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Due Process and Rights of the Accused

Ways someday may be developed by which the government . . . will be enabled to expose to a jury the most intimate occurrences in the home."

—Justice Louis Brandeis's dissent in *Olmstead v. United States*, 1928

Essential Question: How have the provisions in the Bill of Rights and the Fourteenth Amendment been interpreted to balance due process and the rights of the accused with public safety and national security?

While the First and Second Amendments focus on guaranteeing individual liberties in relation to speech, religion, assembly, and gun ownership, other amendments in the Bill of Rights focus on protections of vulnerable populations—those suspected or accused of crimes, the poor and indigent, and the unborn—through the due process clause of the Fifth and Fourteenth Amendments. Constitutional provisions also help guide conflicts between individual liberties and national security concerns.

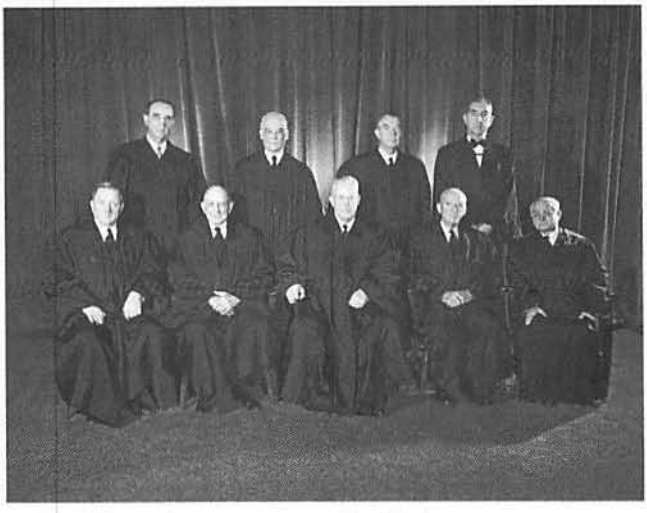
The United States has struggled to fully interpret and define phrases such as "unreasonable searches" and "cruel and unusual punishments." Citizens, leaders, and courts have interpreted these ideas differently over time. Justice Louis Brandeis's quote above—from his dissent in *Olmstead v. United States*, an early FBI wiretapping case—speaks to his concern for citizens' rights to privacy and protection from government intrusion into the home as basic wiretapping technology enabled the government to create a surveillance state. Brandeis, as spot on as his prediction was, could not have conceived the technological possibilities of invading citizen's dwellings, personal information, and everyday routines. In the past few years, the Supreme Court has ruled on when the government can or cannot look into your cell phone, when a drug-sniffing dog can step onto a citizen's porch, and whether police can use GPS devices to monitor suspects. **BIG IDEA:** Governmental laws and policies balancing order and liberty are based on the U.S. Constitution and have been interpreted differently over time.

Due Process

There are two types of due process: procedural and substantive. **Procedural due process** addresses the manner in which the law is carried out. **Substantive due process** addresses the essence of a law—whether the point of the law violates a basic right to life, liberty, or property. Both types of due process apply to the federal and state governments through the Fifth and Fourteenth Amendments. These measures prevent government from unfairly depriving citizens of their freedoms or possessions without being heard or receiving fair treatment under the authority of law. The concept ensures that government does not act arbitrarily on unstable whims and is consistently fair. The government *can* take away life, liberty, and property, but only in a highly specific, prescribed manner. Democratically elected legislatures must define criminal offenses before they are committed, and the government must follow prescribed procedures to ensure defendants' rights en route to a legitimate prosecution. As one Supreme Court justice wrote in an early decision, "The fundamental requisite of due process of law is the opportunity to be heard." As the Court interpreted and defined due process in various cases, it also selectively required states to follow additional rights from the Bill of Rights, thus expanding the incorporation doctrine discussed earlier in this chapter.

Procedural Due Process and the Fourth Amendment

Procedural due process refers to the way in which a law is carried out. For example, did the local court give the defendant a fair trial? Did the zoning board accurately appraise the value of the citizen's house before seizing it under its legal powers? Were the suspended students given a chance to explain



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The Warren Court, shown here in 1953, extended individual liberties and limited states' authority in the areas of search and seizure, the right to counsel, and self-incrimination.

their side of the story? Such questions arise in cases that have defined the concept of due process nationally. Under the leadership of Chief Justice Earl Warren (1953–1969), the Court extended liberties and limited state authority in areas of **search and seizure**, the right to legal counsel, and the right against self-incrimination during police interrogations.

The Fourth Amendment prevents law enforcement from conducting unreasonable searches and seizures. Before American independence, Great Britain cracked down on smugglers who tried to avoid taxes. To do so, it used writs of assistance—blanket search warrants—that empowered British soldiers to search any warehouse, vessel, or home at any time. This practice violated any sense of privacy or respect for personal property. The Fourth Amendment seeks to prevent the emergence of such an overpowering police state and requires courts to issue search warrants and arrest warrants only "upon probable cause" supported by a witness on record and under oath. The warrant, if issued, must list the place(s) to be searched and the persons or items to be seized. There are exceptions to the warrant requirement, however, especially when police see or quickly respond to crimes.

Exclusionary Rule In 1914, in *Weeks v. United States*, the Court established the **exclusionary rule**, which states that evidence the government finds or takes in violation of the Fourth Amendment can be excluded from trial. This decision protected the citizenry from aggressive federal police by reducing the chances of conviction. The justice system rejects evidence that resembles the "fruit of the poisonous tree," as Justice Felix Frankfurter called evidence tainted by acquisition through illegal means.

In 1961, the Court incorporated the exclusionary rule to state law enforcement. Seven police officers broke into Dollree Mapp's Cleveland house in search of a fugitive suspect and gambling paraphernalia. The police found no person or evidence related to either suspect or paraphernalia, but they did find some obscene books and pictures. Mapp was convicted on obscenity charges and sent to prison. When her case arrived in the Supreme Court, the justices ruled the police had violated her rights and should never have discovered the illegal contraband. ***Mapp v. Ohio*** (1961) became the selective incorporation case for the Fourth Amendment. Since that ruling state laws must abide by the Fourth Amendment.

Exceptions Law enforcement can still conduct searches without warrants, but they need to establish probable cause. Other exceptions to the warrant requirement include the consent of the person being searched and searches in airports and at U.S. borders.

Chief Justice Burger's Court refined the exclusionary rule to include the "inevitable discovery" and "good faith" exceptions. The inevitable discovery exception is when police find evidence in an unlawful search but would have eventually made the same discovery in a later, lawful search. The good faith exception addresses police searches under a court-issued warrant that is proven unconstitutional or erroneous later. In such instances, the police conducted the

search under the good faith that they were following the law and thus have not abused or violated the Fourth Amendment. Evidence discovered under these exceptions will likely be admitted at trial.

Searches in Schools As the *Tinker* decision upheld, students' constitutional rights do not stop at the schoolhouse gate. However, students in school have fewer protections against searches that may violate the public interest than do average citizens in public or in their home because, within the public school context, the public interest argument outweighs concerns for individual liberties.

This issue was decided in ***New Jersey v. TLO*** (1985). After a student informed a school administrator that another student, TLO (the Court used only initials to protect this minor's identity), had been smoking in the restroom, an assistant principal searched TLO's purse. He found cigarettes, as well as marijuana, rolling papers, plastic bags, a list of students who owed her money, and a large amount of cash. The administrator turned this evidence over to the police, who prosecuted the student. She appealed her conviction on exclusionary rule grounds. The Court ruled that although the Fourth Amendment does protect students from searches by school officials, in this case the search was reasonable. School officials are not required to have the same level of probable cause as police. Students are entitled to a "legitimate expectation of privacy," the Court said, but this must be weighed against the interests of teachers, administrators, and the school's responsibility and mission. The *New Jersey v. TLO* ruling gave administrators a greater degree of leeway than police in conducting searches, requiring that they have reasonable cause or suspicion.

What if a student leaves a backpack behind on the bus? Can school officials search it, knowing or not knowing who the owner is? That was recently answered in Ohio after a bus driver discovered a backpack left behind in his bus. He handed it over to the school security officer, who reached not-too-deeply into the bag to find a paper with the rightful owner's name on it. He then recalled a rumor that this student was a gang member. Then, with the principal, he emptied the bag and found bullets. They then summoned the student and searched a second bag and found a gun. Were these discovered items found lawfully or in violation of the Fourth Amendment? On appeal the Ohio Supreme Court found both the initial and secondary searches were reasonable. The school's public duty to act on unattended bags, and the student's relinquishing his expectation of privacy by leaving the bag behind, enhanced the school's ability to search. If the bag were just unattended while the owner went to the bathroom, of course, a high expectation of privacy would have remained. The Ohio court gave the administrators wide latitude on searching that bag, even if the administrators had no belief of imminent threat. Once the bullets were discovered, searching the second bag was within the school officials' scope.

Source: *GettyImages*

What is the current national legal standard for a school official to conduct a search of a student's locker, backpack, or person?

Erring on the Side of Warrants In other recent Fourth Amendment rulings the U.S. Supreme Court has extended protections regarding cell phones, GPS locators, and narcotics-sniffing dogs at a person's front door. In one case after a constitutional arrest in California, the police, in clearing a commandeered vehicle, discovered the arrestee's cell phone. They searched it and found video evidence of his membership in a gang. The challenge in the High Court questioned whether, after the arrest, law enforcement can search a suspect's phone for any general information. The Court ruled unanimously that, though police are allowed to search immediate items in the name of protecting other officers or preserving evidence, searching such comprehensive items as a cell phone and all the suspect's digital data—that which can be preserved without a search and does not pose an immediate threat—is only reasonable after a court-ordered warrant.

In a separate case, the Court ruled that attaching a GPS tracker to monitor a suspected drug dealer's movements and daily interactions was unconstitutional. When the challenge arrived at the Supreme Court, the government argued that a motorist moving about on the public streets does not have an expectation of privacy and their monitoring his movements did not even amount to a search. The Court, however, asserted that the government invades a reasonable expectation of privacy when it violates a subjective expectation of privacy. All motorists realize they might be seen, but few assume all their movements are monitored for 24-hour cycles. So this was indeed a search—an unreasonable search that would have been reasonable had the police secured a warrant ahead of time.

As a final example, a case from Florida, in which an officer walked a drug-sniffing dog up onto a citizen's front porch, arrived before the Court. The dog communicated to the officer that marijuana was inside the home. The officer secured a warrant, came into the home, and found 25 pounds of marijuana. Appealing the conviction, the suspect and his lawyer claimed that the search had taken place on the porch long before a warrant was obtained. Law enforcement cannot search willy-nilly along citizens' front porches in hopes of having their dogs smell incriminating evidence that the police can then pursue. The Court was divided on this case, but for now, police cannot take drug dogs onto a resident's porch without obtaining a warrant.

The Fourth Amendment in the Digital Age Two major changes in the past two decades have shaped government's relationship with its citizens and have disrupted the balance between American freedoms and national security. At the same time the United States and other developed countries moved from traditional to electronic and cellular communication, the concern for terrorism spiked when al-Qaeda terrorists attacked the United States on September 11, 2001 and killed about 3,000 people. In a drastic response to find these terrorists and prevent future attacks, the U.S. government capitalized on modern forms of investigation and electronic surveillance. (See pages 27–28 on the USA PATRIOT Act.) Not long after the attack, President George W. Bush initiated a program by executive order that secretly allowed the executive branch to connect with third parties—Verizon and other telecommunications companies—to acquire and examine cell phone data. This third-party relationship excused the government from obtaining warrants as long as the third party was willing to give up the information. In essence, this relationship was similar to the police asking a cocaine user where he purchased his stash, or asking a suspect's friend what the suspect had told him. No warrant is required for these questions.

As governmental security organizations, especially the National Security Agency (NSA), increased their surveillance efforts, they instituted a program code-named PRISM that compels Internet service providers to give up information related to Internet activity and communications. Also, as revealed by NSA contractor and now U.S. fugitive Edward Snowden, a program that processed overwhelming amounts of data allowed the United States and its intelligence apparatus to collect telephone metadata. **Metadata** is all the cell phone communication information minus the actual conversation; that is, who is calling whom, when, and for how long. The constitutional acceptance for such collection parallels an earlier Court ruling that allowed police to monitor calls made, though not the content of the conversation, if disclosed by a third party. The government's motivation here is to determine who might be connected to terror suspects in the United States and abroad and to what degree.

The government contends that since its activities do not spy on the actual conversation, the actions are non-intrusive and in compliance with the Fourth Amendment. But as David Cole of *The Nation* points out, "We are in danger of seeing our privacy go the way of the eight-track player." Metadata "can

reveal whether a person called a rape-crisis center, a suicide or drug-treatment hotline, a bookie, or a particular political organization." Should the government be privy to such information without probable cause or securing a particular warrant?

As David Gray sums up in his 2017 book *The Fourth Amendment in an Age of Surveillance*, investigative journalists report that "every major domestic telecommunications company provided telephonic metadata to the NSA under this program," and that the agency has gathered and stored metadata associated with a substantial proportion of calls made since 2006. In the wake of Snowden's blowing the whistle on the program while criminally violating his security agreement with the U.S. government (he is still in Russia under the protection of the Russian government), civil libertarians, privacy activists, Fourth Amendment attorneys, and ordinary citizens immediately sought to end the program. The 2015 USA FREEDOM Act has at least altered it. The new law does not completely eliminate the collection and storage of this metadata by cell-phone operators, but it does prevent the government easy access to it. The new law requires the Executive Branch to acquire a warrant to examine the metadata.

Procedural Due Process and the Rights of the Accused

Procedural due process also guarantees that the accused are treated fairly and according to the law. The Fifth, Sixth, and Eighth Amendments have been mostly incorporated so they apply to the states as well.

Self-Incrimination "You have the right to remain silent . . . ." goes the famed Miranda warning. This statement also reminds arrested suspects that "anything you say can and will be used against you." Since 1966, this statement has become familiar, mostly through TV crime dramas. The warning resulted from an overturned conviction of a rapist who confessed to his crime in ***Miranda v. Arizona***.

For years, the Court handled a heavy appellate caseload addressing the problem of police-coerced confessions. Many losing defendants claimed during appeal that they had confessed only under duress, while police typically insisted the confessions were voluntary. The **Fifth Amendment** states, "nor shall [anyone] be compelled in any criminal case to be a witness against himself." Since a number of related cases about police procedures were reaching the Court, the justices took Miranda's case and created a new standard.

Ernesto Miranda, an indigent man who never completed the ninth grade, was arrested for the kidnapping and rape of a girl in Arizona. The police questioned Miranda for two hours until they finally emerged from the interrogation room with a signed confession. The confession was a crucial piece of evidence at Miranda's trial.

There had been some question as to when the Fifth Amendment right against self-incrimination begins. It clearly meant no defendant was compelled to take the witness stand at trial. In *Miranda*, the Court declared the right applies once a suspect is in custody by the state. It declared that custodial interrogation carries with it a badge of intimidation. If such pressures from the state are going to occur, the police must inform the suspect of his or her rights.

Civil libertarians hailed the *Miranda* ruling, while conservatives and law enforcement saw it as tying the hands of the police. Miranda received a new trial that did not use his confession. Additional proof, it turned out, was enough to convict this rapist. He went to prison while changing the national and state due process law.

There is, however, one exception to the *Miranda* rule, the **public safety exception**. A number of cases starting in the 1980s have allowed statements obtained before a suspect was warned of his or her rights to be admitted as evidence on the basis of protecting the public safety. In the first such case, *New York v. Quarles*, police chased Benjamin Quarles, who had been identified as assaulting a woman and carrying a gun, into a grocery store. When he was surrounded by police officers, he was searched and the police found an empty gun holster. The police asked Quarles where the gun was, and Quarles indicated it was in an empty milk carton. In the original case, the suspect's attorneys tried to have Quarles's statement on the location of the gun and the gun itself suppressed from evidence because he had not been warned of his rights against self-incrimination. When the case reached the Supreme Court, however, the Court reasoned that although the suspect was surrounded by police, he was not otherwise coerced to answer the question, and the question was necessary to protect the public from the danger of a loaded gun. Later cases upheld the public safety exception. If the questioning is for the purpose of neutralizing a dangerous situation, and a suspect responds voluntarily, the statement can be used as evidence even though it was made before the *Miranda* rights were read.

Right to Counsel "If you cannot afford an attorney, one will be appointed for you," the Miranda warning continues. This wasn't always the case. Though the Sixth Amendment's right to counsel has been in place since the ratification of the Bill of Rights, it was first merely the right to have a lawyer present at trial, and, as with the rest of the Bill of Rights, it originally applied only to defendants in federal court. In a series of cases starting in the 1930s, the Supreme Court developed its view of right to counsel in state criminal cases. The first established that when the death penalty was possible, the absence of counsel amounted to a denial of fundamental fairness. In 1942, the Court ruled in *Betts v. Brady* that refusal to appoint defense counsel in noncapital cases did not violate the amendment, but that the state did have to provide counsel when defendants had special circumstances, like incompetency or illiteracy. These precedents were shaped further with *Gideon v. Wainwright*.

MUST-KNOW SUPREME COURT DECISIONS:
GIDEON V. WAINWRIGHT (1963)

The Constitutional Question Before the Court: Does a state's prosecution of a criminal defendant without counsel constitute a violation of the Sixth Amendment's right to counsel?

Decision: Yes, for Gideon, 9:0

Facts: Clarence Earl Gideon, a drifter who had served jail time in four previous instances, was arrested for breaking and entering a Florida pool hall and stealing some packaged drinks and coins from a cigarette machine. He came to his trial expecting the local court to appoint him a lawyer because he had been provided one in other states in previous trials. The Supreme Court had already ruled that states must provide counsel in the case of an indigent defendant facing the death penalty, or in a case in which the defendant has special circumstances, such as illiteracy or psychological incapacity. At the time of Gideon's trial, 45 states appointed attorneys to all indigent defendants. Florida, however, did not.

Gideon was convicted and sent away to Florida's state prison in Raiford. From the prison, Gideon filed an *in forma pauperis* brief with the Supreme Court, a procedure "in the form of a pauper" available to those who believe they were wrongly convicted and do not have the means to appeal through the typical channels. The Court receives thousands of these each year, and every now and then it deems one worthy. The Court appointed an attorney for Gideon to argue this case. His attorney argued that the Fourteenth Amendment's due process clause required states to follow the Sixth Amendment provision. Since this decision in *Gideon v. Wainwright*, all states must pay for a public defender when a defendant cannot afford one

The Court voted 9:0 for Gideon and ruled that Florida had to provide defense attorneys to all indigent defendants regardless of the severity of the crime.

Reasoning: The Court reasoned that a basic principle of the American system of government is that every defendant should have an equal chance at a fair trial, and that without an attorney, a defendant does not have that equal chance. In the majority opinion, Justice Black quoted from a number of previous cases that supported the appointment of an attorney for indigent persons and argued that the 1942 case of *Betts v. Brady* went against the Court's own precedents. Further, the Court reasoned that there was no logical basis to the distinction between a capital offense, which would allow the appointment of an attorney for an indigent person, and a noncapital offense, which until the Gideon decision would not have allowed free legal representation to indigent persons.

Source: *Public Domain/State of Florida*
Clarence Earl Gideon

The Court's Majority Opinion by Mr. Justice Hugo Black: In returning to these old precedents, we . . . restore constitutional principles established to achieve a fair system of justice. Not only these precedents, but also reason and reflection, require us to recognize that, in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Three other justices filed concurring opinions with different reasons for supporting the ruling. In his concurring opinion, Justice Tom C. Clark focused on due process.

Concurring Opinion by Mr. Justice Tom Clark: That the Sixth Amendment requires appointment of counsel in "all criminal prosecutions" is clear both from the language of the Amendment and from this Court's interpretation. It is equally clear . . . that the Fourteenth Amendment requires such appointment in all prosecutions for capital crimes. The Court's decision today, then, does no more than erase a distinction which has no basis in logic and an increasingly eroded basis in authority . . . I must conclude here . . . that the Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprival of "liberty," just as for deprival of "life," and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life—a value judgment not universally accepted—or that only the latter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

Political Science Disciplinary Practices: Explain How the Court's Decision Relates to Political Principles

Justice Clark states in his concurring opinion that "there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved." With this statement he affirms that if the principle of due process applies in one instance it should apply in other instances comparable in important ways. Examine how the Court's decision relates to other principles through the activity below.

Apply: Complete the following tasks.

1. Explain the principles on which Justice Black's opinion relies.
2. Explain the relationship between the Sixth and Fourteenth Amendments as they apply to selective incorporation.
3. Explain how the decision in this case balances the principles of individual liberties and state powers.

Death Penalty The Eighth Amendment prevents cruel and unusual punishments and excessive bail. Capital punishment, or the death penalty, has been in use for most of U.S. history. A handful of states, as well as most Western and developed countries, have banned the practice. States can use a variety of methods of execution; lethal injection is the most common. From 1930 through the 1960s, 87 percent of death penalty sentences were for murder, and 12 percent were for rape. The remaining 1 percent included treasonous charges and other offenses. In the United States, strong majorities have long favored the death penalty for premeditated murders.

The Court put the death penalty on hold nationally with the decision in *Furman v. Georgia* in 1972. In a complex 5:4 decision, only two justices called the death penalty itself a violation of the Constitution. The Court was mostly addressing the randomness of the death penalty. Some justices pointed out the disproportionate application of the death penalty to the socially disadvantaged, the poor, and racial minorities.

With the decision of *Gregg v. Georgia* in 1976, the Court began reinstating the death penalty as states restructured their sentencing guidelines. No state can make the death penalty mandatory by law. Rather, aggravating and mitigating circumstances must be taken into account in the penalty phase, a second phase of trial following a guilty verdict. Character witnesses may testify in the defendant's favor to affect the issuance of the death penalty. In recent years, in cases of murder, the Court has outlawed the death penalty for mentally handicapped defendants and those defendants who were under 18 years of age at the time of the murder.

Substantive Due Process

Substantive due process places substantive limits on what laws can actually be created. If the substance of the law—the very point of the law—violates some basic right, even one not listed in the Constitution, then a court can declare it unconstitutional. State policies that might violate substantive due process rights must meet some valid interest to promote the police powers of regulating health, welfare, or morals. The right to substantive due process protects people from policies for which no legitimate interest exists.

These policies became a thorny issue as labor unions and corporations debated the Constitution and while legislatures tried to promote the health and safety of citizens. The 1873 *Slaughterhouse Cases* forced a decision on the privileges or immunities clause of the recently ratified Fourteenth Amendment. The *Slaughterhouse Cases* were a group of cases relating to the state of Louisiana's consolidation of slaughterhouses into one government-run operation outside of New Orleans, requiring butchers in other locations to close up shop and thereby infringing on their right to pursue lawful employment. The majority opinion ruled that the Fourteenth Amendment's privileges or immunities clause protected only those rights related to national citizenship and did not apply to the states, even though the state law in this case limited the butchers' basic right to pursue lawful employment. In a dissenting opinion, Justice Joseph Bradley asserted that "the right of any citizen to follow whatever lawful employment he chooses to adopt . . . is one of his most valuable rights and one which the legislature of a State cannot invade," so a law that violates such a fundamental, inalienable right cannot be constitutional. The Court majority, however, interpreted the law on a procedural basis rather than addressing the substance of the right involved. In later years, when the Court addressed business regulation in the industrial period, it developed the substantive due process doctrine in relation to state and federal regulations in the workplace.

Right to Privacy In the 1960s a new class of substantive due process suits came to the Court. These suits sought to protect individual rights, especially those of privacy and lifestyle. In ***Griswold v. Connecticut*** (1965), the Court ruled an old anti–birth control state statute in violation of the Constitution. The overturned law had even barred married couples from receiving birth control literature. The Court for the first time emphasized an inherent **right to privacy** that, though not expressly mentioned in the Bill of Rights, could be found in the penumbras (shadows) of the First, Third, Fourth, and Ninth Amendments.

The Court further bolstered the right to privacy in the ***Roe v. Wade*** **(1973)** decision. Primarily a question of whether Texas or other states could prevent a woman from aborting her fetus, the decision rested on a substantive due process right against such a law. Whether a pregnant woman was to have or abort her baby was a private decision between her and her doctor and outside the reach of the government. These two cases together revived the substantive due process doctrine first laid down a century earlier.

MUST-KNOW SUPREME COURT DECISIONS: *ROE V. WADE* (1973)

The Constitutional Question Before the Court: Does Texas's anti-abortion statute violate the due process clause of the Fourteenth Amendment and a woman's constitutional right to an abortion?

Decision: Yes, for Roe, 7:2

Facts: In 1971, when Texas resident Norma McCorvey, a single circus worker, became pregnant for the third time at age 19, she sought an abortion. States had developed anti-abortion laws since the early 1900s, and this case reached the Court as the national debate about morality, responsibility, freedom, and women's rights had peaked. At the time, only four states allowed abortions as in this case, and Texas was not one of them (Texas did allow abortions in cases when the mother's life was at stake).

With Attorney Sarah Weddington of the American Civil Liberties Union (ACLU), McCorvey filed suit against local District Attorney Henry Wade. To protect her identity the Court dubbed the plaintiff "Jane Roe" and the case became known as *Roe v. Wade*.

Reasoning: The legal principle on which the case rests was new and somewhat revolutionary. Weddington and her team argued that Texas had violated Roe's "right to privacy" and that it was not the government's decision to determine a pregnant woman's medical decision. Though there is no expressed right to privacy in the Constitution, the Court had decided in *Griswold v. Connecticut* in 1965 that the right to privacy was present in the penumbras of the Bill of Rights. Meanwhile, the state stood by its legal authority to regulate health, morals, and welfare under the police powers doctrine, while much of the public argued the procedure violated a moral code. Roe relied largely on the Fourteenth Amendment's due process clause, arguing that the state violated her broadly understood liberty by denying the abortion. However, the majority opinion recognized that the "potentiality of human life" represented by the unborn child is also of interest to the state.

The Court's Majority Opinion by Mr. Justice Harry Blackmun, with which Justices Douglas, Brennan, Stewart, Marshall, Powell, and Chief Justice Burger joined: State criminal abortion laws, like those involved here . . . violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term . . . .

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Justice Stewart wrote a concurring opinion that stressed the foundational role of substantive due process and the Fourteenth Amendment in arriving at the majority opinion, arguing that the liberty to which the Fourteenth Amendment refers must be understood broadly.

In dissenting opinions, Justice Rehnquist raised a technical question about the legal standing of the case, questioning whether Roe, who already gave birth to her baby (and had given the baby up for adoption), could file a complaint on behalf of others who might find themselves in her position. He wrote that plaintiffs "may not seek vindications for the rights of others." Justice White addressed substantial disagreement with the interpretation of the majority.

Dissenting Opinion written by Justice Byron White with which Justice William Rehnquist joins: At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless, unwanted for any one or more of a variety of reasons— convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. . . . The Court, for the most part, sustains this position: during the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect the fetus from an abortion not prompted by more compelling reasons of the mother. . . .With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgment.

Since *Roe*: The Court has addressed a series of cases on abortion since *Roe* and the abortion issue inevitably comes up at election time and during Supreme Court nominees' confirmation hearings. In *Planned Parenthood v. Casey*, the Court outlawed a Pennsylvania law designed to discourage women from getting an abortion or expose abortion patients via public records. It also did not uphold the "informed consent" portion of the law that required the aborting woman (mother), married or unmarried, to inform and secure consent from the father. However, the *Casey* decision did uphold such state requirements as a waiting period, providing information on abortion alternatives, and requiring parental (or judge's) consent for pregnant teens.

Political Science Disciplinary Practices: Explain the Court's Reasoning

The *Roe* case against the Texas law forbidding abortion came to the Supreme Court on appeal after a decision by the United States District Court for the Northern District of Texas. That decision struck down the Texas law on the basis of the Ninth Amendment, relying in part on the decision in *Griswold*. The Supreme Court, however, based its decision on the due process clause of the Fourteenth Amendment, reinforcing substantive due process.

Apply: Complete the following tasks.

1. Analyze the wording in the due process clause of the Fourteenth Amendment that supports the privacy right of a woman to decide whether or not to carry her unborn child to term. (See page 639 for the Fourteenth Amendment.) Explain your answer.
2. Explain how the Court distinguished different legal standards throughout a woman's pregnancy.
3. Explain the competing interests the Court had to consider and how it balanced those interests.
4. Explain Justice White's concern about the impact of the Court's decision.
5. Explain the issues related to federalism in this decision.
6. Explain the similarities and differences in the *Roe* and *Planned Parenthood* rulings.

***Roe* and Later Abortion Rulings** Before 1973, abortion on demand was legal in only four states. The *Roe* decision made it unconstitutional for a state to ban abortion for a woman during the first trimester, the first three months of her pregnancy. An array of other state regulations developed in response. States passed statutes to prevent abortion at state-funded hospitals and clinics. They adjusted their laws to prevent late-term abortions. In 1976, Congress passed the Hyde Amendment (named for Illinois Congressman Henry Hyde) to prevent federal funding that might contribute to an abortion.

Civil Liberties and National Security

The Court has typically sided with governmental restrictions on liberties that protect national security during times of war or international threat. (See *Schenck v. United States* on page 240.) Two months after the Japanese bombed Pearl Harbor, the federal government created internment camps to relocate Japanese immigrants and Japanese Americans for the remainder of the war. Internee Fred Korematsu challenged this practice in the Supreme Court on the grounds that the government had exceeded its proper war powers and that the practice violated the equal protection clause of the Fourteenth Amendment because it targeted only Japanese Americans. Korematsu lost—the Court applied strict scrutiny and found the government's interest during wartime sufficiently compelling to limit individual liberties even of a selected group of people. Although the internees were compensated in the 1980s for their treatment, the ruling has never been officially overturned. Congress curtailed First Amendment liberties during the Cold War and during the Vietnam War. Since the September 11th attacks in 2001, the United States has wrestled with the issue of protecting the nation from terrorism while also maintaining constitutional rights.

September 11

In Chapter 1 you read about the USA PATRIOT Act in response to the terrorist attacks on September 11, 2001, and the civil liberties questions raised when government surveillance efforts intensified. (See pages 27–28.) Additional issues related to the "war on terror" also drew attention to civil liberties.

Executive Branch Initiatives U.S. armed forces quickly invaded Afghanistan, where al-Qaeda operated under the ruling Taliban regime. The terrorist network, however, also operated in cells throughout the Middle East and beyond. Some members were in the United States. President Bush issued an executive order authorizing trials of captured terrorists to take place via military tribunals rather than civilian courts.

A debate about handling terrorists created controversy. Should the United States seek out these terrorists as criminals who violated federal law under the established criminal justice system, or should the federal government treat this as a war against an outside adversary? In other words, does the Bill of Rights apply to these people? In both cases, the government must follow established laws. If done through law enforcement, the government arrests terrorists and tries them in U.S. district courts to put them away in prison if convicted. This approach requires the government to follow standard criminal justice due process rights. If done as part of a war effort, the federal government has fewer restrictions but still must recognize U.S. law and international treaties. Depending on the circumstance, the government currently acts in both ways and employs tactics that critics declare violate the Constitution and international law.

When President Bush declared a "war on terror," questions arose. For example, does the 1949 Geneva Convention, the international treaty that governs the basic rules of war, apply? Al-Qaeda is not a nation-state and is not a signatory (signer) of the Geneva Convention or any international treaty. In that case, does the United States have to honor Geneva provisions when acting against al-Qaeda? And does the Constitution apply to U.S. action beyond U.S. soil (especially when acting against enemies)? The Bush administration categorized those captured on the terror battlefield—meaning basically anywhere—as "enemy combatants" and treated their legal condition differently than either an arrested criminal or a conventional prisoner of war.

Guantanamo Bay and Interrogations The U.S. military set up a detention camp at its naval base in Guantanamo Bay, Cuba, to hold terror suspects. Placing the camp at this base provided stronger security, minimal press contact, and less prisoner access to legal aid than if it had been within U.S. borders. Administration officials believed that the location of the camp and interrogations outside the United States allowed a loosening of constitutional restrictions.

Soon after 9/11, administration officials signaled that unconventional tactics would be necessary to prevent another devastating attack. In trying to determine the legal limits of an intense interrogation, President Bush's lawyers issued the now infamous "torture memo." In August of 2002, President George

W. Bush's Office of Legal Counsel offered the legal definition of torture, calling it "severe physical pain or suffering." The memo claimed such pain "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." One of the notorious techniques employed to gather information from reluctant detainees that fit this description was waterboarding—an ancient method that simulates drowning.

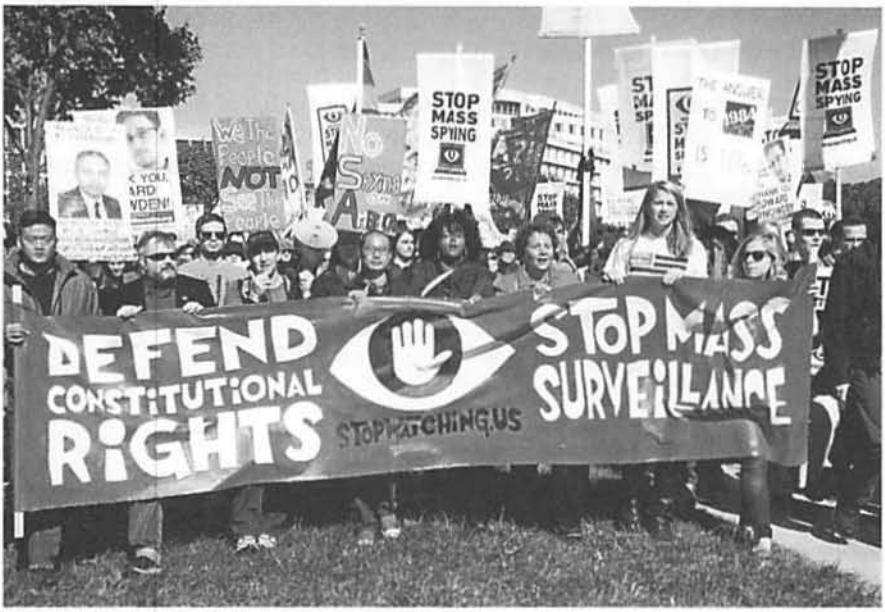
As these policies developed and became public, some people became outraged. Civil libertarians in the United States questioned the disregard for both *habeas corpus* rights and the Eighth Amendment's prohibition of cruel and unusual punishment. The international community, too, was aghast.

In the Courts

These legal complications and competing views on how to apply international law and the Bill of Rights in a war against an enemy with no flag have caused detainees and their advocates to challenge the government in court. A lower court has declared part of the USA PATRIOT Act unconstitutional. The Supreme Court has addressed *habeas corpus* rights.

The right of *habeas corpus* guarantees that the government cannot arbitrarily imprison or detain someone without formal charges. Could detainees at Guantanamo Bay question their detention? The president said no, but the Court said yes. *Rasul v. Bush* (2004) stated that because the United States exercises complete authority over the base in Cuba, it must follow the Constitution. Fred Korematsu, who lost his own *habeas corpus* claim in 1944, submitted an *amicus curiae* brief in support of Rasul. "It is during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested," Justice Sandra Day O'Connor wrote, "and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."

In *Hamdi v. Rumsfeld* (2004), the Court overruled the executive branch's unchecked discretion in determining the status of detainees. After this, the United States could not detain a U.S. citizen without a minimal hearing to determine the suspect's charge. In a separate case, *Hamdan v. Rumsfeld* (2006), the Court found that Bush's declaration that these detainees should be tried in military tribunals violated the United States Code of Military Justice. The commissions themselves, wrote Associate Justice John Paul Stevens, violated part of the Geneva Convention that governed noninternational armed conflicts before a "regularly constituted court ... affording judicial guarantees ... by civilized peoples." As summed up in *Hamdi*, "We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens.



Source: *Rena Schild / Shutterstock*

Citizens rally to protest mass surveillance policies.

BY THE NUMBERS SUPREME COURT VOTES IN DUE PROCESS DECISIONS		
Mapp v. Ohio (1961)	States must follow the exclusionary rule.	6 : 3
Gideon v. Wainwright (1963)	States must supply defense attorneys to indigent defendants.	9 : 0
Miranda v. Arizona (1966)	States must inform the accused of their rights.	5 : 4
Griswold v. Connecticut (1965)	Privacy rights prevent state anti-birth control law.	7 : 2
Roe v. Wade (1973)	States cannot outlaw abortion in first trimester and must adhere to the trimester standard established by the Court.	7 : 2
Hamdi v. Rumsfeld (2004)	The U.S. cannot hold terror suspects without following *habeas corpus* rights.	6 : 3
Hamdan v. Rumsfeld (2006)	The U.S. must follow Geneva Convention and cannot rely strictly on military commissions in prosecuting terror suspects.	5 : 3

What do the numbers show? In which decisions did the Court have stronger majorities or unanimous opinions? Which cases brought narrow decisions? What do the narrow decisions say about the view of civil liberties? Which cases altered or shaped law enforcement? Which ones dealt with privacy? Which amendments were at issue in each case?

REFLECT ON THE ESSENTIAL QUESTION

Essential Question: *How have the provisions in the Bill of Rights and the Fourteenth Amendment been interpreted to protect civil liberties, and how has the government responded to questions when there are conflicts between security and liberty?*

On separate paper, complete a chart like the one below to gather details to answer that question.

Cases that protect civil liberties	Cases that protect national security and social order

KEY TERMS AND NAMES

exclusionary rule/278
Fifth Amendment/282
Gideon v. Wainwright (1963)/283
Griswold v. Connecticut (1965)/287
Mapp v. Ohio (1961)/278
metadata/281
Miranda v. Arizona (1966)/282
New Jersey v. TLO (1985)/279
procedural due process/277
public safety exception/283
right to privacy/287
Roe v. Wade (1973)/287
search and seizure/278
substantive due process/277

MULTIPLE-CHOICE QUESTIONS

1. The Bill of Rights guarantees which of the following rights to a person arrested and charged with a crime?
   (A) The right to participate in elections
   (B) The right to negotiate a plea bargain
   (C) The right to an appeal if convicted
   (D) The right to legal representation

2. Which of the following principles is meant to discourage government from conducting unlawful searches and to protect citizens when unlawful searches occur?
   (A) Clear and present danger
   (B) Police powers
   (C) Exclusionary rule
   (D) Prior restraint

3. Which of the following statements best describes how the balance of liberties and safety has been interpreted over time?
   (A) The balance has been interpreted consistently over time.
   (B) The balance leans more toward liberties than safety.
   (C) Different courts in different times have found different balances.
   (D) Stare decisis requires similar findings in similar cases.

4. Which statement best describes the Supreme Court's interpretation of the Fourteenth Amendment?
   (A) The Fourteenth Amendment has restricted the application of judicial review.
   (B) The Fourteenth Amendment prevents states from taxing agencies of the federal government.
   (C) The Fourteenth Amendment's due process clause makes most rights contained in the Bill of Rights applicable to the states.
   (D) The Fourteenth Amendment's equal protection clause defines certain classes of people who are not eligible for equal protection.

5. What is the key difference between the due process clause in the Fifth Amendment and the due process clause in the Fourteenth Amendment?
   (A) The Fifth Amendment prevents government from depriving persons of liberty, while the Fourteenth Amendment prevents a deprivation of life.
   (B) The Fifth Amendment sets limits on the private sector, while the Fourteenth Amendment restrains governmental institutions.
   (C) The Fifth Amendment protects citizens against the federal government, while the Fourteenth protects citizens against the states.
   (D) The Fifth Amendment protects citizens against criminal charges, while the Fourteenth Amendment protects citizens against civil lawsuits.

6. Which statement accurately describes the Supreme Court's contemporary interpretation of the death penalty?

(A) States may not use the death penalty.

(B) The interpretation focuses on the method of execution.

(C) The Court has found the practice unconstitutional because it is cruel and unusual.

(D) The Court has interpreted the execution of minors and the mentally handicapped as unconstitutional.

7. Under what circumstance can police conduct searches?

(A) Only if a court issues a warrant

(B) If they have slight suspicion of wrongdoing

(C) As long as they have probable cause of criminal activity

(D) If they have been tipped off by a reliable source

8. Which statement is accurate regarding the law and government surveillance of persons in the United States?

(A) Police and FBI can listen to private phone conversations when they see fit.

(B) U.S. law enforcement first began to watch or surveil U.S. persons after the September 11th attacks.

(C) The Constitution and Bill of Rights protect only U.S. citizens from arbitrary surveillance.

(D) Policies have changed over time as people debate the balance between security needs and individual liberties.

9. Which of the following is an accurate comparison of substantive and procedural due process?

	SUBSTANTIVE DUE PROCESS	PROCEDURAL DUE PROCESS
(A)	Deals with "the how" of the law, or steps in carrying out the law	Must be followed by the states, not the federal government
(B)	Followed when the ideas or points of the law are fundamentally fair and just	Focuses on the manner in which government acts towards its citizens
(C)	Applicable because of the Fifth Amendment, not the Fourteenth Amendment	Was violated in the *Roe v. Wade* case according to the Supreme Court
(D)	Must be followed by the federal government, not state governments	Is followed when Congress follows the legislative process in lawmaking

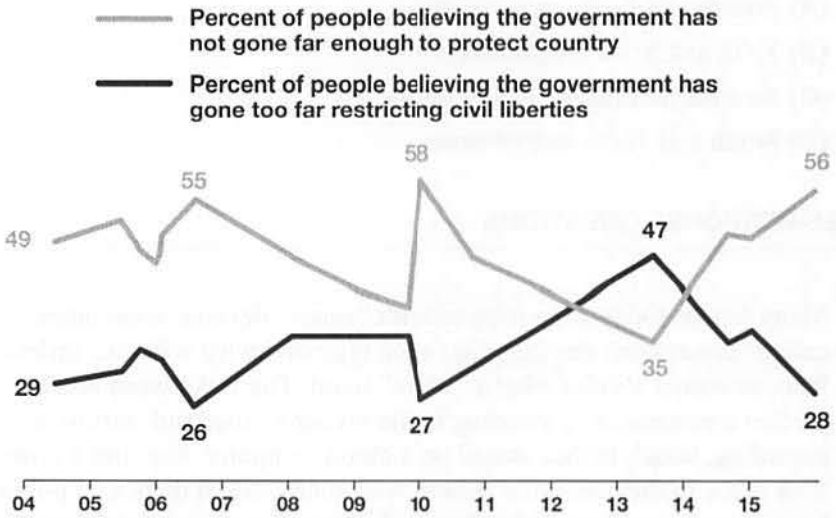
10. The Miranda rule stems from rights protected by which of the following amendments?
    (A) Fourth and Fifth amendments
    (B) Fifth and Sixth amendments
    (C) Seventh and Eighth amendments
    (D) Ninth and Tenth amendments

FREE-RESPONSE QUESTIONS

1. Many homes today are equipped with "smart" devices, sometimes called "always on" devices. One such type of device will take orders from an owner's voice after a "wake" word. The wake word sets in motion a process of responding to the owner's order and starting a recording, which is then stored on a cloud computer. Suppose a crime took place in the home of a person with such a smart device. If police have a warrant to search that home, do they also have a right to seize the device and obtain information stored in the cloud that might help in solving the case? Tech companies and the Electronic Freedom Frontier say no. They argue that people have a reasonable expectation of privacy in their homes, and tech companies have refused to comply with the order to provide users' personal information even under warrant. To support its position, Amazon has quoted an opinion in a 2010 court case that was decided in its favor when the tech giant refused such compliance: "[t]he fear of government tracking and censoring one's reading, listening and viewing choices chills the exercise of First Amendment rights."

    After reading the scenario, respond to A, B, and C below.
    (A) Describe the constitutional principle at issue in this scenario.
    (B) In the context of the scenario, explain how the principle described in part A affects law enforcement.
    (C) In the context of the scenario, explain how the principle in part A demonstrates a tension between individual liberties and public safety.

Public's Shifting Concerns on Security and Civil Liberties (2004–2015)



Source: *Pew Research Center* Don't know responses not shown.

2. Use the information graphic to answer the questions below.
   (A) Describe the tension expressed in the graph.
   (B) Describe the relationship between the issues in tension, and draw a conclusion about the reason for the relationship.
   (C) Explain how the information graphic demonstrates a principle in the Fourth Amendment.

3. In *Planned Parenthood v. Casey* (1992), the Supreme Court ruled on a case that challenged a Pennsylvania law that placed certain requirements on women seeking an abortion. These were: (1) a doctor had to provide information on the procedure to the woman at least 24 hours before the procedure; (2) in most cases, a married woman had to notify her husband of the planned procedure; (3) minors had to obtain informed consent from a parent or guardian or let the court assume a parental role; (4) if a doctor determined the pregnancy was a medical emergency endangering the mother, an abortion could be performed; (5) facilities providing abortions were held to reporting and record-keeping standards. A divided Court upheld the essential ruling in *Roe v. Wade* but said that the state could not interfere with a woman's right to an abortion until the fetus reached viability—the condition that would allow it to survive outside the womb—which could happen as early as 22 weeks. The ruling also set an "undue burden" test for state abortion laws—those that presented an undue burden on the mother seeking an abortion were unconstitutional. The only one of the five provisions explained above that failed that test was the notification of the husband.

(A) Identify the assumed protection that is common to both *Planned Parenthood v. Casey* (1992) and *Roe v. Wade* (1973).

(B) Based on the assumed protection identified in part A, explain why the facts of the case in *Planned Parenthood v. Casey* led to a modification of the holding in *Roe v. Wade*.

(C) Explain how the holdings in *Planned Parenthood v. Casey* and *Roe v. Wade* demonstrate change over time in the law.

4. Develop an argument that explains whether or not the death penalty should be determined as unconstitutional in all circumstances.

In your essay, you must:

- Articulate a defensible claim or thesis that responds to the prompt and establishes a line of reasoning
- Support your claim with at least TWO pieces of accurate and relevant information:
  - At least ONE piece of evidence must be from one of the following foundational documents:
    - The Eighth Amendment of the Constitution
    - The Tenth Amendment of the Constitution
    - The Fourteenth Amendment of the Constitution
  - Use a second piece of evidence from another foundational document from the list above or from your study of the rights of the accused
- Use reasoning to explain why your evidence supports your claim/thesis
- Respond to an opposing or alternative perspective using refutation, concession, or rebuttal

WRITING: ***BUDGET YOUR TIME***

All four of the free-response questions will be weighted equally when the exams are scored—each accounts for 12.5 percent of your score. However, the College Board recommends that you spend 20 minutes on each of the first three free-response questions and leave 40 minutes to devote to the argumentative essay.