

Due Process Clause

**Both 5th and 14th Amendment
provide that:**

**no person shall be deprived of
“life, liberty or property without
due process of law”**

Magna Carta, Art. 39 (1215)

“No free man shall be taken, or imprisoned, or desseized, or outlawed, or exiled, or any wise destroyed ... but by lawful judgment of his peers or by the law of the land.”

Two Forms of Due Process

Procedural: a person must be given notice and a fair hearing before a neutral decision-maker before adverse action

Substantive: Laws must be based in real needs and the means chosen to serve those needs must be based in both logic and evidence

A Hypothetical

A new policy states that all individuals with AIDS must be incarcerated to prevent the spread of the infection. All individuals have a right to a hearing and appeal.

***Barron v. Baltimore* (1835)**

- **Bill of Rights only applies to federal government**
- **Adopted for fear that federal government threatened those rights already recognized by states**

Slaughterhouse Cases (1873)

The 14th Amendment only protects rights held by individuals as federal citizens, not as state citizens. Cannot replicate basic rights of free speech, defendants' rights, etc as those are protected by states

Incorporated Amendments

Complete Incorporation:

First, Fourth, Sixth, Ninth

Partial Incorporation

Fifth (except requirement for Grand Jury)

Eighth (except ban on excessive bail or fines)

Non-Incorporated:

Second, Third, Seventh

Application of Bill of Rights to States

Amend	Right	Supreme Court Case
First	Speech	<i>Gitlow v. New York (1925)</i>
	Press	<i>Near v. Minnesota (1931)</i>
	Assembly	<i>DeJonge v. Oregon (1937)</i>
	Free Exercise of Religion	<i>Cantwell v. Connecticut (1940)</i>
	Establishment of Religion	<i>Everson v. Board of Education (1947)</i>
Fourth	Search & Seizure	<i>Wolf v. Colorado (1949)</i>
	Exclusionary Rule	<i>Mapp v. Ohio (1961)</i>

Application of Bill of Rights to States

	Right	Supreme Court Case and Year
Fifth	Just Compensation	<i>Chicago, Burlington, & Quincy RR. v. Chicago</i> (1897)
	Self-Incrimination	<i>Malloy v. Hogan</i> (1964)
	Double Jeopardy	<i>Benton v. Maryland</i> (1969)
Sixth	Public Trial	<i>In re Oliver</i> (1948)
	Assistance of Counsel	<i>Gideon v. Wainwright</i> (1963)
	Confrontation	<i>Pointer v. Texas</i> (1965)
	Impartial Jury	<i>Parker v. Gladden</i> (1966)
	Speedy Trial	<i>Klopfer v. No. Carolina</i> (1967)
	Jury Trial	<i>Duncan v. Louisiana</i> (1968)

Twinning v. New Jersey (1908)

Rights may be incorporated “not because they are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of the due process of law.”

Palko v. CT (1937)

Defines fundamental rights

Natural law definition:

“very essence of a scheme of ordered liberty”

Customary law definition:

“rooted in the traditions and conscience of our people”

Levels of Scrutiny

Strict Scrutiny

State must show “compelling governmental interest” & means are “narrowly tailored”

Intermediate or Heightened Scrutiny

State must show “important governmental interest” & means are “substantially related”

Ordinary Scrutiny

State must show “legitimate governmental interest” & means are “rationally related”

City of Richmond v. J.A. Croson (1989)

“The purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”

Justice Sandra Day O’Connor

Strict Scrutiny

Applies to Fundamental Rights

Policy must address a real, not speculative, problem, government has least discretion

Civil Liberties: Speech, Press, Assembly, Petition, Association, Defendants' Rights, Interstate Travel, Right to Vote

Equal Protection: Race, National Origin, Legal Residents (states), Poverty when relates to fundamental rights

Intermediate or Heightened Scrutiny

Applies to rights of intermediate importance, allows government some discretion

State must show “important governmental interest” & means are “substantially related”

Civil Liberties: Privacy

Equal Protection: Gender, Legitimacy of Birth, Illegal Aliens (states)

Ordinary Scrutiny

Permits government to exercise greatest discretion

State must show “legitimate governmental interest” & means are “rationally related”

Civil Liberties: Religious Establishment, Religious Free Exercise, Economic Due Process

Equal Protection: Age, Disability, Sexual Orientation, Resident and Illegal Aliens (federal), Wealth/Income

Scrutiny Reference Table

Level of Scrutiny	Standard	Liberties (Due Process)	Suspect Classes (Equal Protection)
Strict	compelling government interest/ least restrictive alternative or narrowly tailored	Speech, Press, Association, Defendants' rights, Privacy (before 1989), Free Exercise (before 1988), Interstate Travel, Right to Vote	Race, Religion, Ethnic Origin, Alienage (state regulation of legal residents), Poverty (criminal proceedings, family relationships)
Intermediate/ Heightened	important government interest/ substantially related OR "not an undue burden"	Privacy (since 1992)	Gender (since 1975), Legitimacy, Alienage (state regulation of illegal aliens or political functions)
Ordinary	legitimate government interest/ rationally related	Establishment, Free Exercise, Economic Due Process, Privacy (1989-1992)	Alienage (federal regulation), Disability, Poverty (most civil matters), Age

Facial Challenges v. As Applied

- **Facial challenges are to laws as written**
- **Challenges to a law or policy “as applied” look to the way that governmental actors have interpreted and enforced the law**