EQUAL JUSTICE UNDER LAW

Part Three

Liberty, Community, and Constitutional Interpretation under the Bill of Rights

Considered in its totality, and not simply provision by provision, a bill of rights sketches the broad outlines of the relationship between liberty and community. A bill of rights is a blueprint, less a list of protected liberties than an overall vision of the ideal relationship between liberty and community.[1] In this larger, autobiographical sense, a bill of rights indicates how conflicts between liberty and community should be conceived and, to some extent, reconciled. It expresses the "dominant ideas concerning the relations between the individual citizen and the government."[2]

This pattern of ordered liberty, and the delicate balance between public interest and private right it seeks to achieve, is reflected in every part of the American Bill of Rights. Individual provisions, such as the First Amendment, express in broad terms how the Framers sought to balance specific liberties and the public interest. Similarly, the Due Process Clauses of the Fifth and Fourteenth Amendments do not guarantee absolute or unrestricted rights to liberty and property, but only that government may not deprive a person of them without due process of law.[3] Their very language assumes the state may regulate individual liberties in the public interest.

A bill of rights, therefore, is important not only for the specific protections it promises, but also for what it tells us about larger issues of constitutional politics. Implicit in a bill of rights are assumptions about human nature, the source and scope of individual rights, and the relationship of the individual

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[1] As Donald Lutz has written, the Framers saw the Bill of Rights as "the statement of broad principles rather than as a set of legally enforceable rights." As quoted in James A. Henretta, *The Nineteenth-Century Revolution in Civil Liberties: From "Rights in Property" to "Property in Rights."* 19 This Constitution 13 (Fall 1991). See also Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 2000).

[2] Carl J. Friedrich, *Constitutional Government and Democracy*. Rev. ed. (Boston: Ginn and Company, 1950), 160.

[3] What due process of law requires of state authorities before they may regulate or infringe upon a right is another question. Some scholars, notably John Hart Ely, believe the Due Process Clause of the Fourteenth Amendment imposes only procedural restrictions. *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 18–22. Other scholars argue the clause has a "substantive" component, or that there is, in addition to "procedural due process," a type of "substantive due process." See Laurence H. Tribe, *Constitutional Choices* (Cambridge: Harvard University Press, 1985), 10–11.

and community. The American Bill of Rights does not so much resolve these issues as it raises them.

Consider the most basic of questions: From where does individual liberty originate? The Preamble to the Constitution states only that "We the People . . . to secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution. . . ." But nowhere does the text suggest the source of the Blessings of Liberty, which has led scholars and judges to look for evidence elsewhere. The Declaration of Independence, for example, asserts "That all men are created equal, that they are endowed by their creator with certain unalienable rights; [and] that among these are life, liberty & the pursuit of happiness. . . ."

Implicit in this dramatic assertion of human equality are important claims about the nature and origin of constitutional liberties, as well as of the limits of governmental power. The phrase, "endowed by their creator with certain unalienable rights," for example, suggests that "human rights . . . do not depend on history, but on the laws of nature and nature's God."[4] We possess rights because we are human, not because others have chosen to give them to us or because we have given them to ourselves in a social contract. The source of human liberties is natural and pre-constitutional. Constitutional liberties therefore precede, not only in historical time but also in political theory, both the Declaration of Independence and the Constitution.

The Declaration of Independence, then, may have considerable significance for how we understand the Constitution and the Bill of Rights. The Declaration asserts that we possess certain inalienable rights. The Constitution *recognizes* and seeks to protect them by imposing limits on both the objects and the means of governmental power. We possess these liberties, and governments must respect them, not because they are "in" the Constitution, whether explicitly or implicitly, but because such rights derive from nature.

Whatever the Founders may have thought about the relationship between the Declaration and the Constitution of 1787, many scholars and Supreme Court justices now reject the premise that there are "natural rights." Like John Hart Ely, many judges have concluded that "The idea [of natural law] is a discredited one in our society . . . and for good reason."[5] The good reason is that "natural law" is so hopelessly vague that we doubt its utility as a way of discerning the Constitution's meaning. "At various times," Ely notes, "judges have argued that natural law says nothing at all about the propriety of slavery, while others have insisted that no conception of natural law could possibly authorize such a practice." In a case included in the next chapter, *Adamson v. California* (1947), Justice Black further noted that the imprecision of natural law as a source of constitutional meaning would endow "this Court . . . with boundless power . . . periodically to expand and contract constitutional standards to conform to the Court's conception of . . . 'civilized decency' and 'fundamental liberty and justice.' "

Scholars and judges who reject the natural law theory of the Declaration argue that the Constitution itself, or rather, the agreement that secured it, is the basis of our liberties. The Constitution does more than simply recognize or recite liberties; it *creates* and thus is the very source of those liberties. The Constitution, therefore, "con-

[4] Edward J. Erler, *The American Polity: Essays on the Theory and Practice of Constitutional Government* (New York: Crane Russak, 1991), xi.

[5] Ely, supra note 3, at 50.

sists of a complex of value judgments the framers wrote into the text of the Constitution and thereby constitutionalized."[6]

This controversy is not simply a theoretical argument among constitutional law scholars and judges cloistered from the real world. Disputes over the source of liberty are important for understanding two vital issues in constitutional interpretation. As we shall see in chapter 9, whether we need a Bill of Rights, and how far it should extend (to the national government only, or to the states as well) will be influenced by our answers to the questions of source and scope.

Differences between competing accounts of the source of individual liberty also manifest themselves in everyday practical disputes between the rights of individuals and the powers of the community. Expansive conceptions of the right to property, as we shall see in chapter 10, or of privacy, as we shall see in chapter 11, inevitably run up against communal interests in the regulation of those rights. Should the right to property include the right to use one's backyard as a landfill for toxic waste? Should the right to liberty include the right of adults to have sexual relations with members of the same sex (see *Lawrence v. Texas* [2003], reprinted in chapter 11)?

The answers to these questions should indicate the extent to which constitutional interpretation involves reconciling individual liberty and the rights of the larger community. If the community is the source of liberty and property—if, in other words, those rights exist because they are the product of democratic agreement—then the community's authority to regulate them is arguably greater than it is if such rights have an existence independent of the Constitution.

This has important consequences for constitutional interpretation. If the Bill of Rights is the source of liberty, then there is little warrant, some argue, for judges to "find" or "infer" additional constitutional rights. If additional or implied rights exist, then they do so only because and when the community chooses to recognize them through the process of constitutional amendment. If, however, the Bill of Rights acknowledges that liberty is derived from nature, or the human condition, then there may be some justification for judicial efforts to infer additional rights not expressly mentioned in the Bill of Rights.

Hence, the second issue concerns who possesses the constitutional authority to resolve such disputes. It is a part of any constitution's function to mark the boundaries between state and society, but constitutions typically speak with imprecision. The "majestic generalities" of constitutional texts require interpretation. But interpretation by whom? Who should fix the boundaries between liberty and community? How one approaches the question of who decides will be influenced by the approach one uses to understand the founding. As we saw in chapter 2, those who favor the democratic or republican interpretations of the founding will be more apt to favor an allocation of interpretive authority to the popular, representative institutions, which can be democratically controlled. Constitutionalists will be more likely to want to remove at least some areas of constitutional interpretation from popular institutions, for fear of majority tyranny and faction. In the chapters that follow, we will see how questions concerning interpretive authority continue to influence the process of interpretation itself.

Bills of Rights in Other Constitutions

The American Constitution is relatively silent about the source of liberty. Most foreign constitutions, in contrast, include explicit claims about the source of individual liber-

[6] Michael J. Perry, *The Constitution, the Courts, and Human Rights* (New Haven: Yale University Press, 1982), 10.

ties and of the state's responsibility to recognize and protect them. Section 7(2) of the South African Bill of Rights thus provides that "The state must respect, protect, promote and fulfill the rights in the Bill of Rights."

The German Basic Law states clearly that humans possess liberty because it is an inalienable human right, not because the state, or our fellow citizens, have given it to us. Article 1 of the Basic Law thus *recognizes* that individuals possess liberties, but it is not the source of those liberties. As if to emphasize its importance, Article 1 of the Basic Law states, "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."[7]

Similarly, in *McGee v. Attorney General and Revenue Commissioners* (1974), the Irish Supreme Court declared that:

> *Articles 41, 42, and 43 [of the Irish Constitution] emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural or human rights are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural or human rights over which the state has no authority.*

Article 97 of the Japanese Constitution takes a somewhat different, if related tack. It states that:

> *The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.*

Every bill of rights is unique in some ways, but there are also similarities, especially in post–World War II constitutions.[8] The list of liberties expressly protected is usually more expansive than the American Bill of Rights. It is common, for example, to find explicitly protected rights to privacy, and guarantees of equality based on gender as well as race. Contemporary constitutions are also likely to protect "social rights" that the American Bill of Rights fails to mention. These "social rights" include rights to work, as well as rights to various types of social welfare, such as health care, education, and subsistence.[9]

In contrast to the stark, typically unqualified language of the American Constitution, many other constitutions are far less likely to use the absolutist language of the American Bill of Rights, and correspondingly more likely to qualify rights with duties. Thus constitutions in other states often couple provisions for individual liberties with governmental authority to restrict those liberties in the public interest. The Basic Law

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[7] The German Bill of Rights also adopts a theory of human rights that gives those rights superior political status. The Basic Law's Bill of Rights appears in the first twenty articles of the text. In contrast, the Weimar Constitution had put its list of liberties at the end of the text. Article 79 of the Basic Law further underscores the importance of Article 1 and respect for human dignity by providing that "Amendments of this Basic Law affecting . . . the basic principles laid down in Articles 1 and 20, shall be inadmissible." Article 19 states that "the essential content of a basic right [may not be] encroached upon."

[8] Philip Alston, *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (New York: Oxford University Press, 2000).

[9] Cass Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2006).

of Germany, for example, "reflects a conscious ordering of individual freedoms and public interests. It resounds with the language of human freedom, but a freedom restrained by certain political values, community norms, and ethical principles."[10] Article 5 of the Basic Law guarantees freedom of expression. It states "There shall be no censorship." It adds, however, that "These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honor." Even more importantly, Article 18 of the Basic Law provides that "Whoever abuses freedom of expression of opinion, in particular of the press, freedom of teaching, freedom of assembly, freedom of association, privacy of posts and telecommunications, or the right of asylum in order to combat the free democratic order, shall forfeit these basic rights."

Some constitutions include so-called general limitation clauses, which typically indicate that rights and liberties are subject to reasonable limitation. Section 36 of the South African Constitution, for example, provides that "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. . . ." Similarly, Section 1 of the Canadian Charter of Rights, the general limitations clause, provides that every guarantee in the Charter is subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." As Peter Hogg has concluded, "Section one makes clear that a law limiting a Charter Right is valid, if the law is a 'reasonable' one that can be reasonably justified in a free and democratic society."[11] Article 2 of the Italian Constitution also stresses the interdependence of individual and community. In it, "The Republic recognizes and guarantees the inviolable rights of man, both as an individual and in the social organizations wherein his personality is developed, and it requires the performance of fundamental duties of political, economic, and social solidarity." Article 4 likewise guarantees all citizens a right to work, but couples it with "the duty of exercising . . . an activity or pursuit that contributes to the material or spiritual progress of society."

In sum, the American Bill of Rights is inescapably individualistic at heart, especially when compared to the bills of rights of most other constitutional democracies. In this sense, the image of the human person implicit in the Bill of Rights is that of the autonomous, free individual who exists in a state of tension with the larger community. By way of contrast, consider the opinion of the German Federal Constitutional Court in *The Investment Aid Case* (1954):

> *The image of man in the Basic Law is not that of an isolated, sovereign individual. On the contrary, the Basic Law has resolved the tension between individual and society in favor of coordination and interdependence with the community without touching the intrinsic value of the person.*[12]

Conclusion

In every case that arises under the Bill of Rights, we must reconcile our desire for individual liberty with the need for public order, personal autonomy with the needs

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[10] Donald P. Kommers, *The Jurisprudence of Free Speech in the U.S. and the Federal Republic of Germany*, 53 Southern California Law Review 677 (1980).

[11] Peter W. Hogg, *Constitutional Law of Canada*. 3rd ed. (Toronto: The Carswell Company Limited, 1985), 801–02.

[12] *Investment Aid Case,* 4 BVerfGE 7 (1954).

of the community. Of course, the process of constitutional interpretation under the First Amendment is in some ways unique to that provision, as interpretation of the Fifth Amendment is unique to it.

This uniqueness is partly a consequence of constitutional draftsmanship: The language and purpose of the First Amendment differ from the Fifth, which in turn differ from the Fourteenth. The tendency to focus on the uniqueness of specific constitutional provisions, sometimes called "clause-bound interpretivism," is a consequence of a written constitution that "picks out" certain individual liberties for special protection. It is a convenient way of understanding particular problems in constitutional law. It is, moreover, the way books in constitutional law are organized, and how courses in constitutional law are usually taught.

For organizational convenience, we utilize that approach in the following chapters. We want to emphasize again, however, that inherent in individual cases and isolated provisions are common problems of constitutional interpretation. Recognition of those common problems is an important part of the process of constitutional interpretation, both in the United States and in other constitutional democracies.

Chapter 9

The Bill of Rights, Incorporation, and Capital Punishment

The relationship between liberty and community, or between individual liberty and the public good, is one of the inescapable features of political life. It appears in every polity, in matters as profound as the death penalty, and in ordinary activities like applying for a driver's license. If we were perfectly free to do as we like, anyone could drive, whether licensed or not. But the public has important interests, such as the safety and welfare of the community, which lead it to override individual liberty and create a licensing system. When the state acts on the basis of one of these public interests it exercises its police power, or "the power to protect the health, safety, morals and welfare of the people."[1] Much of politics in any society consists in determining what restrictions on liberty are permissible. The relationship between liberty and community is especially complex in constitutional democracies, however, because they are committed simultaneously to the preservation of individual liberty, human dignity, and to majoritarian rule.

In a simple democracy, unencumbered by constitutional limits, restrictions on individual liberty need only satisfy the *process* required to make law. Any law passed according to the proper majoritarian procedures, regardless of its content, is legitimate.[2] The primacy of form over substance should be no surprise. At its core, democracy is a theory of empowerment and not of limitations. In contrast, constitutionalists seek to protect individual liberty from arbitrary or capricious governmental power. Constitutionalists believe power is always prone to abuse no matter who wields it; they hold that some individual liberties may not be abridged even by a majority. Because constitutionalists share with democrats a commitment to self-government, one of these liberties is the right to participate in politics. Unlike democrats, however, constitutionalists do not consider this liberty necessarily preeminent or the only one immune from majoritarian infringement. They seek not only to empower majorities, but also to protect "the self in its dignity and

[1] *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

[2] Some scholars would argue that even in a pure democracy, there may be no laws that would dismantle the structure of democracy itself. See Michael Walzer, *Philosophy and Democracy*, 9 Political Theory 379, 383 (1981).

worth."[3] Thus constitutional democracies allow majorities to rule while simultaneously limiting their power. In this way they hope to reconcile individual liberty and the public good, or "the permanent and aggregate interests of the community," in the words of the Founders.[4] As James Madison wrote in *Federalist* 10, "To secure the public good and private rights . . . and at the same time to preserve the spirit and form of popular government, is then the great object to which our inquiries are directed."

One device for achieving that goal is a bill of rights. As we saw in chapter 8, however, it is not the only, or perhaps even the most important, mechanism.[5] Indeed, most of the delegates at the Philadelphia Convention did not think a bill of rights was necessary. When George Mason, senior delegate from Virginia, proposed that one be drafted, the delegates rejected his suggestion. Only about half of the new American states included a bill of rights in their constitutions. The Articles of Confederation also omitted a bill of rights.

Constitutional Theory and the Need for a Bill of Rights

Constitutional theory no more supplied a reason for including one than did experience. Many of the Constitution's principal authors, including Madison and Hamilton, argued that a bill of rights would be at best superfluous and at worst dangerous. It would be superfluous because, in the words of James Bowdoin, "The Constitution itself is a bill of rights."[6] This was the classical understanding of constitutional government: the Constitution is a grant of enumerated powers from the sovereign people to the government, which depends for its authority upon popular consent. Powers not granted to the government remain with the people (a philosophy later made explicit in the Tenth Amendment). Thus the national government's only authority to interfere with individual liberty was delegated by the people in the Constitution. A bill of rights would be dangerous because, by restating the truism that powers not surrendered are retained by the people, it might create confusion about the source of governmental authority. As Hamilton explained in *Federalist* 84, "[B]ills of rights . . . are not only unnecessary . . . but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is not power to do?"

Like Hamilton, Madison worried that incompleteness might lead to the conclusion that government could properly abridge any liberties not included in a list of liberties. Moreover, no such list could hope to be complete—the passage of time would reveal the imperfect foresight of its authors. Madison also warned that bills of rights were based on a naive view of human nature. Writing to Thomas Jefferson, he argued that mere "parchment barriers" would not restrain a majority or government intent on subverting individual liberty. "[E]xperience proves the inefficacy of a bill of rights on those occasions when its controul is most needed," he wrote. "Repeated violations of those parchment barriers have been committed by overbearing majorities in every

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[3] Carl J. Friedrich, *Transcendent Justice* (Durham: Duke University Press, 1964), 16.

[4] Clinton Rossiter (ed.), *The Federalist Papers* (New York: New American Library, 1961). See nos. 10, 45, 78, 80, and 89. References to *The Federalist Papers* are from this edition.

[5] The Australian Constitution has no bill of rights, nor did the Canadian until recently.

[6] Quoted in Philip B. Kurland and Ralph Lerner (eds.), *The Founder's Constitution* (Chicago: University of Chicago Press, 1987), I: 426.

state."[7] Other delegates argued that a bill of rights might handicap the ability of the national government to act with energy in those areas where it was authorized to govern. The Framers sought to achieve two equally important goals: to limit government to protect liberty and property, and to create a central government strong enough to overcome the weakness and parochialism that had plagued the Union under the Articles of Confederation. A bill of rights, some feared, might leave the government so limited that it would be unable to secure the public good.

The unamended text of the Constitution does contain a few important limitations on majoritarian government, such as ones concerning habeas corpus or property rights, provisions not unlike the parchment barriers of a bill of rights. Even so, the Framers did not rely primarily on these for the protection of liberty. Madison's argument in *Federalist* 10 illustrates their approach to the problem. The chief threat to liberty in a democracy, argued Madison, was "faction," by which he meant "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." An inevitable consequence of democracy, faction could be controlled in two ways, either by "removing its cause" or "controlling its effects." Because the former would require denying people liberty to associate and pursue their ends, it represented a "remedy . . . worse than the disease." Therefore, Madison concluded, one must try to control the effects of faction.

The Founders' primary strategy for accomplishing this was the creation of a large, geographically diverse republic, since a large republic would encourage the development of a wide variety of local interests. "Extend the sphere," wrote Madison, "and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength. . . ." In the face of such diversity, only very large and stable popular majorities could sustain themselves for long. Moreover, in a republic, the process of representation itself would help moderate factions. Representation would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."

Finally, the *Federalist* also shows that the Founders sought to protect liberty through proper constitutional design and institutional structure. As we saw in chapters 4 and 6, they hoped that separation of powers, checks and balances, and federalism would limit the ability of any one governmental institution to act capriciously. Any exercise of real power would require the cooperation of other branches, each primarily concerned with the preservation of its own autonomy and power. Any faction bent on threatening liberty would thus find it necessary to control not only the legislature or the presidency, but both.

Omission of a bill of rights quickly became one of the central issues in the debates over ratification. Many of the anti-Federalist opponents of the Constitution were classical republicans. They considered the chief purpose of good government to be the promotion and protection of virtue among its citizens. Their preference for small,

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[7] Letter of James Madison to Thomas Jefferson, 17 October 1788. Reprinted in Michael Kammen (ed.), *The Origins of the American Constitution: A Documentary History* (New York: Penguin Books, 1986), 367–71.

local communities and their corresponding fear of Madison's "enlarged republic" indicate that they desired the political liberty to govern themselves in those small communities, free from national interference. A bill of rights could further that goal. A guarantee of religious liberty, for example, might prevent the national government from establishing a religion to replace the establishments erected by the various states.[8]

Thomas Jefferson advanced what eventually became three of the strongest arguments in support of a bill of rights. First, sharing with the Federalists a dim view of human nature, he argued that "a bill of rights is what the people are entitled to against every government on earth . . . and what no just government should refuse, or rest on inference."[9] Parchment barriers might not restrain government, but the permanence gained through the written word might remind governors and governed alike of the limits on power and the value of liberty. Second, and relatedly, Jefferson and other anti-Federalists believed that a written bill of rights could be a vital tool in the education of citizens into the ways of constitutional democracy. Finally, Jefferson suggested to Madison that a bill of rights might put "a legal check . . . in the hands of the judiciary."[10] It is unclear whether Jefferson really thought a written bill of rights authorized judicial review,[11] but his observation proved remarkably accurate.

Such arguments persuaded ratification conventions in Virginia and New York, as well as in Massachusetts, South Carolina, and New Hampshire, to favor "conditional" ratification of the Constitution: ratification in return for the promise of amendments to protect individual liberties. Despite their opposition, both Madison and Hamilton eventually agreed to submit a bill of rights to the first Congress. Introducing the amendments to the House of Representatives on 8 June 1789, Madison said that, though he still thought them unnecessary, he had "always conceived, that in a certain form, and to a certain extent, such a provision was neither improper nor altogether useless."[12] Congressional debate consolidated and reduced Madison's proposals to twelve amendments, ten of which were ratified by 15 December 1791.[13]

Passage of the Bill of Rights did not quiet all controversy. The language of the amendments left open the question of whether they applied to the federal government only, or to the states as well.[14] Inherent in the question were two very different

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[8] See Leonard Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan Publishing Company, 1986), 75–77. In *Elk Grove v. Newdow*, 542 U.S. 1 (2004), Justice Thomas argued that because the "establishment clause is a federalism provision," it should not have been incorporated against the states.

[9] Kammen, supra note 7, 376–78.

[10] Ibid.

[11] Recall our discussion in chapter 3 of Jefferson's departmentalist theory of constitutional review, which did not deny the possibility of judicial review but did subordinate it to the larger practice of constitutional review, carried out not only by the courts but by all three branches of the national government.

[12] Speech Placing the Proposed Bill of Rights before the House of Representatives, 8 June 1789.

[13] Massachusetts, Connecticut, and Georgia did not ratify the amendments until the sesquicentennial of the Constitution in 1939. The two proposals not ratified concerned congressional representation and a provision that would have prevented Congress from voting on congressional salary increases.

[14] As Michael W. McConnell has observed in a perceptive essay, "The natural inclination is to think that individual 'rights' must be protected against 'the state'—that is, against government in general. . . . Yet it is striking how many important rights in the Constitution . . . are protected by their terms against one level or branch of government and not against the others." "Contract Rights and Property Rights: A Case Study in the Relationship between Individual Liberties and Constitutional Structure," in Ellen Frankel Paul and Howard Dickman [eds.], *Liberty, Property, and the Foundations of the American Constitution* (Albany: State University of New York, 1989), 141.

conceptions of liberty and community. Madison and others thought the Bill of Rights should apply to both levels of government because they believed the states were at least as likely to abuse power and threaten liberty as the federal government. Most anti-Federalists, by contrast, feared encroachment by the national government and sought to protect states from its overbearing power. They believed the proximity of state and local governments to their citizens, coupled with political liberty, made local interference with individual rights unlikely. They therefore argued that the Bill of Rights applied only to the national government.[15]

The Supreme Court took up this question in *Barron v. Baltimore* (1833, reprinted later in the chapter). Baltimore had dredged a harbor, thus rendering Barron's wharf useless. Barron sued the city, claiming that its action constituted an unlawful taking of property in violation of the Fifth Amendment. In resolving the case, Chief Justice Marshall—arguing on the basis of constitutional theory and history—first distinguished between constitution-making at the state and national levels. Because the national government is one of enumerated powers, argued Marshall, it possesses only those powers explicitly granted and whatever is fairly implied by them. The Bill of Rights reflected the Founders' fears that the new government might try to exceed those powers. "The constitution," wrote Marshall, "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states." Each state established a constitution for itself, and in that constitution, provided such "limitations and restrictions on the powers of its particular government, as its judgment dictated." Next, arguing from the constitutional text, Marshall conceded that parts of the original Constitution did profess to operate on the states directly, such as Article I, Section 10. But because the Bill of Rights, by contrast, did not include such language, Marshall argued that when the Framers sought to restrict the states, they said so explicitly. Because he could find no reason "for departing from this safe and judicious course, in framing the amendments," Marshall concluded that the Bill of Rights was meant to apply only to the national government.

Barron v. Baltimore is an important case, with lasting effects on the development of the Supreme Court's jurisprudence. It made clear that the liberties contained in the Bill of Rights did not protect citizens against actions taken by state governments. It protected certain freedoms against federal infringement, but any state could restrict those freedoms unless prohibited from doing so by its own state constitution.

The Reconstruction Amendments and the Bill of Rights

The peristence of slavery and the Civil War shattered the nation's confidence in the ability or willingness of state governments to protect the liberties of all citizens. In 1868, following the Civil War, Congress ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution (the Reconstruction Amendments). The Thirteenth prohibits slavery and involuntary servitude, and the Fifteenth ensures that the

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[15] The same concerns influenced debate over the proposed language of the Tenth Amendment. Anti-Federalists wanted it to read, "The powers not *expressly* delegated to the United States . . . are reserved to the States respectively, or to the people." The Federalists succeeded in deleting the word "expressly." Thus drafted, the Amendment did not prohibit the general government from exercising implied powers, thought by many Federalists to be the natural reading of the necessary and proper clause of Article I and the cornerstone of a strong national government.

right of U.S. citizens to vote may not be abridged because of race or color.[16] The centerpiece of the Reconstruction Amendments, however, is the Fourteenth. A congressional response to the Supreme Court's decision in *Dred Scott v. Sandford* (1857) that the Fifth Amendment protected ownership of slaves because they were property, the Fourteenth Amendment in particular sought to correct *Dred Scott* in three ways. First, it made the freed slaves citizens and protected the "privileges and immunites of citizens of the United States" against infringement by the states; second, it protected due process of law against infringement by the states; and third, it prohibited states from depriving people of "the equal protection of the laws."[17]

The Fourteenth Amendment did much more than simply correct *Dred Scott*, important though that was. The Reconstruction Amendments worked a fundamental transformation in the relationship between the federal government and the states in the field of civil liberties. The dominant view at the founding, cemented by *Barron*, was that the Bill of Rights applied only against the national government, leaving the states free to settle upon the terms of their own powers and limitations.[18] The Fourteenth Amendment reflects Madison's earlier fear that individual liberties might be restricted by the states as well as by the national government. Indeed, all three of the Reconstruction Amendments rested upon a different conception of which level of government, local or national, should take responsibility for protecting civil liberties. These amendments, and a series of civil rights acts in the 1860s and 1870s, were evidence of Congress' suspicion of the states and its belief that the federal government could more safely be entrusted with this task. This philosophy is perhaps best represented in Section 5 of the Fourteenth Amendment, which provides that "Congress shall have the power to enforce . . . the provisions of this article."

The Fourteenth Amendment and the Incorporation Doctrine

Inspired by the philosophy that animated the Reconstruction Amendments, some constitutional lawyers soon began to ask whether the Fourteenth Amendment should force reconsideration of *Barron*. Did the Fourteenth Amendment make the Bill of Rights applicable to the states? It is certainly possible to read at least part of the Amendment as doing just that: The privileges and immunities clause provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The critical issue, of course, is the definition of "privileges and immunities." Is it a shorthand for the guarantees included in the first ten amendments?

The Supreme Court first considered this question in the *Slaughter-House Cases*

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[16] Some scholars have argued that the Reconstruction Amendments, by embracing fully the concept of human equality, represent the full constitutionalization of the Declaration of Independence, which had been compromised by slavery at the founding. The Reconstruction Amendments are thus, in this view, an integral part of our efforts to become "a more perfect Union." See, for example, Edward J. Erler, *The American Polity* (New York: Crane Russak, 1991), 4–8.

[17] Whereas the privileges and immunities clause speaks of the privileges and immunities of *citizens*, the Due Process and Equal Protection Clauses apply, significantly, to *persons*.

[18] As Laurence Tribe notes, "The nineteenth century legal mind grasped the concept of federalism by visualizing two coextensive spheres, one defining the power of the federal government, the other that of states. . . . Historically, a large part of the states' sphere consisted in the power and duty to guard the 'rights and privileges of the citizen. . . .'" *American Constitutional Law.* 2nd ed. (Mineola, New York: Foundation Press, 1988), 552.

(1873, reprinted later in the chapter). At issue was whether a monopoly in New Orleans on the butchering of livestock violated the rights of butchers employed elsewhere. The butchers argued that the monopoly, created by the state legislature, violated their right to pursue a legal occupation, supposedly protected by the privileges and immunities clause of the Fourteenth Amendment. The Court's resolution of this issue is a magnificent example of how constitutional interpretation is intertwined with the three normative themes we identified in the introduction: the conflict between federal and state power; the conflict between representative democracy (political majoritarianism) and constitutionalism (limits on majorities); and the conflict between the individual and the community. *Slaughter-House* involved all three of these tensions.

Writing for the Court, Justice Miller held that the Fourteenth Amendment recognized two types of citizenship: citizenship of one's own state, and citizenship of the United States. By creating citizenship of the United States and granting it to newly freed slaves, and by forbidding states to deny citizens the privileges and immunities of U.S. citizenship, the Fourteenth Amendment had overturned *Dred Scott.* But, Miller continued, the privileges and immunities of federal citizenship—citizenship of the United States—are not identical to those of state citizenship. Each citizenship protects a set of privileges and immunities peculiar to itself. The Framers of the amendment did not intend it to interfere with the privileges and immunities of state citizenship, but only to protect the privileges and immunities of national citizenship against hostile state action.[19] Because the right to pursue an occupation was a privilege of state and not federal citizenship, Miller concluded, states could regulate it as they wished.

Plainly evident in Miller's clever (if less than obvious) interpretation is a vision of states, and their responsibility for civil liberties, at odds with the vision reflected in the Fourteenth Amendment. In Miller's view, the amendment was not intended to alter the states' role as primary custodians of individual liberty, possessing considerable autonomy to regulate the affairs of their own citizens. Others disagreed. Justice Swayne, in dissent, conceded that the interpretation Miller refused to embrace would be revolutionary in its impact on the relationship between the states and the federal government. But, he wrote, "Fairly construed these amendments may be said to rise to the dignity of a new Magna Charta." Moreover, Justice Field argued that if the majority's interpretation was correct—if the Fourteenth Amendment merely restated the relationship between state and federal responsibility for protecting civil liberties that existed before the Civil War—then the amendment "was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." An amendment so unremarkable in theory and benign in effect would have been unlikely to create such controversy in Congress.

Slaughter-House put to rest the possibility that the privileges and immunities clause might serve as the basis for applying the Bill of Rights to the states. Yet in less than thirty years the spirit of the *Slaughter-House* dissents became law, and today most of the first ten amendments do apply against the states. How did this happen? The "doctrine of incorporation" allowed the federal courts to apply most of the provisions of the Bill of Rights to the states by reading (or "incorporating") those protections into the Due Process Clause of the Fourteenth Amendment, and not through the privileges and immunities clause. Even though it does not say so, courts now

[19] One might note in response that these were already protected through the supremacy clause of Article VI.

interpret the Fourteenth Amendment to mean ". . . Nor shall any state deprive any person of life, liberty, and property, without due process of law, as defined by the first eight amendments to the Constitution." Linguistically, and perhaps conceptually, the process of incorporation is awkward and untidy, an unfortunate consequence of *Slaughter-House*. Nevertheless, its effect on the relationship between the states and the federal government, and on the power of the federal judiciary, has been dramatic.

The Court's deliberations reveal four basic approaches to the incorporation doctrine. Implicit in each is a particular vision of the relationship between liberty and community, as well as of the relationship between the states and the federal government. Likewise, each rests upon a particular understanding of the limits of judicial power in a constitutional democracy.

The Fundamental Fairness Doctrine

In *Hurtado v. California* (1884), the Court rejected the claim that the Due Process Clause incorporated the Fifth Amendment.[20] Nevertheless, the Court did concede that the Due Process Clause was a general guarantee of fairness, prohibiting the states from interfering with "fundamental principles of liberty and justice." The Court built on this interpretation in *Holden v. Hardy* (1898) by concluding that the Due Process Clause, though not incorporating the entire Bill of Rights, protects "traditional notions" of due process and fundamental fairness. In *Twining v. New Jersey* (1908), the Court refused to incorporate the Fifth Amendment's protection against self-incrimination, but it admitted,

> *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 these 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.*

Finally, in *Gitlow v. New York* (1925), the Court followed through on its earlier suggestions by ruling that the Due Process Clause did incorporate the First Amendment's guarantee of freedom of speech.

By the 1930s the case law concerning the incorporation of the Bill of Rights was confused. The Court confronted the mess in *Palko v. Connecticut* (1937, reprinted later in the chapter), when it ruled that the Fourteenth Amendment did not make the double jeopardy clause applicable to the states. Palko had argued that "[w]hatever would be a violation of the original bill of rights . . . if done by the federal government is . . . equally unlawful by the force of the Fourteenth Amendment if done by a state." Although the Court rejected the argument, Justice Cardozo conceded that some provisions of the Bill of Rights had been made applicable to the states. Was there some principled way of distinguishing between those cases in which the Court had applied a part of the Bill of Rights to the states and those in which it had refused to do so? "The line of division may seem to be wavering and broken," wrote Cardozo, but "reflection and analysis" disclosed a "rationalizing principle." The Due Process Clause incorporates those parts of the Bill of Rights "so rooted in the traditions and con-

[20] The Court eventually reversed this judgment. It incorporated free speech in *Gitlow v. New York* (1925); freedom of the press in *Near v. Minnesota* (1931); free exercise of religion in *Hamilton v. Regents* (1934); and no establishment in *Everson v. Ewing Township* (1947).

science of our people as to be ranked fundamental" or which are "the very essence of a scheme of ordered liberty." Double jeopardy was not one of those provisions.[21]

In sum, the fundamental fairness doctrine, restated in *Palko*, insisted the Due Process Clause did not incorporate the entire Bill of Rights, but only those parts of it essential to ordered liberty. The Due Process Clause might include guarantees similar to those of the first eight amendments, but it certainly did not include every provision. In some ways, then, the fundamental fairness doctrine yields a Due Process Clause that is both less expansive than the Bill of Rights (since some of those rights may not be protected) and more expansive (since fairness may require protections not explicitly included in the first eight amendments). As Justice Harlan, dissenting in *Duncan v. Louisiana* (1968, reprinted later in the chapter), said, "[T]he first section of the Fourteenth Amendment was meant neither to incorporate, nor to be limited to, the specific guarantees of the first eight Amendments. . . ." Instead it "requires that those procedures be fundamentally fair in all respects." To require more than that would be to put a "straitjacket" on the states and their administration of civil and criminal law.[22] As we shall see when we consider the death penalty cases, this concern for federalism and the limits of judicial power—which we also saw in *Slaughter-House* and *Hurtado*—continues to influence the Court.

Total Incorporation

One might argue that the Due Process Clause makes every provision of the Bill of Rights applicable to the states. The foremost proponent of this view, called total incorporation, was Justice Hugo Black. Black insisted—probably mistakenly—that original intent required this position.[23] But his attraction to total incorporation also rested on a particular understanding of the limits of judicial power in a constitutional democracy. Any alternative approach, he argued, gave judges unwarranted and unprincipled discretion in deciding which, if any, of the Bill of Rights applied to the states. In *Duncan*, Black responded forcefully to Harlan's support for the fundamental fairness doctrine:

> *Thus [in Harlan's approach] the Due Process Clause is treated as prescribing no specific and clearly ascertainable constitutional command that judges must obey in interpreting the Constitution, but rather as leaving judges free to decide at any particular time whether a particular rule or judicial formulation embodies an "immutable principle of free government" or is "implicit in the concept of ordered liberty," or whether certain conduct "shocks the judge's conscience" or runs counter to some other similar, undefined and undefinable standard. . . . It is impossible for me to believe that such unconfined power is given to judges in our Constitution that is a written one in order to limit governmental power.*

Black routinely chastised Harlan for this position, claiming that its inherent subjectivity—where did Harlan find these additional restraints upon state governments, since

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[21] The Court's refusal to apply the double jeopardy clause to the states reflected its treatment of the criminal procedure provisions of the Bill of Rights more generally. These were not incorporated until after 1961, when the Court found "essential" the search and seizure clauses of the Fourth Amendment in *Mapp v. Ohio* (1961).

[22] See also Harlan's concurrence in *Ker v. California* (1963).

[23] See his dissent in *Adamson v. California* (1947). For evidence that Black was probably wrong about the intent of those who wrote the Fourteenth Amendment, see, for example, Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stanford Law Review 5 (1949).

the text itself was silent on the matter?—gave extraordinary and unaccountable power to nonelected judges. It allowed them, once freed from the specific restraints in the Bill of Rights, to remake the states in whatever image they chose.

Justice Harlan argued in response that total incorporation was at best an illusory restraint on judicial power, since most of the so-called specific restraints on interpretation found in the Bill of Rights were every bit as vague as due process and therefore could not effectively limit judicial discretion. Justice Felix Frankfurter also reacted to Black's argument that fundamental fairness left judges free to depart from the text:

> *Judicial review . . . inescapably imposes on this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people. . . . These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the [clause] must move within accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment.*

Frankfurter also complained in *Adamson v. California* (1947, reprinted later in the chapter) that "[a] construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights [would] deprive the States of opportunity for reforms in legal process designed for extending the area of freedom." Black responded simply, "I am not bothered by the argument [about federalism]. . . . I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights. . . ."

Total Incorporation "Plus"

Favored by Justices Douglas and Murphy, total incorporation plus holds that the Due Process Clause fully incorporates the Bill of Rights as well as other nonexplicit and evolving rights. Dissenting in *Poe v. Ullman* (1961), Douglas wrote, "Though I believe that "due process" as used in the Fourteenth Amendment includes all of the first eight Amendments, I do not think it is restricted and confined to them." This approach shares with total incorporation the view that the Due Process Clause is a shorthand for the first eight amendments, but it goes substantially beyond it. Some justices, especially Black, thought that Douglas' willingness to include nonexplicit, implied rights reopened the possibility of unprincipled judicial subjectivity and therefore offered no improvement over the fundamental fairness approach. With that in mind, compare Douglas' position quoted above to Harlan's dissent in the same case: "[I]t is not the particular enumeration of rights in the first eight Amendments which spells out the reach of . . . due process, but rather . . . those concepts which are considered to embrace those rights which are fundamental; which belong to the citizens of all free governments. . . ."

Selective Incorporation

A majority of the justices who have considered the issue have ruled that the Due Process Clause incorporates some but not all of the Bill of Rights. The doctrine of selective incorporation resembles the fundamental fairness doctrine in its willingness to distinguish what is essential to due process from what is not. Both doctrines pro-

tect under the Due Process Clause only those rights that are "fundamental to ordered liberty." There is, however, one important difference between the positions. Whereas judges following the fundamental fairness approach would incorporate only the particular part of a constitutional guarantee involved in the specific case at hand, proponents of selective incorporation look less to the particulars of the case and instead determine whether the guarantee as a whole should apply to the states.

The doctrine of selective incorporation eventually resulted in the piecemeal incorporation of nearly every provision of the Bill of Rights—in part because Justice Black, unable to win a majority for total incorporation, was willing to support selective incorporation as the next best alternative. Dissenting in *Adamson*, Black wrote that "if the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process. . . ." Thus the position favored by Justice Black has become law in fact, if not in theory.

Black's criticism of selective incorporation was mild compared to that of Justice Harlan, who called it "an uneasy and illogical compromise among the views of various justices on how the Due Process Clause should be interpreted." In the same opinion in *Duncan*, Harlan criticized selective incorporation for equating "fundamental" with "old, much praised, and found in the Bill of Rights." Finally, reflecting the concern for federalism he had expressed in earlier cases, Harlan wrote that "neither history, nor sense, supports using the Fourteenth Amendment to put the states in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law."[24]

The incorporation doctrine dramatically transformed American constitutional law and "altered fundamentally the nature of the federal system."[25] Implicit in each of the approaches to incorporation is a particular vision of the relationship between liberty and community. Proponents of full incorporation argue for the dominance of national standards and the need for uniformity in local communities. Justices who favor the fundamental fairness approach or selective incorporation are willing to sacrifice some degree of national uniformity for greater flexibility within local communities. These are still live questions, as the Court's continuing struggle with the jot-for-jot theory indicates.[26]

The debate over incorporation thus involved competing understandings of constitutional interpretation, the role of the states in a federal system, and the proper role of judges in a constitutional democracy. It also illustrates how questions concerning individual liberties are also questions about federalism and the limits of judicial power. This helps to explain the conviction with which different justices held their views on the meaning and proper interpretation of the Due Process Clause. Much of

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[24] We shall see in chapter 11 that selective incorporation is intricately related to the concept of fundamental rights. The fundamental rights doctrine, following *Palko*, holds that there are two classes of constitutional liberties. Some liberties are fundamental because "they are the very essence of a scheme of ordered liberty." Some liberties, however, are not essential and hence not fundamental. A state may use its police powers to interfere with fundamental rights only when it has a "compelling reason" to do so (see, for example, *San Antonio v. Rodriguez* [1973]). A state may regulate nonfundamental rights so long as its action is rational, rather than compelling.

[25] Richard C. Cortner, *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of the Bill of Rights* (Madison: University of Wisconsin Press, 1981), 291.

[26] In 1985, Attorney General Edwin Meese publicly criticized the incorporation doctrine, calling its intellectual foundation "shaky" and complaining that the doctrine had damaged the states as independent constitutional actors. For a criticism of Meese's speech, see Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, NC: Duke University Press, 1986).

the rhetoric surrounding incorporation occurred not in dissents, but in concurring opinions. Often judicial disagreement over the proper method of interpretation had no effect on the outcome of the case. At stake were federal-state relations and the power of the federal judiciary to oversee those relations, issues that transcended specific results in specific cases.

Continuing Incorporation Problems

The process of selective incorporation resulted in the application to the states of nearly every provision of the Bill of Rights (see table 9.1). One provision that has not been incorporated is the Second Amendment. In *United States v. Cruikshank* (1875), the Court wrote that the Second Amendment "has no other effect than to restrict the powers of the national government," thus strongly suggesting that the Fourteenth Amendment did not incorporate it. In the recent case of *District of Columbia v. Heller* (2008, reprinted later in the chapter), a majority of the Court concluded that the Second Amendment does protect an individual right to own certain kinds of firearms

TABLE 9.1 *I. Selected Supreme Court Decisions on Selective Incorporation*

Constitutional Provision	***Case***
First Amendment	
Speech & Press	Gitlow v. New York (1925)
Free Exercise	Cantwell v. Connecticut (1940)
Establishment	Everson v. Board of Education (1947)
Fourth Amendment	
Search & Seizure	Wolf v. Colorado (1949)
Exclusionary Rule	Mapp v. Ohio (1961)
Fifth Amendment	
Self-incrimination	Malloy v. Hogan (1964)
Double jeopardy	Benton v. Maryland (1969)
Sixth Amendment	
Public trial	In re Oliver (1948)
Right to counsel (felony)	Gideon v. Wainwright (1963)
Right to counsel (misdemeanor w/jail)	Argersinger v. Hamlin (1972)
Speedy trial	Klopfer v. North Carolina (1967)
Jury trial	Duncan v. Louisiana (1968)
Eighth Amendment	
Cruel & unusual punishment	Louisiana v. Resweber (1947)
Ninth Amendment	
Implied Rights	
Privacy	Griswold v. Connecticut (1965)
II. Unincorporated Provisions of the Bill of Rights	
Second Amendment	
right to keep and bear arms	
Third Amendment	
no quartering of soldiers	
Fifth Amendment	
right to a grand jury hearing	
Seventh Amendment	
right to trial by jury in civil cases	
Eighth Amendment	
right to be free of excessive fines	

(please see our discussion of the case in chapter 2 for how the Court reached this conclusion). Because the case originated in the District of Columbia, the Court did not directly take up its earlier ruling in *Cruikshank*. Justice Scalia did make a reference to *Cruikshank* in footnote 23 of the majority opinion, noting that:

> *With respect to* Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that* Cruikshank *also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in* Presser v. Illinois *(1886) and* Miller v. Texas *(1894), reaffirmed that the Second Amendment applies only to the Federal Government.*

One might read footnote 23 to suggest that *Cruikshank* would no longer be good law. As the Court noted, *Cruikshank* also held that the First Amendment did not apply to the states. The interpretive logic that led the Court to reverse course with respect to the First Amendment might lead to a similar result with respect to the Second Amendment, especially given the majority's insistence upon the individual character of the right involved in *Heller*. This raises a fascinating question: Is the right to own a firearm more or less important than freedom of speech? Or more broadly: Is the right to own a firearm "the very essence of a scheme of ordered liberty?" to borrow the language from *Palko*?

There also remains some question about whether any particular guarantee applies with equal force or in precisely the same way against the states and the national government. That they might mean somewhat different things was a logical, if not inevitable, result of the fundamental fairness approach. A determination that fairness requires the incorporation of a provision of the Bill of Rights would not necessarily mean that it also requires the application of the entire set of requirements that the Court has determined are applicable to the national government under that provision.

In *Mapp v. Ohio* (1961) a majority of the Court seemed to insist that incorporation of a right did include the full range of requirements that had been developed under the provision. Other cases, however, suggest that the issue is not fully settled.[27] Writing in a long concurrence in *Williams v. Florida* (1970), Harlan complained that, because judges recognized the states' need for a little "elbow room," the "jot-for-jot" theory of incorporation had led to the diminution of federal rights. "These decisions," he wrote, "demonstrate that the difference between a [*Palko*] 'due process' approach [and] 'selective incorporation' is not an abstract [one]. The 'backlash' in [this case] exposes the malaise, for [here] the Court dilutes a federal guarantee in order to reconcile the logic of 'incorporation,' the jot-for-jot and case-for-case application of the federal right to the States, with the reality of federalism." The tensions between the principles of federalism and incorporation may reach far beyond the criminal procedure provisions in the Bill of Rights. In *Elk Grove v. Newdow* (2004), Justice Thomas argued that the establishment clause of the First Amendment should be understood as a "federalism provision," designed principally "to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause."

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[27] See, for instance, *Williams v. Florida* (1970, holding that the Sixth Amendment's requirement of trial by jury did not mandate a twelve-person jury) and *Apodaca v. Oregon* (1972, holding that the Sixth Amendment did not require unanimous jury verdicts in state courts).

As *Mapp* and *Williams* intimate, much of the Court's long discussion about incorporation occurred in the context of whether the criminal procedure provisions of the Bill of Rights should apply to the states. Traditionally, the states had possessed nearly complete autonomy in the areas of criminal law and procedure. The effects of incorporation would be most apparent in these cases. Consequently, they provided the occasion for an extended series of judicial discussions about the merits of incorporation. These decisions are important also because they often involve the Court's initial efforts to give the provisions in question an expansive interpretation. But they factor just as importantly in those cases where the Court has sought to restrict their reach, as we shall see when we examine the Court's longstanding and complex jurisprudence surrounding cruel and unusual punishment.

The Bill of Rights and Capital Punishment

Justice Stewart, concurring in *Furman v. Georgia* (1972), observed "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. . . . [I]t is unique . . . in its absolute renunciation of all that is embodied in our concept of humanity." A majority of the Court—and apparently a majority of American citizens—has never agreed, however, that the death penalty is by definition cruel and unusual. Nevertheless, Justice Stewart was unquestionably correct when he suggested death is different: In a constitutional democracy, committed to the dignity of the human person, a decision to sentence a person to death implicates moral values and constitutional principles of the highest order.

The United States Supreme Court has not always seemed to recognize the enormity of capital punishment. In *Louisiana v. Resweber* (1947), for example, the Court agreed that the ban against cruel and unusual punishments applied to the states. Nevertheless, it ruled that a young African American man was not subjected to cruel and unusual punishment when he was made to face the electric chair a second time because it had malfunctioned the first time. The majority wrote

> *The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. . . . The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. . . .*

Justice Burton, dissenting, argued that "Although the failure of the first attempt, in the present case, was unintended, the reapplication of the electric current will be intentional. How many deliberate and intentional reapplications of electric current does it take to produce a cruel, unusual and unconstitutional punishment?"

If there is one distinguishing feature of the Court's death penalty jurisprudence, it is the persistence and intensity of disagreement over its constitutionality. If *Resweber* foreshadowed that controversy, the Supreme Court's decision in *Furman v. Georgia* (1972) cemented it. A sharply divided Court concluded that Georgia's death penalty violated the Eighth Amendment, but could not agree why. Justice Stewart was not the only justice to write separately in *Furman*. *Every* member of the Court issued an opinion. Only Justices Brennan and Marshall directly addressed the question on the merits, concluding that the death penalty must always be unconstitutional. Three other justices (Douglas, White, and Stewart) did not go so far, ruling instead that the statute in question was unconstitutional because it gave the jury too great a discretion to impose or to withhold the penalty, thus making its imposition capricious. Four other justices dissented, leaving Chief Justice Burger to conclude, "Since there is no

majority of the Court . . . the future of capital punishment in this country has been left in limbo. . . . If today's opinions demonstrate nothing else, they starkly show that this is an area where legislatures can act far more effectively than courts."

Following *Furman*, well over 30 states adopted new death penalty laws, and every new decision by the Court seems to evoke a similar flurry of activity in the states. States that maintained or reinstituted the penalty after *Furman* argued that it serves several important purposes, including those of deterrence and retribution. Advocates also argue that capital punishment can be an appropriate "expression of society's moral outrage at particularly offensive conduct." (Justice Stewart in *Gregg v. Georgia* [1976, reprinted later in the chapter.])

The *Furman* Court's insistence upon changes in the administration of the death penalty, coupled with its inability to agree upon the reasons why Georgia's system amounted to cruel and unusual punishment, initiated an ongoing dialogue among federal courts and state legislatures about when the death penalty can pass constitutional muster. That dialogue has lasted some forty years, and shows no sign of ending. For the most part, these new statutes attempted to constrain the jury's decision to impose death by imposing new procedural guidelines, such as bifurcated proceedings—one to determine guilt, and a second for sentencing.

The Court considered some of these in the leading case of *Gregg v. Georgia*. Once again, the Court could not find a majority voice. Writing for a plurality, Justice Stewart wrote, "We now hold that the punishment of death does not invariably violate the Constitution. . . . And a heavy burden rests on those who would attack the judgment of the representatives of the people." Even so, the Court did presume to cabin the death penalty with a number of important restrictions, because "the death penalty must [comport] with the basic concept of human dignity at the core of the [Eighth] Amendment." Mandatory death penalty schemes, the plurality concluded, are by definition unconstitutional—the sentencing authority, judge or jury, must have the option to reject death. Similarly, the plurality noted that the sentencing authority must be "given adequate information and guidance. As a general proposition these concerns are best met by a bifurcated proceeding. . . ." In an impassioned dissent, Justice Brennan challenged the plurality's insistence upon deference to the political process, writing that ". . . This Court inescapably has the duty, as the ultimate arbiter of the meaning of the Constitution, to say whether . . . 'moral concepts' require us to hold" that the death penalty is cruel and unusual. "I emphasize only that foremost among the 'moral concepts' recognized in our cases and inherent in the Clause is . . . that the State . . . must treat its citizens in a manner consistent with their intrinsic worth as human beings. . . ."

Since *Gregg*, the Court and the states have continued to tinker with the administration of the death penalty, but the Court has steadfastly refused to revisit the fundamental question of whether the death penalty, per se, violates the Eighth Amendment.[28] The Court has, however, placed several additional limitations on the practice. So, for example, in *Enmund v. Florida* (1982), the Court ruled that capital punishment could not be imposed on an individual who had driven a getaway car, but had not actually participated in a murder that took place as part of the same crime. In *Coker v. Georgia* (1977), the Court invalidated the death penalty for the

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[28] In April 2002, U.S. District Court Judge Jed S. Rakoff did conclude that the Federal Death Penalty Act is unconstitutional because the death penalty violates the cruel and unusual punishments clause. The judge concluded that the "fully foreseeable" risk that enforcement of the death penalty will result in the execution of "a meaningful number of innocent people" violates "substantive due process." The decision was reversed by the circuit court in *United States v. Quinones and Rodriguez*, 313 F.3d 49 (2d Cir. 2002).

crime of rape, and recently, in the case of *Kennedy v. Louisiana* (2008, reprinted later in the chapter), the Court ruled that the death penalty may not be imposed for the crime of raping a child. Writing for a 5–4 majority, Justice Kennedy concluded that "[t]he Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death." The Court has also ruled that a state may not execute any person found to be mentally retarded, *Atkins v. Virginia* (2002), and in *Roper v. Simmons* (2005, reprinted later in the chapter), the Court, again splitting 5–4, concluded that it is unconstitutional to impose the death penalty for crimes committed under the age of 18. The decision thus overruled *Stanford v. Kentucky* (1989), where the Court had upheld the constitutionality of the death penalty for defendants aged sixteen and seventeen. The Court addressed the manner of execution in *Baze v. Rees* (2008), where Justice Roberts, writing for a plurality, concluded that the particular protocols adopted by the State of Kentucky in administering lethal injections did not violate the cruel and unusual punishment clause.

Who Gets the Death Penalty?

As long ago as *Furman* (1972), some justices had complained that the imposition of the death penalty was racially biased. "It would seem to be incontestable," Justice Douglas wrote, "that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." Justice Douglas knew all too well, though, that the long history of the death penalty in the United States was at least partly a sorrowful history of racial discrimination. Under Jim Crow, some states had made a rape committed by a white man punishable by a prison term; the same crime, committed by a black man against a white woman, was punishable by death.

A quick look at the demographics of death row might lead one to conclude that racial discrimination continues to haunt the death penalty. In 2008, there were over 3200 persons on death row in the United States, with approximately a third of them in Texas, California and Florida.[29] Over 98 percent are male, 45 percent are white, 42 percent are black, and 11 percent are Hispanic.[30]

In *McCleskey v. Kemp* (1987, reprinted later in the chapter), the Court considered a claim of racial discrimination by Warren McCleskey—an African American sentenced to death for killing a policeman during an armed robbery. McCleskey's attorneys presented statistical studies that African Americans who murdered white victims were substantially more likely to receive the death penalty than whites who murdered blacks. In his opinion for the Court, though, Justice Powell concluded that "At most . . . ," the evidence presented "indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. . . ." And, echoing recurrent fears about the limits of judicial power, Powell noted, "McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. . . ." In response, Justice Brennan

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[29] Fourteen states (and the District of Columbia) do not have the death penalty. They are: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

[30] http://www.deathpenaltyinfo.org/FactSheet.pdf.

wrote, "to reject McCleskey's powerful evidence on this basis is to ignore the qualitatively different character of the death penalty and the particular repugnance of racial discrimination. . . ."

Continuing Death Penalty Issues: Does Innocence Matter?

In *Herrera v. Collins* (1993), the Court ruled that a prisoner's claim of "actual innocence," standing alone, is not a sufficient ground for habeas corpus relief because federal courts "sit to correct constitutional violations, not factual errors."[31]

Suppose we know that some persons, innocent of the crimes for which they are convicted, will be put to death. Should the failure of any system of capital punishment to execute only the guilty matter constitutionally? According to one estimate, since 1973, 123 people have been released from death row because there was persuasive evidence of their innocence. Between 2000 and 2007, there has been an average of 5 exonerations per year, in part a consequence of work by organizations like the Innocence Project.[32] In January 2003, just days before his term was to end, Illinois Governor George Ryan commuted the sentences of all 167 death row inmates in the state's prisons. Ryan noted that nearly half of the state's 300 capital cases had been reversed for new trials or resentencing, and that thirty-three defendants had been represented by attorneys who were later suspended or disbarred. And whatever the Court had concluded in *Kemp*, Governor Ryan was disturbed to learn that more than two-thirds of the inmates on death row were African Americans. Perhaps most troubling, the Governor concluded that "there is not a doubt in my mind that the number of innocent men freed from our Death Row stands at 17. . . . That is an absolute embarrassment [and] nothing short of a catastrophic failure." The Governor concluded, "Our capital system is haunted by the demon of error. . . . [Some] will say that I am usurping the decisions of judges and juries and state legislators. . . . Even if the exercise of my power becomes my burden I will bear it. Our Constitution compels it."

Summary

Governor Ryan's impassioned speech—and the outraged response it drew in some quarters—illustrates the depth of feeling and emotion that continue to surround the debate over the death penalty in the United States. The Court is not immune from that passion. In *Callins v. Collins* (1994), the Supreme Court denied a petition for certiorari by Bruce Edward Callins, sentenced to death by a Texas jury. Callins had shot a man in the neck during a robbery; the victim soon bled to death. Callins ultimately appealed, claiming ineffective assistance of counsel.[33]

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[31] But see *United States v. Quinones* (196 F. Supp. 2d 416 [S.D.N.Y. 2002]) where District Judge Rakoff concluded that *Herrera* is limited because Herrera's proffer of actual innocence was not truly persuasive.

[32] Staff Report, House Judiciary Subcommittee on Civil and Constitutional Rights, Oct. 1993; see also http://deathpenaltyinfo.org/FactSheet.pdf. More generally, see Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydstun, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge: Cambridge University Press, 2008).

[33] In *Wiggins v. Smith* (26 June 2003), the Court reversed the sentence of Maryland death row inmate Kevin Wiggins on the basis of inadequate representation by his original trial attorneys. Standard procedure in Maryland at the time of the trial included preparation of a "social history" report that would contain mitigation investigations regarding the case. In this case, however, the report was not prepared or even requested. Justice O'Connor, writing for the Court, remarked that "[a]ny reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice among possi-

The Court voted 8 to 1—Justice Blackmun dissenting—to deny the petition. In his opinion, an emotional Justice Blackmun stated,

> *from this day forward, I no longer shall tinker with the machinery of death. . . . Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. . . . The basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—cannot be answered in the affirmative. . . . The path the Court has chosen lessens us all. I dissent.*

Blackmun's poignant dissent provoked an equally impassioned response by Justice Scalia. He noted that Justice Blackmun's opinion "often refers to 'intellectual, moral and personal' perceptions, but never to the text and tradition of the Constitution. It is the latter rather than former that ought to control. . . . Convictions in opposition to the death penalty are often passionate and deeply held. That would be no excuse for reading them into a Constitution that does not contain them. . . ."

As the heated discussion between Justices Scalia and Blackmun should make clear, disagreement over the constitutionality of the death penalty is also a dispute about the requirements of human dignity, and about purposes and limits of judicial power. Indeed, it is a dispute about the nature and meaning of the Constitution itself.

Comparative Perspectives

The first thing to note about the death penalty in comparative perspective is that most constitutional democracies have abolished it. By law or by practice, approximately 135 countries prohibit capital punishment. There is no death penalty in Canada, France, Germany, Ireland, Italy, South Africa, Spain, and Sweden. On the other hand, Afghanistan, China, Iran, Iraq, the Republic of Congo, Cuba, Egypt, India, Japan, Jordan, Libya, North Korea, Syria, Taiwan, and the United States do have the death penalty. According to Amnesty International, in 2007, 88 percent of all executions occurred in China, Iran, Saudi Arabia, Pakistan, and the United States.[34] As one critic has noted, "the countries that most vigorously employ the death penalty are generally ones that the United States has the least in common with politically, economically, or socially . . . , as they are the least democratic and the worst human rights abusers in the world."[35]

Suppose America's prolific use of the death penalty is a case of American "exceptionalism," as some scholars have argued. Should the practices of other countries matter to constitutional analysis in the United States? Consider Justice Scalia's remarks

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ble defenses, particularly given the apparent absence of aggravating factors from Wiggins' background." The Court concluded that the "performance of Wiggins' attorneys at sentencing violated his Sixth Amendment right to effective assistance of counsel."

[34] http://www.amnesty.org/en/library/asset/ACT50/001/2008/en/b43a1e5b-ffea-11dc-b092-bdb020617d3d/act500012008eng.pdf.

[35] Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 Oregon Law Review 97 (2002). Professor Steiker's pioneering work seeks to answer an important question: What accounts for this gross discrepancy in the use of capital punishment between the United States and the rest of the countries we consider to be our "peers" in so many other respects? Steiker's nuanced analysis suggests there are a number of reasons—but one was the Court's decision in *Furman* to regulate, rather than to abolish capital punishment. This "choice helped to legitimize and stabilize the practice of capital punishment in the United States." Moreover, the decision "created an impediment to American acceptance of capital punishment as a violation of international human rights law. . . ."

in his opinion for the plurality in *Stanford v. Kentucky* (1989), where he wrote "We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant." In dissent, Justice Brennan disagreed, writing "Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance. . . . Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved." Perhaps because the difference between the United States and other constitutional democracies is so stark, dispute about the relevance of comparative constitutional practices has become a staple in American death penalty jurisprudence, figuring prominently, for example, in the Court's opinion in *Atkins v. Virginia* (2002). Thus, Justice Scalia, dissenting, argued that "[I]rrelevant are the practices of the 'world community'. . . . We must never forget that it is a Constitution for the United States of America that we are expounding. . . ." The debate continued in *Roper v. Simmons* (2005, reprinted later in the chapter), where Justice Kennedy, writing for the majority, noted that "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility." Yet at least from the time of the Court's decision in *Trop v. Dulles* (1958), the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." In response, Justice Scalia observed that "Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage. . . . More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."

This kind of debate over the appropriateness of constitutional borrowing (see chapter 2), is especially interesting in light of the Eighth Amendment's reference to "unusual" in the "cruel and unusual punishments" clause. It also takes on added significance in light of the increasing globalization of liberal democratic institutions, a phenomenon we discussed in chapter 2.

The Death Penalty and Judicial Power

In some countries, the death penalty is prohibited clearly and explicitly in the constitutional text.[36] In other countries, the prohibition is a function of judicial decision. Two of the most important decisions are by the constitutional courts of South Africa and Hungary. The decision by the Hungarian Constitutional Court is perhaps the clearest example of how issues of judicial power are wrapped up in the death penalty: The Court's decision—striking down the death penalty—was its very first. Perhaps more surprising, the decision did not follow a lower court decision sentencing an offender to death. Instead, the Court acted upon a complaint filed by a law professor, who had argued that the penalty violated Article 54(1) of the Constitution. That

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[36] "Out of the 69 countries in the world which have to date abolished the death penalty for all crimes, at least 38 have prohibited it in their constitutions, often on human rights grounds. The latest to do so is Luxembourg, which amended its constitution in April 1999 to prohibit the death penalty. Nine other countries have constitutional provisions which limit the crimes for which the death penalty can be imposed." http://www.web.amnesty.org/rmp/dplibrary.nsf/index?openview.

article provides that "everyone has the inherent right to life and human dignity. . . . And no one shall be subject to torture or to cruel and inhumane or degrading treatment or punishment. . . . " No other provision mentioned the death penalty. One commentator has suggested that the decision can be explained as a condition for Hungary's entry into the European Union.[37]

The South African Constitution, like the Hungarian, does not mention the death penalty. In *State v. Makwanyane* (1995), the Constitutional Court noted that the silence of the South African constitution was "not accidental," but instead reflected a "Solomonic" decision by the founders to leave the decision to the Court. Relevant provisions of the Constitution included Article 9, which provides that every person has the right to life; Article 10, which provides that everyone has the right to dignity; and Article 11(2), which prohibits "cruel, unhuman, or degrading treatment or punishment."

In accordance with its Constitution, which instructs the Court "to consider international law" and permits it to consider foreign law (see our discussion of "borrowing" in chapter 2), the Court began its opinion with a detailed discussion of the death penalty in the United States, as well as decisions by the European Court of Human Rights, the Constitutional Court of Hungary, and several other countries, including India and Japan. It noted, too, that comparable bills of rights would have especial importance until South Africa developed its own indigenous jurisprudence. Nevertheless, the Court also made clear that comparative materials, while instructional, do not necessarily provide definitive answers to questions about the interpretation of the South African Bill of Rights. A sophisticated understanding of constitutional borrowing must account for the kinds of situations and circumstances where the better approach would be to reject foreign experience as an appropriate model of constitutional development.

The Court began its review of comparative materials by observing that

> *Today, capital punishment has been abolished as a penalty for murder either specifically or in practice by almost half the countries of the world including the democracies of Europe and our neighbouring countries, Namibia, Mozambique and Angola. In most of those countries where it is retained, as the Amnesty International statistics show, it is seldom used.*

The Court's most detailed discussion, however, was of the history of the death penalty in the American Supreme Court. It concluded that American

> *jurisprudence has not resolved the dilemma arising from the fact that the Constitution prohibits cruel and unusual punishments, but also permits, and contemplates that there will be capital punishment. The acceptance by a majority of the United States Supreme Court of the proposition that capital punishment is not per se unconstitutional, but that in certain circumstances it may be arbitrary, and thus unconstitutional, has led to endless litigation. Considerable expense and interminable delays result from the exceptionally-high standard of procedural fairness set by the United States courts in attempting to avoid arbitrary decisions. The difficulties that have been experienced in following this path, to which Justice Blackmun and Justice Scalia have both referred, but from which they have drawn different conclusions, persuade me that we should not follow this route.*

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[37] George P. Fletcher, *Searching for the Rule of Law in the Wake of Communism*, 1992 Brigham Young University Law Review 145, 159.

The Court noted that its decision was also intricately caught up with questions about the limits of judicial power in a constitutional democracy. Echoing Justice Brennan's remarks in *Gregg*,

> *This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public. Justice Powell's comment in his dissent in* Furman v Georgia *bears repetition: But however one may assess amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery—not the core—of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, and not a judicial, function. . . .*[38]

The Court thus declined to follow the United States' model, concluding instead that the constitutional value of human dignity, coupled with Article 11(2), prohibited capital punishment as a "serious impairment of human dignity." The Court concluded,

> *The rights to life and dignity are the most important of all human rights, and the source of all other personal rights. . . . By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.*[39]

The Court also noted that the Canadian Court had similarly recognized the value of human dignity in the well-known case of *Kindler v. Canada* (1992). In *Kindler*, three of seven judges concluded that the death penalty is cruel and unusual, in part because "it is the supreme indignity to the individual, . . . [and] the absolute and irrevocable castration. . . ." Nevertheless, a majority concluded that the Canadian Constitution did not prohibit the government from extraditing Kindler to the United States without first seeking assurance that Kindler would not be given the death penalty.[40]

In its review of foreign case law, the Court observed also that "similar issues were debated by the European Court of Human Rights" in *Soering v. United Kingdom* (1989). *Soering* also involved extradition to the United States of a defendant facing capital punishment. Detained in England, Soering was a suspect in the murder of his girlfriend's parents in Virginia. Soering argued that, if extradited, he would be subject to inhuman and degrading treatment in violation of Article 3 of the European Convention on Human Rights. Article 2 of the Convention similarly protects the right to life, but makes an exception for executions "following [the] conviction of a crime for

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[38] Compare the decision by the Hungarian Court, after noting that "social sentiments" often favor the death penalty: "The Constitutional Court, however, does not hunt for popularity in society; its only competence is to ensure the coherence and constitutionality of the legal system. . . ."

[39] The Court also embarked upon a long review of capital punishment in India, Canada and other countries. It concluded that in India, the relevant constitutional provisions were worded differently, and that the founders had "specifically contemplated and sanctioned" the death penalty.

[40] In *Minister v. Burns* (2001), the Canadian Court reconsidered the issue in *Kindler*, concluding that the "basic tenets" of fundamental justice had not changed since *Kindler*, "but their application in particular cases . . . must take note of factual developments in Canada and in relevant foreign jurisdictions." The Court then concluded that the balance, which had "tilted in favour of extradition without reassurances in *Kindler* . . . now tilts against the constitutionality of such an outcome."

TABLE 9.2 *Constitutional Provisions Prohibiting the Death Penalty*

Country	Title and date of constitution	Article prohibiting the death penalty and reference to human rights
Austria	Federal Constitutional Law of the Republic of Austria, as revised in 1929	Article 85 states: ''The death penalty is abolished.''
Cape Verde	Constitution of the Republic of Cape Verde (promulgated in 1981)	Article 26 (2) states: ''. . . in no case will there be the death penalty. Article 26, ''The Right to Life and to Physical and Mental Integrity,'' is included under Title II, ''Rights, Liberties and Guarantees.''
Colombia	Constitution of Colombia (1991)	Article 11 states: ''The right to life is inviolable. There will be no death penalty.'' Article 11 is included under Title II, ''Rights, Guarantees and Duties.''
Dominican Republic	Constitution of the Dominican Republic (promulgated in 1966)	Article 8 (1) refers to ''the inviolability of life'' and states: ''Therefore, neither the death penalty, torture, nor any other punishment or oppressive procedure or penalty that implies loss or diminution of the physical integrity or health of the individual may be established.'' Article 8 is included under Title II, Section I, ''Individual and Social Rights.''
Ecuador	Constitution of the Republic of Ecuador (1979)	Article 19 (1) refers to ''The inviolability of life and personal integrity'' and states in part: ''There is no death penalty.'' Article 19 is included under Title II, ''Rights, Duties and Guarantees.''
Germany	Basic Law of the Federal Republic of Germany (of 23 May 1949)	Article 102 states: ''The death penalty is abolished.''
Haiti	Constitution of the Republic of Haiti (1987)	Article 19 states: ''The death penalty is abolished in all cases.'' Article 19 is included under Title III, ''Basic Rights and Duties of the Citizen.''
Honduras	Constitution of the Republic of Honduras (1982, in force since 1985)	Article 66 states: ''The death penalty is abolished.'' Article 66 is included under Title III, ''Declarations, Rights, and Guarantees.''
Iceland	Constitution of the Republic of Iceland (1944)	Article 69, as amended in 1995, reads in part: Capital punishment may never be stipulated by law. Article 69 is included in the section of the Constitution which deals with human rights.
Italy	Constitution of the Republic of Italy of 27 December 1947	Article 27 states in part: ''The death penalty is not admitted except in cases specified by military laws in time of war.'' Article 27 is included under Title I, Part One, ''Rights and Duties of Private Citizens.''
Marshall Islands	Constitution of the Republic of the Marshall Islands (came into effect on 1 May 1979)	''No crime under the law of the Marshall Islands may be punished with death.'' (Article III)

TABLE 9.2 Continued.

Country	Title and date of constitution	Article prohibiting the death penalty and reference to human rights
Micronesia (Federated States of)	Constitution of the Federated States of Micronesia (came into effect on 10 May 1979)	"Capital punishment is prohibited." (Article IV, Section 9)
Monaco	Constitution of the Principality of Monaco of 17 December 1962	Article 20 states in part: "The death penalty is abolished." Article 20 is included under Title III, "Liberties and Fundamental Rights."
Mozambique	Constitution of the Republic of Mozambique (1990)	Article 70 states: "1. All citizens shall have the right to life. All shall have the right to physical integrity and may not be subjected to torture or to cruel or inhuman treatment. 2. In the Republic of Mozambique there shall be no death penalty." Article 70 is included under Part II, "Fundamental Rights, Duties and Freedoms."
Namibia	Constitution of the Republic of Namibia (1990)	Article 6, "Protection of Life," states: "The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia." Article 6 is included under Chapter 3, "Fundamental Human Rights and Freedoms."
Netherlands	Constitution of the Kingdom of the Netherlands (1983)	Article 114 states: "The death penalty may not be imposed."
Nicaragua	Constitution of Nicaragua (1987)	Article 23 states: "The right to life is inviolable and inherent to the human person. In Nicaragua there is no death penalty." Article 23 is included under Title IV, "Rights, Duties and Guarantees of the Nicaraguan People."
Panama	Constitution of the Republic of Panama (1972)	Article 30 states: "There is no death penalty. . . ." Article 30 is included under Title III, "Individual and Social Rights and Duties."
Portugal	Constitution of the Portuguese Republic (1976)	Article 24, "Right to Life," states: "1. Human life is inviolable. 2. In no case will there be the death penalty." Article 24 is included under Part I, "Fundamental Rights and Duties."
Sao Tomé and Príncipe	Constitution of the Republic of Sao Tomé and Príncipe (1990)	Article 21, "Right to Life," states: "1.Human life is inviolable. 2. In no case will there be the death penalty." Article 21 is included under Title II, "Personal Rights."

TABLE 9.2 Continued.

Country	Title and date of constitution	Article prohibiting the death penalty and reference to human rights
Spain	Spanish Constitution (1978)	Article 15 states: "All have the right to life and physical and moral integrity and in no case may they be subjected to torture or inhuman or degrading punishment or treatment. The death penalty is abolished except in those cases which may be established by military penal law in times of war."
Sweden	Instrument of Government of the Swedish Constitution (came into effect on 1 January 1975)	Chapter 2, Article 4 states: "Capital punishment may not occur." Chapter 2 is entitled "Fundamental Freedoms and Rights."
Uruguay	Constitution of the Oriental Republic of Uruguay (1970)	Article 26 states in part: "The death penalty will not be applied to anyone." Article 26 is included under Section II, "Rights, Duties and Guarantees."
Venezuela	Constitution of the of Venezuela (1961)	Article 58 states: "The right to life is Republic inviolable. No law can establish the death penalty, nor any authority apply it." Article 58 is included under Title III, "Duties, Rights and Guarantees."

Source: http://www.amnesty.org/en/library/asset/ACT50/006/1996/en/dom-ACT 500061996en.html

which this penalty is provided by law." A blanket prohibition of capital punishment under Article 3 would thus conflict with Article 2. Consequently the Court ruled that the death penalty is not absolutely contrary to the Convention, but must satisfy the conditions set forth in Article 3. These included a requirement of proportionality and acceptable conditions of detention. The Court ruled that in this case, Soering's extradition would not satisfy those conditions. Soering, the Court concluded, was impaired mentally, a youth (18 at the time of the offense), and might be on death row for as long as eight years, which might itself possibly amount to cruel and unusual punishment.

Conclusion

Justice Stewart was right: Death is different. And when seen in a comparative perspective, it becomes clear that America is different, too. The constitutional courts of other advanced industrial democracies have concluded that the constitutional values of life, liberty, and dignity compel them, even in the absence of a clear constitutional command, and even in the face of public opposition, to condemn the death penalty. Should these decisions have any relevance for constitutional interpretation in the United States? The justices of the American Supreme Court ask the question with increasing frequency, especially in the area of capital punishment. They have yet to come to a consensus, but just to ask the question is to engage, once again, the most fundamental of constitutional issues: Who are we, and what do we believe?

TABLE 9.3 *Constitutional Provisions Limiting the Scope of the Death Penalty*

Country	Title and date of constitution	Article limiting the death penalty and reference to human rights
Brazil	Constitution of the Federative Republic of Brazil (1988)	Article 5, XLVII states in part: "There will be no penalties of: a) death, except in cases of declared war as defined in Article 84, XIX." Article 5, XLVII is included under Title II, "Fundamental Rights and Guarantees."
El Salvador	Constitution of the Republic of El Salvador of 1983	Article 27 states in part: "The death penalty may be imposed only in cases provided by military laws during a state of international war." Article 27 is included under Title II, "Rights and Fundamental Guarantees of the Individual."
Luxembourg	Constitution of the Grand Duchy of Luxembourg of 17 October 1868	Article 18 states: "The death penalty on political grounds and civil death and branding are hereby abolished."
Mexico	Constitution of the United States of Mexico (1992)	Article 22 states in part: "The death penalty is prohibited for political crimes and, in relation to other crimes, can only be imposed for betraying the country during international war, parricide, murder that is committed against a defenceless person, with premeditation or treacherously, arson, kidnapping, banditry, piracy and grave military offences."
Peru	Political Constitution of Peru (1993)	Article 140 states: "The death penalty may only be applied for the crime of treason in times of war, and of terrorism, in accordance with national laws and international treaties to which Peru is party."

SOURCE: http://www.amnesty.org/en/library/asset/ACT50/006/1996/en/dom-ACT500061996en.html

Selected Bibliography

Allen, Howard W., and Jerome M. Clubb. 2008. *Race, Class, and the Death Penalty: Capital Punishment in American History*. Albany: State University Press of New York.

Amar, Akhil Reed. 2000. *The Bill of Rights: Creation and Reconstruction*. New Haven: Yale University Press.

——— 1999. *Intratextualism*. Harvard Law Review 112: 747.

———. 1999. *Continuing the Conversation*. University of Richmond Law Review 33: 579.

———. 1996. *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States*? Harvard Journal of Law & Public Policy 19: 443.

Arkes, Hadley. 1990. *Beyond the Constitution*. Princeton: Princeton University Press.

Atwell, Mary Welek. 2007. *Wretched Sisters: Examining Gender and Capital Punishment*. New York: Peter Lang.

Baldus, David, G. Woodruff, and C. Pulaski, Jr., 1990. *Equal Justice and the Death Penalty*. Boston: Northeastern University Press.

Banner, Stuart. 2002. *The Death Penalty: An American History*. Cambridge: Harvard University Press.

Baumgartner, Frank R., Suzanna L. De Boef, and Amber E. Boydstun. 2008. *The Decline of the Death Penalty and the Discovery of Innocence*. Cambridge: Cambridge University Press.

Becker, Theodore. 1941. *The Declaration of Independence: A Study in the History of Political Ideas*. New York: Alfred A. Knopf.

Berger, Raoul. 1997. *Government by Judiciary: The Transforming of the Fourteenth Amendment*. Indianapolis: Liberty Fund, Inc.

——1982. *Death Penalties: The Supreme Court's Obstacle Course*. Cambridge: Harvard University Press.

Berns, Walter. 1979. *For Capital Punishment: Crime and the Morality of the Death Penalty*. New York: Basic Books.

Black, Charles, L. 1975. *Capital Punishment: The Inevitability of Caprice and Mistake.* New York: W.W. Norton.

Cogan, Neil. 1997. *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*. New York: Oxford University Press.

Cortner, Richard C. 1981. *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of the Bill of Rights*. Madison: University of Wisconsin Press.

Corwin, Edward S. 1948. *Liberty Against Government*. Baton Rouge: Louisiana State University Press.

Culbert, Jennifer L. 2007. *Dead Certainty: The Death Penalty and the Problem of Judgment*. Palo Alto: Stanford University Press.

Curtis, Michael Kent. 1986. *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights*. Durham: Duke University Press.

Dayan, Colin. 2007. *The Story of Cruel and Unusual*. Cambridge: MIT Press.

Dorf, Michael C. 2002. *Equal Protection Incorporation*. Virginia Law Review 88: 951.

Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge: Harvard University Press.

Erler, Edward J. 1991. *The American Polity: Essays on the Theory and Practice of Constitutional Government*. New York: Crane Russak.

Haines, Herbert H. 1996. *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972–1994*. New York: Oxford University Press.

Kammen, Michael. 1986. *The Origins of the American Constitution: A Documentary History*. New York: Penguin Books.

Kennedy, Randall L., 1988. *McKleskey v. Kemp: Rule, Capital Punishment, and the Supreme Court.* Harvard Law Review 101: 1388.

Levy, Leonard. 1999. *Origins of the Bill of Rights*. New Haven: Yale University Press.

McDonald, Forrest. 1985. *Novus Ordo Seclorum*. Lawrence: University Press of Kansas.

Ogletree, Charles, Jr., and Austin Sarat. 2006. *From Lynch Mobs to the Killing State: Race and the Death Penalty in America*. New York: New York University Press.

Perry, Michael. 1982. *The Constitution, the Court, and Human Rights*. New Haven: Yale University Press.

Rivkind, Nina and Steven F. Shatz. 2005. *Cases and Materials on the Death Penalty*. Eagan, MN.: ThomsonWest.

Sarat, Austin, 2001. *When the State Kills: Capital Punishment and the American Condition*. Princeton: Princeton University Press.

———. ed. 1998. *The Killing State: Capital Punishment in Law, Politics, and Culture.* New York: Oxford University Press.

Tribe, Laurence. 1985. *Constitutional Choices*. Cambridge: Harvard University Press.

Van den Haag, Ernest and John P. Conrad. 1983. *The Death Penalty: A Debate*. New York: Putman Press.

Wildenthal, Bryan H. 2000. *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment.* Ohio State Law Journal 61: 1051.

Wong-Ervin, Koren Wai. 1998. *The Second Amendment and the Incorporation Conundrum: Towards a Workable Jurisprudence*. Hastings Law Journal 50: 177.

Wood, Gordon. 1969. *The Creation of the American Republic 1776–1787*. New York: W.W. Norton & Company.

Selected Comparative Bibliography

Alston, Philip, ed. 1999. *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*. New York: Oxford University Press.

Campbell, Tom, Jeffrey Goldsworthy, and Adrienne Stone, eds. 2006. *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia*. Aldershot, UK: Ashgate.

Friedrich, Carl J. 1950. *Constitutional Government and Democracy*. rev. ed. Boston: Ginn and Company.

Hood, Roger. 2003. *The Death Penalty: A Worldwide Perspective*. New York: Oxford University Press.

Hood, Roger et al. 1999. *The Death Penalty—Abolition in Europe*. Council of Europe Publishing.

Johnson, David T. and Franklin E. Zimring. 2009. *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia.* New York: Oxford University Press.

Kaufman-Osborn, Timothy V. 2002. *From Noose to Needle: Capital Punishment and the Late Liberal State.* Ann Arbor: University of Michigan Press.

Sarat, Austin and Christian Boulanger. 2005. *The Cultural Lives of Capital Punishment: Comparative Perspectives*. Palo Alto: Stanford University Press.

Schabas, William A. 2002. *The Abolition of the Death Penalty in International Law.* 3rd ed. Cambridge: Cambridge University Press.

Barron v. Baltimore

32 U.S. 243, 7 Pet. 243, 8 L. Ed. 672 (1833)

In paving its streets, the city of Baltimore had diverted the flow of several streams, resulting in deposits of sand and gravel near Barron's wharf. Baltimore's activity deprived Barron of the use of his wharf, whereupon he sued the city, claiming that its action violated the clause of the Fifth Amendment that proclaims "no person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Opinion of the Court: *Marshall*, Duvall, Johnson, McLean, Story, Thompson. Not Participating: Baldwin.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

The question thus presented is, we think, of great importance, but not of much difficulty.

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff . . . insists, that the constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the tenth section of the first article.

We think that section affords a strong, if not a conclusive, argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to congress; others are expressed in general terms. The third clause, for example, declares, that "no bill of attainder or ex post facto law shall be passed." No language can be more general; yet the demonstration is complete, that it applies solely to the government of the United States. . . .

If the original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the state; if, in every inhibition intended to act on state power, words are employed, which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course, in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states, by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained, that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.

In compliance with a sentiment thus generally ex- pressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

We are of opinion, that the provision in the fifth amend- ment to the constitution, declaring that private property shall not be taken for public use, without just compensa- tion, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. We are, there- fore, of opinion, that there is no repugnancy between the several acts of the general assembly of Maryland . . . and the constitution of the United States. This court, therefore, has no jurisdiction of the cause, and it is dismissed.

Notes and Queries

1. The Court concluded that the question raised in this case was, as Marshall wrote, "not of much difficulty." But consider: Only two provisions of the Bill of Rights apply explicitly to the national government—the First, which mentions Congress, and the Seventh, which is addressed to the federal judiciary—whereas the others are written in general terms. Why shouldn't we infer that the Founders intended the Bill of Rights to apply to the states, except on those two occasions when they took great care to say so?
2. Is Marshall's opinion based on a particular under- standing of the relationship between the national govern- ment and the states? Consider the opinion of Laurence Tribe, who argues that *Barron* is "a concession to state power." Tribe contends that implicit in *Barron* is the belief that respect for the principle of federalism and state's rights was for the Founders a necessary part of what it meant to protect liberty. *American Constitutional Law* (Mineola: New York, 1988), 3. The influence of federalism on interpretation of the Bill of Rights is a recurrent theme in this chapter.
3. What approaches to constitutional interpretation does Marshall use in *Barron?* To what extent does he rely upon historical context? Structural reasoning? Political the- ory? Words of the Constitution?
4. Does Marshall regard the Bill of Rights more as a list of individual liberties, or rather as a set of restrictions on the actions of certain levels of government? What is the difference?
5. Would Madison and Hamilton agree with Marshall's argument about the reach of federal power? Would most anti-Federalists agree with Marshall's decision?