

# A

## What is Incorporation?

### BACKGROUND ESSAY

#### Whose Actions Did the Bill of Rights Limit?

In 1791, the Bill of Rights protected American citizens only against the actions of the national government. Forty years later, the Supreme Court confirmed this situation. In *Barron v. Baltimore* (1833), the Court noted that the federal constitution did not prohibit an individual state from executing heretics, shutting down newspapers, or confiscating property. The Bill of Rights protected individuals against the actions of the federal government. It did not limit state action. Individual states had their own bills of rights, but these differed from state to state. Many thought the Court's decision supported the constitutional principle of federalism. Others were concerned that the states could limit fundamental liberties.

#### Why Was the Fourteenth Amendment Written?

After the Civil War, America was struggling over how to treat former slaves. Three amendments were passed by Congress and ratified by the states. The Thirteenth Amendment abolished slavery. The Fourteenth Amendment guaranteed citizenship to the freed slaves. The Fifteenth Amendment guaranteed to former male slaves the right to vote.

The first section of the Fourteenth Amendment states that all who are born or naturalized in the United States are citizens. The Amendment continues, "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States..."

#### How Did the Fourteenth Amendment Change the Bill of Rights?

The significant part of this statement is the first two words: "No State..." The Founders intended that the Bill of Rights be protections against the federal government only. Now, the Fourteenth Amendment placed limitations on what the state governments could do.

Five years later, a case about butchers (the Slaughter House Cases, 1873) provided an opportunity to clarify which rights, if any, were protected against both state and federal governments. The answer: not very many. The Privileges or Immunities Clause did not "bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States." Twenty years later, the Courts had a different view of these protections.



*The United States Supreme Court building*

## What is the Due Process Clause?

The next section of the Fourteenth Amendment, the Due Process clause, also places limits on the actions of states: "...nor shall any State deprive any person of life, liberty, or property, without due process of law." Due process means that the laws themselves are fair. The procedures for enforcing those laws must also be fair.

In *Quincy Railways v. Chicago* (1897), the Supreme Court ruled that the state violated due process when it took property without paying just compensation. By using the Fourteenth Amendment to apply part of the Bill of Rights to a state action, the Court opened the door for similar protections.

A good example of the debates over expanded protection is Frank Palko of Connecticut. In 1935, Palko killed two police officers and escaped after stealing a phonograph. He was found guilty of second-degree murder and sentenced to life in prison. Prosecutors appealed, hoping for a death penalty, and a state law permitted a second trial.

In that trial, he was found guilty of first-degree murder and was sentenced to death.

Palko took his case to the Supreme Court. His attorneys argued that, because of the due process protection of the Fourteenth Amendment, the Connecticut law that had permitted two different trials was in violation of the Fifth Amendment protection against double jeopardy. The Court ruled against Palko and he was executed in 1938.

## What is the Equal Protection Clause?

Finally, the Equal Protection Clause of the Fourteenth Amendment says, "[No State will] deny to any person within its jurisdiction the equal protection of the laws."

This clause means that states must apply the law equally. States cannot discriminate against people or groups of people arbitrarily. Of course, all people do not have to be treated the same way. For example, states can require some people to wear glasses when they drive. However, they cannot ban people from driving because of their race.

The understanding of the equal protection clause has changed over time. In *Plessy v. Ferguson* (1896), the Supreme Court held that racial segregation by a state-owned railroad did not violate the equal protection clause. In *Brown v. Board of Education* (1954), the Court ruled that "separate but equal" segregated classrooms

were in violation of the Fourteenth Amendment. Today, the clause is understood to protect various classes of people from discrimination by government.

### **What Is Incorporation and Why is It Controversial?**

During the twentieth century, protections provided by the Bill of Rights against the national government were incorporated (meaning “included within”) the protections against state or local governments. In the *Gitlow v. New York* (1925) case, the Supreme Court ruled that the First Amendment’s protection of free speech applied to the states as well as to the federal government. Since then the Supreme Court has extended the protections of the Bill of Rights one right at a time one case at a time. Today, almost all of the protections of the Bill of Rights have been incorporated so that they now

limit all levels of government.

Many debate whether incorporation is a good idea. Incorporation can speed up the process of ensuring that everyone’s basic liberties are protected. Some have even referred to the Fourteenth Amendment as the “second” Bill of Rights.

Others argue that the Founders were very clear that the Bill of Rights should apply only to actions of the federal government. Keeping the federal government out of state issues is a way to help to ensure that the federal government cannot get too much power.

Incorporation means that thousands of controversies have been decided by federal judges. In 1895, around 400 cases were filed with the Supreme Court. Today, over 10,000 cases are filed annually. It seems that fewer people are making more decisions about the nature of our fundamental rights.



### **Comprehension Questions**

1. What are three important clauses [parts of sentences] in the first section of the Fourteenth Amendment?
2. Can you think of a time when you (or someone you know) was denied due process?
3. Can you think of a time when you (or someone you know) was denied equal protection under the law?
4. Why do some people call the Fourteenth Amendment the “Second Bill of Rights”?
5. What is incorporation?
6. Do you agree/disagree with most of the Founders that the Bill of Rights should apply only to actions of the federal government? Why?

# B

## The Nation, the States, and Liberty

In the 1780s, James Madison believed that the greatest threat to liberty came from the individual states, not from Congress. Accordingly, he favored allowing Congress to veto state laws.

*"A constitutional negative [veto] on the laws of the States seems equally necessary to secure individuals against encroachments [limitations] on their rights."*

—JAMES MADISON TO THOMAS JEFFERSON, 24 OCTOBER, 1787

*"No state shall violate the equal rights of conscience..."*

—JAMES MADISON

1. Restate each of Madison's ideas in your own words.

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2. How did Madison's proposal for protecting individual liberties above differ from the language used in the final version of the First Amendment?

*Congress shall make no law respecting the establishment of religion, or the free exercise thereof...*

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3. Restate in your own words each of these excerpts from the Fourteenth Amendment.

*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.*

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*[No State] shall deprive any person of life, liberty, or property, without due process of law.*

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*[No State shall] deny to any person within its jurisdiction the equal protection of the laws.*

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4. As a result of incorporation, individuals who are unhappy with how states protect their liberties can bring suit in federal courts. Does it matter whether the state governments or the federal government has the power to protect our rights?

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## Consequences of Incorporation

**Directions:** Read your assigned part with expression.

**Student:** Both my government teacher and my English teacher have said that I will have two hours of homework each night. This is so unfair. I'm going to speak with them. (Turning to English teacher) Mr. Smith, will you please reconsider?

**Mr. Smith:** On second thought, that does seem to be too much homework. I'll plan to assign thirty minutes about twice a week—that should do it.

**Student:** Terrific. (Turning to government teacher) Ms. Jones, how about you?

**Ms. Jones:** There is just so much to cover in this course, and I can't do it all in class. You will just have to budget your time so you can spend two hours each night on government homework.

**Student:** This is just ridiculous. I'm going to speak to the principal. (Turning to the principal) Principal Hart, what do you think about two hours of homework each night?

**Principal Hart:** I agree that the policy is unfair. It only applies to government class. Students in all classes will now be given two hours of homework each night.

**Student:** That's not what I was expecting. Now the entire school is affected by that stupid homework requirement. I'm going to speak with the superintendent. (Turning to the superintendent) Superintendent Sole, my principal is violating the rights of students in our school by requiring every course to have two hours of homework each night. This isn't fair.

**Superintendent Sole:** I agree that the policy isn't fair. Students in your school have too much homework and students in some schools have too little. In order to be fair to everyone, I am going to incorporate my decision so that it applies not only to your school but to every school. From now on, every class in every high school in the district will have no more than 30 minutes of homework once a week.

**Student:** Now that's what I'm talkin' about! But some of my friends in other high schools where they didn't have very much homework might not be too happy. (Long pause.)

**Student:** It's six months later now. Can you believe this e-memo that the superintendent sent out to all schools?