

BILL OF RIGHTS AND SELECTIVE INCORPORATION

BILL OF RIGHTS AND THE STATES

The overwhelming majority of court decisions that define American civil liberties are based on the Bill of Rights, the first ten amendments added to the Constitution in 1791.

Even though most of the state constitutions in 1787 included separate bills of rights for their citizens, the original Constitution did not. Most of the attention of the Constitution focused on defining the powers of the branches of government, not on preserving individual rights. Many people were widely suspicious of these omissions, and in order to gain ratification, the founders agreed to add ten amendments in 1791, the Bill of Rights.

- Added to the original Constitution to appease states
- Rights of the individuals and states listed to protect them from the federal government
- Bill of Rights only applied to the federal government and did not include protections against state governments (*Barron v. Baltimore*, 1833)

SELECTIVE INCORPORATION AND THE FOURTEENTH AMENDMENT

One important consequence of the Fourteenth Amendment is the incorporation of the Bill of Rights to apply to the states. The Bill of Rights originally only limited the powers of the federal government.

It was assumed that the states' bills of rights would protect individuals from abuse by state laws. However, the 14th Amendment nationalized the nature of civil rights with this statement:

"No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Incorporation happened gradually over time through individual court decisions that required states to protect most of the same liberties and rights that the Bill of Rights protects from federal abuse. These changes are reflected in numerous court decisions made between 1925 and 1969.

One example of a case that reflects incorporation is *Gitlow v. New York* (1925). Benjamin Gitlow was arrested and found guilty of breaking a New York state sedition act when he passed out pamphlets that supported socialism and overthrow of the government. Gitlow believed that his freedom of speech was violated, and the case was appealed to the Supreme Court. Even though the Court did not declare the New York law unconstitutional, the majority opinion stated that "fundamental personal rights" were protected from infringement by states by the Due Process Clause of the Fourteenth Amendment.

- Incorporation - the process by which provisions of the Bill of Rights are brought within the scope of the Fourteenth Amendment and so applied to state and local governments.
- Modifying Effect of the 14th Amendment
 - The due process and equal protection clauses have been used to apply some of the provisions of the Bill of Rights to the states.
 - The "total incorporation" view would apply all of the provisions of the Bill of Rights to the states. It argues for nationalization (or federalization) of the Bill of Rights.
 - The "selective incorporation" view would apply only some of these provisions, and would do so on a case-by-case basis.
 - The Supreme Court selectively incorporated the Bill of Rights into the Due Process Clause.
 - The important case here: *Gitlow v. New York*, 1925.
 - States may not deny free speech and press. These were protected by 14th Amendment Due Process Clause.
 - Subsequent cases federalized parts of the Bill of Rights:
 - 1st – Assembly, Petition, Religion
 - 2nd – Right to Bear Arms
 - 4th – Search and Seizure protections
 - 5th – Self-Incrimination, Double Jeopardy
 - 6th – Right to Counsel, Right to Bring Witnesses, Right to Confront Witnesses
 - 8th – Protection against Cruel and Unusual Punishment
 - All provisions of the Bill of Rights except Amendment 3, Amendment 7, Amendment 10, and the Grand Jury requirement of the 5th Amendment have been federalized.