South Carolina Law Review

Volume 16 | Issue 4 Article 5

1964

Constitutional Law, self-incrimination

William B. Regan

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

 Part of the Law Commons

Recommended Citation
William B. Regan, Federal Standard Required of the States by the Due Process Clause of the Fourteenth Amendment, 16 S. C. L. Rev. 520 (1964).

This Note is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.

CONSTITUTIONAL LAW—SELF-INCRIMINATION—FEDERAL STANDARD REQUIRED OF THE STATES BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

In June of 1964, the Supreme Court of the United States held that the privilege against self-incrimination found in the Bill of Rights is a fundamental right which each state must guarantee to its citizens. Speaking through Justice Brennan, the Court said that the petitioner who had been imprisoned for refusing to answer questions in a state gambling investigation had been denied the due process of law required by the Fourteenth Amendment.

The case involved a Connecticut citizen who had refused to answer any questions concerning the circumstances surrounding his arrest and conviction in 1959 for pool-selling. The Connecticut Supreme Court of Errors held that the privilege could not be properly invoked, since the petitioner was immune to prosecution for the activities in which he had been engaged due to the running of the one year statute of limitations, and also because he had failed to show how the revelation of his relationship with another would incriminate him. In reversing, the Supreme Court held that, henceforth, the courts must apply the federal standard when the privilege is invoked, and that, measured by that standard, the petitioner had been denied due process. The state was attempting to find out who ran the gambling operations in question, and, had the petitioner answered, he might have provided a necessary link in a chain which could have connected him to a crime for which he could still be convicted (*e.g.*, conspiracy) or it may have acted as a waiver with respect to his relationship with a possible criminal. *Malloy v. Hogan*, 84 Sup. Ct. 489 (1964).[1]

In extending the Due Process Clause of the Fourteenth Amendment to include a procedural right which some feel is not and never has been fundamental, the Court has taken a significant step toward what must ultimately be the total inclusion of every right of citizenship in that Amendment—unrestrained even by the limits of the Bill of Rights. The decision does not represent a new departure, but rather another stone in the wall of protection which the Court has been erecting around what it

1. In separate dissenting opinions, Justices Harlan and Clark, and Justices White and Stewart registered their disapproval with the decision.

Published by Scholar Commons, 2020

deems to be the fundamental rights of the individual. The decision is in keeping with the theory under which the Court has operated for the past half-century.

In order to place this step in its proper perspective, it is necessary to review briefly the development of this area of constitutional law. Prior to the ratification of the Fourteenth Amendment in the aftermath of the Civil War, the Bill of Rights —and the separate rights therein—had no application to the states. The first eight amendments were drawn up by the Founding Fathers as limitations on the central government. They apparently felt it unnecessary and politically inexpedient to place similar restrictions on the states. In fact, an amendment proposed by Madison to deny to the states the power to violate "the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases"[2] was defeated in the First Congress. The clear intent of the drafters was affirmed in 1833, in *Barron v. Baltimore*,[3] when the Court, speaking through John Marshall, held that the provision in the Fifth Amendment proscribing the taking of private property for public use without just compensation was intended "solely as a limitation on the exercise of power by the government of the United States and . . . not applicable to the legislation of the states."[4] The Bill of Rights, the Chief Justice said, was ratified as "security against the apprehended encroachments of the general government—not against those of the local government."[5]

By the time of the Civil War this proposition was generally accepted, but the war's end brought the ratification of the Fourteenth Amendment, and the whole issue was reopened. Since the intent of the Congress which framed the Reconstruction Amendment was not so clear as that expressed by the drafters of the Bill of Rights, the battle has raged for a century as to just what was intended. In an appendix to his dissenting opinion in *Adamson v. California*,[6] Justice Black set out in detail the pro side of the argument. He felt that the framers meant to and did

2. Quoted in Warren, *The New 'Liberty' Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 434 (1926). In the ensuing debate Thomas Tucker of South Carolina answered the proponents of the amendment that it would "be much better . . . to leave the State Governments to themselves and not to interfer with them more than we already do. . . ." *Ibid.*

3. 32 U.S. (7 Pet.) 243 (1833).

4. *Id.* at 250-51.

5. *Id.* at 250.

6. 332 U.S. 46, 92 (1947). For a refutation of Justice Black's view, see Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

Regan: Constitutional Law, self-incrimination

include the Bill or Rights in the Due Process Clause of the Amendment. Justices Murphy and Rutledge, while agreeing that the Due Process Clause included the entire Bill of Rights, felt that it went further, in that it was not "entirely and necessarily limited by the Bill of Rights."[7]

Although the Court has never accepted this view that the Bill of Rights applies to the states in its entirety, it lost little time in applying a gloss to the Due Process Clause of the Amendment[8] which could, and undoubtedly will, do the job that both the drafters and Justice Black failed to do—apply the entire Bill of Rights, or all of it which is relevant to our times, to the states.

In *Chicago B. & Q. R. Co. v. Chicago*,[10] the Court held that the action of a state in taking private property for public use without just compensation was "wanting in the due process of law required by the 14th Amendment of the Constitution. . . ."[11] Shortly after the turn of the century, while holding that a state need not guarantee the freedom from self-incrimination, the Court stated that:

> It is possible that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law . . . If this is so, it is not because the rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law.[12]

In *Holden v. Hardy*,[13] a decade earlier, in speaking of due process the Court said that it was sufficient to say "that there are certain immutable principles of justice which inhere in the very

7. Adamson v. California, *supra* note 6, at 124.

8. It became apparent quite early that the Privileges and Immunities Clause of the Fourteenth Amendment would hold little protection for the individual against state legislation or action. Maxwell v. Dow, 176 U.S. 581 (1900); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). "Only a few scattered rights of a national character . . . are considered embodied in the . . . clause; it has become in effect a last resort for hopeless constitutional claims." 58 YALE L. J. 268, 269 n 9 (1949).

9. It is doubtful that the Court would include the provision of the Seventh Amendment requiring a jury trial in suits where the value in controversy exceeds twenty dollars.

10. 166 U.S. 226 (1897).

11. *Id.* at 241.

12. Twining v. New Jersey, 211 U.S. 78, 99 (1908).

13. 169 U.S. 366 (1898).

idea of a free government which no member of the Union may disregard. . . ."[14]

Justice Cardozo, in *Palko v. Connecticut*,[15] expressed the theory under which the Court apparently operates. Certain rights, he said, are valid against the states, as well as the Federal Government, because they are "implicit in the concept of ordered liberty."[16] If a right is found to be "implicit" in this concept, no state may violate it; if not, the decision is up to the state. Cardozo felt that, although the line which separates these rights may seem to be a wavering and broken one, meaning can be found in the fact that the rights which the Court has found "implicit" are rights which are basic to our freedom. The fact that certain of the rights found in the earlier amendments have been taken into the Fourteenth by a "process of absorption", he said, indicated a belief on the part of the Court that these rights are fundamental, and that without them neither liberty nor justice could survive.[17]

In 1920, the Court assumed for the sake of argument that the freedom of speech guaranteed by the First Amendment was a natural and inherent right which no state could violate.[18] Five years later, in *Gitlow v. New York*,[19] the Court said that "for present purposes we may and do assume that freedom of speech and of the press—which are protected by the 1st Amendment from abridgement by Congress—are among the fundamental rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the states."[20]

14. *Id.* at 389.

15. 302 U.S. 319 (1937).

16. *Id.* at 325.

17. This dictum of Cardozo's dealing with "absorption" of rights has been criticized by those who feel he is saying that the rights enforced against the states are the full federal rights. Louis Henkin, in an excellent article on "selective incorporation", states that *Palko* is not only not authority for such a theory, but that his language actually negates such a theory. Cardozo, he says, held that the state's appeal of error did not put the defendant in double jeopardy, but he reserved judgment on the question of whether or not a state might appeal on error-free trial. Thus he was implying some right might exist in due process, but not the full federal right. Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L. J. 74, 80-81 (1963). But see Malloy v. Hogan, 84 Sup. Ct. 1489, at 1495 (1964): "The Court has thus rejected the notion that the Fourteenth Amendment applies to the states only a 'watered-down, subjective version of the Bill of Rights.'"

18. Gilbert v. Minnesota, 254 U.S. 325 (1920). But see Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).

19. 268 U.S. 652 (1925).

20. *Id.* at 666.

In short order, the Court included the other rights found in the First Amendment: religion,[21] press,[22] assembly and petition,[23] and association.[24] The right to counsel in capital cases,[25] and later in non-capital cases involving serious crimes,[26] was added, as was the right to be safe in one's home from unlawful searches and seizures.[27] The provision of the Eighth Amendment relating to cruel and unusual punishments was included in *Robinson v. California*,[28] and, in a series of cases, the Court has reversed convictions in state courts based on confessions where there has been any hint of coercion.[29]

At the same time, however, the Court has refused to enforce under the Due Process Clause the rights on the other side of Cardozo's "wavering line". The rights, while important, are not "of the very essence of a scheme of ordered liberty. [Therefore] to abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[30] Among these are the right to a trial by jury,[31] a grand jury indictment[32] and, until *Malloy v. Hogan*,[33] the privilege against self-incrimination.[34]

In the reasoning of the Court in *Malloy* was that the decisions in the area of state use of coerced confessions had so eroded the doctrine of *Adamson* and *Twining v. New Jersey*[35] that it could no longer be considered good authority for the proposition that

21. Cantwell v. Connecticut, 310 U.S. 296 (1940); Hamilton v. Regents of the Univ. of California, 293 U.S. 245 (1934).
22. Lovell v. City of Griffin, 303 U.S. 444 (1938); Grosjean v. American Press Co., 297 U.S. 233 (1936).
23. De Jonge v. Oregon, 299 U.S. 353 (1937).
24. Shelton v. Tucker, 364 U.S. 479 (1960).
25. Powell v. Alabama, 287 U.S. 45 (1932).
26. Gideon v. Wainwright, 372 U.S. 335 (1963).
27. In Wolf v. Colorado, 338 U.S. 25 (1949), the Court said, at page 27, that "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is . . . implicit in 'the concept of ordered liberty' and . . . enforceable against the states . . . ." The Court, however, refused to exclude the evidence illegally obtained. But in 1961, in Mapp v. Ohio, 367 U.S. 643 (1961), the Court reversed *Wolf* in so far as it refused to exclude the evidence obtained by the illegal search, and held that the right of privacy guaranteed by the Fourth Amendment ". . . is enforceable against the states by the same sanction of exclusion as is used against the Federal Government." *Id.* at 655.
28. 370 U.S. 660 (1962).
29. See text accompanying footnotes 36-43.
30. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
31. Maxwell v. Dow, 176 U.S. 581 (1900).
32. *Ibid.*; Hurtado v. California, 110 U.S. 516 (1884).
33. 84 Sup. Ct. 1489 (1964).
34. Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908).
35. *Supra* note 34.

the right to refuse to be a witness against oneself is not a "fundamental" right.

In passing on a confession that had been forced, in a case not involving a state, the Supreme Court has said that, when the question arises as to whether a confession is incompetent because not voluntary, the "issue is controlled by that portion of the Fifth Amendment to the Constitution . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' "[36] The Court has refused to allow the use in state courts of any confession that is not free and voluntary. Approaching on a case by case basis—a method which apparently leaves little in the way of guidelines—the Court has reversed convictions based on confessions which were forced by torture,[37] given "voluntarily" after an excessive period of questioning,[38] or even where the sympathy of the defendant has been played upon as an inducement.[39]

In *Watts v. Indiana*,[40] the Court spoke of the accused's "refusal of disclosure which is his constitutional right."[41] Clearly this right of non-disclosure is analogous to the privilege against self-incrimination. Although the authority for and the background of each is different, the policies behind the two are similar. Again, in *Gallegos v. Colorado*,[42] the Court expressed the view that one of the main reasons that the Due Process Clause of the Fourteenth Amendment condemns confessions obtained through coercion is the "element of compulsion which is condemned by the Fifth Amendment."[43]

It is indeed difficult to see how the Court could square the decisions in the area of coerced confessions with the notion that the states can compel a person to incriminate himself, and agree with *Twining*,[44] or with Cardozo's dictum in *Snyder v. Massachusetts*[45] that "the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for

36. Bram v. United States, 168 U.S. 532, 542 (1897).
37. Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).
38. Ashcraft v. Tennessee, 322 U.S. 143 (1944).
39. Spano v. New York, 360 U.S. 315 (1959). See Haynes v. Washington, 373 U.S. 503 (1963), where a conviction based on a confession was overturned because the accused was not allowed to call his wife or attorney until he signed.
40. 338 U.S. 49 (1949).
41. *Id.* at 54.
42. 370 U.S. 49 (1962).
43. *Id.* at 51.
44. 211 U.S. 78 (1908).
45. 291 U.S. 97 (1934).

the state,"[46] or with *Palko*: "the immunity from compulsory self-incrimination . . . . too might be lost, and justice still be done."[47]

It is clear that the relationship between the two rights is there, and, just as clearly, the right is fundamental. What is actually involved here is a right to silence. Such a right is not, and cannot be, unlimited, but it does extend to the point of protecting an individual from being forced to be a witness against himself. As the respondent State of Connecticut conceded in *Malloy*, it is "fundamentally inconsistent to suggest, as the Court's opinions now suggest, that the State is entirely free to compel an accused to incriminate himself before a grand jury, or at the trial, but cannot do so in the police station."[48]

The privilege is more than merely a protection against a prosecution and conviction based solely on evidence forced from the accused; it is a "safeguard of conscience and human dignity . . . ."[49] Dean Griswold has said that the privilege is "one of the great landmarks in man's struggle to make himself civilized."[50] This right is probably one of our least appreciated, but, as it has been said so often, without the power which this right restricts, the inquisition can never function in this country. Today, when an individual can be forced to reveal his very thoughts through the use of narcotics, hypnotism, lie detectors and other means, the courts must be especially vigilant to see that the fundamental right of a man to refuse to be the instrument of his own destruction is protected.

In approaching a decision such as the one in *Malloy*, the Court is, in actuality, balancing the interests of society against the rights of the citizen. The legitimate interests of the state in the administration of its criminal justice cannot be questioned, nor can the fact that this interest is limited by the demands of the Fourteenth Amendment be questioned. It is, therefore, the place of the Supreme Court to see that in the quest of society for law and order the fundamental rights of the individual are not infringed.

The Fourteenth Amendment necessarily gave the Court broad discretion in determining what limitations should be placed upon

46. *Id.* at 105.
47. 302 U.S. 319 (1937).
48. Brief for Respondent, quoted in Malloy v. Hogan, 84 Sup. Ct. 1489, 1494-95 (1964).
49. Ullmann v. United States, 350 U.S. 422, 445 (1956).
50. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955).

South Carolina Law Review, Vol. 16, Iss. 4 [2020], Art. 5

the states. Perhaps it is unfortunate that the Justices cannot proceed within clearly marked boundaries in interpreting the clause, but must instead, "roam at will in the limitless area of their own beliefs. . . ."[51] However, that was not the intention of those who drafted the amendment, nor would it be altogether satisfactory if it had been. Certainly the view of *Palko*, which applies some of the rights in the Bill of Rights to the states, is preferable to and sounder than the earlier views, such as *Twining*, which would apply none of them. It is also much to be preferred to the total incorporation view, which would tie the Court to an Eighteenth Century evaluation of what rights are and what rights are not fundamental. In the flexibility of the approach of the Court lies its true value. Although there is always the possibility that some future Court might "selectively" remove from the Due Process Clause the rights that have been found there over the past half-century; this is a gamble that a system based on a living constitution, such as ours, must take.

Shortly after the Court reaffirmed in *Adamson v. California*[52] that the privilege against self-incrimination need not be guaranteed by a state, a writer stated that a main issue raised by the case was "whether the due process technique so abjectly fails to protect personal liberties that—practically by default—Justice Black's technique must be adopted."[53] The development of the Court's approach up to and including *Malloy* indicates that such fears were groundless.

WILLIAM B. REGAN

51. Adamson v. California, 332 U.S. 46, 92 (1947).
52. *Supra* note 51.
53. 58 YALE L. J. 268, 278 (1949).