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Recommended Citation

Extent to Which Rights Secured by the First Eight Amendments to the Federal Constitution are Protected Against State Action by the Fourteenth Amendment, 2 Md. L. Rev. 174 (1938)

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**EXTENT TO WHICH RIGHTS SECURED BY THE
FIRST EIGHT AMENDMENTS TO THE FEDERAL
CONSTITUTION ARE PROTECTED AGAINST
STATE ACTION BY THE FOURTEENTH
AMENDMENT**

*Palko v. State of Connecticut*¹

Pursuant to a state statute,² the State appealed from a conviction of murder in the second degree; the Supreme Court of Errors of Connecticut reversed the judgment because of error prejudicial to the State in excluding certain evidence and ordered a new trial.³ On the new trial, defendant was convicted of murder in the first degree and sentenced to death, which judgment was affirmed on appeal.⁴ Defendant, claiming subjection to double jeopardy, appealed to the United States Supreme Court. *Held* (one justice dissenting): affirmed; the Fifth Amendment is not applicable to a State and the Fourteenth Amendment does not protect against subjection to double jeopardy at the instance of a State—at least, where the challenged procedure is no more than an attempt to insure a trial of the accused free from legal error.

The Court, although finding it unnecessary to consider the precise limits of the prohibition against double jeopardy of the Federal Constitution, assumed that this is not confined to jeopardy in a new and independent case but forbids also jeopardy in the same case through a new trial at the instance of the government rather than upon motion of the accused.⁵ So that for the purposes of the case, the challenged State procedure was considered as constituting a subjection to double jeopardy within the meaning of the Fifth Amendment. The decision rests upon the proposition that such subjection by a State is not a denial of due process of law forbidden to the States by the Fourteenth Amendment.

That the rights secured by the first eight amendments to the Federal Constitution are protected thereby against the United States only and that those amendments are not as such applicable to the States, has been familiar and fre-

¹ — U. S. —, 82 L. Ed. 220, 58 S. Ct. 149 (1937).

² Conn. Gen. Stat. (1930), Sec. 6494.

³ State v. Palko, 121 Conn. 669, 186 Atl. 657 (1936).

⁴ State v. Palko, 122 Conn. 529, 191 Atl. 320 (1937); the Court followed the earlier case of State v. Lee, 65 Conn. 205, 30 Atl. 1110 (1894), which upheld the same statute challenged here.

⁵ See *Keppner v. United States*, 195 U. S. 100, 49 L. Ed. 114, 24 S. Ct. 797 (1904).

quently repeated doctrine since *Barron v. Baltimore*.⁶ This, in spite of the fact that the Maryland Court of Appeals, undoubtedly through inadvertence, has in one recent case held a State law unconstitutional as contravening the due process clause of the Fifth Amendment,⁷ and in another case, decided a few years ago, seems to proceed throughout upon the assumption that the privilege against self-incrimination was secured against the State by virtue of the Fifth Amendment,⁸ although the Supreme Court had held directly to the contrary in *Twining v. New Jersey*.⁹

However, it is now definitely settled that some, but not all, of such rights are embraced within the concept of "ordered liberty" and due process of law and are consequently protected against the States by the Fourteenth Amendment.¹⁰

State abridgment of the following rights, specifically protected against the Federal government in the first eight amendments, has been regarded by the Supreme Court as a denial of due process of law prohibited by the Fourteenth Amendment:—religious freedom;¹¹ freedom of speech and press;¹² peaceable assembly;¹³ just compensation if private property is taken for a public use;¹⁴ the assistance of coun-

⁶ 7 Pet. 243, 8 L. Ed. 672 (1833). To the same effect is *Price v. State*, 160 Md. 670, 154 Atl. 556 (1931).

⁷ *Schneider v. Duer*, 170 Md. 326, 184 Atl. 914 (1936), where the 1935 act creating a board of barber examiners and providing for licensing and regulation of barbers, was held to contravene both the 5th and 14th Amendments to the United States Constitution and the 23rd Article of the Maryland Declaration of Rights. In the case of *Dasch v. Jackson*, 170 Md. 251, 183 Atl. 534 (1936), decided at the same term, involving the same constitutional questions, the 1935 Act providing for the licensing and regulation of paperhangers was held to contravene only the 13th Amendment and the 23rd Article of the Declaration of Rights, no mention being made of the 5th Amendment.

⁸ *Gamble v. State*, 164 Md. 50, 163 Atl. 859 (1932).

⁹ 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14 (1908).

¹⁰ "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 . . . 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." *Moody, J.*, in *Twining v. New Jersey*, supra note 9. See, generally, *Warren, The New "Liberty" under the Fourteenth Amendment* (1926), 39 *Harv. L. R.* 436; note (1936) 4 *Geo. Wash. L. R.*, 347; note (1938) 26 *Georgetown L. J.* 439.

¹¹ *Hamilton v. Regents*, 293 U. S. 245, 79 L. Ed. 343, 55 S. Ct. 204 (1934).
¹² *Stromberg v. California*, 283 U. S. 359, 75 L. Ed. 1117, 51 S. Ct. 532 (1931); *Near v. Minnesota*, 283 U. S. 697, 75 L. Ed. 1357, 51 S. Ct. 625 (1931); *Grosjean v. American Press Co.*, 297 U. S. 233, 80 L. Ed. 660, 56 S. Ct. 444 (1936); *DeJonge v. Oregon*, 299 U. S. 353, 81 L. Ed. 278, 57 S. Ct. 255 (1937); *Herndon v. Lowry*, 301 U. S. 242, 81 L. Ed. 1066, 57 S. Ct. 732 (1937).

¹³ *DeJonge v. Oregon*, supra note 12; *Herndon v. Lowry*, *Ibid.*

¹⁴ *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897).

sel in the case of one accused of crime.¹⁵ Possibly, also, freedom from excessive fines is to be included.¹⁶

On the other hand, the following rights (also specifically protected against the Federal government in the first eight amendments) have been held not to be protected against the States by any constitutional provision:—to keep and bear arms;¹⁷ not to be held to answer for a capital or infamous crime except upon presentment or indictment of a grand jury;¹⁸ not to be subjected to double jeopardy;¹⁹ freedom from self-incrimination;²⁰ trial by jury, in either criminal or civil proceedings.²¹ It seems probable that this is true also as to the right of freedom from unreasonable searches and seizures,²² and the right of the accused in criminal proceedings to a public trial,²³ and to be confronted with the witnesses against him;²⁴ they are, at least, so classified by the Court in the instant case.²⁵

The difficulty of establishing a dividing line between the two groups of cases is apparent, and has troubled the Court both in the instant case and in *Powell v. Alabama*.²⁶ The rationale of the earlier cases was that, since due process of law was specifically guaranteed with respect to the Federal government in addition to the other rights specifically protected, it was not to be construed as including any of such other rights, as otherwise their enumeration would have been superfluous; and that the same phrase in the Fourteenth Amendment was accordingly to be interpreted in the same way.²⁷

Such reasoning would obviously exclude all the rights set forth in the first eight amendments from any protection

¹⁵ *Powell v. Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55 (1932).

¹⁶ See *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908); *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. Ed. 417, 29 S. Ct. 220 (1909).

¹⁷ *Presser v. Illinois*, 116 U. S. 252, 29 L. Ed. 615, 6 S. Ct. 580 (1886).

¹⁸ *Hurtado v. California*, 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111, 292 (1884).

¹⁹ *Palko v. Connecticut*, *supra* note 1.

²⁰ *Twining v. New Jersey*, *supra* note 9.

²¹ *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678 (1876); *Maxwell v. Dow*, 176 U. S. 581, 44 L. Ed. 597, 20 S. Ct. 448 (1900); *N. Y. Cent. R. R. Co. v. White*, 243 U. S. 188, 61 L. Ed. 667, 37 S. Ct. 247 (1917).

²² See *National Safety Deposit Co. v. Stead*, 232 U. S. 58, 58 L. Ed. 504, 34 S. Ct. 209 (1914); *Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652, 34 S. Ct. 341 (1914); *Burdeau v. McDowell*, 256 U. S. 405, 65 L. Ed. 1048, 41 S. Ct. 574 (1921).

²³ See *Gaines v. Washington*, 277 U. S. 81, 72 L. Ed. 793, 48 S. Ct. 468 (1928).

²⁴ See *West v. Louisiana*, 194 U. S. 258, 48 L. Ed. 965, 24 S. Ct. 650 (1904).

²⁵ 53 S. Ct. 149, 151.

²⁶ 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55 (1932).

²⁷ See *Hurtado v. California*, 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111, 292 (1884).

by the Federal Constitution against State action, and would remit the individual for protection with respect thereto to the provisions of the various State Constitutions. With the one exception of *Chicago, B. & Q. R. Co. v. Chicago*,²⁸ it was followed, though with occasional weakening,²⁹ until 1925, when in *Gitlow v. New York*,³⁰ the Court in sustaining a State law challenged as denying freedom of speech and press, assumed without deciding that such a denial would deprive the accused of liberty without due process of law.³¹ The assumption was repeated in subsequent cases,³² gaining sufficient strength with each repetition, so that in 1931 in *Stromberg v. California*³³ (although never until then definitely decided) it was treated as settled law.

The rationale of the cases prior to 1925, in consequence, seems to have been definitely abandoned. The authority of their holdings, on the other hand, is treated in the instant case as unimpaired, and as being entirely consistent with the decisions since 1931.

The cases now are made to turn upon the somewhat vague concept of fundamental principles of liberty and justice. If a right secured against the Federal government by one of the first eight amendments is of a character such that neither liberty nor justice would exist without it, then it is absorbed by the Fourteenth Amendment and is protected against the States; otherwise it is neither so absorbed nor so protected. The question is whether denial of the right causes subjection to "a hardship so acute and shocking that our polity will not endure it." The dividing line between the cases grouped above is stated to have been generally true to this unifying principle.

This follows the line somewhat hesitatingly indicated for the first time by the Court in *Powell v. Alabama*.³⁴ How far it departs from the reasoning of earlier cases may be realized, when one notes that the Court uses, as an illustration of the sort of right clearly and necessarily embraced within the Fourteenth Amendment, freedom of speech and press. Yet only a few years before the *Gitlow* case, the Court had

²⁸ *Supra* note 14.

²⁹ See note 10 *supra*.

³⁰ 268 U. S. 652, 69 L. Ed. 1138, 45 S. Ct. 625 (1925).

³¹ The implications of this assumption were viewed with considerable alarm by Mr. Charles B. Warren who challenged its propriety vigorously. See Warren, *The New "Liberty" under the Fourteenth Amendment* (1926), 39 *Harv. L. R.* 438; see also note by the late Dean James Parker Hall in (1926) 20 *Ill. L. R.* 809.

³² See, e. g., *Whitney v. California*, 274 U. S. 357, 71 L. Ed. 1095, 47 S. Ct. 641.

³³ 283 U. S. 359, 75 L. Ed. 1117, 51 S. Ct. 532 (1931).

³⁴ 287 U. S. 45, 77 L. Ed. 153, 53 S. Ct. 55 (1932).

said: "Neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about freedom of speech."³⁵

Just what is demanded by fundamental principles of liberty and justice is something as to which men's minds will inevitably differ and as to which no clear or unvarying rule can conceivably be laid down to guide State action. The situation is somewhat reminiscent of Seldon's aphorism as to the principles governing the exercise of jurisdiction by the chancery courts; for it would seem that whether a denial by a State of one of the rights enumerated in the first eight amendments would constitute a denial of due process of law depends in the final analysis upon whether such a denial would shock the conscience of the Supreme Court. And there is no guide except the now uncertain path pricked out by past decisions as to the principles in accordance with which the conscience of the Court will be influenced.

This is illustrated by the instant case, for whether freedom from double jeopardy is a "fundamental" right is surely a question as to which there could well be difference of opinion.³⁶ The Court, indeed, seems to imply strongly that, if the State "were permitted, after a trial free from error, to try the accused over again or bring another case against him," or if it were "attempting to wear the accused out by a multitude of cases with accumulated trials," then due process of law would be denied, fundamental rights would be infringed, and their holding would have been different.³⁷

³⁵ *Prudential Insurance Co. v. Cheek*, 259 U. S. 530, 543, 66 L. Ed. 1044, 42 S. Ct. 510 (1922).

³⁶ See, e. g., the language of the Maryland Court of Appeals in *Gilpin v. State*, 142 Md. 464, 466, 121 Atl. 354 (1923), where it was said: "That no person shall, for the same offense, be twice put in jeopardy, is both a provision of the Constitution of the United States, and an established rule of the common law, and a plea of former jeopardy is good under either."

³⁷ 58 S. Ct. 149, 153.