

The Nationalization of the Bill of Rights: An Overview

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In the 1980s, amid heated discussion about constitutional rights, few Americans recall that for most of our history the Bill of Rights did not apply to the exercise of power by state and local governments. Until the 1920s, only state constitutions and state law prevented local governments from encroaching upon basic liberties such as freedom of speech, press, religion and the right against compulsory self-incrimination.

In 1897, however, the Supreme Court for the first time began to extend the protections guaranteed in the Bill of Rights to exercises of power by state and local governments. That first decision and others since have been based on the Fourteenth Amendment of the Constitution, adopted in 1868 in the wake of the Civil War, specifically the clause that prohibits the states from depriving any person of life, liberty or property without "due process of law." The process by which the Court has applied most of the rights in the Bill of Rights as restrictions upon state and local governments via the "due process" clause of the Fourteenth Amendment is usually referred to as the "nationalization" of the Bill of Rights.

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The Constitution that emerged from the Philadelphia convention in 1787 did not of course include a bill of rights; during the ratification struggle in the states, that omission provoked the most heated criticism of the new frame of government. To win over 1 opponents, the Federalist supporters of the new Constitution promised to consider amendments guaranteeing basic freedoms. Keeping that promise, the first Congress in 1789 submitted for ratification amendments making up the Bill of Rights, drafted largely by James Madison; the Bill of Rights formally became a part of the Constitution in 1791.

Advocates of a bill of rights feared that the new national government created by the Constitution would encroach upon personal liberties. Thus, according to the common understanding of the period, the rights specified in the Bill of Rights checked only the powers of the national government; they did not apply to powers retained by state and local governments. The U.S. Supreme Court confirmed this understanding in *Barron v. Baltimore* in 1833, and it became thereby a basic principle of constitutional law.

The Fourteenth Amendment In 1868, the ratification of the Fourteenth Amendment in the wake of the Civil War placed new restrictions upon state power. Many of its framers entertained the hope that the Fourteenth Amendment's provisions prohibiting the states from denying persons the privileges and immunities of U.S. citizenship (the "privileges and immunities" clause) or denying them life, liberty or property without due process of law (the "due process" clause) might become the bases for guaranteeing fundamental individual rights against deprivation by state and local governments.

Although Congressman John Bingham (R., Ohio) and Senator Jacob Howard (R., Mich.) had suggested during debates on the Fourteenth Amendment in Congress that the privileges and immunities clause might apply all of the Bill of Rights to the states, interpretation of that clause by the Supreme Court denied it such an important role as a source of civil liberties. In the *Slaughter House Cases*, decided in 1873, the Court held that the most basic rights of the individual had state law and state constitutions as their source, notwithstanding the addition of the Fourteenth Amendment to the Constitution, and that the privileges and immunities clause

guaranteed only a very narrow spectrum of relatively unimportant rights against deprivation by the states.

This narrow reading of the Fourteenth Amendment carried over as well to the Court's construction of the due process clause, and for a time that clause also seemed destined to become a constitutional dead letter. In 1884, in *Hurtado v. California*, the Court rejected an argument that the due process clause required the states to indict defendants in criminal cases by grand juries, a right guaranteed in serious federal criminal cases by the Fifth Amendment of the Bill of Rights; in the process, the Court adopted reasoning that denied that any right specifically guaranteed in the Bill of Rights could apply to the states via the due process clause of the Fourteenth Amendment. The *Hurtado* case therefore appeared to foreclose the possibility that the due process clause would serve as a vehicle for the extension of the rights in the Bill of Rights to the states, just as the *Slaughter House Cases* extinguished the same potential for the privileges and immunities clause.

Substantive Due Process Pressure on the Supreme Court by business interests, however, eventually undermined the reasoning adopted by the Court in the *Hurtado* case. Until 1890, "due process" had been commonly interpreted by the courts as essentially a procedural limitation on governmental power—that is, in taking action depriving persons of life, liberty or property, the government must act in a manner that was procedurally fair. "Due process" meant that individuals had to have notice of the government's action and a hearing before the action occurred. Apprehensive of pending state regulatory legislation, business interests, particularly the railroads, now began to argue that their economic and property rights deserved more than fair governmental procedures under the due process clause, that there were some governmental actions affecting "liberty" and "property" that were illegitimate under the due process clause regardless of how such actions were carried out.

Although initially reluctant to accept this concept of "substantive due process," in an 1890 case, *Chicago, Milwaukee & St. Paul Railroad v. Minnesota*, the Supreme Court finally expanded the meaning of the due process clause to embrace substantive rights as well as procedural protections. In doing so, the Court granted broad protection to property rights and also stymied regulation of commercial enterprises by the states. But the new interpretation of due process also had a fundamental impact upon the nationalization of the Bill of Rights. Although most of the rights in the Bill of Rights are procedural, the rights in the First Amendment are substantive. Without the Court's acceptance of the idea that the due process clause embraced substantive as well as procedural rights, the theoretical basis for the application of the First Amendment rights to the states via the Fourteenth Amendment would not have existed.

The breakthrough regarding the nationalization of the Bill of Rights occurred in 1897, *Chicago, Burlington & Quincy Railroad Co. v. Chicago*. In this case the Court held that the due process clause required the states when taking private property for a public purpose to give the owners just compensation—a right also guaranteed by the "just compensation" clause of the Fifth Amendment of the Bill of Rights. For the first time a right in the Bill of Rights had been applied to the states via the due process clause of the Fourteenth Amendment.

By its decision in the *Chicago, Burlington & Quincy Railroad* case, the Court implicitly repudiated the reasoning in the *Hurtado* case of 1884, in which it had held that no right specifically guaranteed in the Bill of Rights could apply to the states via the due process clause.

Fundamental Rights The Court attempted to reconcile the contradiction between the two cases when the next stage of the nationalization process opened in 1908 with the decision in *Twining v. New Jersey*. In *Twining*, the Court rejected a claim that the self-incrimination clause of the Fifth Amendment applied to the states via the due process clause, but at the

same time it attempted to formulate a general rule governing the relationship of the Bill of Rights to the due process clause. Although the rights in the Bill of Rights did not apply to the states exactly as they applied to the national government, the Court concluded, the due process clause might embrace some rights similar to those in the Bill of Rights because they were essential to the concept of due process of law. The test was this: "Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?" The *Twining* case thus opened the door to the future application to the states of some rights at least similar to some of those in the Bill of Rights.

Despite the promise of the *Twining* case, the nationalization process nevertheless stalled for seventeen years. Then, in 1925, the Court reviewed Benjamin Gitlow's conviction in New York for advocating the violent overthrow of the government, which he claimed deprived him of freedom of expression under the due process clause of the Fourteenth Amendment. While the Court affirmed the conviction in *Gitlow v. New York* in 1925, it took a major step in the nationalization process by declaring that for "present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states."

Whether the "assumption" in the *Gitlow* case was a reality remained unclear until 1931. In that year, the Court decided *Stromberg v. California* and *Near v. Minnesota* and ruled squarely that the due process clause guaranteed both freedom of speech (*Stromberg*) and freedom of the press (*Near*). "It is no longer open to doubt," Chief Justice Charles Evans Hughes wrote in the *Near* case, "that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment. It was found impossible to conclude that this essential liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property."

After the freedoms of speech and press had been nationalized, the question remained about other rights in the First Amendment. Did they come under the Court's definition in the *Twining* case, as fundamental principles of liberty and justice which inhere "in the very idea of free government" and which are "the inalienable right of a citizen to such a government"? The Court addressed these questions in short order. The right of assembly and petition, the free exercise of religion and the prohibition of an establishment of religion were held to be applicable to the states via the due process clause in the Court's decisions in *DeJonge v. Oregon* (1937), *Cantwell v. Connecticut* (1940) and *Everson v. Board of Education* (1947). By 1947, therefore, the nationalization of the First Amendment was complete, with all of the rights in that amendment having been held to be applicable to the states via the due process clause.

Criminal Procedure The third phase of the nationalization of the Bill of Rights paralleled the nationalization of the First Amendment and concerned the question of which criminal procedure protections like those in the Bill of Rights applied to the states. The Court first began to increase its attention to questions of criminal procedure under the due process clause in *Moore v. Dempsey* in 1923. At its most rudimentary level, "due process" had always required that the defendant receive adequate notice of the charges and a fair trial or hearing in criminal cases, but in *Moore v. Dempsey* the Court began to insist that state criminal trials must be fair in fact as well as form to meet the requirements of "due process." If a defendant's trial met proper formal standards but the trial was mob-dominated, the Court held in *Moore*, the state had nevertheless violated due process of law.

Following the fair trial rule that emerged from *Moore v. Dempsey*, the Supreme Court focused more closely on which elements were necessary to ensure a fair trial in fact as well as form. In *Powell v. Alabama*, decided in 1932, it ruled that uneducated, indigent black youths could not receive a fair trial in a capital case unless they were afforded the effective assistance of state-

appointed counsel in their defense. In 1936, the Court similarly held in *Brown v. Mississippi* that the admission of a coerced confession as evidence against a state criminal defendant also violated the due process clause. In neither *Powell v. Alabama* nor *Brown v. Mississippi*, however, did the Court hold that the "assistance of counsel" clause of the Sixth Amendment or the Fifth Amendment's "self-incrimination" clause applied to state criminal trials under the due process clause. Rather, the Court was focusing on the question of whether fair trials had in fact been afforded the defendants in those cases, and it concluded that the lack of counsel in a capital case and the use of a coerced confession as evidence denied the right to a fair trial.

In the *Powell* and *Brown* cases, the Court was therefore following the rule of the *Twining* case, that the due process clause imposed upon the states in the conduct of criminal trials certain rights *similar* to some of those in the Bill of Rights, but if such rights did apply to the states, they were only similar and not identical to their counterparts in the Bill of Rights. The "fair trial" rule, involving the application to state criminal trials of rights similar but not identical to some of those in the Bill of Rights, became the Court's dominant approach to issues of criminal procedure under the due process clause until 1961.

Thus, by the late 1930s, the Court had not only begun the nationalization of the First Amendment, which it would complete in 1947, but it had also started tightening the meaning of due process in state criminal trials. The Court took the occasion of its decision in *Palko v. Connecticut* in 1937 to restate the general principles it was following in the nationalization of the Bill of Rights. Speaking for the Court in the *Palko* case, Justice Benjamin Cardozo at the outset rejected the argument that the due process clause applied all the rights in the Bill of Rights to the states. If some but not all of the rights in the Bill of Rights applied to the states, the question then became one of how the Court distinguished between those rights that did apply to the states and those that did not. The answer, Cardozo said, was that the due process clause imposed upon the states those rights that were "of the very essence of a scheme of ordered liberty," such as freedom of speech, as well as those rights of criminal procedure that were "essential to the substance of a hearing." The question of whether a state criminal trial violated the due process clause, Cardozo added, was whether it involved "a hardship so shocking that our polity will not endure it." Applying this test to the *Palko* case, he concluded that the Fifth Amendment's prohibition of double jeopardy was not applicable to the states, just as the right to be indicted by a grand jury, right against compulsory self-incrimination, and jury trials in criminal and civil cases were equally inapplicable to the states via the due process clause.

The decision in the *Palko* case expressed the consensus the Court had reached regarding the nationalization of the Bill of Rights at the end of the 1930s, but it left unclear whether the First Amendment rights which had been nationalized were *similar* or *identical* to those in the Bill of Rights. Was the freedom of speech and of the press, recognized in the *Stromberg* and *Near* cases in 1931, somehow different from the freedoms of speech and press guaranteed in the First Amendment? The Court soon provided the answers. By the early 1940s, the language used in its decisions involving First Amendment rights clearly indicated that it considered the First Amendment rights applicable to the states to be identical, not merely similar, to those in the First Amendment itself. The result was, however, considerable theoretical tension between the Court's treatment of First Amendment rights and its treatment of criminal procedure rights under the due process clause.

Despite the disparate treatment by the Court of nationalized First Amendment rights and rights of criminal procedure, its adherence to the fair trial rule did yield two important decisions in the field of criminal procedure during the 1940s. In a 1948 decision in *In re Oliver*, the Court stated that the due process clause required the states to hold public criminal trials, a requirement that was also a part of the Sixth Amendment. And in *Wolf v. Colorado*, decided in 1949, the Court declared that the due process clause embraced at least "the core" of the Fourth Amendment and therefore prohibited state officers from engaging in unreasonable searches and seizures. It further held, however, that the federal exclusionary rule, which barred from trial evidence seized in violation of the Fourth Amendment, did not apply to the states. So, after *Wolf v. Colorado*, state officers were prohibited from engaging in unlawful

searches and seizures, but the evidence they obtained by such illegal measures could continue to be admitted as evidence in state criminal trials.

Total Incorporation? A 1947 case revealed that the consensus of the Court regarding the nationalization issue, expressed in *Palko*, had been shattered. In *Adamson v. California*, the majority of the Court once again rejected the proposition that the Fifth Amendment's self-incrimination clause applied to the states and reaffirmed the ruling in *Twining v. New Jersey* on that point. Justice Hugo Black dissented however, contending that a study of the historical evidence regarding the proposal and ratification of the Fourteenth Amendment had convinced him that the intent of the framers of the amendment was to apply all of the Bill of Rights to the states in the identical way in which it applied to the national government. He argued further that defining the meaning of the due process clause of the Fourteenth Amendment to embrace all of the rights in the Bill of Rights would prevent the Court from reading its own personal predilections into the due process clause.

Black's position favoring the "total incorporation" of the Bill of Rights into the due process clause had been anticipated by Justice John Marshall Harlan I during the nineteenth and early twentieth centuries, but Harlan had usually been in lonely dissent on that issue. Black's dissent in the *Adamson* case, however, attracted the support of three of his colleagues, Justices William O. Douglas, Wiley Rutledge and Frank Murphy, so that the "total incorporation" position received the largest number of votes in the *Adamson* case than it had ever received before. The majority position was vigorously defended by Justice Felix Frankfurter in a concurring opinion in the *Adamson* case, and despite Black's challenge in his dissent, the *Twining* "fair trial" approach to the nationalization of criminal procedure rights remained dominant throughout the 1950s.

Selective Incorporation

During the late 1950s, a new approach to the theory of nationalization, offered by Chief Justice Earl Warren and Justice William Brennan, began to emerge on the Court. The new theory came to be called "selective incorporation," since the theory rejected Black's argument that all of the rights in the Bill of Rights applied to the states via the Fourteenth Amendment. However, the selective incorporationists agreed that most of the rights in the Bill of Rights did apply to the states, and they agreed with Black on a crucial issue -that if a right in the Bill of Rights did apply to the states, it applied in the identical way as it applied to the national government.

The incorporationist theory of nationalization was stoutly resisted by Justice John Marshall Harlan II (grandson of the total incorporationist) throughout the 1960s. Harlan insisted that the Bill of Rights had not been intended historically to apply to the states at all. The due process clause of the Fourteenth Amendment, he conceded, did impose upon the states certain fundamental rights similar to those in the Bill of Rights, but the crucial point for Harlan was that those rights found in the due process clause had as their source the due process clause itself and were therefore only similar to but not identical to the rights in the Bill of Rights. Despite Harlan's eloquent defense of his position, he was increasingly isolated on the Court.

The breakthrough for the incorporationists came in *Mapp v. Ohio* in 1961, when a majority of the Court held that the full Fourth Amendment as well as the federal exclusionary rule, forbidding the use of illegally seized evidence in court, applied to the states via the due process clause. There followed a series of decisions in which the Court held that "cruel and unusual punishments" clause of the Eighth Amendment (*Robinson v. California*, 1962), "assistance of counsel" clause of the Sixth Amendment (*Gideon v. Wainwright*, 1963), self-incrimination clause of the Fifth Amendment (*Malloy v. Hogan*, 1964), the provisions in the Sixth Amendment guaranteeing defendants the right to confront and cross-examine

prosecution witnesses (*Pointer v. Texas*, 1965), the right to a speedy trial (*Klopfer v. North Carolina*, 1967), the right to subpoena favorable witnesses (*Washington v. Texas*, 1967), and the right to a trial by jury (*Duncan v. Louisiana*, 1968), and, finally, the double jeopardy clause of the Fifth Amendment (*Benton v. Maryland*, 1969) were applicable to the states in the identical way in which they applied to the national government. With the completion of the nationalization process in the *Benton* decision in 1969, the only rights remaining in the Bill of Rights that had not been made applicable to the states were the Second and Third Amendments, the "grand jury indictment" clause of the Fifth Amendment, the Seventh Amendment's requirements of jury trials in civil cases and the "excessive fines and bail" clause of the Eighth Amendment.

When he introduced in Congress his proposed amendments that would become the Bill of Rights, James Madison had included restrictions on state powers as well as those directed at the national government, but Congress ultimately rejected the proposed restrictions on state power. By the time the Supreme Court had concluded the nationalization of the Bill of Rights in the late 1960s, however, it had more than made up for Madison's failure to restrict the powers of the states in 1789. Indeed, the Court had through the nationalization process transformed the "due process" clause of the Fourteenth Amendment into a second bill of rights applicable to the states—a bill of rights far more salient to the liberty of the average American than the original authored by Madison and ratified by the states in 1791.

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