

The **FOURTEENTH** Amendment

Section 1. 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.

According to Justice William Brennan, the Fourteenth Amendment gave Americans “a brand new Constitution after the Civil War.” It extended citizenship to former slaves and promised them equal treatment under the law. Moreover, the Fourteenth Amendment specifically restricted the states, so it was used by the Supreme Court to apply the Bill of Rights to the states as well—thereby enormously expanding the scope of constitutional rights and the caseload of the Court.

The Fourteenth Amendment has five sections dealing with many issues that arose after the Civil War, such as paying war debts and barring Confederates from holding public office. Section 1 has had the most lasting significance in constitutional law. It provides that no person shall be denied “due process of law” (fairness in government actions) or “equal protection of the laws” (protection from unreasonable discrimination). These two rights have been the basis of most twentieth-century cases in constitutional law.

HISTORICAL BACKGROUND

Slavery was firmly entrenched in the Constitution of 1787. Slaves had no rights under the Constitution or the Bill of Rights. Moreover, the Supreme Court ruled in *Dred Scott v. Sandford* (1857) that even free blacks could not be citizens of the United States, that they “had no rights which a white man was bound to respect.”

Although the Thirteenth Amendment abolished slavery in 1865, after the Civil War many southern states passed “Black Codes”—forbidding blacks from voting, serving on juries, holding certain jobs, moving freely, owning firearms, or gathering in groups. These laws were similar to the slave codes that controlled blacks before the Civil War. To remedy such discrimination, Congress passed the Fourteenth Amendment, which gave blacks citizenship—a status previously defined only by the states. The amendment also promised blacks “equal protection of the laws.” Southern states were required to ratify the Fourteenth Amendment before they could reenter the union.



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Dred Scott, a Missouri slave who had for a time been taken into free territory; sued for his freedom in Dred Scott v. Sandford (1857) but lost.

The author of the Fourteenth Amendment, Representative John Bingham of Ohio, and other supporters argued during congressional debates that the amendment would also, through its Privileges or Immunities Clause, extend the protections of the Bill of Rights to the states. The Supreme Court, however, refused to go along with this interpretation. In the *Slaughterhouse Cases* (1873), the Court held that the Privileges or Immunities Clause of the Fourteenth Amendment did not apply the Bill of Rights to the states, for doing so would “change the whole theory of the state and federal governments” and “would [make] this Court a perpetual censor upon all legislation of the states.”

But twenty-four years later, the Supreme Court did begin to apply the Bill of Rights to the states using the Due Process Clause of the Fourteenth Amendment. Over a period of seventy-five years, the Court eventually applied most of the Bill of Rights to the states—something it could have done all at once in the *Slaughterhouse Cases*.

DUE PROCESS

... NO STATE shall . . . deprive any person of life, liberty, or property, without

DUE PROCESS OF LAW . . .

This part of the Fourteenth Amendment is known as the Due Process Clause. Its wording is similar to the Due Process Clause of the Fifth Amendment, but it applies to the states, whereas the Fifth Amendment

restricts only the national government. Through the Due Process Clause of the Fourteenth Amendment, the Supreme Court has nationalized the Bill of Rights and applied most of its provisions to the states.

As discussed in the Fifth Amendment chapter, due process means that the government must be fair in its actions. Procedural due process means that the way the laws are carried out must be fair; substantive due process means that the laws themselves must be fair. Most cases using substantive due process have been based on the Fourteenth Amendment.

INCORPORATION OF THE BILL OF RIGHTS

James Madison included in his proposals for the Bill of Rights an amendment that forbade the states to violate "the rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." Although Madison regarded it as "the most valuable amendment in the whole list," Congress defeated the amendment. The provisions of the Bill of Rights thus limited only the federal government, not the states, as the Supreme Court held in *Barron v. Baltimore* (1833).

With the addition of the Fourteenth Amendment in 1868, however, the Court had a mechanism for applying the Bill of Rights to the states. In a series of decisions, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment "incorporates," or includes within it, certain fundamental provisions of the Bill of Rights—thus applying them to the states. By 1972, the Court had incorporated most of the rights in the first eight amendments, which contain most individual rights.

SELECTIVE INCORPORATION. The Supreme Court applied the Bill of Rights to the states in a piecemeal fashion, rather than all at once. The Court determined whether a right was important enough to be included in "due process of law." If so, that right was applied to the states. In *Palko v. Connecticut* (1937), Justice Benjamin Cardozo set forth the test for whether a right should be incorporated. Only those rights that were "fundamental" and essential to "a scheme of ordered liberty" would be incorporated.

TOTAL INCORPORATION. Some justices on the Supreme Court, most notably Justice Hugo Black, argued that the Fourteenth Amendment incorporated the entire Bill of Rights, not just selected rights that the Court deemed "fundamental." That a right was even listed in the Bill of Rights made it "fundamental" to advocates of total incorporation.

Case Study: *Adamson v. California* (1947)

In this case, Justice Hugo Black argued that the original purpose of the Fourteenth Amendment was to apply the Bill of Rights to the states.

Justice Black, dissenting . . .

My study of the historical events that culminated in the Fourteenth Amendment . . . persuades me that one of the chief objects that the provisions of the amendment's first section . . . were intended to accomplish was to make the Bill of Rights applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. . . .

I cannot consider the Bill of Rights to be an outworn eighteenth-century "straight jacket." . . . Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive

power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives. . . . I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the states, or . . . applying none of them, I would choose the *Palko* selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution. . . .

Moreover, these justices feared that selective incorporation gave judges too much discretion to pick and choose among rights according to their own subjective values.

INCORPORATION AND FEDERALISM. Advocates of selective incorporation argued, as had the Supreme Court in the *Slaughterhouse Cases*, that applying the entire Bill of Rights to the states would destroy the nature of federalism. The states should be free, they said, to be laboratories for new standards and procedures, not bound by the specific limitations of the Bill of Rights, which some saw as "an eighteenth-century straightjacket."

The Incorporation of the Bill of Rights

Year	Amendment	Provision Incorporated	Supreme Court Case
1897	Fifth	Just Compensation Clause	<i>Chicago, Burlington, & Quincy Railroad Co. v. Chicago</i>
1925	First	Freedom of speech	<i>Gitlow v. New York</i>
1931	First	Freedom of press	<i>Near v. Minnesota</i>
1932	Sixth	Right to counsel in capital felonies	<i>Powell v. Alabama</i>
1937	First	Freedom of assembly, petition	<i>DeJonge v. Oregon</i>
1940	First	Free Exercise Clause	<i>Cantwell v. Connecticut</i>
1947	First	Establishment Clause	<i>Everson v. Board of Education</i>
1948	Sixth	Right to public trial	<i>In re Oliver</i>
1949	Fourth	Protection from unreasonable searches, seizures	<i>Wolf v. Colorado</i>
1961	Fourth	Exclusionary rule	<i>Mapp v. Ohio</i>
1962	Eighth	Prohibition of cruel and unusual punishment	<i>Robinson v. California</i>
1963	Sixth	Right to counsel in noncapital felonies	<i>Gideon v. Wainwright</i>
1964	Fifth	Protection from self-incrimination	<i>Malloy v. Hogan</i>
1965	Sixth	Right to confront adverse witnesses	<i>Pointer v. Texas</i>
1966	Sixth	Right to an impartial jury	<i>Parker v. Gladden</i>
1967	Sixth	Right to speedy trial	<i>Klopper v. North Carolina</i>
1967	Sixth	Right to obtain favorable witnesses	<i>Washington v. Texas</i>
1968	Sixth	Right to trial by jury in nonpetty criminal cases	<i>Duncan v. Louisiana</i>
1969	Fifth	Prohibition of double jeopardy	<i>Benton v. Maryland</i>
1972	Sixth	Right to counsel in imprisonable misdemeanor cases	<i>Argersinger v. Hamlin</i>

However, proponents of total incorporation maintained that the specific language of the Bill of Rights was less of an intrusion upon the states than the subjective definition of due process used by the Supreme Court, which gave the states no standards to follow.

TWO SYSTEMS OF JUSTICE. Incorporation had the greatest impact on the criminal justice system, in part because much of the Bill of Rights protected defendants. As long as the Bill of Rights did not apply to the states, America had two systems of justice. Federal prosecutors were

required to have search warrants, trial by jury, counsel for the defendant, and other rights protecting the accused, but state prosecutors were not. This double standard encouraged disobedience of the Constitution, as the Supreme Court noted in *Mapp v. Ohio* (1961) regarding the exclusionary rule:

Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same [Fourth] Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. . . .

Eventually, the Supreme Court abolished the dual system of justice by incorporating almost all the provisions of the Bill of Rights dealing with the criminal process.

RIGHTS NOT INCORPORATED. Of the first eight amendments in the Bill of Rights, those provisions that have not been incorporated are: the Second Amendment's right to keep and bear arms; the Third Amendment's ban on quartering troops; the Fifth Amendment's right to a grand jury indictment; the Seventh Amendment's guarantee of trial by jury in civil cases; and the Eighth Amendment's prohibition of excessive bail and fines. The Supreme Court has not regarded these rights as "fundamental" enough to be a necessary part of due process.

Normally, when a right is incorporated, the same standard applies to the states as to the federal government. But although the Sixth Amendment right to a jury trial in criminal cases has been incorporated, states are not required to have twelve-person juries and unanimous verdicts in noncapital cases, although the federal government is. So at least a small vestige of the double standard in criminal justice still remains. But so much of the Bill of Rights was applied to the states under selective incorporation that, as Justice Black noted with pleasure, it came close to being total incorporation after all.

SUBSTANTIVE DUE PROCESS

Besides incorporation, the Due Process Clause of the Fourteenth Amendment has also been used to uphold rights not specifically listed in the Constitution, as mentioned in the Ninth Amendment chapter. Using substantive due process, the Court determines which "liberty" or "property" interests are fundamental and cannot be denied by state law, even if the law is enacted according to fair procedures. From the 1880s

to the 1930s, the Court mainly protected property interests; since the 1930s, the Court has focused on liberty interests.

PROPERTY INTERESTS. The rapid industrial growth of the late 1880s created many social problems—such as unsafe working conditions, long hours, low pay, and child labor. State legislatures passed laws attempting to correct these problems, under the rationale of promoting the general welfare. The critics of the laws, mainly businessmen, argued that the government should follow a *laissez-faire* policy of leaving the economy alone. Economic regulations, businessmen said, protected the “special interests” of the workers at the expense of property rights.

The Supreme Court upheld a *laissez-faire* economic policy in a series of cases. In the most notorious of these, *Lochner v. New York* (1905), the Court struck down a New York law that limited the work week of bakers to sixty hours. The Court held that the law restricted bakers’ “liberty of contract” to work for hours as long as they pleased—even though bakeries, not bakers, were subject to the law.

In a famous dissent, Justice Rufus Wrenn Holmes argued that “the Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*,” referring to a popular book that advocated Social Darwinism—the theory that “survival of the fittest” applies in business as well as in nature. “A constitution,” he maintained, “is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*.”

The *Lochner* decision became a symbol of the Supreme Court using substantive due process to impose its own subjective values. Critics argued that the Court was acting as a “super legislature,” second-guessing the value choices of the people’s elected representatives. The Court received so much criticism for its reversal of economic regulations, particularly during the New Deal, that it began to reverse itself. In *United States v. Carolene Products Company* (1938), the Court announced that economic regulations would be presumed constitutional and that a state had only to prove a “rational basis” for enacting the law—a very weak test. But in the famous Footnote 4 of that decision, the Court said that states must prove a “compelling interest”—a very difficult test—for laws affecting fundamental personal liberties.

LIBERTY INTERESTS. While the Supreme Court abandoned the field of economic regulation, it started to play a much greater role in protecting personal liberties. This role began in the 1920s, when the Court in *Meyer v. Nebraska* (1923) used substantive due process to strike down a

Nebraska law that forbade the teaching of languages other than English. And in *Pierce v. Society of Sisters* (1925), the Supreme Court struck down an Oregon law requiring parents to send their children to public schools, rather than private schools. In the 1950s, the Supreme Court also protected the right of international travel using substantive due process. More recently, the Court has upheld the right to privacy—including a woman's decision to have an abortion—and the right to die.

The Right to Privacy. As discussed in the Ninth Amendment chapter, the Supreme Court has used substantive due process under the Fourteenth Amendment to protect rights not specifically listed in the Constitution. The most famous of these rights is the right to privacy. In *Roe v. Wade* (1973), the Supreme Court ruled that the right to privacy was “founded on the Fourteenth Amendment’s concept of personal liberty” and was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”

In *Roe*, the Court set forth guidelines for how states could regulate abortions by dividing a pregnancy into three-month periods, or trimesters. During the first trimester, the state cannot prohibit or regulate abortions. During the second trimester, the state’s interest in the mother’s health increases, so that it can regulate how abortions are performed but not outlaw them. During the third trimester, the state has an interest in the “potentiality of human life” as the fetus becomes more viable, or able to live outside the mother’s body. States may prohibit third-trimester abortions, unless the life or health of the mother is endangered.

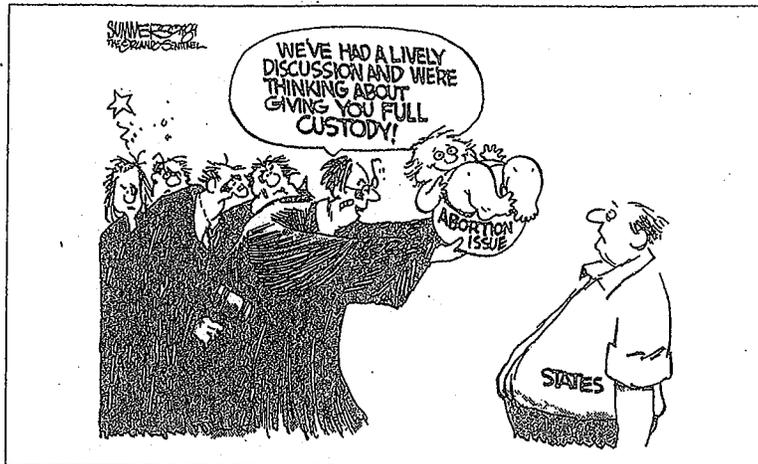
Since *Roe*, the Supreme Court has held that states and the federal government do not have to pay for abortions under Medicaid programs for poor people. The Court has also upheld laws that require minors to notify their parents before obtaining an abortion, as long as they can go before a judge instead of telling their parents if necessary. Generally, the Court has struck down laws that attempt to regulate abortions before the third trimester for reasons other than a woman’s health. But in *Webster v. Reproductive Health Services* (1989), the Court’s majority argued that a state’s interest in protecting human life began before viability. Some justices suggested that *Roe* be overturned and that abortions be regulated by the states instead.

Many states took *Webster* as an invitation to pass more restrictive abortion laws. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Supreme Court upheld *Roe v. Wade*—to the surprise of many experts—but it abandoned *Roe*’s trimester framework. Rather, the Court held that states were free to regulate abortions as long as they did not place an “undue burden” on a woman’s right to choose an abortion. The



Jane Roe Women's Center

Norma McCorvey was the actual “Jane Roe” in Roe v. Wade (1973). Plaintiffs in controversial cases sometimes use the aliases “Doe” or “Roe” to protect their anonymity.



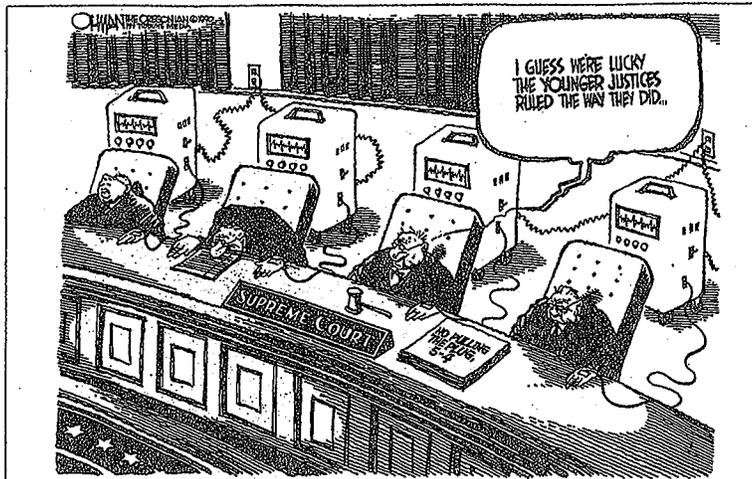
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Court defined “undue burden” as placing a “substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”

The Right to Die. Besides abortion, the Supreme Court has also used substantive due process to uphold the right to die. In *Cruzan v. Director, Missouri Department of Health* (1990), the Court held that the right to refuse medical treatment was a “liberty interest” protected by the Fourteenth Amendment. But the other issue in *Cruzan* was whether this right applied to a person who was incompetent, or unable to make choices for herself, like Nancy Beth Cruzan.

In 1983, Cruzan was critically injured in an automobile accident. Although paramedics were able to revive her, Nancy’s brain was without oxygen for about twelve minutes. She seemed unresponsive to her surroundings and was unable to swallow food or water. Doctors surgically inserted a tube into her stomach through which she received food and water to keep her alive. By 1987, her parents were convinced that Nancy was in a “persistent vegetative state” and would never get better. They wanted to have the feeding tube removed and allow Nancy to die, arguing that Nancy would not have wanted to live another thirty years (which her doctors believed was possible) as a “vegetable.” But Nancy’s nurses, the hospital, and the state of Missouri opposed the action—even though her care cost the state more than \$100,000 per year.

The trial court ruled for Nancy’s parents, who argued that they were the best persons to exercise Nancy’s right to die on her behalf, since Nancy could not do it herself. But the Missouri Supreme Court ruled that the state needed “clear and convincing evidence” of Nancy’s wishes,



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and overturned the lower court. The U.S. Supreme Court held that, although the Fourteenth Amendment protected a right to refuse medical treatment, states could require strong evidence that an incompetent person actually wanted to die in such circumstances, rather than turning that decision over to relatives.

Nancy's parents sued again in Missouri court, producing evidence from several of her friends that in specific conversations Nancy had said she would not want to "live like a vegetable." The court ordered the feeding tube removed, and, almost eight years after her accident, Nancy died. The *Cruzan* case prompted many Americans to draft living wills stating that they do not want to be kept alive by medical technology if they are terminally ill or in a persistent vegetative state.

EQUAL PROTECTION

... **NO STATE shall . . . deny to any person within its jurisdiction the EQUAL PROTECTION OF THE LAWS.** . . .

This part of the Fourteenth Amendment is known as the Equal Protection Clause, which forbids unreasonable discrimination. All laws discriminate in some fashion; a law forbidding burglary discriminates against burglars, for instance. But under the Equal Protection Clause, a law must have a good reason for treating people differently, especially if it discriminates on the basis of race or gender. Since the Equal Protection Clause only applies to the states, the Supreme Court has ruled that the

the Texas Supreme Court later ruled that education funds must be distributed equally across the state and ordered the legislature to come up with a new funding plan. In 1991, Texas enacted a "Robin Hood" law implementing the court's decision. Thus, a state supreme court can recognize a law as unconstitutional if it is not authorized under the U.S. Constitution by the U.S. Supreme Court.

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RURAL VS. URBAN. State legislatures traditionally had the power to determine the apportionment, or allocation and distribution, of legislative seats. Many state constitutions required that the legislature reapportion itself based on changes in population. However, as population shifted from rural to urban areas, legislators were reluctant to redraw district lines and put themselves out of office. Consequently, rural areas were over-represented in state legislatures and urban areas were underrepresented—so that a rural person's vote could be worth as much as forty-three times that of an urban person.

The courts would normally not get involved in reapportionment disputes, holding that such cases were "political questions" to be resolved by the legislatures. But in *Baker v. Carr* (1962), the Supreme Court ruled that federal courts could hear challenges to reapportionment plans under the Equal Protection Clause. And in *Reynolds v. Sims* (1964), the Court applied the "one person, one vote" rule to both houses of a state legislature. Population, said the Court, was the only basis for apportionment of legislative seats:

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. . . . The Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.

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A NEW CONSTITUTION

In the words of Justice Thurgood Marshall: "While the Union survived the Civil War, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the Fourteenth Amendment." Under the Fourteenth Amendment, the Bill of Rights was applied to the states, vastly expanding the reach of constitutional law. And under the Fourteenth Amendment, blacks and other Americans began to enjoy "equal protection of the laws." The Fourteenth Amendment was not just another amendment to the Constitution; it made possible a new Constitution.

THE END

