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AMENDMENTS TO THE CONSTITUTION

FIRST THROUGH TENTH AMENDMENTS

BILL OF RIGHTS

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AMENDMENTS TO THE CONSTITUTION

FIRST THROUGH TENTH AMENDMENTS

Bill of Rights

On September 12, five days before the Convention adjourned, Mason and Gerry raised the question of adding a bill of rights to the Constitution. Said Mason: "It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours." But the motion of Gerry and Mason to appoint a committee for the purpose of drafting a bill of rights was rejected.[1] Again, on September 14, Pinckney and Gerry sought to add a provision "that the liberty of the Press should be inviolably observed—." But after Sherman observed that such a declaration was unnecessary, because "[t]he power of Congress does not extend to the Press," this suggestion too was rejected.[2] It cannot be known accurately why the Convention opposed these suggestions. Perhaps the lateness of the Convention, perhaps the desire not to present more opportunity for controversy when the document was forwarded to the States, perhaps the belief, asserted by the defenders of the Constitution when the absence of a bill of rights became critical, that no bill was needed because Congress was delegated none of the powers which such a declaration would deny, perhaps all these contributed to the rejection.[3]

In any event, the opponents of ratification soon made the absence of a bill of rights a major argument[4] and some friends of the document, such as Jefferson,[5] strongly urged amendment to in-

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[1] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 587–88 (rev. ed. 1937).

[2] Id. at 617–618.

[3] The argument most used by proponents of the Constitution was that inasmuch as Congress was delegated no power to do those things which a bill of rights would proscribe no bill of rights was necessary and that it might be dangerous because it would contain exceptions to powers not granted and might therefore afford a basis for claiming more than was granted. THE FEDERALIST NO. 84 at 555–67 (Alexander Hamilton) (Modern Library ed. 1937).

[4] Substantial excerpts from the debate in the country and in the ratifying conventions are set out in 1 B. SCHWARTZ (ED.), THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 435–620 (1971); 2 id. at 627–980. The earlier portions of volume 1 trace the origins of the various guarantees back to the Magna Carta.

[5] In a letter to Madison, Jefferson indicated what he did not like about the proposed Constitution. "First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of the fact triable by the laws of the land and not by the law of Nations. . . . Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."

clude a declaration of rights.[6] Several state conventions ratified while urging that the new Congress to be convened propose such amendments, 124 amendments in all being put forward by these States.[7] Although some dispute has occurred with regard to the obligation of the first Congress to propose amendments, Madison at least had no doubts[8] and introduced a series of proposals,[9] which

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12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (J. Boyd ed. 1958). In suggested that nine States should ratify and four withhold ratification until amendments adding a bill of rights were adopted. Id. at 557, 570, 583. Jefferson still later endorsed the plan put forward by Massachusetts to ratify and propose amendments. 14 id. at 649.

[6] Thus, George Washington observed in letters that a ratified Constitution could be amended but that making such amendments conditions for ratification was ill-advised. 11 THE WRITINGS OF GEORGE WASHINGTON 249 (W. Ford ed. 1891).

[7] 2 B. SCHWARTZ (ED.), THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 627–980 (1971). *See also* H. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION 19 (1896).

[8] Madison began as a doubter, writing Jefferson that while "[m]y own opinion has always been in favor of a bill of rights," still "I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment. . . ." 5 THE WRITINGS OF JAMES MADISON 269. (G. Hunt ed. 1904). His reasons were four. (1) The Federal Government was not granted the powers to do what a bill of rights would proscribe. (2) There was reason "to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power." (3) A greater security was afforded by the jealousy of the States of the national government. (4) "[E]xperience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. . . . Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. . . . Wherever there is a interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful and interested prince." Id. at 272–73. Jefferson's response acknowledged the potency of Madison's reservations and attempted to answer them, in the course of which he called Madison's attention to an argument in favor not considered by Madison "which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity." 14 THE PAPERS OF THOMAS JEFFERSON 659 (J. Boyd ed. 1958). Madison was to assert this point when he introduced his proposals for a bill of rights in the House of Representatives. 1 ANNALS OF CONGRESS 439 (June 8, 1789).

In any event, following ratification, Madison in his successful campaign for a seat in the House firmly endorsed the proposal of a bill of rights. "[I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c." 5 THE WRITINGS OF JAMES MADISON 319 (G. Hunt ed. 1904).

[9] 1 ANNALS OF CONGRESS 424–50 (June 8, 1789). The proposals as introduced are at pp. 433–36. The Members of the House were indisposed to moving on the proposals.

he had difficulty claiming the interest of the rest of Congress in considering. At length, the House of Representatives adopted 17 proposals; the Senate rejected two and reduced the remainder to twelve, which were accepted by the House and sent on to the States[10] where ten were ratified and the other two did not receive the requisite number of concurring States.[11]

Bill of Rights and the States.—One of the amendments which the Senate refused to accept—declared by Madison to be "the most valuable of the whole list"[12]—read: "The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases shall not be infringed by any State."[13] In spite of this rejection, the contention that the Bill of Rights—or at least the first eight—was applicable to the States was repeatedly pressed upon the Supreme Court. By a long series of decisions, beginning with the opinion of Chief Justice Marshall in *Barron v. Baltimore,*[14] the argument was consistently rejected. Nevertheless, the enduring vitality of natural law concepts encouraged renewed appeals for judicial protection through application of the Bill of Rights.[15]

The Fourteenth Amendment.—Following the ratification of the Fourteenth Amendment, litigants disadvantaged by state laws and policies first resorted unsuccessfully to the privileges and immunities clause of § 1 for judicial protection.[16] Then, claimants seized upon the due process clause of the Fourteenth Amendment as guaranteeing certain fundamental and essential safeguards,

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[10] Debate in the House began on July 21, 1789, and final passage was had on August 24, 1789. 1 ANNALS OF CONGRESS 660–779. The Senate considered the proposals from September 2 to September 9, but no journal was kept. The final version compromised between the House and Senate was adopted September 24 and 25. *See 2* B. SCHWARTZ, (ED.), THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983–1167 (1971).

[11] The two not ratified dealt with the ratio of population to representatives and with compensation of Members of Congress. H. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION 184, 185 (1896). The latter proposal was ratified in 1992 as the 27th Amendment.

[12] 1 ANNALS OF CONGRESS 755 (August 17, 1789).

[13] Id.

[14] 32 U.S. (7 Pet.) 243 (1833). *See also* Livingston's Lessee v. Moore, 32 U.S. (7 Pet.) 469 (1833); Permoli v. First Municipality, 44 U.S. (3 How.) 589, 609 (1845); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Withers v. Buckley, 61 U.S. (20 How.) 84 (1858); Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1867); Twitchell v. Commonwealth, 74 U.S. (7 Wall.) 321 (1869).

[15] Thus, Justice Miller for the Court in Loan Association v. Topeka, 87 U.S. (20 Wall.) 655, 662, 663 (1875): "It must be conceded that there are . . . rights in every free government beyond the control of the State . . . There are limitations on [governmental] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

[16] Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

without pressing the point of the applicability of the Bill of Rights.[17] It was not until 1887 that a litigant contended that, although the Bill of Rights had not limited the States, yet so far as they secured and recognized the fundamental rights of man they were privileges and immunities of citizens of the United States and were now protected against state abridgment by the Fourteenth Amendment.[18] This case the Court decided on other grounds, but in a series of subsequent cases it confronted the argument and rejected it,[19] though over the dissent of the elder Justice Harlan, who argued that the Fourteenth Amendment in effect incorporated the Bill of Rights and made them effective restraints on the States.[20] Until 1947, this dissent made no headway,[21] but in *Ad-*

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[17] Walker v. Sauvinet, 92 U.S. 90 (1876); United States v. Cruikshank, 92 U.S. 542 (1876); Hurtado v. California, 110 U.S. 516 (1884); Presser v. Illinois, 116 U.S. 252 (1886). In *Hurtado,* in which the Court held that indictment by information rather than by grand jury did not offend due process, the elder Justice Harlan entered a long dissent arguing that due process preserved the fundamental rules of procedural justice as they had existed in the past, but he made no reference to the possibility that the Fourteenth Amendment due process clause embodied the grand jury indictment guarantee of the Fifth Amendment.

[18] Spies v. Illinois, 123 U.S. 131 (1887).

[19] In re Kemmler, 136 U.S. 436 (1890); McElvaine v. Brush, 142 U.S. 155 (1891); O'Neil v. Vermont, 144 U.S. 323 (1892).

[20] In O'Neil v. Vermont, 144 U.S. 323, 370 (1892), Justice Harlan, with Justice Brewer concurring, argued "that since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier Amendments of the Constitution." Justice Field took the same position. Id. at 337. Thus, he said: "While therefore, the ten Amendments, as limitations on power, and so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal government and not to the States, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them." Id. at 363. Justice Harlan reasserted this view in Maxwell v. Dow, 176 U.S. 581, 605 (1900) (dissenting opinion), and in Twining v. New Jersey, 211 U.S. 78, 114 (1908) (dissenting opinion). Justice Field was no longer on the Court and Justice Brewer did not in either case join Justice Harlan as he had done in *O'Neil.*

[21] Cf. Palko v. Connecticut, 302 U.S. 319, 323 (1937), in which Justice Cardozo for the Court, including Justice Black, said: "We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule." *See* Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78* HARV. L. REV. 746 (1965). According to Justice Douglas' calculations, ten Justices had believed that the Fourteenth Amendment incorporated the Bill of Rights, but a majority of the Court at any one particular time has never been of that view. Gideon v. Wainwright, 372 U.S. 355, 345–47 (1963) (concurring opinion). *See also* Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964). It must be said, however that many of these Justices were not consistent in asserting this view. Justice Goldberg probably should be added to the list. Pointer v. Texas, 380 U.S. 400, 410–14 (1965) (concurring opinion).

amson v. California[22] a minority of four Justices were marshalled behind Justice Black, who contended that his researches into the history of the Fourteenth Amendment left him in no doubt "that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights."[23] Scholarly research stimulated by Justice Black's view tended to discount the validity of much of the history recited by him and to find in the debates in Congress and in the ratifying conventions no support for his contention.[24] Other scholars, going beyond the immediate debates, found in the pre- and post-Civil War period a substantial body of abolitionist constitutional thought which could be shown to have greatly influenced the principal architects, and observed that all three formulations of § 1, privileges and immunities, due process, and equal protection, had long been in use as shorthand descriptions for the principal provisions of the Bill of Rights.[25]

Unresolved perhaps in theory, the controversy in fact has been mostly mooted through the "selective incorporation" of a majority of the provisions of the Bill of Rights.[26] This process seems to have

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[22] 332 U.S. 46 (1947).

[23] Id. at 74, Justice Black's contentions, id. at 68–123, were concurred in by Justice Douglas. Justices Murphy and Rutledge also joined this view but went further. "I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." Id. at 124. Justice Black rejected this extension as an invocation of "natural law due process." For examples in which he and Justice Douglas split over the application of nonspecified due process limitations, *see, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965); In re Winship, 397 U.S. 358 (1970).

[24] The leading piece is Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? 2* STAN. L. REV. 5 (1949).

[25] Graham, *Early Antislavery Backgrounds of the Fourteenth Amendment, 1950* WISC. L. REV. 479, 610; Graham, *Our "Declaratory" Fourteenth Amendment, 7* STAN. L. REV. 3 (1954); J. TENBROEK, EQUAL UNDER LAW (1965 enlarged ed.). The argument of these scholars tends to support either a "selective incorporation" theory or a fundamental rights theory, but it emphasized the abolitionist stress on speech and press as well as on jury trials as included in either construction.

[26] Williams v. Florida, 399 U.S. 78, 130–32 (1970) (Justice Harlan concurring in part and dissenting in part). The language of this process is somewhat abstruse. Justice Frankfurter objected strongly to "incorporation" but accepted other terms. "The cases say the First [Amendment] is 'made applicable' by the Fourteenth or that it is taken up into the Fourteenth by 'absorption,' but not that the Fourteenth 'incorporates' the First. This is not a quibble. The phrase 'made applicable' is a neutral one. The concept of 'absorption' is a progressive one, i.e., over the course of time something gets absorbed into something else. The sense of the word 'incorporate' im-

had its beginnings in an 1897 case in which the Court, without mentioning the just compensation clause of the Fifth Amendment, held that the Fourteenth Amendment's due process clause forbade the taking of private property without just compensation.[27] Then, in *Twining v. New Jersey*[28] the Court observed that "it is possible that some of the personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law . . . . If this is so, it is not because those rights are enumerated in the first eight amendments, but because they are of such nature that they are included in the conception of due process of law." And in *Gitlow v. New York,*[29] the Court in dictum said: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." After quoting the language set out above from *Twining v. New Jersey*, the Court in 1932 said that "a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character."[30] The doctrine of this period was best formulated by Justice Cardozo, who observed that the due process clause of the Fourteenth Amendment might proscribe a certain state procedure, not because the proscription was spelled out in one of the first eight amendments, but because the procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[31] because certain proscriptions were "implicit in the concept of ordered 'liberty.'"[32]

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plies simultaneity. One writes a document incorporating another by reference at the time of the writing. The Court has used the first two forms of language, but never the third." Frankfurter, *Memorandum on 'Incorporation' of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78* HARV. L. REV. 746, 747–48 (1965). It remains true that no opinion of the Court has used "incorporation" to describe what it is doing, cf. Washington v. Texas, 388 U.S. 14, 18 (1967); Benton v. Maryland, 395 U.S. 784, 794 (1969), though it has regularly been used by dissenters. E.g., Pointer v. Texas, 380 U.S. 400, 408 (1965) (Justice Harlan); Williams v. Florida, 399 U.S. 78, 130 (1970) (Justice Harlan); Williams v. Florida, supra, 143 (Justice Stewart).

[27] Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

[28] 211 U.S. 78, 99 (1908).

[29] 268 U.S. 652, 666 (1925).

[30] Powell v. Alabama, 287 U.S. 45, 68 (1932).

[31] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[32] Palko v. Connecticut, 302 U.S. 319, 325 (1937). Justice Frankfurter was a strong advocate of this approach to the Fourteenth Amendment's due process clause. E.g., Rochin v. California, 342 U.S. 165 (1952); Adamson v. California, 332 U.S. 46, 59 (1947) (concurring opinion). Justice Harlan followed him in this regard. E.g.,

As late as 1958, Justice Harlan was able to assert in an opinion of the Court that a certain state practice fell afoul of the Fourteenth Amendment because "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech . . . ."[33]

But this process of "absorption" into due process of rights which happened also to be specifically named in the Bill of Rights came to be supplanted by a doctrine which had for a time coexisted with it, the doctrine of "selective incorporation." This doctrine holds that the due process clause incorporates the text of certain of the provisions of the Bill of Rights. Thus in *Malloy v. Hogan*,[34] Justice Brennan was enabled to say: "We have held that the guarantees of the First Amendment, . . . the prohibition of unreasonable searches and seizures of the Fourth Amendment, . . . and the right to counsel guaranteed by the Sixth Amendment, . . . are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." And Justice Clark was enabled to say: "First, this Court has decisively settled that the First Amendment's mandate that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made wholly applicable to the States by the Fourteenth

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Benton v. Maryland, 395 U.S. 784, 801 (1969) (dissenting opinion); Williams v. Florida, 399 U.S. 78, 117 (1970) (concurring in part and dissenting in part). For early applications of the principles to void state practices, *see* Moore v. Dempsey, 261 U.S. 86 (1923); Meyer v. Nebraska, 262 U.S. 390 (1923); Tumey v. Ohio, 273 U.S. 510 (1927); Powell v. Alabama, 287 U.S. 45 (1932); Mooney v. Holohan, 294 U.S. 103 (1935); Brown v. Mississippi, 297 U.S. 278 (1936); Rochin v. California, supra.

[33] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).

[34] 378 U.S. 1, 10 (1964). In Washington v. Texas, 388 U.S. 14, 18 (1967), Chief Justice Warren for the Court said that the Court has "increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law." And in Benton v. Maryland, 395 U.S. 784, 794 (1969), Justice Marshall for the Court wrote: "[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." In this process, the Court has substantially increased the burden of showing that a procedure is fundamentally fair as carried by those who would defend a departure from the requirement of the Bill of Rights. That is, previously the Court has asked whether a civilized system of criminal justice could be imagined that did not accord the particular procedural safeguard. E.g., Palko v. Connecticut, 302 U.S. 319, 325 (1937). The present approach is to ascertain whether a particular guarantee is fundamental in the light of the system existent in the United States, which can make a substantial difference. Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968). *Quaere*, the approach followed in Williams v. Florida, 399 U.S. 78 (1970), and Apodaca v. Oregon, 406 U.S. 404 (1972).

Amendment."[35] Similar language asserting that particular provisions of the Bill of Rights have been applied to the States through the Fourteenth Amendment's due process clause may be found in numerous cases.[36] Most of the provisions have now been so applied.[37]

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[35] Abington School District v. Schempp, 374 U.S. 203, 215 (1963). Similar formulations for the speech and press clauses appeared early. E.g., West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Schneider v. Irvington, 308 U.S. 147, 160 (1939). In Griffin v. California, 380 U.S. 609, 615 (1965), Justice Douglas stated the holding as "that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids" the state practice at issue.

[36] E.g., Mapp v. Ohio, 367 U.S. 643 (1961); Klopfer v. North Carolina, 386 U.S. 213 (1967); Duncan v. Louisiana, 391 U.S. 145 (1968); Ashe v. Swenson, 397 U.S. 436 (1970); Baldwin v. New York, 399 U.S. 66 (1970).

[37] The following list does not attempt to distinguish between those Bill of Rights provisions which have been held to have themselves been incorporated or absorbed by the Fourteenth Amendment and those provisions which the Court indicated at the time were applicable against the States because they were fundamental and not merely because they were named in the Bill of Rights. Whichever formulation was originally used, the former is now the one used by the Court. Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

First Amendment—

Religion—

Free exercise: Hamilton v. Regents, 293 U.S. 245, 262 (1934); Cantwell v. Connecticut, 310 U.S. 296, 300, 303 (1940).

Establishment: Everson. v. Board of Education, 330 U.S. 1, 3, 7, 8 (1947); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).

Speech—Gitlow v. New York, 268 U.S. 652, 666 (1925); Fiske v. Kansas, 274 U.S. 380 (1927); Stromberg v. California, 283 U.S. 359 (1931).

Press—Near v. Minnesota ex rel. Olson, 283 U.S. 697, 701 (1931).

Assembly—DeJonge v. Oregon, 299 U.S. 353 (1937).

Petition—DeJonge v. Oregon, supra, 364, 365; Hague v. CIO, 307 U.S. 496 (1939); Bridges v. California, 314 U.S. 252 (1941).

Fourth Amendment—

Search and seizure—Wolf v. Colorado, 338 U.S. 25 (1949); Mapp v. Ohio, 367 U.S. 643 (1961).

Fifth Amendment—

Double jeopardy—Benton v. Maryland, 395 U.S. 784 (1969); Ashe v. Swenson, 397 U.S. 436 (1970) (collateral estoppel).

Self-incrimination—Malloy v. Hogan, 378 U.S. 1 (1964); Griffin v. California, 380 U.S. 609 (1965).

Just compensation—Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

Sixth Amendment—

Speedy trial—Klopfer v. North Carolina, 386 U.S. 213 (1967).

Public trial—In re Oliver, 333 U.S. 257 (1948).

Jury trial—Duncan v. Louisiana, 391 U.S. 145 (1968).

Impartial Jury—Irvin v. Dowd, 366 U.S. 717 (1961); Turner v. Louisiana, 379 U.S. 466 (1965).

Notice of charges—In re Oliver, 333 U.S. 257 (1948).

Confrontation—Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).

Compulsory process—Washington v. Texas, 388 U.S. 14 (1967).

Counsel—Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963).

Aside from the theoretical and philosophical considerations which enter into the question whether the Bill of Rights is incorporated into the Fourteenth Amendment or whether due process subsumes certain fundamental rights which may be named in the Bill of Rights, the principal relevant controversy is whether, once a guarantee or a right set out in the Bill of Rights is held to be a limitation on the States, the same standards which restrict the Federal Government restrict the States. The majority of the Court has consistently held that the standards are identical, whether the Federal Government or a State is involved,[38] and "has rejected the notion that the Fourteenth Amendment applies to the State only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"[39] Those who have argued for the application of a dual-standard test of due process as between the Federal Government and the States, most notably Justice Harlan,[40] but includ-

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Eighth Amendment—

Cruel and unusual punishment—Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Robinson v. California, 370 U.S. 660 (1962).

Provisions not applied are:

Second Amendment—

Right to keep and bear arms—Cf. United States v. Cruikshank, 92 U.S. 542, 553 (1876); Presser v. Illinois, 116 U.S. 252, 265 (1886).

Third Amendment—

Quartering troops in homes—No cases.

Fifth Amendment—

Grand Jury indictment—Hurtado v. California, 110 U.S. 516 (1884).

Seventh Amendment—

Jury trial in civil cases in which value of controversy exceeds $20—*Cf.* Adamson v. California, 332 U.S. 46, 64–65 (1947) (Justice Frankfurter concurring). *See* Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916).

Eighth Amendment—

Bail—*But see* Schilb v. Kuebel, 404 U.S. 357, 365 (1971).

Excessive Fines—*But see* Tate v. Short, 401 U.S. 395 (1971) (utilizing equal protection to prevent automatic jailing of indigents when others can pay a fine and avoid jail).

[38] Malloy v. Hogan, 378 U.S. 1, 10–11 (1964); Ker v. California, 374 U.S. 23 (1963); Griffin v. California, 380 U.S. 609 (1965); Baldwin v. New York, 399 U.S. 66 (1970); Williams v. Florida, 399 U.S. 78 (1970); Ballew v. Georgia, 435 U.S. 223 (1978); First National Bank of Boston v. Bellotti, 435 U.S. 765, 780 n.16 (1978) (specifically the First Amendment speech and press clauses); Crist v. Bretz, 437 U.S. 28 (1978); Burch v. Louisiana, 441 U S. 130 (1979).

[39] Williams v. Florida, 399 U.S. 78, 106–107 (1970) (Justice Black concurring in part and dissenting in part), quoting Malloy v. Hogan, 378 U.S. 1, 10–11 (1964).

[40] Justice Harlan first took this position in Roth v. United States, 354 U.S. 476, 496 (1957) (concurring in part and dissenting in part). *See also* Ker v. California, 374 U.S. 23, 45–46 (1963) (concurring). His various opinions are collected in Williams v. Florida, 399 U.S. 78, 129–33 (1970) (concurring in part and dissenting in part).

ing Justice Stewart,[41] Justice Fortas,[42] Justice Powell,[43] and Justice Rehnquist,[44] have not only based their contentions on a rejection of actual incorporation but upon the ground as well that if the same standards are to apply the standards previously developed with the Federal Government in mind will have to be diluted in order to give the States more leeway in the operation of their criminal justice systems.[45] The latter result seems to have developed with regard to issues surrounding the interpretation of the jury trial guarantee of the Sixth Amendment.[46]

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[41] Williams v. Florida, 399 U.S. 78, 143–45 (1970) (concurring in part and dissenting in part); Duncan v. Louisiana, 391 U.S. 145, 173–83 (1968) (Justices Harlan and Stewart dissenting). *But see* Apodaca v. Oregon, 406 U.S. 404, 414 (1972) (dissenting). *See also* Crist v. Bretz, 437 U.S. 28 (1978) (Justice Stewart writing opinion of the Court).

[42] Bloom v. Illinois, 391 U.S. 194, 211 (1968) (concurring).

[43] Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (concurring); Crist v. Bretz, 437 U.S. 28, 52–53 (1978) (dissenting, joined by Chief Justice Burger and Justice Rehnquist). *But see* First National Bank of Boston v. Bellotti, 435 U.S. 765, 780 n.16 (1978) (rejecting theory in First Amendment context in opinion for the Court, joined by Chief Justice Burger).

[44] Buckley v. Valeo, 424 U.S. 1, 290 (1976) (concurring in part and dissenting in part); First National Bank of Boston v. Bellotti, 435 U.S. 765, 822 (1978) (dissenting). *See also* Crist v. Bretz, 437 U.S. 28, 52–53 (1978) (joining Justice Powell's dissent). Justice Jackson was also apparently of this view. Beauharnais v. Illinois, 343 U.S. 250, 288 (1952) (dissenting).

[45] E.g., Williams v. Florida, 399 U.S. 78, 129–38 (1970) (Justice Harlan concurring in part and dissenting in part); Bloom v. Illinois, 391 U.S. 194, 213–215 (1968) (Justice Fortas concurring). *But see* Williams v. Florida, supra, 106–08 (Justice Black concurring in part and dissenting in part).

[46] Williams v. Florida, 399 U.S. 78 (1970); Apodaca v. Oregon, 406 U.S. 404 (1972). *But cf.* Ballew v. Georgia, 435 U.S. 223 (1978).