

THE INCORPORATION DOCTRINE - HISTORY

Incorporation happened gradually over time through individual court decisions that required states to protect most of the same liberties and rights that the Bill of Rights protects from federal abuse.

What happens, however, if a state passes a law violating one of the rights protected by the federal Bill of Rights and the state's constitution does not prohibit this abridgment of freedom? In 1833, the answer to that question was "nothing." The Bill of Rights, said the Court in *Barron v. Baltimore*, restrained only the national government, not states and cities.

An opening toward a different answer was provided by the Fourteenth Amendment, one of the three "Civil War amendments," which was ratified in 1868. The Fourteenth Amendment declares,

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.

In 1925, in *Gitlow v. New York*, however, the Court relied on the Fourteenth Amendment to rule that a state government must respect some First Amendment rights. Specifically, the Court said that freedoms of speech and press "were fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states." In effect, the Court interpreted the Fourteenth Amendment to say that states could not abridge the freedoms of expression protected by the First Amendment.

This decision began the development of the incorporation doctrine, the legal concept under which the Supreme Court has nationalized the Bill of Rights by making most of its provisions applicable to the states through the

Fourteenth Amendment. In *Gitlow*, the Supreme Court held only parts of the First Amendment to be binding on the states. Gradually, and especially during the 1960s, the Court applied most of the Bill of Rights to the states. Many of the decisions that nationalized provisions of the Bill of Rights were controversial. Nevertheless, today the Bill of Rights guarantees individual freedoms against infringement by state and local governments as well as by the national government. Only the Third and Seventh Amendments, the grand jury requirement of the Fifth Amendment, and the prohibition against excessive fines and bail in the Eighth Amendment have not been applied specifically to the states.

Date	Amendment	Right	Case
1925	First	Freedom of speech	<i>Gitlow v. New York</i>
1931	First	Freedom of the press	<i>Near v. Minnesota</i>
1937	First	Freedom of assembly	<i>De Jonge v. Oregon</i>
1940	First	Free exercise of religion	<i>Cantwell v. Connecticut</i>
1947	First	Establishment of religion	<i>Everson v. Board of Education</i>
1958	First	Freedom of association	<i>NAACP v. Alabama</i>
1963	First	Right to petition government	<i>NAACP v. Button</i>
2010	Second	Right to bear arms	<i>McDonald v. Chicago</i>
	Third	No quartering of soldiers	Not incorporated*
1949	Fourth	No unreasonable searches and seizures	<i>Wolf v. Colorado</i>
1961	Fourth	Exclusionary rule	<i>Mapp v. Ohio</i>
1897	Fifth	Guarantee of just compensation	<i>Chicago, Burlington, and Quincy RR v. Chicago</i>
1964	Fifth	Immunity from self-incrimination	<i>Mallory v. Hogan</i>
1969	Fifth	Immunity from double jeopardy	<i>Benton v. Maryland</i>
	Fifth	Right to grand jury indictment	Not incorporated
1932	Sixth	Right to counsel in capital cases	<i>Powell v. Alabama</i>
1948	Sixth	Right to public trial	<i>In re Oliver</i>
1963	Sixth	Right to counsel in felony cases	<i>Gideon v. Wainwright</i>
1965	Sixth	Right to confrontation of witnesses	<i>Pointer v. Texas</i>
1966	Sixth	Right to impartial jury	<i>Parker v. Gladden</i>
1967	Sixth	Right to speedy trial	<i>Klopfer v. North Carolina</i>
1967	Sixth	Right to compulsory process for obtaining witnesses	<i>Washington v. Texas</i>
1968	Sixth	Right to jury trial for serious crimes	<i>Duncan v. Louisiana</i>
1972	Sixth	Right to counsel for all crimes involving jail terms	<i>Argersinger v. Hamlin</i>
	Seventh	Right to jury trial in civil cases	Not incorporated
1962	Eighth	Freedom from cruel and unusual punishment	<i>Robinson v. California</i>
	Eighth	Freedom from excessive fines or bail	Not incorporated
1965	Ninth	Right of privacy	<i>Griswold v. Connecticut</i>

*The quartering of soldiers has not occurred under the Constitution.