

Social Studies Virtual Learning

AP US Gov & Politics

Selective Incorporation Development

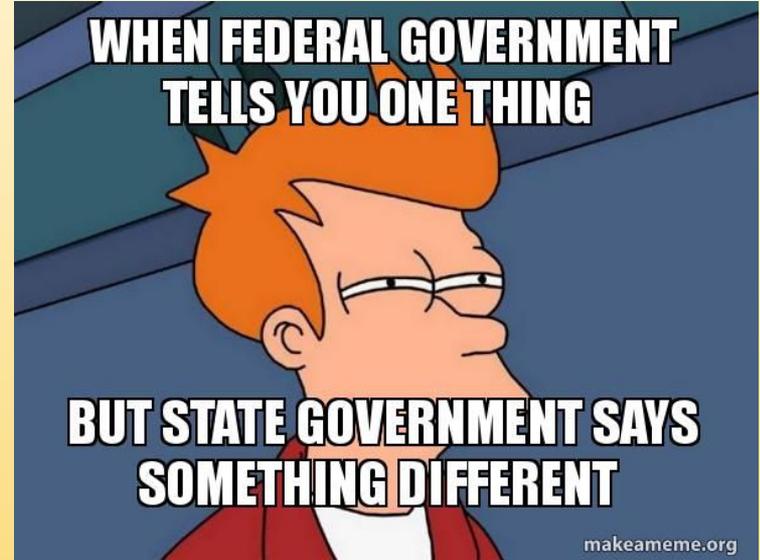
April 09, 2020

AP US Gov & Politics

Lesson #17: April 9th, 2020

Learning Target (LOR 3.A) : Explain the implications of the doctrine of selective incorporation.

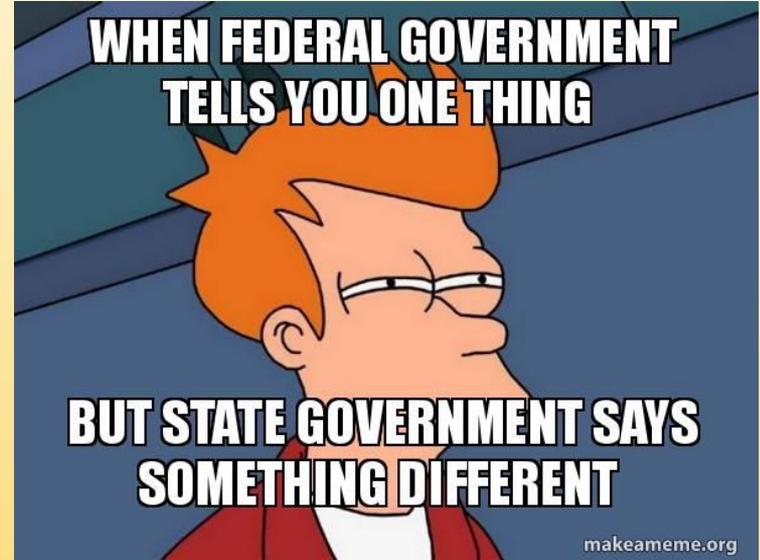
Warm Up:



Cartoon on the left: What do you think Lady Liberty's view about the government protecting citizens' First Amendment rights? Why might she feel that way?

Meme on the right: What is one example of something that you know where the Federal government has a different policy than the state governments? Describe why this would be a problem if differences existed on how Americans' rights and liberties were protected?

Warm Up: Teacher Thoughts



Cartoon on the left: Lady Liberty is probably frustrated at the developments related to First Amendment protections over time. She might feel like a D- grade because our country is still considered the land of the free but often times, there is suppression of our rights and liberties

Meme on the right: I think of the conflicting policies on marijuana that have it classified illegal nationwide but individual states are practicing legal policies at the same time. This could be a problem with different ways to allow American freedoms because states could deny certain individuals as was the case with pre-1970s Southern racial discrimination.

Lesson Activity

Today we will learn about the Selective Incorporation cases over time encompassing:

1st Amendment :

2nd Amendment

4th Amendment

5th Amendment

6th Amendment

8th Amendment

9th Amendment

Click on this
Summary video

What is incorporation of
the Bill of Rights?

USLawEssentials

Selective Incorporation cases that might be on the AP Exam:



If you see this STAR, that case is fair game for the AP Exam,
they are **RED** on this slide

1st Amendment :

Engel v. Vitale and Wisconsin v. Yoder

Gitlow v. US as a reference to Selective Incorporation only

2nd Amendment : McDonald v. Chicago

4th Amendment (Mapp v. Ohio)

5th Amendment (Palko v. Connecticut and others)

6th Amendment : Gideon v. Wainwright

8th Amendment (Lots)

9th Amendment (Griswold v. Connecticut)

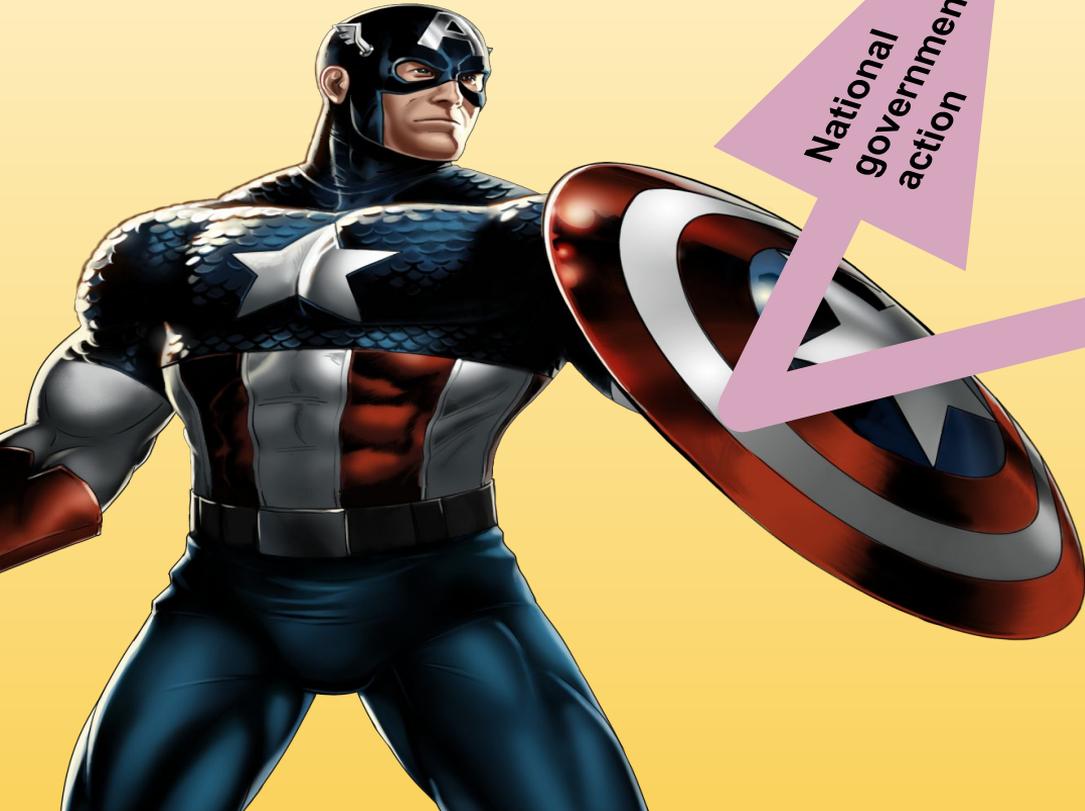
Key terms

| Term | Definition |
|----------------------|---|
| Due process | the legal requirement that an individual's rights must be respected by a state or government; protected at the federal level by the Fifth Amendment, and at the state level by the Fourteenth |
| Fourteenth Amendment | explicitly guarantees certain rights against infringement by states, including citizenship, due process, and equal protection for all citizens; before the Amendment's 1868 adoption, these rights were protected at the Federal level by the Bill of Rights, but not explicitly at the state level |
| Fundamental rights | rights and immunities protected by the Bill of Rights and interpreted by the Supreme Court as "implicit in the concept of ordered liberty," ¹ and therefore protected against state governments in addition to the federal government |
| Incrementalism | the process of incorporating specific rights and provisions of the Bill of Rights to the state level on a case-by-case basis; compare to total incorporation |
| Total incorporation | a doctrine that applies <i>all</i> the guarantees of the Bill of Rights to the state level without exception; this doctrine has never been adopted by a Supreme Court majority opinion, although several dissenting justices have advocated for it |



Write me down. I'm important!

What are Civil Liberties?



National
government
action

**Civil Liberties are your
protections, BUT they are
NOT clearly defined!**

**But what if the shield only
protected some attacks
(Amendments 1-10)**

Guarantees of State Civil Liberties



Civil Liberties are your protections, BUT they are NOT clearly defined!

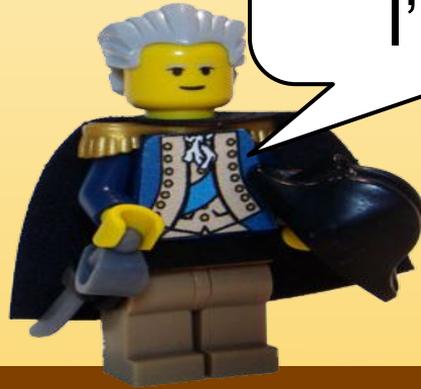
But what if the shield only protected some attacks (Amendments 1-10) while some went through or around those rights?

Guarantees of State Civil Liberties

Original Cases

- **Barron v. Baltimore (1833)**- ruled that the Bill of Rights did not protect individuals against state governments.
 - 5th Amendment and Eminent Domain
- **Gitlow v. New York (1925)**- the Court reversed its earlier decision, citing the due process clause of the 14th Amendment as the reason to protect individuals' free speech and free press rights found in the 1st Amendment OVER states.

Barron v. Baltimore (1833)



My wharf is
very profitable.
I'm rich!

Barron v. Baltimore (1833)



Sorry. Street repairs silted your wharf.



I'm going to **sue** you in State civil court for ruining my business.

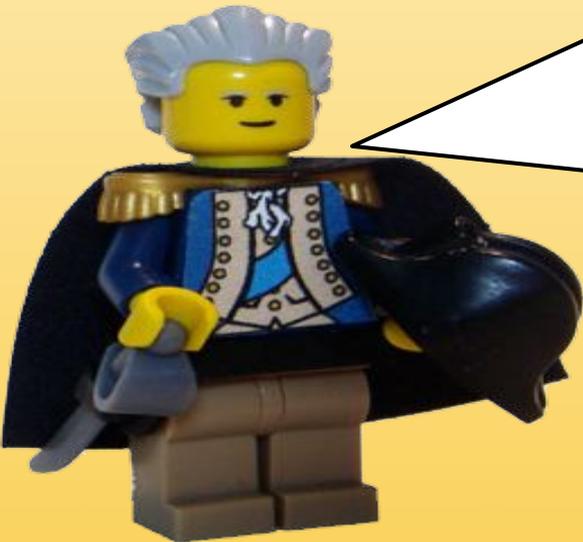


I can't dock at Barron's wharf anymore!

Barron loses in state court so he sues in federal district court

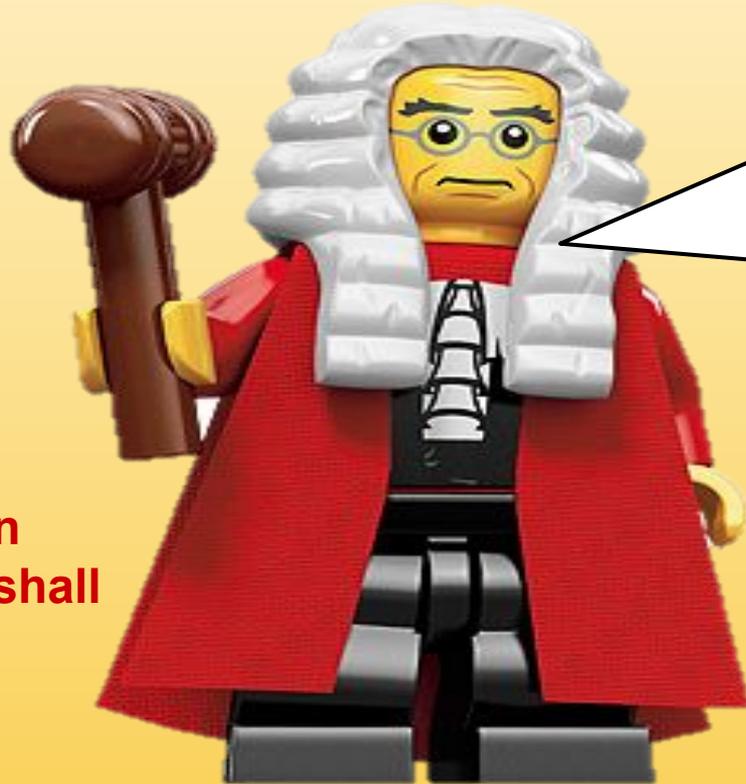
The 5th Amendment's **TAKINGS CLAUSE** says “nor shall private property be taken for public use, without just compensation.”

Baltimore’s street repairs “took” my wharf from me. They should compensate me.



The government taking your property for public use is called **eminent domain!**

Barron v. Baltimore (1833)



John
Marshall

The first ten "amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them."

Barron **lost**. But more importantly, the case set the precedent (example) that the Bill of Rights did **not** apply to the states.

Barron v. Baltimore (1833)

Long Term Effect

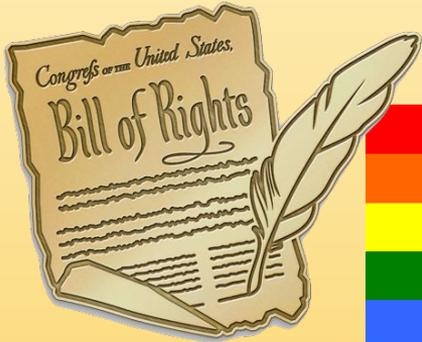


Does the protective
light of the Bill of
Rights shine on me
in Missouri and
protect me from my
STATE
government?



Barron v. Baltimore (1833)

Long Term Effect



1st Amend.

2nd Amend.

4th Amend.

5th Amend.

6th Amend.

8th Amend.

9th Amend.

B
A
R
R
O
N

v.

B
A
L
T
I
M
O
R
E

Because of **Barron**,
I'm only protected
against the actions of
my **STATE** government
if my **STATE'S**
constitution says so.
The BoR does me no
good.



Bill of Rights only protects you from the FEDERAL gov, not STATE gov's

Write me
down. I'm
important!

14th Amendment

Due Process & Equal Protection Clauses

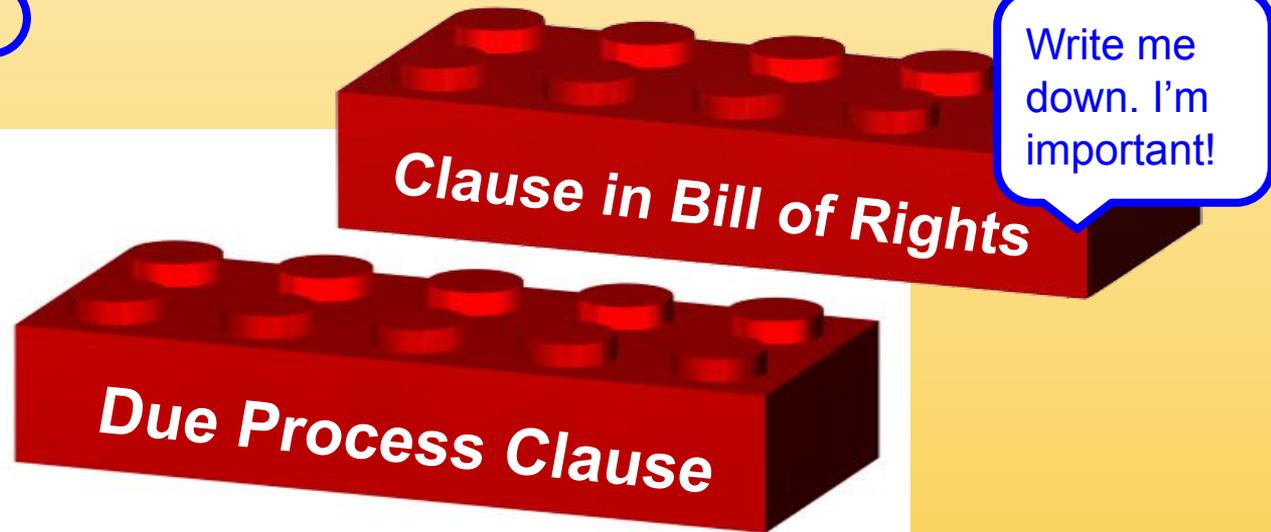
“... nor shall any state deprive any person of life, liberty, or property without due process of law; nor (shall any state) deny any person within its jurisdiction the equal protection of the law.”

“Selective” Incorporation Theory

The court accepts a case where a person was harmed by their state government and they couldn't use the Bill of Rights.

“I declare the 14th Amendment a building block for cases.”

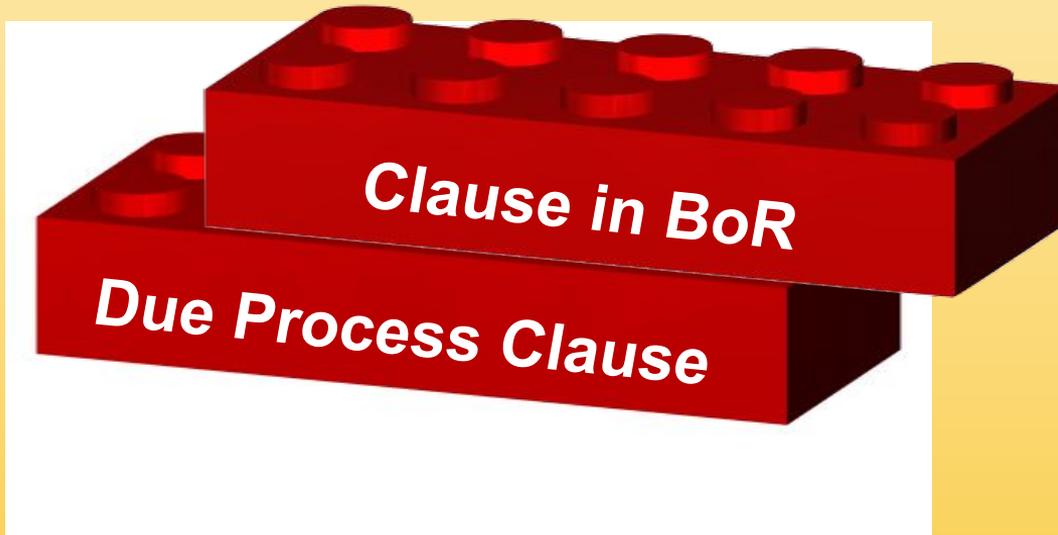
-Mr. Grubb



“Selective” Incorporation Theory

Write me
down. I'm
important!

The court incorporates (clicks together) two pieces...the **Due Process Clause (14th)** and something from the **Bill of Rights**



After these two pieces are clicked together, citizens of the states can use THAT part of the BoR to protect themselves against actions of their **STATE** government.

Challenger #1
Gitlow v. New York

Incorporation Example

Gitlow v. New York (1925)

Write me
down. I'm
important!



- Gitlow, a socialist writer, was arrested for distributing “Left Wing Manifesto” a criminal felony in **STATE** court.
- New York **STATE** Criminal Anarchy Law punished advocating for the overthrow of the government by force.
- New York **STATE** said that just because no action took place didn't mean that the **1st Amend.** protected him.

Does the First Amendment prevent a state from punishing political speech that directly advocates the government's violent overthrow?

No!

In an opinion authored by Justice Edward Sanford, the Court concluded that **New York could prohibit advocating violent efforts to overthrow the government** under the Criminal Anarchy Law. Citing *Schenck* (free speech restriction case), the **Court reasoned the government could punish speech that threatens its basic existence because of the national security implications.** Despite the small scale of Gitlow's actions, the majority was not persuaded that they were too insignificant to have an impact.

The Supreme Court previously held, in *Barron v. Baltimore* (1833), that the Constitution's Bill of Rights applied only to the federal government. *Gitlow* partly reversed that precedent and established that while the Bill of Rights was designed to limit the power of the federal government, the incorporation principle allows it to be applied to states.

In dissent, Justice Oliver Wendell Holmes held that Gitlow had not violated the clear and present danger test used in *Schenck*. Since Gitlow's call to action was abstract and would not resonate with a large number of people, Holmes concluded that there was not sufficient imminence to warrant punishing the speech.

Opposing viewpoint

Challenger #2
Palko v. Connecticut

Evolution of Incorporation

Palko v. Connecticut (1937)

Palko kills 2 cops
while fleeing from a crime

State charges 1st degree murder
(death penalty) but Palko gets 2nd
degree (life in prison)

State appeals, retries Palko and he
gets 1st degree murder and is
sentenced to death.

Evolution of Incorporation

Palko v. Connecticut (1937)

“nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb” - Amendment 5

Palko believed he was being deprived of his “life, liberty, or property” without being granted due process (because the **STATE** kept trying him until they got a death penalty conviction).



Evolution of Incorporation

Palko v. Connecticut (1937)



Palko lost his SCOTUS case

- SCOTUS said some BoR guarantees are fundamental and “neither liberty nor justice would exist if they were sacrificed”
- Some BoR guarantees are **valuable and important**, but not **essential**
- Palko was executed by electrocution in 1938.

The Palko decision was overturned in 1969 (Benton v. MD)

Selective Incorporation is
NOT a sledgehammer



1st

2nd

3rd

4th

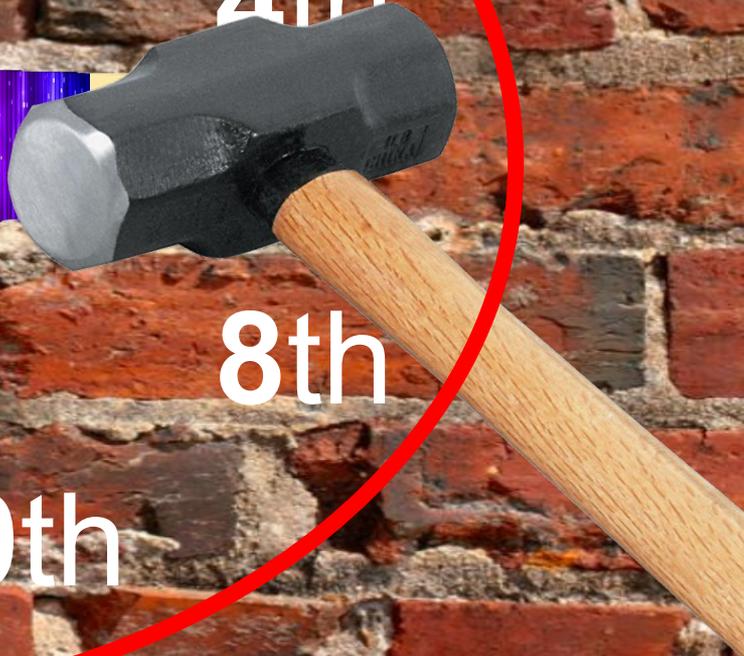
5th

7th

8th

9th

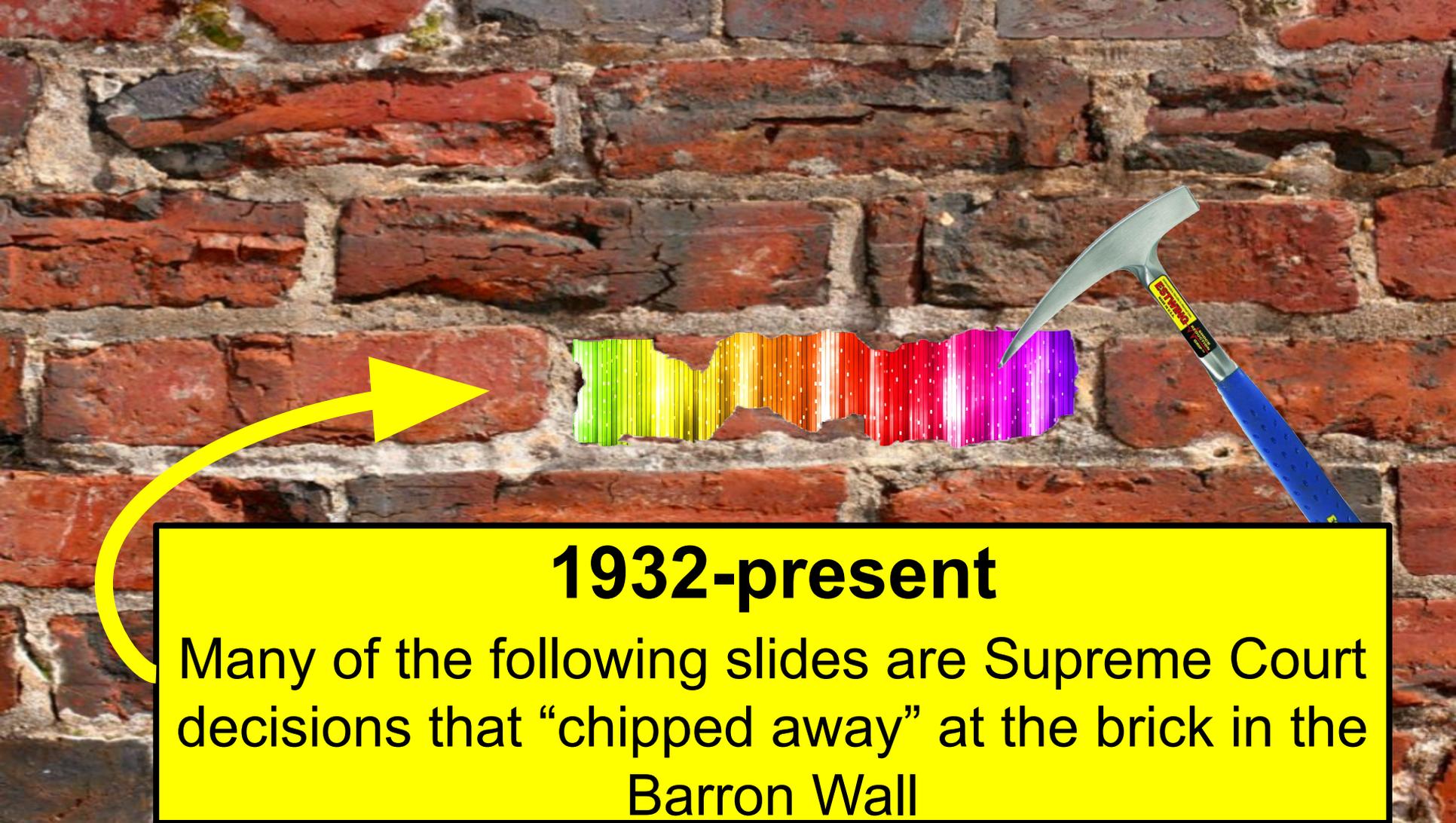
10th



Selective Incorporation
chips away at the
Barron v. Baltimore
wall (precedent or
example) that divided
your rights between
national and state
applied



Write me
down. I'm
important!



1932-present

Many of the following slides are Supreme Court decisions that “chipped away” at the brick in the Barron Wall

A close-up photograph of a brick wall. The bricks are reddish-brown and show signs of weathering, with some darkening and cracking. The mortar is a light grey color. A solid black horizontal band runs across the middle of the image, containing the text "Does the Barron Wall still stand?" in a bold, white, sans-serif font.

**Does the Barron Wall
still stand?**

A close-up photograph of a brick wall. The bricks are reddish-brown and show signs of wear, with some white residue or mortar on their surfaces. The mortar joints are dark. A semi-transparent text box with a green-to-yellow gradient background is overlaid on the left side of the image.

Gitlow v. New York (1925)
Freedom of Speech - 1st

**Barron has been overturned
little by little (brick by brick) over time**

Selective Incorporation Theory

AKA “Nationalizing” the BoR



Write me
down. I'm
important!

Does the protective
light of the Bill of
Rights shine on me
in Missouri and
protect me from my
STATE
government?

1st Amend.

2nd Amend.

4th Amend.

5th Amend.

6th Amend.

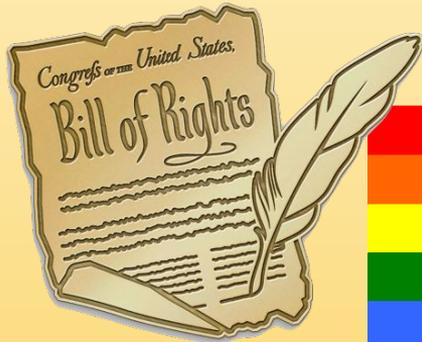
8th Amend.

9th Amend.



Selective Incorporation Theory

AKA “Nationalizing” the BoR



1st Amend.

2nd Amend.

4th Amend.

5th Amend.

6th Amend.

8th Amend.

9th Amend.

NO

B
A
R
R
O
N

v.

B
A
L
T
I
M
O
R
E

Because of **Barron**,
I'm only protected
against the actions of
my **STATE** government
if my **STATE'S**
constitution says so.
The BoR does me no
good.



Bill of Rights only protects you from the FEDERAL gov, not STATE gov's

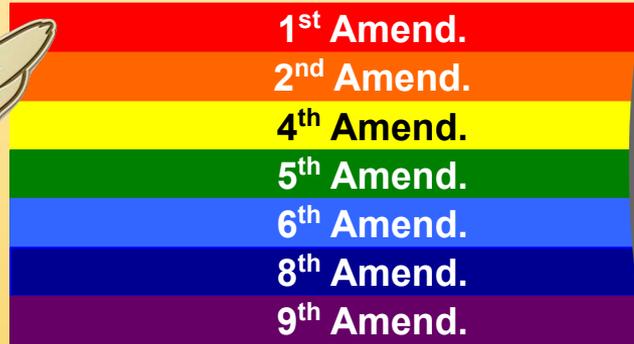
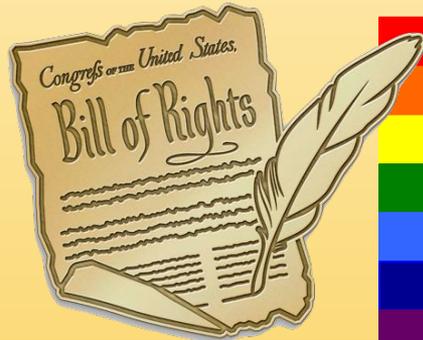
Selective Incorporation Theory

AKA “Nationalizing” the BoR

14th Amendment’s Due Process Clause

Nor shall any STATE deprive any person of life, liberty, or property without due process of law.

= SUPER PRISM LIGHT REFLECTOR!



D
U
E

P
R
O
C
E
S
S

B
A
R
R
O
N

v.

B
A
L
T
I
M
O
R
E

Write me
down. I'm
important!



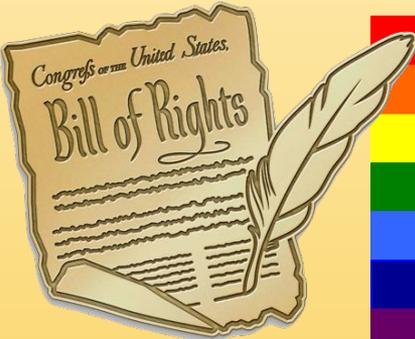
Bill of Rights only protects you from the FEDERAL gov, not STATE gov

Selective Incorporation Theory

AKA “Nationalizing” the BoR

14th Amendment’s Due Process Clause

Nor shall any STATE deprive any person of life, liberty, or property without due process of law.



1st Amend.

2nd Amend.

4th Amend.

5th Amend.

6th Amend.

8th Amend.

9th Amend.

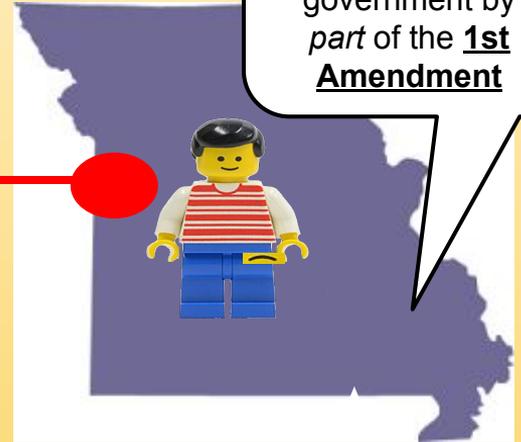
D
U
E

P
R
O
C
E
S
S

B
A
R
R
O
N

V.

B
A
L
T
I
M
O
R
E



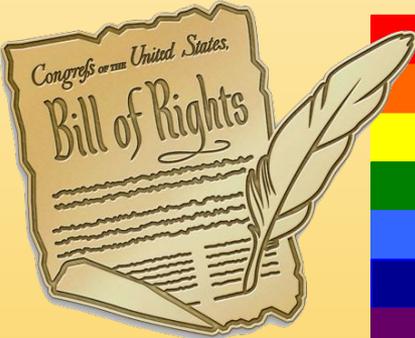
Now I'm protected against actions of my state government by *part of the* 1st Amendment

Bill of Rights only protects you from the FEDERAL gov, not STATE gov's

Selective Incorporation : Gitlow v. NY

14th Amendment's Due Process Clause

Nor shall any STATE deprive any person of life, liberty, or property without due process of law.



1st Amend.

2nd Amend.

4th Amend.

5th Amend.

6th Amend.

8th Amend.

9th Amend.

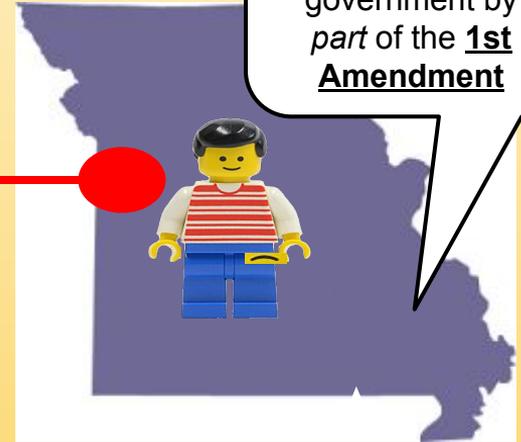
D
U
E

P
R
O
C
E
S
S

B
A
R
R
O
N

V.

B
A
L
T
I
M
O
R
E



Now I'm protected against actions of my state government by *part of the* 1st Amendment

Bill of Rights only protects you from the FEDERAL gov, not STATE gov's

PRACTICE

Review questions

1

What basis does the Court use to decide whether or not a right is incorporated to the states?

2

Does selective incorporation limit or increase the power of state governments? How?

3

From where does the Supreme Court derive its authority to declare state laws unconstitutional? Is it right for the judicial branch to have that authority?

1

To incorporate or not to incorporate? When deciding whether a right is incorporated to the states (and all levels of government), the Court considers whether the right is "implicit in the concept of ordered liberty", or otherwise "fundamental". If the right is fundamental, it applies to the states through the Fourteenth Amendment's due process clause.

Not every right or provision of the Bill of Rights has been incorporated to the states; including those that have never been challenged in the Supreme Court, and those that the Court has specifically ruled non-fundamental, such as the Fifth Amendment's double jeopardy protection.

Limits on state power: Using the doctrine of selective incorporation, the Supreme Court has ruled that many provisions of the Bill of Rights apply to the states. This represents a limiting of state power by federal oversight; any state attempt to regulate individual rights could potentially be ruled unconstitutional by the Court.

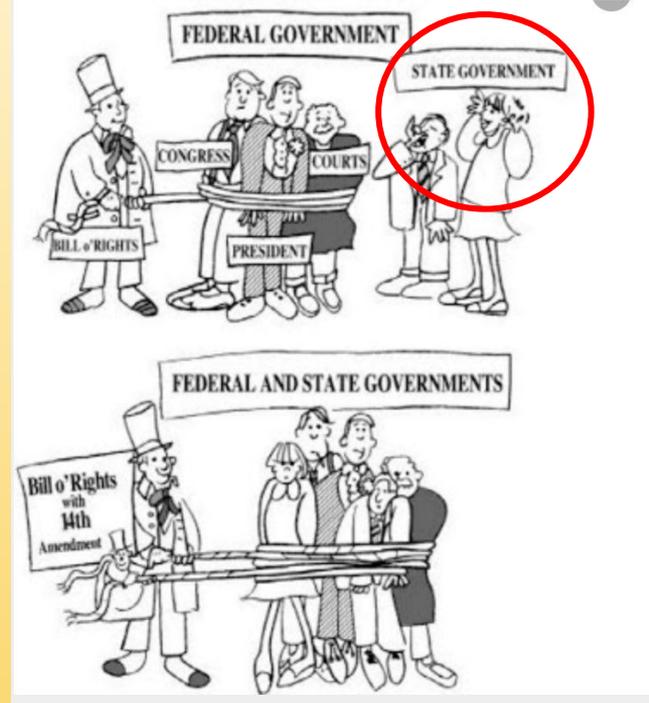
2

3

Individual freedom and public safety: The tension between public safety considerations and individual rights plays out at all levels of government, and is frequently a factor in cases in which the Court considers selective incorporation. For example, *McDonald v Chicago* came about because of a city-level handgun ban motivated by public safety, but the Court's ruling gave primacy to individual rights and reversed the ban.

#4 The Bill of Rights protects you from...

- A. actions of your state government.
- B. actions of your central government.
- C. actions of both the state and central government.

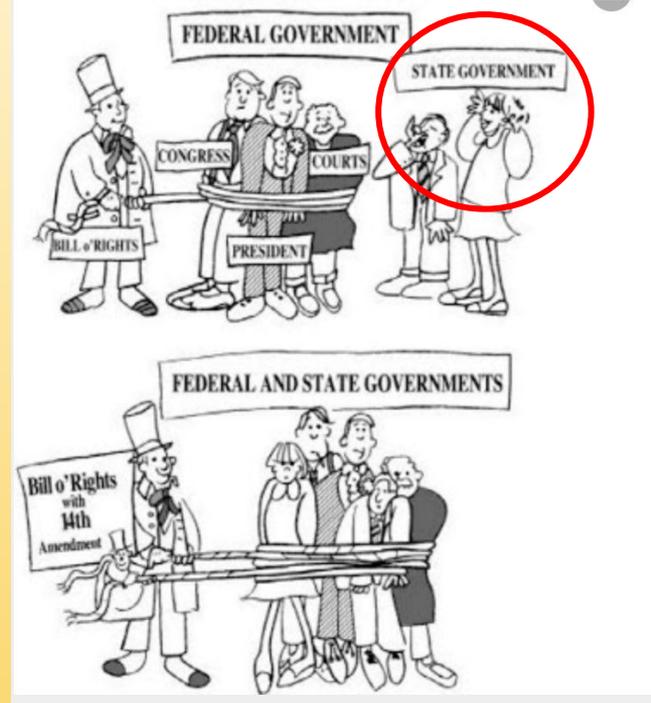


Bill of Rights = the First 10 Amendments

Federalists promised the Anti-Feds they'd add the BoR if they supported the Constitution.

#4 The Bill of Rights originally protects you from...

- A. actions of your state government.
- B. actions of your central government.
- C. actions of both the state and central government.

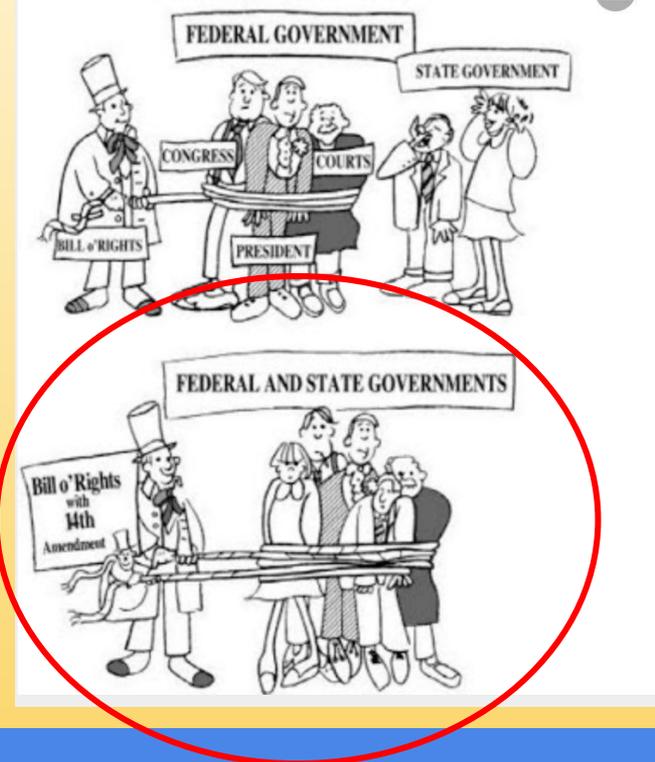


Bill of Rights = the First 10 Amendments

Federalists promised the Anti-Feds they'd add the BoR if they supported the Constitution.

#4 Selective Incorporation of the Bill of Rights protects you from...

- A. actions of your state government.
- B. actions of your central government.  
- C. actions of both the state and central government.



Bill of Rights = the First 10 Amendments

Parts of the 1st, 2nd, 4th, 5th, 6th, 8th, & 9th Amendments have been Incorporated