



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

(Author Unknown)

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	<u>First</u>	<u><i>Gitlow v. New York</i></u>	1925
To Have Attorney in Capital Cases	<u>Sixth</u>	<u><i>Powell v. Alabama</i></u>	1932
To Exercise Any Religion	<u>First</u>	<u><i>Hamilton v. Regents of U.C.</i></u>	1934
Of Assembly & Petition	<u>First</u>	<u><i>DeJonge v. Oregon</i></u>	1937
From Establishment of Religion	<u>First</u>	<u><i>Everson v. Board of Ed.</i></u>	1947
To Have a Public Trial	<u>Sixth</u>	<u><i>In re Oliver</i></u>	1948
From Unreasonable Searches & Seizures	<u>Fourth</u>	<u><i>Mapp v. Ohio</i></u>	1961
From Cruel & Unusual Punishments	<u>Eighth</u>	<u><i>Robinson v. California</i></u>	1962
To Have Attorney for Felony Cases	<u>Sixth</u>	<u><i>Gideon v. Wainwright</i></u>	1963
From Self-incrimination	<u>Fifth</u>	<u><i>Malloy v. Hogan</i></u>	1964
To Confront Witnesses	<u>Sixth</u>	<u><i>Pointer v. Texas</i></u>	1965

To Have Attorney for
Charges That Could
Be Jailed For

Sixth

Argersinger v. Hamilin

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 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 Norrande, 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.

Education and the 14th Amendment

During the 1970s, a lot of people entered the United States illegally. Many came from Mexico to work for low wages in border states like Texas.

Attorney General William French Smith testified before Congress in 1981 that most of the 3 to 6 million illegal aliens were living more or less permanently in this country. This situation led to questions about the legal status and rights of these persons. (They are often referred to as "undocumented workers" or "illegal aliens," because they have not obtained the papers necessary for being in the country.)

The [14th Amendment](#) prohibits any state from denying "to any person within its jurisdiction the equal protection of the laws." The equal protection clause clearly requires that all American citizens must be treated equally by the law. But does the equal protection clause also demand equal treatment for those who are not citizens or who have entered the United States illegally?

In 1982, the U.S. Supreme Court decided the case of a group of children of undocumented workers who had been denied free public schooling by the State of Texas.

The Background of *Plyler v. Doe*

In May 1975, the Texas state legislature passed a law authorizing school districts to deny enrollment to children who had not been "legally admitted" into the United States. Under this law, Texas school districts could either bar from the schools the children of illegal aliens or charge them tuition. The [Tyler Independent School District](#) in Smith County chose the second option.

Several federal court lawsuits were filed against the Texas law. The first was a class-action suit filed in 1977 by legal defense attorneys on behalf of "certain school-age children of Mexican origin residing in Smith County, Texas, who could not establish that they had been legally admitted into the United States." A federal district court ruled in 1977 and again in 1980 that the state law violated the equal protection clause of the 14th Amendment. An injunction (court order) barred the state and the Tyler school board from denying free public schooling to the undocumented immigrant children. A federal appeals court in 1981 agreed with the lower court rulings. The Tyler school board and school superintendent, James Plyler, appealed to the U.S. Supreme Court.

The Constitutional Questions

In preparing their briefs for the Supreme Court hearing, the attorneys for the Tyler school district, as well as the attorneys for the undocumented immigrant children, had to address two basic constitutional questions:

- Does the 14th Amendment's equal protection clause apply to school-age children who have not been legally admitted into the United States?
- Does the 14th Amendment's equal protection clause require Texas and the Tyler Independent School District to provide a free public education to school-age children who have not been legally admitted into the United States on an equal basis with children who are legally residing in the state?

The Arguments of the Appellants

Attorneys representing the Tyler Independent School District, the appellants in this case, answered "no" to both of the constitutional questions. To support their position, the appellants offered the following arguments:

- The children in this case are not "persons" within the state's jurisdiction. They are unlawfully living in the state and are subject to deportation.
- Undocumented immigrants should not be protected under the equal protection clause to the same degree as citizens and others living legally in the country.
- By denying free public schooling to children of undocumented immigrants, the Texas law serves a "substantial state interest," which justifies an exception to the equal protection clause. The "substantial state interest" in this case is based on the following:
 - It will cost Texas over \$62 million per year to educate the estimated 20,000 children of undocumented immigrants now living in the state. This money could better be spent on the children of legal residents.
 - A free public education for the children in this case will encourage the continued influx of undocumented immigrants into Texas.
 - The children of undocumented aliens place "special burdens" on the Texas education system

such as the hiring of additional bilingual teachers.

- The U.S. Supreme Court has earlier held that a free public education is not a "fundamental right" under the Constitution. [[*San Antonio Independent School District v. Rodriguez*](#), 411 U.S. 1 (1973)]
- Requiring free public schooling for these children will lead to other cases in which those who have entered the country illegally will demand equal access to such public benefits as food stamps, unemployment insurance, and a free college education. Congress and the federal government should be held responsible for the education of illegal immigrant children since this is a national, not a state problem.
- The Supreme Court has no constitutional authority to strike down state laws simply because they may be unwise.
- The Supreme Court has no constitutional authority to create rights when they do not exist in the Constitution.
- The Supreme Court should not attempt to solve social problems. This is the job of Congress and the state legislatures.
- It is not fair for Texas taxpayers to be held responsible for educating the children of the world.

The Arguments of the Respondents

The attorneys representing the undocumented immigrant children, the respondents in this case, answered "yes" to both of the constitutional questions. To support their position, the respondents offered the following arguments:

- The U.S. Supreme Court has previously ruled that the equal protection clause of the 14th Amendment applies not only to citizens but to "any person" including aliens [[*Yick Wo v. Hopkins*](#), 118 U.S. 356 (1886)]. The children in this case are "persons" living within the "jurisdiction" of the state since they reside in Texas and are subject to its laws.
- Discrimination against the school-age children in this case is not justified by any "substantial state interest":
 - The children in this case represent only 1 percent of the school-age population in Texas. Spending some state funds by educating these children will not reduce the quality of schooling of the other children.

- There is little evidence that undocumented immigrants come to Texas seeking educational benefits for their children. Most come looking for jobs.
 - Most of the state funds used for bilingual education and related special needs are spent on pupils who are legal residents.
- While education may not be a "fundamental right" under the Constitution, the equal protection clause of the 14th Amendment requires that when a state establishes a public school system (as in Texas), no child living in that state may be denied equal access to schooling.
- Failure to educate these children will lead to higher future social costs related to unemployment, welfare, and crime.
- Children should not be penalized for the illegal acts of their parents.
- Undocumented immigrant children could later become legal residents or even citizens as a result of marriage or changes in the law.
- Denying a free public education to the children of undocumented immigrants now will keep them forever in the lowest socio-economic class.
- Some children of undocumented immigrant parents were born in this country. These children are already full citizens of the United States and are entitled to an education. Their brothers and sisters born in Mexico, however, are still in the U.S. illegally. Is it fair for some children in a family to have access to public education while others are denied?
- The Texas law presents the danger of creating a permanent class of undocumented immigrants encouraged to stay as cheap labor but denied any benefits of society.
- Texas will be better off having these children in school rather than roaming the streets.

For Further Information

[Illegal Aliens: To Teach or Not to Teach](#) Background and pros and cons on the issue. By Becky Smith.

[Illegal Immigrant Children: In or Out of Public Schools?](#) An article outlining the positions of President Bill Clinton and candidate Bob Dole in the 1996 presidential election. From *Education Week*.

[Plyler v. Doe: A Visual](#) A cartoon encapsulating the background to the case.

[Writing the Appellate Brief: The Argument](#) Instructions on how to write an argument to an appeals court. The instructions use the *Plyler* case as the example.

[Undocumented Children in the Schools: Successful Policies and Strategies](#) Suggestions on how schools should deal with undocumented students. From Eric Digests.

Book: Abraham, Henry J. [Freedom and the Court](#). 5th ed. New York: Oxford University Press, 1988.
