Lecture Notes

# Chapter 3: Incorporation of the Bill of Rights

## Annotated Chapter Outline

1. Must States Abide by the Bill of Rights? Initial Responses
   1. To achieve ratification, supporters of the new government in 1787 found it necessary to promise that a bill of rights would be added promptly to the new Constitution.
   2. James Madison submitted to the First Congress a list of seventeen articles, mostly aimed at safeguarding personal freedoms against tyranny by the federal government.
      1. 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. Because this article failed to garner congressional approval, the states never considered it.
      3. Scholars now agree that Madison viewed this amendment as the most significant among the seventeen he proposed.
      4. 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.
      5. *Barron v. Baltimore (1833)*
         1. The first case in which the U.S. Supreme Court considered nationalizing the Bill of Rights.
         2. Chief Justice Marshall’s opinion sent a clear message that the Bill of Rights was intended only to protect the people against abusive actions of the federal government, not the states.
2. Incorporation through the Fourteenth Amendment: Early Interpretations
   1. The primary purposes of this post–Civil War amendment were to secure the Union and ensure equality for Black Americans.
   2. Some lawyers viewed two of its provisions as possible vehicles for nationalizing the Bill of Rights.
   3. 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.”
      1. Supporters of applying the Bill of Rights to the states argued that the “privileges or immunities” of U.S. citizenship were those guaranteed by the first eight amendments to the Constitution.
      2. Achieving this result would require the Supreme Court to be expansive in its interpretation of the privileges or immunities clause.
   4. ***Slaughterhouse Cases (1873)***
      1. In Louisiana, the state legislature claimed that the Mississippi River had become polluted because New Orleans butchers dumped garbage into it.
      2. To remedy this problem the legislature created the Crescent City Live-Stock Landing & Slaughter-House Company to receive and slaughter all city livestock for twenty-five years.
      3. Because they were forced to use its facilities, and pay top dollar for the privilege, the butchers despised the new corporation.
      4. They formed their own organization, the Butchers’ Benevolent Association, and sued the corporation for depriving them of their right to pursue their business under the Fourteenth Amendment.
      5. After a state district court and the Louisiana Supreme Court ruled in favor of the corporation, the butchers’ association appealed to the U.S. Supreme Court.
      6. Justice Miller affirmed the judgment of the Louisiana court.
      7. Miller’s limited interpretation of the proposition privileges or immunities clause of the Fourteenth Amendment rendered that clause almost useless, a condition that has changed little since then.
      8. The Court made clear that it would not use this the privileges or immunities clause as a vehicle to apply the Bill of Rights to state governments.
   5. Attorneys turned to yet another section of the Fourteenth Amendment, the due process clause, which says, “Nor shall any State deprive any person of life, liberty, or property, without due process of law.”
      1. Advocates of nationalizing the Bill of Rights hoped to convince the Court that the term *due process of law* subsumed those substantive rights protected by the first eight amendments.
   6. *Hurtado v. California (1884)*
      1. The Court rejected that interpretation of the due process clause.
      2. The Court did not completely rule out the possibility of incorporation.
      3. The majority reasoned that because due process is but one part of the Fifth Amendment, it could not at the same time be the equivalent of the entire Bill of Rights.
      4. But the Court did hold that the due process clause protects individuals from the states encroaching on those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”
   7. ***Chicago, Burlington & Quincy Railroad v. Chicago (1897)***
      1. As Chicago began to expand, it acquired, under the principle of eminent domain, large pieces of property belonging to railroad companies and private citizens.
      2. In one county court, an interesting pattern emerged: individual property owners received almost $13,000 for their lands, and the railroad companies were given $1.
      3. Viewing this inequity as a violation of the Fifth Amendment’s guarantee that private property shall not “be taken for public use, without just compensation,” a railroad company took its case to the Illinois Supreme Court.
      4. When the judges affirmed the county court’s decision, the company appealed to the U.S. Supreme Court, asking the justices to interpret the Fifth Amendment with the Fourteenth Amendment’s due process clause.
      5. The Court ruled that the states must abide by the Fifth Amendment’s commands regarding government seizure of private property for a public purpose.
   8. ***Maxwell v. Dow (1900)***
      1. At issue was Charles L. “Gunplay” Maxwell, who robbed a Utah bank in 1898.
      2. After an eight-person jury found him guilty, Maxwell hired an experienced criminal lawyer, J. W. N. Whitecotton, to represent him in the state supreme court.
      3. Whitecotton argued that the state’s denial of grand jury proceedings and its jury trial system deprived Maxwell of his federal Fifth and Sixth Amendment rights, which should be incorporated under the Fourteenth Amendment’s due process and privileges or immunities clauses.
      4. Utah’s highest court rejected this claim, and Maxwell filed for a writ of error with the U.S. Supreme Court.
      5. The Court refused to do so and paid little heed to the incorporation argument.
3. Tests Emerge
   1. ***Twining v. New Jersey (1908)***
      1. At his trial in state court, Twining refused to take the stand, invoking his guarantee against self-incrimination.
      2. The judge allowed him to do this, but in his charge to the jury he made reference to Twining’s refusal to testify, insinuating that it implied guilt.
      3. If the federal Fifth Amendment provision against self-incrimination were applicable to the states, such comments clearly would be impermissible.
      4. The New Jersey supreme court upheld the judge’s right to highlight in his instructions to the jury a defendant’s refusal to testify.
      5. Twining appealed to the U.S. Supreme Court, asking it to incorporate the Fifth Amendment protection against self-incrimination.
      6. The Court affirmed New Jersey’s ruling against Twining.
      7. But the Court explicitly opened the door for the future application of some Bill of Rights provisions to the states.
      8. Justice Moody declared that some provisions of the Bill of Rights might be protected against state abridgment through the due process clause of the Fourteenth Amendment—those that were “fundamental” and “inalienable.”
         1. See Table 3.1.
   2. *Gitlow v. New York (1925)*
      1. To combat the “red menace,” several states, including New York, created commissions to investigate subversive organizations.
      2. Among those arrested was Benjamin Gitlow, a leader in the Socialist Party, who had produced a pamphlet titled *Left Wing Manifesto* that called for mass action to overthrow the capitalist system in the United States.
      3. 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.
      4. The Supreme Court affirmed Gitlow’s conviction, but it also adopted Gitlow’s argument and incorporated the free speech and press clauses.
   3. *Palko v. Connecticut (1937)*
      1. In 1937 the Court did not consider the protection against double jeopardy a “fundamental right,” and this ruling set the groundwork for Palka’s execution.
      2. To some extent it fleshed out fundamental rights as those “of the very essence of a scheme of ordered liberty” and “rooted in the traditions and conscience of our people.”
      3. The majority of justices adopted the doctrine of selective incorporation, from which they would determine fundamental rights on a case-by-case basis.
4. Incorporation in the Aftermath of *Palko*
   1. The Court continued to incorporate the various guarantees contained in the Bill of Rights.
      1. See Table 3.2.
      2. At first the Court limited itself to those rights contained in the First Amendment.
      3. In the 1960s it began to incorporate guarantees the Constitution affords to people accused of crimes.
   2. ***Adamson v. California (1947)***
      1. This case was an appeal that asked the Court to apply the Fifth Amendment self-incrimination clause to the states.
      2. The Court declined to incorporate self-incrimination.
   3. Other justices expressed different views.
      1. Some offered a more cramped version of incorporation.
      2. Others offered a more expansive perspective.
   4. *Duncan v. Louisiana (1968)*
      1. This case illustrates the Warren Court’s use of selective incorporation and the support for distinct approaches to incorporation.
      2. The Court continued to abide by the compromise position of selective incorporation.
      3. It applied to the states only those rights or procedures deemed fundamental under various definitions of “fundamental.”
      4. But, in practice, the total incorporation approach favored by the first John Marshall Harlan and Hugo Black has predominated.
      5. Over the years the Court has incorporated and made applicable to the states almost every guarantee contained in the Bill of Rights.
   5. *District of Columbia v. Heller (2008)*
      1. The contemporary Court has made several recent additions to the list in Table 3.2.
      2. The Supreme Court expanded the rights of gun owners against federal gun control regulations.
   6. ***McDonald v. City of Chicago (2010)***
      1. The court incorporated the guarantee in *Heller*, making it applicable to states and localities.
      2. Justice Alito held that the use of handguns for self-defense is “fundamental to our scheme of ordered liberty” or “deeply rooted in this Nation’s history and tradition.”
   7. ***Timbs v. Indiana (2019)***
      1. Justice Ginsburg used the same test to incorporate the excessive fines clause.
      2. The prohibition against excessive fines is both “fundamental to our scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition.”
   8. ***Ramos v. Louisiana (2020)***
      1. The Court took a step that Justice Fortas explicitly opposed in *Duncan v. Louisiana*.
      2. It held that state juries, like federal juries, must reach unanimous verdicts in cases involving serious crimes.