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What is Incorporation?

BACKGROUND ESSAY

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. In *Barron v. Baltimore* (1833), the Court stated that the federal constitution did not stop an individual state from executing heretics, shutting down newspapers, or taking property. The Bill of Rights protected individuals against the actions of the federal government only. It did not limit state action. Individual states had their own bills of rights, but these were different in each 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 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 [have gone through the legal process to become a citizen] in the United States are citizens. The Amendment continues, "No State shall make or enforce any law which shall abridge [limit] the privileges or immunities of the citizens of the United States."

How Did the Fourteenth Amendment Change the Bill of Rights?

The important part of this statement is the first two words: "No State." The Founders intended that the Bill of Rights restrict the actions of 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 *Slaughterhouse Cases*, 1873) provided an opportunity to clarify which rights, if any, were protected against both state and federal governments. The answer: not very many.

According to the Supreme Court's majority, the Privileges or Immunities Clause did not "bring within the power of Congress" all the civil rights which previously belonged 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 limits 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 laws and the procedures for enforcing them must 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 set an example for similar future protections.

A good example of the debates over expanded protection is the case of Frank Palko of Connecticut. In 1935, Palko killed two police officers and escaped after stealing a phonograph [record player]. 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 allowed two different trials violated 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 promises that 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, not all people have to be treated the same way if there’s a good reason to do otherwise. 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 said 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 violated 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 into [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 further extended the protections of the Bill of Rights. 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 debates 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?