

3.9: Amendments: Due Process and the Right to Privacy
Explain the extent to which states are limited by the due process clause from infringing upon individual rights.

Many political scientists insist, with the passage of the Fourteenth Amendment following the American Civil War, that a second revolution took place. Others argue it merely reinforced principles already in place in the original constitution. Both sides, however, would agree that the relationship between the federal government and the states and the federal government and the people was changed forever. The text from Section 1 of the Fourteenth Amendment seems simple enough:

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.

Yet the incorporation of the federal government's authority to oversee the "due process" and "equal protection" of all citizens represents a significant change. **Protections of the Bill of Rights have been selectively incorporated by way of the Fourteenth Amendment's "due process" clause to prevent state infringement of basic liberties.**

First a little historical context might help us understand this "second revolution." The Founding Fathers may have abandoned the Articles of Confederation in favor of a new constitution but they did not dismiss state sovereignty all together. Rather they created a federal system. The national government was created to be supreme but state and local governments maintained certain reserved powers. This was codified in the Tenth Amendment. Furthermore, the rights and privileges contained in the Bill of Rights were imposed limits on the national government and not the states. The Bill of Rights only protected our civil liberties and civil rights from being infringed by the national government. This was clearly defined by the Supreme Court in the case *Barron v. Baltimore* (1833). The court made clear that the rights contained in the first ten amendments did not apply to the states. In other words, the United States Congress could not violate your freedom of speech but the State of New York could. It would take a number of generations before this confusion was remedied. It would take the passage of the Fourteenth Amendment.

The extension of the Bill of Rights to the States is called the Selective Incorporation Doctrine. It could not have occurred without the Fourteenth Amendment. The Fourteenth Amendment guaranteed to all citizens in all of the States both the due process of law and the equality of opportunity granted to all. No State could abridge the privileges or immunities given to citizens of the United States. It was not until 1925, in the case *Gitlow v. New York*, when the Supreme Court applied the language of the Fourteenth Amendment into a State dispute. When the court ruled in this case that the First Amendment took precedence in a state dispute over speech the second revolution had officially begun. Now the national government and its courts would be the final arbitrator of our rights and privileges superseding all state and local laws.

Today virtually all of our civil liberties as guaranteed in the Bill of the Rights have been applied or incorporated to the States. To summarize, little by little the Supreme Court applied or

incorporated the Bill of Rights to the States using the due process clause of the Fourteenth Amendment. This difficult concept is best understood by looking at a few critical examples.

Until 1961, state and local laws defined most police action. Federal authority was immaterial when determining when, where and how state law enforcement officials engaged in searches and seizures of private property. This changed with the case *Mapp v. Ohio* (1961). In this case the Supreme Court, using the authority of the “due process” clause of the Fourteenth Amendment, applied the Court interpreted provisions of the Fourth Amendment to the States. More specifically, the Court extended the Exclusionary Rule to the States as it had earlier (see *Weeks v. U.S.*, 1914) to the national government. Now warrantless seizure of private property was inadmissible in both federal and state courts.

Another similar example of the Selective Incorporation Doctrine can be found in the case *Gideon v. Wainwright* (1963). Here the Supreme Court applied the Sixth Amendment right to counsel not just to defendants in federal trials but in state trials as well. The authority of the federal government to impose these new procedural requirements, fundamental individual rights, was not found in the words of the Bill of Rights alone. Rather it was required to use the “due process” clause of the Fourteenth Amendment. Little by little the Supreme Court applied or incorporated the Bill of Rights to the States using the due process clause of the Fourteenth Amendment.

The Selective Incorporation Doctrine goes beyond the mere application of the Bill of Rights to the States. Any and all rights, as defined by Congress and the Courts, have been equally applied to state governments. Here the best example is the extension of privacy rights. *Griswold v. Connecticut* (1965) utilized the vague language of the Bill of Rights to establish the right to privacy. The Court defended their discovery of privacy by arguing:

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman, (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

At issue in this case was a state prohibition denying access to contraceptives, even to married couples. The Court would apply this reasoning further. Though not specifically mentioned in the Constitution’s Bill of Rights the right to privacy was later extended to include a women’s right to choose an abortion in *Roe v. Wade* (1973). Due to the Incorporation Doctrine, national, state and local governments now could no longer infringe upon a woman’s inalienable right to privacy. Though Court’s have more recently allowed for limits to these rights the second revolution has been thoroughly grounded in American life.

There are many other examples of how the Incorporation Doctrine has been used but the lessons are the same. States are now limited by the Fourteenth Amendment’s “due process” clause from infringing upon individual rights.