



Pendleton Barbour

Barbour wrote, "That a state has a variable and unlimited jurisdiction over persons and things, within its territory, or any foreign nation; where the rights are surrendered or restrained: that is, within the United States. That it is not only the right, but the duty of a state, to advance the health and prosperity of its people, and the general welfare, by a regulation, which it may deem to be the best means to those ends" (p. 139).

In his concurring opinion in *Holmes v. United States*, Barbour endorsed his argument that the rights of foreign countries are not subject to the jurisdiction and added that in the case of a state governor or

his friend of Barbour's judicial philosophy, presented a reasonable view of the judge in an opinion that is honest & convincingly intelligent; but his fears of this government's ability to abrogate rights so absolute that they hardly arise, in which the executive power of decision. M. Wiltse et al, eds., *The Supreme Court*, vol. 4, 1980, p. 192). Barbour died on 25 February 1811, after an influential tenure on the

*Barenblatt v. United States*, 360 U.S. 109 (1959), decided 11 Nov. 1958, decided 8 June 1959 by vote 5-4. Chief Justice Warren, Justice Harlan for the Court, Black, joined by Brennan and Douglas, in dissent, Brennan also in dissent. This decision signaled a retreat from the Court's position in *United States v. Brown* (1957), which had placed limits on the ability of congressional committees to inquire into political beliefs and associations. Chief Justice Warren and similar decisions provoked congressional efforts in Congress to curb the Court's power, which, although unsuccessful, nevertheless persuaded a majority to be more circumspect in protecting the rights of alleged communists. *Barenblatt* upheld the conviction for contempt of Congress of a witness who had refused to testify before the House Committee on Un-American Activities about his beliefs and his membership in a communist club at the University of Michigan.

The Court dismissed Barenblatt's First Amendment claim through a "balancing of interests" (FIRST AMENDMENT BALANCING). It defined the government's interest as national self-defense despite the fact that the only evidence concerning the club was that its members engaged in abstract intellectual discussions. At the same time, it treated the First Amendment interest as essentially irrelevant. The Court also found that the House committee had made clear the pertinency of its questions, contrary to *Watkins*, and the Court held that pertinency had not been made clear, even though the committee's interest had been essentially the same in both cases. Although *Barenblatt* has never been explicitly overruled, the Court has since displayed far less willingness to reverse convictions of uncooperative witnesses before such committees on First Amendment grounds.

See also ASSEMBLY AND ASSOCIATION, FREE SPEECH, COMMUNISM AND COLD WAR; CONGRESSIONAL POWER OF INVESTIGATION.)

Alfange, Jr., "Congressional Investigations and the First Amendment," *University of Cincinnati Law Review* 30 (1961): 113-171. Dean Alfange, Jr.

*Barron v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991), decided 8 Jan. 1991, decided 21 June 1991 by vote 5-4; Rehnquist for the Court, White, Blackmun, Marshall, Blackmun, and Stevens, in dissent. In this case the Supreme Court upheld the constitutionality of a statute that prohibited the knowing or intentional appearance in public in a condition that required female dancers to wear "pasties" and a "G-string" when performing. Respondents were two South Bend dancers who argued that the ordinance provided totally nude dancing entertainment. In *Schad v. Borough of Mount Airy* (1981), the Court had ruled that barroom dancing, which was expressive content, was protected some First Amendment protection. The ordinance in *Schad* covered all live entertainment, making it both more content-

specific than Indiana's statute and overbroad by being applicable to other forms of protected expression. Indiana's statute prohibited all forms of public nudity, not simply live entertainment.

The Court treated Indiana's law as "time, place, and manner" measure that regulated the incidental effects of speech. Such regulation is valid if it satisfies a four-part test developed in *United States v. O'Brien* (1968): if it is "within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" (pp. 376-377).

Justice William Rehnquist concluded that the Indiana law met this test. Most importantly and controversially, he maintained that the measure was "unrelated to the suppression of free expression" because "the perceived evil that Indiana seeks to address is not erotic dancing, but public nudity" (pp. 2461, 2463). The breadth of Indiana's statute saved it in this regard.

Justice Byron White's dissent was directed primarily to this key contention. Because the dancers' nudity is itself an important expressive component of their dance, "it cannot be said that the statutory prohibition is unrelated to expressive conduct" (p. 2474).

(See also SPEECH AND THE PRESS.)

Donald A. Downs

**Barron v. Baltimore**, 7 Pet. (32 U.S.) 243 (1833), argued 11 Feb. 1833, decided 16 Feb. 1833 by vote of 7 to 0; Marshall for the Court. A wharf owner sued the city of Baltimore for economic loss occasioned by the city's diversion of streams, which lowered the water level around his wharves. He claimed that the city took his property without "just compensation in violation of the Fifth Amendment. This presented the question whether the Fifth Amendment restrained the states. After surveying the history of the Bill of Rights, Chief Justice John Marshall concluded that the first ten amendments restrained only the federal government, thus requiring Americans to look to state constitutions for protection of their civil and political liberties. The opinion marked a retreat from Marshall's earlier nationalism, one impelled by the changing composition of the Court and the growth of states' rights sentiment. The Court reaffirmed the holding of *Barron* in *Permol v. New Orleans* (1845).

With the ratification of the Fourteenth Amendment in 1868, the application of the Bill of Rights to the states again became an issue. In *Hurtado v. California* (1884), the Court held that the Fourteenth Amendment was a limit on state power. Not until the twentieth century incorporation cases, beginning with *Gillow v. New York* (1925) did *Barron* lose its authoritative status. Today almost all of the guarantees of the Bill of Rights

Pendleton Barbour," in *For* Randolph-Macon College, N.C., ed. D. Lowery, James Barber, et al. (1981). Gerard W. Cooney, Jr.

have been incorporated as restraints on the states.

(See also INCORPORATION DOCTRINE; STATE CONSTITUTIONS AND INDIVIDUAL RIGHTS; STATE SOVEREIGNTY AND STATES' RIGHTS.)

David J. Bodenhamer

**Bates v. State Bar of Arizona**, 433 U.S. 350 (1977), argued 18 Jan. 1977, decided 27 June 1977 by vote of 5 to 4; Blackmun for the Court; Burger, Powell, and Rehnquist in dissent. In *Bates* the Supreme Court struck down state legal ethics codes that prohibited lawyers from advertising. Two young lawyers, John Bates and Van O'Steen, sought to create a test case by placing a newspaper advertisement indicating that they offered "legal services at very reasonable fees" and listing some of the fees they charged. The Board of Governors of the State Bar recommended that the two lawyers be suspended. The Arizona Supreme Court upheld the decision but reduced the punishment to censure.

In the U.S. Supreme Court the attorneys attacked the Arizona rule on two grounds: that it violated the \*Sherman Antitrust Act by creating a restraint of trade, and that it violated the \*First Amendment by restraining the right of free speech. The Supreme Court rejected the \*antitrust claim, but held that their First Amendment rights of speech, together with the right of the public consumers of legal services to receive their message, outweighed any adverse effects on professionalism that advertising might have (see COMMERCIAL SPEECH). The Court subsequently limited the First Amendment right in *Ohrlik v. Ohio State Bar Association* (1978), where it sanctioned a policy of totally barring in-person solicitation of clients.

*Bates* opened up the practice of law to greater competition and made possible the growth of legal clinics that provide routine legal needs of the middle and lower middle class. One empirical study in Arizona found that, after *Bates*, the average cost of these legal services declined. The case, along with \**Goldfarb v. Virginia State Bar* (1975), which prohibited bar-sponsored feeschedules, signaled the end to total self-regulation of the bar, which the leadership of the American legal profession has decried.

(See also BAR ADVERTISING.)

Rayman L. Solomon

**Batson v. Kentucky**, 476 U.S. 79 (1986), argued 12 Dec. 1985, decided 30 Apr. 1986 by vote of 7 to 2; Powell for the Court, White, Marshall, O'Connor, and Stevens (with Brennan) concurring, Burger and Rehnquist in dissent. Batson, a black man, was tried for second-degree burglary and the receipt of stolen goods. The judge conducted the voir dire examination of the potential jurors, excused some of them for cause, and then permitted prosecution and defense to exercise their peremptory challenges—six and nine re-

spectively. The prosecutor's exercise of peremptories removed all four blacks from the panel. Batson moved for a mistrial, claiming that the panelists violated his \*Sixth and Fourteenth Amendment rights to a jury drawn from a cross-section of the community as well as his Fourteenth Amendment right to the equal protection of the laws. The trial judge denied Batson's motion and Batson was convicted on two counts. The Supreme Court of Kentucky granted Batson's appeal and affirmed the conviction. The U.S. Supreme Court reversed.

Ruling in favor of Batson, the Court placed substantial limits on the prosecutor's use of peremptory challenges. Overruling *Swain v. Alabama* (1965) in part, the Court applied the equal protection principle to the exercise of peremptory challenges. For all practical purposes, the Court transformed peremptory challenges for cause, even if the holding is on a lesser (but undefined) standard, into a disputed peremptory challenge that the prosecutor is required to support a challenge for cause. The *Batson* Court's claim that it did not "curtail" the contribution the [peremptory] challenge generally makes to the administration of justice (pp. 98–99) is entirely unconvincing.

The thrust of *Batson* is not toward ending color-conscious law, applying a racial standard to the prosecutor's use of peremptory challenges. The ultimate effect of *Batson* may even be the de facto introduction of racial quotas for the jury since the racially disproportionate use of peremptories now may be attacked as constitutionally improper. Given the lack of standards for a successful rebuttal, the only safe use of peremptories will be racially proportionate to the race or community makeup.

The Court failed to distinguish between the selection of the jury venire (where representativeness is the chief concern) and the selection of the jury (where impartiality must be the chief consideration). The Court also failed to distinguish between general and particular fitness. A person's general fitness to be included in the venire is, indeed, not a matter of race. A person's suitability to serve on a particular jury, however, may well be a matter of race. It is not difficult to imagine a crime that offends a particular social group that it is feared that all of its members lack the impartiality of the proper juror. When exercising peremptory challenges, attorneys must be able to allay this fear. To hold otherwise is to forfeit the appearance of jury impartiality. Given that the appearance of jury impartiality cannot be known with certainty, the appearance of impartiality becomes a matter of extraordinary importance. All the Court did not recognize (p. 97).

The use of peremptory challenges brings into conflict the goals of jury impartiality and jury representativeness. Until *Batson*