

10

Types of Law

Introduction

There are four primary sources (both Federal and State) for determining what the law is on a particular issue:

- Constitutions,
- Statutes,
- Rules and Regulations, and
- Case Law
 - Common Law and
 - Interpretative Case Law.

There are three branches of government:

- Legislature
- Executive
- Judiciary

In class we will briefly go over the first two branches. If you need a refresher or are unfamiliar with these branches, you can look them up on line of use these cites:

- Legislative Branch: <http://www.whitehouse.gov/our-government/legislative-branch>
- Executive Branch: <http://www.whitehouse.gov/our-government/executive-branch>
- The Departments and Agencies of the Executive Branch:
<http://www.usa.gov/directory/federal/index.shtml>

Each branch has the power to create law.

Creation of Law			
Branch	Types of Law	Creation Steps	
Legislative Branch	Statute (Legislation becomes a statute when either signed by the Executive or vetoed by the Executive and then the veto is overridden by 2/3rds of the Legislature)	STEP 1	Bill (proposed)
		STEP 2	Legislation (passed)
		STEP 3	Statute (law)
	Administrative Law (e.g., Rules pertaining to the registration of claims to copyrights in the Copyright Office.	STEP 1	Proposed Rule
		STEP 2	Rule and Regulation
Executive Branch	Executive Orders (e.g., "Don't Ask; Don't Tell").	President issues Executive Order	
	Administrative Law (e.g., Federal Aviation Administration Regulations pertaining to the licensing of pilots)	STEP 1	Proposed Rule in a particular Agency (in Federal Register)
		STEP 2	Rule and Regulation (in Code of Federal Regulations)
Judicial Branch	Case Law (e.g., <i>Miranda v Arizona</i>)	A particular court issues an opinion, decision and/or order as a part of litigations	
	Administrative Law (i.e., Rules and Regulation)	STEP 1	Proposed Rule
		STEP 2	Rule and Regulation

To learn more about the creation of rules and regulations, you can go to the on-line version of the Federal Register¹

¹ https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf

Excerpts from McDonald v City of Chicago, 561 US 742 (2010)

The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government. In *Barron ex rel. Tiernan v Mayor of Baltimore*, 7 Pet. 243 (1833), the Court, in an opinion by Chief Justice Marshall, explained that this question was “of great importance” but “not of much difficulty.” *Id.*, at 247. In less than four pages, the Court firmly rejected the proposition that the first eight Amendments operate as limitations on the States, holding that they apply only to the Federal Government. *See also Lessee of Livingston v Moore*, 7 Pet. 469, 551-552 (1833) (“[I]t is now settled that those amendments [in the Bill of Rights] do not extend to the states”).

The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country’s federal system. The provision at issue in this case, § 1 of the Fourteenth Amendment, provides, among other things, that a State may not ... deprive “any person of life, liberty, or property, without due process of law.”

* * * *

[T]he Court eventually moved in that direction by initiating what has been called a process of “selective incorporation,” i.e., the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. *See e.g. Gideon v Wainwright*, 372 US 335, 341 (1963); *Malloy v Hogan*, 378 US 1, 5-6 (1964); *Pointer v Texas*, 380 US 400, 403-404 (1965); *Washington v Texas*, 388 US 14, 18 (1967); *Duncan*, 391 US, at 147-148; *Benton v Maryland*, 395 US 784, 794 (1969).

The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually

incorporated almost all of the provisions of the Bill of Rights.² Only a handful of the Bill of Rights protections remain unincorporated.³ * * * *

[T]he Court decisively held that incorporated Bill of Rights protections “are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” *Id.*, at 10; *see also* *Mapp v Ohio*, 367 US 643, 655-656 (1961); *Ker v California*, 374 US 23, 33-34 (1963); *Aguilar v Texas*, 378 US 108, 110 (1964); *Pointer*, 380 US, at 406; *Duncan*, at 149, 157-158; *Benton*, 395 US, at 794-795; *Wallace v Jaffree*, 472 US 38, 48-49 (1985).⁴

[T]he Court overruled earlier decisions in which it had held that particular Bill of Rights guarantees or remedies did not apply to the States. *See, e.g.,* *Mapp*, 367 US 643 (overruling in part *Wolf*, 338 US 25); *Gideon*, 372 US 335 (overruling *Betts*, 316 US 455); *Malloy*, *supra* (overruling *Adamson*, 332 US 46, and *Twining*, 211 US 78); *Benton*, *supra*, at 794 (overruling *Palko*, 302 US 319)....

² With respect to the First Amendment, *see* *Everson v Board of Ed. of Ewing*, 330 US 1 (1947) (Establishment Clause); *Cantwell v Connecticut*, 310 US 296 (1940) (Free Exercise Clause); *De Jonge v Oregon*, 299 US 353 (1937) (freedom of assembly); *Gitlow v New York*, 268 US 652 (1925) (free speech); *Near v Minnesota ex rel. Olson*, 283 US 697 (1931) (freedom of the press).

With respect to the Fourth Amendment, *see* *Aguilar v Texas*, 378 US 108 (1964) (warrant requirement); *Mapp v Ohio*, 367 US 643 (1961) (exclusionary rule); *Wolf v Colorado*, 338 US 25 (1949) (freedom from unreasonable searches and seizures).

With respect to the Fifth Amendment, *see* *Benton v Maryland*, 395 US 784 (1969) (Double Jeopardy Clause); *Malloy v Hogan*, 378 US 1 (1964) (privilege against self-incrimination)....

With respect to the Sixth Amendment, *see* *Duncan v Louisiana*, 391 US 145 (1968) (trial by jury in criminal cases); *Washington v Texas*, 388 US 14 (1967) (compulsory process); *Klopfer v North Carolina*, 386 US 213 (1967) (speedy trial); *Pointer v Texas*, 380 US 400 (1965) (right to confront adverse witness); *Gideon v Wainwright*, 372 US 335 (1963) (assistance of counsel); *In re Oliver*, 333 US 257 (1948) (right to a public trial).

With respect to the Eighth Amendment, *see* *Robinson v California*, 370 US 660 (1962) (cruel and unusual punishment); *Schilb v Kuebel*, 404 US 357 (1971) (prohibition against excessive bail).

³ In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict, *see* n. [3]), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines.

We never have decided whether the Third Amendment or the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause. *See Browning-Ferris Industries of Vt., Inc. v Kelco Disposal, Inc.*, 492 US 257, 276, n. 22 (1989) (declining to decide whether the excessive-fines protection applies to the States)....

⁴ There is one exception to this general rule. The Court has held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials. *See Apodaca v Oregon*, 406 US 404 (1972); *see also* *Johnson v Louisiana*, 406 US 356 (1972) (holding that the Due Process Clause does not require unanimous jury verdicts in state criminal trials). ...