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Incorporation Doctrine

An Inquiry Pack to Accompany [LegalTimelines.org](https://legaltimelines.org)

Inquiry Question: What impact has the incorporation doctrine had on federalism (the division of power between the federal and state government)?

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Introduction: Incorporation Doctrine

The Bill of Rights is the first 10 amendments to the Constitution, which protect specific individual rights like the right to free speech and the right against self-incrimination. As originally written, the Bill of Rights applied only to the national government, not to state governments. In *Barron v. Baltimore* (1833), the Supreme Court stated clearly that the Bill of Rights (the Fifth Amendment specifically) only applied to the federal government. Therefore, state governments sometimes infringed upon rights guaranteed in the first 10 amendments.

After the Civil War, the 14th Amendment was ratified and granted citizenship to formerly enslaved people. It also guaranteed that, “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.” However, those words did not immediately or automatically require state governments to stop infringing on the rights of their citizens. In fact, up until 1925, the Supreme Court ruled in some cases that the Bill of Rights did not apply to the states.

In 1925, the Supreme Court ruled in what is considered the first incorporation case—*Gitlow v. New York*. The Court held that the First Amendment’s provision protecting free speech, which states that the federal “Congress shall make no law... abridging the freedom of speech,” also applies to state governments. Over time the Supreme Court has applied almost all of the Bill of Rights’ protections to the states using the 14th Amendment’s Due Process Clause through a process called incorporation.

In 1937 in *Palko v. Connecticut*, the Supreme Court explained how it would apply the incorporation doctrine and decide whether a right should be incorporated against the states. In future cases, the Supreme Court would weigh whether that right is essential to “a scheme of ordered liberty,” and “so rooted in the traditions and conscience of our people as to be ranked fundamental.” Because the incorporation of rights was accomplished over many years and on a case-by-case basis, the process is known as selective incorporation.

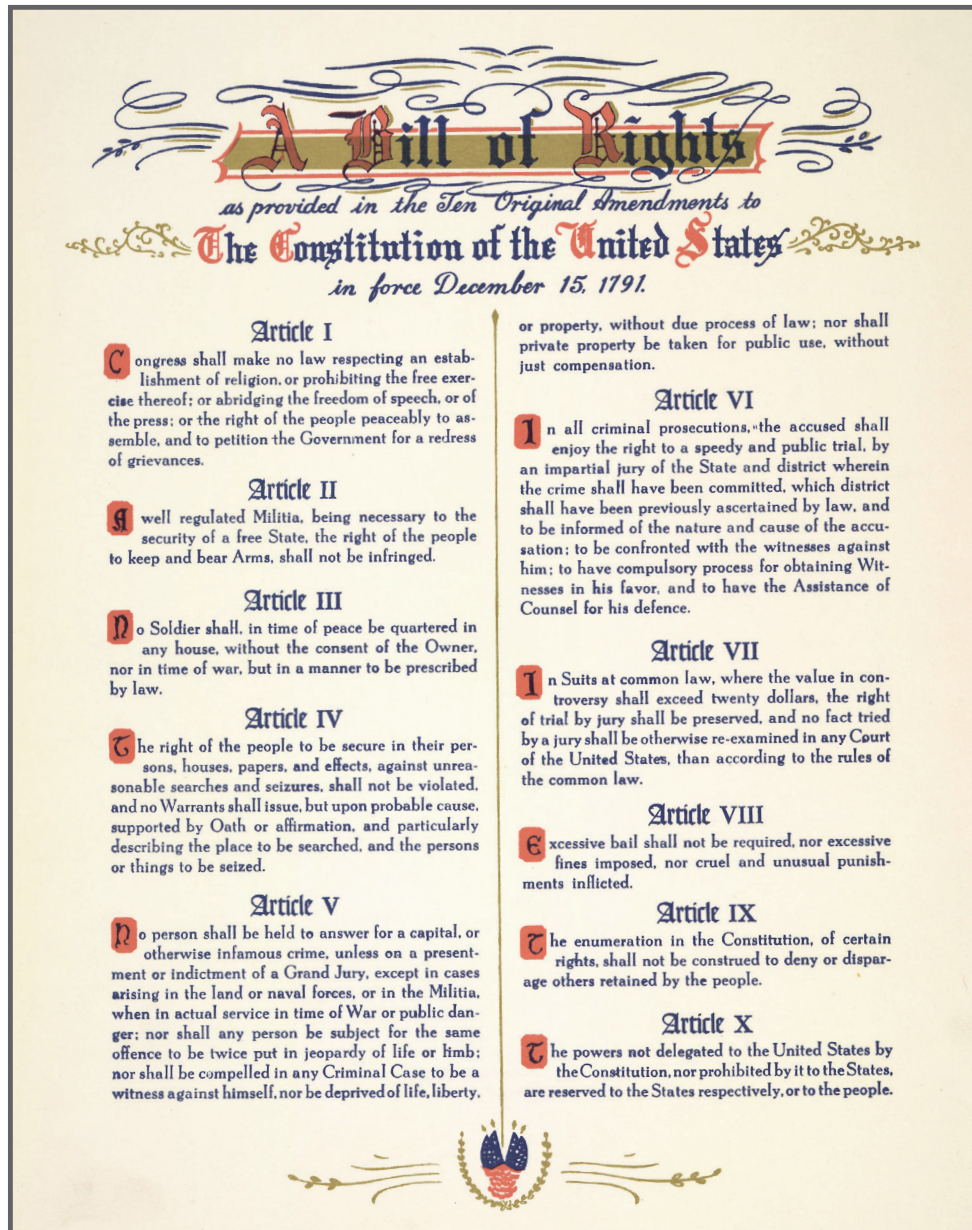
Some important incorporation cases involve the following rights: freedom of press (*Near v. Minnesota*, 1931), right to counsel in capital cases (*Powell v. Alabama*, 1932), freedom of assembly (*DeJonge v. Oregon*, 1937), freedom of religion (*Cantwell v. Connecticut*, 1940), prohibiting establishment of religion (*Everson v. Board of Education*, 1947), protection from illegal searches (*Mapp v. Ohio*, 1961), protection from cruel and unusual punishment (*Robinson v. California*, 1962), right to counsel in non-capital felony cases (*Gideon v. Wainwright*, 1963), right to a speedy trial (*Klopper v. North Carolina*, 1967), protection against double jeopardy (*Benton v. Maryland*, 1968), right to keep and bear arms (*McDonald v. Chicago*, 2009), and most recently the protection from unreasonable fines (*Timbs v. Indiana*, 2019).

Today most, but not all, amendments have been applied to state governments. The few notable exceptions are the Third Amendment prohibition of quartering troops in private homes during peacetime, the Fifth Amendment guarantee to a grand jury, and the Seventh Amendment right to a jury trial in civil cases.

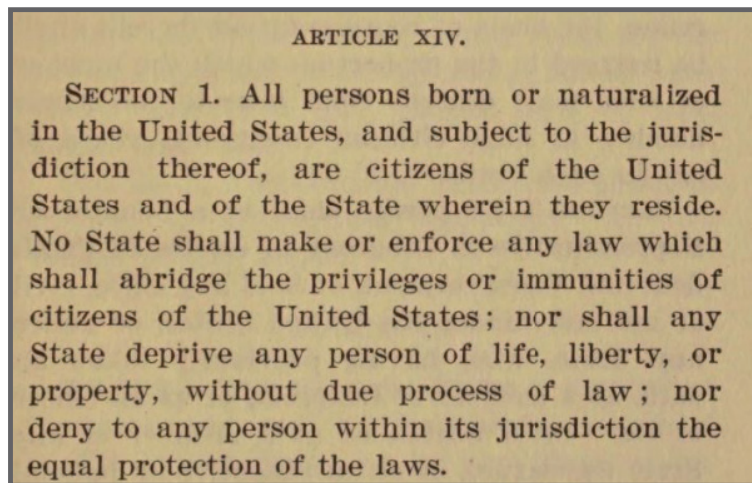
The adoption of the incorporation doctrine allows citizens to challenge their states in federal court if the state infringes on many of the protected liberties guaranteed in the Bill of Rights. This has changed the balance of division of the duties and powers that the Founders set forth in the system of federalism established in the original Constitution. Ultimately, through incorporation, the federal government’s role has expanded into areas originally controlled by the states.

Constitutional Amendments and Incorporation

Source A: The Bill of Rights¹



Source A Information: As originally written, the Bill of Rights applied only to the federal government. The Bill of Rights guarantees fundamental rights and limits the federal government. Note: In this broadside of the Bill of Rights, the term “Article” is used instead of the term now more commonly used “Amendment.” (See source at [Library of Congress](#).)

Source B: The 14th Amendment to the U.S. Constitution²

Source B Information: In 1868, the 14th Amendment was ratified to guarantee citizenship to enslaved people and establish birthright citizenship (all people born in the United States are automatically U.S. citizens). The 14th Amendment extended the fundamental freedoms by prohibiting states from passing or enforcing laws that conflicted with those established in the Constitution. It also prohibited states from depriving its citizens of due process of law and denying them equal protection of the law. Over time, the Supreme Court handed down many decisions that also prohibited state governments from infringing on specific rights found in the Bill of Rights. ([See source at Library of Congress.](#))

Questions to Consider for Sources A and B:

- 1. Observe:** What do you notice about each source?
- 2. Reflect:** How are these two sources related? What evidence is there in Source A that the Bill of Rights originally applied only to the federal government? How does the 14th Amendment (Source B) extend the rights guaranteed in the Bill of Rights (Source A) to the states?
- 3. Question:** What questions do you have about these sources?

Incorporating the First Amendment

In 1902 New York passed the criminal anarchy law, which made advocating for the overthrow of the government a felony. The law stated:

A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow.

During the Red Scare, a period of time after the Russian Revolution when many Americans feared the spread of communism, Benjamin Gitlow was the manager of *The Revolutionary Age*, a socialist magazine. In 1919, *The Revolutionary Age* published the *Left Wing Manifesto*, which explained the principles of socialism. Gitlow was arrested for violating the criminal anarchy law and was convicted. He challenged his conviction because he said the New York law violated his First Amendment right to free speech and free press found in the U.S. Constitution's Bill of Rights. In 1925, the U.S. Supreme Court heard the case *Gitlow v. New York*.

Source C: Benjamin Gitlow Mugshot³



Transcription of Source C:

BENJAMIN GITLOW

Business Manager of "The Revolutionary Age," official organ — Left Wing Section of Socialist Party

Arrested on charge of Criminal Anarchy by direction of the Committee, December 1, 1919, tried, convicted and sentenced to State Prison for not less than five years nor more than ten years.

Source C Information: The Supreme Court case that challenged Benjamin Gitlow's arrest, *Gitlow v. New York* (1925), is commonly considered the first incorporation case. ([See source at Wikipedia.](#))

Source D: Majority opinion in *Gitlow v. New York* (1925)⁴

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and “liberties” protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 543, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question.⁹

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.

Source D Information: In *Gitlow v. New York*, the Supreme Court decided 7-2 for New York. The Court found that Gitlow's speech could be restricted by the state. However, an important precedent was set establishing that while the Bill of Rights originally only limited the federal government, the 14th Amendment's Due Process Clause applied the Bill of Rights to the states. ([See source at Library of Congress.](#))

Glossary of key terms from the source:

- *abridgement*: infringement on rights
- *confer*: bestow
- *determinative*: having the power to determine
- *immunity*: freedom from penalty
- *unbridled*: uncontrolled

Questions to Consider for Sources C and D:

1. **Observe:** What do you notice about each source? What do you notice about Benjamin Gitlow by looking at the pictures in Source C?
2. **Reflect:** How are these two sources related? What do you learn about Benjamin Gitlow by reading the caption in Source C? How does Source D explain the use of the 14th Amendment to incorporate the First Amendment freedom of speech? How might this decision have begun a new era in federalism?
3. **Question:** What questions do you have about these sources?

Selective Incorporation

Source E: Clarence Earl Gideon Petition for Certiorari⁵

Clarence Earl Gideon was accused of petty larceny (stealing a small amount of cash), which was a felony in Florida. While on trial, he asked to have an attorney appointed to him because he was indigent (experiencing extreme poverty). His request was denied because Florida law only provided attorneys for those accused of capital offenses (crimes for which the person could receive the death penalty). Gideon was convicted and received a five-year prison sentence. He appealed his case to the U.S. Supreme Court. In *Gideon v. Wainwright* (1963), the Supreme Court ruled unanimously for Gideon and incorporated the Sixth Amendment right to counsel guaranteeing indigent defendants court-appointed counsel. ([See source at National Archives.](#))

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CORRESPONDENCE REGULATIONS

MAIL WILL NOT BE DELIVERED WHICH DOES NOT CONFORM WITH THESE RULES

No. 1 -- Only 2 letters each week, not to exceed 2 sheets letter-size 8 1/2 x 11" and written on one side only, and if ruled paper, do not write between lines. Your complete name must be signed at the close of your letter. Clippings, stamps, letters from other people, stationery or cash must not be enclosed in your letters.

No. 2 -- All letters must be addressed in the complete prison name of the inmate. Cell number, where applicable, and prison number must be placed in lower left corner of envelope, with your complete name and address in the upper left corner.

No. 3 -- Do not send any packages without a Package Permit. Unauthorized packages will be destroyed.

No. 4 -- Letters must be written in English only.

No. 5 -- Books, magazines, pamphlets, and newspapers of reputable character will be delivered only if mailed direct from the publisher.

No. 6 -- Money must be sent in the form of Postal Money Orders only, in the inmate's complete prison name and prison number.

INSTITUTION _____ CELL NUMBER _____

NAME _____ NUMBER _____

In The Supreme Court of The United States
Washington D.C.
Clarence Earl Gideon
Petitioner -
vs. H.G. Cochran, Jr. as
Director, Division of
Corrections State
of Florida
Petition for a writ
of Certiorari directed
to The Supreme Court
of the State
of Florida
No. 890 Misc.
OCT. TERM 1961
U. S. Supreme Court
To: The Honorable Earl Warren, Chief
Justice of the United States
Comes now The petitioner, Clarence
Earl Gideon, a citizen of The United States
of America, in proper person, and appearing
as his own counsel, who petitions this
Honorable Court for a Writ of Certiorari
directed to The Supreme Court of The State
of Florida, To review the order and Judg-
ment of the court below denying The
petitioner a Writ of Habeas Corpus.
Petitioner submits that The Supreme
Court of The United States has the authority
and jurisdiction to review The final Judg-
ment of The Supreme Court of The State
of Florida the highest court of The State.
Under sec. 344(B) Title 28 U.S.C.A. and
Because The "Due process clause" of the

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INSTITUTION _____ CELL NUMBER _____

NAME _____ NUMBER _____

fourteenth amendment of the constitution
and the fifth and sixth articles of the
Bill of Rights has been violated. Furthermore, the decision of The Court
below denying the petitioner a Writ of
Habeas Corpus is also inconsistent and
adverse to its own previous decisions
in parallel cases.

Transcription of Source E:

In The Supreme Court of the United States
Washington, D.C.

Clarence Earl Gideon
Petitioner

vs.

H.G. Cochran, Jr. as
Director, Divisions
of corrections state
of Florida

Petition for a writ
of Certiorari Directed
to the Supreme Court
State of Florida

To: The Honorable Earl Warren, Chief Justice of the United States

Comes now the petitioner, Clarence Earl Gideon, a citizen of the United States of America, in proper person, and appearing as his own counsel. Who petitions this Honorable Court for a Writ of Certiorari directed to the Supreme Court of the State of Florida. To review the order and judgement of the court below denying the petitioner a writ of Habe[a]s Corpus.

Petitioner submits that the Supreme Court of the United States has the authority and jurisdiction to review the final judgement of the Supreme Court of The State of Florida the highest court of the state under sec. 344 (B) Title 28 U.S.C.A. and Because the “Due process clause” of the fourteenth amendment of the constitution and the fifth and sixth arti[c]les of the Bill of rights has been violated. Furthermore, the decision of the court below denying the petitioner a Writ of Habe[a]s Corpus is also inconsistent and adverse to its own, previous decisions in paralleled cases.

Source E Information: The source is a petition for *certiorari* (request for the Court to take the case) filed in forma pauperis in Gideon’s own handwriting. To file *in forma pauperis*, a petitioner must show they cannot pay the filing or attorney fees. *In forma pauperis* briefs do not need to follow many of the requirements of paid petitions. Many *in forma pauperis* are filed by incarcerated people like Gideon. ([See source at National Archives.](#))

Glossary of key terms from the source:

- *writ of habeas corpus*: legal term for an order requiring a person under arrest to be brought before a judge where the government must show lawful grounds for their arrest. A person applies (petitions) for a writ of *habeas corpus* when they ask a court to review their case to make sure their arrest and detention is lawful.

Source F: Majority opinion in *Timbs v. Indiana* (2019)⁶

The most recent provision of the Bill of Rights to be incorporated was the Excessive Fines Clause of the Eighth Amendment. The Eighth Amendment states that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The protections against excessive bail and cruel and unusual punishment have been applied to the states for many years. However, the Court had not fully incorporated the Eighth Amendment’s protection from excessive fines until 2019.

Tyson Timbs was arrested for selling narcotics and the state of Indiana seized his Land Rover SUV valued at \$42,000. Timbs challenged the seizure arguing that the Eighth Amendment should be incorporated to protect him from Indiana’s seizure, which he claimed was an excessive fine. The U.S. Supreme Court heard his case in *Tyson Timbs and a 2012 Land Rover v. the State of Indiana*.

When ratified in 1791, the Bill of Rights applied only to the Federal Government. *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833). “The constitutional Amendments adopted in the aftermath of the Civil War,” however, “fundamentally altered our country’s federal system.” *McDonald*, 561 U. S., at 754. With only “a handful” of exceptions, this Court has held that the Fourteenth Amendment’s Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States. *Id.*, at 764–765, and nn. 12–13. A Bill of Rights protection is incorporated, we have explained, if it is “fundamental to our scheme of ordered liberty,” or “deeply rooted in this Nation’s history and tradition.” *Id.*, at 767 (internal quotation marks omitted; emphasis deleted).

Incorporated Bill of Rights guarantees are “enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” *Id.*, at 765 (internal quotation marks omitted). Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.¹

Source F Information: In *Timbs v. Indiana*, the Supreme Court decided unanimously for Timbs that the Eighth Amendment Excessive Fines Clause is an incorporated protection applicable to the states. The above is an excerpt of the majority opinion written by Justice Ruth Bader Ginsburg. ([See source at Supreme Court of the United States.](#))

Questions to Consider for Sources E and F:

- 1. Observe:** What do you notice about these sources?
- 2. Reflect:** How are these two sources related? In Source E, how does the opinion in *Gideon v. Wainwright* explain the use of the 14th Amendment to incorporate the Sixth Amendment right to counsel? What consequences might the decision in *Gideon v. Wainwright* have had on state governments? In Source F, how does Justice Ginsburg explain the incorporation doctrine? Why is it important for the Supreme Court to incorporate a right?
- 3. Question:** What questions do you have about these sources?

Inquiry Question

What impact has the incorporation doctrine had on federalism (the division of power between the federal and state government)?

In your answer, use the timeline and the available sources to support your definition.

Inquiry Extension Question

The 14th Amendment was ratified in 1868. Over the years most of the guarantees in the Bill of Rights have been incorporated against the states on a case-by-case basis. The U.S. Supreme Court decided its first incorporation case in 1925 and its most recent in 2019.

Why has it taken over 150 years to incorporate most of the Bill of Rights?

Suggested Resources:

- [The 14th Amendment and Incorporation \(Introductory Level\)](#), January 19, 2022, National Constitution Center
- [The Fourteenth Amendment Due Process Clause](#), Interactive Constitution, National Constitution Center
- [The 14th Amendment and the “Second Bill of Rights,”](#) Constitutional Rights Foundation

Notes

¹ “A bill of rights as provided in the ten original amendments to the constitution of the United States in force,” *U.S. Constitution*, 1950. From Library of Congress Rare Book and Special Collections Division, www.loc.gov/item/rbpe.24404400/.

² United States, *The Constitution of the United States of America*, U.S. Government Printing Office, 1920. From Library of Congress General Collections, www.loc.gov/item/20013929/.

³ City of New York Police Department, Benjamin Gitlow mugshot, November 1919. From Federal Judicial Center, <https://twitter.com/fedjudicialhist/status/1005086915090108417>.

⁴ *Gitlow v. New York*, 268 U.S. 652 (1924). From Library of Congress U.S. Reports, www.loc.gov/item/usrep268652/.

⁵ Supreme Court of the United States, “Petition for a Writ of *Certiorari* from Clarence Gideon to the Supreme Court of the United States,” Textual Reference, January 5, 1962. From National Archives Catalog, <https://catalog.archives.gov/id/597554>.

⁶ *Timbs v. Indiana*, 586 U. S. ____ (2019). From the Supreme Court of the United States, https://www.supremecourt.gov/opinions/18pdf/17-1091_5536.pdf.