The Bill of Rights and the Fourteenth Amendment controversy

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David Ward Rein · 18 days ago

In last week's lecture, Professor Amar emphatically stated that the Fourteenth Amendment made all of the Bill of Rights applicable to the States. However, in *The Slaughterhouse Cases* of 1873 -- which was the first time the Supreme Court of the United States interpreted the Fourteenth Amendment -- the Court, by a five to four vote, resoundingly rejected the idea that the Fourteenth Amendment incorporated all of the Bill of Rights onto the States.

Quoting from Mr. Justice Miller's majority opinion, "The language [of the Fourteenth Amendment] is, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States.'* It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose. Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment...."

The four dissenters, including Chief Justice Chase, strongly disagreed with the Court's rationale. The dissent thought the Bill of Rights should uniformly apply to the States. However, in the one hundred and forty one years since this case was decided, there have never been the five votes necessary to make the dissenters' view -- and Professor Amar's view -- the majority Opinion of the Court and thus the law of the land. This is why we have seen over many decades the ***selective*** incorporation of the Bill of Rights onto the States. Total incorporation in one fell swoop has been the unattainable dream of progressives on the Court, including Justices Hugo Black and William O. Douglas.

Personally, I agree with the dissent in *The Slaughterhouse Cases,* Justices Black and Douglas, and Professor Amar. But the majority opinion from 1873 has never been overruled by the Court and never been corrected through congressional act or constitutional amendment -- an amendment to amend the

amendment, so to speak. Justice Miller's majority opinion is standing precedent -- the law of the land -- and must be accorded due deference, even if we strongly disagree with it.

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Joel Kovarsky · 18 days ago

The incorporation doctrine does not appear to be anything near settled precedent (based on my very limited understanding). It came up in another thread: Is the State of Arizona trying to abridge free speech and association? The doctrine is the source of significant constitutional debate:http://law2.umkc.edu/faculty/projects/ftrials/conlaw/incorp.htm . A number of interpretations have been described, including no incorporation, selective incorporation, selective incorporation plus, and total incorporation plus. This also gets to a discussion of "privileges and immunities" stemming from Dred Scott. From that latter site:

"Note that there are several possible positions that could be taken with respect to the incorporation debate. First, one could argue that the Fourteenth Amendment (either through the P & I Clause or the Due Process Clause) made the specific provisions of the Bill of Rights enforceable against the states and no more. This was the view argued for by Justice Black. Second, one could argue that the provisions of the Bill of Rights are essentially irrelevant to interpretation of the Fourteenth Amendment, and that violations of the Due Process Clause are to be determined by a natural-law-like tests such as "Does the state's action shock the conscience?" or "Is the state's action inconsistent with our concept of ordered liberty"? This is the "No Incorporation" Theory advanced by Justice Frankfurter, among others. Third, one could take a position such as Justice White did in *Duncan* that the Fourteenth Amendment incorporates certain fundamental provisions, but not other non-fundamental provisions. This view is often called the "Selective Incorporation" Theory. Finally, one could adopt either a "Selective Incorporation Plus" view or a "Total Incorporation Plus" (see Justice Murphy's view in *Adamson*, for example) view. These views hold that in addition to incorporating some or all of the provisions of the Bill of Rights, the Fourteenth Amendment also prohibits certain other fundamental rights from being abridged by the states."

They also have links to several relevant cases, spread from 1873 to 2010:

Cases
The Slaughter-House Cases (1873)
Adamson vs California (1947)
Duncan vs. Louisiana (1968)
McDonald vs Chicago (2010)

I am not sure how Prof. Amar interprets these varied circumstances, and maybe one of the TAs will weigh in.

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Harvey Randall · 18 days ago

Article IV, Section 2 of the Constitution provides, in pertinent part, that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States while the second paragraph of Article VI provides that "This Constitution [and presumably any amendments thereto] .... shall be the supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

I suggest that these provisions are incorporated by implication in Section 1 of the Fourteenth Amendment notwithstanding the narrow interpretation of Justice Miller to the contrary.. Although both the majority opinion and the dissent reference Article IV in their respective analysis of the case in terms of "Privileges and Immunities," conspicuous by its absence is any reference to the Supremacy Clause, Article VI, in these opinions.

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Joe Caro · 11 days ago

Harvey, I believe your take on this is pertinent to the topic. From the wording in the Constitution it has always been clear that people are both citizens of the state in which they reside AND citizens of the United States and I suggest it was worded this way to recognize that there were indeed different powers and jurisdictions of the Federal and State governments.

Your pointing out the absence of reference to the supremacy clause is an interesting observation in that the court did NOT, evidently, choose to address it, thus letting it to stand as a precept.

I believe that the notion that constitutional "civil rights" accrue to all citizens no matter what state they reside in, AND that the states themselves cannot abridge these was a necessary addition to the constitution. I suppose one could take the position that "it goes without saying" that the same restrictions upon the central government in this regard must also apply to the states was just not enough as some states clearly believed they could abridge the rights of their citizens where the feds could not. That is what made the 14th a necessity, it had to be said.

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Edward L Dunlay · 18 days ago

The most prominent right, which has not been recognized as being incorporated, is the right to a grand jury before one can be prosecuted on criminal charges. Prof. Amar readily acknowledges this on his book.

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 Susan Ye Laird Signature Track · 17 days ago

I find Prof. Amar propsal of jury reforms in his book 'The Constituion and Criminal procedure - first principles' contains some revolutionary ideas ! And the best of his approach is to tie 'jury' duty with 'voting right' ... Why not? The Supremacy of 8000 democratically structural self-governance will be reduced to nothing if jury is no longer composed of 'revolutionary' minded citizen and son of guns.

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 Susan Ye Laird Signature Track · 17 days ago

Here's several paragraphs from Prof. Amar's book 'The Bill of Rights- Creation and Reconstruction' (copyright 1998) :

"The relationship between the original Bill of Rights and the Fourteenth Amendment has typically been framed by the question of whether the latter "incorporates" the former against states, and if so, how. Although this is one of the most important questions in all of constitutional law, no dominant answer has emerged, and with good reason. Each of the three main approaches - Hugo
Black's "total incorporation" theory, William Brennan's "selective incorporation" model, and Felix Frankfurter's "fundamental fairness" doctrine contains both a deep insight and a fatal flaw. I shall therefore propose a synthesis of their three divergent approaches to break the current stalemate.

This synthesis, which I shall call 'refined incorporation," begins with Black's insight that _all_ of the privileges and immunities of citizens recognized in the Bill of Rights became 'incorporated' against states by dint of the Fourteenth Amendment. But not all of the provisions of the original Bill of Rights were indeed rights of citizens. Some instead were at least part rights of states, and as such, awkward to fully incorporate _against_ states. Most obvious, of course, is the 10th Amendment, but other provisions of the first eight amendments resembled the 10th much more than Justice Black admitted. Thus there is deep wisdom in Justice Brennan's invitation to consider incorporation clause by clause - or more precisely still, right by right - rather than wholesale. But having identified the right unit of analysis, Brennan posed the wrong question: Is a given provision of the original Bill a fundamental right? The right question is whether the provision guarantees a privilege or immunities of individual citizens rather than a right of states or the public at large. .... certain alloyed provisions of the original Bill - part citizen right, part state right - may need to undergo refinement and filtration before their citizen-right elements can be absorbed by the 14th Amendment. And other provisions may become less majoritarian and populist, and more libertarian, as they are repackaged in the 14th Amendment as liberal civil rights - 'privileges or immunities" of individuals - rather than republican political 'rights of the people" as in the original Bill.

...

Since I am not a natural born US citizen, although my road to citizenship was fairly uneventful, my employment experience with US private and public employer's undisputed discretion of terminating their dislike on dissenting value was my growing pain of becoming a law-abiding citizen. I find this book on 'Bill of Rights' most illuminating at differentiating 'citizen, state sovereignty and public at large', liberal civil rights vs. republican political rights etc. Judging democratic value of US Constitution is far more revealing when certain international outcry of human rights protection in war zone vs. civil equality and employment of public at large which including non-citizen and illegal immigrants within US border.

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Michael Blanco · 15 days ago

I think *Slaughter-House* is a fascinating decision because it made the right decision based on the right premise applied in the wrong way. The decision is correct: the police powers of Louisiana gave it every right to protect the safety of the people of New Orleans (of course, downstream of New Orleans, you're on your own!). The incorporation of the The Crescent City Live-Stock Landing and Slaughter-House Company, at least in its incorporation provisions, allowed butchers to pursue their trade under reasonable government regulation. So, no unreasonable infringement of fundamental rights was afoot. Further, the Court was correct to distinguish the privileges and immunities of national citizenship from state citizenship. Even today, if states want to raise the bar of fundamental rights or equal protection (no one disputes that states have the right to extend marriage rights to same-sex couples), they can do so. They simply can't lower the bar on federally-recognized fundamental rights or equal protection. Where the Court went wrong was to limit the privileges and immunities of national citizenship to *habeus corpus*, the use of navigable waters, and the like. I agree with Professor Amar that the privileges and immunities intended by the 14th Amendment were much broader, broader than even the Bill of Rights (e.g., privacy, child rearing, and so on). Contrary to Justice Miller, the 14th Amendment **was** intended to be a perpetual censor upon all legislation of the states. To be fair to Miller, he gave a slight nod to the idea that the Bill of Rights could be the basis of the limitation of state police power.

"It may, therefore, be considered as established that the authority of the legislature of Louisiana to pass the present statute is ample unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited." 83 U.S. 36, 66 (1872)

However, what he balked at was the idea that the 14th Amendment changed the entire structure of federalism (which it of course did not). The 14th Amendment gave federal courts the power to be a censor on state legislation, but it was a censor that still had to operate within the overall structure of federalism.

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 Alec D. Rogers · 10 days ago

I think it's fair to say that Slaughterhouse has been de facto overturned to a large extent, as we've used "substantive due process" to accomplish with the privileges and immunities clause arguable should have.

Professor Amar would likely take issue with the OP: The Constitution - not Slaughterhouse - is the "supreme law of the land".

At least one Justice, Justice Thomas, agrees with Prof. Amar:

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In a clear pitch to Justice Thomas, the brief quotes his dissent in Saenz, and comments:
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"Restoring the Privileges or Immunities Clause to its proper place in the constitutional structure would have the advantage of tethering this Court's rights-protecting jurisprudence much more closely to the Constitution's text and history" than other parts of the Fourteenth Amendment have.

One of the reasons that Justice Thomas has suggested a possible reexamination of*Slaughterhouse* is a concern, apparently shared by other Justices and conservative commentators, to rein in the use of other clauses in the Fourteenth Amendment in the Court's jurisprudence.

http://www.scotusblog.com/2009/07/might-it-happen-slaughterhouse-overruled/

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Michael Blanco · 10 days ago

No doubt *Slaughter-House* has been largely defanged via substantive due process, and the reasons you cite for Thomas' and other conservative jurists' desire to return to the Privileges or Immunities clause are spot on. I found Thomas' vote to incorporate the 2nd Amendment under the Privileges or Immunities clause in *McDonald* interesting. The plurality obviously voted to not "disturb the *Slaughter-House* holding" (so some kind of residuum of *Slaughter-House* exists for the Court) under *stare decisis*, which, as is well known, means little to Thomas. While Thomas refused to speculate on the impact of incorporating under Privileges or Immunities v. substantive due process in *McDonald*, who can doubt that the prospect of differentiating the rights of "citizens" under Privileges or Immunities v. the rights of "persons" (where non-citizens are included) under solely procedural due process would be tantalizing to some conservative jurists (and perhaps be frightening to some liberal ones!). Not that they would get away with it fully since some sort of substance will, I think, always be found in the Due Process clause even if the Privileges or Immunities clause is revived. But even some sort of difference would be a victory. Citizens might have the 2nd Amendment while both citizens and non-citizens would get Establishment/Free Expression clause protections (but perhaps not the same free speech protections, say, something less than *Brandenburg* when the possibility of violence was part of the fact pattern or more constrained time, place, and manner restrictions for non-citizens - who knows, just speculating).

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