

# Panel III: The First Amendment and Incorporation

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## **Freedom of Speech, Due Process, and The Mechanics of Constitutional Change**

The incorporation doctrine, which makes the various federal guarantees set out in the Bill of Rights applicable to state governments, significantly transformed constitutional law and the structure of American government. *Gitlow* is often described as both the first case to hold that the protections of the First Amendment apply to the states and the origin of the wider doctrine of incorporation. Both claims are technically wrong, though ultimately accurate in substance for the most part. The recognition of federal free speech constraints on state action and the emergence of incorporation as a general constitutional principle each occurred incrementally, and *Gitlow* touched off the processes that culminated in those twin features of modern American constitutional order. To some extent this was accidental, and to some extent it rested on a willful misreading of the case itself, but *Gitlow* was nevertheless pivotal.

It is unsurprising that invocation of First Amendment-type freedoms would be the catalyst for the incorporation transformation. Unlike the more specific rights associated with criminal process, freedom of speech slotted into established practices and doctrines with minimal friction. Not only had the *Lochner*-era Supreme Court become accustomed to the principle that the Due Process clause extended beyond strictly procedural matters and the practice of invalidating state legislation under the Clause, but it had encountered speech issues in various aspects of its general superintendence of economic regulation. The framework of protection extended during this period regarded rights less as “trumps” or as particular types of interests meriting heightened scrutiny than as basic and general freedoms protected against arbitrary or improper interference. It could hardly be denied that freedom of speech was a basic liberty, given the body of pronouncements in other contexts about the nature of liberty, and the proposition that rights were always held subject to a justified exercise of the police power provided assurance that nothing too radical was at stake. The criminal procedure rights, by contrast, were not so easily qualified. So too was the relative dearth of free speech precedent—particularly in service of the controversial causes and activities that would come to the fore as the twentieth century progressed—which helped to blur the distinction between due process constraints on speech regulation and the Freedom of Speech acknowledged in the First Amendment. And in comparison to the criminal procedure matters, far fewer encounters with problematic state measures could be expected. Both the volume of criminal prosecutions and the likelihood of a violation of the more specific

constitutional rights at issue would be an order of magnitude greater than in the free speech context.

The early cases involving speech, press, and assembly conceptualized the right as an aspect of due process, not the direct application of the First Amendment to the states. But the distinction was one that made very little difference so far as freedom of speech was concerned, and over time, what had begun as a view grounded in notions of due process increasingly came to be seen as the application of the First Amendment itself to the states, via the Fourteenth. That in turn facilitated the rapid-fire incorporation of the Constitution's criminal process rights to the states, and decades later, the Second Amendment. But as the chief proponents of each of those developments had hoped, it also helped limit the recognition of other forms of protection under the Due Process Clause.