights and 70 years after the 14th Amendment was adopted!

e. In *Everson*, the court, introduces Jefferson's "Wall of Separation" metaphor, claiming "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[33]

D. Why Should Selective Incorporation be Rejected?

1. **The Blaine Amendment**

a. Besides all of the evidence previously cited for rejecting federal authority over the states, the following should be considered.

b. First, the *Blaine Amendment* was an attempted amendment to the constitution in 1875. It failed. That proposed amendment stated in relevant part,

"*No State* shall make any law respecting an establishment of religion or prohibiting the free exercise thereof."[34]

c. If the Bill of Rights were incorporated to the states by the 14th amendment, why would the congress—7 years later—attempt to apply the First Amendment to the states? The answer is obvious—because the 14th Amendment did not incorporate the Bill of Rights.

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[31] 310 US 296 (1940)

[32] 330 US 1 (1947)

[33] Everson v. Board of Education

[34] See the discussion in Michael S. Ariens and Robert A. Destro, *Religious Liberty in a Pluralistic Society* (Duram, NC: Carolina Academic Press, 1996) 166-169.

2. Secondly, States did not recognize SI or change their behaviors regarding the alleged incorporation of the Bill of Rights until the USSC began declaring these things.
3. Thirdly, if the Bill of Rights were incorporated to the States, particularly the first amendment, why did it take the Justices nearly 80 years to declare it!
4. Lastly, SI detrimentally affects the concept of the rule of law. If judges can simply declare what are and are not rights *ex nihilo* with impunity, there is not much need for a legislature. And the divisions or government and the predictability of the law are imperiled.

E. Strategies to Remedy the Effects of SI

1. **Introduction**
   a. While there are many elements to consider in discussing a theology and policy of church-state relations, for example, the nature and purpose of government, the form of government, the source of law, when and how to use both general and special revelation to support our views, the issue here is who has the right and duty to make those decisions in the American system of government.
2. **Remedies**
   a. Congress can impeach the Justices who hold SDP and SI.
   b. Constitutional Amendments
      (1) The People can pass an amendment stating that the Bill or Rights does not apply to the states. Moreover, any justice who attempts to "incorporate" provisions of the Bill of rights will be in violation of her oath of office.
      (2) The People can pass an amendment defining a method or hermeneutic for interpreting the constitution, thus mandating an "Original Intent" or "Grammatical Historical" hermeneutic.
   c. State Secession
      (1) States could voluntarily leave the union, revoking the enumerated powers they granted to the federal Government.
   d. Additional Remedies