Incorporation Doctrine

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A constitutional doctrine whereby selected provisions of the Bill of Rights are made applicable to the states through the due process clause of the Fourteenth Amendment.

The doctrine of selective incorporation, or simply the incorporation doctrine, makes the first ten amendments to the Constitution—known as the Bill of Rights—binding on the states. Through incorporation, state governments largely are held to the same standards as the federal government with regard to many constitutional rights, including the First Amendment freedoms of speech, religion, and assembly, and the separation of church and state; the Fourth Amendment freedoms from unwarranted arrest and unreasonable searches and seizures; the fifth amendment privilege against self-incrimination; and the Sixth Amendment right to a speedy, fair, and public trial. Some provisions of the Bill of Rights—including the requirement of indictment by a Grand Jury (Sixth Amendment) and the right to a jury trial in civil cases (Seventh Amendment)—have not been applied to the states through the incorporation doctrine.

Until the early twentieth century, the Bill of Rights was interpreted as applying only to the federal government. In the 1833 case Barron ex rel. Tiernon v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672, the Supreme Court expressly limited application of the Bill of Rights to the federal government. By the mid-nineteenth century, this view was being challenged. For example, Republicans who were opposed to southern state laws that made it a crime to speak and publish against Slavery alleged that such laws violated First Amendment rights regarding Freedom of Speech and Freedom of the Press.

For a brief time following the ratification of the Fourteenth Amendment in 1868, it appeared that the Supreme Court might use the privileges and immunities clause of the Fourteenth Amendment to apply the Bill of Rights to the states. However, in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873), the first significant Supreme Court ruling on the Fourteenth Amendment, the Court handed down an extremely limiting interpretation of that clause. The Court held that the clause created a distinction between rights associated with state citizenship and rights associated with U.S., or federal, citizenship. It concluded that the Fourteenth Amendment prohibited states from passing laws abridging the rights of U.S. citizen-ship (which, it implied, were few in number) but had no authority over laws abridging the rights of state citizenship. The effect of this ruling was to put much state legislation beyond the review of the Supreme Court.

Instead of applying the Bill of Rights as a whole to the states, as it might have done through the Privileges and Immunities Clause, the Supreme Court has gradually applied selected elements of the first ten amendments to the states through the Due
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Process Clause of the Fourteenth Amendment. This process, known as selective incorporation, began in earnest in the 1920s. In *Gitlow v. New York*, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925), one of the earliest examples of the use of the incorporation doctrine, the Court held that the First Amendment protection of freedom of speech applied to the states through the Due Process Clause. By the late 1940s, many civil freedoms, including freedom of the press (*Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 [1931]), had been incorporated into the Fourteenth Amendment, as had many of the rights that applied to defendants in criminal cases, including the right to representation by counsel in capital cases (*Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 [1931]). In 1937, the Court decided that some of the privileges and immunities of the Bill of Rights were so fundamental that states were required to abide by them through the Due Process Clause (*Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288).

In 1947, the Court rejected an argument that the Fifth Amendment’s right against Self-Incrimination applied to the states through the Fourteenth Amendment (*Adamson v. People of the State of California*, 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 2d 1903 [1947]). However, in one of the most famous dissents in history, Justice hugo l. black argued that the Fourteenth Amendment incorporated all aspects of the Bill of Rights and applied them to the states. Justice Felix Frankfurter, who wrote a concurrence in *Adamson*, disagreed forcefully with Black, arguing that some rights guaranteed by the Fourteenth Amendment may overlap with the guarantees of the Bill of Rights, but are not based directly upon such rights. The Court was hesitant to apply the incorporation doctrine until 1962, when Frankfurter retired from the Court. Following his retirement, most provisions of the Bill of Rights were eventually incorporated to apply to the states.

**Further readings**

**Cross-references**
*Due Process of Law.*