

Incorporation of the Bill of Rights

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Grade level: Grades 9-12

Objectives:

Students will be able to:

1. Describe the concept of incorporation as it relates to the Bill of Rights.
2. Explain what is meant by “selective” incorporation.
3. Discuss why the Supreme Court of the United States chose selective incorporation over total incorporation.
4. Explain the standard the Supreme Court of the United States uses to determine incorporation of rights.

Introduction

When the Bill of Rights was proposed in 1787 and ratified in 1789, the general understanding was that these rights applied only to protections from the federal government. The only governmental institution mentioned in the Bill of Rights is Congress. The Supreme Court of the United States had an opportunity to apply the Bill of Rights to state governments in the 1833 case of *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), but declined to do so.

When the Fourteenth Amendment was ratified by the states in 1868, many thought that the plain language interpretation of the amendment was that the Bill of Rights now applied to the states as well as the federal government:

Section 1 (Fourteenth Amendment). All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. **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. (emphasis added)

However, in the *Slaughterhouse* cases of 1873, the Supreme Court of the United States (the Court) appeared to shut the door on the application of the Bill of Rights to state governments. (For a description of the cases, go to www.oyez.org/cases/1850-1900/83us36.) The Court held that the privileges and immunities clause of the 14th Amendment did not purport to extend the protections of the Bill of Rights to matters involving state governments.

Then, starting in 1897 and throughout the 20th century, the Court issued a series of decisions that held that the due process and equal protections clauses of the 14th Amendment did apply to state governments as well other governmental entities such as schools. (It was not until the 2010 case of *McDonald v. City of Chicago* that the Court broached the subject of the privileges and immunities clause as being applicable to the states, but the majority of the Court held that the *Slaughterhouse* cases were still good law and chose to incorporate the Second Amendment as the

right to due process.) This case by case approach to finding that the rights found in the Bill of Rights applied to the states through the 14th Amendment is the Doctrine of Incorporation, and more specifically, the Doctrine of Selective Incorporation. Through incorporation, state governments are held to the same standards as the federal government with regard to many constitutional rights.

Background information on Selective Incorporation

- The first case where the Court held that the 14th Amendment did apply to the states was *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897). The Court held that the 14th Amendment due process clause did apply to the states in regard to providing just compensation for the taking of property for governmental purposes (eminent domain).
- In the cases of *Maxwell v. Dow*, 176 U.S. 581 (1900) and *Twining v. New Jersey*, 211 U.S. 78 (1908), Justice Marshall Harlan argued in dissent that the 14th Amendment did apply to state governments.
- In 1925, in the case of *Gitlow v. New York*, a freedom of speech case, the Court held that the due process clause of the 14th Amendment did apply to actions by a state government.
- In neither the 1897 railroad case nor the *Gitlow* case was there any discussion as to whether the 14th Amendment applied to all of the Bill of Rights or just the ones at issue in those cases. That discussion occurred in *Palko v. Connecticut* (1937). At that time, some of the justices argued that all of the protections in the Bill of Rights applied to the states. However, the majority of the justices favored applying only the freedom that was at issue in the case before them. Thus, began a judicial practice of “incorporating” the Bill of Rights one at time as a case involving a particular right came before the Court. This practice is called selective incorporation.
- In the case of *Palko v. Connecticut*, 302 U.S. 319 (1937), Justice Benjamin Cardozo held that the due process clause protected only those rights that were "**of the very essence of a scheme of ordered liberty**". That is generally the standard the Court has followed for the selective incorporation of rights.

Below is a chart showing the path of selective incorporation:

Bill of Rights Provision	Case	Year
First Amendment—freedom of speech	<i>Gitlow v. New York</i> , 268 U.S. 652	1925
First Amendment—freedom of press	<i>Near v. Minnesota</i> , 283 U.S. 697	1931
First Amendment—freedom of assembly	<i>DeJonge v. Oregon</i> , 299 U.S. 353	1937
First Amendment—free exercise of religion	<i>Cantwell v. Connecticut</i> , 310 U.S. 296	1940
First Amendment—guarantee against an establishment of religion	<i>Everson v. Board of Education</i> , 330 U.S. 1	1947

Second Amendment—right to bear arms	<i>McDonald v. City of Chicago</i>	2010
Third Amendment—right not to be forced to quarter soldiers.	Not incorporated. The Supreme Court of the United States has never heard a Third Amendment case.	
Fourth Amendment—the right to be free from unreasonable searches and seizures	<i>Wolf v. Colorado</i> , 338 U.S. 25	1949
Fourth Amendment—the Exclusionary Rule	<i>Mapp v. Ohio</i> , 367 U.S. 643	1961
Fourth Amendment—what is reasonable as to a warrantless search	<i>Ker v. California</i> , 374 U.S. 23	1963
Fourth Amendment—warrant requirement	<i>Aguilar v. Texas</i> , 378 U.S. 108	1964
Fifth Amendment—the takings clause i.e. just compensation for the government taking property	<i>Chicago, Burlington & Quincy Railroad Co. v. City of Chicago</i> , 166 U.S. 226	1897
Fifth Amendment—protection against double jeopardy	<i>Benton v. Maryland</i> , 395 U.S. 784	1969
Fifth Amendment—right to a grand jury	Not incorporated.	
Fifth Amendment—right not to incriminate oneself	<i>Malloy v. Hogan</i> , 378 U.S. 1	1964
Sixth Amendment—right to a public trial	<i>In re Oliver</i> , 333 U.S. 257	1948
Sixth Amendment—right to a speedy trial	<i>Klopfer v. North Carolina</i> , 386 U.S. 213	1967
Sixth Amendment—right to confront witnesses	<i>Pointer v. Texas</i> , 380 U.S. 400	1965
Sixth Amendment—right to counsel	<i>Powell v. Alabama</i> 287 U.S. 45 for capital cases,	1932
	<i>Gideon v. Wainwright</i> , 372 U.S. 335 for all felony cases	1963
	<i>Argersinger v. Hamlin</i> , 407 U.S. 25 for imprisonable misdemeanors	1972
Sixth Amendment—right to a trial by an impartial jury	<i>Parker v. Gladden</i> , 385 U.S. 363	1966
Sixth Amendment—right to know what crimes you have been charged with	<i>In re Oliver</i> , 333 U.S. 257	1948
Sixth Amendment—right to subpoena witnesses to testify at trial	<i>Washington v. Texas</i> , 388 U.S. 14	1967

Seventh Amendment—right to a jury trial in a civil matter. Has not been incorporated.	Not incorporated.	
Eighth Amendment—right to be free from cruel and unusual punishment	<i>Robinson v. California</i> , 370 U.S. 660	1972
Eighth Amendment—protections against excessive bail or excessive fines.	Not incorporated.	

Possible teaching activities:

1. Introduce students to the concept of incorporation using the explanation offered in this lesson plan.
2. In your opinion, what were the reasons that plain language of the 14th Amendment was not immediately regarded as law?
3. As a class, discuss the pros and cons of selective incorporation v. total incorporation. Why do you think the Court went down this path?
4. Divide the students into groups to read the opinion in *Palko v. Connecticut* (1937). Have the students underline or highlight what the justices are saying about incorporation. (Go to www.oyez.org for cases.)
5. Look at the chart on incorporation and discuss how the various rights that have been incorporated are "of the very essence of a scheme of ordered liberty"? Do you think any of the remaining unincorporated rights meet the test of "the very essence of the scheme of ordered liberty"? Why or why not?
6. In the cases of *NAACP v. Alabama*, 357 U.S. 449 (1958) and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the court appears to incorporate the "freedom of expressive association." Where do the justices derive that freedom from? Do you agree that this freedom is contained within the Bill of Rights? Why or why not?
7. Pick one of the "incorporation" cases and highlight the incorporation language.

Grade Level Expectations (DESE approved 4.16):

Theme 1-History Continuity and Change	E. Analyze the causes and consequences of a specific issue tied to government as well as the challenges and opportunities faced by those trying to address the problem.
Theme 1-Government Systems and Principles	A. Analyze laws, policies, and processes to determine how governmental systems affect individuals and groups in society.
Theme 4-Government in Action	A. Trace the changing power relationships between branches of the United States government over time. B. Analyze changing ideas regarding an "active judiciary," and an "active executive branch" in United States government over time.

Theme 3-Structure of Government	C. Analyze the unique roles and responsibilities of the three branches of government to determine how they function and interact.