

# Overview of the Bill of Rights and the Incorporation Doctrine

by Stephen Popp

## Only a few rights are listed in the body of the Constitution (not Amendments)

- Ban on religious test for office—Article VI
- Ban on bill of attainder—which would punish people without a judicial trial (Art. I sec 9)
- Ban on ex post facto laws—legislative act making some behavior illegal that was not when it was done (Art. I sec. 9)
- Founders originally thought preservation of liberties a states issue, general attitude that states would be less likely to violate people's liberties (after all the state governments were closer to the people)

## Ratification of The Bill of Rights

- Virginia eleventh state to ratify thus giving amendments the three fourths necessary Dec. 1791
- States were ratifying twelve amendments initially
  - 11—dealing with fixed apportionment in the House of Reps.
  - 12—Congressional salaries “No law varying for the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened. Enacted 1792
- Madison actually favored an amendment protecting the rights of conscience, free speech, free press, and trial by jury against state action. Senate refused however.
- Supporters of the Constitution promised the first 10 amendments to secure votes for ratification
  1. Set up individual legal and constitutional protections against the government
  2. Written to restrict the powers of the new national government—a “collection of thou shalt nots”
  3. Emphasized majority rule in respect to minority rights
  4. Responsibility for interpreting Bill of Rights falls on courts

## Evolution of American rights often a slow, piecemeal process.

- Only 2 of 160 cases in 1935-36 in Supreme Court dealt with civil rights/civil liberties
- 66 of 132 in 1989-90
- 59 of 116 in 1990-91
- 55 of 109 in 1991-92

## Barron v. Baltimore (1833)—Landmark case that confirmed the BOR applied ONLY to national gov't.

- John Barron, wharf owner
- City of Baltimore changes direction of several streams and waterways
- Vast amount of sediment collected around Barron's wharf, making it inaccessible to ships and indeed worthless.
- Marshall refuses to hold Bill of Rights applicable to states ...
  1. National character of Constitution  
*“The constitution was ordained and established by the people of the United States ... 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.”*
  2. Rejected Barron's claim that these amendments had intentions of limiting state governments.  
*“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.”*
- Bill of Rights contained to national government—Americans were required to look to their state constitutions and state bills of rights and not to the federal Bill of Rights.

## Then, came the 14<sup>th</sup> Amendment (1868) that established the “Incorporation Doctrine”

Principle in which the Supreme Court has held that most, but not all, of the specific guarantees in the Bill of Rights limit state and local governments by making those guarantees applicable to the states through the due process clause of the 14<sup>th</sup> Amendment.

**Selective Incorporation** – Application of BOR to subnational governments is a gradual process. Each “right” is applied to the subnational governments on a case-by-case basis.

## The 14<sup>th</sup> Amendment

### Privileges and Immunities Clause and Due Process

Representative John Bingham—crafted the amendment and he seemingly favored the idea that the amendment should guarantee fundamental rights on a nationwide basis. (Analysis though inconclusive)

### The Slaughterhouse Cases (1873)

- Rejected contention that the 14<sup>th</sup> had brought constitutional privileges and immunities under federal control.
- Due process guarantees as applicable only to the procedural rights of Negroes.

### Hurtado v. California (1884)

- California's practice of using a prosecutor's information in lieu of a grand jury indictment did not deprive a person of due process of law (despite the 5<sup>th</sup> assertion and guarantee of such a right in all federal cases)
- States should be free to frame their own due process guarantees.
- If the 14<sup>th</sup> had intended states to require grand jury indictments in all cases it would have stated that requirement clearly.
- Justice Stanley Matthews—*"We are forbidden to assume, that without clear reason to the contrary, that any part of this most important Amendment is superfluous."*
- The existence of a grand jury clause in the 5<sup>th</sup> meant that grand jury provisions were not included in the Due Process Clause—would violate doctrine of "nonsuperfluosness".

(1886) Court holds that corporations were "persons" within the meaning of Due Process.

Effectively brought corporate property rights under due process protection, thereby making government regulation difficult.

### Twining v. N.J. (1908)

- Twining and associate refused to take the stand
- Twining claimed that his silence served as a form of self-incrimination
- Court rejected Claim but Justice Moody ponders...  
*"Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?"*  
Suggested an opening for those hoping to expand the protections of the Bill of Rights into the states.  
*"Privilege of great value"* but not yet part of due process.

### Gitlow v. N.Y. (1925)

- Benjamin Gitlow was convicted of a crime of criminal anarchy
  - Gitlow, a member of a dissenting faction of a party of moderate socialism, published and distributed materials urging the violent overthrow of the U.S. gov't (Gitlow was on the board of managers and arranged for the printing of the 16,000 copies of the Manifesto)
  - Tried, convicted and sentenced under N.Y. criminal anarchy statute that made it illegal to advocate the overthrow of the U.S. gov't by violent and unlawful means
1. Did this statute deprive the defendant of his liberty of expression in violation of the due process clause of the 14<sup>th</sup> amendment?
  2. What did this statute prohibit?

### Decision

Historical and philosophical essays critical of gov't not prohibited nor were essays advocating a change in gov't through constitutional and lawful means prohibited

- What is prohibited is language advocating, advising, or teaching the overthrow of organized government by unlawful means
- This N.Y. law very similar in language to the federal Espionage Act

Gitlow's conviction upheld but Supreme Court ruled that the states were not completely free to limit forms of political expression

- *"Freedom of speech and the press ... are among the fundamental personal rights and "liberties" protected by the due process clause of the 14<sup>th</sup> amendment from impairment by the states."*

### Near v. Minnesota (1931)

First case in which the Supreme Court found that a state law violated freedom of the press as protected by the First Amendment

- Near was a newspaper publisher of a weekly Minneapolis newspaper which regularly attacked a variety of groups—African Americans, Catholics, Jews, and labor union leaders
- Newspaper closed under state criminal libel law banning “malicious, scandalous, or defamatory” publications
- Near appealed and Supreme Court held that just because the freedom of the press may be abused by “*miscreant purveyors of scandal does not make any less necessary the immunity of the press from previous restraint*”

### Powell v. Alabama (1932)

- Held the due process clause to require that counsel be appointed for indigent defendants in state criminal proceedings involving capital crimes.
- Justice Sutherland—not formal incorporation but... “*that there are certain immutable principles of justice which inhere in the very idea of government which no member of the Union may disregard.*”

### Palko v. Connecticut (1937)

- Justice Benjamin Cardozo enunciates **selective incorporation**
- Double jeopardy not fundamental to due process or liberty  
It will be up to future courts to determine just which privileges and immunities should be absorbed.

### Adamson v. California (1947)

- Court refuses to incorporate the 5<sup>th</sup>'s protection of self-incrimination (largely on Twining's precedent)
- Dissenter is Justice Hugo Black  
Claimed founders wanted incorporation  
Black advocated **total incorporation**
- Another dissent in this decision by Justice Frank Murphy—not willing to hold the 14<sup>th</sup>'s due process guarantees to be limited entirely to the Bill of Rights  
This view held by Justice Douglas and Goldberg especially in *Griswold v. Connecticut (1965)*

### Exceptions to the Incorporation

**Second Amendment** -States free to regulate sale and use of firearms

**Third Amendment** - Largely unimportant since the Revolution

**Fifth Amendment** - Grand Jury not incorporated

**Seventh Amendment** - Not incorporated

**Eighth Amendment** - Excessive bail and crimes not incorporate

**Ninth Amendment** - Not Incorporated

**Tenth Amendment** - Not Incorporated

### **Court has established some rights not in the Bill of Rights**

- Presumption of innocence
- Right to privacy.
- Right to travel within the country

**Amendment V**—grand jury—purpose to limit the power of the federal government in prosecuting citizens—do not determine guilt or innocence, but decide whether or not the evidence is strong enough to present to the trial jury

Not all states possess grand juries, discussion to the fact that grand juries prolong the process and are no longer useful—rather the District Attorney presents the evidence (indictment)

### **Amendment VII**

Common law—based on previous decisions and custom

Statutory law—passed by legislature

Ex. A wreck case between citizens of different states is decided by a trial by jury because it is common law and not an action resulting from statutory right.

Ex. FCC and radio station conflict—no jury trial

If both parties consent—the case may be heard by a judge without a jury