

3.7: Selective Incorporation

Explain the implications of the doctrine of selective incorporation.

With the Selective Incorporation Doctrine, we again visit the debate that took place in Philadelphia in 1787 at the original constitutional convention. We needed a stronger central government, but how strong? The historical answer here is growing more and more obvious. With each passing generation, it would appear stronger. The doctrine of selective incorporation has implications for the balance of power in our federal system of government.

One might think that giving greater power to the national government would interfere and weaken individual rights. "Power corrupts" we have been told. Yet in the case of selective incorporation we find, more times than not, that our individual rights and liberties have been more thoroughly protected.

The Selective Incorporation Doctrine, as we have already seen, has shifted responsibility to the national government in a dramatic way. Utilizing the language of the Fourteenth Amendment, specifically that "no state...shall abridge...due process of law," the national government now serves as protector of our alienable right to "life, liberty and property." Most of the time this has resulted in the national government imposing its will on state and local laws to the contrary. We saw this already in cases that extended the exclusionary rule (*Mapp*), right to counsel (*Gideon*), right to privacy (*Griswold*) and right to an abortion (*Roe*). In all of these cases individual rights and privileges that had once been excluded by state governments were now preserved and protected by agents of the national government. This arc of history continues.

Most recently we have seen the national government apply the right to own firearms. The Second Amendment historically was interpreted to preclude the national government from banning the right to "bear arms." State and local governments, however, were free to do so and they did. Many local governments over the years banned handguns, assault rifles and types of ammunitions. There appeared to be no constitutional contradiction as long as the *Barron* precedent prevailed. The Bill of Rights did not apply to the states. The Incorporation Doctrine changed all of that. With the Fourteenth Amendment's "due process" clause the Court now had an instrument to use to apply fundamental rights to all by protecting them from all. In the case *McDonald v. Chicago* (2010) the U.S. Supreme Court applied the right to "bear arms" to the states for the first time. Most state gun control laws were ruled unconstitutional. Here again is another example of the implications of the doctrine of selective incorporation on the balance of power in our federal system.

Of course, there are some examples that demonstrate the national government's Incorporation Doctrine, a newfound power and authority, used as a weapon to impede our apparent liberties. The Supreme Court upheld a state's limitation on free speech in the case *Gitlow v. New York* (1925). In another case the use of the drug peyote,

ceremonially by two native-Americans, was not protected from job discrimination in the case *Oregon v. Smith* (1990). Many saw this precedent as dangerously close to the national government impeding on our fundamental right to “free exercise” of religion. There are implications when granting power, especially when given to governments.

Some have called the passage of the Fourteenth Amendment a second revolution. The doctrine of selective incorporation has had a dramatic impact on the balance of power. In many instances the use of the “due process” clause has been used by the national government to further protect our fundamental rights. Yet as we have seen this has not always been the case. It is here where we best heed the words of Madison in Federalist 51 and recognize “*the necessity of auxiliary precautions.*” The legitimacy and authority to rule is ultimately in our hands. **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.**