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Legal Sidebar

Application of the Bill of Rights to the States Through the Fourteenth Amendment and Selective Incorporation

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The Bill of Rights, comprising the first ten amendments to the U.S. Constitution, protects certain rights against infringement by the federal government. A recurring question throughout U.S. history is whether state or local governments are bound by the proscriptions found in the Bill of Rights. Certain provisions—such as the First Amendment—specifically mention "Congress." Others, like the Second Amendment, contain no such explicit references.

In the early 19th century, both Congress and the Supreme Court treated the Bill of Rights as applying only to the federal government and not to the states. In the 1833 case *Barron v. City of Baltimore*, Chief Justice John Marshall wrote that the amendments that make up the Bill of Rights "contain no expression indicating an intention to apply them to the state governments." On that basis, the Court declined to apply the Fifth Amendment's Takings Clause to a municipal government.

Ratification of the Fourteenth Amendment in the aftermath of the Civil War altered the states' role in the constitutional system by prohibiting states from "abridg[ing] the privileges or immunities of citizens of the United States" and "depriv[ing] any person of life, liberty, or property, without due process of law." Litigants hoping to apply the Bill of Rights to the states argued that the rights secured by the amendments were components of the "privileges or immunities" or the right to "due process" protected by the Fourteenth Amendment against encroachment by the states.

The Supreme Court, however, distinguished "privileges or immunities of citizens of the United States" that states cannot infringe under the Fourteenth Amendment from the rights that the federal government cannot infringe under the Bill of Rights. In the 1872 *Slaughter-House Cases,* the Supreme Court held that the Fourteenth Amendment's "privileges or immunities" referred only to rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." Three years after the *Slaughter-House Cases*, the Supreme Court held in *United States v. Cruikshank* that the Bill of Rights did not establish new rights but rather secured such rights from federal government infringement. Because the rights set forth in the Bill of Rights do not "owe their existence to . . . the Constitution," they do not constitute "privileges or immunities of citizens of the United States" under the Court's *Slaughter-House* precedent.

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The Supreme Court has been more amenable to arguments based on the Fourteenth Amendment's Due Process Clause. In *Twining v. New Jersey*, the Court acknowledged that some of the Bill of Rights' protections "may also be safeguarded against state action, because a denial of them would be a denial of due process of law . . . ." The Supreme Court therefore accepted the possibility that the Due Process Clause might allow for some of the Bill of Rights' provisions to constrain state governments.

The Supreme Court has rejected the notion that the protections of the Fourteenth Amendment encompass the entire Bill of Rights—an approach known as *total incorporation*. Instead, the Supreme Court's approach since the late 19th century has been *selective incorporation* of the Bill of Rights against the state and local governments. In other words, the Court has held on a case-by-case basis whether a right safeguarded by the Bill of Rights against federal government action is also safeguarded against state government action. Absent incorporation, a state may take action that would be unconstitutional if taken by the federal government. Conversely, incorporation of a particular provision of the Bill of Rights into the Fourteenth Amendment protects individuals from state infringement of the right. The Supreme Court's controlling decisions incorporating provisions of the Bill of Rights almost entirely rely on the Fourteenth Amendment's Due Process Clause, though some decisions refer only to the Fourteenth Amendment in general, and some individual members of the Court have expressed support for incorporation through the Privileges or Immunities Clause in concurrences. As of 2024, the Supreme Court has incorporated most of the protections of the Bill of Rights against the states, as detailed in the table below.

This table includes every commonly recognized provision from the first eight amendments to the U.S. Constitution. The Ninth and Tenth Amendments do not expressly enumerate substantive rights for protection and thus the Supreme Court has recognized that they are not subject to incorporation. The table does not include protections derived from the Bill of Rights that are not expressly provided for in the text of the amendments, such as the freedom of association. For more information on incorporation of the Bill of Rights, see these essays on the Constitution Annotated website.

Table 1. Provisions of the Bill of Rights Recognized by the Supreme Court as Incorporated by the Fourteenth Amendment and Applicable to State and Local Government

Amendment	Provision or Clause	Formally Incorporated?	Incorporation Recognized In	Notes
First Amendment	Establishment Clause	Yes	Everson v. Board of Education, 330 U.S. 1, 8 (1947)	Incorporation assumed without deciding in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause)
First Amendment	Free Exercise Clause	Yes	Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)	
First Amendment	Free Speech Clause	Yes	Gitlow v. New York, 268 U.S. 652, 666 (1925)	Right assumed incorporated in *Gitlow*; *Gitlow* later recognized as incorporating the right; *see* McDonald v. City of Chicago, 561 U.S. 742, 764 n.12 (2010)

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First Amendment	Free Press Clause	Yes	Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 707 (1931)	Incorporation assumed without deciding in *Gitlow*, 268 U.S. at 666
First Amendment	Freedom of Assembly	Yes	De Jonge v. Oregon, 299 U.S. 353, 364 (1937)	
First Amendment	Freedom of Petition	Yes	Edwards v. South Carolina, 372 U.S. 229, 237–38 (1963)	
Second Amendment	Right to Keep and Bear Arms	Yes	McDonald v. City of Chicago, 561 U.S. 742, 778 (2010)	Plurality opinion incorporated through the Due Process Clause; Justice Thomas, concurring in part, would rely on Privileges or Immunities Clause
Third Amendment	Right Against Quartering Soldiers	No		Incorporation not considered by the Supreme Court; incorporation recognized by lower federal court in Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982); alluded to as a source of penumbral rights incorporated against the states in Griswold v. Connecticut, 381 U.S. 479, 484 (1965)
Fourth Amendment	Right Against Unreasonable Searches and Seizures	Yes	Wolf v. Colorado, 338 U.S. 25, 27–28 (1949), *overruled in part on other grounds,* Mapp v. Ohio, 367 U.S. 643 (1961)	Exclusionary rule (exclusion of evidence obtained in violation of the Fourth Amendment) not incorporated by *Wolf*; later incorporated in *Mapp v. Ohio*, 367 U.S. at 655
Fourth Amendment	Warrant Requirement	Yes	Aguilar v. Texas, 378 U.S. 108, 110 (1964), *overruled in part on other grounds,* Illinois v. Gates, 462 U.S. 213 (1983)	
Fifth Amendment	Grand Jury Clause	No		Incorporation rejected in Hurtado v. California, 110 U.S. 516, 534-35 (1884)

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Fifth Amendment	Double Jeopardy Clause	Yes	Benton v. Maryland, 395 U.S. 784, 794 (1969)	Incorporation assumed without deciding in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462 (1947)
Fifth Amendment	Right Against Self-Incrimination	Yes	Malloy v. Hogan, 378 U.S. 1, 6 (1964)	
Fifth Amendment	Due Process Clause	No		Incorporation not considered by the Supreme Court; Fourteenth Amendment Due Process Clause recognized to be source of due process right against states in Scott v. McNeal, 154 U.S. 34, 45 (1894)
Fifth Amendment	Takings Clause	Yes	Chicago, Burlington & Quincy Railroad v. City of Chicago, 166 U.S. 226, 241 (1897)	
Sixth Amendment	Right to a Speedy Trial	Yes	Klopfer v. North Carolina, 386 U.S. 213, 222–23 (1967)	
Sixth Amendment	Right to a Public Trial	Yes	*In re* Oliver, 333 U.S. 257, 273 (1948)	Right to a public trial recognized without explicit reliance on Sixth Amendment
Sixth Amendment	Right to a Trial by Jury	Yes	Duncan v. Louisiana, 391 U.S. 145, 149 (1968)	
Sixth Amendment	Right to Impartial Jury	Yes	Irvin v. Dowd, 366 U.S. 717, 721–22 (1961) (right recognized without reference to Sixth Amendment); Parker v. Gladden, 385 U.S. 363, 364 (1966) (right recognized with reference to the Sixth Amendment)	Predates incorporation of Sixth Amendment right to a trial by jury

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Sixth Amendment	Right to Local Jury/Vicinage	No		Incorporation not considered by the Supreme Court; incorporation rejected by lower federal courts in Cook v. Morrill, 783 F.2d 593, 594-95 (5th Cir. 1986); Caudill v. Scott, 857 F.2d 344, 345-46 (6th Cir. 1988); incorporation assumed not to apply by lower court in Martin v. Beto, 397 F.2d 741, 748 (5th Cir. 1968)
Sixth Amendment	Notice of Accusation	Yes	*In re* Oliver, 333 U.S. 257, 273 (1948)	Right of "reasonable notice of a charge" recognized without explicit reliance on Sixth Amendment in *Oliver*
Sixth Amendment	Confrontation Clause	Yes	Pointer v. Texas, 380 U.S. 400, 403 (1965)	
Sixth Amendment	Right to Compulsory Process	Yes	Washington v. Texas, 388 U.S. 14, 17–18 (1967)	
Sixth Amendment	Right to Counsel	Yes	Powell v. Alabama, 287 U.S. 45, 71 (1932) (for capital cases); Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963) (for all felony cases)	
Seventh Amendment	Right to a Civil Jury Trial	No		Incorporation rejected in Walker v. Sauvinet, 92 U.S. 90, 92–93 (1876)
Seventh Amendment	Reexamination Clause	No		Incorporation assumed not to apply in Justices v. Murray, 76 U.S. (9 Wall.) 274, 278 (1870)

Eighth Amendment	Excessive Bail Clause	Yes	Schilb v. Kuebel, 404 U.S. 357, 365 (1971)	Right "assumed" incorporated in *Schilb*; *Schilb* later recognized as incorporating the right; see McDonald v. City of Chicago, 561 U.S. 742, 764 n.12 (2010)
Eighth Amendment	Excessive Fines Clause	Yes	Timbs v. Indiana, 586 U.S. 146, 154 (2019)	Majority opinion incorporated through Due Process Clause; Justice Thomas, concurring, would rely on Privileges or Immunities Clause; Justice Gorsuch, concurring, suggests Privileges or Immunities Clause might be appropriate vehicle for incorporation
Eighth Amendment	Cruel and Unusual Punishments Clause	Yes	Robinson v. California, 370 U.S. 660, 666–67 (1962)	Incorporation assumed without deciding in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462 (1947)

Source: Decisions of the Supreme Court.

Notes: For purposes of this table, a provision is "formally incorporated" when a decision of the Supreme Court holds that the protections of the provision apply to states through the Fourteenth Amendment. A case listed in this table is either the earliest Supreme Court case to expressly hold that a provision has been incorporated or a Supreme Court case that has been commonly understood by the Supreme Court to incorporate the particular provision. Unless otherwise indicated, this table does not include cases that assume, affirm, or reject incorporation of a particular provision of the Bill of Rights when such was not necessary to the Court's resolution of the case.

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