



AP Landmark Supreme Court Cases Encore Scholar Exchange Briefing Document

WATCH

Back by popular demand, the Center will host another Landmark Supreme Court Cases Class! The Advanced Placement (AP) exam has been rewritten for 2020 and covers three units with two free-response questions (FRQs). This fast-paced and fun session will review the top 15 court cases from a typical course of study for an AP Government class. Join Jeffrey Rosen, president and CEO of the National Constitution Center, to better understand these landmark Supreme Court cases and the major principles of the U.S. Constitution. Cases include *McCulloch v. Maryland* (1819), *Engel v. Vitale* (1962), *Schenck v. United States* (1919), *Gideon v. Wainwright* (1963), *Baker v. Carr* (1963), and 10 more canonical cases.

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INTERACTIVE CONSTITUTION

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SECTION ONE

AP Gov. Framework Note:

Federalism reflects the dynamic distribution of power between national and state governments. CON-2

[McCulloch v. Maryland \(1819\)](#)

The debate over the constitutionality of a national bank was one of the most contentious constitutional battles in early American history. Following the chartering of a national bank in 1816, the state of Maryland passed a new law imposing taxes on it. When Baltimore bank cashier James McCulloch refused to pay those taxes, Maryland brought this case to compel him to do so. Maryland also challenged Congress's authority to establish a bank in the first place. In a landmark opinion written by Chief Justice John Marshall, the Supreme Court held that under the Necessary and Proper Clause of Article I of the Constitution, Congress had powers that were not expressly mentioned in the Constitution and thus could take actions—such as establishing a bank—that were “appropriate and legitimate” in service of its enumerated powers.

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Additionally, the Court ruled that Maryland had no right to tax federal institutions like the national bank, noting that the “power to tax involves, necessarily, a power to destroy.”

Key Take-Home Points:

- The Marshall Court read the Constitution—and, in particular, Article I’s Necessary and Proper Clause—in such a way that it gave Congress some flexibility to exercise powers that weren’t explicitly mentioned in the Constitution (*e.g.*, the power to establish a national bank) but *were* related to other key powers granted explicitly to Congress by the Constitution (*e.g.*, borrowing money and taxing/spending for the general welfare).
- *McCulloch* promoted national supremacy (protected by Article VI’s Supremacy Clause) by striking down a state effort to undermine a national institution established to carry out powers within the authority of the national government (*e.g.*, using state taxes to try to destroy a national bank).
- Famous Quote: “[W]e must never forget that it is a *constitution* we are expounding.”
- Famous Quote II: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.”

United States v. Lopez (1995)

Alfonzo Lopez was arrested for carrying a concealed weapon in his high school. He was charged under the federal Gun-Free Schools Act of 1990, which prohibited individuals from possessing firearms near schools. He challenged his conviction, arguing that the Act exceeded Congress’s Article I authority to regulate interstate commerce and, therefore, was unconstitutional. The Supreme Court, in a 5-4 decision, struck down the law for exceeding Congress’s power under the Commerce Clause. The Court noted that carrying a gun into schools was not an “economic activity” and did not qualify as the kind of private activity that Congress has the authority to regulate under the Commerce Clause.

Key Take-Home Points:

- The *Lopez* decision stands for a fundamental constitutional proposition: Under the U.S. Constitution, the national government is a government of limited powers.
- From the New Deal through *Lopez*, the Supreme Court read Congress’s commerce power broadly and set few limits on it. *Lopez* is best read as a modern attempt set a limit on this power in certain contexts—particularly, if Congress is attempting to regulate a non-economic activity and that activity doesn’t “substantially affect” interstate commerce in some way.
- While *Lopez* established a framework for evaluating constitutional challenges to congressional laws, the Court has struck down very few laws as exceeding Congress’s power to regulate interstate commerce since *Lopez*.

SECTION TWO

AP Gov. Framework Note:

Provisions of the U.S. Constitution’s Bill of Rights are continually being interpreted to balance the power of government and the civil liberties of individuals. LOR-2

Engel v. Vitale (1962)

The New York State Board of Regents authorized public schools to recite a short, voluntary prayer at the beginning of each school day. It read, “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country. A group of parents challenged this practice, arguing that it violated the First Amendment’s Establishment Clause. The Court—in a 6-1 decision—struck down the New York prayer under the

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First Amendment. The Court explained that state officials may not compose official state prayers and require that they be recited in public schools, even if the prayer is “denominationally neutral” and students could opt out of reciting the prayer.

Key Take-Home Points:

- *Engel* was an important decision policing the boundaries of church and state.
- The decision resulted in a massive public backlash against the Supreme Court, but the Court held its ground and further expanded the reasoning of the school prayer decisions in later cases, covering prayer at high school graduation ceremonies ([Lee v. Weisman](#)—1992) and football games ([Santa Fe Independent School District v. Doe](#)—2000).
- In its school prayer decisions, the Supreme Court has expressed concerns about the dangers of prayer in the specific context of schools—with students perceived as especially susceptible to coercion. However, the Court *has* upheld public prayers in contexts involving adults, such as in legislative sessions ([Marsh v. Chambers](#)—1983) and at town council meetings ([Town of Greece v. Galloway](#)—2014).

[Wisconsin v. Yoder \(1972\)](#)

Three members of the Amish faith brought a First Amendment challenge against the State of Wisconsin. They argued that a state law requiring all children to attend public schools until age 16 was contrary to their religious beliefs, which forbade parents from sending their children to school after the eighth grade. A unanimous Supreme Court agreed with the Amish challengers, concluding that an individual’s right to the free exercise of religion outweighed the state’s interest in requiring Amish children to continue in public schools beyond the eighth grade. Noting that the high school curriculum was “in sharp conflict” with Amish values, the Court required Wisconsin to grant the Amish families a religious exemption from the Wisconsin law.

Key Take-Home Points:

- *Yoder* involves a key (and recurring) question under the First Amendment’s religion clauses—when can (or must) the government grant accommodations to religious challengers who claim that a law violates basic tenets of their faith?
- The *Yoder* decision is one of the most powerful decisions granting a religious challenger an exemption from a law that applies to everyone.
- Over time, the Supreme Court has granted few of these exemptions to religious challengers, but the issue of religious accommodations remains an active area of litigation (and debate) at the Supreme Court.

[Tinker v. Des Moines Independent Community School District \(1969\)](#)

This landmark First Amendment case involved a group of high school students who wore black armbands to school in order to protest the Vietnam War. The students were disciplined by the school for wearing the armbands, and the students filed a lawsuit arguing that their armbands were a form of symbolic protest that should be protected under the First Amendment. In a 7-2 decision, the Supreme Court held that the armbands represented expression that was protected under the First Amendment. The Court further held that the students retained their First Amendment rights while at school as long as their speech (or expressive acts) did not “materially or substantially interfere” with the school’s operation. In *Tinker*, there was no actual interference—the school only feared potential disruption. This wasn’t enough to survive a First Amendment challenge.

Key Take-Home Points:

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- This is *the* landmark case covering free speech in public schools.
- While *Tinker* is an important defense of free speech rights for students, it also emphasizes the limits of free speech rights in the school context—namely, schools may limit student speech when it “materially or substantially interfere[s]” with a school’s operations and its central mission, teaching students.
- **Famous Quote:** “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

New York Times Co. v. United States (1971)

By 1971, the United States had been involved in conflict with North Vietnam since November 1955 and in an intense war for six years. By this point, around 58,000 soldiers had died and discontent with the war had risen in American life. In 1967 Secretary of Defense Robert S. McNamara, growing in his opposition to continued war in Vietnam, commissioned a "massive top-secret history of the United States role in Indochina." Daniel Ellsberg, who was a RAND corporation military analyst who worked on the report, leaked 43 volumes of the 47-volume, 7,000-page report to reporter Neil Sheehan of *The New York Times* in March 1971. Once the paper began publishing parts of the report, Ellsberg sent the papers to 17 other papers and Senator Mike Gravel read 4,000 pages into the Congressional record on June 29, 1971. On June 15, the New York Times received an order from a district court to stop publication because it would cause “irreparable injury to the defense interests of the United States.” The defense department sought a restraining order to stop the Times from any further publications under Section 793 of the Espionage Act which punished the “unauthorized possession of any document, paper....or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated.” The Supreme Court was unwilling to apply the “grave and danger” rule of *Dennis v. United States* (1951) to the case. In an unsigned or *per curiam* opinion, the Court found that, “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”

Key Take-Home Points:

- *New York Times v. United States* is often known as the “Pentagon Papers” case and is a key case on the concept of “prior restraint”—that almost all attempts to stop publications before the fact are unconstitutional and violate the First Amendment.
- The case, as a result, strongly protected freedom of the press under the First Amendment because it put the burden on the government to justify any “heavy restraint” on publication. The Nixon Administration, not the *Times* or the other defendants like the *Washington Post*, had to prove that publication of the Pentagon Papers would cause a “grave and irreparable danger.”
- **Famous Quote:** Pointing to the 1964 case of *New York Times v. Sullivan*, Justice William O. Douglas said, “secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions, there should be “uninhibited, robust, and wide-open” debate.”
- **Famous Quote II:** In his concurring or separate opinion agreeing the decision of the Court for separate reasons, Justice Hugo Black wrote, “[T]he injunction against *The New York Times*....amounts to a flagrant, indefensible, and continuing violation of the First Amendment. ... The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government.”

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Schenck v. United States (1919)

During World War I, the defendants were charged with mailing printed circulars designed to obstruct the military draft in violation of the Espionage Act of 1917. The Espionage Act made it illegal to convey information with the intent of interfering with the operation of the U.S. armed forces or obstructing military recruitment. Writing for a unanimous Court, Justice Oliver Wendell Holmes upheld the defendants' convictions and ruled that the Espionage Act did not conflict with the First Amendment. In his opinion, Holmes established the "clear and present danger test." Under this test, the Court must ask the following question when evaluating a free speech challenge: Were the words used "in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent?" It was, as Holmes wrote, "a question of proximity and degree," famously explaining, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

Key Take-Home Points:

- This is one of the Supreme Court's most important early free speech cases—the source of the Court's famous "clear and present danger test." While the First Amendment protects free speech rights, *Schenck's* "clear and present danger test" is a key reminder that these rights aren't absolute.
- The Supreme Court reversed course in future decades, increasingly protecting free speech over time—following a series of famous dissents by Justice Oliver Wendell Holmes and Justice Louis Brandeis in the 1910s and 1920s.
- By the 1960s, the Supreme Court advanced a broad vision of free speech protections. The First Amendment now generally protects speech—including speech by political minorities and even hateful speech—against government regulation unless the speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (*Brandenburg v. Ohio*—1969).

SECTION THREE

AP Gov. Framework Note:

Protections of the Bill of Rights have been selectively incorporated by way of the 14th Amendment's due process clause to prevent state infringement of basic liberties. LOR-3

Gideon v. Wainwright (1963)

Clarence Gideon was tried in a Florida state court on a felony count. He was denied an attorney under a Florida law that provided counsel only to indigent defendants in death penalty cases. After representing himself and being found guilty, Gideon appealed, arguing that the state's denial of an attorney in a criminal trial violated his Sixth Amendment rights. The Court unanimously agreed with Gideon and found that the Sixth Amendment right to counsel applies to all criminal defendants charged with a felony in state courts.

Key Take-Home Points:

- The *Gideon* decision is one of the most famous Warren Court decisions increasing criminal procedure protections for those accused of a crime. This is a key part of the Warren Court's constitutional legacy.
- The Sixth Amendment's right to counsel is one of the Constitution's many provisions offering procedural protections for criminal defendants—ensuring a fair process before someone is found guilty of crime.

Roe v. Wade (1973)

A Texas woman—"Jane Roe"—sought an abortion. However, a Texas law banned abortions except in instances in which a woman's life was endangered. "Jane Roe" challenged the Texas law, arguing that it was unconstitutional. In a 7-2

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decision, the Court held that the right to an abortion fell within the right to privacy previously established in [Griswold v. Connecticut](#) (1965).

In addition, the Court established a trimester framework for analyzing the constitutionality of abortion regulations. While there could be no restrictions on abortion in the first trimester of a pregnancy, government could begin to place restrictions on abortion in the second trimester—the point at which the Court concluded the fetus was viable (or could live outside its mother’s womb) without extraordinary medical assistance.

Key Take-Home Points:

- *Roe* built on previous Supreme Court cases like *Griswold v. Connecticut* (1965). These cases recognized a constitutional right to privacy even though that right isn’t explicitly mentioned in the Constitution.
- While the Supreme Court reaffirmed the core of *Roe* in [Planned Parenthood v. Casey](#) (1992), it moved away from *Roe*’s trimester framework and established an “undue burden” test for evaluating a government’s attempt to regulate abortion after fetal viability.
- In *Casey*, the Court described an undue burden as follows: “A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”

[McDonald v. Chicago \(2010\)](#)

In 2008, the Supreme Court decided [District of Columbia v. Heller](#) (2008), holding that a D.C. handgun ban enacted by the federal government violated the Second Amendment. By challenging a similar handgun ban in Chicago, the *McDonald* case asked the key follow-up question: does the Fourteenth Amendment extend the Second Amendment’s key protections to state abuses? In a divided 5-4 decision, the Supreme Court concluded that it did. It held that the right to keep and bear arms for the purpose of self-defense was “deeply rooted” in the nation’s history and was thus incorporated against the states through the Fourteenth Amendment—meaning that the states could not infringe on that right.

Key Take-Home Points:

- For much of its history, the Supreme Court issued few cases addressing the Second Amendment.
- While the original Bill of Rights only applied to the national government, the Fourteenth Amendment applied those core protections to abuses by the states—a process known as “incorporation.”
- In 2008, the Supreme Court issued its decision in *Heller*, setting a core Second Amendment principle: an individual had the right to possess a gun for purposes of protecting one’s home. However, *Heller* also emphasized that Second Amendment rights—much like other rights enshrined in the Bill of Rights—weren’t absolute. As a result, the Court recognized longstanding gun regulations, including laws banning guns in schools and laws keeping guns away from felons.
- Through incorporation, *McDonald* applied the Second Amendment to state laws. However, many key Second Amendment issues remain, including how the Second Amendment applies to government regulations of guns *outside* of the home like concealed carry laws.

SECTION FOUR

AP Gov. Framework Note:

The 14th Amendment’s equal protection clause as well as other constitutional provisions have often been used to support the advancement of equality. PRD-1

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Brown v. Board of Education (1954)

This landmark Supreme Court case addressed the question of whether state-mandated segregation of the races in public schools was constitutional. In *Brown*, the Supreme Court combined similar challenges from a variety of locations—namely, Kansas, South Carolina, Virginia, Delaware, and Washington D.C. These cases all involved African American students who had been denied admittance to white public schools. The challengers argued that these segregation laws violated the Fourteenth Amendment’s Equal Protection Clause and that separate could never be equal in public education. However, in *Plessy v. Ferguson* (1896), the Supreme Court long ago upheld racial segregation law that provided “separate but equal” facilities and institutions for people of different races. In *Brown*, the Court unanimously overruled *Plessy*, holding that “separate but equal” facilities were, in reality, unequal, because separating the races resulted in a damaging brand of inferiority imposed on black children.

Key Take-Home Points:

- *Brown* may be the most famous Supreme Court decision in American history—attacking the core of the white South’s Jim Crow laws and reinvigorating the Fourteenth Amendment’s promise of equality.
- The *Brown* decision grew out of an extensive litigation campaign led by Thurgood Marshall and the NAACP Legal Defense and Educational Fund—a gradual campaign to undermine segregation in other contexts like public universities and law schools before turning to segregation in public schools.
- Following *Brown*, the Supreme Court extended the reach of the Equal Protection Clause to cover discrimination in other settings.
- **Famous Quote:** “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”

AP Gov. Framework Note:

The impact of federal policies on campaigning and electoral rules continues to be contested by both sides of the political spectrum. PRD-2

Citizens United v. Federal Election Commission (2010)

PLEASE NOTE: This case is no longer included on the exam, but we are including it here as it is still helpful to understand.

The Federal Election Commission tried to apply the Bipartisan Campaign Reform Act (BCRA) to a film produced by Citizens United, *Hillary: The Movie*. Under BCRA, corporations and labor unions were prevented from funding partisan communications out of their general funds. In a 5-4 decision, the Court held that such independent political communications were protected under the First Amendment, even when they come from corporate sources. From there, the Court—with a separate majority—also upheld BCRA’s requirement that the organization producing such a communication must disclose its donors and add a disclaimer when it is not authorized by a particular candidate the group intends to support.

Key Take-Home Points:

- *Citizens United* offers strong protection for political spending under the First Amendment—in particular, striking down government restrictions on political spending by corporation and labor unions.
- This decision is one of a series of decisions in recent years applying the First Amendment to strike down various efforts to regulate money in politics.

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- Broadly speaking, the Supreme Court has upheld regulations that limit the amount of money an individual donor may give to a candidate, but it has struck down regulations that limit the money that individuals (and campaigns) may spend communicating their political message. This split between the Court’s treatment of contributions and spending has its roots in the Court’s landmark campaign-finance decision, [Buckley v. Valeo](#) (1976).

SECTION FIVE

AP Gov. Framework Note:

The republican ideal in the U.S. is manifested in the structure and operation of the legislative branch. CON-3

[Baker v. Carr \(1962\)](#)

Tennessee citizens brought a challenge to the state’s legislative districts. The Tennessee legislature established those legislative districts six decades earlier. The challengers argued that the state’s legislative districts ignored population shifts that had occurred within the state over that time. In a 6-2 opinion, the Supreme Court held that legislative apportionment challenges raise questions under the Equal Protection Clause of the Fourteenth Amendment that courts may adjudicate. The Court later went on to establish a new constitutional standard, requiring states to ensure that legislative districts are designed to allow “one person, one vote”—in other words, promoting districts that are roughly equal in population. The Court’s reapportionment decisions led to changes in districts across a number of states that had not previously responded to similar populations shifts within their borders.

Key Take-Home Points:

- Over time, many state legislatures—much like the Tennessee legislature in *Baker v. Carr*—had not redrawn legislative districts to match changes in population. During this period, urban areas across a number of states grew in population—leading to electoral district maps that gave more electoral strength to rural areas than urban areas. The Warren Court’s reapportionment cases addressed this issue—reshaping political power in legislatures across the country.
- In 1946, the Supreme Court concluded that the Supreme Court wouldn’t address constitutional challenges to legislative maps ([Colegrove v. Green](#)—1946). Justice Felix Frankfurter famously wrote, the challengers “ask of this Court what is beyond its competence to grant. [E]ffective working of our government revealed this issue to be of a peculiarly political nature and therefore not fit for judicial determination. . . . [C]ourts ought not to enter this political thicket.”
- The Supreme Court reversed course in *Baker v. Carr*, concluding the Court *could* consider these challenges under the Fourteenth Amendment’s Equal Protection Clause. Two years later, the Court attacked legislative malapportionment and established the “one-person, one-vote” standard in [Reynolds v. Sims](#) (1964)—requiring legislative district to be roughly equal in size.
- Chief Justice Earl Warren called these reapportionment rulings the Court’s most important decisions during his tenure—a tenure that included other landmark decisions like *Brown v. Board of Education*.

[Shaw v. Reno \(1993\)](#)

This was one of the first racial gerrymandering cases to come before the Supreme Court. North Carolina had created a congressional reapportionment plan that created two majority-black districts. One of them was an unusual shape, designed to track Interstate 85. Residents challenged this oddly shaped district under the Fourteenth Amendment’s Equal Protection Clause, arguing that North Carolina designed this district to enable the election of an additional African American representative. In a 5-4 decision, the Court concluded that, while North Carolina’s plan was not expressly based on race, the district was so extraordinary in its shape that it constituted an effort to impermissibly draw district

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lines on the basis of race. The Court determined that such a suspiciously drawn district would not pass constitutional muster under the Equal Protection Clause unless the state could show it had a compelling justification for designing the district as it did.

Key Take-Home Points:

- The *Shaw* decision helped establish a framework for analyzing the use of race in the legislative districting process—in other words, for evaluating racial gerrymandering claims.
- Under *Shaw*, the Court should apply strict scrutiny—the Court’s most demanding test—to the use of race as a key factor in the redistricting context. Under this test, the Court may allow the use of race in redistricting decisions, but only if the government establishes that this move is necessary to serve a compelling government interest.

SECTION SIX

AP Gov. Framework Note:

The design of the judicial branch protects the Supreme Court’s independence as a branch of government, and the emergence and use of judicial review remains a powerful judicial practice CON-5

Marbury v. Madison (1803)

In the election of 1800, Thomas Jefferson—a Democratic-Republican—defeated the incumbent President John Adams, a Federalist. Immediately after the election, the lame-duck Congress—with Federalist majorities in both chambers—passed the Judiciary Act of 1801, which Adams signed into law. The law created new lower federal courts and positions that the outgoing President John Adams could fill with Federalists. The Senate confirmed all of Adams’s nominations, but the Adams Administration failed to deliver all of the commissions—a formality confirming these appointments—before Adams left office. William Marbury was appointed by Adams as a Justice of the Peace for the District of Columbia, but he did not receive his commission from the Adams Administration before Jefferson took office. Marbury asked the Supreme Court to issue a writ of mandamus compelling James Madison—the new Secretary of State—to deliver his commission. In a unanimous opinion delivered by Chief Justice John Marshall, the Supreme Court held that Marbury was entitled to his commission, but that the Supreme Court didn’t have the power to issue a writ of mandamus requiring Madison to give it to him. The Court ruled that the provision of the Judiciary Act of 1789 expressly empowering a litigant such as Marbury to ask the Court for a writ of mandamus was unconstitutional, because it expanded the Court’s original jurisdiction beyond that which the Constitution had expressly authorized. In so holding, Marshall established the power of “judicial review,” which is the power of a court to rule on the constitutionality of a law.

Key Take-Home Points:

- The *Marbury* decision represents the Supreme Court’s most important early defense of judicial review—a court’s power to determine the constitutionality of a law.
- While judicial review isn’t mentioned explicitly in the Constitution, many scholars draw on the Constitution’s text and history to support its validity.
- Judicial review intersects with important questions about constitutional interpretation and the Supreme Court’s proper role in the American constitutional system. On the one hand, judicial review sometimes requires unelected judges to strike down laws passed by the American people’s elected representatives. On the other hand, the Constitution itself sets limits on the powers of the elected branches, and judicial review allows an

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independent judiciary to step in, police those limits, and check abuses by the elected branches (and even popular majorities).¹

INCORPORATION

On Incorporation and the Bill of Rights

A longstanding debate in Constitutional law is what is known as “incorporation.” This refers to the application of different rights in the Bill of Rights to state governments and actors. Before the Civil War, a Supreme Court decision—*Barron v. Baltimore*—declared that the Bill of Rights only applied to the federal government, as the First Amendment, for instant, refers to “Congress shall not....” John Bingham, the author of the 14th amendment, believed that the Bill of Rights was always meant to apply to the states and wrote the text of the 14th amendment (particularly Section 1) to accomplish this—particular through the “Privileges or Immunities Clause.” After *Slaughterhouse* (an 1873 case) severely limited the meaning of the “Privileges or Immunities” Clause, another case—*Cruikshank v. U.S.*--suggested that several of rights in the Bill of Rights did not apply to the states, including the right to assembly and the 2nd amendment. By the turn of the century, the Court began to turn to the “Due Process” Clause to incorporate the Bill of Rights, but only by each individual right, a process called “selective incorporation.” While some justices—namely Justice Hugo Black—believed the Court should incorporate the whole of Bill of Rights at once, the Court over the 20th and into the 21st century continued to “incorporate” most rights in the Bill of Rights against the states. However, some still remain to be incorporated, including the 3rd amendment, the 5th amendment grand jury clause, the 6th amendment right to an impartial jury of the state and district where a crime is committed, the 9th and the 10th amendment. However, the 9th and the 10th amendments are unlikely to be incorporated, as the 10th amendment refers directly to the rights states retain and the 9th amendment protects natural rights which existed before the Constitution and Bill of Rights not enumerated or named in the document.

¹ Research provided by Nicholas Mosvick, Senior Fellow for Constitutional Content and Thomas Donnelly, Senior Fellow for Constitutional Studies, at the National Constitution Center