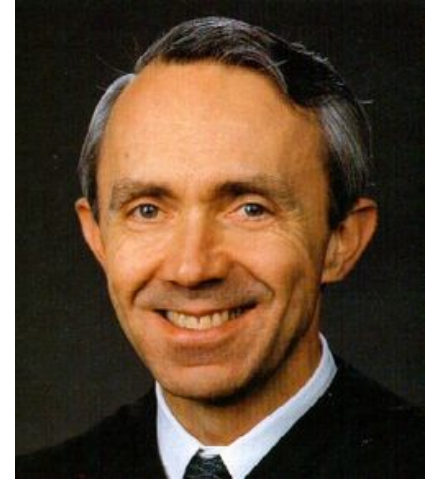


## Quotation

Supreme Court Justice David  
Souter referred to the  
Fourteenth Amendment as:



"[T]he most significant  
structural provision  
adopted since the  
original Framing."

---*McCreary County v. ACLU of Kentucky* (2005)

What does this mean?  
Your Summary:

## Important Sections of the Fourteenth Amendment

Why Important?  
Class Notes:

### 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. (Clause 1)

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; (Clause 2)

nor shall any state deprive any person of life, liberty, or property, without due process of law; (Clause 3)

nor deny to any person within its jurisdiction the equal protection of the laws. (Clause 4)

### Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed....

### Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

### The Fourteenth Amendment - Debrief

| What does this mean?<br>(Summary)  | Clauses of the Fourteenth Amendment  | Why important?<br>Class Notes   |
|--|--|---|
| <u>Clause 1 Summary:</u><br>(a) You can be a US citizen by birth or naturalization.<br>(b) If you are a citizen, you are a citizen of both the state you live in and the nation. | 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. | This made former slaves citizens and nullified the <u>Dred Scott</u> decision. Intended to unify the nation following the Civil War because previously, people saw themselves as citizens of states instead of citizens of the country (state citizenship was more important than national citizenship).  |
| <u>Clause 2 Summary:</u><br>The government cannot take away our rights as citizens.  | No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States   | As citizens of the US, people have certain rights (outside of the Bill of Rights). Some of the rights that follow national citizenship (although not listed in the clause), include the right to vote for federal office holders, protection on the high seas, and the right to pass freely from state to state.  |
| <u>Clause 3 Summary:</u><br>Government cannot take away life, freedom or property without following a fair process   | nor shall any state deprive any person of life, liberty, or property, without due process of law;  | Before the government can execute a person (capital punishment), take away their freedom (put in jail), or take away a person's private property (including money through fines), it must have established certain steps to ensure fairness. For example, a police officer cannot just throw someone in jail on a whim. There are certain safeguards that must be followed before a person ends up in jail. |

### The Fourteenth Amendment – Debrief (continued)

| What does this mean?<br>Summary   | Clauses of the Fourteenth<br>Amendment   | Why important?<br>Class Notes  |
|---|--|--|
| <u>Section 1, Clause 4</u><br>Summary: Governments should apply the laws equally for all people.  | nor deny to any person within its jurisdiction the equal protection of the laws.   | This guarantees that a government must treat an individual or group of individuals the same as it treats other individuals or groups in like circumstances.  |
| <u>Section 2 Summary:</u><br>Representation in the House of Representatives will be based on the total number of people living in each state, including both black and white people (but not Native Americans who do not pay taxes) | Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.... | This resulted in a constitutional change to Article I, Section 2, Clause 3, otherwise known as the Three-Fifths Compromise. Blacks were no longer considered 3/5 of a person for voting purposes; they were now equal to whites for representation purposes. |
| <u>Section 5 Summary:</u><br>Congress has the power to make laws to enforce this amendment  | The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.  | The section added to Congress' power to pass laws to combat discrimination such as the Civil Rights Act of 1964; the Voting Rights Act of 1965, Americans with Disabilities Act, 1990, as well as federal hate crimes legislation.                           |

**Why did Justice Souter believe this amendment was the most important structural change?**

# Due Process Clauses

**Due Process Defined:** A legal principle that the government must respect all of the legal rights that are owed to a person according to the law.

Specified in two ways:

- a course of formal proceedings (as legal proceedings) carried out regularly and in accordance with established rules and principles —called also ***procedural due process***
- a judicial requirement that enacted laws may not contain provisions that result in the unfair, arbitrary, or unreasonable treatment of an individual —called also ***substantive due process***

## Constitutional Provisions

| Fifth Amendment  | Fourteenth Amendment  |
|--|---|
| ...nor be deprived of life, liberty, or property, without due process of law | ...nor shall any state deprive any person of life, liberty, or property, without due process of law |

## Selective Incorporation Doctrine

*A constitutional doctrine (principle) whereby selected provisions of the Bill of Rights are made applicable to the states.*

<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/incorp.htm>; <http://www.merriam-webster.com/dictionary/due%20process>  
[http://en.wikipedia.org/wiki/Due\\_process](http://en.wikipedia.org/wiki/Due_process); <http://legal-dictionary.thefreedictionary.com/Incorporation+Doctrine>

## The Due Process Clause and Selective Incorporation

### Amendment I

- Guarantee against establishment of religion: This provision is applicable to the states. See *Everson v. Board of Education* (1947)
- Guarantee of free exercise of religion: This provision is applicable to the states. See *Cantwell v. Connecticut*, (1940).
- Guarantee of freedom of speech: This provision is applicable to the states. See *Gitlow v. New York* (1925)
- Guarantee of freedom of the press: This provision is applicable to the states. See *Near v. Minnesota* (1931).
- Guarantee of freedom of assembly: This provision is applicable to the states. See *DeJonge v. Oregon* (1937).
- Right to petition for redress of grievances: Incorporation is suggested in *Edwards v. South Carolina* (1963) and is essentially the basis of *Romer v. Evans* (1996).
- Guarantee of freedom of expressive association: This right, though not in the words of the first amendment, was first mentioned in the case *NAACP v. Alabama* (1958), and was at that time applied to the states.

### Amendment II

- Right to keep and bear arms: This right is applicable to the states. See *McDonald v. Chicago* (2010).

### Amendment III

- Freedom from quartering of soldiers: Not incorporated by the Supreme Court.

### Amendment IV

- Unreasonable search and seizure: This right is applicable to the states, along with the remedy of exclusion of unlawfully seized evidence, by the Supreme Court's decision in *Mapp v. Ohio* (1961). In *Mapp*, the Court overruled *Wolf v. Colorado* (1949), in which the Court had ruled that while the Fourth Amendment applied to the states (meaning that they were bound not to engage in unreasonable searches and seizures), the exclusionary rule did not (meaning that they were free to fashion other remedies for criminal defendants whose possessions had been illegally seized by the police in violation of the Fourth Amendment).
- Warrant requirements: The various warrant requirements have been incorporated against the states. See *Aguilar v. Texas* (1964). The standards for judging whether a search or seizure undertaken without a warrant was "unreasonable" also have been incorporated against the states. *Ker v. California* (1963).

### Amendment V

- Right to indictment by a grand jury: This right has not been applied to the states. *Hurtado v. California* (1884). Because many state constitutions provide for indictment by grand jury, at least in the case of serious crimes, it is unlikely that the Supreme Court will revisit the decision not to incorporate this right against the states.
- Protection against double jeopardy: This right is applicable to the states. *Benton v. Maryland* (1969).

- Constitutional privilege against self-incrimination: This right is applicable to the states. *Malloy v. Hogan* (1964). A note about the *Miranda* warnings: The text of the Fifth Amendment does not require that the police, before interrogating a suspect whom they have in custody, give him or her the now-famous *Miranda* warnings. Nevertheless, the Court has held that these warnings are a necessary prophylactic device, and thus required by the Fifth Amendment by police who interrogate any criminal suspect in custody, regardless of whether he or she is ultimately prosecuted in state or federal court.
- Protection against taking of private property without just compensation: This right is applicable to the states. See *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago* (1897).

## Amendment VI

- Right to a speedy trial: This right is applicable to the states. See *Klopfer v. North Carolina* (1967).
- Right to a public trial: This right is applicable to the states. See *In re Oliver* (1948).
- Right to trial by impartial jury: This right is applicable to the states. See *Duncan v. Louisiana* (1968). However, the size of the jury, as well as the requirement that it unanimously reach its verdict, varies between federal and state courts. Even so, the Supreme Court has ruled that a jury in a criminal case may have as few as six members. If there are twelve, only nine jurors need agree on a verdict. Furthermore, there is no right to a jury trial in juvenile delinquency proceedings held in state court. See *McKeiver v. Pennsylvania* (1971).
- Right to notice of accusations: This right is applicable to the states. *In re Oliver* (1948).
- Right to confront adverse witnesses: This right is applicable to the states. See *Pointer v. Texas* (1965).
- Right to compulsory process (subpoenas) to obtain witness testimony: This right is applicable to the states. See *Washington v. Texas* (1967).
- Right to assistance of counsel: This right is applicable to the states. See *Gideon v. Wainwright* (1963). In subsequent decisions, the Court extended the right to counsel to any case in which a jail sentence is imposed.

## Amendment VII

- Right to jury trial in civil cases: This right has NOT been applied to the states. See *Minneapolis & St. Louis R. Co. v. Bombolis*, (1916).
- Re-Examination Clause: This clause has been applied to the states. See *The Justices v. Murray*, (1869).

## Amendment VIII

- Protections against "excessive" bail and "excessive" fines: These provisions have NOT been applied to the states. In *Murphy v. Hunt*, (1982), the Court held that a pretrial detainee's suit under 42 U.S.C. § 1983 that he was being unconstitutionally denied bail, in violation of the Eighth Amendment, was rendered moot when he was convicted in a Nebraska court. The conclusion that the § 1983 case had been moot from the moment of the defendant's conviction allowed the Court to avoid deciding whether the Eighth Amendment protection against "excessive" bail applied to prosecutions in state court. In any event, all state constitutions provide for a similar right, and so the most frequent mechanism for challenging the amount of bail, or the complete denial of bail, remains state law.
- Protection against "cruel and unusual punishments": This provision is applicable to the states. See *Robinson v. California* (1962).

## Questions for Due Process and Selective Incorporation

1. What rights have been incorporated by the Supreme Court to apply to the states?
  - What kind of rights were incorporated first?
  - What kind of rights were incorporated much later?
  - Speculate on why there might be a gap of time between these incorporations?
  
2. What rights have not been incorporated by the Supreme Court to apply to the states?
  - Why might these rights have been left unincorporated?
  
3. During which time period did many of these incorporations take place?
  - Do they happen in a particular century or part of a century?
  - Do the incorporations seem to be clustered around a particular time in history?
    - If so, what do we know about this time period of history?
    - What might have changed that allowed for incorporation to take place?