The Bill of Rights and the States

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- The Supreme Court once said the Bill of Rights doesn't apply to the states.
- Then again, the Supreme Court also said that the Fourteenth Amendment incorporated the Bill of Rights against the states.
- Are either of those statements true?

There are certain lies told about the Constitution that repeatedly grind into me like salt in an open wound. One of those is the repeated statement that "The Fourteenth Amendment incorporates the Bill of Rights, including the First Amendment, to the states." By which, the speaker usually means that, before the Fourteenth Amendment, none of the ten amendment in the Bill of Rights could be applied to the states. That, ladies and gentlemen, is a flat out lie, and I will prove it here.

Amending the Constitution

We all know that the Bill of Right are the first ten amendments to the Constitution. Therefore, to understand the scope of their effectiveness, we have to understand how the Constitution is amended. That process is laid out in Article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or,

on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. Constitution, Article V

There are two steps to amend the Constitution. First, an amendment must be proposed. This can be done either by Congress or by a convention of the states for the purpose for proposing amendments. Once an amendment is proposed, it's sent to the states where it can be ratified in one of two ways, either by state legislatures or by conventions in the states. In either case, there must be a three-fourths majority of states that ratify the amendment before it becomes a part of the Constitution, as Article V states.

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U.S. Constitution, Article V

That means, when when three-fourths of the states had ratified these ten amendments in 1791, they were as much a part of the Constitution as the original seven articles, and the 17 amendments that were later ratified.

The Marshall Rebellion

In 1833 the case Barron v. Mayor & City Council of Baltimore

was decided by the Supreme Court. Writing the opinion was Chief Justice Marshall, who said:

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.

Barron v. Mayor & City Council of Baltimore

In the mind of the court, since the Constitution established the government of the United States, and not the governments of the Several States, then any general statement it contained logically applied only to what we now call the federal government. Needless to say, that was not the position of the other side.

The counsel for the plaintiff in error 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. It 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.

Barron v. Mayor & City Council of Baltimore

According to the court, the fact that each clause of Article I, Section 10 specifically states that “No State shall..” is proof that the court is correct in its opinion.

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. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain State legislation, contains in terms the very prohibition. It declares, that “no State shall pass any bill of attainder or ex post facto law.” This provision, then, of the ninth section, however comprehensive its language, contains no restriction on State legislation.

Barron v. Mayor & City Council of Baltimore

Isn’t it amazing that the court used terms like “obviously intended” and “the demonstration is complete” to demonstrate that their position is correct, yet not a single clause they quote, nor any other in the Constitution, actually states or infers that it’s purpose was solely for the central government unless stated otherwise. Which brings us to the Bill of Rights.

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.

Barron v. Mayor & City Council of Baltimore

I would say that is a very big if, especially when you consider more than just the cherry-picked clauses that court has used. Let's start with the Preamble:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. Constitution, Preamble

Why did We the People ordain and establish this Constitution for the United States of America? Not, as the court stated "for their own government", but for a more perfect union. A union of what? A union of states. How is this Constitution supposed to insure domestic tranquility or provide for the common defense if it is not applicable to the states? Yes, the Constitution created the government of the United States, but that is not all that it did. Let's take a look at Article IV, Section 2:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. Constitution, Article IV, Section 2

Tell me, how is a citizen of one state supposed to be entitled to all privileges and immunities of citizens in the several states if that one state is not bound, under the Constitution, to do so? How is a person charged in one state to be delivered up to another state unless the Constitution binds them to do so? And how is an escaped person supposed to be delivered up unless the states are bound by the Constitution to do so? These statements may not be as general as those the court referenced in Article I, Section 9, but there's more.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S Constitution, Article VI, Clause 2

Article VI, Clause 2, known as the Supremacy Clause, not only clearly states that the Constitution is the supreme law of the land, but that the judges in every state are bound to it. In fact, Clause 3 adds to that thought:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S Constitution, Article VI, Clause 3

Not only are the members of the federal government required to be bound by oath or affirmation to support the Constitution, but the members of each state's legislature and their executive and judicial officers are as well. If the Constitution is supreme even over the constitution and laws of

any state, why would anyone assume that a general statement in the document would not be binding against the states?

Also, if Chief Marshall and the court are allowed to infer by language, let me do a little myself. While, according to the Preamble, the people did ordain and establish this Constitution for the United States of America, are the people not parties to the compact?

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

U.S. Constitution Article VI

The states, as the ratifying entities, are the parties to this compact, this agreement between the states. Don't you think, if they intended to be excluded from part of it, they would have said so somewhere? Yet I can find nothing in the language of the Constitution, or the debates in the convention, that even hinted at the idea that this document was primarily to protect us only from the actions of the federal government unless otherwise stated.

There's one more thing, but that will have to wait until we get the to First Amendment below.

The Fourteenth Amendment

When people talk about the Fourteenth Amendment "incorporating" the Bill of Rights against the states, I can only reasonably surmise they're talking about Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment XIV

Do you see any language in the amendment stating that the Bill of Rights, the first ten amendments, were once somehow not a full part of the Constitution, but now are? Could they mean "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;"? But how is that functionally different from "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." in Article IV, Section 2, Clause 1 that I cited before? In fact, nowhere in the Fourteenth Amendment does it claim to change the scope of any other part of the Constitution. If anything, much of Section 1 of the Fourteenth Amendment seems to overturn the mistaken decision by the Barron court.

The First Amendment

There is one part of the Bill of Rights that patently applies only to the federal government: The First Amendment,

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment I

Unlike the other nine amendments, the first five words of the First Amendment are, "Congress shall make no law…." Congress is the proper name of the federal legislature. Therefore, only that body is restricted by the First Amendment. And since the rest of the federal government was either created by Congress or acts in response to laws created by Congress, the First Amendment only applies to the federal government. There is no

language in the Fourteenth Amendment that modifies the First Amendment. Before you start worrying about your precious freedoms of religion, speech, press, assembly, and petition, recognize that each and every state has their own version of the Bill of Rights which protects these rights, if in different details and forms.

Which brings me back to the Barron court, which claimed that any general statement in the Constitution was to be applied only to the central government, what we now call the federal government. If that were true, why did the members of the very first Congress, many of whom were involved with the the Constitutional Convention or the Ratification Debates for the Constitution, feel the need to call out Congress for what became the First Amendment? After all, neither the President nor the federal courts can make federal law, but only the federal legislature. So if, as the court and Chief Justice Marshall contend, "No Bill of Attainder or ex post facto Law shall be passed," obviously applies only to the federal government, why wouldn't "No law respecting an establishment of religion," as well? I contend that it's obvious that in an agreement between the states, general statements apply to all parties except when the language or context identifies a specific entity.

Conclusion

When I sat down and read the Constitution for the first time, I was struck by two things. First, how much I had not been taught in school. Second, how much of what I had been taught was absolutely wrong. This idea that the Bill of Rights did not apply to the states until 1868 and the ratification of the Fourteenth Amendment is one of those things we're taught that's absolutely false.

I'm not sure why the Barron court wanted to detach the Constitution from the parties that ratified it, but they did, and without any concrete evidence to support their position.

Here we are, almost 200 years later, and the fiction created by the Barron court still persists today. No, the Barron court did not attempt to excise the Bill of Rights from the rest of the Constitution, but as we know, judges play a form of telephone with their opinions. One judge says one thing, then another judge interprets that to mean something slightly different, and this goes on and on until the judges believe the Constitution says the exact opposite of those words on parchment.

This toxic separation of the Bill of Rights and the States is a perfect example of the need for We the People to once again read and study the Constitution of our country. The only way we can be the land of the free is to be the home of people brave enough to read our founding documents, then apply them to our lives today.

So the next time someone tells you the Bill of Rights doesn't apply to the states, or that it didn't until the Fourteenth Amendment, ask them to show you evidence of why that is so. If they claim Barron v. Baltimore, you have an answer that can prove them wrong.

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