

Constitution Class Handout
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Lesson 12

Bill of Rights: Introduction to, and Incorporation of

Introduction to the Bill of Rights

The Bill of Rights does not guarantee your rights, nor was it designed to allow the federal government to protect your rights. The language used in the first ten amendments is clear. The 1st Amendment begins, “Congress shall make no law...” The 2nd Amendment ends with the words, “...shall not be infringed.” The 3rd Amendment begins, “No Soldier shall...” The key phrase in the 4th Amendment is “shall not be violated.” The entire Bill of Rights was designed to confirm what the first seven articles had already established. The federal government was granted only certain authorities, and for the purpose of clarity, the Bill of Rights was written to reinforce the concept that the federal government has no business infringing upon the rights of the people. The federal government is not charged with protecting those rights, or guaranteeing those rights, anywhere in the Bill of Rights. The first ten amendments were written to tell the federal government, “Hands off, do not touch, thou shalt not.”

The concept that the federal government exists to guarantee our rights, or protect our rights, emerged after the ratification of the 14th Amendment. The Civil War Amendment tasked the federal government with ensuring the newly emancipated slaves were treated fairly, and that their rights were protected – even at the State level. In an effort to capitalize on that idea, the courts got involved to ensure that the former slave States behaved. The southern States, the North was convinced, could not be trusted, and often the South confirmed the lack of confidence the Union States harbored with laws designed to get around the new restrictions placed upon them.

After the American Civil War, the three amendments proposed and ratified to protect the emancipated slaves were specifically designed for the purpose of ensuring the newly freed slaves were treated equally in the eyes of the law. Statism, however, seized upon the ideas planted by Congressman John Bingham, and through the courts worked to weave an intricate tapestry that would change the culture of the United States from a union of voluntary members, to a nation of states joined in an unbreakable union. The country no longer resembled the union of sovereign states it had once been, and instead became a nation held together by the statist consequences of the ravages of war.

The federal government telling States what they can and can't do regarding our rights opens a Pandora's Box the framers of the Constitution never intended to be breached. By allowing the federal government to dictate to the States what they can and can't do regarding rights, even with the best of intentions, the precedent is established allowing federal control. A federal government that can force a State to behave in an acceptable manner can later dictate to a State to follow a federal mandate designed to reduce your access to your rights.

As President Gerald Ford once wisely said, “A government big enough to give you everything you want is a government big enough to take from you everything you have.”

A significant segment of the Founding Fathers believed the **Bill of Rights** to be unnecessary. The first seven articles of the U.S. Constitution were written in such a way that the concerns of the **Anti-Federalists** had been addressed, but they still feared that the federal government would compromise the natural rights of the citizens if a Bill of Rights was not included in the Constitution.

The Constitution was written in a manner that allowed the new federal government only the authorities granted to it by the Law of the Land. Regarding **arms**, for example, the possession of guns was never an issue granted to the federal government in the first seven articles of the U.S. Constitution, therefore the federal government had no authority to restrict guns in any way, shape, or form. The Anti-Federalists, however, did not believe the federal government would abide by the limitation of authorities placed on the United States Government, and demanded that a Bill of Rights be written. Failure to provide a Bill of Rights, indicated the Anti-Federalists, would result in a failure of those States dominated by Anti-Federalists to ratify the new Constitution.

The Framers of the Constitution, understanding that without the critical approval of the Anti-Federalists, the new Constitution would never be ratified, agreed to include a Bill of Rights. James Madison was asked to gather the amendments to be proposed and potentially ratified by the States, and use them to write a Bill of Rights.

Originally, there were a large number of amendments proposed, but the final proposal that went to the States for ratification was narrowed down to twelve amendments. Only ten were ratified. Of the remaining two, one regarding apportionment remains unratified, and the other became the Twenty-Seventh Amendment in 1992.

The debates over the adoption of the Constitution found the Anti-Federalists fearful that as drafted, the Constitution created a central government that may have the opportunity to become a tyranny. These fears were based on the memory of the British violation of basic civil rights before and during the American Revolution. With past British tyranny as a frame of reference, the Anti-Federalists demanded that a "bill of rights" be written that would clarify without question the immunities of individual citizens. Though the amendments of the Bill of Rights were not proposed until 1789, several state conventions during their ratification conventions ratified the Constitution with the understanding that the amendments would be offered.

One of the fears regarding the proposal of the Bill of Rights was that by trying to protect specific rights, it might imply that any unmentioned rights would not be protected. It was believed by many that as a result, the Bill of Rights was actually unnecessary, for in the British system of **common law** natural rights were not defined, nor quantified. Adding a Bill of Rights to the Constitution may actually limit the rights of the people to those listed in the Constitution. As a result of this argument, included in the Bill of Rights is the Ninth Amendment, which indicates that rights not **enumerated** would also be protected.

Another argument against the Bill of Rights is that the ten amendments muddy the waters of the Constitution, because the first seven articles were designed to grant authorities to the federal government, and if an authority is not granted, the federal government does not have that power. The Bill of Rights tells the federal government what it cannot do. This enables those who oppose the Constitution to claim that the Constitution does not only grant express powers. By focusing on the Bill of Rights, the opposition responds to constitutional challenges with the question, "Where in the Constitution does it say the federal government can't do that?" Considering the Bill of Rights was not even necessary, this provides unnecessary ammunition to those that oppose the Constitution.

Terms:

Anti-Federalists - Opposed to formation of a federal government, particularly by adoption of the Constitution of the United States.

Arms - Weapons, firearms; a gun that may be used for protection of property or as part of a militia.

Bill of Rights - The first ten amendments of the U.S. Constitution; a formal summary of those rights and liberties considered essential to a people or group of people.

Common Law - The part of English law that is derived from custom and judicial precedent rather than statutes, able to be changed by the whims of the governed, or their representatives.

Enumerated - Counted or told, number by number; reckoned or mentioned by distinct particulars.

Questions for Discussion:

1. Why does the Constitution offer the opportunity for both oaths, and affirmations?
2. Why did some of the Founding Fathers consider the Bill of Rights unnecessary?
3. What did the Anti-Federalists think of the creation of the federal government? Why?
4. Why were the Founding Fathers willing to add the Bill of Rights even though they believed the amendments to be unnecessary?

Resources:

Joseph Andrews, *A Guide for Learning and Teaching The Declaration of Independence and The U.S. Constitution - Learning from the Original Texts Using Classical Learning Methods of the Founders*; San Marcos: The Center for Teaching the Constitution (2010).

Philip B. Kurland and Ralph Lerner, *The Founder's Constitution – Volume Five – Amendments 1-12*; Indianapolis: Liberty Fund (1987)

The Charters of Freedom: The Bill of Rights, National Archives and Records Administration: http://archives.gov/exhibits/charters/bill_of_rights.html

Incorporation of the Bill of Rights

The Bill of Rights was originally intended to be applied only to the federal government. Even the most ardent opponent to the **originalist view of the Constitution** concedes that it is commonly understood that originally the Bill of Rights was not intended to apply to the States whatsoever. The text of the U.S. Constitution does not necessarily clearly exhibit that the Bill of Rights was only intended to apply to the federal government, but a deep study of the text of the first ten amendments, and the various writings of the Founding Fathers on the topic, reveals without a doubt that the Bill of Rights was indeed originally intended to only apply to the federal government.

Though even the most ardent opponent of the United States Constitution will admit that the Bill of Rights was originally intended to only apply to the federal government, the rule of inapplicability to the States was abandoned by statist after 1868, when it became argued that the 14th Amendment changed this rule, and served to extend most of the Bill of Rights to the States.

The section of the 14th Amendment that has been interpreted to extend the Bill of Rights to the States comes from the second sentence of Section 1 of the 14th Amendment, which reads:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.”

Through a series of court rulings, the Supreme Court has changed the Constitution by applying parts of the Bill of Rights to the States. The process over the time period since the ratification of the 14th Amendment which works to apply the Bill of Rights to the States through court rulings and written opinions is called “**The Incorporation of the Bill of Rights.**”

The Bill of Rights was originally not meant to be a guarantee of individual freedoms at all, but a limitation of federal authority against our God given rights. In other words, the Bill of Rights was not written for the

people, but for the federal government as a means of telling the federal government what it cannot do in regards to our unalienable rights.

Why not apply these amendments to the States as well?

The States already had a Bill of Rights in their own State Constitutions (and those that did not have a constitution yet, did include a Bill of Rights later). The Founding Fathers were confident that the people of the States could control their own State officials, and would be involved in their local governments. The people did not fear their local governments acting in a tyrannical manner similar to the potential of a centralized government system. Their fears were of the new and distant central government.

Originally, parts of the first amendments proposed by James Madison did in fact address the States, seeking to limit the State governments with provisions such as, "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." The parts of the Bill of Rights that sought to be applied to the powers of the States, however, were not approved by Congress, and therefore were not a part of the proposed amendments to the States.

The Bill of Rights was understood, at its ratification, to be a bar on the actions of the federal government. Prior to the incorporation of the Bill of Rights to the States by the courts as based on their interpretation of the 14th Amendment, the Bill of Rights did not apply to the States, and was never intended to be fully applied to the States.

The argument used, despite original intent, that the Bill of Rights must also apply to the States is based more on philosophy, than historical evidence. One of the philosophical standpoints used is that if the specific rights given in the Bill of Rights are based on the more general rights to life, liberty, and property which in turn are considered to be God-given and unalienable, then State governments do not have the authority to infringe on those rights any more than can the federal government.

The argument, however, simply suggests that the Bill of Rights *ought* to apply at the State level, not that it originally did.

If the Bill of Rights originally only applied to the Federal Government, and over time has changed to be something that was applicable on the State level through court decisions, the reality is that the Constitution itself has never allowed the Bill of Rights to be applied to the States. The change was done by judicial means, meaning that the Constitution has been changed by **judicial activism**. The problem, however, is that according to the Constitution, the only way to change the Constitution is through an amendment process. Therefore, the incorporation of the Bill of Rights to the States occurred unconstitutionally.

This returns us to the argument that the 14th Amendment is the source and authority of the incorporation of the Bill of Rights to the States. The Supreme Court's first ruling regarding the scope of the 14th Amendment, and if the amendment enables the Bill of Rights to be applied to the States, was rendered in the Slaughterhouse Cases just five years after the ratification of the 14th Amendment in 1868. A five to four vote by the high court interpreted the Privileges and Immunities Clause to be the authority they needed to enforce The Bill of Rights against the States. Subsequent cases also used the 14th Amendment as an authority for incorporation. During the early twentieth century a number of court cases, using the arguments referencing the 14th Amendment, began selectively incorporating some of the specific provisions of the Bill of Rights while rejecting the incorporation of others.

The courts, through this process of incorporating The Bill of Rights to the States, have changed the Constitution through unconstitutional means, and against **original intent**. As originally intended, all provisions in the U.S. Constitution apply to the federal government, unless otherwise noted. The Bill of Rights was originally intended to apply only to the federal government, and if we are to remain in line with the original intent of the Founding Fathers, State sovereignty must remain protected by that original intent.

Congressman John A. Bingham of Ohio was the primary author of the first section of the 14th amendment, and it was his personal intention the Bill of Rights be applied to the States as well. His argument was that it was necessary in order to secure the civil rights of the newly appointed slaves. However, most of the representatives during the five months of debate on the floor of Congress argued against incorporating the Bill of Rights to the States, and so when the amendment was agreed upon for proposal, the majority of those involved intended for the 14th Amendment to not influence how the Bill of Rights was applied. In the beginning, the courts ruled that the Amendment did not extend the Bill of Rights to the States. It was after the realization that **Black Codes** were emerging in the South that the courts decided for the purpose of protecting the civil rights of the emancipated slaves, they would begin to apply parts of the Bill of Rights to the States.

Terms:

Black Codes - Laws put in place in the United States after the Civil War with the effect of limiting the basic human rights and civil liberties of blacks.

Incorporation of the Bill of Rights - The process through court rulings based on the interpretation of the 14th Amendment to apply the Bill of Rights to the States.

Judicial Activism - When judges violate the Separation of Powers through their rulings; when a judge rules legislatively by modifying or striking down a law using the unconstitutional authority of judicial review.

Original Intent - Original meaning of the United States Constitution as intended by the framers during the Federal Convention of 1787, and the subsequent State Ratification Conventions.

Originalist view of the Constitution - View that the Constitution as written should be interpreted in a manner consistent with what was meant by those who drafted and ratified it.

Questions for Discussion:

1. Why is the originalist view of the Constitution so important?
2. How have Statists changed the Constitution through the courts over the last two hundred years?
3. What is the only legal way to change the Constitution?
4. Why is the Bill of Rights not a guarantee of individual freedoms?
5. From where do our rights come from?
6. How did the Black Codes play a part in the incorporation of the Bill of Rights?

Resources:

14th Amendment to the U.S. Constitution: Civil Rights (1868), Our Documents dot gov: <http://www.ourdocuments.gov/doc.php?flash=true&doc=43>

Intent of the Fourteenth Amendment was to Protect All Rights (argument supporting incorporation of the Bill of Rights to the States), Constitution dot org (2000): http://www.constitution.org/col/intent_14th.htm

Joseph Andrews, *A Guide for Learning and Teaching The Declaration of Independence and The U.S. Constitution - Learning from the Original Texts Using Classical Learning Methods of the Founders*; San Marcos: The Center for Teaching the Constitution (2010).

Philip B. Kurland and Ralph Lerner, *The Founder's Constitution – Volume Five – Amendments 1-12*; Indianapolis: Liberty Fund (1987)

Richard L. Aynes, On Misreading John Bingham and the Fourteenth Amendment (1993): http://www.constitution.org/lrev/aynes_14th.htm

The Fourteenth Amendment and Incorporation, The Tenth Amendment Center (2010): <http://newyork.tenthamentendmentcenter.com/2010/05/the-14th-amendment-and-incorporation/>

To Whom Does The Bill Of Rights Apply?, Lew Rockwell dot com (2005): <http://www.lewrockwell.com/browne/browne27.html>

What is the Bill of Rights?, About dot com Civil Liberties (argument supporting incorporation of Bill of Rights to the States: http://civilliberty.about.com/od/historyprofiles/ff/what_is_bill.htm

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