

3.7 Selective Incorporation



ESSENTIALS

1. The doctrine of selective incorporation has imposed limitations on state regulation of civil rights and liberties as represented by: *McDonald v. Chicago* (2010).
2. Selective Incorporation began with *Gitlow v. New York* (1925).
3. The key to Selective Incorporation is the “due process” clause of the Fourteenth Amendment.

1. What is the underlying idea of this cartoon?

2. How has the concept of selective incorporation strengthened our free speech? How has it weakened federalism?

For the first 150 years of our history, the Bill of Rights protected our liberties from an intrusion by the national government. State governments were not held to the standards found in the Bill of Rights.

What was the long-lasting precedent in the court case *Barron v. Baltimore* (1833)?

Selective Incorporation DEFINITION:

Little by little the United States Supreme Court applied the Bill of Rights to the States using the due process clause of the Fourteenth Amendment.

Review the definition of *selective incorporation*. How did this case change the *Barron* precedent?

Gitlow v. New York (1925) was the first case to authoritatively apply to the States First Amendment protections. Investigate the context of the *Gitlow* case. Explain the court’s rationale to apply the First Amendment’s “free speech clause” to New York (use a direct quote from the opinion).

The Eighth Amendment guarantees the right to be free from excessively harsh punishment at the hands of the government. Yet in spite of the amendment's deep roots in U.S. history and jurisprudence, a critical part of it had been left behind in the incorporation project: The Excessive Fines Clause. Last Term, in *Timbs v. Indiana*, the Supreme Court finally held that the clause was incorporated against the states, and further, that it encompassed civil forfeitures in addition to criminal fines.

Source: Harvard Law Review, November 2019

1. Review the *Timbs* precedent. What was the context, and what did the court decide?
2. INVESTIGATE: What provisions of the Bill of Rights have yet to be incorporated?

SCOTUS Comparison

When the Bill of Rights was first ratified their protections applied exclusively to the national government. "Emphatically not to the states," it was argued. This understanding would change with the passage of the Fourteenth Amendment (1868) following the Civil War. The Fourteenth Amendment declared, "...No state could deprive anyone of life, liberty, or property without due process of law." The due process clause of the Fourteenth Amendment has been interpreted to prevent the states from infringing upon basic liberties. In political science this is called the Incorporation Doctrine. Navigating this profound change would have broad implications for federalism and the role of the United States Supreme Court.

Gitlow v. New York (1925) was the first time the court made the First Amendment's guarantee of free speech binding upon the states. Gitlow incorporated free speech. The merits of the case become secondary to this crucial landmark moment. Nevertheless, the Gitlow story feels familiar to certain contemporary issues that we face. Benjamin Gitlow was a part of the radical American Communist Party that appeared to many to be promoting a violent overthrow of the government. The state of New York in 1902 had criminalized the advocacy of anarchy, "a dangerous doctrine at any time." In addition to incorporating free speech, the Supreme Court found Benjamin Gitlow responsible for the probable outcome of his words. His conviction was upheld. States may prohibit speech tending to cause danger to public safety. Incorporation today receives little debate. The "bad tendency" principle, however, is tested each and every day on our streets as we attempt to balance both our liberties and the government's responsibility to keep its citizens safe.

Based on the information above, respond to the following questions.

- A. Identify a common constitutional principle used to make a ruling in both *Gideon v. Wainwright* (1963) and *Gitlow v. New York* (1925).
- B. Explain how the facts of *Gideon v. Wainwright* (1963) and the facts of *Gitlow v. New York* (1925) led to a similar holding in both cases.
- C. Describe an action that state governments can take to respond to the *Gitlow v. New York* (1925) ruling if it disagreed with the decision.