The Breakfast Club

Constitutional Minute for 19 April 2022

The Incorporation Doctrine – Did the Bill of Rights Bind the States?

From 2014 to 2018, I wrote a weekly column called "Constitutional Corner." Each essay was distributed to a (free) subscriber list. I covered a lot of constitutional ground in those five years of writing and I didn't limit each essay, as I do with Constitutional Minute, to two pages. Some of them ran to 6-8 pages of analysis and discussion. Looking back over the five years of essay titles to get ideas for this week's Constitutional Minute, I was startled to see that I hadn't written a single essay on the topic of the 14th Amendment and its associated Incorporation Doctrine. I guess it's about time I did so, seeing that the doctrine, created out of whole cloth by the Supreme Court, fundamentally changed how we view the Constitution. Here goes.

Ratified on December 15, 1791, the first ten amendments to the Constitution were intended to restrain the federal government from interfering with certain fundamental or essential rights, such as the right to free speech, the right to worship as one chooses, the right to be secure in one's person, home and property, etc. You may recall that a Declaration of Rights was not included in the original Constitution, despite the complaints of several delegates, Virginian George Mason particularly, over the omission.

James Madison drafted nineteen amendments which Congress wordsmithed down to twelve and transmitted these to the several states for ratification in September 1789. When the states "opened the mail" they found the twelve articles prefaced with a "preamble" of sorts that explained the purpose of the proposed changes:

> *"The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire,* ***in order to prevent misconstruction or abuse of its powers****, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent [sic] ends of its institution, Resolved….." (*emphasis added)

So, the Bill of Rights original purpose was not to create rights, but rather to protect existing ones by preventing misconstruction of the Constitution's words or abuse of its powers.

The Constitution empowered the federal government, not the state governments. In fact, the 10th Amendment made clear that the states (or the people) retained all the political powers not being assigned to the new federal government. So "abuse of its powers" could only apply to the federal government, not the states. The first words of what became the First Amendment (it started out as Article 3 of the 12 Articles sent to the states) reinforced this idea: "*Congress shall make no law respecting,,,"* Congress, the legislative branch of the *federal* government, was being constrained, not the state legislatures.

For the first 120 or so years under the Constitution this was the understanding: the Bill of Rights constrained the federal government in specific ways, not the state governments, in any way. The Supreme Court reinforced this view in the 1833 case of *Barron v. Baltimore*. John Barron sued

the City of Baltimore over loss of the commercial use of his waterfront property due to negligence of the city which produced a "silting up" of the water in front of Mr. Barron's very profitable wharf. The reduced water depth made berthing of large cargo ships impossible. Mr. Barron argued his property had become worthless by making his wharf unusable, in violation of the 5th Amendment's Takings Clause. In a unanimous decision, authored by Chief Justice John Marshall, the Court held that the first ten *"amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them."* Mr. Barron lost his case and was not compensated for the loss of revenue from his property.

As late as 1876,[i] the Court continued to hold to this view: that the BOR only applied to the federal government. Whatever protections citizens enjoyed not found in the BOR had to come from their state constitution.

Meanwhile, in 1868, the 14th Amendment was ratified. It created U.S. citizenship for "*All persons born or naturalized in the United States, and subject to the jurisdiction thereof."* The Amendment also stated: *"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."* (emphasis added)

Did the drafters of the 14th Amendment intend it to result in the states being held accountable for the protections found in the Bill of Rights? The evidence for this conclusion is somewhat sketchy.[ii] But even more pertinent: did the states which ratified the 14th Amendment understand that by doing so, they were making themselves accountable for the protections in the BOR? Here the evidence is even more sparse.

It would take another 57 years for the Court to come to the conclusion the Due Process clause of the 14th Amendment should be construed to "incorporate" certain protections found in the BOR as pertaining to the states through the amendment's "due process" clause.[iii] Beginning with 1925's *Gitlow v New York* (dealing with free speech) the Court has slowly but inexorably incorporated most (but not all) of the BOR's protections against the states, whether a similar protection was found in the state constitutions or not.[iv]

What makes the incorporation doctrine additionally problematic is the dubious ratification history of the 14th Amendment itself. After losing the Civil War, Southern states were required to ratify the 14th or face continued martial law, military governance and delayed re-admittance to the Union. The phrase, "ratification at the point of a bayonet," was coined and a few Northern states even reversed their previous ratifications of the 14th when they saw how the Southern states were being treated. If the 14th was not properly and legally ratified[v] the entire Incorporation Doctrine is not valid.

Should the state governments be required to adhere to the Bill of Rights? Most people, I included, will say "yes." But how should that change in interpretation be enacted, by nine non-elected black-robed gentlemen, or by an act of "We the People?" You know my answer.

Prepared by: Gary R. Porter, Executive Director, Constitution Leadership Initiative, Inc. for The Breakfast Club.
Contact: gary@constitutionleadership.org; 757-817-1216

[i] *United States v. Cruikshank*, 92 U.S. 542 (1876).
[ii] https://tenthamendmentcenter.com/2012/03/12/the-14th-amendment-and-the-bill-of-rights/.
[iii] Some scholars insist that the first use of incorporation was the 1897 case of *Chicago, Burlington and Quincy Railroad v. City of Chicago*.
[iv] https://www.law.cornell.edu/wex/incorporation_doctrine.
[v] http://www.lewrockwell.com/orig/healy1.html.