

INCORPORATION

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The case-by-case process of applying key Bill of Rights protections against state abuses.

THE HISTORY OF THE BILL OF RIGHTS, THE 14TH AMENDMENT, AND INCORPORATION

For much of American history, the Bill of Rights didn't play the central role that it plays today—both at the Supreme Court and in the American public imagination. When it was added to the Constitution in 1791, its protections applied only to the national government. So, before the 14th Amendment was ratified, the Bill of Rights only protected us against abuses by the *national* government, not by our *state* governments.

That was what Chief Justice John Marshall and his Court said in *Barron v. Baltimore* in 1833.

So, throughout the pre-Civil War period, if a state—like New Jersey—violated free speech rights, a person would have no legal claim under the U.S. Constitution. They may have had one under their *state* constitution, but *not* under the U.S. Constitution. And many Southern states *did* violate core Bill of Rights protections like free speech rights throughout the pre-Civil War period—for instance, by banning abolitionist speech.

However, today, the Bill of Rights represents a charter of national freedom—protecting us from abuses by *both* the national government *and* our state governments. Scholars refer to this as the process of **incorporation**—the case-by-case process of applying key Bill of Rights protections against state abuses.

Who can we thank for this transformation?

Above all, we can thank the Reconstruction Republicans—who rebuilt America after the Civil War—and, most notably, Ohio Representative **John Bingham**. Who is this forgotten American figure, and why should we care about him? Justice Hugo Black later described Bingham as the James Madison of the 14th Amendment. And so he was.

Ratified after the Civil War, the 14th Amendment wrote the Declaration of Independence's promise of freedom and equality into the U.S. Constitution.

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Through the 14th Amendment, Bingham and many of his fellow 14th Amendment drafters sought to protect the American people, in part, from state abuses of key Bill of Rights protections like religious liberty and free speech.

THE 14TH AMENDMENT AND THE PROCESS OF INCORPORATION

Incorporation is one of the most important topics in constitutional law and is a key reason why many scholars refer to the Reconstruction Amendments—including the 14th Amendment—as a key part of our nation’s “second founding.”

How did this process work on the ground?

Interestingly, in early cases like *The Slaughter-House Cases* (1873), the Supreme Court limited the 14th Amendment’s reach—rejecting early efforts to apply the 14th Amendment to abuses of key rights in the states.

These decisions continued to limit the Bill of Rights to abuses by the national government for decades.

THE 20TH CENTURY AND SELECTIVE INCORPORATION

In the 1900s, the Supreme Court began to reinvigorate Bingham’s vision and apply key Bill of Rights protections to the states—a process that lawyers call “selective incorporation.”

During this period, the Court applied key Bill of Rights protections like free speech and religious liberty to the states on a case-by-case basis—one constitutional right at a time.

The incorporation story could be traced to the 1897 case of *Chicago, Burlington, and Quincy Railroad v. City of Chicago*.

But scholars often argue that the Court really began the process in earnest with *Gitlow v. New York* in 1925. There, the Court applied the First Amendment’s protection of the freedom of speech/press against the states.

Although Gitlow lost his case, the Court would build on this doctrinal framework in a series of 14th Amendment rulings that would strike down state laws that restricted speech, press, and assembly rights.

Later, it expanded the list of incorporated rights to include the First Amendment’s Free Exercise Clause (*Cantwell v. Connecticut*, 1940) and Establishment Clause (*Everson v. Board of Education*, 1947).

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Interestingly, in these early years, the Court also held that certain other Bill of Rights protections like the Fifth Amendment's protection against double-jeopardy did *not* fully apply against the states.

But, beginning in the early 1960s, the Court would move to apply most of the remaining provisions of the Bill of Rights against the states, as the Court proceeded clause-by-clause and case-by-case, incorporating those rights in the Bill of Rights that it deemed "fundamental."

And, once a clause was deemed "fundamental," it had to be incorporated fully against the states in every aspect.

During this incorporation revolution in the 1960s, the Warren Court applied the following protections against state abuses:

- The federal exclusionary rule in Fourth Amendment cases (*Mapp v. Ohio*)
- The Sixth Amendment's right to counsel (*Gideon v. Wainwright*)
- The Fifth Amendment's right against self-incrimination (*Malloy v. Hogan* and *Miranda v. Arizona*)

The Sixth Amendment's rights to a jury trial in criminal cases (*Duncan v. Louisiana*)

- The Fifth Amendment's Double Jeopardy Clause (*Benton v. Maryland*)
- The Eighth Amendment's bans on excessive bail and cruel and unusual punishments (*Robinson v. California*)

The Warren Court also strengthened the protections of other rights that had already been incorporated by the Court, including:

- Free speech/press (*New York Times v. Sullivan* and *Brandenburg v. Ohio*)
- The Religion Clauses (*Engel v. Vitale* and *Abington School District v. Schempp*)

By the end of this incorporation revolution, the Court had used the Bill of Rights to strike down *many* state and local practices in a number of different contexts—never before had the Court been so active in protecting freedom. During this period, the Bill of Rights truly became a charter of *national* freedom.

Today, virtually *all* of the Bill of Rights protections apply equally against abuses by state and local government.

And this process remains ongoing through today. In fact, over the last few years, the Court incorporated the Sixth Amendment's right to a unanimous jury verdict in *Ramos v. Louisiana* and

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the Eighth Amendment's protection against excessive fines in *Timbs v. Indiana*. And in 2010, it incorporated the Second Amendment's right to keep and bear arms in *McDonald v. City of Chicago*.

And there are only a few rights that the Supreme Court still hasn't applied to the states—the Third Amendment (quartering of troops), the Fifth Amendment (grand jury right), and the Seventh Amendment (civil jury right).

In the end, the Court continues to use the 14th Amendment's Due Process Clause in these cases. But it's important not to get tripped up by legal jargon and technicalities.

BIG IDEA

Just remember the big idea: Through incorporation, the 14th Amendment applies key Bill of Rights protections (like free speech and religious liberty) to abuses by state governments. With incorporation, the Bill of Rights became a powerful charter of national freedom—applying to abuses by all levels of government: national, state, and local.