

## Incorporation & the Bill of Rights



**Do the Bill of Rights Apply to the states?**

## The Bill of Rights

- The first ten amendments to the U.S. Constitution
- Passed by the first Congress in 1791. The Bill of Rights was added during the ratification because of the fear that the federal government might become too powerful and encroach on individual rights.
- The Bill of Rights as originally proposed by Congress and ratified by the states applied ONLY to the federal government. The wording of the Bill of Rights prevented those rights from being applied to the states.
- It was the passage of the 14<sup>th</sup> Amendment that created a formal framework for extending certain aspects of the Bill of Rights to apply to the states.

## The 14<sup>th</sup> Amendment (1868)

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| <ul style="list-style-type: none"> <li>□ Privileges and Immunities Clause<br/>→</li> <li>□ Due Process Clause<br/>→</li> <li>□ Equal Protection Clause<br/>→</li> </ul> | <ul style="list-style-type: none"> <li>□ "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"</li> <li>□ "nor shall any state deprive any person of life, liberty, or property, without due process of law..."</li> <li>□ "nor deny to any person within its jurisdiction the equal protection of the laws"</li> </ul> |
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## What is (Selective) Incorporation?

- **Incorporation:** The process by which certain provisions of the Bill of Rights have been made applicable to the states.
- **Selective Incorporation:** As U.S. entered 20<sup>th</sup> century, Supreme Court slowly began to inform state governments that they must abide by most guarantees contained in the first 8 amendments to the federal Constitution. Hence, the Supreme Court decides on a case-by-case basis which provisions of the Bill of Rights apply to the states.
- Under the incorporation doctrine, most provisions of the Bill of Rights now also apply to the state and local governments, by virtue of the *due process clause* of the 14th Amendment.
- The doctrine of incorporation has profoundly influenced the character of American federalism.

## Origins of the Incorporation Debate

- **Barron v. Baltimore** (1833) was the first case in which the U.S. Supreme Court considered nationalizing the Bill of Rights.
- Chief Justice Marshall found the limitations on government articulated in the Fifth Amendment were specifically intended to limit the powers of the national government.
- Citing the intent of the framers and the development of the Bill of Rights as an exclusive check on the federal government, Marshall argued that the Supreme Court had no jurisdiction in this case since the Fifth Amendment was not applicable to the states.

## The Incorporation Debate Continued...

- **After the Barron v. Baltimore case...**
- From the 1830s until the Civil War southern states made speech and publication critical of slavery a crime. A number of leading Republicans viewed these statutes as violations of the 1<sup>st</sup> Amendment and other provisions of the Constitution.
- Immediately after the Civil War, Republicans complained that southern states were denying African-Americans, Republicans, and loyalist citizens basic rights to free speech and press, to due process, and to bear arms.

## Selective Incorporation Begins...

- **Gitlow v. New York** (1925) ruled that the 14<sup>th</sup> Amendment to the Constitution had extended the reach of certain provisions of the First Amendment -- specifically the provisions protecting freedom of speech and freedom of the press -- to the governments of the individual states.
- **Other cases tested the various clauses of the 14<sup>th</sup> Amendment and their application of the Bill of Rights to the states. Some were successful, some were not.**
- The Slaughterhouse cases (1873)
- *Hurtado v. California* (1884)
- *Chicago, Burlington & Quincy Railroad v. Chicago* (1897)
- *Twining v. New Jersey* (1908)
- *Palko v. Connecticut* (1937)

## Selective Incorporation Continued...

- Many of the provisions of the First Amendment were applied to the states in the 1930s and 1940s.
- Most of the procedural protections provided to criminal defendants were not enforced against the states until the **Warren Court** of the 1960s which focused on the rights of those accused of crimes, brought state standards in line with federal requirements.
- **The Ninth Amendment**: its wording indicates that it "is not a source of rights as such; it is simply a rule about how to read the Constitution".
- **The Tenth Amendment**: its wording, it is a reservation of powers to the states and to the people.

## Current Status of the Bill of Rights: Which amendments have been incorporated?

- **1<sup>st</sup> Amendment**: Fully incorporated by 1947; started in 1925 with *Gitlow v. New York* and seven other court cases from 1925 to 1947.
- **2<sup>nd</sup> Amendment**: Fully incorporated in 2010 with decision in *McDonald v. Chicago*.
- **3<sup>rd</sup> Amendment**: No Supreme Court decision on incorporation; U.S. Court of Appeals for 2<sup>nd</sup> circuit found to be incorporated in 1982 with decision in *Engblom v. Carey*. It is the least cited sections of the U.S. Constitution.
- **4<sup>th</sup> Amendment**: Fully incorporated by 1964 with decision in *Mapp v. Ohio* and two other court cases from 1961-1964.

## Current Status of the Bill of Rights: Which amendments have been incorporated?

- **5<sup>th</sup> Amendment**: Partially incorporated in the 1960s with decisions in *Benton v. Maryland* and *Malloy v. Hogan* except for clause guaranteeing criminal prosecution on grand jury indictment.
- **6<sup>th</sup> Amendment**: Fully incorporated by 1968; started with *In Re Oliver* in 1948 and six other Supreme Court cases from 1948 to 1968 including *Gideon v. Wainwright*.
- **7<sup>th</sup> Amendment**: Not incorporated. Right to trial by jury in civil cases.
- **8<sup>th</sup> Amendment**: "cruel and unusual punishments" clause incorporated in 1962 with decision in *Robinson v. California*; no Supreme Court ruling on incorporation of "excessive fines and bail" protections.

- The theory of selective incorporation in concept has emerged the victor; but, for all practical purposes and with only a few exceptions, total nationalization of the Bill of Rights has prevailed.
- As a result, present reading of the Constitution now ensures that the basic civil liberties of U.S. citizens are uniformly protected against infringement by any government entity- federal, state, or local.