The Breakfast Club

Constitutional Minute for 30 August 2022

"Congress? Shall Make No Law? – The Incorporation Doctrine

These five words (minus the question marks) begin what would become the First Amendment of our "Bill of Rights." As we all know, the Constitution was initially ratified without a Bill of Rights. There were compelling arguments made at the Constitutional Convention both for and against adding a declaration of rights: George Mason thought it was necessary ("*it will give great quiet to the people*")[i] and would be simple to draft (Mason had been the principal author of the Virginia Declaration of Rights passed eleven years earlier). Others, like Alexander Hamilton, thought a declaration of rights superfluous ("[*W]hy declare that things shall not be done which there is no power [in the Constitution] to do*?").[ii] But after Virginia ratified the document in June of 1788 , James Madison promised the people of Orange County, VA, if they elected him he would work to add a Bill of Rights; they did and he did, making this one of the most significant political promises ever kept.

The Bill of Rights was intended to constrain only the federal government, that much is obvious from the first five words of Amendment 1 (which was actually the third article sent to the states for ratification, the first two initially failing ratification). That sentiment was confirmed in the 1833 case of *Barron v. Baltimore*; writing for a unanimous court, Chief Justice John Marshall said that the first ten "*amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.*"

So, while there would be no national religion declared and religious expression would not be curtailed in any way by the federal government, the states were free to do so. In 1791, when the Bill of rights was ratified, several states had Christian denominations declared as the official religion of the state. And the final dis-establishment of religion in a state (Congregationalism in Massachusetts) did not take place until 1833, ironically that same year as Barron v Baltimore).

The 14th Amendment was dubiously ratified in 1868. It was intended to punish the southern states for not giving their freed slaves full civil rights as citizens, especially after many in Congress began to harbor doubts about constitutionality of the Civil Rights Act of 1866. When the newly-reconstructed southern states balked at ratifying the 14th, Congress said: "Fine, you'll remain under military governorship until you ratify." "Ratification at the point of a bayonet," as some called it, worked. The second sentence of Section One of the Amendment reads: *"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."* Great, what are "*the privileges or immunities of citizens of the United State?"* Is there more to *"life, liberty or property"* than meets the eye? Yes, as it turns out, there is.

Over the last one hundred years or so the Supreme Court has found that nearly every right mentioned in the first eight amendments is apparently part of "*life, liberty, or property."*

Since 1925, the Court has been busy "incorporating" provisions of the Bill of Rights into the 14th Amendment's Due Process Clause, one by one. In 1925, it was "Freedom of speech" (Gitlow v New York), in 1931, it was "Freedom of the Press" (Near v. Minnesota). The next year your "Right to the Assistance of Counsel" found in the Sixth Amendment was incorporated (Powell v. Alabama), and so on until today only a few clauses of the Bill of Rights have ***not*** been incorporated. These include the Right to Re-Examination Clause of the 7th Amendment, your right to a jury trial in civil cases, found in the Seventh Amendment, and your right to a jury "of the State and district wherein the crime shall have been committed" found in the 6th Amendment. Perhaps the most important clause of the Bill of Rights not yet incorporated and held against the states is your right to indictment by a grand jury found in the 5th Amendment. Most states protect this right in their state constitutions, but not all of them. Oh, and your "right to not have troops quartered in your home without your consent," found in the 3rd Amendment, has only been incorporated within the jurisdiction of the 2nd US Court of Appeals (Connecticut, New York and Vermont)

Now, as I tell my Constitution Seminar students, I believe the states *should* be required to observe the protections of the Bill of Rights, the Supremacy Clause (Article 6) seems to suggest this anyway, but there is a right way and a wrong way to go about amending the Constitution and it's spelled out in Article V. The Court ignored that article when they essentially amended the Constitution to "incorporate" their made-up doctrine of "Incorporation."

The proper method of holding the states accountable to the Bill of Rights would have been to propose and ratify an amendment to the Constitution explicitly saying so. This would have provided "we the people," through our state governments, the opportunity to say whether or not we agree with the proposal. But that is a long, involved and potentially messy process, a process the Court apparently didn't have the patience to try.

In the Brutus #11 essay (countering "Publius" in the federalist essays), Anti-Federalist "Brutus" (thought to be New Yorker Robert Yates) exclaimed: *"This power in the judicial, will enable them to mould the government, into almost any shape they please*." The Supreme Court has not only "moulded" the federal government and, through the incorporation doctrine, the state governments, over these 200+ years they have molded the very fabric of American life, and not always for the better, as we will see as we delve deeper into the issue of "separation" of church and state. Consider joining us in "Lessons in Liberty."

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[i] Madison's Notes of the Convention. September 12, 1787.
[ii] Alexander Hamilton, Federalist 84, May 28, 1788.