

# Term paper on name

Law, Criminal Justice



## Civil Liberties in the Bill of Rights

### Evolution of Civil Liberties

Throughout time, civil liberties contained within the Bill of Rights in the US Constitution have evolved throughout years of scrutiny by the Supreme Court through the assessment of several cases. While civil liberties including the freedom of religion, speech, right against unlawful searches and seizures and the like have remained standing throughout time, new interpretations have nevertheless emerged from the Supreme Court. Among the most compelling developments introduced by the Supreme Court as part of existing civil liberties is the doctrine of absorption. Before the 20th century, the Bill of Rights was exclusive for the application of federal government. None of the state courts has sought to apply any Bill of Rights provision to state decisions. With the introduction of the Fourteenth Amendment, with emphasis on the due process clause, state courts began to apply the Bill of Rights in decisions. The wording of the due process clause itself, located in Section I of the Fourteenth Amendment, appears to be a short paraphrasing of the entire Bill of Rights. States courts thus considered those in deciding state-level legal controversies calling for the use of the federal-level Bill of Rights for resolution. The Supreme Court applied the absorption doctrine in several cases such as *Adamson v. California*, *Rochin v. California* and *Twining v. New Jersey* (Lacy 37-38).

Yet, the decisions issued by the Supreme Court on the matter did not imply that state courts have to absorb the whole Bill of Rights in related decisions.

The Supreme Court has thus described the absorption doctrine as one that is selective in nature. Such is due to the premise that not all Bill of Rights in the US Constitution may apply equally across different states. It would be difficult to support the position that the Bill of Rights has to find equal application in all states, as both the US Constitution and jurisprudence do not provide for compelling reasons in favor of such (Henkin 74, 88). For instance, the issue of death penalty has become contentious due to the introduction of the absorption doctrine. Whereas the Bill of Rights gives Supreme Court justices the opportunity to reconsider the application of death penalty in determining related state cases, most states - around 35 in all, prefer the outright imposition of death penalty within their jurisdiction. Thus, there prevails a conflict between implementing the Bill of Rights in deciding on cases related to death penalty and the preference of those states to use death penalty as an effective guardian against crime within their jurisdictions (Berger 466).

## **Discussing the Fourteenth Amendment**

The Fourteenth Amendment provides for the controversial change in the application of the Bill of Rights. Upon its introduction, it has guaranteed a stronger application of the principle of due process not just in the federal level but also at the state level. Crucial to its activating power is the wording of the due process clause, noting that states are not allowed to deny any person of any basic rights (Legal Information Institute). That particular phrase in the provision alone resembles the ideals constituting the Bill of Rights (Henkin 74, 88).

Before the introduction of the Fourteenth Amendment, the Bill of Rights did

not hold even a selective influence over state jurisprudence. States chose to apply state laws that resemble as their rendition of the Bill of Rights, leaving the Bill of Rights in question at the federal level only. By the turn of the 20th century, the call for greater due process of law sponsored by the Fourteenth Amendment entailed the eventual applicability of the Bill of Rights in state decisions. The Bill of Rights then came to resemble as a unifying force among states that has led to influence them further on a universal regard for civil liberties. The application of basic civil liberties in the Bill of Rights has proven instrumental to the increasing adherence of states to democratic efforts. Simultaneously, the absorption doctrine helped emphasize the recognition of particular civil liberties that did not apply in certain states. The case of the right to bear arms is one that has met with strict scrutiny.

Although it did not force states to recognize that people have individual rights to bring guns with them, it nevertheless made states aware of the argument surrounding such civil liberty, despite some states choosing not to apply it in jurisprudence (Akhil 1284).

Thus, the concept of selective or refined incorporation has taken place as the most prominent method in applying the absorption doctrine in states. State courts do not have restrains in terms of deciding on cases related to civil liberties. Instead, those courts even have another option to consider aside from applying various state-level provisions of law. Yet, there is an understanding that such scenario does not necessarily translate to a form of forum shopping - an instance in which the success of the case is ensured through the availability of different kinds of fora. Deciding whether the application of state laws could produce a more fitting decision in the case

than the application of the federal-level Bill of Rights would not be an applicable scenario. Rather, the consideration of jurisprudential precedents of states, alongside the opinion of the state courts, would heavily influence arguments that may be in favor or against the absorption of the Bill of Rights. Thus, the Fourteenth Amendment does not call for state courts to militate against state provisions, but rather it only emphasizes the essence of the federal-level Bill of Rights (Akhil 1284; Henkin 74, 88).

### **Civil Liberties Issue: Same-Sex Marriage**

The issue of same-sex marriage has become a focal point for the application of the Fourteenth Amendment in terms of imposing the Bill of Rights. Yet, the case involved has not yet established its hold firmly in terms of jurisprudence and the spirit of constitutional law. It is noteworthy to establish the heralded status of marriage in jurisprudence. The Supreme Court has issued decisions upholding the primacy of public regulation as the core of marriage. Thus, that facet alone attests to the legal status of marriage, as noted by Justice Field that it has “ more to do with the morals and civilization of a people other than any other institution”. The case of Loving v. Virginia saw the Supreme Court decide against the implementation of a Virginia statute that requires antimiscegenation, simply known as racial profiling in marriage, holding that allowing such a law to proliferate would violate the very institution marriage seeks to create. It is apparent that the Supreme Court has constantly held the legal status of marriage as sacrosanct, as a civil liberty that benefits both individual rights and the integrity of society in terms of maintaining order (Wardle).

Yet, marriage as a fundamental right has not brought a fully convincing

argument favoring same-sex marriage within the same line. In terms of being a preferred relationship, same-sex marriage does not hold to be one due to the strong consensus among US states rejecting it. Several arguments seeking to establish that same-sex marriage involves the application of the right of intimate association have not succeeded in doing so, particularly due to the failure of proponents to specify the kinds of associations among homosexual couples that require protection. The status of same-sex marriage as being less than a preferred relationship compared to heterosexual marriage - a legal ground that does not necessarily contravene values in the mold of those against racism and sexism. Thus, it is essential for proponents to mobilize in favor of making same-sex marriage a preferred relationship akin to that of heterosexual marriage (Wardle). In addition, the provision of a new definition of marriage for the accommodation of same-sex marriage is highly essential for the cause. Currently, the legal definition of Supreme Court has presented a two-pronged consideration - the presence of personal commitment and emotional attachment. Such is ambiguous for the purposes of establishing the importance of same-sex marriage as a viable legal imposition, and thus a fitting definition that would set clear parameters would be essential for the cause. Publicizing and legitimizing same-sex relationship before legal authorities certainly have to expand beyond the provided definition. Arguments on state interests concerning the protection of children and ensuring procreation serve as among the obstacles same-sex marriage face. Those two interests receive a liberal constitutional protection, as provided in the case of Meyer v. Nebraska. There is a general understanding that same-sex marriage could not lead to procreation, yet

there are several debates on the viability of same-sex couples to raise children. Nevertheless, proponents tend to dispute the degree to which those state interests could be compelling (Friedman).

The concern on same-sex marriage would thus be a matter of policy debate. States hold the position of legitimizing same-sex marriage within their areas of jurisdiction, may it be due to its recognition of the matter as a preferred relationship or through other analogous reasons in line with the law. The federal law, however, could not easily incorporate same-sex marriage as legal within its own terms mainly because of the fact that it recognizes several rifts of opinion regarding the matter in different states. Thus, it is possible that same-sex couples could marry within states that allow doing so. The only way that could convince states to approve same-sex marriage is through policy debates. The argument that the Fourteenth Amendment holds marriage as an essential institution does not take into account same-sex relationships as part of its definition of marriage, although it does not bar any state-level attempts of doing so. Thus, it is crucial for proponents to focus on engaging in policy debates with their respective state-level officials. State policy, then, would ultimately decide on the fate of those who want to see same-sex marriage institutionalized on their states (Wardle).

## **Possible Changes to Bill of Rights**

As it is, the Bill of Rights has proven itself adequate to the cause of advancing the democratic lives of people in the US. It has sufficiently covered several aspects of life where people could find reasons to be free, as well as loosen those that became subject to unjust consequences.

Throughout time, the Bill of Rights has ridden through various tests

throughout time in the form of environmental changes, technological innovations and social trends. Yet, an important aspect that needs to find ample revision is the provision on the right to carry firearms. Several incidents in recent history have involved the irresponsible and malicious use of guns. By introducing limitations without distorting the intent of the present provision, the US will be able to face minimal to none damage brought by the use of guns in improper situations. Placing regulations to make gun rights more oriented towards the safety of other people would definitely help in the cause of upholding the principle of gun rights - that of self-defense. Right now, the growing number of people who have lost their lives to guns should serve as an alarm for policymakers to do something. After all, if people continue to take gun rights for granted, then there would be a further denial of other civil liberties contained in the Bill of Rights, especially rights such as the freedom of speech and assembly. Thus, it is important to disable people from abusing the right to carry guns, for there is a significant chance that its misconstrued application might give the provision a maligned impression.

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