

# CONSTITUTIONAL RIGHTS FOUNDATION

## *Bill of Rights in Action*

Spring 1991 (7:4)

### **The 14th Amendment and the "Second Bill of Rights"**

In 1815, John Barron, a successful businessman, owned a wharf located at the deepest part of Baltimore's harbor. That year, several city street improvement projects diverted streams, which caused soil to build up in front of Barron's wharf. By 1822, no ships could tie up at the wharf and John Barron was out of business.

Barron went to a state court and sued the city of Baltimore for destroying his wharf business. According to the [Fifth Amendment](#) of the Bill of Rights, Barron argued, private property could not be taken or reduced in value for public use without "just compensation." The case finally ended up before the U.S. Supreme Court. Writing for the majority of the Supreme Court, Chief Justice [John Marshall](#) dismissed Barron's lawsuit on the grounds that the Fifth Amendment, as well as all the amendments of the Bill of Rights, applied only to the national government and not to the states. [[Barron v. Baltimore](#), 7 Peters 243 (1833)]

The *Barron* decision established the principle that the rights listed in the original Bill of Rights did not control *state* laws or actions. A state could abolish freedom of speech, establish a tax-supported church, or do away with jury trials in state courts without violating the Bill of Rights.

#### **The Due Process Clause**

In the [first Congress](#) in 1789, Congressman [James Madison](#) had submitted proposed amendments for the Bill of Rights. One of Madison's proposed amendments would have prohibited states from violating the rights of conscience, freedom of the press, and trial by jury in criminal cases. The House passed Madison's proposed amendment. But the Senate rejected it because all the states already had their own bills of rights. The first 10 amendments thus limited only the national government.

When members of Congress debated the [14th Amendment](#) after the [Civil War](#), they hardly discussed whether the amendment made the entire Bill of Rights apply to all the states. A key provision of the amendment is its due process clause: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." Did this due process clause apply all the guarantees in the Bill of Rights to the states? Or, did it merely refer to those rights related to a fair trial like the identically worded due process provision in the Fifth Amendment? [Raoul Berger](#), a scholar who wrote extensively on the 14th Amendment, argued that the elusive due process clause was simply intended to protect the civil rights of the ex-slaves in the South following the Civil War.

When the Supreme Court interpreted the 14th Amendment for the first time in 1873, the justices avoided ruling on the meaning of the due process clause [[\*Slaughterhouse Cases\*](#), 16 Wallace 36 (1873)]. The Supreme Court did eventually begin to rule on its meaning. In 1897, the justices unanimously held that the due process clause required state and local governments to give "just compensation" for taking private property for public purposes. Still, this decision (which would have pleased John Barron) did not connect the due process clause of the 14th Amendment to the Bill of Rights. According to the Supreme Court, "just compensation" was a right within the meaning of the due process clause itself. [[\*Chicago Burlington & Quincy Railroad Co. v. Chicago\*](#), 166 U.S. 226 (1897)]

The Supreme Court first applied the Bill of Rights to the states in 1925 in the *Gitlow* case. Benjamin Gitlow was a Socialist Party member who had been convicted of writing several revolutionary pamphlets in violation of New York's Criminal Anarchy Act. His attorneys argued that the New York law violated Gitlow's First Amendment freedom of speech. They contended that the due process clause of the 14th Amendment protected a citizen's freedom of speech from state laws as well as national law. While upholding Gitlow's conviction, the Supreme Court ruled for the first time that the First Amendment freedoms of speech and press "are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States." [[\*Gitlow v. New York\*](#), 268 U.S. 652 (1925)]

The Supreme Court did not say in the *Gitlow* decision that all the protections of the Bill of Rights applied to the states. But the majority of justices did agree that at least some of these rights limited the powers of state and local governments. Following this landmark decision, the Supreme Court on a case-by-case basis applied most of the guarantees of the Bill of Rights to the states. When the last of these cases was decided in 1969, the Supreme Court had created what amounted to a "second bill of rights" limiting the actions of state governments just as the original Bill of Rights had limited the national government. See the chart below:

### The "Second Bill of Rights"

Freedom Case	Amendment	Supreme Court	Date
Of Speech & Press	<a href="#"><u>First</u></a>	<a href="#"><u><i>Gitlow v. New York</i></u></a>	1925
To Have Attorney in Capital Cases	<a href="#"><u>Sixth</u></a>	<a href="#"><u><i>Powell v: Alabama</i></u></a>	1932
To Exercise Any Religion	<a href="#"><u>First</u></a>	<a href="#"><u><i>Hamilton v. Regents of U.C.</i></u></a>	1934
Of Assembly & Petition	<a href="#"><u>First</u></a>	<a href="#"><u><i>DeJonge v. Oregon</i></u></a>	1937
From Establishment of Religion	<a href="#"><u>First</u></a>	<a href="#"><u><i>Everson v. Board of Ed.</i></u></a>	1947
To Have a Public Trial	<a href="#"><u>Sixth</u></a>	<a href="#"><u><i>In re Oliver</i></u></a>	1948
From Unreasonable Searches & Seizures	<a href="#"><u>Fourth</u></a>	<a href="#"><u><i>Mapp v. Ohio</i></u></a>	1961
From Cruel & Unusual	<a href="#"><u>Eighth</u></a>	<a href="#"><u><i>Robinson v. California</i></u></a>	1962

## Punishments

To Have Attorney for Felony Cases	<a href="#">Sixth</a>	<a href="#"><i>Gideon v. Wainwright</i></a>	1963
From Self-incrimination	<a href="#">Fifth</a>	<a href="#"><i>Malloy v. Hogan</i></a>	1964
To Confront Witnesses	<a href="#">Sixth</a>	<a href="#"><i>Pointer v. Texas</i></a>	1965
To Have an Impartial Jury Trial	<a href="#">Sixth</a>	<a href="#"><i>Parker v. Gladden</i></a>	1966
To Have a Speedy Trial	<a href="#">Sixth</a>	<a href="#"><i>Klopfer v. North Carolina</i></a>	1967
To Compel Witnesses to Testify	<a href="#">Sixth</a>	<a href="#"><i>Washington v. Texas</i></a>	1967
To Trial by Jury	<a href="#">Sixth</a>	<a href="#"><i>Duncan v. Louisiana</i></a>	1968
From Double Jeopardy	<a href="#">Fifth</a>	<a href="#"><i>Benton v. Maryland</i></a>	1969
To Have Attorney for Charges That Could Be Jailed For	<a href="#">Sixth</a>	<a href="#"><i>Argersinger v. Hamilin</i></a>	1972

## "Fundamental Rights" and the "Incorporation Doctrine"

By 1937, freedom of speech, press, religion, assembly, and petition had all been "incorporated" into the 14th Amendment's due process clause. This meant that these First Amendment freedoms were now also part of the 14th Amendment, which limited state laws and actions. The Supreme Court had yet to explain why some rights from the Bill of Rights had been "incorporated" while others had not.

In a case involving the Fifth Amendment protection against double jeopardy (being tried twice for the same crime), Justice [Benjamin Cardozo](#) explained that only "fundamental rights" need be "incorporated" into the 14th Amendment. He went on to define these rights as "of the very essence of a scheme of ordered liberty" and "rooted in the tradition and conscience of our people."

While such rights as freedom of speech were clearly "fundamental," according to Justice Cardozo and the Supreme Court majority, others were not. Thus, the Supreme Court established the principle of "partial incorporation": Only certain "fundamental rights," not the entire Bill of Rights, apply to the states through the due process clause of the 14th Amendment. [[\*Palko v. Connecticut\*](#), 302 U.S. 319 (1937)] By 1972, the Supreme Court had "incorporated" into the 14th Amendment all but five rights named in the Bill of Rights. Those rights still not deemed "fundamental" include the Second Amendment right to bear arms, the Third Amendment protection against quartering troops in private homes, the Fifth Amendment right of grand jury indictment, the Seventh Amendment right of trial by jury in civil cases, and the Eighth Amendment guarantee against excessive bail and fines. (The Ninth and Tenth amendments do not name specific personal rights.)

As a practical matter today, the Bill of Rights protects Americans from both national and state governments. In the view of scholar Richard Cortner, the Supreme Court "has transformed the Due Process Clause of the Fourteenth Amendment into our second bill of

rights, a bill of rights more salient [significant] to the liberty of the average American than the original document authored by Madison and ratified by the states in 1791."

### **For Discussion and Writing**

1. Do you agree or disagree with Richard Cortner that the "second bill of rights" is more significant to average Americans than James Madison's original document? Why?
2. Another scholar, Raoul Berger, criticizes the Supreme Court for creating a "second bill of rights." "At stake is the integrity of the Constitution, the right of the people to govern themselves," he writes. "Whence does the Court derive authority to bring the Constitution in tune with its own predilections [opinions]?" Do you agree or disagree with Berger's view? Explain why.
3. Should all the protections listed in the Bill of Rights apply to the states as well as to the national government? Why or why not?

### **For Additional Information**

[An Important Piece of U.S. Constitutional History: The Doctrine of Incorporation](#) A summary of the development of the doctrine. From *Freedom Writer*.

[The Incorporation Debate](#) Good overview of the debate. From [Exploring Constitutional Conflicts](#) by Doug Linder, University of Missouri-Kansas City School of Law.

[The Liberty Lion Should Be Man of the Century](#) Article argues that all the rights in the Bill of Rights should be incorporated into the 14th Amendment. It includes a good history of incorporation. By Nat Hentoff.

[Intent of the Fourteenth Amendment Was to Protect All Rights](#) Long argument favoring full incorporation.

[The Big Lie](#) Argument against incorporation. From James Bemis in the Catholic Exchange.

[Fourteenth Amendment: Selective Incorporation](#) Discussion of the debate, includes the original proposals sent from the House to the Senate and an extensive bibliography.

[Civil Liberties](#) A slide presentation that includes talking points on incorporation. By Barbara Norrandner, professor of political science, University of Arizona.

[James Madison Proposes the Bill of Rights to the House of Representatives](#) Explanation by Dennis Bent and the text of Madison's proposal. From the James Madison Center.

Books:

Cortner, Richard. [\*The Supreme Court and the Second Bill of Rights\*](#). Madison, Wis.: University of Wisconsin Press, 1981. Read an [Excerpt](#).

Berger, Raoul. [\*The Fourteenth Amendment and the Bill of Rights\*](#). Norman, Okla.: University of Oklahoma Press, 1989.

Curtis, Michael Kent. [\*No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights\*](#). Durham, N.C.: Duke University Press, 1990.