

Historical Overview: The Fourteenth Amendment and the Selective Incorporation of the Bill of Rights

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Introduction

The U.S. Constitution, as it emerged from the Constitutional Convention in the summer of 1787, created a new system of government that was uniquely American at the time. It created a federal national government, with specific or enumerated powers, and state governments that retained the powers they had not delegated to the central government. The wording of the Bill of Rights, the first 10 amendments to the Constitution, prevented those rights from being applied to the states. Only the passage of the Fourteenth Amendment created a formal framework for extending certain aspects of the Bill of Rights to apply to the states, eventually applied in an unfolding legal doctrine known as selective incorporation. With selective incorporation, the Supreme Court decided, on a case-by-case basis, which provisions of the Bill of Rights it wished to apply to the states through the due process clause. This doctrine has profoundly influenced the character of American federalism.

The Framework: The Constitutional Convention and the Bill of Rights

The delegates who met at the Constitutional Convention in Philadelphia in the summer of 1787 were sent with instructions from their state legislatures to amend the Articles of Confederation. The Articles had established a confederal system of government in which sovereignty rested with the several states. The central government under the Articles consisted of the Continental Congress, a weak legislative body that a growing number of Americans believed was incapable of governing the nation.

A few days into the convention, Virginia governor Edmund Randolph introduced James Madison's plan for a new form of government. This new government would be much more powerful than the Continental Congress, but it would not be a unitary government that swept away the states. Instead it would create a federal system. Madison wrote of the new federal government that "its jurisdiction extends to certain enumerated objects only, and leaves to the states a residuary and inviolable sovereignty over all other objects."¹

One of the most important questions at the convention was which powers the states would surrender to the new government. The delegates did not think it necessary to attach a bill of rights to the Constitution, because the federal government was understood to have only the powers granted to it by the states. A bill of rights, specifying which powers the government would not have, was seen as superfluous. So the Constitution, as it came out of the convention and was sent to the states for ratification, contained no bill of rights.

During the ratification debates that followed in each of the states, opponents of the Constitution repeatedly criticized the document because it contained no bill of rights. The state constitutions had bills of rights, and the memory of British violations of basic liberties was fresh in the minds of many. Several state ratifying conventions called for the addition of a bill of rights to the document, and some ratified on the condition that one be added.²

Madison promised at the Virginia ratifying convention that he would work to have a bill of rights added if the Constitution was adopted. True to his word, he introduced a list of amendments in the first session of the House of Representatives, in June of 1789. The House and Senate pared Madison's list down to 12 amendments, formally proposed them by the necessary two-thirds vote, and sent them out to the states for ratification. The states approved 10 of the amendments, which were added to the Constitution as our Bill of Rights.

The Bill of Rights, as originally proposed by Congress and ratified by the states, applied only to the federal government. The delegates to the state ratifying conventions had called for a bill of rights because they wished to put limitations on the powers of the new federal government, not because they wanted to limit the powers of their respective state governments. Even so, Madison included in his list of amendments one that said, "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."³ Congress chose not to include this limitation on state power in the amendments it officially proposed and sent to the states for ratification. The only institution referred to by name in the Bill of Rights is the federal Congress. The First Amendment begins with the phrase, "Congress shall make no law." Clearly, the limitations on power applied only to the federal government, not to the states.

Judicial Interpretations Before the Civil War

In *Barron v. Baltimore* (1833), the Supreme Court was called upon for the first time to interpret whether the Bill of Rights could be seen as limiting state powers. Chief Justice John Marshall, a former member of the Federalist Party and opponent of the doctrine of states' rights, wrote the opinion in the case. The plaintiff in the case wanted the Court to apply the just compensation clause of the Fifth Amendment to the city of Baltimore. The question presented by the case, Marshall said, was of great importance but not of much difficulty. He continued:

The Constitution was ordained and established by the people of the United States for themselves, 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 power of its particular government as its judgment dictated.⁴

Barron argued that the Constitution placed restrictions on both the federal and the state governments. In support of his argument, Barron noted the restrictions on state powers specified in Article I, Section 10. Marshall replied that had the framers of the Bill of Rights intended for them to apply to the states, they would have imitated those who wrote the Constitution, by expressing that intention. Marshall also observed that the call for

amendments that emanated from the state ratifying conventions was motivated by fear of federal power, not fear of state power. In light of the unambiguous historical record, the Supreme Court had no authority to apply the Bill of Rights to the states. The Court's decision in *Barron v. Baltimore* remained unchallenged until after the Fourteenth Amendment was added to the Constitution in 1868.

The Fourteenth Amendment and the Privileges and Immunities Clause

The Fourteenth Amendment was proposed by Congress to protect the rights of recently freed slaves, to overturn the three-fifths clause of the Constitution (in which slave populations were counted as three-fifths of free populations for purposes of congressional apportionment), to forbid southern insurrectionists from holding federal office, and to repudiate southern state debts incurred during the Civil War. The first section of the amendment creates a national citizenship and contains three clauses that limit the power of state governments to interfere with the rights of U.S. citizens. These clauses are known as the privilege and immunities clause, the due process clause, and the equal protection clause.

The Court had its first opportunity to use the Fourteenth Amendment to limit state power in the *Slaughterhouse Cases* of 1873.⁵ The cases arose from a Louisiana law granting an exclusive franchise to one large slaughterhouse to process all meat in and around the city of New Orleans. This was done to control the dumping of refuse into the Mississippi River, which was polluting the water and causing outbreaks of cholera in the city. The Court was asked to interpret the privileges and immunities clause as establishing a national right to practice one's occupation free of state-created monopoly.

In its decision, the Court refused this interpretation of the clause, finding that the claimed right did not exist before the passage of the amendment and was not deducible from the clause itself. Instead, the Court read the clause to mean that citizens of a state may freely travel to and establish residence in another state, and are entitled to the same privileges and immunities under state law as the citizens of the state to which they travel. This decision has been characterized as "virtually emasculating the privileges and immunities clause," spelling "the demise of the [clause] as an effective guarantor of federal liberties at the state level."⁶

Due Process and Different Doctrines of Incorporation

The Court's decision in the *Slaughterhouse Cases* thus eliminated the privileges and immunities clause as a vehicle for applying the Bill of Rights to the states. After an interval of many years, similar attempts under the Fourteenth Amendment would begin to bear legal fruit. The avenue this time would be the due process clause, which prohibits a state from depriving any person of life, liberty, or property without due process of law.

In 1925, the case of *Gitlow v. New York* came to the Supreme Court. Benjamin Gitlow had been convicted by the state of New York for advocating the overthrow of the government

by force. Gitlow challenged the state statute on the grounds that it violated the due process clause of the Fourteenth Amendment. In *Gitlow v. New York* a majority of the Supreme Court, for the first time, accepted the argument that provisions of the Bill of Rights apply to state governments. The Court said freedom of speech and of the press “are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states.”⁷ The Court did not explain how it came to interpret the due process clause in this manner, nor did it say what other rights and liberties it thought were fundamental enough to enjoy protection from state infringement. The Court left these matters to be decided later, as other cases brought different issues to the fore.

Not surprisingly, different justices came to see those issues differently. Some thought the word “liberty” in the due process clause was shorthand for the Bill of Rights. They became advocates of the position known as “total incorporation,” which held that the due process clause embodied or incorporated the entire Bill of Rights. This meant that the due process clause imposed the same restrictions on state power as the Bill of Rights did on federal power.

While total incorporation had the virtue of simplicity, it had some difficulties as well. For example, it meant imposing on state court systems the requirement to have a trial by jury in civil suits where the amount in dispute exceeded 20 dollars.⁸ In addition, applying the Tenth Amendment (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people”) to the states seems illogical.

For these and other reasons a majority of justices finally accepted what is known as “selective incorporation.” With selective incorporation, the Supreme Court decided, on a case-by-case basis, which provisions of the Bill of Rights it wished to apply to the states through the due process clause. The key case for selective incorporation is *Palko v. Connecticut* (1937), in which the Court did two things: it specifically rejected total incorporation, and it established the standard to guide the process of selective incorporation. The Court said any right “found to be implicit in the concept of ordered liberty” and “so rooted in the traditions and conscience of our people as to be ranked as fundamental” would be applied to the states.⁹

In the 35 years following *Palko*, the Court heard a variety of cases through which it incorporated more of the Bill of Rights into the due process clause of the Fourteenth Amendment. (A list of important cases, and the provision of the Bill of Rights each incorporated, appears at the end of this article.) During these years the Court incorporated all of the First, Fourth, and Sixth Amendments, and all of the Fifth, except the right to indictment by grand jury. The Second, Third, Seventh, and Tenth Amendments were not incorporated, nor were the restrictions on excessive fines and bail from the Eighth. The status of the Ninth Amendment at present is difficult to ascertain.

The Warren Court and the Heyday of Selective Incorporation

In 1953, President Eisenhower nominated Earl Warren to be chief justice of the Supreme Court. Warren's term, which lasted until 1969, was one of the most important in the history of the Court. The Warren Court handed down several landmark cases that almost completely incorporated the first eight amendments into the due process clause of the Fourteenth Amendment.

In *Engel v. Vitale* (1962), the Court declared that state-sponsored prayer in public schools violates the establishment of religion clause of the First Amendment. The case effectively ended prayer in public schools that was written or led by school officials. A year later, in *Abington School District v. Schempp* (1963), the Court ruled that officially sanctioned Bible reading in public schools violates the establishment clause. These cases began the process of disentangling state governments from religious activities and laid the foundation for the "Lemon Test" articulated by the Court in 1971.¹⁰

The Warren Court also affected a revolution in criminal procedure at the state level. The Court expanded the rights of suspects under the Fourth, Fifth, and Sixth Amendments, and applied those rights to the states. *Mapp v. Ohio* (1961) applied the "exclusionary rule" to the states, preventing illegally obtained evidence from being admitted at trial. In *Gideon v. Wainwright* (1963), the Court ordered states to provide counsel, at state expense, to indigent defendants in felony cases. This ruling forced states to retry or release thousands of inmates in state custody who had been convicted without benefit of counsel. *Miranda v. Arizona* (1966), arguably the most sweeping of the Warren Court decisions, held that the police must notify suspects of their rights before interrogation. Writing for the Court in *Miranda*, Warren stated:

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that [he] has the right to remain silent... that anything said can and will be used against the individual in court... that he has the right to consult with a lawyer and to have the lawyer with him during interrogation... [and] that if he is indigent, a lawyer will be appointed to represent him.¹¹

Mapp, *Gideon*, and *Miranda* are the most famous of the Warren Court's cases concerning criminal procedure, but they barely scratch the surface of the Court's activity in this area. Between 1961 and 1969 the Court incorporated 11 provisions of the Fourth, Fifth, and Sixth amendments. *Benton v. Maryland* (1969), decided on the last day of Warren's tenure on the Court, incorporated the protection against double jeopardy. In the years after Chief Justice Warren's retirement, the Court has incorporated only one other provision of the Bill of Rights.¹²

Conclusion

Selective incorporation has profoundly altered American federalism. Before the process started the federal courts had little to say about the day-to-day operation of state and local governments. Those governments regulated speech and the press; handled criminal

investigations, prosecutions, and punishments; and for a time even had official, established churches, all without interference from federal agents or courts. That time has long since passed.

With the incorporation of the freedom of speech and the press came federal guidelines for states and localities concerning what type of expression must be allowed in books, magazines, and movies. The federal courts tell states what sort of antiobscenity and antipornography laws they may pass and enforce, and what sorts of marches, rallies, and protests they must allow in public places. Whether the Chicago suburb of Skokie must allow Nazis to march through its Jewish neighborhoods—or a city in Florida may prevent the sale of albums by 2 Live Crew—is now a question involving the Supreme Court's interpretation of the First Amendment.

The incorporation of the Fourth, Fifth, and Sixth Amendments has changed the way state and local authorities enforce criminal law. Law enforcement officials must now pay particular attention to the way in which they interrogate suspects and must stop interrogations upon request, until a suspect has a lawyer present. Courts must appoint counsel for any indigent accused of a crime that carries a jail sentence, and judges must not allow evidence to be introduced at trial that was obtained in violation of the rights of the accused.

The incorporation of these and other rights has made criminal justice systems fairer for the accused and more uniform from state to state. The nationalization of these rights has helped us achieve a fuller realization of the promises contained in the Preamble to the Constitution, that the American people might establish justice and form a more perfect Union.

The Text of the Fourteenth Amendment

(Approved by Congress on June 13, 1866; ratified on July 9, 1868)

Section 1. 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. 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.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis

of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Table 1: Major Cases Affecting the Doctrine of Selective Incorporation

Case	Year	Provision	Amendment
<i>Gitlow v. New York</i>	1925	Freedom of speech	First
<i>Near v. Minnesota</i>	1931	Freedom of the press	First
<i>Powell v. Alabama</i>	1932	Right to counsel in capital cases	Sixth
<i>De Jonge v. Oregon</i>	1937	Freedom of assembly, right to petition	First
<i>Cantwell v. Connecticut</i>	1940	Free exercise of religion	First
<i>Everson v. Board of Education</i>	1947	No establishment of religion	First
<i>In re Oliver</i>	1948	Right to public trial	Sixth
<i>Wolf v. Colorado</i>	1949	Right against unreasonable search and seizure	Fourth
<i>Mapp v. Ohio</i>	1961	Exclusionary rule	Fourth (and Fifth)
<i>Robinson v. California</i>	1962	Right against cruel and unusual punishment	Eighth
<i>Gideon v. Wainwright</i>	1963	Right to counsel in felony cases	Sixth

Case	Year	Provision	Amendment
<i>Malloy v. Hogan</i>	1964	Right against self-incrimination	Fifth
<i>Pointer v. Texas</i>	1965	Right to confront witnesses	Sixth
<i>Griswold v. Connecticut</i>	1969	Privacy	First, Third, Fourth, Fifth, Sixth, and Ninth
<i>Parker v. Gladden</i>	1966	Right to impartial jury	Sixth
<i>Klopfer v. North Carolina</i>	1967	Right to speedy trial	Sixth
<i>Washington v. Texas</i>	1967	Right to compulsory process	Sixth
<i>Duncan v. Louisiana</i>	1968	Right to jury trial in cases involving serious crime	Sixth
<i>Benton v. Maryland</i>	1969	Right against double jeopardy	Fifth
<i>Argersinger v. Hamlin</i>	1972	Right to counsel in any criminal case with potential sentence of incarceration	Sixth

Notes

1. *Federalist* 39.
2. www.archives.gov/national-archives-experience/charters/bill_of_rights.html
3. www.churchstatelaw.com/historicalmaterials/8_4_2.asp
4. The full name of the case is *Barron v. The Mayor and City Council of Baltimore*, 1833. U.S. (7 Pet.) 243, 8 L.Ed. 672.
5. The full name of the lead case is *Butchers' Benevolent Association v. Crescent City Livestock Landing & Slaughterhouse Co.* 83 U.S. (16 Wall) 36, 21 L. Ed. 394.
6. Craig R. Ducat, *Constitutional Interpretation*, 8th ed. (Belmont, Calif.: Thomson West, 2004).
7. *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L. Ed. 1138.
8. While \$20 might have been a sizeable amount of money in 1791, when the Seventh Amendment was ratified, by the 1900s it was not. Applying the amendment to the states would have required juries in even small claims cases, hopelessly clogging the state court systems.
9. *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288.
10. This test is named for the Court's decision in *Lemon v. Kurtzman* (1971), in which the Court established a test for determining whether state actions violate the establishment clause. The test is threefold. The statute: 1) must have a clear secular purpose; 2) must neither advance nor inhibit religion; and 3) must not foster an excessive government entanglement with religion.
11. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d. 694.
12. In *Argersinger v. Hamlin* (1972) the Court completed the process of selective incorporation by incorporating the right to counsel in all criminal cases entailing a jail term.