3 Incorporation of the Bill of Rights

THE FIRST AMENDMENT to the U.S. Constitution contains a clear prohibition: "Congress shall make no law . . . abridging the freedom of speech." The wording specifically limits the powers of Congress, reflecting the fact that the Bill of Rights was added to the Constitution out of fear that the *federal* government might become too powerful and encroach upon individual rights. Does the language of the First Amendment mean that state legislatures *may* enact laws curtailing their citizens' free speech? For more than a hundred years it did. The U.S. Supreme Court, following historical interpretations and emphasizing the intention of the framers of the Constitution, refused to nationalize the Bill of Rights by making its protections binding on the state governments. The states were free to recognize those freedoms they deemed important and to develop their own guarantees against state violations of those rights.

Because of a process known as selective incorporation, however, this interpretation is no longer valid. As the nation entered the twentieth century, the Supreme Court slowly began to inform state governments that they too must abide by most guarantees contained in the first eight amendments of the federal Constitution. Today we take for granted that the states in which we live may not infringe on our right to exercise our religion freely, that no officer of the state may enter our homes without a warrant, and so forth. But the process by which we obtained these rights was long, and the supporters of incorporation lost many disputes along the way. The process caused acrimonious debates among Supreme Court justices. In fact, the question of whether states must honor the guarantees contained in the Bill of Rights is almost as old as the nation and has been debated by modern Courts as well.

MUST STATES ABIDE BY THE BILL OF RIGHTS? INITIAL RESPONSES

In drafting the original version of the Constitution of 1787, the delegates to the convention did not include a bill of rights, believing that such a list was unnecessary.[1] Much of the nation thought otherwise, however, and in order to achieve ratification, supporters of the new government found it necessary to promise that a bill of rights promptly would be added to the new Constitution. Subsequently, James Madison submitted to the First Congress a list of seventeen articles (amendments), mostly aimed at safeguarding personal freedoms against tyranny by the federal government. In a speech to the House, he suggested that "in revising the Constitution, we may throw into that section which interdicts the abuse of certain powers of the State legislatures, some other provisions of equal [illegible]

1. Before the framers adjourned, "It was moved and seconded to appoint a Committee to prepare a Bill of Rights." The motion, however, was defeated.

greater importance than those already made." To that end, Madison's proposed fourteenth amendment said, "[N]o State shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases."[2] This article failed to garner congressional approval, so the states never considered it.

Although scholars now agree that Madison viewed this amendment as the most significant among the seventeen he proposed, Congress's refusal to adopt it may have meant that the founders never intended for the Bill of Rights to be applied to the states or local governments. Chief Justice John Marshall's opinion in *Barron v. Baltimore* (1833), the first case in which the U.S. Supreme Court considered nationalizing the Bill of Rights, supports this conclusion. While reading *Barron,* note the relative ease with which Marshall reached the conclusion that historical circumstances could not possibly have implied that states were bound by the federal Bill of Rights.

Barron v. Baltimore

32 U.S. (7 PET.) 243 (1833)
http://laws.findlaw.com/US/32/243.html
Vote: 6 (Duvall, Johnson, Marshall, McLean, Story, Thompson)
0

OPINION OF THE COURT: ***Marshall***
NOT PARTICIPATING: ***Baldwin***

FACTS:

The story of this case begins in Baltimore, a city undergoing major economic changes in the early 1800s.[3] Because of its busy harbor, Baltimore was becoming a major hub of economic activity in the United States. Such growth necessitated constant construction and excavation. While entrepreneurs erected new buildings, the city began to repair its badly worn streets.

Most of Baltimore's residents welcomed the activity, but a group of wharf owners saw problems. They noticed that the city's street construction altered the flow of streams coming into Baltimore Harbor. This redirection of water, the owners argued in a letter to the city, led to the accumulation of sand and earth near their wharves, causing the surrounding water to become too shallow for large ships. Because their livelihood depended on accommodating these ships, which unloaded goods on the wharves for storage in nearby warehouses, the owners wanted the city to dredge the harbor at its expense. But the city paid no heed to their request.

John Barron and John Craig owned a particularly profitable wharf in the eastern section of the city. When they acquired the wharf, it enjoyed the deepest water in the harbor and was therefore capable of servicing the largest ships. As a consequence of the city's construction program, however, sand and silt deposits had rendered the water in front of their wharf so shallow that their business had lost nearly all its value. In 1822 they brought city representatives to county court in Maryland, asking for $20,000 in damages. The court ordered the city to pay them $4,500. When a state appellate court reversed the county court's decision, a determined Barron appealed to the U.S. Supreme Court.

Although Barron's lawyer wanted to discuss the specific facts surrounding the wharf's lost value, the justices were more concerned with a constitutional question. Specifically, under what authority did the United States Supreme Court have jurisdiction to review this local matter that had already been decided by the state courts?

ARGUMENTS:

For the plaintiff-in-error, John Barron:

- The Fifth Amendment to the United States Constitution, which holds that "private property cannot be taken for public use, without just compensation," gives the Court authority over this dispute.
- The Constitution was intended to secure rights against state abuse as well as federal.
- The City of Baltimore, through its public works project, has taken the value of the wharf without providing the owners just compensation.

For the defendants-in-error, the Mayor and the City Council of Baltimore:

- Although the city opposed Barron's position, attorney Roger Brook Taney, a future Supreme Court chief justice, was not allowed to present an argument. As soon as Taney rose to address the Court, the justices cut him off, apparently having already made up their minds.

2. James Madison, speech before the House of Representatives, June 7, 1789.

3. For an interesting account of this case, see Fred Friendly and Martha J. H. Elliot, *The Constitution: That Delicate Balance* (New York: Random House, 1984).

MR. CHIEF JUSTICE MARSHALL DELIVERED THE OPINION OF THE COURT.

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 farther than they are supposed to have a common interest.

The counsel for the plaintiff-in-error insists, that the constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the tenth section of the first article. We think, that section affords a strong, if not a conclusive, argument in support of the opinion already indicated by the court. The [ninth section] contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to congress; others are expressed in general terms. The third clause, for example, declares, that 'no bill of attainder or ex post facto law shall be passed.' No language can be more general; yet the demonstration is complete, that it applies solely to the government of the United States. [The tenth section] . . . , the avowed purpose of which is to restrain state legislation, contains in terms the very prohibition. It declares, that 'no state shall pass any bill of attainder or ex post facto law.' This provision, then, of the ninth section, however comprehensive its language, contains no restriction on state legislation.

. . . Perceiving, that in a constitution framed by the people of the United States, for the government of all, no limitation of the action of government on the people would apply to the state government, unless expressed in terms, the restrictions contained in the tenth section are in direct words so applied to the states. . . .

If the original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the state; if, in every inhibition intended to act on state power, words are employed, which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course, in framing the amendments, before that departure can be assumed. We search in vain for that reason.

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 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. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

We are of opinion that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that state, and the constitution of the United States. This court, therefore, has no jurisdiction of the cause, and it is dismissed.

Writing for a unanimous Court, in one of his last major opinions, Chief Justice John Marshall, who previously had shown a propensity to enlarge the powers of national government, sent a clear message to the states on the question of nationalizing the Bill of Rights. The Bill of Rights was intended only to protect the people against abusive actions of the federal government, not the states. Guarantees against state violations of individual liberties would have to be found in the laws and constitutions of the respective individual states.

INCORPORATION THROUGH THE FOURTEENTH AMENDMENT: EARLY INTERPRETATIONS

Marshall quipped that the Court did not have "much difficulty" in addressing the question at issue in *Barron*, but the question of the applicability of the Bill of Rights to state and local governments would not disappear with similar ease. Although Marshall's opinion settled the issue for the time being, members of the legal community continued to search for opportunities to reverse the Court's decision. A chance to do so emerged in 1868 when the nation ratified the Fourteenth Amendment. The primary purposes of this post–Civil War amendment were to secure the Union and ensure equality for African Americans, but some lawyers viewed two of its provisions—the privileges or immunities clause and the due process clause—as possible vehicles for nationalizing the Bill of Rights.

The privileges or immunities clause declares, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Supporters of applying the Bill of Rights to the states argued that the "privileges or immunities" of U.S. citizenship were nothing more or less than those rights guaranteed by the first eight amendments to the Constitution. If accepted, this interpretation would mean that no state could violate the liberties protected by the Bill of Rights. In other words, the proponents argued, the privileges or immunities clause "incorporated" or "absorbed" the Bill of Rights guarantees and obliged the states to honor them. Achieving this result, however, would require the Supreme Court to be quite expansive in its interpretation of the amendment.

The Supreme Court had its first opportunity to evaluate this argument in the ***Slaughterhouse Cases*** (1873). This litigation grew out of the Industrial Revolution—an economic diversification that touched the whole country. Although industrialization changed the United States for the better in many ways, it also had negative effects. In Louisiana, for example, the state legislature claimed that the Mississippi River had become polluted because New Orleans butchers dumped garbage into it. To remedy this problem (or, as some have suggested, to use it as an excuse to form a monopolistic enterprise), the legislature created the Crescent City Live Stock Landing & Slaughter House Company to receive and slaughter all city livestock for twenty-five years.

raided one such group, arrested several Socialist Party leaders, and seized their materials. Among those arrested was Benjamin Gitlow, a leader in the Left Wing Section of the party, who had produced a pamphlet titled *Left Wing Manifesto* that called for mass action to overthrow the capitalist system in the United States.

Gitlow was prosecuted in a New York trial court for violating the state's criminal anarchy law. Under the leadership of Clarence Darrow, Gitlow's defense attorneys alleged that the statute violated the First Amendment's guarantee of free speech, a fundamental right deserving incorporation under the due process clause.

In a 7–2 decision, the Supreme Court affirmed Gitlow's conviction, but it also adopted Darrow's argument and incorporated the free speech and press clauses. As Justice Edward T. Sanford wrote for the majority:

> For present purposes we may and do assume that 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. . . . Reasonably limited . . . this freedom is an inestimable privilege in a free government.

The Court went no further; once again it refused to provide a more general principle by which to identify fundamental rights.

Gitlow represents the Court's first meaningful steps toward the selective incorporation doctrine. In *Twining* the Court had declared that incorporation of some rights was possible; in *Gitlow* the justices made particular provisions of the Bill of Rights binding on the states. *Gitlow* was a portent of decisions to come, but it took the Court another twelve years to provide the next indication of what it meant by "fundamental rights." *Palko v. Connecticut* (1937), a case involving the Fifth Amendment's prohibition against double jeopardy, was the vehicle. While reading *Palko*, consider the signals it sent to lawyers across the nation. How did it help them to determine which rights were fundamental?

Palko v. Connecticut

302 U.S. 319 (1937)
http://laws.findlaw.com/US/302/319.html
Vote: 8 (Black, Brandeis, Cardozo, Hughes, McReynolds, Roberts, Stone, Sutherland)
1 (Butler)

OPINION OF THE COURT: ***Cardozo***

FACTS:

The story of Frank Palka (whose name was misspelled as *Palko* in Court documents) begins in Connecticut where he robbed a store and shot and killed two police officers. Arrested in Buffalo, New York, Palka confessed to the killings. At his trial for first-degree murder, the Connecticut judge refused to admit the confession, and, in the absence of such evidence, the jury found him guilty only of second-degree murder, for which Palka received a mandatory life sentence. State prosecutors appealed to the Connecticut Supreme Court of Errors, which reversed the trial judge's exclusion of Palka's confession and ordered a new trial. Palka's attorney objected, claiming that a new trial violated the Fifth Amendment's prohibition of double jeopardy. Nevertheless, Palka was tried and convicted again, but this time of first-degree murder, and he was sentenced to death. When his appeal to the Connecticut high court failed, Palka turned to the U.S. Supreme Court.

ARGUMENTS:

For the appellant, Frank Palko:

- The right against double jeopardy is a fundamental and immutable principle of law not to be abridged by the state.
- The right against double jeopardy is protected and made applicable to the states through the due process clause of the Fourteenth Amendment.

For the appellee, State of Connecticut:

- Double jeopardy is not a fundamental principle of law.
- The prohibition against double jeopardy is not implied by the due process clause of the Fourteenth Amendment.
- The laws of Connecticut rightfully do not allow Palko to benefit from the trial court's erroneous decision to deny the jury access to his confession.

MR. JUSTICE CARDOZO DELIVERED THE OPINION OF THE COURT.

The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the states, but solely to the federal government, creates immunity from double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment ordains, "nor shall any State deprive any person of life, liberty, or property, without due process

of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State. . . .

We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to information at the instance of a public officer. The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. . . .

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress, or the like freedom of the press, or the free exercise of religion, or the right of peaceable assembly, without which speech would be unduly trammeled, or the right of one accused of crime to the benefit of counsel. In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. This is true, for illustration, of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts. Fundamental too in the concept of due process, and so in that of liberty, is

the thought that condemnation shall be rendered only after trial. The hearing, moreover, must be a real one, not a sham or a pretense. . . .

Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unfaltering throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before. . . .

The judgment is

Affirmed.

BOX 3-1 AFTERMATH . . . FRANK PALKA

On the evening of September 30, 1935, Frank Palka allegedly shot and killed two police officers in Bridgeport, Connecticut, after he had smashed a window of a music store and stolen a radio. Palka, a twenty-three-year-old aircraft riveter, had previously been in legal trouble for juvenile delinquency and statutory rape. He was found guilty of first-degree murder after an earlier trial had found him guilty of murder in the second degree. Palka's attorneys appealed to the U.S. Supreme Court, claiming that the second trial violated Palka's Fifth Amendment right against double jeopardy.

The Court in 1937 ruled against Palka, holding that the double jeopardy clause was not binding on the states, only on the federal government. However, in his opinion for the Court, Justice Benjamin Cardozo modified the standards of the selective incorporation doctrine, making it easier for specific provisions of the Bill of Rights to be made applicable to the states. This doctrinal shift was a significant one for the expansion of civil liberties, but it did not help Frank Palka. On April 12, 1938, he was put to death in the Connecticut electric chair. Thirty-one years later, in *Benton v. Maryland* (1969), the Supreme Court reversed its position and made the double jeopardy clause binding on the states through the due process clause of the Fourteenth Amendment.

History Center, Bridgeport Public Library

Frank Palka as photographed with his mother in 1935. Palka was convicted of shooting two police officers to death, Sergeant Thomas Kearney and patrolman Wilfred Walker, who confronted him during a burglary.

SOURCE: Richard Polenberg, "Cardozo and the Criminal Law: *Palko v. Connecticut* Reconsidered," *Journal of Supreme Court History* 21, no. 2 (1996): 92–105.