
Civil Liberties

I. THE BILL OF RIGHTS

A. WHY A BILL OF RIGHTS?

1. The Framers did not include a list of specific individual rights in the original Constitution for two primary reasons, discussed by Hamilton in “Federalist No. 84.”
 - a. The proposed system of government offered the best protection for individual rights.
 - b. No list of rights could be drafted to cover all rights held by individuals. Any suggested list, therefore, could be used to deprive individuals of rights that were omitted from the list.
2. The lack of a specific and extensive list protecting individual rights became a primary driver of Anti-Federalist opposition to the Constitution. Ultimately, this argument did not defeat the Constitution, but resulted in the adoption of the Bill of Rights shortly after ratification.
3. The Bill of Rights is composed of the first 10 amendments to the Constitution. It protects numerous individual liberties, including rights to free speech and religion, privacy, and rights of those accused of crimes.



You may be asked to analyze how debates over the extent and application of the rights included in the Constitution illustrate the tension in our society between individual liberties/freedoms and the need for social order and safety. Should speech be protected if it poses a threat to order? How does protecting the rights of accused criminals impact public safety? How should one individual's right to privacy be balanced against another person's right to protection? Consider how the Court has balanced these conflicting interests as you read the cases in this chapter.

B. CIVIL LIBERTIES VS. CIVIL RIGHTS

1. Most of what we think of as “rights,” such as the right to free speech and the right to bear arms, are actually *civil liberties*, those personal rights and freedoms with which the government is not allowed to arbitrarily interfere.
2. It is important to understand that civil liberties are not absolute; they all have important limits and exceptions. The government may limit specific civil liberties in many circumstances, such as limiting free speech when it poses a serious and immediate danger to the public.
3. The term *civil rights* refers to the rights of minority group members to be protected by the government against discrimination. The right to government protection is not related to the Bill of Rights, but is found in the Equal Protection Clause of the Fourteenth Amendment. (Civil rights are covered in Chapter 10.)
4. The terms *civil liberties* and *civil rights* may be confusing. This confusion is made worse by the fact that civil liberties are listed in the Bill of Rights. (It might help to think of the Bill of Rights as the Bill of Liberties.)
 - a. Civil liberties are extended to apply to the states through the Fourteenth Amendment’s Due Process Clause.
 - b. Civil rights are protected by the Fourteenth Amendment’s Equal Protection Clause.
 - c. It may be helpful to remember that civil liberties prohibit government action. For example, the government may not restrict free speech or search your home without a warrant. Civil rights require the government to act. For example, the government must enforce legislation prohibiting discrimination in housing or education.

C. SELECTIVE INCORPORATION

1. *Due process* is the legal principle requiring that the government follow standardized rules and procedures and respect the rights of all persons.
2. *Selective incorporation* is the name for the legal doctrine by which the Supreme Court has interpreted most individual liberties stated in the Bill of Rights to protect citizens against state actions using the Due Process Clause of the Fourteenth Amendment. (Note that the Due Process Clause of the Fifth Amendment guarantees due process on the part of the federal government.)



The Bill of Rights included a due process requirement in the Fifth Amendment, which was intended to restrain the federal government. State governments, however, were not held to this standard. Following the Civil War, the Fourteenth Amendment was enacted to protect individuals against state government due process infringements. Be sure to understand the difference between these clauses. Questions on court cases about due process will almost always relate to the Due Process Clause of the Fourteenth Amendment.

3. The Bill of Rights was adopted as a means of preventing the federal government from interfering with personal liberties. Later Supreme Court decisions reinforced the idea that the Bill of Rights did not place restrictions on the actions of state governments. States' actions frequently did not comply with guarantees of individual freedoms made in the federal Constitution.
4. Following the Civil War, Congress proposed and the states ratified the Fourteenth Amendment, which made several guarantees to United States citizens, including Due Process and Equal Protection.
5. The Due Process Clause of the Fourteenth Amendment has come to be interpreted as guaranteeing that most state actions are restricted by the Bill of Rights to the same extent as federal actions.
6. The application of the Bill of Rights to the states did not happen in a single case, but piecemeal, one right at a time (selectively).
7. In *Gitlow v. New York* (1925), the Court formally extended the First Amendment's free speech protection to the states, ruling that the Fourteenth Amendment's Due Process Clause restricted state governments as well as the federal government.
8. Following *Gitlow*, the Court went on, over the next several decades, to apply most of the Bill of Rights to the states through selective incorporation. Many of the cases in this unit are incorporation cases.
9. The term *selective incorporation* refers to the process of applying the Bill of Rights piecemeal (one at a time) to the states, rather than applying these rights completely to the states all at once. The term *total incorporation* refers to the idea that *all* of the protections of the Bill of Rights apply to the states, but this doctrine has never been accepted by the Court and only appears in dissenting opinions.



It is important for you to be able to explain how the Supreme Court has used selective incorporation to extend the civil liberties in the Bill of Rights to apply to state and local government through the Due Process Clause of the Fourteenth Amendment. While many of the civil liberties in the Bill of Rights have been incorporated, some still do not apply to the states.

Selective Incorporation

Incorporated Rights	
<p>First Amendment</p> <ul style="list-style-type: none"> – Establishment Clause – Free Exercise Clause – Free speech – Press freedom – Right to Assemble – Right to Petition <p>Second Amendment</p> <ul style="list-style-type: none"> – Right to keep and bear arms <p>Fourth Amendment</p> <ul style="list-style-type: none"> – Freedom from unreasonable searches and seizures – Warrant requirement 	<p>Fifth Amendment</p> <ul style="list-style-type: none"> – Right against double jeopardy – Right against self-incrimination – Right to compensation for property taken by the government (<i>eminent domain</i>) <p>Sixth Amendment</p> <ul style="list-style-type: none"> – Right to a speedy and public trial – Right to jury trial – Right to confront witnesses – Right to compel witnesses to testify – Right to counsel (an attorney) <p>Eighth Amendment</p> <ul style="list-style-type: none"> – Right against cruel and unusual punishment – Right against excessive fines
Rights Not Yet Incorporated	
<p>Third Amendment</p> <ul style="list-style-type: none"> – Right against quartering of troops in homes <p>Fifth Amendment</p> <ul style="list-style-type: none"> – Right to indictment by grand jury 	<p>Seventh Amendment</p> <ul style="list-style-type: none"> – Right to jury trial in civil cases <p>Eighth Amendment</p> <ul style="list-style-type: none"> – Right against excessive bail.



The AP® exam may ask you to differentiate between the issues of due process and equal protection. According to the Fourteenth Amendment, a state may not “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.”

- *The Due Process Clause of the Fourteenth Amendment requires that state governments may not act arbitrarily, but must follow fair and standardized procedures, and respect individual rights. This is the basis for the selective incorporation doctrine; it is used to protect civil liberties.*
- *The Equal Protection Clause of the Fourteenth Amendment requires that the law protect all people equally, and is the basis for the Brown v. Board of Education and subsequent civil rights rulings.*

D. OTHER INDIVIDUAL RIGHTS IN THE CONSTITUTION

1. The Framers were well aware of the danger of government interference in individual rights, and did include specific protections in the body of the Constitution. Article I prohibits the use of *ex post facto* laws and bills of attainder, and protects the right of habeas corpus.
2. *Ex post facto* (Latin for “after the fact”) laws are laws passed by Congress making conduct criminal after it has taken place. Individuals cannot be charged with crimes that did not exist in law at the time the actions were committed.
3. Bills of attainder are laws passed to declare a person or group guilty of a crime and impose punishment. People may not be declared guilty of crimes by legislative acts.
4. A *writ of habeas corpus* (Latin for “produce the body”) protects the right of a detained person to be brought before a judge and defend himself or herself. A writ of *habeas corpus* is issued by a judge to bring a prisoner to court for a hearing.

II. THE FIRST AMENDMENT

A. RIGHTS PROTECTED

1. Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."
2. The First Amendment protects five specific rights:
 - a. **Freedom of religion** is addressed in two parts: a prohibition of government support for or affiliation (establishment clause) with religion, and a guarantee of protection of religious practice (free exercise clause).
 - b. **Freedom of speech** is broadly understood to include a wide range of expression, including symbolic speech.
 - c. **Freedom of the press** is preserved and has been broadly applied, guaranteeing extensive protections to the press.
 - d. **Freedom to assemble** guarantees the right of people to meet and gather in groups to peacefully protest government policies.
 - e. **Freedom to petition** the government for a redress of grievances allows individuals to make complaints to or seek the assistance of their government without threat of punishment.



The First Amendment's protection of religious freedom includes two distinct clauses: the Establishment Clause and the Free Exercise Clause. You may be required to distinguish between these clauses.

B. ESTABLISHMENT CLAUSE

1. The Establishment Clause states: "Congress shall make no law respecting an establishment of religion." The term *separation of state and church* means that the government may not adopt or support an official religion. It has been broadly interpreted by the Court to mean that the government may not support or associate with any religion except in the most limited and necessary ways.

2. *Engel v. Vitale* (1962)

- a. **Facts of the Case:** A public school district adopted a policy of leading a daily prayer. The prayer was non-denominational (not connected with any particular religion or denomination), and non-compulsory (no student was required to participate in the prayer).
 - b. **Constitutional Issue(s):** Does the classroom reading of a non-denominational, non-compulsory prayer in a public school violate the Establishment Clause of the First Amendment?
 - c. **Holding(s):** Yes, the Establishment Clause prohibits the classroom reading of a non-denominational, non-compulsory prayer in public school.
 - d. **Reasoning:** The Establishment Clause requires the separation of state and church. It does not allow the government to encourage or promote religion, even if students are not required to participate. The fact that the prayer was non-denominational was not significant, as it still promoted a particular type of religious thought. The Establishment Clause prohibits the government from endorsing or promoting religious activities.
3. Not all interpretations of the Establishment Clause have been quite so clear-cut.
- a. In *Lemon v. Kurtzman* (1970), the Court held that some forms of taxpayer support for private religious schools might be permissible, so long as (1) it is done for a secular (non-religious) legislative purpose; (2) it does not advance or inhibit religion; and (3) it does not create excessive government involvement with religion. These three requirements are referred to as the Lemon test.
 - b. Schools may offer moments of silence, during which students may pray, but prayer may not be encouraged.

C. FREE EXERCISE CLAUSE

1. The Free Exercise Clause means that the government cannot interfere with citizens practicing their chosen religions. Citizens are allowed to pray and worship as they choose and to engage in religious rituals and practices without restriction by the government. The free exercise of religion, however, may be limited when the government has a legitimate interest in restricting it.

2. *Wisconsin v. Yoder* (1972)

- a. **Facts of the Case:** Several Amish families challenged a Wisconsin state law requiring that children attend school until the age of 16. The Amish argued that education beyond the early teen years was a violation of their religious beliefs. Their right to religious practice required that children stop receiving formal education and learn the skills and values they would need within their community.
- b. **Constitutional Issue(s):** Do laws that require school attendance violate the Free Exercise Clause of the First Amendment?
- c. **Holding(s):** Laws that require school attendance violate the Free Exercise Clause where the state cannot show an interest of "the highest order," which could not be achieved in another way.
- d. **Reasoning:** The Court balanced the interest of the state in ensuring that all citizens be reasonably well-educated against the interest of the Amish to freely practice their religion. Although the state has a legitimate interest in educated citizens, the Court concluded that the state's interest was outweighed by the need of the Amish to learn the skills and values to prepare them for life in their community. The fact that Amish children would receive two fewer years of education would not cause harm to society.

3. Other interpretations of the Free Exercise Clause.

- a. In *Reynolds v. United States* (1878), the Court upheld Reynolds' conviction for bigamy (the crime of having multiple spouses/polygamy), even though his religion required it. The Court ruled that the Free Exercise Clause protects beliefs, not necessarily conduct. Conduct may be restricted when it interferes with the rights of others or society.
- b. Claims made under the Free Exercise Clause must be based on legitimate practices of a recognized religion. People can't invent religious reasons to justify otherwise unlawful conduct.
- c. Laws that are intended to interfere with religious practice are strictly scrutinized to ensure that restrictions are narrowly drawn and address a compelling government interest. Laws that are not intended to interfere with religious practice, but which do so inadvertently, are generally acceptable.

- For example, while Native Americans are allowed to use peyote in their religious ceremonies, drug use may still be used to deny unemployment benefits, according to *Employment Division v. Smith* (1990).
 - Similarly, laws compelling vaccinations have been upheld against people who claim that their religion forbids vaccinations.
- d. Religious practice may be restricted where it causes harm to others.



It may be helpful to understand how courts evaluate claims involving civil liberties, as well as those involving civil rights. Under the doctrine of strict scrutiny, government actions that infringe on a fundamental liberty or affect a "suspect classification" of people—one based on a protected status, such as race or gender—must meet three tests.

- *First, the government action must be based on a compelling government interest.*
- *Second, the government action must be narrowly constructed to achieve that interest.*
- *Finally, the government action must be the least restrictive method by which to protect the government's interest.*

A law that does not meet all three requirements will be found to be unconstitutional.

D. FREEDOM OF SPEECH

1. *Schenck v. United States* (1919)

- a. **Facts of the Case:** Charles Schenck and Elizabeth Baer produced and distributed more than 15,000 fliers urging draft-age men to refuse conscription during World War I. Both were convicted of violating the Espionage Act of 1917. The defendants argued that their activities were protected by the First Amendment's free speech guarantee.
- b. **Constitutional Issue(s):** Is the publication and distribution of literature urging resistance to a military draft protected speech under the First Amendment?

- c. **Holding(s):** The First Amendment does not protect speech promoting resistance to the draft.
- d. **Reasoning:** Speech may be restricted when it poses a clear and present danger that it will cause substantial harm that the government has a right to prevent. The Court noted that the defendants' activities had been interpreted in the context of a war. During peacetime, their activities might be found to be protected.



The Schenck opinion is notable for creating the clear and present danger test and has been widely criticized for its potential to have a chilling effect on free speech. The opinion is also famous for the analogy, drawn by Supreme Court Justice Oliver Wendell Holmes, Jr., who wrote that the protection of free speech did not extend to a man "falsely shouting fire in a theatre." Such speech was unprotected, he wrote, because it would create a dangerous situation (panic) likely to result in harm to people. Today's modern analogy might be the prohibition against falsely yelling "bomb" on an airplane. The Court's decision in Brandenburg v. Ohio (1969) limited Schenck and created greater protections for political speech.

2. **Tinker v. Des Moines Independent Community School District (1969)**

- a. **Facts of the Case:** Several students wore black armbands to school to protest the Vietnam War. The students did not make any verbal statements about the war or cause any disruption. After the students were sent home for wearing the armbands, their parents filed suit, claiming a violation of the students' free speech rights.
- b. **Constitutional Issue(s):**
 - Do freedom of speech protections apply to students in public schools?
 - Is the wearing of black armbands considered "speech" within the meaning of the First Amendment?
- c. **Holding(s):**
 - The First Amendment protects student speech.
 - Wearing armbands is a form of speech.

- d. **Reasoning:** Free speech rights apply to public schools, and students have a right to free expression, so long as it does not substantially interfere with school discipline. The armbands were symbolic speech, protected by the First Amendment.



The Tinker case recognized that wearing black armbands in protest was a form of speech. Symbolic speech is expression that is intended to convey a particular message to its viewers and is likely to be understood. Another important symbolic speech case is Texas v. Johnson (1989), in which the Court ruled that burning the United States flag in protest of the government is protected speech.

3. There are many limitations on the First Amendment's free speech guarantee.
- In *West Virginia State Board of Education v. Barnette* (1943), the Court found that students have a right to refuse to salute the flag and to refuse to participate in the Pledge of Allegiance. Although the refusal of the students in this case was based on religious beliefs, the Court found the right to refuse to salute or pledge to be based on free speech grounds, and applicable regardless of religious beliefs.
 - The right of schools to limit student speech was upheld in *Morse v. Frederick* (2007). As the Olympic torch was carried through their city, several students held up a sign at the school-sponsored event that read "BONG HITS 4 JESUS" and were suspended for promoting illegal drug use. The Court held that schools may restrict student speech that substantially interferes with the school's educational mission.
 - Defamation—falsely injuring the reputation of another—is not protected under the First Amendment freedom of speech. Defamation can take the form of libel or slander.
 - *Libel* is harm caused to the reputation of another in written form.
 - *Slander* is verbally harming the reputation of another.
 - Public officials have less protection than private citizens concerning defamation. To prove libel or slander against himself or herself, a public official must prove that false claims were made maliciously (with evil intent), rather than simply prove that they were false. *New York Times v. Sullivan* (1964)

- d. Obscenity (pornography) may be restricted. Historically, the problem for the Court has hinged on the definition of obscenity. What makes a thing “obscene”? Justice Potter Stewart noted this difficulty when he wrote that obscenity might be impossible to define, but “I know it when I see it.” In *Miller v. California* (1973), the Court created a three-part test to determine whether material is obscene (the obscenity test). In order to determine that the work in question is obscene, it must be determined that it meets all three criteria.
- Would an average person, applying contemporary community standards, find that the work appeals to the prurient (generating lustful thoughts) interest?
 - Does the work depict or describe sexual conduct?
 - Does the work lack serious literary, artistic, political, or scientific value?

Note: Child pornography has no constitutional protection.

- e. Attempts have been made to regulate hate speech, speech intended to offend or threaten a person or group on the basis of race, religion, sex, or another characteristic. The Court’s rulings on hate speech laws have been mixed.
- Ordinances (local laws) that criminalize certain forms of hate speech, such as swastikas or cross-burnings have been found to be unconstitutional because they criminalize speech based on content. *R.A.V. v. City of St. Paul* (1992)
 - Penalty enhancement laws, which create increased penalties for ordinary crimes motivated by hate, have been upheld as constitutional. *Wisconsin v. Mitchell* (1993)
 - Many colleges and universities have rules against hate speech on campus. The Supreme Court has not ruled on this type of speech restriction.
- f. Although attempts have been made to regulate Internet speech, the Court has found that online speech is entitled to full First Amendment protection. The Court struck down the Communications Decency Act, a law which attempted to regulate certain types of Internet speech, because it was too vague in its definition of obscenity. *Reno v. ACLU* (1997)

E. FREEDOM OF THE PRESS

1. *New York Times Co. v. United States* (1971)

- a. **Facts of the Case:** The *New York Times* and the *Washington Post* newspapers obtained extensive content of a classified government report (the Pentagon Papers) detailing U.S. involvement in the Vietnam War. The *Times* began publishing a series of articles based on the classified report. The government obtained a restraining order from a federal district court requiring the *Times* to stop publishing the classified information. The case focused on the issue of **prior restraint**, the ability of the government to censor information before it is published.
- b. **Constitutional Issue(s):** May the government prevent the publication of information that may cause harm to the government, the United States, or its people?
- c. **Holding(s):** The government is not entitled to prevent newspapers from publishing classified information that may be embarrassing or cause harm to the government.
- d. **Reasoning:** By a 6–3 vote, the Court held for the newspapers in a *per curiam* opinion (an opinion with no specific author). In the opinion, the Court noted that the party seeking to restrain the press from publishing information has a heavy burden. Each of the nine justices wrote separate opinions regarding the issue. Most of the opinions agreed that the press generally has the right to publish information in its possession, even if it may cause some degree of harm to the government. Prior restraint of the press by the government is prohibited by the Constitution.

2. Other considerations surrounding freedom of speech.

- a. Although the Framers included press freedom in the First Amendment as a specific right, freedom of the press is closely related to freedom of speech and has generally been interpreted as such. No case has recognized the press as having rights distinct from free speech.
- b. The government may not restrict publication of information critical of government officials. Officials who are criticized may, however, sue for libel. *Near v. Minnesota* (1931)

III. SECOND AMENDMENT

A. THE RIGHT TO KEEP AND BEAR ARMS

1. The Second Amendment reads: “A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.”
2. Because the Second Amendment refers to a “well regulated militia,” it was historically interpreted as applying to militias—or, as we understand this term in modern times, the National Guard—and not to private citizens.

B. INCORPORATION OF THE SECOND AMENDMENT

1. It was not until 2008, in *District of Columbia v. Heller*, that the Court held the Second Amendment to grant a right to keep weapons to private citizens generally. Because the District of Columbia is a federal territory and not a state, however, the *Heller* decision was limited to federal law.
2. **McDonald v. Chicago (2010)**
 - a. **Facts of the Case:** A Chicago ordinance banned the ownership of handguns. Otis McDonald, a city resident who lived in a dangerous neighborhood and had been the victim of crime in his home on several occasions, sued the city for violating his right to keep and bear arms.
 - b. **Constitutional Issue(s):** Does the Second Amendment’s guarantee of the right to keep and bear arms apply against infringement by state and local governments?
 - c. **Holding(s):** The Second Amendment guarantees the right to keep and bear arms against infringement by state and local governments.
 - d. **Reasoning:** The right to keep and bear arms is a fundamental constitutional guarantee, and must, therefore, be incorporated into the Due Process Clause of the Fourteenth Amendment. The right to keep and bear arms has been extended to the states under the doctrine of selective incorporation.

IV. RIGHTS OF THE ACCUSED

A. SPECIFIC RIGHTS GUARANTEED TO THE ACCUSED BY THE CONSTITUTION

1. One important function of the government is to protect citizens from criminals, and to charge and punish those who commit crimes. The Framers recognized, however, that the vast power of the government could be used to harass and punish citizens for political reasons. It was critical to ensure that government must follow the rule of law, and that it was restrained from acting arbitrarily or serving the will of those in power. In order to protect individuals against the awesome power of the government, the Bill of Rights includes several guarantees of specific rights held by those accused or suspected of crimes.

The Rights of the Accused

Fourth Amendment	Fifth Amendment	Sixth Amendment	Eighth Amendment
<ul style="list-style-type: none"> – prohibits unreasonable searches and seizures – requires warrant based on probable cause 	<ul style="list-style-type: none"> – right to grand jury indictment for serious crimes – prohibits double jeopardy – right against self-incrimination – right to due process – prohibits taking of private property by government without reasonable compensation 	<ul style="list-style-type: none"> – right to speedy and public trial – right to jury trial – right to be informed of charges – right to confront hostile witnesses – right to compel witnesses to testify – right to counsel 	<ul style="list-style-type: none"> – prohibits excessive bail – prohibits excessive fines – prohibits cruel and unusual punishment



The only required case related to the rights of the accused is Gideon v. Wainwright (1963). However, the Miranda and Mapp precedents created important rules that you are required to understand.

2. *Miranda v. Arizona* (1962)

Note: Although the *Miranda* case is not required by the AP® course, it is important that you are familiar with the facts and holdings of this case.

- a. **Facts of the Case:** Ernesto Miranda was arrested on suspicion of rape and kidnapping, and interrogated for two hours. He confessed to the crime, and his confession was admitted as evidence at trial, where he was convicted. Miranda argued on appeal that he did not know and was not informed that he had a right to remain silent or a right to counsel (an attorney). His confession was, therefore, coerced, and could not be used against him.
- b. **Constitutional Issue(s):** Must the government guarantee that suspects in custody and subject to interrogation are aware of their constitutional rights?
- c. **Holding(s):** The government must ensure that suspects in custody are aware of their rights before questioning in what has become known as the *Miranda* rule.
- d. **Reasoning:** The Court found that, when an individual is in police custody, there is a significant danger that the right against self-incrimination may be violated. Based on the Fifth and Sixth Amendments, police must ensure that information is given voluntarily. Specifically, the government must ensure that a suspect is aware that he or she has the following rights:
 - the right to remain silent
 - anything said by the suspect may be used against him or her in a court of law
 - the right to assistance of an attorney
 - if the suspect cannot afford an attorney, one will be appointed to assist him or her by the court

3. The Miranda requirement is based on the custodial nature of the situation. Whether a suspect is “in custody” is dependent on circumstances. If not, the warning is not required.
4. The Court has recognized a public safety exception to the Miranda requirement. Police officers may question suspects in custody if there is a serious threat to public safety and the need for information outweighs the need for the Miranda warning. For example, police may interrogate a suspect without a Miranda warning in the case of an armed fugitive or about the location of a loaded weapon in a public place.

B. RIGHT TO COUNSEL

1. *Gideon v. Wainwright* (1963)

- a. **Facts of the Case:** Clarence Earl Gideon was charged with stealing a bottle of wine and money from a cash register in a pool hall in Panama City, Florida. He was too poor to hire an attorney, but requested that an attorney be appointed to represent him. Under Florida law, defendants were not entitled to have an attorney paid for by the state unless charged with a capital (death penalty) offense. Gideon was convicted of robbery and appealed his conviction on the basis that he was denied counsel in violation of the Sixth Amendment right “to have the assistance of counsel for his defense.”
- b. **Constitutional Issue(s):**
 - Does the Sixth Amendment right to counsel (lawyer) apply in all cases, even those not involving severe penalties?
 - Does the Sixth Amendment right to counsel apply to the states?
- c. **Holding(s):**
 - The Sixth Amendment right to counsel applies in all felony cases.
 - The Sixth Amendment applies to the states under the Due Process Clause of the Fourteenth Amendment.
- d. **Reasoning:** The right to counsel is a fundamental right, essential to a fair trial and to due process of law. All defendants in felony cases are entitled to an attorney, regardless of ability to pay. States must provide appointed (government funded) attorneys for indigent (poor) defendants. This right had

previously existed under federal law and was applied to the states in *Gideon*.

2. Additional requirements relating to the right to counsel.
 - a. The right to counsel has been extended to include misdemeanor (less serious crime) cases. *Argersinger v. Hamlin* (1972)
 - b. The right to counsel applies at any critical stage of a critical proceeding, such as questioning by police, in addition to trial.
 - c. Counsel must be effective. That is, a defendant's attorney must be competent and helpful to their legal situation.
 - d. A defendant may waive (give up) his or her right to counsel, but only if he or she does so voluntarily and with a full understanding of his or her rights.

C. SEARCH AND SEIZURE

1. The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
2. *Mapp v. Ohio* (1962)

Note: Although the *Mapp* case is not required by the AP® course, it is important that you are familiar with the facts and holdings of this case.

- a. **Facts of the Case:** Police went to the home of Dollree Mapp, believing that she might be hiding a fugitive. When they knocked on the door and asked to search the home, Ms. Mapp asked if they had a warrant. They did not and later returned, claiming to have a warrant, which they did not have. The police forced their way in and searched the home. They did not find the suspect, but did find some obscene materials (pornographic magazines). The evidence was used against Mapp at trial, even though it had been obtained through a warrantless search. Mapp was convicted of possession of obscene materials in violation of Ohio state law. She appealed her conviction, arguing that the evidence should not have

been admitted against her at trial, since it had been obtained in violation of her Fourth Amendment rights.

- b. **Constitutional Issue(s):** May evidence obtained in violation of a suspect's constitutional rights be admitted against him or her at trial?
 - c. **Holding(s):** Illegally obtained evidence may not be admitted against a defendant at trial (the exclusionary rule).
 - d. **Reasoning:** The Court noted that police would have little respect for the rights of suspects if any evidence they gathered would be admissible regardless of the circumstances under which it was obtained. The only way to ensure that the Fourth Amendment is meaningful is to prevent the use of evidence obtained in its violation. The exclusionary rule had been established in *Weeks v. United States* (1914) with regard to federal law. The *Mapp* decision incorporated the exclusionary rule and applied it to the states.
3. **Other Fourth Amendment Search Issues**
- a. The Fourth Amendment prohibits unreasonable searches, but not all searches. Police searches must be based on probable cause (a reasonable belief based on facts). A warrant (an order signed by a judge based on probable cause) is required for searches in certain instances, but not in all cases.
 - b. An important exception to the warrant requirement is the exigent circumstances exception, which allows the police to act without a warrant where someone's life or safety is threatened, or evidence is about to be lost or destroyed.
 - c. The Court has ruled that cell phone data is entitled to Fourth Amendment protection; police need a warrant to search cell phones for data. *Riley v. California* (2014)
 - d. Following the 9/11 terror attacks on the United States, Congress passed the USA PATRIOT Act in 2001. The law significantly broadened the authority of federal law enforcement to monitor communications and collect metadata on U.S. citizens without warrants. (Metadata is electronic information about computer files and digital activities. It includes things such as phone numbers called by individuals, but not the conversations themselves.) Because most service providers willingly shared user metadata, the government contended that it was not subject to Fourth Amendment protection. In other words, individual users did not have a privacy right in this type of data. In 2015 Congress

passed the USA Freedom Act, which limits bulk collection of user data and requires warrants in some circumstances.

- e. The Court has upheld mandatory drug testing of students participating in athletics and extracurricular activities. *Vernonia School District 47J v. Acton* (1995); *Pottawatomie v. Earls* (2002)



An ongoing theme in Fourth Amendment law is the constant need to adapt to changing technology. Is the use of a thermal imaging device to detect heat emanating from a house a "search"? (Yes.) Is the use of a drug-sniffing dog to detect the odor of drugs emanating from a suitcase a "search"? (No.) The law is still developing with regard to many areas of technology. For example, may police use cell phone location tracking data maintained by service providers? When applying the Fourth Amendment to a new situation, think about analogous (factually similar) cases that have already been decided.

D. CRUEL AND UNUSUAL PUNISHMENT

1. The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
2. The term *cruel and unusual punishment* is generally understood to be punishment that is torturous or barbaric, or any punishment that is excessively disproportionate to the crime committed.
3. Although most countries in the world no longer allow capital punishment (the death penalty), the United States is one of a shrinking number that retains it. Most important Eighth Amendment cases relate to the death penalty and the circumstances under which it fails the test of cruel and unusual punishment.
 - a. In *Furman v. Georgia* (1972), the Supreme Court struck down a Georgia statute because it failed to prescribe a logical and consistent basis for applying the death penalty. As a result, capital punishment was being applied in a disproportionate number of cases involving minority defendants.
 - b. Four years later, the Court upheld a newly designed Georgia death penalty statute in *Gregg v. Georgia* (1976). The new law specified factors to be considered and procedures to be

followed in applying the death penalty, theoretically resolving the problems of arbitrary application and discrimination.

- c. The death penalty has been held to be cruel and unusual when applied to defendants younger than 18 years of age at the time the crime was committed. *Roper v. Simmons* (2005)
- d. The death penalty has been held to be cruel and unusual when applied to defendants with an intellectual disability. *Atkins v. Virginia* (2002)

V. PRIVACY

A. SUBSTANTIVE DUE PROCESS

1. The Fourteenth Amendment states that no state may “deprive any person of life, liberty, or property, without due process of law.”
 - a. The Due Process Clause was initially interpreted to apply only to the procedures followed by the government in regulating private activities. In other words, the Court would not evaluate the content, or substance, of a law, so long as the government followed appropriate procedures.
 - b. Later, the Court began to rely on the principle of “liberty” contained in the Fourteenth Amendment to strike down laws that, although they followed acceptable procedures, were unfair in their content.
 - c. The term *substantive due process* refers to the idea that the law must be fair and reasonable in content and in application. This idea has been used by the Court to protect the fundamental rights of the individual against government interference.
2. *Griswold v. Connecticut* (1965)

Note: Although the *Griswold* case is not required by the AP® course, it is important that you are familiar with the facts and holdings of this case.

- a. **Facts of the Case:** Estelle Griswold, the Executive Director of the Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton, medical director of the League, opened a birth control clinic in violation of a Connecticut law that prohibited the use of any drug or device to prevent conception. (It outlawed birth control.) They were convicted of providing birth control information to married persons.

- b. **Constitutional Issue(s):** Does the Connecticut statute outlawing birth control use violate a fundamental right protected by the Constitution?
- c. **Holding(s):** The Connecticut law violated the right of marital privacy and was, therefore, unconstitutional.
- d. **Reasoning:** The Court faced a problem in the *Griswold* case: although a law invading the contraceptive practices of married couples was unreasonable and seemed outrageous to many, the state of Connecticut argued there was nothing in the Constitution to prevent it from enforcing the law. There is no “right to privacy” in the Bill of Rights. The Court disagreed. Although the Constitution does not specifically list a right to privacy, the Ninth Amendment reads: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The Framers made clear in the Ninth Amendment that the people held unspecified fundamental rights. The Court pointed to several rights, such as freedom of religion and speech, the right to be free from unreasonable searches and seizures, and the right to remain silent, to justify its finding of a right to privacy by calling these zones of privacy. When taken together, these rights include within their sphere a right to privacy in marriage. The Court applied the substantive due process doctrine to strike down the Connecticut law as violating marital privacy.

B. EXTENDING PRIVACY RIGHTS

1. *Roe v. Wade* (1973)

- a. **Facts of the Case:** Norma McCorvey, a 21-year-old woman, challenged a Texas law prohibiting abortion. (McCorvey used the pseudonym Jane Roe to protect her identity.)
- b. **Constitutional Issue(s):** Did the Texas law prohibiting abortion violate women’s constitutional right to privacy?
- c. **Holding(s):** Under the Ninth and Fourteenth Amendments, the constitutional right to privacy protects a woman’s right to an abortion but may be regulated or restricted by the government in the second and third trimesters.
- d. **Reasoning:** *Roe* extended the right to privacy established in *Griswold* to include a woman’s right to make reproductive decisions, including whether to continue or terminate a pregnancy. The Court, however, balanced the right of the

woman in making reproductive decisions against the interest of society in protecting the health of both the mother and the fetus. The result was the trimester test, under which:

- abortion may not be restricted in the first trimester of pregnancy.
- beginning in the second trimester, abortion may be regulated to protect the health of the woman.
- after the beginning of the third trimester, the state's interest becomes sufficient to restrict abortion to protect the developing fetus.



*Many important cases involve the conflict of rights, situations in which the rights of an individual conflict with those of another individual or with society generally. In *Roe*, the Court balanced the privacy right of pregnant women against the interest of society in “potential life.” There are many other examples of the Court balancing rights. Debates over the right to bear arms are frequently framed in terms of the individual's right to self-protection versus society's need to maintain order and public safety. Government surveillance cases consider the extent of the government's right to monitor and collect data on its citizens against the right of citizens to privacy in their data and communications.*

2. Post-Roe Cases

- a. The trend since *Roe v. Wade* has been for states to place increasing burdens on abortion access.
- b. *Planned Parenthood v. Casey* (1992) upheld a fundamental right to abortion from the *Roe v. Wade* decision but allowed states to regulate abortion at any point in pregnancy as it does not pose an “undue burden” on the woman. The Court has ruled that after the point of viability (the point at which a fetus can survive outside of the womb), the state may restrict or prohibit abortion. The *Casey* decision also struck down a husband-notification requirement for women seeking an abortion.
- c. In recent years, the membership of the Supreme Court has changed. Recognizing the Court's changing ideological composition, some states have enacted increasingly restrictive abortion laws in anticipation of the Court possibly revisiting

the issue. Other states, however, have enacted laws explicitly recognizing and protecting abortion rights. The Court may consider various state positions relating to the regulation of abortion in coming years.

- d. The right to die has also been argued in the context of a right to privacy. A competent person may have a protected interest in refusing life-sustaining medical procedures. (*Cruzan v. Missouri Department of Health* (1990)) There is, however, no constitutionally protected right to commit suicide, or to have others assist in suicide. (*Washington v. Glucksberg* (1997))



Although the term privacy is not directly mentioned in the Constitution, other rights such as those found in the First, Third, Fourth, and Fifth Amendments imply that people have a right to privacy. For example, the Third Amendment's right to not have soldiers quartered in the home and the Fourth Amendment's protection from unreasonable searches and seizures imply a right to privacy in the home.