CHAPTER 1

Incorporation and the Nationalization of Constitutional Rights*

THE BILL OF RIGHTS AS A CODE OF CRIMINAL PROCEDURE

The main source of the constitutional rights we have when encountering the police (or later at trial) is the Bill of Rights, which was ratified in 1791. The Bill of Rights is the first 10 Amendments to the U.S. Constitution. Within the Bill is the Fourth Amendment, securing our freedom from unreasonable searches and seizures and setting out the requirements for the police when pursuing a warrant. This Amendment is the major source of control over the police, and the major substance of this text.

There is no debate as to the original target of the Bill of Rights. That would be the newly formulated Federal Government. The Bill of Rights had absolutely no relevance to the operation of criminal justice

* Much of the information used to develop this Chapter was derived from three sources:

Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment.* 2nd ed. Indianapolis: Liberty Fund, 1997.

Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding." 2 *Stanford Law Review* 5 (1949).

Stanley Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Judicial Interpretation." 2 *Stanford Law Review* 140 (1949).

in the states. The spoiler alert is that, today, the Bill of Rights controls the criminal justice systems in all states (plus the federal system). What remains for consideration is what exactly was the original design and how did we get to where we are now.

IN THE BEGINNING: FROM THE ARTICLES TO THE CONSTITUTION

Following the American Revolution, the former British colonies were reluctant to establish a strong, centralized government. The fear was that such a ruling body could reintroduce the tyranny the British monarchy had imposed during the colonial period. The first governing document adopted after the successful revolution was the Articles of Confederation. The Articles reflected the fear of erecting a strong ruling body as they established a rather loosely organized and barely regulated 13 independent states. Today, a comparison would be the European Union; each state was virtually an independent nation. There was no strong central command. Realizing the obstacles this constituted to coordinated action among the states, representatives met in Philadelphia during the summer of 1787 to draft a Constitution that would initiate a new, centralized form of Federal Government over the United States. Despite the general recognition that centralization was a necessity, if not desirable, many prominent figures were concerned that this new entity would be too powerful and would interfere greatly with the internal business of the various states. These individuals were known as the anti-federalists. As the Constitution was being considered for adoption in each state (examining the State Quarters series will tell you the order in which the states adopted the Constitution), the anti-federalists were promised in the state ratifying conventions that there would soon be a Bill of Rights created that would guarantee that very serious limits would be placed on the powers of this new Federal government.

DRAFTING AND RATIFYING THE BILL OF RIGHTS

There were two developments during the drafting and ratifying of the Bill of Rights that arguably would prove to be on immense importance. Both involve James Madison, the composer and "Father" of the Bill of Rights. Madison had been charged with putting the Bill together. He consulted various bills of rights and constitutions from the 13 states. The New York constitution contained a phrase that had been used for the first time in any American document: **due process of law**. Prior to this occasion, and dating back to the days of Magna Charta (1215), the more commonly employed term was: **law of the land**. Until more recent times (late 1800s), both phrases meant the same: access to the courts to claim the existing law. Being denied the law (and rights) of the era encouraged the colonists to rebel against England. Race and gender have historically been linked with denial of the law and (equal) rights in this country. Race was also critical in terms of even gaining access to the courts so as to complain about a denial of rights. Until the 1860s Blacks had not been granted such access. Today we take having access to the courts for granted. Everybody seems to be able to sue everybody else or to force an opposing party into court, including the government. History has shown that this liberal access to the courts was not always the case, however.

Madison's choice to adopt due process (which ultimately became part of the Fifth Amendment) instead of law of the land was critical in this way. Although both terms once meant nothing more than being able to make a claim in court for **the law that *already existed*** (i.e., the law of the land), due process created an opportunity to claim much more, such as, **the law/rights that *should be* or the law/rights that one is *due*** (i.e., the **process** you're **due**). Whereas the first is static and already in place, the latter is dynamic and readily adjustable by the courts. The other major difference is that law of the land suggests that the legislature is the source of law and rights, while due process affords the courts a chance to supplement the decisions of the legislature and

to also develop law and rights. The significance of the difference cannot be understated. Madison's choosing due process contributed mightily to the Supreme Court's ability to eventually transport the Bill of Rights to the states. In short, the Court would soon determine and expand upon the process all were due vis-à-vis the police (and the courts) in the federal system and all 50 states.

The second development involved what happened when Madison presented his work to the House of Representatives. Madison had recommended that the Bill of Rights or proposed Amendments should be incorporated into the text of the Constitution. In other words, the Constitution would be edited so as to reflect an updated status, much like a student would edit a term paper on the computer today. Obsolete provisions would be erased; only current standards would remain. What is ironic is that Roger Sherman, an anti-Federalist, opposed Madison's recommendation and argued that the Amendments should be adopted as a separate series of adjustments or revisions at the end of the text of the Constitution. This way all would know not only what the Constitution holds but also what had been revised or removed from the Constitution in the past. A permanent record would exist. Sherman's position prevailed. The irony stems from the fact that the status of the Bill of Rights as a separate document assisted in its eventual incorporation (or transfer) into the operation of the states. Had the Bill of Rights been incorporated directly into the Constitution's text it would have been difficult, if not impossible, to transport the provisions into the states. Never has the Constitution itself been incorporated into state law. As an anti-Federalist, Sherman is likely spinning in his grave. His "victory" has meant an immense increase in the Supreme Court's or federal government's power. The Court has gained control over what occurs in the states by forcing the states to abide by the Bill of Rights. Sherman would likely regard this development as a federal takeover of the states' rights and prerogatives.

One interesting failure on Madison's part was the rejection of his proposed Amendment to control the states, and to prevent them from violating a right to conscience and jury trial, and to ensure freedom of

speech and the press. Madison envisioned the states as being as much a potential culprit in infringing someone's rights as would be the federal government. He was relatively alone in this apprehension, however, and his proposal was defeated. It would have been interesting, historically, if Madison had succeeded in having "his" Amendment adopted by Congress. This would-be Amendment might have sufficed (with whatever additions were perceived as necessary through time) in protecting individuals from the states and might have rendered unnecessary the eventual incorporation of most of the Bill of Rights.

PREMATURE ATTEMPTS AT INCORPORATION

It is not surprising that individuals in the states would seek the protections afforded by the Bill of Rights. Why shouldn't state governments be as controlled as the federal government? Wasn't Madison correct about the possible mischief emanating from state authorities? With so many of the provisions aimed at safeguarding those accused of crimes, defense attorneys would certainly have liked to have the same rights for their clients in the state courts (and against state police). However, the first two attempts to steer the Bill of Rights in the direction of the states were non-criminal justice matters. In 1833, in *Barron v. Baltimore* (32 U.S. 243, 1833), the petitioner to the Court requested that the Fifth Amendment's Just Compensation Clause should have equal application to the states or that the states should be similarly bound. The Supreme Court, via Chief Justice Marshall, explained that the provisions of the Bill of Rights applied only to the federal government. Twelve years later, in *Parmoli v. New Orleans* (44 U.S. 589, 1845), the Court similarly rejected an opportunity to apply the First Amendment to the states.

There were two obstacles to holding the states accountable to the Bill of Rights. The first was simply that the document was specifically aimed at the federal system only. That the Supreme Court could just as simply disregard history and its lack of authority to force the states to

answer to the Bill of Rights was unfathomable at this time. The second problem was the strength of the concept of federalism. Here, the idea is that there are two separate systems in the United States, the states and the feds. Neither controls the other, and the feds certainly do not dictate to the states. The popularity of a federal government without overwhelming powers was still evident until the mid-Nineteenth Century.

THE CIVIL WAR AND ITS AFTERMATH

A War Between the States and modernization will combine to change the notion that the Bill of Rights should not be relevant to the states. States' rights was dealt a serious blow when the South and its attempt to secede so as to preserve slavery were defeated in the Civil War. The South's reaction to defeat would ultimately contribute to a further diminishing of state autonomy, and to the ultimate extension of the Bill of Rights to the states.

The post-war introduction of the **Black Codes** launched this extension. The Black Codes were an attempt to impose economic slavery upon the newly liberated black person in the South. Although the Thirteenth Amendment had prohibited slavery during the War and the North's victory certainly meant physical slavery could not persist, southern states quickly responded with the Black Codes so as to lessen the extent of true liberty for blacks. There were limits on property ownership, bound apprenticeships and labor restrictions that guaranteed blacks would be beholden financially to whites in the south. Lincoln's party in the North was irate and engineered the passage of the **Civil Rights Act of 1866** in response. This Act granted citizenship to blacks and extended basic business rights as well. The 1866 Act directly negated the Black Codes, but it was nevertheless a mere act of Congress that would be subject to repeal by a subsequent Congress. In order to give the Act more permanence, the Republicans devised the **Fourteenth Amendment** that would guarantee blacks basic business rights (the mission of the Civil Rights Act), and grant citizenship to blacks at the same time. The Dred Scott decision (*Dred Scott v. Sandford*,

60 U.S. 393, 1857) had denied that blacks, even free ones in the North, were citizens. This decision was still "good" law, despite the Thirteenth Amendment and the outcome of the Civil War, and despite the Civil Rights Act, too, since it was merely a legislative act of Congress (which cannot overcome a Supreme Court decision). Thus, the first sentence of the Fourteenth Amendment negates the *Dred Scott* decision since a Constitutional Amendment can overrule a Supreme Court holding. The remaining provisions establish the basic business rights and protection of same; the Amendment was all about race. The Fourteenth Amendment states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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 equal protection of the laws.

The Amendment has three clauses that are directed at the states, particularly the southern states, and permit federal oversight of state operations. The ***privileges or immunities*** clause refers to the basic business rights (to enter into contracts, to own property, to sue, etc.) to be afforded or at least not to be denied blacks; it does not include political rights, such as the right to vote or to hold public office. The main body of the Constitution (Article IV) has the same privileges and immunities clause within it (and the Articles of Confederation had the same provision), thus limiting the powers of the federal government to invade the basic business rights of U.S. citizens***. Due process*** would establish for the first time in this country the right of blacks to proceed to court in which they could claim the ***equal protection*** of those basic business rights. Prior to this time blacks were not empowered to take issues and claims to court; they were denied equal protection of all laws. The Amendment constitutionalized the Civil Rights Act of 1866 and gave the federal government a formidable weapon against southern

states in the event that they might attempt another method of economic subjugation of blacks. The Amendment also seemed to deal another blow to states' rights since it would appear to allow the U.S. Supreme Court to negate state actions that would violate the Amendment's provisions.

The records of both the debates in Congress during the drafting of the Amendment and the discussions in the states as they were considering ratification of the Amendment do not show any understanding that the Bill of Rights was being incorporated into state operation via the Fourteenth Amendment's adoption. There would have been extensive coverage of the tremendous change in state governance had incorporation been the design of the Fourteenth Amendment. Nearly all the states would have been simultaneously and extensively amending their own constitutions since all would have had at least one provision inconsistent with the many within the Bill of Rights. Moreover, southern states were told that ratifying the Fourteenth Amendment was a prerequisite for readmission to the Union and that their state constitutions had to be compatible with the federal one. If incorporation was a goal of the Amendment, then southern states should have been denied readmission to the Union since their state constitutions were not compatible.

THE SHORT AND LONG HISTORY OF THE FOURTEENTH AMENDMENT

Within five years of its ratification, The Fourteenth Amendment was squarely before the Supreme Court in the *Slaughter-House Cases* (83 U.S. 36, 1873). The state of Louisiana had granted a monopoly to a single company for the slaughter of livestock in the city of New Orleans. The monopoly seemed to directly contradict the privileges and immunities provisions of the Amendment since the right of individuals to conduct business in that city was compromised by a state statute. Nevertheless, the Court determined (in a 5–4 vote) that the principal purpose of the Amendment was to declare freedom for and to extend

civil rights to blacks, and to protect the privileges and immunities of citizens of the U.S., not the various states. The decision resulted in effectively excising the Privileges and Immunities Clause from the Amendment; the provision still exists, it just has no meaning. What is remarkable is that the Amendment was stripped of its substance. This opened the door, eventually, for two possible developments: Privileges and Immunities could assume another meaning or another clause, such as Due Process, could be substituted as the substance of the Amendment.

Around the turn of the Nineteenth and Twentieth Centuries, a number of attorneys wanted their state clients to enjoy the same rights that their federal clients enjoyed due to the Bill of Rights; these rights ranged from criminal justice examples (such as indictment by grand jury to the protection against self-incrimination and cruel and unusual punishment to peremptory challenges to jurors) to non-criminal justice elements (such as First Amendment rights). When it was first argued that the Privileges and Immunities Clause was meant to capture all the rights enumerated in the Bill of Rights (*Spies v. Illinois*, 123 U.S. 131, 1887) the Supreme Court ignored the claim. On repeated occasions after that, in pursuit of prohibiting the states from imposing cruel and unusual punishment, the Court specifically rejected the claim that privileges and immunities were intended to have such an interpretation (*In re Kemmler*, 136 U.S. 436, 1890; *McElvaine v. Brush*, 142 U.S. 155, 1891; *O'Neil v. Vermont*, 144 U.S. 323, 1892). If the privileges and immunities clause was supposed to be an equivalent to the Bill of Rights, then the Bill of Rights would not have been needed since its substance was already covered in the Article IV clause. Nevertheless, three Justices in the *O'Neil* decision dissented and stated the privileges and immunities were meant to represent the Bill of Rights provisions; two of these Justices had not held such a position when the issue had been before the Court in previous cases. A final attempt to have privileges and immunities interpreted as the right to a grand jury indictment and a trial jury of 12 members (instead of eight) was unsuccessful in *Maxwell v. Dow* in 1900 (176 U.S. 581).

The more common contention adopted by the lawyers seeking the Bill of Rights enforcement in the states was that the Due Process Clause of the Fourteenth Amendment was substantive in nature and not merely a matter of procedure (i.e., in establishing a guarantee to have access to the courts). Instead, they insisted that Due Process was meant to incorporate the Bill of Rights and to force the observance of these rights in the states. On multiple occasions, the Supreme Court rejected these petitions and offered what seemed to be unassailable logic in defense of that conclusion. The logic is contained in what has been identified as the ***Doctrine of Nonsuperfluousness***. The Doctrine holds that the Due Process Clause of the Fourteenth has to mean the same as the Due Process Clause of the Fifth Amendment within the Bill of Rights. The latter Due Process provision cannot be considered as an abbreviation of or synonym for the numerous other provisions in the Bill of Rights or it would be redundant or superfluous. In other words, if all the other rights were actual versions or manifestations of Due Process, there was no need to mention Due Process itself or again—the other rights already said as much. Madison must have had another right (such as access to the courts) in mind when he put Due Process in the Fifth Amendment, just as the Framers of the Fourteenth Amendment must have had the same procedural notion (and something other than the Bill of Rights) in mind when they drafted the Fourteenth Amendment.

Accordingly, the Court decided that, unlike the federal system, California does not have to provide for grand jury indictment (a Fifth Amendment right) before it can convict someone of murder in *Hurtado v. California* (110 U.S. 516, 1884). While the Doctrine of Nonsuperfluousness was cited with approval in denying the claim that the Fifth Amendment provision was incorporated to the states, the Doctrine was dealt a blow of sorts. Possibly in an attempt to warn the states that it would not look the other way if a state were to act outrageously in dealing with the criminally accused, the *Hurtado* Court reiterated a phrase from a 1926 case (*Herbert v. Louisiana*, 272 U.S. 312) that Due Process would prohibit actions that violate "fundamental

principles of liberty and justice." At the same time that the Court was announcing that it was not forcing states to abide by the Bill of Rights provisions *en masse*, it held that Due Process had some (albeit minimal) relevance to prosecuting criminals in the states. Even still, the Court consistently rejected claims that Due Process was meant to include peremptory challenges to jurors (*Brown v. New Jersey*, 175 U.S. 172, 1899) and self-incrimination (*Jack v. Kansas*, 199 U.S. 372, 1905; *Barrington v. Missouri*, 205 U.S. 483, 1907; *Twining v. New Jersey*, 211 U.S. 78, 1908).

The Doctrine of Nonsuperfluousness had been undermined to a considerable extent when, in 1897, the Court declared that the Just Compensation Clause of the Fifth Amendment was incorporated into the states via the Fourteenth Amendment Due Process Clause in *Chicago, Burlington and Quincy Railroad v. Chicago* (166 U.S. 226, 1897). Had the Privileges and Immunities Clause not been negated by the *Slaughter-House Cases*, this illegal seizure of land could have been remedied without resorting to the Due Process Clause and incorporation. Regardless, between the 1920s and 1940s, the Supreme Court incorporated the free speech (*Gitlow v. New York*, 268 U.S. 652, 1925), press (*Near v. Minnesota*, 283 U.S. 697, 1931), assembly (*DeJonge v. Oregon*, 299 U.S. 353, 1937), and religion (*Cantwell v. Connecticut*, 310 U.S. 296, 1937) provisions form the First Amendment via the Due Process Clause of the Fourteenth Amendment. It was only a matter of time before wholesale incorporation would occur.

THE DEVELOPMENT OF MODERN INCORPORATION THEORY

While parts of the Bill of Rights were being incorporated, the Supreme Court held fast against including criminal justice provisions within this list. Nevertheless, there were two occasions in the 1930s in which the Court applied its *fundamental to liberty and justice* standard in reversing state convictions. Both involved black defendants and both prosecutions were in the South. In *Powell v. Alabama* (287 U.S. 45, 1932), the Court ruled that counsel had to be provided to indigent defendants

who were facing a capital prosecution. In *Brown v. Mississippi* (297 U.S. 278, 1936), the Court held that coerced confessions (in this case the accused was brutally beaten until he confessed) cannot be the sole basis of a conviction. Interesting is that the Court based these rulings on Due Process itself and not on the right to counsel and the protection against self-incrimination from the Fifth and Sixth Amendments, respectively. During the same decade the Court refused to incorporate the Fifth Amendment's Double Jeopardy provision (*Palko v. Connecticut*, 302 U.S. 319, 325, 1937), but adjusted the standard for potential incorporation so as to include any right that was viewed as "implicit in the concept of ordered liberty." The Court explained that the First Amendment rights that had been incorporated were considered "preferred freedoms," but that criminal justice-oriented rights were not. Similarly, while the right to counsel was guaranteed in capital prosecutions, the right of the indigent to receive counsel in a non-capital case would occur only if the lack of counsel would result in the defendant's being "deprived of a fair trial" (*Betts v. Brady*, 316 U.S. 455, 1942). Later, in *Adamson v. California* (332 U.S. 46, 1947), the Court ruled that the Sixth Amendment right to a jury trial was not binding on the states, since a jury was not essential to securing a fair trial. In this case, however, there were signs of a changing tide on the Supreme Court in favor of adopting incorporation of the criminal justice provisions in the Bill of Rights: four Justices gave notice that they favored a view of the Due Process Clause as incorporating the Bill of Rights. Critical, here, was that Justice Black had changed his opposing incorporation in the *Palko* case to supporting it in *Adamson*. As we will see in Chapter 2, a serious change in the Court's thinking about incorporation was only a few years away (the story about the development of incorporation will continue there).

The incorporation of the criminal justice aspects of the Bill of Rights was achieved mostly during the 1960s under the auspices of the Warren Court. The case that launched this development was the well-known, *Mapp v. Ohio* decision (367 U.S. 643, 1961), which we will examine in greater depth in the next chapter. *Mapp* involved the adoption of the exclusionary rule for the states. For the rest of the

decade the Court brought one criminal justice provision after another from the Bill of Rights into state criminal justice, affecting state police, courts and corrections. The provisions/rights that were incorporated were chosen by the Supreme Court due to their being perceived as *fundamental to the American system of justice*. Only two of the criminal justice rights were not and still have not been incorporated: bail and the right to a grand jury indictment. The Court has also proceeded beyond the parameters of the Bill of Rights and has incorporated provisions not included in the Bill of Rights, such as the exclusionary rule and the *Miranda* ruling (see Chapter 9, *infra*.); the requirement to prove guilt beyond a reasonable doubt is also an example. What exists today in terms of the rights that have been enforced against the states is called: ***selective incorporation plus***.

That is, *some but not all* of the Bill of Rights provisions have been incorporated (the selective part), while provisions *not in the Bill of Rights* have been incorporated as well (the plus part). While logic is supposedly essential to the field of law, this approach to incorporation is illogical. If the Fourteenth Amendment Due Process Clause was meant to incorporate the Bill of Rights (contrary to what this text has portrayed), then how is the incorporation not total? How can it be only selective, meaning the Court has simply chosen to incorporate some, while rejecting the incorporation of other rights? This makes incorporation arbitrary or reliant upon Supreme Court approval instead of constitutional requirement. Either the Fourteenth Amendment was meant to incorporate the Bill of Rights or it wasn't; it simply cannot be that it was meant to incorporate only part of the Bill of Rights. That's like being only somewhat pregnant. Moreover, again assuming that the Fourteenth Amendment was meant to incorporate the Bill of Rights how could the Fourteenth Amendment be meant to have incorporated measures not even in the Bill of Rights? That puts no limit to what can be incorporated, except for needing a majority or sufficient votes of the Supreme Court Justices.

FACTORS EXPLAINING THE DEVELOPMENT OF INCORPORATION

Incorporation of the Bill of Rights has likely had some positive results (cleaning up the criminal justice system) and some negative results (consolidation of immense power in the hands of a few Justices; it can reasonably be said that five people—a majority of the Court—run the country). At the same time it is understandable how incorporation happened.

- States' rights had been dealt a significant blow via the outcome of the Civil War.
- The Reconstruction Amendments (13th, 14th, and 15th) reinforced the vulnerability of States' rights while granting meaningful rights to blacks.
- The Fourteenth Amendment had been stripped of its intended substance via the outcome of the *Slaughter-House Cases*.
- There was a huge gap between the rights one had in state versus federal criminal justice systems, which made less and less sense as time went on.
- Both privileges and immunities and due process had a vague and malleable meaning.
- As the notion that everyone is entitled to a "fair trial" caught on (and that neither the federal nor the state system should deprive a defendant of such) it was easy to equate due process with a fair trial.
- States also brought incorporation upon themselves. They engaged in some egregious behavior, such as seizing property without just compensation, repressing speech, press, and religion, and, sometimes handling those accused of crime in horrific ways.

- The U.S. Supreme Court saw a need to intervene so as to clean up state operations, and lacked any other avenue by which to prevent state misbehavior.
- Society had modernized, especially after the mid-Twentieth Century. The idea of federalism was fading, if not completely disappeared; citizenship was not seen as being dual (U.S. vs State).
- The notion that one has rights protecting him/her from federal law enforcement but not from state/local law enforcement seemed irrational.

The composition of the Supreme Court changed dramatically from the 1950s on. An increasing number of Justices not only saw the need for intervention, but also endorsed the idea that incorporation was indeed the original goal of the Fourteenth Amendment.

Box 1-1: Expanding Police Powers During the Last 4 Decades Has Taken a Variety of Forms

Establishing many limits/exceptions to ER (Chapter 2)

Reducing REP (Reasonable Expectation of Privacy) (Chapter 4)

Terry doctrine (Chapter 5)

Establishing many limits/exceptions to *Miranda* (Chapter 9)