

## Terms 5

### **Incorporation: The Federal Bill of Rights and the Fourteenth Amendment**

1. In American constitutional history one issue that has stood out is whether individual liberties and rights included in the **federal Bill of Rights** (the first ten amendments to the US Constitution) protect only against violations of those rights by the federal government, or do they also limit what state governments and their officials can do. The most important safeguards available to a defendant in criminal proceedings in the US are found in the Bill of Rights. These ten amendments were made part of the US Constitution in 1791, two years after the Constitution itself was ratified. Initially, the Bill of Rights was viewed as limiting only the acts of federal officers, because the Constitution itself limited only the powers of the federal government, not the state governments. State and local officers originally were limited only by provisions of their own constitutions, state laws, and local ordinances. In 1868, in the immediate aftermath of the Civil War, Congress passed and the states ratified the **Fourteenth Amendment**. Section 1 of that amendment states, in part: “**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.**”

2. The **Due Process Clause of the Fourteenth Amendment** has been interpreted over the years by the US Supreme Court, primarily during the 20<sup>th</sup> century, as “**incorporating**” most of the provisions of the federal Bill of Rights. The Supreme Court did not do this all at once, but rather **through a process of selective incorporation in various cases decided over a long period of time**. As a consequence, although the fundamental rights granted by the Bill of Rights were originally meant to cover only violations by federal officers, the wording of the Fourteenth Amendment (specifically, the Due Process Clause) has been interpreted by the Supreme Court to prohibit violations of rights by either federal or state officers. In other words, those rights that are incorporated under the Fourteenth Amendment now apply to state as well as federal criminal proceedings.

3. **What are some of the larger meanings of the incorporation of federal rights into the Fourteenth Amendment?**

A. **These constitutional protections now constitute a minimum national standard for criminal justice proceedings.** We now have guaranteed safeguards, backed by the US Constitution, that apply uniformly to all federal and state criminal proceedings throughout the United States. Thus, the landmark decisions of the US Supreme Court that applied Bill of Rights standards to the states as well as the federal government are crucial in defining the limitations of our criminal justice system. This consequence is even more important when we reflect that most criminal prosecutions in the US occur in the states rather than in federal jurisdictions.

**B. The Fourteenth Amendment also allows the federal courts to become involved in state cases if one of the incorporated rights comes into play.** In short, the Fourteenth Amendment enlarges the scope of constitutional protection for personal liberties, including those involving procedural criminal law, by opening the federal courts to persons who are dissatisfied with state court decisions.

4. The following provisions of the Bill of Rights apply to both federal and state proceedings:

Year	Provision	Amendment Involved	Case
1925	Freedom of Speech	I	Gitlow v. NY
1931	Freedom of the Press	I	Near v. MN
1932	Right to Counsel (in capital cases)	VI	Powell v. AL
1937	Freedom of Assembly/ Petition	I	DeJonge v. OR
1940	Freedom of Religion	I	Cantwell v. CT
1947	Separation of Church and State	I	Everson v. Bd. of Ed.
1948	Right to a Public Trial	VI	In Re Oliver
1949	Protections against Unreasonable Arrest, Search and Seizure	IV	Wolf v. CO
1961	Exclusionary Rule of Evidence	IV	Mapp v. OH
1962	Prohibition of Cruel and Unusual Punishment	VIII	Robinson v. CA
1963	Right to Counsel (in all non-capital felonies)	VI	Gideon v. Wainwright
1963	Warrant Requirements	IV	Ker v. CA; Aguilar v. TX
1964	Right Against Compulsory Self-Incrimination	V	Malloy v. Hogan
1965	Right to Confront Adverse Witnesses	VI	Pointer v. TX
1966	<u>Miranda</u> Warnings	V, VI	Miranda v. AZ
1966	Right to an Impartial Jury	VI	Parker v. Gladden
1967	Right to a Speedy Trial	VI	Klopfer v. NC
1967	Right to Obtain Favorable Witnesses	VI	Washington v. TX
1968	Right to Trial by Jury (in all non-petty criminal cases)	VI	Duncan v. LA
1969	Prohibition of Double Jeopardy	V	Benton v. MD
1972	Right to Counsel (in all imprisonable non-felony cases)	VI	Argersinger v. Hamlin

**5. Are there Bill of Rights provisions that the US Supreme Court has not incorporated or has expressly refused to incorporate into the Fourteenth Amendment?** The list below includes those provisions that have not been incorporated. Although these rights are required in federal proceedings, the states do not have to grant an accused person these rights unless they are required by state constitution or state law:

- A. Right to keep and bear arms (Amendment II)
- B. Prohibition against quartering of soldiers (Amendment III)
- C. Right to indictment by grand jury (Amendment V)
- D. Right to a unanimous jury verdict (Amendment VI) (implicit)
- E. Right to trial in civil cases (Amendment VII)
- F. Prohibition against excessive bail (Amendment VIII)

**6. Does the original US Constitution contain procedural safeguards in addition to those set forth in the Bill of Rights?** Article I, Section 9 provides that the **writ of habeas corpus** will be available to all citizens except in times of rebellion or national invasion. Article I, Sections 9 and 10 also prohibit both Congress and the state legislatures from enacting any **bills of attainder or ex post facto laws**.