

UNIT 3

Civil Liberties and Civil Rights

In a diverse America, people have used the institutions of government to seek individual liberties and equality. The Bill of Rights guarantees fundamental freedoms and prevents government from denying citizens free speech, free religion, privacy, a fair trial, and other essential liberties. The American Civil Liberties Union and other rights groups have fought to prevent government from squelching these freedoms. For both equal treatment and due process, advocates have emphasized the Fourteenth Amendment and turned to the courts as the most useful institution to secure these rights. The Supreme Court has ordered that states, too, must refrain from infringing on most of the same rights.

African Americans overcame the notorious legacy of slavery and persevered through a century of discrimination before experiencing legal equality and fair representation. Social organizations, such as the National Association for the Advancement of Colored People, have led the charge for racial equality, due process for black defendants, school desegregation, and voting rights for more than 100 years. By lobbying Congress, organizing public protests and voter registration drives, and pressing their cases in the courts, the NAACP and other civil rights groups dismantled laws that denied equality to African Americans in the South. Women, Asian Americans, Latinos, the LGBTQ community, people with disabilities, and other minorities have also taken a path toward equality via congressional laws, presidential directives, and court decisions.

ENDURING UNDERSTANDINGS: INTERACTIONS AMONG BRANCHES

- LOR-2: Provisions of the U.S. Constitution's Bill of Rights are continually being interpreted to balance the power of government and the civil liberties of individuals.
- LOR-3: Protections of the Bill of Rights have been selectively incorporated by way of the Fourteenth Amendment's due process clause to prevent state infringement of basic liberties.
- PRD-1: The Fourteenth Amendment's equal protection clause as well as other constitutional provisions have often been used to support the advancement of equality.
- PMI-3: Public policy promoting civil rights is influenced by citizen-state interactions and constitutional interpretation over time.
- CON-6: The Court's interpretation of the U.S. Constitution is influenced by the composition of the Court and citizen-state interactions. At times, it has restricted minority rights and, at others, protected them.

Source: AP® United States Government and Politics Course and Exam Description

CHAPTER 8

The Bill of Rights and the First Amendment

Topics 3.1–3.4

Topic 3.1 The Bill of Rights

LOR-2.A: Explain how the U.S. Constitution protects individual liberties and rights.

LOR-2.B: Describe the rights protected in the Bill of Rights.

- Required Foundational Document:
 - The Constitution of the United States

Topic 3.2 First Amendment: Freedom of Religion

LOR-2.C: Explain the extent to which the Supreme Court's interpretation of the First and Second Amendments reflects a commitment to individual liberty.

- Required Supreme Court Cases:
 - *Engel v. Vitale* (1962)
 - *Wisconsin v. Yoder* (1972)

Topic 3.3 First Amendment: Freedom of Speech

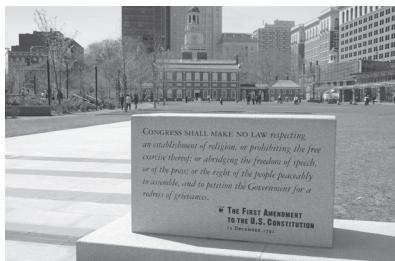
LOR-2.C: Explain the extent to which the Supreme Court's interpretation of the First and Second Amendments reflects a commitment to individual liberty.

- Required Supreme Court Cases:
 - *Tinker v. Des Moines Independent Community School District* (1969)
 - *Schenck v. United States* (1919)

Topic 3.4 First Amendment: Freedom of the Press

LOR-2.C: Explain the extent to which the Supreme Court's interpretation of the First and Second Amendments reflects a commitment to individual liberty.

- Required Foundational Document:
 - The Constitution of the United States
- Required Supreme Court Case:
 - *New York Times Co. v. United States* (1971)



Source: Getty Images

First Amendment display
in front of Independence
Hall in Philadelphia

The Bill of Rights

"We will not, under any threat, or in the face of any danger, surrender the guarantees of liberty our forefathers framed for us in our Bill of Rights."

—President Franklin Roosevelt, radio address, December 15, 1941

Essential Question: How does the U.S. Constitution protect individual liberties and rights, and what rights are protected in the Bill of Rights?

Americans have held liberty in high regard, in part due to the violation of several fundamental liberties by British authorities. The original Constitution includes a few basic protections from government—Congress can pass no bill of attainder and no ex post facto law and cannot suspend *habeas corpus* rights in peacetime. Article III guarantees a defendant the right to trial by jury. However, the original Constitution lacked many fundamental protections, so critics and Anti-Federalists pushed for a bill of rights to protect **civil liberties**—those personal freedoms protected from arbitrary governmental interference or deprivations by constitutional guarantee.

Liberties and the Constitution

James Madison originally opposed adding a bill of rights to the proposed Constitution. Madison felt it was unnecessary, believing that the Constitution clearly diluted powers of the government into the three branches, greatly diminishing any chance government would run over citizen rights. The checks and limitations already in the Constitution, he argued, would remove the need for a specific listing of rights. Additionally, if such a new document listed all the rights that the government cannot take away, any rights not listed might be vulnerable to government overreach. An incomplete list would create danger to liberty in years to come.

James Madison's Role One of the main debates between the Federalists and the Anti-Federalists was over a bill of rights. Several delegates at the state-ratifying conventions voted against ratification on this point. Others voted conditionally or expressed a general acceptance of the Constitution in spite of this deficiency. As the debate continued after the ninth and requisite state ratified the original document, Madison's opinion began to change. When Congress opened in 1789, Madison served in the brand-new House of Representatives. Considering the complaints and suggestions of Anti-Federalists, including essays in the newspapers at the time and formal petitions from the states, he

narrowed down dozens of points of law into twelve formal rights. Congress agreed and sent these rights to the states for ratification. One of the first major pieces of legislation enacted by the new republic was the ratification process. In the end, ten of Madison's amendments were added to the Constitution in 1791. The Father of the Constitution and original critic of this rights plan had become the Father of the Bill of Rights.

Protections in the Bill of Rights

The **Bill of Rights** was designed specifically to guarantee liberties and rights. These civil liberties include protections of citizens' thoughts, beliefs, opinions, and their right to express them. It protects property. Government cannot take away property without a just cause. A list of criminal justice rights embedded in the Bill of Rights guarantees a criminal defendant protection against government searches unless with probable cause; a right to cross-examine witnesses, to refuse to testify, and to be judged by a jury of peers; and protection against cruel and unusual punishment. (See Topics 3.7–3.9 for in-depth coverage of these rights.)

Madison and his new congressional colleagues included two disclaimers at the end of the list. The Ninth Amendment states there are rights that are protected and cannot be denied by the government, even those not explicitly listed in the Bill of Rights. The Tenth Amendment codifies an understanding from Philadelphia in 1787 and throughout the ratification debate on the proposed Constitution: All powers delegated to the federal government are expressly listed, and those that are not listed remain with the states.

Fear of a Central Government

Specifically, individuals were protected *from the federal government* and “misconstruction or abuse of its powers,” according to the Preamble of the Bill of Rights. That list of protections did not originally apply to state governments. It did not prevent states from entangling church and government nor from taking private property for public use. Some states had laws on the books that required major officeholders to be members of a church. However, for the most part, state constitutions and common values across the country upheld the protections in the Bill of Rights. But in a landmark case, *Barron v. Baltimore* (1833), the Supreme Court said those protections didn't have to be guaranteed by the states. This precedent remained until the *selective incorporation doctrine* began to develop and was applied by the Supreme Court in the 20th century. (See Topic 3.7.)

Over the years, the Supreme Court has interpreted the provisions in the Bill of Rights in an effort to balance individual rights with public safety and order. Eight of the fifteen Supreme Court cases to know for the AP exam are tied to the Bill of Rights.

MUST-KNOW SUPREME COURT CASES AND RELEVANT AMENDMENTS		
Must-Know Supreme Court Cases	Ruling	Amendment
<i>Schenck v. United States</i> (1919)	Speech representing "a clear and present danger" is not protected. (See Topic 3.3.)	First
<i>Engel v. Vitale</i> (1962)	School-sponsored prayer violates the establishment clause. (See Topic 3.2.)	First
<i>Tinker v. Des Moines Independent Community School District</i> (1969)	Students in public schools are allowed to wear armbands as symbolic speech. (See Topic 3.3.)	First
<i>New York Times Co. v. United States</i> (1971)	The government cannot exercise prior restraint of the press (forbid publication ahead of time). (See Topic 3.4.)	First
<i>Wisconsin v. Yoder</i> (1972)	Requirements that Amish students attend school past the eighth grade violate the free exercise clause. (See Topic 3.2.)	First
<i>McDonald v. Chicago</i> (2010)	The right to keep and bear arms for self-defense in one's home applies to the states. (See Topic 3.7.)	Second
<i>Gideon v. Wainwright</i> (1963)	States must provide poor defendants with an attorney to guarantee a fair trial. (See Topic 3.8.)	Sixth
<i>Roe v. Wade</i> (1973)	The right of privacy extends to a woman's decision to have an abortion, though the state has a legitimate interest in protecting the unborn after a certain point and protecting a mother's health. (See Topic 3.9.)	The First, Third, Fourth, Fifth, and Ninth amendments have been interpreted as creating "zones of privacy."

A Culture of Civil Liberties

The freedoms Americans enjoy are about as comprehensive as those in any Western democracy. Anyone can practice or create nearly any kind of religion. Expressing opinions in public forums or in print is nearly always protected. Just outside the Capitol building, the White House, and the Supreme Court, protestors often gather to criticize law, presidential action, and alleged miscarriages of justice without fear of punishment or retribution. Nearly all people enjoy a great degree of privacy in their homes. Unless the police have "probable cause" to suspect criminal behavior, individuals can trust that government will not enter unannounced. When civil liberties violations have occurred, individuals and groups such as the American Civil Liberties Union (ACLU) have challenged them in court.

At the same time, however, civil liberties are limited when they impinge on the public interest, another cherished democratic ideal. **Public interest** is the welfare or well-being of the general public. For example, for the sake of public interest, the liberties of minors are limited. Their right to drive is restricted until they are teenagers (between 14 and 17 years old, depending on their state), both for their safety and the safety of the general public. And although people generally have the right to free speech, what they say cannot seriously threaten public safety or ruin a person's reputation with untruthful claims. In the culture of civil liberties in the United States, then, personal liberties have limits out of concern for the public interest.

Interpreting the Bill of Rights

The United States has experienced many changes in the more than two centuries it has existed. World wars, economic depressions, industrial revolutions, and social shifts have challenged the flexibility of the Constitution. Whether they are interpreting the Constitution, clarifying the meaning of the amendments, or determining the constitutionality of newly passed laws, the justices on the Supreme Court often dictate the direction of the nation. The Court has interpreted and reinterpreted liberties in an effort to protect them from encroachment by the federal government or local governments.

In addition to the Must-Know Cases in the table above, the Supreme Court has been involved in determining if the government—state or federal—crosses a line and violates a clause in the Bill of Rights. These Supreme Court decisions provide clarity on the law. Whether they permit the state to limit the Bill of Rights in the name of order or declare the government has gone too far and violated citizens' rights, these decisions further define civil liberty. Decisions over what exactly constitutes a “fair and impartial jury,” a “speedy trial,” or “excessive bail” have changed over time. These broad phrases enabled the Bill of Rights’ ratification in 1791 but have kept the courts busy over the years. In the process of judicial review and defining these liberties, the courts will continue to clarify the balance between liberties and public order.



THINK AS A POLITICAL SCIENTIST: DESCRIBE POLITICAL PRINCIPLES IN CONTEXT

The protection of civil liberties is an important political principle of the United States. Free speech is among those civil liberties, but how far does the protection extend? In the *Schenck v. United States* (1919) case, free speech was limited when it presented a “clear and present danger.” The Court saw this danger as Schenck had urged draftees during World War I to resist the draft. Justice Oliver Wendell Holmes used the following analogy to further explain, “*The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic . . .*” (See Topic 3.3 for more about *Schenck v. United States*.)

Practice: Read the scenario below and determine if the principle of free speech would be protected using the "fire in a theater" analogy:

After giving a speech at a rally, a white neo-Nazi leader is convicted under criminal syndicalism laws—laws to prevent illegal acts to achieve political reform. He spoke on private property to other neo-Nazi members and his speech alluded to action against the government if perceived threats against the Caucasian race continued due to government decisions. Does the First Amendment protect his speech?

(See *Brandenburg v. Ohio* for the Court's decision in a similar type of case.)

REFLECT ON THE ESSENTIAL QUESTION

Essential Question: How does the U.S. Constitution protect individual liberties and rights, and what rights are protected in the Bill of Rights? On separate paper, complete the chart below.

Rights Guaranteed in the Bill of Rights	Related Amendment

KEY TERMS AND NAMES

Bill of Rights (1791) public interest
civil liberties



Source: Getty Images

While wearing a mask is inconvenient, many people wore one during the COVID-19 pandemic for the sake of the public interest. Others, however, believed required mask wearing infringed on their individual rights.

First Amendment: Freedom of Religion

"The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right."

—James Madison, *A Memorial and Remonstrance, on the Religious Rights of Man*, 1784–1785

Essential Question: To what extent does the Supreme Court's interpretation of freedom of religion reflect a commitment to individual liberty?

The Religious Freedom Restoration Act (RFRA) of 1993 states that "governments should not substantially burden religious exercise without compelling justification." This law was created out of anger at a Supreme Court ruling in the *Employment Division v. Smith* case in 1990. Both liberals and conservatives disapproved of the ruling because it weakened citizens' rights to religious practices that conflicted with government statutes. The Supreme Court struck down parts of the RFRA in 1997, stating it infringed on states' rights, and according to many, weakened Americans' right to religious freedom. Since the RFRA was passed, 31 states have passed similar legislation to protect religious liberty.

Today, the issue of free exercise of religion can collide with the state's power to assure fairness toward LGBTQ people. For example, can a state through its power to regulate commerce mandate a merchant to serve gay people if doing so conflicts with the merchant's religious beliefs about homosexuality?

The First Amendment: Church and State

The founders wanted to stamp out religious intolerance and outlaw a nationally sanctioned religion. The Supreme Court did not address congressional action on religion for most of the 1800s, and it did not examine state policies that affected religion for another generation after that. As the nation became more diverse and more secular over the years, the Supreme Court constructed what Thomas Jefferson had called a "**wall of separation**" between church and state. In this nation of varied religions and countless government institutions, however, church and state can sometimes encroach on each other. Like other

interpretations of civil liberties, those addressing freedom of religion are intricate and sometimes confusing. Recently, the Court has addressed laws that regulate the teaching of evolution, the use of school vouchers, and the public display of religious symbols.

Freedom of Religion

Both James Madison and Thomas Jefferson led a fight to oppose a Virginia tax to fund an established state church in 1785. Madison argued that no law should support any true religion nor should any government tax anyone, believer or nonbeliever, to fund a church. During the ratification battle in 1787, Jefferson wrote Madison and expressed regret that the proposed Constitution lacked a Bill of Rights, especially an expressed freedom of religion. The First Amendment allayed these concerns because it reads in part, “Congress shall make no law respecting an *establishment* of religion or prohibiting the *free exercise* thereof.” In 1802, President Jefferson popularized the phrase “separation of church and state” after assuring Baptists in Danbury, Connecticut, that the First Amendment builds a “wall of separation between church and state.” Today some citizens want a stronger separation; others want none.

Members of the First Congress included the **establishment clause** in the First Amendment to prevent the federal government from establishing a national religion. More recently, the clause has come to mean that governing institutions—federal, state, and local—cannot sanction, recognize, favor, or disregard any religion. The **free exercise clause** in the First Amendment prevents governments from stopping religious practices. This clause is generally upheld, unless a religious act is illegal or threatens the interests of the community. Today, these clauses collectively mean people can practice any religion they want, provided it doesn’t violate established law or harm others, and the state cannot endorse or advance one religion over another. The Supreme Court’s interpretation and application of the establishment clause and free exercise clause show a commitment to individual liberties and an effort to balance the religious practice of majorities with the right to the free exercise of minority religious practices or no religious practices.

The Court Erects a Wall In the 1940s, New Jersey allowed public school boards to reimburse parents for transporting their children to school, even if the children attended parochial schools—those maintained by a church or religious organization. Some argued this constituted an establishment of religion, but in *Everson v. Board of Education* (1947), the Court upheld the law. State law is not meant to favor or handicap any religion. This law gave no money to parochial schools but instead provided funds evenly to parents who transported their children to the state’s accredited schools, whether religious or public. Preventing payments to parochial students’ parents would create an inequity for them. Much like fire stations, police, and utilities, school transportation is a nonreligious service available to all taxpayers.

Though nothing changed with *Everson*, the Court did signal that the religion clauses of the First Amendment applied to the states via the Fourteenth

Amendment in the selective incorporation process. (See Topic 3.7.) The Court also used Jefferson's phrase in its opinion and began erecting the modern wall of separation.

Prayer in Public Schools In their early development, public schools were largely Protestant institutions that began their day with a prayer. But the Court outlawed the practice in the early 1960s in its landmark case, *Engel v. Vitale* (1962). A year later, in *School District of Abington Township, Pennsylvania v. Schempp*, the Court outlawed a daily Bible reading in the Abington schools in Pennsylvania and thus in all public schools. In both cases, the school had projected or promoted religion, which constituted an establishment.



MUST-KNOW SUPREME COURT CASE: *ENGEL V. VITALE* (1962)

The Constitutional Question Before the Court: Does allowing a state-created, nondenominational prayer voluntarily recited in public schools violate the First Amendment's establishment clause?

Decision: Yes, for Engel et al., 6:1

Before *Engel*: Since the days of one-room schools, many public schools across the United States started the school day with a prayer. In the 1950s, the state of New York tried to standardize prayer in its public schools by coming up with a common, nondenominational prayer that would satisfy most religions. The State Board of Regents, the government body that oversees the schools, did so: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Each school day, classes recited the Pledge of Allegiance followed by this prayer, which teachers were required to recite. Students were allowed to stand mute or, with written permission, to depart the room during the exercise.

Facts: In 1959, the parents of ten pupils organized and filed suit against the local school board because this official prayer was contrary to the beliefs, religions, or religious practices of both themselves and their children. Lead plaintiff Stephen Engel and the others argued the prayer—created by a state actor and recited at a state-funded institution where attendance was required by state law—violated the establishment clause. The respondent, William Vitale, was the chairman of the local Hyde Park, New York, school board.

Reasoning: The majority reasoned that since a public institution developed the prayer and since it was to be used in a public school setting with mandatory attendance, the Regents board had made religion its business, a violation of the establishment clause. Because of the Fourteenth Amendment and incorporation, states as well as the federal government are forbidden from officially backing any religious activity. They also noted that including the word "God" was denominational—not all religions believe in God. Further, they explained that even though participation was voluntary, students would likely feel reluctant not to take part in a teacher-led activity.

The Court's Majority Opinion by Mr. Justice Black: We think that, by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. . . .

The petitioners contend . . . the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. . . .

One of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. . . .

It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that, because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

"[I]t is proper to take alarm at the first experiment on our liberties. . . ."

Justice Douglas agreed with the majority but made the point that children may feel like a "captive" audience, even though they were technically free to leave the room.

Concurring Opinion by Mr. Justice Douglas: It is said that the element of coercion is inherent in the giving of this prayer.

... Few adults, let alone children, would leave our courtroom or the Senate or the House while those prayers are being given. Every such audience is in a sense a "captive" audience. . . . A religion is not established in the usual sense merely by letting those who choose to do so say the prayer that the public school teacher leads. Yet once government finances a religious exercise, it inserts a divisive influence into our communities.

Since Engel: The Court has since ruled against student-led prayer at official public school events. In the 1980s, Alabama created a policy to satisfy community wishes without violating the 1960s' precedents. The state provided that schools give a moment of silence at the beginning of the school day to facilitate prayer or meditation. In a 1985 ruling, however, the Court said this constituted an establishment of religion. The Court left open the possibility that an undefined, occasional moment of silence might pass constitutional muster.

Political Science Disciplinary Practices and Reasoning Processes: Explain Reasoning, Similarities, and Differences

Justice Black quoted James Madison, the author of the First Amendment, in the majority opinion: "[I]t is proper to take alarm at the first experiment on our liberties." Madison's words following that quote help explain why: "We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late

Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle."

Apply: Complete the following tasks.

1. Explain how Justice Black's point in the Court's majority opinion relates to Madison's admonition to be alarmed.
2. Explain how Justice Douglas elaborated on the majority opinion, especially the role of public money.

The Lemon Test In 1971, the Court created a measure of whether or not the state violated the establishment clause in *Lemon v. Kurtzman*. Rhode Island and Pennsylvania passed laws to pay teachers of secular subjects in religious schools with state funds. The states mandated such subjects as English and math and reasoned that it should assist the parochial schools in carrying out a state requirement. In trying to determine the constitutionality of this statute, the Court decided these laws created an "excessive entanglement" between the state and the church because teachers in these parochial schools may improperly involve faith in their teaching. In the unanimous opinion, Chief Justice Warren Burger further articulated Jefferson's "wall of separation" concept, and "far from being a 'wall,'" the policy made a "blurred, indistinct, and variable barrier." To guide lower court decisions and future controversies that might reach the High Court, the justices in the case of *Lemon v. Kurtzman* developed the Lemon test to determine excessive entanglement.

THE LEMON TEST

To avoid an excessive entanglement, a policy must:

- Have a secular purpose that neither endorses nor disapproves of religion
- Have an effect that neither advances nor prohibits religion
- Avoid creating a relationship between religion and government that entangles either in the internal affairs of the other

Education and the Free Exercise Clause In 1972, the Court ruled that a Wisconsin high school attendance law violated Amish parents' right to teach their own children under the free exercise clause. The Court found that the Amish's alternative mode of informal vocational training paralleled the state's objectives. Requiring these children to attend high school violated the basic tenets of the Amish faith because it forced their children into unwanted environments.



MUST-KNOW SUPREME COURT CASE: WISCONSIN V. YODER (1972)

The Constitutional Question Before the Court: Does a state's compulsory school law for children age 16 and younger violate the First Amendment's free exercise clause for parents whose religious beliefs and customs dictate they keep their children out of school after a certain age?

Decision: Yes, for Yoder, 7:0

Facts: A Wisconsin statute required parents of children age 16 and under to send their children to a formal school. Three parents in the New Glarus, Wisconsin, school system—Jonas Yoder, Wallace Miller, and Adin Yutzy—had teenagers which they did not send to school. Yoder and the others were charged, tried in a state criminal court, found guilty, and fined \$5.00 each. The parents appealed the case to the state supreme court, arguing their religion prevented them from sending their children to public schools at their age. The state court agreed. State officials then appealed to the Supreme Court, hoping to preserve the law and its authority to regulate compulsory school attendance.

These same children had attended a public school through eighth grade. Their parents felt an elementary education suitable and necessary, but they refused to enroll their 14- and 15-year-olds in the public schools. Amish teens are meant to develop the skills for a trade, not continue learning subjects that do not have a practical application. Also, the parents did not want their children exposed to divergent values and practices at a public high school. The parents argued that the free exercise clause entitled them to this practice and this decision.

The state invoked the legal claim of *parens patriae*—parental authority—claiming it had a legal responsibility to oversee public safety and health and to educate children to age 16. Those who skipped this education would become burdens on society.

Reasoning: The Court found making the Amish attend schools would expose them to attitudes and values that ran counter to their beliefs. In fact, the Court also said that forcing the Amish teens to attend would interfere with their religious development and integration into Amish society. Further, the Court realized that stopping schooling a couple of years early and continuing informal vocational education did not make members of this community burdens on society.

The Court declared in this case that the free exercise clause overrode the state's efforts to promote health and safety through ensuring a full, formal education. In a rare instance, Justice William O. Douglas voted with the majority but wrote a partial dissenting opinion. Justices William Rehnquist and Lewis Powell did not participate.

The Court's Majority Opinion by Mr. Justice Burger: Formal high school education beyond the eighth grade is contrary to Amish beliefs not only because it places Amish children in an environment hostile to Amish beliefs, with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within

the category of those best learned through example and “doing,” rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish faith—and may even be hostile to it—interposes a serious barrier to the integration of the Amish child into the Amish religious community. Dr. John Hostetler, one of the experts on Amish society, testified that the modern high school is not equipped, in curriculum or social environment, to impart the values promoted by Amish society.

Political Science Disciplinary Practices: Understanding Opposing Views

While the majority opinion becomes the lasting legacy of a Supreme Court case, knowing the arguments the opposing side made can help clarify the Court’s decision.

Apply: Complete the following tasks.

1. Explain the First Amendment principle at issue in this case.
2. Identify the public policy or law the citizens challenged in this case.
3. Explain the Court’s reasoning described in the majority opinion.
4. Analyze the Court’s response to the state’s two primary arguments by identifying the kind of evidence the Court relied on to address the state’s arguments.



Source: Shutterstock

Amish families, such as this one in Pennsylvania, wear simple clothing, use horses and buggies rather than cars, and value manual labor. The Amish parents involved in *Wisconsin v. Yoder* believed that sending their children to high school would endanger their families’ salvation.



THINK AS A POLITICAL SCIENTIST: DESCRIBE THE DECISIONS OF REQUIRED SUPREME COURT CASES.

The Supreme Court has ruled on many cases that deal with separating church and state. In its rulings, the Court has consistently “built a wall of separation” between the institutions, as the framers intended. In *Engel v. Vitale* (1962) and *Wisconsin v. Yoder* (1972), the Supreme Court ruled the First Amendment had been violated.

Practice: Review the majority decisions given in both cases and answer the questions that follow.

1. What were the similarities in the majority opinions given by Justice Black in *Engel v. Vitale* and Justice Burger in *Wisconsin v. Yoder*?
2. What were the differences in the majority opinions given by Justices Black and Burger in those two cases?
3. Which of the cases is likely to have a larger impact in future rulings on religious freedom? Explain your opinion.

Contemporary First Amendment Issues

Real and perceived excessive entanglements between church and state continue to make the news today. Can government funding go to private schools or universities at all? Does a display of religious symbols on public grounds constitute an establishment of religion? As with so many cases, it depends.

Public Funding of Religious Institutions Many establishment cases address whether or not state governments can contribute funds to religious institutions, especially Roman Catholic schools. Virtually every one has been struck down, except those secular endeavors that aid higher education in religious colleges, perhaps because state laws do not require education beyond the twelfth grade and older students are not as impressionable.

Vouchers Supporters of private parochial schools and parents who pay tuition argue that the government should issue vouchers to ease their costs. Parents of parochial students pay the same taxes as public school parents while their children don't receive the services of public schools. A Cleveland, Ohio, program offered as much as \$2,250 in tuition reimbursements for low-income families and \$1,875 for any families sending their children to private schools. The Court upheld the program largely because the policy did not make a distinction between religious or nonreligious private schools, even though 96 percent of private school students attended a religious-based school. This money did not go directly to the religious schools but rather to the parents for educating their children.

Religion in Public Schools Since the *Engel* and *Abington* decisions, any formal prayer in public schools and even a daily, routine moment of silence are considered violations of the establishment clause. The Court has even ruled against student-led prayer at official public school events. However, popular opinion has never endorsed these stances. In 2014, Gallup found that 61 percent of Americans supported allowing daily prayer, down from 70 percent in 1999.

Students can still operate extracurricular activities of a religious nature provided these take place outside the school day and without tax dollars. The free exercise clause guarantees students' rights to say private prayers, wear religious T-shirts, and discuss religion. Public teachers' actions are more restricted because they are employed by the state.

Religious Symbols in the Public Square Pawtucket, Rhode Island, annually adorned its shopping district with Christmas decor, including a Christmas tree, a Santa's house, and a nativity scene. Plaintiffs sued, arguing that the nativity scene created government establishment of Christianity. In *Lynch v. Donnelly* (1984), the Court upheld the city's right to include this emblem because it served a legitimate secular purpose of depicting the historical origins of the Christmas holiday. In another case in 1989, the Court found the display of a crèche (manger scene) on public property, when standing alone without other Christmas decor, a violation because it was seen as a Christian-centered display.

Ten Commandments In 2005, the Court ruled two different ways on the issue of displaying the Ten Commandments on government property. One case involved a large outdoor display at the Texas state capitol. Among 17 other monuments sat a six-foot-tall rendering of the Ten Commandments. The other case involved the Ten Commandments hanging in two Kentucky courthouses, accompanied by several historical American documents. The Court said the Texas display was acceptable because of the monument's religious and historical function. It was not in a location that anyone would be compelled to be in, such as a school or a courtroom. And it was a passive use of the religious text in that only occasional passersby would see it. The Kentucky courtroom case brought the opposite conclusion because an objective observer would perceive the displays as having a predominantly religious purpose in state courtrooms—places where some citizens must attend and places meant to be free from prejudice.

REFLECT ON THE ESSENTIAL QUESTION

Essential Question: To what extent does the Supreme Court's interpretation of freedom of religion reflect a commitment to individual liberty? On separate paper, complete the chart below.

Explanation of Free Exercise Clause Cases

Explanation of Establishment Clause Cases

KEY TERMS AND NAMES

Engel v. Vitale (1962)
establishment clause
free exercise clause

Lemon v. Kurtzman (1971)
wall of separation
Wisconsin v. Yoder (1972)

First Amendment: Freedom of Speech

"Free speech is not speech you agree with . . . It's speech that you find stupid, selfish, dangerous, uninformed or threatening . . . unpopular, contentious and sometimes ugly. It reflects a tolerance for differences.

If everyone agreed on all things, we wouldn't need it."

—Robert J. Samuelson, *Washington Post*, 2014

Essential Question: To what extent does the Supreme Court's interpretation of freedom of speech reflect a commitment to individual liberty?

Freedom of speech is one of the cherished liberties in the First Amendment. Freedom of speech issues extend much further than just the words that come out of an individual's mouth. This right can inspire passionate arguments to protect and to limit speech depending on its content. The Supreme Court has ruled on this right many times. The Court's interpretations relate to topics like offensive or obscene speech, protest speech, symbolic speech, and the right not to "speak."

Defining Protected Speech

The Supreme Court has taken two generations of cases to define "free speech" and "free press," and free speech cases still occasionally appear on the Court's docket. When does one person's right to free expression violate others' right to peace, safety, or decency? Free speech is not absolute, but both federal and state governments have to show substantial or *compelling governmental interest*—a purpose important enough to justify the infringement of personal liberties—to curb it.

The creators of the First Amendment meant to prevent government censorship. Many revolutionary leaders came to despise the accusation of seditious libel—a charge that resulted in fines and/or jail time for anyone who criticized public officials or government policies. Expressing dissent in assemblies and in print during the colonial era led to independence and increased freedoms, therefore, members of the first Congress preserved this right as the very first of the amendments.

Time, Place, and Manner Regulations

In evaluating regulations of symbolic expression, the Court looks primarily at whether the regulation suppresses the content of the message or simply regulates the accompanying conduct. Is the government ultimately suppressing what was being said, or the time, place, or manner in which it was expressed?

Era of Protest The 1960s witnessed a revolution in free expression. As support for the Vietnam War waned, young men burned their draft cards to protest the military draft. Congress quickly passed a law to prevent the destruction of these government-issued documents.

David O'Brien burned his Selective Service registration card in front of a Boston courthouse and was convicted for that action under the Selective Service Act, which prohibited willful destruction of draft cards. He appealed to the Supreme Court, arguing that his protest was a symbolic act of speech that government could not infringe. The Court, however, upheld his conviction and sided with the government's right to prevent this behavior in order to protect Congress's authority to raise and support an army. O'Brien was disrupting the draft effort and publicly encouraging others to do the same. Others continued to burn draft cards, but after *United States v. O'Brien* (1968), this symbolic act was not protected.

In April 1968, Paul Robert Cohen wore a jacket bearing the words "F--k the Draft" while walking into a Los Angeles courthouse. Local authorities arrested and convicted him for "disturbing the peace . . . by offensive conduct." The Supreme Court later overturned the conviction in *Cohen v. California* (1971). The phrase on the jacket in no real way incited an illegal action. "One man's vulgarity is another's lyric," the majority opinion stated.

Compare the *Cohen* and *O'Brien* rulings. In both cases, someone expressed opposition to the Vietnam-era draft. O'Brien burned a government-issued draft card. The Court didn't protect the defendant's speech but rather upheld a law to assist Congress in its conscription powers. Cohen publicly expressed dislike for the draft with an ugly phrase printed on his jacket, but he did nothing to incite public protest and did not refuse to enlist, so the Court protected the speech.

Time, place, and manner regulations must be tested against a set of four criteria.

TIME, PLACE, AND MANNER TEST

1. The restriction must be *content-neutral*. That is, it must not suppress the content of the expression.
2. The restriction must serve a *significant government interest*. In the *United States v. O'Brien* (1968) case, the Court ruled that the burning of a draft card was disrupting the government's interest of raising an army.
3. The restriction must be *narrowly tailored*. That is, the law must be designed in the most specific, targeted way possible, avoiding spillover into other areas. For example, the law upheld in *O'Brien* was specifically about burning draft cards, not other items, such as flags, whose burning might express a similar message.
4. There must be adequate *alternative ways of expression*. The court can suppress expression on the basis of time, place, and manner if there are other times, places, and manners in which the idea can be expressed.

The question of “place” and “manner” became key aspects of a landmark case involving free speech in schools.

Symbolic Speech

People cannot invoke **symbolic speech** to defend an act that might otherwise be illegal. For example, a nude citizen cannot walk through the town square and claim a right to symbolically protest textile sweatshops after his arrest for indecent exposure. Symbolic speech *per se* is not an absolute defense in a free speech conflict. However, the Court has protected a number of symbolic acts or expressions.

The Court struck down both state and federal statutes meant to prevent desecrating or burning the U.S. flag in *Texas v. Johnson* (1989) and *United States v. Eichman* (1990), respectively. The Court found that these laws serve no purpose other than ensuring a government-imposed political idea—reverence for the flag.



MUST-KNOW SUPREME COURT CASE: *TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT* (1969)

The Constitutional Question Before the Court: Does a public school ban on students wearing armbands in symbolic, political protest violate a student's First Amendment freedom of speech?

Decision: Yes, for Tinker, 7:2

Facts: In December of 1965 in Des Moines, Iowa, Mary Beth Tinker, her brother John F. Tinker, their friend Christopher Eckhardt, and others developed a plan for an organized protest of U.S. involvement in the conflict in Vietnam. They planned to wear black armbands for a period of time as well as have two days of fasting. The school administrators learned of the organized protest and predicted it would become a distraction in the learning environment they had to maintain. They also believed it might be taken as disrespectful by some students and become, at minimum, a potential problem. School principals met and developed a policy to address their concerns. When the Tinkers and other students arrived at school wearing the armbands, principals instructed the students to remove them. The students, with support from their parents, refused. The school then suspended the students until they were willing to return without wearing the bands. The Tinkers and the others sued in U.S. district court on free speech grounds and eventually appealed to the Supreme Court.

Reasoning: Noting that the record or facts showed no disruption took place, the Court ruled in favor of the students who challenged the suspension, declaring that the students' right to political, symbolic speech based on the First Amendment overrode the school administrators' concerns for *potential* disorder. The decision protected this speech because the suspension failed the content-neutral criterion of the time, place, and manner test: It was intended to quiet the students' anti-war message to avoid possible disruptions.

The Court's Majority Opinion by Mr. Justice Abe Fortas: First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years....

Our problem involves direct, primary First Amendment rights akin to "pure speech"....

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone.

Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students....

Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school, as well as out of school, are "persons" under our Constitution. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Since *Tinker*: The Tinkers' war protest was a brand of political speech. A different brand of speech was at the center of another case involving a school suspension settled in 1986. High school student Matt Fraser gave a speech to a student assembly at his Bethel, Washington, school that showcased student government candidates. In introducing his friend, Fraser delivered a speech riddled with sexual innuendo that caused a roaring reaction and led the school to suspend him. Fraser challenged his suspension. The Court, after fully analyzing Fraser's sexually suggestive language, upheld the school's punishment (*Bethel School District v. Fraser*, 1986). The Court considered the *Tinker* precedent, but unlike the speech in *Tinker*, the speech in this case had no real political value and was designed to entertain an audience of high school students. Students still do not shed their rights at the schoolhouse gates, but neither are they entitled to lewd or offensive speech.

A similar case reached the Court in 2007 (*Morse v. Frederick*). In Alaska, a student body gathered outside a school to witness and cheer on the Olympic torch as runners carried it by. In a quest for attention, one student flashed a homemade sign that read "BONG HITS 4 JESUS" as the torch passed the school. The student was suspended, and he lost his appeal challenging the suspension. The Court ruled that even though the event took place off of school grounds, it was school-sponsored and therefore a matter for school officials to decide, and the school was reasonable to see his sign as promoting illegal drug use.

Political Science Disciplinary Practices and Reasoning Processes: Explain Complex Similarities and Differences

Often, comparing Supreme Court cases can aid understanding of the constitutional principles in each. When you compare cases, you look for similarities and differences in the rulings and opinions.

Apply: Complete the following activities.

1. Explain the facts, majority decision, and reasoning in the *Tinker* case.
2. Explain the constitutional principle under consideration in this case.
3. Explain three points Justice Fortas made in the majority opinion.
4. Explain what the Supreme Court defined as the line between individual freedom and public order in *Tinker*.
5. Explain the similarities and differences of the outcome in *Tinker* with the outcomes of *Bethel School District v. Fraser* and *Morse v. Frederick*.



Source: Granger, NYC

Writing the majority opinion in the *Tinker* case, Justice Abe Fortas stated that schools could forbid conduct that would “materially and substantially interfere with the requirements of appropriate discipline” but not activities that merely create “the discomfort and unpleasantness that always accompany an unpopular viewpoint.”

Obscenity

Some language and images are so offensive to the average citizen that governments have banned them. Though obscenity is difficult to define, two trends prevail regarding **obscene speech**: The First Amendment does not protect it, and no national standard fully defines it.

In the 19th century, some states and later the national government outlawed obscenity. Reacting to published birth control literature, postal inspector and moral crusader Anthony Comstock pushed for the first national anti-obscenity law in 1873, which banned the circulation and importation of obscene materials through the U.S. mail. Yet the legal debate since has generally been over state and local ordinances brought before the Supreme Court on a case-by-case basis. The Court has tried to square an individual’s right to free speech or press and a community’s right to ban obscene and offensive material.

A Transformational Time From the late 1950s until the early 1970s, the Supreme Court heard several appeals by those convicted for obscenity. In *Roth v. United States* (1957), Samuel Roth, a long-time publisher of questionable books, was prosecuted under the Comstock Act. He published and sent through the mail his *Good Times* magazine, which contained partially airbrushed nude photographs. On the same day, the Court heard a case examining a California obscenity law. The Court upheld the long-standing view that both state and federal obscenity laws were constitutionally permissible because obscenity is “utterly without redeeming social importance.” In *Roth*, the Court defined speech as obscene and unprotected when “the average person, applying contemporary community standards,” finds that it “appeals to the prurient interest” (lustful or lewd thoughts or wishes).

Defining Obscenity The new rule created a swamp of ambiguity that the Court tried to clear during the next 15 years. Before Roth finished his prison term, the law turned in his favor. The pornography industry grew apace during the sexual revolution of the 1960s and 1970s. States reacted, creating a battle between those declaring a constitutional right to create or consume risqué materials and local governments seeking bans. The Court struggled to determine this balance. In his frequently quoted phrase from a 1964 case regarding how to distinguish acceptable versus unacceptable pornographic images or expression, Justice Potter Stewart said, “I know it when I see it.” Although the Court could not reach a solid definition of obscenity, from 1967 to 1971, it overturned 31 obscenity convictions.



THINK AS A POLITICAL SCIENTIST: ARTICULATE A DEFENSIBLE CLAIM

An argument, or claim, is a statement that can be supported by facts or evidence. Writing a clear and concise claim is essential to producing a good essay.

The Supreme Court has ruled in cases related to free speech many times in the 20th and 21st centuries. The Court has been willing to grant more freedom in some eras than at other times. As you have read, the Court has revised its definition of what is protected by the First Amendment over time.

Practice: Review the court cases in Topic 3.3. Write a claim in response to the following question based on the decisions in First Amendment cases in the last 100 years. Think of at least four cases that support your claim.

In the last 100 years, has the Supreme Court placed more limits on free speech or recognized more freedoms?

The conflict continued with *Miller v. California* (1973). After a mass mailing from Marvin Miller promoting adult materials, a number of recipients complained to the police. California authorities prosecuted Miller under the state’s obscenity laws. On appeal, the justices reaffirmed that obscene material was not constitutionally protected, but they modified the *Roth* decision saying in effect that a local judge or jury should define obscenity by applying local

community standards. Obscenity is not necessarily the same as pornography, and pornography may or may not be obscene. The Court has heard subsequent cases dealing with obscene speech, but the Miller Test—a set of three criteria that resulted from the *Miller* case—has served as the standard in obscenity cases.

THE MILLER TEST

- The average person applying contemporary community standards finds it appeals to the prurient interest.
- It depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law.
- It lacks serious literary, artistic, political, or scientific value.

Balancing National Security and Individual Freedoms

The Supreme Court continually interprets provisions of the Bill of Rights to balance the power of government and the civil liberties of individuals, sometimes recognizing that individual freedoms are of primary importance and at other times finding that limitations to free speech can be justified, especially when needed to maintain social order. (For more on national security and other individual freedoms protected in the Bill of Rights, see Topic 3.1.)

Clear and Present Danger The first time the Court examined a federal conviction on a free speech claim was in *Schenck v. United States* (1919). This case helped establish that limitations on free speech may be warranted during wartime.



MUST-KNOW SUPREME COURT CASE: SCHENCK V. UNITED STATES (1919)

The Constitutional Question Before the Court: Does the government's prosecution and punishment for expressing opposition to the military draft during wartime violate the First Amendment's free speech clause?

Decision: No, for *United States*, 9:0

Facts: As the United States entered World War I against the Central Powers, the 1917 Sedition and Espionage Acts prevented publications that criticized the government, that advocated treason or insurrection, or that incited disloyal behavior in the military. A U.S. district court tried and convicted Charles Schenck, the secretary of the Socialist Party, when he printed 15,000 anti-draft leaflets intended for Philadelphia-area draftees. In an effort to dissuade people from complying with the draft, he argued in his pamphlet that a mandatory military draft, or conscription, amounted to involuntary servitude, which is denied by the Thirteenth Amendment. The government was very concerned at the time about the Socialist Party, German Americans, and those who questioned America's military draft and war effort. Schenck appealed the guilty verdict from the district court.

Reasoning: On hearing the case, the Supreme Court drew a distinction between speech that communicated honest opinion and speech that incited unlawful action and thereby represented a “clear and present danger.” In a unanimous opinion delivered after the war’s end, the Court upheld the government’s right to convict citizens for certain speech. Schenck went to prison, as did defendants in five similar cases. The **clear and present danger** test became the balancing act between competing demands of free expression and a government needing to protect a free society.

The Court arrived at its opinion through recognizing that the context of an expression needs to be considered to determine its constitutionality. At other times, under other circumstances, the pamphlet or circular might have been allowed, but during wartime and because of the immediate actions the pamphlet could lead to, the harm from the circular overrode Schenck’s right to publish and distribute it.

The Court’s Majority Opinion by Mr. Justice Oliver Wendell Holmes: In impassioned language, [the pamphlet] intimated that conscription was despotism in its worst form, and a monstrous wrong against humanity in the interest of Wall Street’s chosen few. . . . It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. . . Of course, the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. . . .

We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights, but the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.

Since Schenck: Justice Holmes famously reconsidered and redefined his views in a similar case that arrived in the Court soon after *Schenck*. In *Abrams v. United States* (1919), an appeal by Russian immigrants convicted under the same law as Schenck had been, the Court decided once again—mainly for the same reason—to uphold convictions. Holmes, however, voted this time to overturn the conviction and wrote a dissenting opinion declaring the Court should uphold such convictions only if the speech “produces or is intended to produce clear and imminent danger that it will bring about . . . substantive evils.” Decades later, the Court ruled in *Brandenburg v. Ohio* (1969)—an appeal of a convicted Klansman accused of inciting lawlessness at a rally—that such speech could be punished only if it is meant to incite or produce “imminent lawless action and is likely to . . . produce such action.” The clear and present danger standard did not prevent all forms of speech nor was the claim always a justification for criminal charges.

Political Science Disciplinary Practices: Explain Reasoning, Similarities, and Differences

A number of Supreme Court cases have established a “test”—a set of criteria to determine whether speech is protected or not. Like other Supreme Court opinions, however, the tests are always being interpreted and reinterpreted over time.

Apply: Complete the following activities focusing on *Schenck v. United States*.

1. Explain the reasoning behind the Supreme Court’s decision. Take into account the context in which the pamphlet was published.
2. Describe the “clear and present danger” the pamphlet was seen to create. What practical effect on the United States would that danger have had if it were realized?
3. Explain how later Court decisions reinterpreted or refined the “clear and present danger” test for protected or unprotected speech. In other words, how were the opinions in *Schenck* similar to and different from those in *Abrams* and *Brandenburg*?

REFLECT ON THE ESSENTIAL QUESTION

Essential Question: *To what extent does the Supreme Court’s interpretation of freedom of speech reflect a commitment to individual liberty? On separate paper, complete the chart below.*

How the Court Has Addressed Symbolic Speech	How the Court Has Balanced Free Speech and Order

KEY TERMS AND NAMES

clear and present danger

Miller v. California (1973)

obscene speech

Schenck v. United States (1919)

symbolic speech

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

First Amendment: Freedom of the Press

"Freedom of the press and constitutional liberty must live or perish together."

—Salmon P. Chase, *Cincinnati Daily Gazette*, 1836

Essential Question: To what extent does the Supreme Court's interpretation of freedom of the press reflect a commitment to individual liberty?

The Internet and access to information have radically changed the nature of the press. Its reach gives it unrivaled power to connect people and also presents significant risks. False and potentially dangerous information can reach countless numbers of people in an instant. Minors are especially vulnerable to the threat of an unregulated Internet.

In most free speech cases, the Supreme Court rules to protect speech. It also has protected free press in many of its rulings. In the 21st century, does the Internet and those who create its content have the same protection as the traditional press under the First Amendment? Should the web be governed under the same protections as the traditional press, or are different rules needed to counter the significant risks?

Free Press in a Democracy

"Our liberty depends on the freedom of the press," Thomas Jefferson wrote, "and that cannot be limited without being lost." The absolute preservation of a free press, as Jefferson's posture signifies, assures a transparent and honest government. Free press can expose the actions of an evil state. In totalitarian countries today, you can see "state television," that is the news about the government brought to you exclusively by the government. When Western journalists and news crews visit these regimes, they are welcomed and monitored by "government minders," who keep the visitors' cameras and eyes off anything that might make the country look negative.

Centuries after Jefferson's quote, President Donald Trump referred to the press as "the enemy of the people" and repeatedly complained about "fake news." At a campaign rally in February 2016 he said, "I'm going to open up our libel laws so when they [the press] write purposely negative and horrible and false

articles, we can sue them and win lots of money.” Could he win those lawsuits? His past efforts, as well as the standards for freedom of the press, say no.

Press and Speech

The Court has not made much distinction between “speech” and “press” and ordinarily provides the same protective standards for both rights. “Speech” includes an array of expressions—actual words, the lack of words, pictures, and actions. An average citizen has as much right to free press as does a professional journalist. The First Amendment does not protect all speech, or all press, especially if communication invites danger.

Libel and “Breathing Space”

A charge of **libel** refers to false statements in print about someone that defames—or damages that person’s reputation. Much negativity can be printed about someone of a critical, opinionated, or even speculative nature before it qualifies as libel. American courts have typically allowed for a high standard of defamation before rewarding a suing party.

The main decision that defined the First Amendment’s protection of printed speech against the charge of libel was *New York Times Co. v. Sullivan* (1964). In 1960, a civil rights group, including Martin Luther King Jr., put an ad in the *New York Times* entitled “Heed their Rising Voices,” which included some inaccuracies and false information about a Montgomery, Alabama, city commissioner, L. B. Sullivan. Sullivan sued for libel in an Alabama court and won \$500,000 in damages. The *Times* appealed, arguing that the First Amendment protected against slight mistakes and these should differ from an intentional defamation. The Supreme Court sided with the newspaper. Uninhibited debate “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,” the Court noted. The fear of an easy libel suit would stifle robust debate and hard reporting. Even false statements, therefore, must be protected “if the freedoms of expression are to have the ‘breathing space’ that they need . . . to survive.”

The standard to prove libel is therefore high. The suing party must prove that they were damaged and that the offending party knowingly printed the falsehood and did so maliciously with intent to defame. Public officials are less protected than laypeople and cannot recover damages for defamatory falsehoods relating to their official conduct unless they can prove actual malice—that is, reckless disregard for the truth. The Court later broadened the category of “public figure” to include celebrities such as movie stars, top athletes, and business leaders.

New York Times Co. v. Sullivan and subsequent decisions have generally ruled that to win a libel suit in a civil court, the suing party must prove that the offending writer either knowingly lied or presented information with a reckless disregard for the truth, that the writer did so with **malicious intent** to defame, and that actual damages were sustained.

Prior Restraint

The government also has no exclusive privilege of **prior restraint**—the right to stop spoken or printed expression in advance. This position was first declared in *Near v. Minnesota* and later reaffirmed in *New York Times Co. v. United States* (1971). Governments cannot suppress a thought from entering the marketplace of ideas just because most people see the idea as repugnant or offensive. A government that can squelch ideas is one that violates the very essence of a free democracy. The Court, however, has never suggested that its reverence for free expression means that all expression should be tolerated at all times under all conditions. There are exceptions that allow state and federal governments to limit or punish additional forms of speech.



MUST-KNOW SUPREME COURT CASE: NEW YORK TIMES CO. V. UNITED STATES (1971)

The Constitutional Question Before the Court: Can the executive branch block the printing of reporter-obtained classified government information in an effort to protect national secrets without violating the First Amendment's free press clause?

Decision: No, for *New York Times*, 6:3

Before *New York Times Co. v. United States*: In the selective incorporation case of *Near v. Minnesota* (1931), the Supreme Court ruled that a state law preventing the printing of radical propaganda violated freedom of the press.

Facts: Daniel Ellsberg, a high-level Pentagon analyst, became disillusioned with the war in Vietnam and in June of 1971 released a massive report known as the Pentagon Papers to the *New York Times*. (The case also included the *Washington Post* since it, too, had been given the document.) The seven-thousand-page top-secret document—which unlike today's easily released digital content had to be photocopied—told the backstory of America's entry into the Vietnam conflict and revealed government deception. These papers questioned the government's credibility and, President Nixon claimed, hampered the president's ability to manage the war. Nixon's lawyers petitioned a U.S. district court to order the *Times* to refrain from printing in the name of national security. "I think it is time in this country," Nixon said of Ellsberg and the *Times*, "to quit making national heroes out of those who steal secrets and publish them in the newspaper." The lower court obliged and issued the injunction (order), and armed guards arrived at the newspaper's office to enforce the injunction.

The *Times* appealed, and the Supreme Court ruled in its favor. The ruling assured that the hasty cry of national security does not justify censorship in advance and that the government does not have the power of prior restraint of publications. Even Nixon's solicitor general, the man who argued his side in the Supreme Court, later said the decision "came out exactly as it should." This decision was "a declaration of independence," claimed *Times* reporter Hedrick Smith, "and it really changed the relationship between the government and the media ever since."

The Court ruled on the newspaper's right to print these documents, not on Ellsberg's right to leak them. In fact, Ellsberg was later indicted under the 1917 Espionage Act in his own trial.

Reasoning: In a rare instance, the Court in this case did not fully explain its ruling with a typical majority opinion. Instead, it issued a *per curiam* opinion, which is a judgment issued on behalf of a unanimous court or the court's majority without attribution to a specific justice. It relied heavily on the reasoning in previous cases. The judgment overruled the lower court's injunction and prevented the executive branch from stopping the printing.

Per Curiam Opinion: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan* . . . (1963); see also *Near v. Minnesota* (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe* (1971). The District Court for the Southern District of New York, in the *New York Times* case, and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit, in the *Washington Post* case, held that the Government had not met that burden. We agree.

Political Science Disciplinary Practices and Reasoning Processes: Explain Reasoning, Similarities, and Differences

In another concurring opinion, Justice William Brennan noted that the executive branch "is endowed with enormous power in the two related areas of national defense and international relations." Given this relatively unchecked power, he reasoned that in these areas "the only effective restraint upon executive policy and power . . . may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For, without an informed and free press, there cannot be an enlightened people."

Apply: Complete the following activities.

1. Explain the reasoning behind Justice Brennan's views that an "enlightened citizenry" can protect the democratic values of our government.
2. Explain the role of the press in creating that citizenry.
3. Explain how the judgment in *New York Times Co. v. United States* balances claims for individual freedom with concerns for national security.
4. Read about the case *Near v. Minnesota* (1931) and the Court's decision at Oyez.org or supremecourt.gov, and then explain the similarities and differences between the opinions in *Near* and those in the *New York Times* case.
5. Explain the impact that this decision might have had on (1) the credibility of the government, (2) the outcome of the Vietnam War, and (3) the legal standing of whistleblowers today. Do research if necessary.



THINK AS A POLITICAL SCIENTIST: EXPLAIN HOW THE VISUAL ELEMENT OF A CARTOON RELATES TO POLITICAL PRINCIPLES

At one time, political cartoons were a way to express opinions even to people who could not read. Despite today's high literacy rate, cartoons have continued, often as a way to express political beliefs and principles. Interpreting a cartoonist's ideas or perspective can take critical thinking skills because cartoons are often created using irony, symbolism, or analogy.

Practice: View the political cartoon and answer the questions that follow.



1. What is the artist's view of the press?
2. How does the *New York Times Co. v. United States* ruling relate to the artist's view of the press?
3. How do either of the other Supreme Court cases from Topic 3.4 relate?

REFLECT ON THE ESSENTIAL QUESTION

Essential Question: To what extent does the Supreme Court's interpretation of freedom of the press reflect a commitment to individual liberty? On separate paper, complete the chart below.

Free Press Supreme Court Case

How the Ruling Affected Free Press

KEY TERMS AND NAMES

"breathing space"

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

libel

New York Times Co. v. Sullivan (1964)

malicious intent

prior restraint

Near v. Minnesota (1931)

CHAPTER 8 Review:

Learning Objectives and Key Terms

TOPIC 3.1: Explain how the U.S. Constitution protects individual liberties and rights. (LOR-2.A)

Describe the rights protected in the Bill of Rights. (LOR-2.B)

Protections in the Bill of Rights (LOR-2.A.1-3 AND LOR-2.B.1)

Bill of Rights (1791)	public interest
civil liberties	

TOPIC 3.2: Explain the extent to which the Supreme Court's interpretation of the First and Second Amendments reflects a commitment to individual liberty. (LOR-2.C)

Interpretation and Application of Freedom of Religion (LOR-2.C.1)

<i>Engel v. Vitale</i> (1962)	<i>Lemon v. Kurtzman</i> (1971)
establishment clause	wall of separation
free exercise clause	<i>Wisconsin v. Yoder</i> (1972)

TOPIC 3.3: Explain the extent to which the Supreme Court's interpretation of the First and Second Amendments reflects a commitment to individual liberty. (LOR-2.C)

Balancing Freedom and Order in Free Speech (LOR-2.C.2 & 3)

clear and present danger	<i>Schenck v. United States</i> (1919)
<i>Miller v. California</i> (1973)	symbolic speech
obscene speech	<i>Tinker v. Des Moines Independent Community School District</i> (1969)

TOPIC 3.4: Explain the extent to which the Supreme Court's interpretation of the First and Second Amendments reflects a commitment to individual liberty. (LOR-2.C)

Supreme Court Interpretations of Free Press (LOR-2.C.4)

"breathing space"	<i>New York Times Co. v. United States</i> (1971)
libel	<i>New York Times Co. v. Sullivan</i> (1964)
malicious intent	prior restraint
<i>Near v. Minnesota</i> (1931)	

CHAPTER 8 Checkpoint: **The Bill of Rights and the First Amendment**

Topics 3.1–3.4

MULTIPLE-CHOICE QUESTIONS

1. Which of the following is an accurate comparison of *Engel v. Vitale* and *Wisconsin v. Yoder*?

	Engel v. Vitale (1962)	Wisconsin v. Yoder (1972)
(A)	Involved the application of the establishment clause	Involved the protection of the free exercise clause
(B)	Involved the issue of school prayer	Involved reimbursement to parents of parochial school children
(C)	Involved the issue of prayer at city council meetings	Involved daily Bible readings in public schools
(D)	Found that state mandated prayer was unconstitutional	Found that religious symbols could not be displayed at state funded locations

2. What was the effect of the ruling in *Schenck v. United States*?

- (A) People can say or express anything as long as the nation is not at war.
- (B) During wartime, no person can criticize the U.S. government.
- (C) Printed materials are protected as free speech, even in times of war.
- (D) Speech that presents a clear and present danger can be punished.

3. Which of the following is protected by the First Amendment?

- (A) Political speech
- (B) Eminent domain
- (C) Obscenity
- (D) Gun ownership

4. With the variety of religious denominations and religions represented at a public high school, the administration has decided to ban students from wearing any religious symbols or garb that reflect a particular religious faith. Which of the following would be the best legal advice for school administrators?
- (A) This is a constitutional policy because it reflects majoritarian religious practices.
 - (B) This is an unconstitutional policy because it violates the free exercise clause.
 - (C) This is a constitutional policy because religious practice is not allowed on public property.
 - (D) This is an unconstitutional policy because of the reserved powers clause.

Questions 5 and 6 refer to the cartoon below.



5. With which of the following statements would the cartoonist most likely agree?
- (A) The government should be able to impose religion on its citizens.
 - (B) Elected officials cannot be religious.
 - (C) There is a constant struggle to define the separation of church and state.
 - (D) The government should provide more help to churches.
6. Which of the following Supreme Court cases is most related to the topic of the cartoon?
- (A) *New York Times Co. v. United States* (1971)
 - (B) *Schenck v. United States* (1919)
 - (C) *Engel v. Vitale* (1962)
 - (D) *Tinker v. Des Moines* (1969)

FREE-RESPONSE QUESTIONS

Concept Application

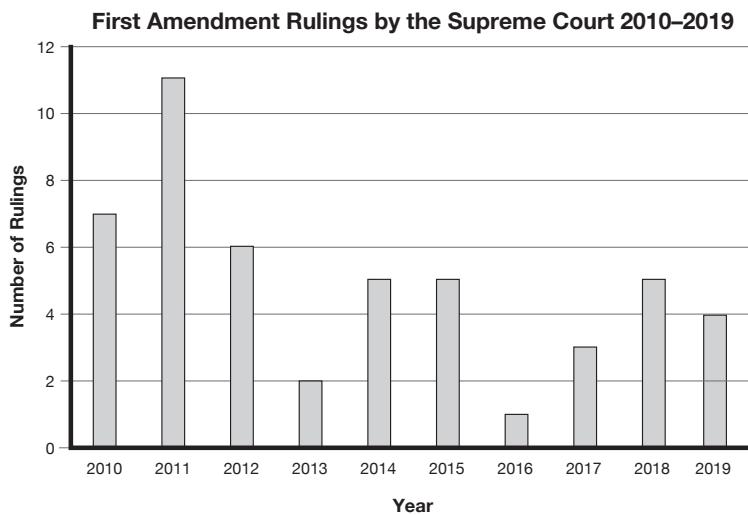
1. RALEIGH – The American Civil Liberties Union of North Carolina Legal Foundation (ACLU-NCLF) today applauded a judge’s ruling that declared North Carolina’s ban on the public use of profanity to be an unconstitutional violation of freedom of speech. The statute at issue [makes] it a misdemeanor offense to use “indecent or profane language” in a “loud and boisterous manner” within earshot of two or more people on any public road or highway in North Carolina. . . . This 98-year-old law is a blatant violation of the First Amendment,” said Jennifer Rudinger, Executive Director of the ACLU-NCLF. “We applaud the judge’s ruling as an important victory for free speech. Our client, Samantha Elabanjo, never should have been charged with a crime just for saying ‘damn’ on a public street.”

—American Civil Liberties Union, Press Release, 2011

After reading the scenario, respond to A, B, and C below:

- (A) Describe how the press release supports a commitment to individual liberty.
- (B) Explain how a state government action could alter the ruling described in the scenario.
- (C) In the context of this scenario, explain how the action described in B can result in different outcomes.

Quantitative Analysis



3. Use the information graphic on the previous page to answer the following questions.
- (A) Describe a trend regarding First Amendment cases and the U.S. Supreme Court.
 - (B) Describe a similarity or difference in the number of First Amendment rulings the U.S. Supreme Court makes in different years.
 - (C) Draw a conclusion about the cause of the similarity or difference described in part B.
 - (D) Explain how U.S. Supreme Court rulings on the First Amendment may reflect a commitment to balancing liberty and order.

SCOTUS Comparison

4. On January 24, 2002, the Juneau [Alaska] School District sanctioned an outdoor event across the street from the high school—watching the Olympic torch as it passed by on its journey to Salt Lake City, where the winter games were going to be held. Just as the torch and camera crews passed by, student Joseph Frederick unfurled a 14-foot banner that said “BONG HITS 4 Jesus.” Principal Deborah Morse confiscated the banner and suspended Frederick for ten days. Although he appealed his suspension, the Juneau School District upheld the suspension, arguing that the sign promoted illegal drug use and the school had a policy against displaying messages that promoted drug use. Frederick sued. A district court decided in favor of the principal. On appeal the Ninth Circuit Court decided that Frederick’s constitutional rights were violated.

The case reached the Supreme Court, which ruled 5:4 in *Morse v. Frederick* in 2007 that the school was within its rights to remove the banner and suspend Frederick. In the majority opinion, Justice Roberts argued that students’ rights in schools do not extend to pro-drug messages, because an important objective of the school was to discourage drug use.

- (A) Identify the constitutional clause that is common to *Morse v. Frederick* (2007) and *Tinker v. Des Moines Independent School District* (1969).
- (B) Based on the similarity identified in part A, explain why the facts of *Tinker v. Des Moines Independent School District* led to a different holding than the holding in *Morse v. Frederick*.
- (C) Describe how the holding in *Morse v. Frederick* affected students’ opportunities to hold gatherings on school grounds supporting alteration of marijuana law.

CHAPTER 9

Balancing Liberty and Safety

Topics 3.5–3.6

Topic 3.5 Second Amendment: Right to Bear Arms

LOR-2.C: Explain the extent to which the Supreme Court's interpretation of the First and Second Amendments reflects a commitment to individual liberty.

- Required Foundational Document:
 - The Constitution of the United States

Topic 3.6 Amendments: Balancing Individual Freedom with Public Order and Safety

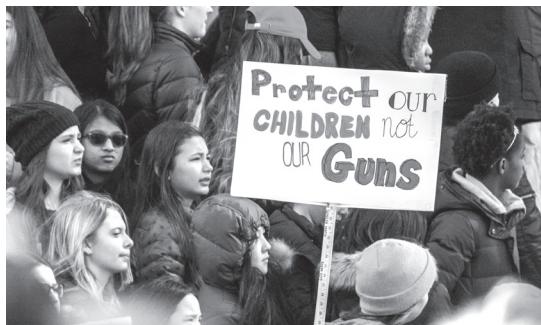
LOR-2.D: Explain how the Supreme Court has attempted to balance claims of individual freedom with laws and enforcement procedures that promote public order and safety.

- Required Foundational Document:
 - The Constitution of the United States



Source: Wikimedia Commons

People march to advocate for gun rights in St. Paul, Minnesota.



Source: Wikimedia Commons

Students from schools in Brooklyn, New York, walk out of class to show support for stricter gun laws.

Second Amendment: Right to Bear Arms

"To disarm the people . . . was the best and most effectual way to enslave them."

—George Mason, Virginia Ratifying Convention, 1788

Essential Question: To what extent does the Supreme Court's interpretation of the Second Amendment reflect a commitment to individual liberty?

The founding fathers vigorously debated the necessity of a nation being able to defend itself from invading forces or from threats within. Today, a growing number of voices is calling for changes to local and national gun laws as gun violence increases. The debate about the meaning of the Second Amendment and the degree to which government may limit guns has become especially heated in the last few decades. Should an amendment created in 1791 still guide an industrialized and modernized nation's gun policy in the 21st century?

Founding Principles and Bearing Arms

At the 1787 Philadelphia Convention, the debate about weapons was generally related to a standing army. In light of the recent Shays' Rebellion, several attendees were inclined to enable Congress to maintain a regular armed force, a paid, professionally trained military. Others clung to the idea of states keeping regular militias that the federal government could call into service. The latter would require an extra step in times of need but would provide an additional check on a potential runaway central government if the army was going to be used for heinous purposes.

Constitutional Convention

The debates show us how far the Revolution and its aftermath had reversed traditional thinking. Previously, most statesmen of the day assumed that militias, locally controlled, would be less prone to corruption and abuse. By 1787, though, the men of the convention insisted an effective government required a national army, but, as historian Michael Waldman explains in *The Second Amendment: A Biography*, "there is no evidence—from James Madison's notes or those of any other participant—that the delegates in the Constitutional

Convention had the slightest inkling that private gun ownership was viewed at risk and required inclusion in a bill of rights. *It simply did not come up.*

In the States

Several state constitutions had a bill of rights. Four of the thirteen states protected the right to bear arms as part of a militia force. Only one, Pennsylvania, protected the right to bear arms as individual self-defense.

Gun regulations were common. As historian Saul Cornell has described, various states and localities maintained laws that, among other things, designated the official location for gun and powder storage, barred firing guns within city limits, and prevented people deemed dangerous from gun ownership. In Maryland, Catholics were barred from having guns. Most states banned African Americans, free or slave, from joining militias or owning weapons. And Rhode Island created a gun registry in supporting the militia.

Much gun law came via common law court rulings. Gun ownership was common and protected. The legal argument for using a gun in self-defense was well established, but courts would eventually weigh the right to own a gun against actions and regulations meant to protect others.

A National Standard

As the ratification debate moved toward adding a bill of rights, George Mason and Virginia's other critics of the proposed Constitution drafted suggested amendments to send to the Congress. Their seventeenth suggestion read in part, “That the people have a right to keep and bear arms; that a well-regulated militia composed of the body of the people trained to arms is the proper, natural and safe defense of a free state.” This, along with suggestions from multiple states, grew into the **Second Amendment**.



THINK AS A POLITICAL SCIENTIST: DESCRIBE THE AUTHOR'S CLAIM AND PERSPECTIVE

Looking at the context in which an article or document is written often helps you clarify an author's claim. The quotes from Michael Waldman above look at how colonial leaders viewed the right of citizens to bear arms soon after the American Revolution. Today, people see the right to bear arms from a different perspective. For example, gun violence has increased in American society. As a result, the arguments for and against citizens' rights to own firearms have heightened. One side emphasizes the right to own a gun to protect oneself and family. The other focuses on laws to restrict ownership of weapons to protect everyone from gun violence.

Practice: Read the excerpt below, and answer the questions that follow.

“On June 8, 1789, James Madison—who had won election to Congress only after agreeing to push for changes to the newly ratified Constitution—proposed 17 amendments on topics ranging from the size of congressional districts to legislative

pay to the right to religious freedom. One addressed the “well-regulated militia” and the right “to keep and bear arms.” We don’t really know what he meant by it. At the time, Americans expected to be able to own guns, a legacy of English common law and rights. But the overwhelming use of the phrase “bear arms” in those days referred to military activities.

There is not a single word about an individual’s right to a gun for self-defense or recreation in Madison’s notes from the Constitutional Convention. Nor was it mentioned, with a few scattered exceptions, in the records of the ratification debates in the states. Nor did the U.S. House of Representatives discuss the topic as it marked up the Bill of Rights. In fact, the original version passed by the House included a conscientious objector provision. “A well regulated militia,” it explained, “composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.”

—Michael Waldman, *Politico Magazine* “How the NRA Rewrote the Second Amendment”, 2014

1. How does Waldman interpret Madison and other founders’ arguments on owning guns?
2. What inferences can be made about the author’s opinion of the Second Amendment?
3. What is the uncertainty that Waldman finds in the founders’ opinion about the right of citizens to own guns?

The Second Amendment and Gun Policy

Supreme Court interpretations of the Second Amendment, like those of the First Amendment, represent a commitment to individual liberties. The amendment states, “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.” The precise meaning is difficult to ascertain in today’s world, which is likely why the Second Amendment has been controversial. Was the amendment written to protect the state’s right to maintain a militia or the citizen’s unfettered right to own a firearm? Gun-control advocates might point out these state militias were “well regulated” and thus subject to state requirements such as training, occasional military exercises, and limitations on the type of gun possessed. The concern at the time was about the federal government imposing its will on or overthrowing a state government with a standing federal army. The original concern was not with the general citizenry’s right to gun ownership. Today’s gun advocates, however, supported by recent Supreme Court decisions, argue that the amendment guarantees the personal right to own and bear arms because each citizen’s right to own a firearm guaranteed the state’s ability to have a militia. Similarly, gun rights proponents argue that the “right of the people” clause means the same as it does with other parts of the Bill of Rights.

National and State Laws

Recall that the Bill of Rights was originally created to limit the federal government. States made their own gun-related laws for years and still do today. A handful of national gun laws exist based on the commerce clause. However, as you will read in the *McDonald* case, states must follow the Second Amendment because of selective incorporation. (See Topic 3.7.)

Gun laws, such as defining where people can carry, fall within the police powers of the state. (See Topic 1.7.) Not until 1934, in an era of bootleggers and gangsters, did Congress pass a national statute about possession of guns. The **National Firearms Act** required registration of certain weapons, imposed a tax on the sale and manufacture of certain guns, and restricted the sale and ownership of high-risk weapons such as sawed-off shotguns and automatic machine guns. The law was challenged not long after Congress passed the bill and it was upheld by the Supreme Court.

Increased urban crime, protest, and assassinations in the 1960s influenced the passage of the **Gun Control Act** of 1968. Along with other anti-crime bills that year, the act sought safer streets. It ended mail-order sales of all firearms and ammunition and banned the sale of guns to felons, fugitives, illegal drug users, people with mental illness, and those dishonorably discharged from the military. In reality, the law's effect was to punish those who owned a gun or used it illegally more than to prevent the purchase or possession of guns.

The Brady Bill The gun debate came to the forefront again after a mentally disturbed John Hinckley shot President Ronald Reagan in 1981. Reagan survived as did his press secretary James Brady, but Brady suffered a paralyzing head wound. His wife helped organize a coalition to prevent handgun violence. They pushed for legislation that became the **Brady Handgun Violence Prevention Act** in 1993. This law established a five-day waiting period for handgun purchases to allow for a background check. The wait also serves as a potential cooling-off period for anyone buying a gun from immediate impulse, anger, or revenge. The law expired in 1998, but a similar policy that established the National Instant Criminal Background Check System has gone into effect. The Brady Campaign to Prevent Gun Violence reported that the initial Brady law prevented the sale of guns to more than two million people.

The law, however, has several loopholes. Private gun collectors can avoid the background check when purchasing firearms at private gun shows, and some guns can be purchased via the Internet without a background check. Federal law and 28 states still allow juveniles to purchase long guns (rifles and shotguns) from unlicensed dealers, and the national check system has an insufficient database of non-felon criminals, domestic violence offenders, and mental health patients.

Meanwhile, states have increasingly passed laws favorable to the possession of a gun. The powerful National Rifle Association (NRA) and Republican-controlled legislatures have worked to pass a number of state laws to enable citizens to carry guns, some concealed, some openly. The NRA has also fought in the courts against laws restricting gun ownership.

The Road to Heller

In 2008 the Supreme Court issued its first Second Amendment decision in decades. The case arose out of a Washington, DC, security guard's desire to travel home with his revolver. Since 1976, a District of Columbia local ordinance barred individuals from keeping a loaded handgun at home without a trigger lock. Security guard Dick Heller and libertarian lawyers filed suit, claiming the ordinance violated his Second Amendment right.

In this case, *District of Columbia v. Heller* (2008), countless interest groups filed friend of the court briefs. Most members of Congress took positions on the issue. The U.S. solicitor general filed a brief that suggested the Court not reach too far in preventing regulation, as reasonable limits on guns should remain lawful.

Amid the oral arguments in the courtroom, little was said about current gun law across the country, the toll of gun violence, or any precedents. Justice Stephen Breyer did cite some statistics on annual deaths and injuries caused by pistols. "Would it be unreasonable for a city with a high crime rate to ban handguns?" he asked Heller's lawyer.

For the first time the Court ruled, in a five-to-four decision, that the Second Amendment recognizes an individual's right to own a gun unrelated to militia service. In the Court's opinion, Justice Antonin Scalia wrote of the amendment and its history, that it "conferred an individual right to keep and bear arms. Of course, the right was not unlimited, just as the First Amendment's right to speech is not" unlimited.

The *Heller* decision is unique in that it struck down an overreaching law put forth by the District of Columbia, the seat of the federal capital. This was not a state law, and thus it would not directly impact or alter similar bans and limitations in state law or local ordinances beyond DC. That would come with the *McDonald* decision. (See Topic 3.7.)

REFLECT ON THE ESSENTIAL QUESTION

Essential Question: To what extent does the Supreme Court's interpretation of the Second Amendment reflect a commitment to individual liberty? On separate paper, complete the chart below.

Government Action Related to the Second Amendment	Effect on Gun Rights

KEY TERMS AND NAMES

Brady Handgun Violence Prevention Act (1993)
District of Columbia v. Heller (2008)

Gun Control Act (1968)
National Firearms Act (1934)
Second Amendment (1791)

Amendments: Balancing Individual Freedom with Public Order and Safety

"When the people fear the government there is tyranny, when the government fears the people there is liberty."

—John Basil Barnhill, *Debate on Socialism*, 1914

Essential Question: How has the Supreme Court attempted to balance claims of individual freedom with laws and enforcement procedures that promote public order and safety?

While the First and Second Amendments focus on guaranteeing individual liberties in relation to speech, religion, assembly, and bearing arms, other amendments in the Bill of Rights protect minorities and vulnerable populations—those suspected or accused of crimes, the poor, and the indigent—through the due process clause of the Fifth and Fourteenth Amendments. Constitutional provisions also help guide conflicts between individual liberties and national security concerns. Those conflicts can range from the Second Amendment argument of the right of one person to own a gun versus another person's right to be safe from gun violence to the Fourth Amendment's protections against illegal searches and seizures versus the government promoting public safety. **BIG IDEA** Governmental laws and policies balancing order and liberty are based on the U.S. Constitution and have been interpreted differently over time.

Cruel and Unusual Punishments and Excessive Bail

The phrases decrying and preventing government from applying “cruel and unusual punishments” and requiring “excessive bail” had worked their way into the English Bill of Rights generations before the American Revolution. The colonists who formed the United States saw some of the punishments toward the early critics of the British monarchy during the pre-war period as cruel and unusual. Kings had imprisoned their foes on false charges and denied the possibility for bail. They had also mistreated or starved their foes to death. These actions were likely taken because a fair and public trial probably would not have rendered the guilty verdict the king wanted. In the new republic, the U.S. Bill of Rights would protect against these practices.

Eighth Amendment

The **Eighth Amendment** (1791) prevents cruel and unusual punishments and excessive bail. Capital punishment, or the death penalty, has been in use for most of U.S. history, and it was allowed at the time of ratification of the Constitution and the Bill of Rights. (The Fifth Amendment refers to individuals being “deprived of life.”) There is nevertheless debate about whether the death penalty fits the definition, according to the framers, of cruel and unusual. A handful of U.S. 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, large 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. Justice Brennan wrote that most of society rejects the unnecessary severity of the death penalty, and there are other less severe punishments available. Justice Marshall called the death penalty excessive and served “no legislative purpose.” Also, the Court’s decision addressed the randomness of the application 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, a careful and deliberate look at the circumstances leading to the crime must be taken into account in the penalty phase—the 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.

Guantanamo Bay and Interrogations

After the September 11, 2001, attack on the United States, in 2002 the U.S. military established a detention camp at its naval base in Guantanamo Bay, Cuba, to hold terror suspects captured in the global war on terror. Placing the camp at this base provided stronger security, minimal media 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. If the suspect never entered the U.S., would he be entitled to constitutional and Bill of Rights provisions?

Soon after the terrorist attacks on September 11, 2001, 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 who fit this description was waterboarding—an ancient method that simulates drowning.

As these policies developed and became public, international peace organizations and 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 and left wondering, “Do the protections of the Bill of Rights extend to suspected terrorists?”

President Obama reversed many of the Bush administration’s positions regarding torture techniques on terrorism suspects. Many U.S. intelligence officials protested these changes, claiming a need for the flexibility of various techniques to acquire information vital to the nation’s security from detainees.



THINK AS A POLITICAL SCIENTIST: SUPPORT AN ARGUMENT USING RELEVANT EVIDENCE

Does the death penalty actually work as a deterrent to crime and make society safer? Strong arguments have been made on both sides of that question. Many times, evidence can support both sides of an argument, depending on how it is presented and interpreted. Both perspectives on the death penalty as a deterrent can use statistics like those below to strengthen their argument.

Practice: Using the information provided, answer the questions below.

MURDER RATES IN STATES WITH AND WITHOUT THE DEATH PENALTY								
Year	1990	1994	1998	2002	2006	2010	2014	2018
States with death penalty	9.5	9.24	6.54	5.74	6.1	4.97	4.75	5.34
States without death penalty	9.16	7.88	4.63	4.27	4.45	4.03	3.79	4.1

Source: deathpenaltyinfo.org

(Data for each year taken from the FBI’s Uniform Crime Reports. Murder rates calculated by dividing the total number of murders by the total population in death penalty and non-death penalty states respectively and multiplying that by 100,000)

1. What are the trends in the data provided?
2. Statistics from which year(s) could show the effectiveness of the death penalty?
3. Statistics from which year(s) could show the ineffectiveness of the death penalty?
4. How could the visual representation of the death penalty data be improved?

Individual Rights and the Second Amendment

Attempts to shape gun policy continue at the federal level with little success. Most gun policy and efforts to balance order and freedom with respect to the Second Amendment are scattered among varying state laws and occasional lower court decisions.

Recent State Policy

About 33,000 American deaths result from handguns each year; roughly one-third are homicides, and two-thirds are suicides. In 2014, about 11,000 of the nearly 16,000 homicides in the United States involved a firearm. In addition to the thousands of single deaths, an uptick in mass shootings has brought attention to the issue of accessibility to weapons. With shootings at Virginia Tech (2007), Newtown (2012), Charleston (2015), Orlando (2016), San Bernardino (2017), Las Vegas (2017), and Parkland (2018), activists and experts on both sides of the gun debate push for new legislation at the state level in hopes of solving a crisis and preventing and protecting future would-be victims.

According to a count by the San Francisco-based Law Center to Prevent Gun Violence, more than 160 laws restricting gun use or ownership were passed in 42 states and the District of Columbia after the Newtown massacre. These included broadening the legal definition of assault weapons, banning sales of magazines that hold more than seven rounds of ammunition, and increasing the number of potentially dangerous people on the no-purchase list. By another expert's estimate, as G. M. Filisko reports in the *American Bar Association Journal*, about nine states have approved more restrictive laws, and about 30 have passed more pro-Second Amendment legislation. Pro-Second Amendment laws include widening open-carry and increasing the number of states that have reciprocity in respecting out-of-state permits. In 2009, only two states had permit-less carry. In 2017, North Dakota became the twelfth state to pass an open-carry law, sometimes called "constitutional carry" by its advocates.

After a mass shooting, the number of state firearms bills introduced increases. The types of laws passed depend on the party in power. Republican pro-Second Amendment civil liberties bills increased more permissive laws by 75 percent in states where Republicans dominate. In Democrat-controlled states researchers found no significant increase in new restrictive laws enacted.

Since the Las Vegas shooting in 2017, which resulted in a record number of deaths for a modern-day shooting, many people have focused on banning bump stocks, a device that essentially turns a semiautomatic rifle into an automatic one. New policies on both sides of the gun argument will continue to come and go with public concern over the issue, as legislatures design and pass them, and as courts determine whether they infringe on citizens' civil liberties.

Search and Seizure

Among the grievances that pushed the colonies toward revolution was the British practice of searching for smuggled goods. The British government issued **writs of assistance**, broad search warrants, that enabled British soldiers to search any vessel, warehouse, home, or wagon. Conflict between the overly aggressive soldiers and the already freedom-deprived colonists propelled the revolution.

Fourth Amendment

When many of the same revolutionaries worked to design the new government, they remembered this miserable chapter in relations between the colonies and Britain. James Madison and the First Congress added the **Fourth Amendment** to prevent a recurrence of such government overreach and violation of liberty, especially in the home. The amendment addresses searches and seizures of evidence and citizens. It specifically protects against *unreasonable* searches and seizures. It provides that warrants are necessary for government or law enforcement to enter a person's home. Courts can issue such warrants only when the information causing suspicion is delivered under oath and reaches the legal standard of a *probable cause*—a reasonable amount of suspicion that a crime has been committed. Probable cause is also needed to make an arrest—“seizing” a person—whether in the heat of the moment on the street or in an officer’s planned knock on the door with warrant in hand.

The right of the people to be secure [safe] in their persons, houses, papers, and effects [belongings] against unreasonable searches and seizures shall not be violated; and no [search] 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.

Fourth Amendment—U.S. Constitution

When law enforcement officers have probable cause to believe criminal activity has taken place or is planned, they are duty-bound to act to preserve order. As the likelihood of danger or harm increases, the threshold for limitations on government search and seizure diminishes. For this reason, there are exceptions to the warrant requirement. For example, officers who see crime in plain view do not need a warrant. Limitless searches can be conducted in airports and at border crossings. Public school principals need only *reasonable* cause or suspicion to conduct searches in schools. If people give consent, waiving their constitutional protection against unreasonable searches, then no warrant is required.

However, the Supreme Court has ruled that warrants are required for wiretapping a suspect’s phone, bringing a drug-sniffing dog upon the porch of a

home, and looking into a cell phone of a suspect or even an arrested defendant. The Supreme Court has ruled in other ways to shape search and seizure law that will be examined in Topic 3.7.

Cell Phones and Metadata

Major changes in the past two decades—the threat of terrorism and the availability of modern electronic communication—have altered the application of the Fourth Amendment. The concern over terrorism significantly spiked after al-Qaeda terrorists attacked the United States on September 11, 2001, killing more than 3,000 people. In a sweeping response to find these terrorists and prevent future attacks, the U.S. government capitalized on modern forms of investigation and electronic surveillance. (See Topics 1.5 and 3.8 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—such as 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 some ways, this relationship was similar to the police asking third parties in other investigations (a suspect's boss, friend, business associate) about a suspect's activities. The degree to which phone companies need to keep phone records private is up to the customer and cellular provider. Some of the companies cooperated with the Bush administration in the name of catching terrorists, raising the legal question of whether such cooperation compromised citizens' right against unreasonable searches.

As governmental security organizations, especially the National Security Agency (NSA), increased their surveillance efforts, they instituted a program code-named PRISM. This program 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.

REFLECT ON THE ESSENTIAL QUESTION

Essential Question: How has the Supreme Court attempted to balance claims of individual freedom with laws and enforcement procedures that promote public order and safety? On separate paper, complete the chart below.

Government Action to Promote Public Order and Safety	Effect on Individual Freedom

KEY TERMS AND NAMES

Eighth Amendment (1791)

metadata

Fourth Amendment (1791)

writs of assistance

CHAPTER 9 Review: Learning Objectives and Key Terms

TOPIC 3.5: Explain the extent to which the Supreme Court's interpretation of the First and Second Amendments reflects a commitment to individual liberty. (LOR-2.C)

Supreme Court Interprets the Second Amendment (LOR-2.C.5)

Brady Handgun Violence Prevention Act (1993) National Firearms Act (1934)

District of Columbia v. Heller (2008)

Second Amendment (1791)

Gun Control Act (1968)

TOPIC 3.6: Explain how the Supreme Court has attempted to balance claims of individual freedom with laws and enforcement procedures that promote public order and safety. (LOR-2.D)

Supreme Court Balances Freedom and Safety (LOR-2.D.1 & 2)

Eighth Amendment (1791)

metadata

Fourth Amendment (1791)

writs of assistance

CHAPTER 9 Checkpoint:

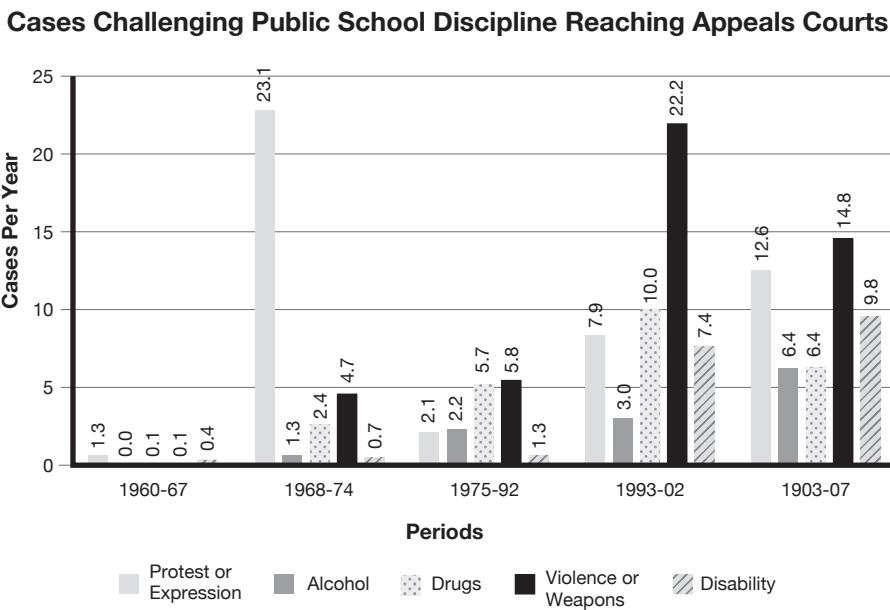
Balancing Liberty and Safety

Topics 3.5–3.6

MULTIPLE-CHOICE QUESTIONS

1. Which of the following interest groups works primarily to protect the rights enumerated in the Second Amendment?
 - (A) American Civil Liberties Union
 - (B) American Bar Association
 - (C) National Rifle Association
 - (D) National Council of State Legislatures
2. 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 always 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.

Questions 3 and 4 refer to the chart below.



Source: Education Next

3. Which of the following is reflected in the data in the chart?
- (A) First Amendment-related challenges were the lead category in each period.
 - (B) Appeals courts in the 1968–1974 period heard more First Amendment cases than more recent appeals courts.
 - (C) Cases challenging punishment for student violence or weapons has steadily increased since 1968–1974.
 - (D) The “War on Drugs” has virtually ended student drug-related cases.
4. Which of the following is an accurate conclusion based on your knowledge of U.S. government concepts and the data in the chart?
- (A) The Supreme Court’s *Tinker v. Des Moines* (1969) ruling may have encouraged more student challenges based on First Amendment rights.
 - (B) Virtually no challenges were made under the Fourth and Eighth Amendments.
 - (C) As the courts became more conservative, they disposed of a greater number of cases.
 - (D) Challenges based on disabilities were limited until the passage of the Americans with Disabilities Act in 1990.
5. Which of the following is an accurate statement related to the Supreme Court’s ruling in *Heller v. District of Columbia* on the right to bear arms?
- (A) The case relied on the application of the Fourteenth Amendment
 - (B) Gun-control activists have been outspoken in favor of the Court’s ruling.
 - (C) The Court overturned a broad handgun ban to assure minority rights.
 - (D) The Court supported First Amendment rights in its ruling.
6. Which of the following is an accurate comparison of the Second and Eighth Amendments?

	Second Amendment	Eighth Amendment
(A)	Assures due process	Mandates equal protection
(B)	Guarantees the right to bear arms	Protects individuals from cruel and unusual punishment
(C)	Protected with <i>District of Columbia v. Heller</i> (2008)	Assured in <i>McDonald v. Chicago</i> (2010)
(D)	Upheled in schools with <i>Tinker v Des Moines</i> (1969)	Limited in <i>Wisconsin v. Yoder</i> (1972)

FREE-RESPONSE QUESTIONS

Concept Application

The following is from a broadcast news outlet.

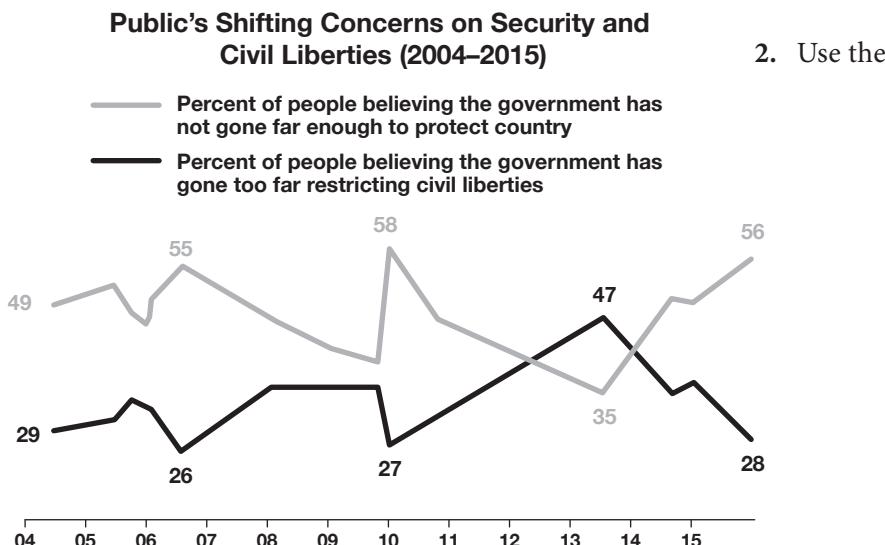
1. The House [of Representatives] passed what advocates call the most significant gun control measure in more than two decades on Wednesday when it approved the first of two bills aimed at broadening the federal background check system for firearms purchases. The vote on the first bill, dubbed the Bipartisan Background Checks Act of 2019, passed largely along party lines, 240 to 190, with Democrats who control the House cheering as they carried the legislation across the finish line. A second bill, expected to be taken up Thursday, would extend the period federal authorities have to complete a background check before a gun sale can go through. Under current law, if a check isn't finalized in three business days, the transaction can automatically proceed.

—Brakkton Booker, National Public Radio, 2019

After reading the scenario, respond to A, B, and C below:

- (A) Describe how the bills would enhance government power.
- (B) Describe an action Congress can take regarding this legislation to better balance government power and civil liberties within the context of the scenario.
- (C) In the context of the scenario, if the policy proposals pass, explain how social movements might use constitutional provisions to advance their agenda.

Quantitative Analysis



information graphic to answer the questions below.

- (A) Identify the lowest percent of people believing that government has gone too far restricting civil liberties.
- (B) Describe a trend in the data in the graph.
- (C) Draw a conclusion about the reason for the trend described in part B.
- (D) Explain how the information graphic demonstrates citizen concern for protecting the country and restricting liberties.

CHAPTER 10

Due Process

Topics 3.7–3.9

Topic 3.7 Selective Incorporation

LOR-3.A: Explain the implications of the doctrine of selective incorporation.

- Required Foundational Document:
 - The Constitution of the United States
- Required Supreme Court Case:
 - *McDonald v. Chicago* (2010)

Topic 3.8 Amendments: Due Process and the Rights of the Accused

LOR-3.B: Explain the extent to which states are limited by the due process clause from infringing upon individual rights.

- Required Supreme Court Case:
 - *Gideon v. Wainwright* (1963)

Topic 3.9 Amendments: Due Process and the Right to Privacy

LOR-3.B: Explain the extent to which states are limited by the due process clause from infringing upon individual rights.

- Required Foundational Document:
 - The Constitution of the United States
- Required Supreme Court Case:
 - *Roe v. Wade* (1973)



Source: Wikimedia Commons

A border patrol agent reads Miranda rights to a detainee.

Selective Incorporation

"For present purposes, we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

—Justice Edward Sanford, *Gitlow v. New York*, 1925

Essential Question: What are the implications of the doctrine of selective incorporation?

All levels of government adhere to most elements of the Bill of Rights, but that wasn't always the case. The Bill of Rights was ratified to protect the people from the *federal* government. The document begins with the First Amendment addressing what the government cannot do. "Congress shall make no law" that violates freedoms of religion, speech, press, and assembly. The document then goes on to address additional liberties Congress cannot take away. Most states had already developed bills of rights with similar provisions, but states did not originally have to follow the national Bill of Rights because it was understood that the federal Constitution referred only to federal laws, not state laws.

Incorporating the Bill of Rights

The Supreme Court has ruled in landmark cases that state laws must also adhere to certain Bill of Rights provisions through the Fourteenth Amendment's due process clause. The process of declaring only certain, or selected, provisions of the Bill of Rights applicable to the states rather than all of them at once is known as **selective incorporation**.

The concept of fundamental fairness that ensures legitimate government in a democracy is **due process**. It prevents arbitrary government decisions to avoid mistaken or abusive taking of life, liberty, or property (including money) from individuals without legal cause. (See Topic 3.8.)

The question of whether the Bill of Rights limited the federal government only, or also the states, was originally answered in the 1833 case *Barron v. Baltimore*. Justice John Marshall's Court made clear that states, if not restrained by their own constitutions or bills of rights, did not have to follow the federal Bill of Rights.

Fourteenth Amendment

Decades after the *Barron* case, the ratification of the **Fourteenth Amendment** (1868) in the aftermath of the Civil War strengthened due process. Before and during the Civil War, southern states placed many restriction on the basic liberties of African Americans and white citizens who tried to defend African American rights. After the war, Union leaders questioned if Southern states would comply with new laws that protected due process, especially for former slaves. Would an accused African American man receive a fair and impartial jury at his trial? Could an African American defendant refuse to testify in court, as a white person could? To ensure the states followed these commonly accepted principles in the federal Bill of Rights and in most state constitutions, Republicans in the House of Representatives drafted the most important and far-reaching of the Reconstruction Amendments, the Fourteenth. It declares that “all persons born or naturalized in the United States . . . are citizens” and that no state can “deprive any person of life, liberty, or property, without due process of law.”

KEY SELECTIVE INCORPORATION SUPREME COURT CASES AND RELEVANT AMENDMENTS		
Selective Incorporation Case	Ruling	Amendment
<i>Everson v. Board of Education</i> (1947)	States that reimburse parents for transportation costs to get their children to parochial schools did not violate the Constitution.	First
<i>McDonald v. Chicago</i> (2010)	The Second Amendment must be protected by states based on the due process clause of the Fourteenth Amendment. (See pages 315–316.)	Second
<i>Mapp v. Ohio</i> (1961)	Evidence obtained in a manner that violated Fourth Amendment protections was inadmissible in state courts too. (See Topic 3.8.)	Fourth
<i>Chicago, Burlington & Quincy Railway Co. v. Chicago</i> (1897)	The requirement for just compensation, from the Fifth Amendment, applies when state government takes property.	Fifth
<i>Gideon v. Wainwright</i> (1963)	States must provide an attorney for defendants who can't afford one to guarantee a fair trial. (See Topic 3.8.)	Sixth
<i>Timbs v. Indiana</i> (2019)	State seizure of a convicted drug dealer's vehicle was a violation of the Eighth Amendment's prohibition of excessive fines.	Eighth

Required Supreme Court cases are **bold**

Early Incorporation

The first incorporation case used due process to evaluate issues of property seizure. In the 1880s, a Chicago rail line sued the city, which had constructed a street across its tracks. In an 1897 decision, the Court held that the newer due process clause compelled Chicago to award just compensation when taking private property for public use. This ruling incorporated the **just compensation clause** of the Fifth Amendment, requiring that the states adhere to it as well.

Incorporation and the First Amendment Later, the Supreme Court declared that the First Amendment prevents states from infringing on free thought and free expression. In a series of cases that addressed state laws designed to crush radical ideas and sensational journalism, the Court began to hold states to First Amendment standards. In the 1920s, Benjamin Gitlow, a New York Socialist, was arrested and prosecuted for violating the state's criminal anarchy law. The law prevented advocating a violent overthrow of the government. Gitlow was arrested for writing, publishing, and distributing thousands of copies of pamphlets called the *Left Wing Manifesto* that called for strikes and "class action . . . in any form."

In one of its first cases, the American Civil Liberties Union (ACLU) appealed his case and argued that the due process clause of the Fourteenth Amendment compelled states to follow the same free speech and free press ideas in the First Amendment as the federal government. In *Gitlow v. New York* (1925), however, the Court actually enhanced the state's power by upholding the state's criminal anarchy law and Gitlow's conviction because Gitlow's activities represented a threat to public safety. The court felt the substantive reason for the state's limitation of Gitlow's message was justified to preserve order. Nonetheless, the Court did address the question of whether or not the Bill of Rights *did or could* apply to the states. In the majority opinion, the Court said, "For present purposes, we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." In other words, Gitlow's free speech was not protected because it was a threat to public safety, but the Court did put the states on notice.

The Court applied that warning in 1931. Minnesota had attempted to bring outrageous and obnoxious newspapers under control with a public nuisance law, informally dubbed the "Minnesota Gag Law." This statute permitted a judge to stop obscene, malicious, scandalous, and defamatory material. A hard-hitting paper published by the controversial J.M. Near printed anti-Catholic, anti-Semitic, anti-Black, and anti-labor stories. Both the ACLU and Chicago newspaper mogul Robert McCormick came to Near's aid, not for his beliefs, but on anti-censorship principles. The Court did too. In *Near v. Minnesota* it declared that the Minnesota statute "raises questions of grave importance. It is no longer open to doubt that the liberty of the press is within the liberty safeguarded by the due process clause of the Fourteenth Amendment." In this ruling, through the doctrine of selective incorporation, the Court imposed limitations on state regulation of civil rights and liberties.

It is appropriate that the Court emphasized the First Amendment freedoms early on in the incorporation process. The founding fathers generally believed that states, too, should not take away the freedoms in the First Amendment. In drafting the Bill of Rights in 1789, James Madison and others had originally stated, “No state shall infringe on the equal rights of conscience, nor the freedom of speech, or of the press.” It was the only proposed amendment directly limiting states’ authority.

In case after case, the Court has required states to guarantee free speech, freedom of religion, fair and impartial juries, and rights against self-incrimination. Though states have incorporated nearly all rights in the document, a few rights in the Bill of Rights remain denied exclusively to the federal government but not yet denied to the states.



MUST-KNOW SUPREME COURT CASE: MCDONALD V. CHICAGO (2010)

The Constitutional Question Before the Court: Does the Second Amendment apply to the states, by way of the Fourteenth Amendment, and thus prevent states or their political subdivisions from banning citizen ownership of handguns?

Decision: Yes, for McDonald, 5:4

Before McDonald: The Second Amendment prevents the federal government from forbidding people to keep and bear arms. In 2008, gun rights advocates and the National Rifle Association challenged a law in the District of Columbia, the seat of the federal government, which effectively banned all handguns, except those for law enforcement officers and other rare exceptions. In the case of *District of Columbia v. Heller*, the Court ruled that the Second Amendment applied and that the district’s handgun ban violated this right. Because the Bill of Rights was intended to restrain Congress and the federal government, not the states, this ruling applied only to the federal government and did not incorporate the Second Amendment to state governments. Any existing state laws preventing handguns were not altered by this precedent—until Otis McDonald came to court.

Facts: Citizens in both Chicago and in the nearby suburb of Oak Park challenged policies in their cities that were similar to the ones struck down in Washington. Chicago required all gun owners to register guns, yet the city invariably refused to allow citizens to register handguns, creating an effective ban. The lead plaintiff, Otis McDonald, pointed to the dangers of his crime-ridden neighborhood and how the city’s ban had rendered him without self-defense, and he argued that the Second Amendment should have prevented this vulnerability. His attorneys also attempted to take the *Heller* decision further, extending its holding to the state governments via the Fourteenth Amendment’s due process clause.

Reasoning: In a close vote, the Court applied the Second Amendment to the states via the Fourteenth Amendment’s due process clause, arguing that, based on *Heller*, the right to individual self-defense is at the heart of the Second Amendment. The majority also noted the historical context for the Fourteenth Amendment and asserted that the amendment sought to provide a constitutional foundation for the Civil Rights

Act of 1866. The selective incorporation doctrine has encouraged the Court to require state governments and their political subdivisions to follow most parts of the Bill of Rights. The ruling in *McDonald* highlighted yet another right that the states and their municipalities could not deny citizens.

Justice Samuel Alito wrote the Court's majority opinion; Justices Antonin Scalia and Clarence Thomas wrote concurring opinions.

Majority Opinion by Mr. Justice Alito: Self-defense is a basic right, recognized by many legal systems from ancient times to the present, and the *Heller* Court held that individual self-defense is "the central component" of the Second Amendment right. [T]he Court found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family. . . . It thus concluded that citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense". . . . *Heller* also clarifies that this right is "deeply rooted in this Nation's history and traditions."

A survey of the contemporaneous history also demonstrates clearly that the Fourteenth Amendment's Framers and ratifiers counted the right to keep and bear arms among those fundamental rights necessary to the Nation's system of ordered liberty. . . .

After the Civil War, the Southern States engaged in systematic efforts to disarm and injure African Americans. These injustices prompted the 39th Congress to pass the Freedmen's Bureau Act of 1866 and the Civil Rights Act of 1866 to protect the right to keep and bear arms. Congress, however, ultimately deemed these legislative remedies insufficient, and approved the Fourteenth Amendment. Today, it is generally accepted that that Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act. Evidence from the period immediately following the Amendment's ratification confirms that that right was considered fundamental.

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

Justice Alito refers to the Fourteenth Amendment as the basis for the right to bear arms. Legislation passed by the 39th Congress (1865–1867) used the Fourteenth Amendment, ratified in 1868, to further extend the right to bear arms to African Americans. Examine how the Court's decision relates to the *Heller* decision and other principles by answering the questions below.

Apply: Complete the following tasks.

1. Explain the similarities and differences of the *Heller* and *McDonald* cases.
2. Identify the historic period to which Justice Alito referred in the majority opinion and explain the reasoning behind referring to this period.
3. Explain the impact of the *McDonald* ruling on the selective incorporation doctrine.

After Heller and McDonald The *Heller* and *McDonald* decisions partially govern gun policy in the United States, but the Court has done little to define gun rights and limits since. It declined to hear cases on assault weapons bans from Maryland and from a Chicago-area municipality. The Court has also declined to rule on a restrictive California limitation on who may carry concealed guns.

Congressional members are typically at loggerheads over gun policy. After each nationally notable mass shooting, the discussion about the Second Amendment becomes loud and intense, but little national law changes. Republicans tend to fiercely defend citizens' rights to own and carry guns, while Democrats tend to seek stronger restrictions on sale, ownership, and public possession. Presidential policy has shifted with changes in office. After a deranged young man shot and killed 20 schoolchildren and 6 adults in Newtown, Connecticut, President Barack Obama issued an executive order to keep guns out of the hands of mentally disabled Social Security recipients. President Donald Trump, a gun advocate, reversed the order in 2017.



Source: shutterstock

Otis McDonald outside the Supreme Court building. He was the lead plaintiff in the *McDonald v. Chicago* (2010) case in which the Court overturned a ban on handguns by the city of Chicago.



THINK AS A POLITICAL SCIENTIST: EXPLAIN HOW A REQUIRED SUPREME COURT CASE RELATES TO A PRIMARY SOURCE

A primary source, also called an original source, is a firsthand account of an event or situation. Primary sources tend to be reliable because they come from people who have a direct connection to a topic or event. An opinion from a

Supreme Court justice is a primary source—the original, firsthand explanation of a legal ruling. Supreme Court opinions, like other primary sources, are often called on again and again to determine interpretation of law.

For example, the Supreme Court ruling in *McDonald v. Chicago* was a victory for gun rights, but how would subsequent gun-related cases be interpreted by the Court? In *Voisine v. United States* (2016), the plaintiff had been convicted of causing reckless bodily injury to a romantic partner. Under Maine law it is a crime to own firearms after a misdemeanor conviction for domestic violence. Stephen Voisine claimed that reckless injury doesn't meet the federal standard for conviction and wanted charges dismissed. He lost in district and appellate courts. The Supreme Court also ruled against Voisine.

Practice: The excerpt is the majority opinion from Justice Kagan. Read the excerpt and answer the questions below.

"The federal ban on firearms possession applies to any person with a prior misdemeanor conviction for the 'use . . . of physical force' against a domestic relation. That language, naturally read, encompasses acts of force undertaken recklessly—i.e., with conscious disregard of a substantial risk of harm. And the state-law backdrop to that provision, which included misdemeanor assault statutes covering reckless conduct in a significant majority of jurisdictions, indicates that Congress meant just what it said. Each petitioner's possession of a gun, following a conviction under Maine law for abusing a domestic partner, therefore violates [Maine's gun laws]. We accordingly affirm the judgment of the Court of Appeals."

1. What similarities can you find between the decisions in the *McDonald* and *Voisine* cases?
2. How do the cases and the decisions differ?

REFLECT ON THE ESSENTIAL QUESTION

Essential Question: *What are the implications of the doctrine of selective incorporation? On separate paper, complete the chart below.*

Selective Incorporation Cases

Rulings' Effects on States' Rights

KEY TERMS AND NAMES

District of Columbia v. Heller (2008)
due process
Fourteenth Amendment (1868)

just compensation clause
McDonald v. Chicago (2010)
selective incorporation

Amendments: Due Process and the 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, *Olmstead v. United States*, 1928

Essential Question: To what extent are states limited by the due process clause from infringing upon individual rights?

The United States has struggled to fully interpret and define phrases in the Bill of Rights and has done so differently at different times. Justice Louis Brandeis's quote above—from his dissent in 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 could not have known how right he was in his prediction of the technological possibilities of invading citizen's dwellings, personal information, and everyday routines. The new technologies raise a familiar question: What is the proper balance between liberty and order? **BIG IDEA** Government laws and policies balancing order and liberty are based on the U.S. Constitution and have been interpreted differently over time.

Procedural Due Process

The right to due process dates back to England's Magna Carta (1215), when nobles limited the king's ability to ignore their liberties. Due process ensures fair procedures when the government burdens or deprives an individual. Due process also ensures accused persons a fair trial. The due process clause in the **Fifth Amendment** establishes that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

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** (see Topic 3.9) 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 is consistently fair and does not act arbitrarily on unstable whims. The government *can* take away life, liberty, and property, but only in a highly specific, prescribed manner. 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.

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 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.

Fourth Amendment and the Exclusionary Rule

The **Fourth Amendment** prevents law enforcement from conducting unreasonable searches and seizures. (See Topic 3.6.) 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.

Chief Justice Burger’s Court later refined the exclusionary rule to include the “inevitable discovery” and “good faith” exceptions. The inevitable discovery exception applies to evidence police find in an unlawful search but would have eventually found in a later, lawful search. The good faith exception addresses police searches under a court-issued warrant that is later proven unconstitutional or erroneous. 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 already stated, students' constitutional rights do not stop at the schoolhouse gate, though that decision addressed free speech. 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, at times 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 local authorities, 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, not full probable cause.

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 on 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. The bus driver and security officer then summoned the student and searched a second bag and found a gun. The state charged the student with possession of the 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: Getty Images

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, 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 might have been reasonable had the police secured a warrant ahead of time.

A final example 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.

Contemporary Procedural Due Process Rights

In recent years in the United States, institutions of government have shaped the interpretations of procedural due process rights in light of modern invention and a complicated war.

Searches and the Electronic World

Has the federal government gone too far in its recent endeavors to catch terrorists or to conduct searches in the era of modern communication? The government contends that many of the new techniques, including the third-party mining of **metadata**—the who, when, and for-how-long details of a communication, but not the actual conversation—are in compliance with the Fourth Amendment. Metadata, according to David Cole of *The Nation*, “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” and that the NSA has gathered and stored metadata associated with a substantial proportion of calls made since 2006. The 2015 **USA FREEDOM Act** has altered the governments access to phone data. 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.

September 11 and Executive Reaction

The USA PATRIOT Act (see Topic 1.5) was a response to the terrorist attacks on September 11, 2001, and the law raised civil liberties questions when government surveillance efforts intensified. Additional issues related to the “war on terror” also drew attention to civil liberties.

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 from either an arrested criminal or a conventional prisoner of war.

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

d 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, a Japanese American assigned to a World War II internment camp 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 another case, *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 non-international 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.”

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.” The warning resulted from an overturned conviction of a rapist who confessed to his crime under some pressure and without being informed that he did not have to talk. In *Miranda v. Arizona* (1966), Ernesto Miranda, an indigent man who never completed 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.

Through the 1950s, 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.

In *Miranda*, the Court declared the Fifth Amendment right applies once a suspect is in custody of 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.



THINK AS A POLITICAL SCIENTIST: USE REASONING TO ANALYZE EVIDENCE AND JUSTIFY A CLAIM

Technological advances have complicated the definition and interpretation of the Fourth Amendment. These advances have forced the Supreme Court to consider when and how technology can be used as evidence. Further complicating the matter are questions about the constitutionality of technologies used by the government to protect public safety.

In *Riley v. California* (2014), David Riley was pulled over for driving with expired registration tags, and officers discovered he was driving on a suspended license as well. Before the car was impounded, it was searched and two guns were found. Riley was arrested for illegal possession of firearms and his cell phone was taken. His phone was analyzed, without a warrant, and authorities discovered images and videos showing gang affiliation. This affiliation led to further investigation and police determined the guns found in Riley’s car were used in a gang-related shooting. Because the analysis of the cell phone that led investigators to the gang connection was obtained without a warrant, Riley wanted the evidence thrown out. Based on the information the police had, did they have the authority and right to search for evidence on his phone?

Practice: From Topic 3.8, review the Fourth Amendment, *Miranda v. Arizona*, and the USA FREEDOM Act. Using evidence from those laws and the *Miranda* ruling, develop a claim about how the Court would rule on the case above. Use reasoning to explain how the evidence supports and justifies the claim you develop.

Public Safety Exception

A number of subsequent cases have allowed statements into court that were obtained before a suspect was warned of his or her rights. Courts have said that if the officer was acting in the name of public safety, a delayed reading or failure to read the warning would not necessarily exclude confessions or statements at court. This approach is known as the **public safety exception**, which puts the protection of people before procedural protections for suspects.

In the first public safety exception case, *New York v. Quarles* (1984), police chased Benjamin Quarles, who had been identified as assaulting a woman and carrying a gun, into a grocery store. After a search, 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, or "Mirandized." 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* (1963).

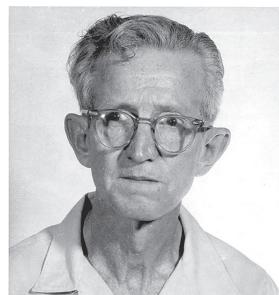


MUST-KNOW SUPREME COURT DECISIONS: GIDEON V. WAINWRIGHT (1963)

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.



Source: State of Florida
Clarence Earl Gideon

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 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.

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.

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.

REFLECT ON THE ESSENTIAL QUESTION

Essential Question: *To what extent are states limited by the due process clause from infringing upon individual rights? On separate paper, complete the chart below.*

Due Process Cases and Laws	How the Case/Law Protects or Infringes Upon Individual Rights

KEY TERMS AND NAMES

exclusionary rule	<i>New Jersey v. TLO</i> (1985)
Fifth Amendment (1791)	procedural due process
Fourth Amendment (1791)	public safety exception
<i>Gideon v. Wainwright</i> (1963)	search and seizure
<i>Mapp v. Ohio</i> (1961)	Sixth Amendment (1791)
metadata	USA FREEDOM Act (2015)
<i>Miranda v. Arizona</i> (1966)	

Amendments: Due Process and the Right to Privacy

"The explosive growth in the collection and sale of consumer information enabled by new technology poses unprecedented risks for Americans' privacy. The government has failed to respond to these new threats."

—Senator Ron Wyden (D-OR), on Consumer Data Protection Act, 2018

Essential Question: To what extent are states limited by the due process clause from infringing upon individuals' rights to privacy?

The framers didn't explicitly state that citizens have a "right to privacy" in the Constitution. This idea of a "right to be left alone" or a right to privacy can be pulled from the wording of several amendments. The First Amendment deals with the privacy of one's thoughts or associations with others. The Third protects the privacy of one's home from the government's no-longer-used practice of mandating that private citizens house soldiers in peacetime. The Fourth protects against illegal searches, keeping a home or other area (purses, lockers) private. The Fifth entitles an accused defendant to refrain from testifying and thus to keep information private. Also, the Ninth Amendment is a cautionary limit to the power of the federal government in general, which states that the people have rights not specifically listed, such as privacy.

Substantive Due Process

Substantive due process places substantive limits on what liberties the government can take away or deprive a citizen of. 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 government policies that might violate substantive due process rights must meet some valid state or public 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 state interest exists or the state interest fails to override the citizens' rights.

Substantive Due Process Denied

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, causing 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 that 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 barred married couples from even receiving birth control literature. The Court for the first time emphasized an inherent **right to privacy** that, although 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 addressing the 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 CASE: 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 21, 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.

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 Topic 3.7 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 the issues related to federalism in this decision.
5. 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.



THINK AS A POLITICAL SCIENTIST: DESCRIBE THE REASONING OF A REQUIRED SUPREME COURT CASE

When more than half of the justices of the Supreme Court agree on a ruling, it constitutes a majority decision. The most senior justice voting in the majority

(always the chief justice if he or she is in the majority) will pick who writes the majority opinion, or explanation of the ruling. The excerpt below is from *Roe v. Wade*. Justice Blackmun justified the decision of the Court in his majority opinion.

Practice: Read the passage and answer the questions below.

“... The Constitution does not explicitly mention any right of privacy. . . [T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . This right of privacy, whether it be founded in the 14th Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by childcare. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.”

1. How does Justice Blackmun use the Ninth Amendment to explain the ruling?
2. What additional reasoning does Justice Blackmun use to support the ruling of the case?

REFLECT ON THE ESSENTIAL QUESTION

Essential Question: *To what extent are states limited by the due process clause from infringing upon individuals' rights to privacy? On separate paper, complete the chart below.*

Right to Privacy Cases and Laws	How the Case/Law Protects or Infringes Upon Privacy Rights

KEY TERMS AND NAMES

Griswold v. Connecticut (1965)

Hyde Amendment (1976)

right to privacy

Roe v. Wade (1973)

substantive due process

CHAPTER 10 Review:

Learning Objectives and Key Terms

TOPIC 3.7: Explain the implications of the doctrine of selective incorporation. (LOR-3.A)	
Selective Incorporation and States' Rights (LOR-3.A.1)	
<i>District of Columbia v. Heller</i> (2008)	just compensation clause
due process	<i>McDonald v. Chicago</i> (2010)
Fourteenth Amendment (1868)	selective incorporation
TOPIC 3.8: Explain the extent to which states are limited by the due process clause from infringing upon individual rights. (LOR-3.B)	
Restricting Individual Liberty (LOR-3.B.1)	Protecting Due Process (LOR-3.B.2–4)
<i>New Jersey v. TLO</i> (1985)	exclusionary rule
public safety exception	Fifth Amendment (1791)
USA FREEDOM Act (2015)	Fourth Amendment (1791)
	<i>Gideon v. Wainwright</i> (1963)
	<i>Mapp v. Ohio</i> (1961)
	metadata
	<i>Miranda v. Arizona</i> (1966)
	procedural due process
	search and seizure
	Sixth Amendment (1791)
TOPIC 3.9: Explain the extent to which states are limited by the due process clause from infringing upon individual rights. (LOR-3.B)	
Right to Privacy (LOR-2.B.5)	
<i>Griswold v. Connecticut</i> (1965)	<i>Roe v. Wade</i> (1973)
Hyde Amendment (1976)	substantive due process
right to privacy	

CHAPTER 10 Checkpoint:

Due Process

Topics 3.7–3.9

MULTIPLE-CHOICE QUESTIONS

1. 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 assures equality with regard to race, not gender.
2. 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)	Is followed when the ideas or points of the law are fundamentally fair and just	Focuses on the manner in which government acts toward its citizens
(C)	Applicable because of the Fifth Amendment, not the Fourteenth Amendment	Was violated in the <i>Roe v. Wade</i> case according to the Supreme Court
(D)	Must be followed by the federal government, not state governments	Is followed when state governors follow the legislative process in governing

3. Which of the following is an accurate description of the implication of the *McDonald v. Chicago* (2010) ruling and selective incorporation?
 - (A) The ruling was based upon the Second Amendment only.
 - (B) The case overturned a gun-restriction policy in the District of Columbia.
 - (C) The case was first heard by the Supreme Court through an original jurisdiction case.
 - (D) The ruling prevented infringement of basic liberties.

4. Which of the following is an accurate summary of the selective incorporation doctrine?
- Government policies can involve religion as long as these are decided selectively.
 - States must protect most rights in the Bill of Rights based on the Fourteenth Amendment's due process clause.
 - The Supreme Court is cautious about which civil liberties cases it accepts.
 - The framers of the Constitution were selective about which rights they included.

Questions 5 and 6 refer to the graphic below.

MIRANDA WARNING

1. YOU HAVE THE RIGHT TO REMAIN SILENT.
2. ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW
3. YOU HAVE THE RIGHT TO TALK TO A LAWYER AND HAVE HIM PRESENT WITH YOU WHILE YOU ARE BEING QUESTIONED
4. IF YOU CANNOT AFFORD TO HIRE A LAWYER, ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONING IF YOU WISH.
5. YOU CAN DECIDE AT ANY TIME TO EXERCISE THESE RIGHTS AND NOT ANSWER ANY QUESTIONS OR MAKE ANY STATEMENTS.

WAIVER

DO YOU UNDERSTAND EACH OF THESE RIGHTS I HAVE EXPLAINED TO YOU? HAVING THESE RIGHTS IN MIND, DO YOU WISH TO TALK TO US NOW?

5. Which of the following best describes the information in the infographic?
- It is required reading before the police can conduct a lawful search.
 - It requires law enforcement to protect civil liberties.
 - It must be read to a defendant at the beginning of a trial.
 - It results from the state's police powers.
6. The above information fulfills the application of an accused person's due process rights as protected by the
- First and Second Amendments
 - Fourth and Tenth Amendments
 - Fifth and Sixth Amendments
 - Fourth and Fifth Amendments

Concept Application

1. “The defendants were convicted of conspiring to violate the National Prohibition Act. Before any of the persons now charged had been arrested or indicted, the telephones by means of which they habitually communicated with one another and with others had been [wire] tapped by federal officers. . . . [T]he defendants objected to the admission of the evidence obtained by wiretapping on the ground that the Government’s wiretapping constituted an unreasonable search and seizure . . . Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. . . . Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and, although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man’s telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping.”

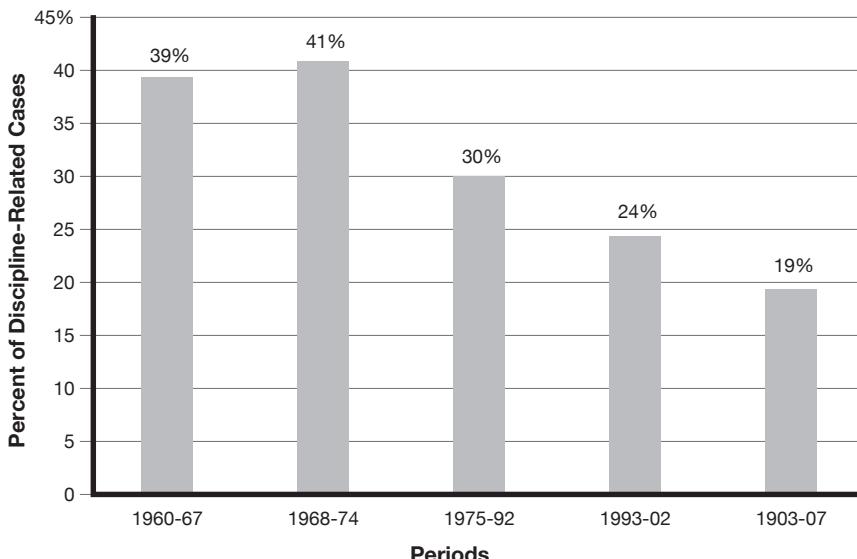
—Justice Louis Brandeis, Dissenting Opinion,
Olmstead v. United States, 1928

After reading the scenario, respond to A, B, and C below:

- (A) Describe Justice Brandeis’s point of view on the government and its infringing on individual liberty.
- (B) In the context of this scenario, explain how Justice Brandeis’s point of view described in Part A has subsequently enhanced Fourth Amendment protections.
- (C) In the context of the scenario, explain how either the executive branch or legislative branch of government could take action to address the justice’s concern.

Quantitative Analysis

Appeals Courts' Pro-Student Rulings on Challenges to Discipline



Source: Education Next

2. Use the information graphic above to answer the following questions.
 - (A) Identify the percent of pro-student rulings by appeals courts from 1975–1992.
 - (B) Describe a trend in the appeals courts' pro-student rulings.
 - (C) Draw a conclusion about what led to the trend described in part B.
 - (D) Explain how the data in the chart could result from judicial interpretation of students' constitutional rights.

SCOTUS Comparison

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 constitutional right that is common to both *Planned Parenthood v. Casey* (1992) and *Roe v. Wade* (1973).
- (B) Based on the constitutional right identified in part A, explain why the facts of the case in *Planned Parenthood v. Casey* led to a different holding than that in *Roe v. Wade*.
- (C) Describe an action interest groups could take to limit the impact of the ruling in *Planned Parenthood v. Casey*.

CHAPTER 11

Civil Rights

Topics 3.10–3.13

Topic 3.10 Social Movements and Equal Protection

PRD-1.A: Explain how constitutional provisions have supported and motivated social movements.

- Required Foundational Documents:
 - The Constitution of the United States
 - “Letter from a Birmingham Jail”

Topic 3.11 Government Response to Social Movements

PMI-3.A: Explain how the government has responded to social movements.

- Required Foundational Document:
 - The Constitution of the United States
- Required Supreme Court Case:
 - *Brown v. Board of Education* (1954)

Topic 3.12 Balancing Minority and Majority Rights

CON-6.A: Explain how the Court has at times allowed the restriction of the civil rights of minority groups and at other times has protected those rights.

- Required Supreme Court Case:
 - *Brown v. Board of Education* (1954)

Topic 3.13 Affirmative Action

CON-6.A: Explain how the Court has at times allowed the restriction of the civil rights of minority groups and at other times has protected those rights.



Source: Wikimedia Commons

President Lyndon Johnson meets with civil rights leaders Martin Luther King Jr. of the Southern Christian Leadership Conference (left), Whitney Young of the Urban League (second from the right), and James Farmer from the Congress of Racial Equality (far right) in 1964.

Social Movements and Equal Protection

"It ought to be possible . . . for American students of any color to attend any public institution they select without having to be backed up by troops. . . . for American consumers of any color to receive equal service in places of public accommodation, [and] to register and to vote in a free election without interference or fear of reprisal."

—President John F. Kennedy, White House Address, 1963

Essential Question: How have constitutional provisions supported and motivated social movements?

The United States places a high priority on freedom and equality and **civil rights**, protections from discrimination based on such characteristics as race, color, national origin, religion, and sex. These principles are evident in the founding documents, later constitutional amendments, and laws such as the 1964 Civil Rights Act. They are guaranteed to all citizens under the due process and **equal protection clauses** in the Constitution and according to acts of Congress. Civil rights organizations representing African Americans and women have pushed for government to deliver on the promises in these documents. In recent years, other groups—Latinos, people with disabilities, and LGBTQ individuals—have petitioned the government for fundamental fairness and equality. A pro-life movement emerged to fight for the rights of the unborn, and a pro-choice movement fought for the right of women to control decisions about their bodies. All three branches have responded in varying degrees to these movements and have addressed civil rights issues. Even so, racism, sexism, and other forms of bigotry have not disappeared. Today, a complex body of law shaped by constitutional provisions, Supreme Court decisions, federal statutes, executive directives, and citizen-state interactions defines civil rights in America.

Equality in Black and White

In the United States, federal and state governments generally ignored civil rights policy before the Civil War. The framers of the Constitution left the legal question of slavery up to the states, allowing the South to strengthen its plantation system and relegate enslaved and free African Americans to

subservience. The North had a sparse black population and little regard for fairness toward African Americans. Abolitionists, religious leaders, and progressives sought to outlaw slavery and advocated for African Americans in the mid-1800s.

The NAACP Pushes Ahead

The Fourteenth Amendment's equal protection clause spurred citizens to take action. One organization, the **National Association for the Advancement of Colored People (NAACP)** stood apart from the others in promoting equal rights for African Americans. State-sponsored discrimination and a violent race riot in Springfield, Illinois, led civil rights leaders to create the NAACP in 1909. On Abraham Lincoln's birthday, a handful of academics, philanthropists, and journalists sent out a call for a national conference. Harvard graduate and Atlanta University professor Dr. W.E.B. DuBois was among those elected as the association's first leaders. By 1919, the organization had more than 90,000 members.

Before World War I, the NAACP and its leaders pressed President Woodrow Wilson to overturn segregation in federal agencies and departments. The citizen group had also hired two men as full-time lobbyists in Washington, one for the House and one for the Senate. The association joined in filing a case to challenge a law that limited voter rights based on the then-legal status of voters' grandparents. (See Topic 3.11 for more on this "grandfather clause.") The Supreme Court ruled the practice a violation of the Fifteenth Amendment. Two years later, the Court again sided with the NAACP when it ruled government-imposed residential segregation a constitutional violation.

Legal Defense Fund

The NAACP has regularly argued cases in the Supreme Court. It added a legal team that was led by Charles Hamilton Houston, a Howard University law professor, and his assistant, Baltimore native Thurgood Marshall. They defended mostly innocent black citizens across the South in front of racist judges and juries. They successfully convinced the Supreme Court to outlaw the white primary—a primary in which only white citizens could vote. In southern states, the white primary had essentially extinguished the post-Civil War Republican Party, the party of Lincoln, allowing southern Democrats to stay in power and pass discriminatory laws.

The NAACP began a legal strategy to chip away at state school segregation, filing lawsuits to integrate first college and graduate schools and then K-12 schools. Early success came in 1938, when Lloyd Gaines integrated the University of Missouri's Law School. The state had offered to pay his out-of-state tuition at a neighboring law school, but the Fourteenth Amendment specifically requires states to treat the races equally and failing to provide a "separate but equal" law school, the Court claimed, violated the Constitution. In 1950, the NAACP won decisions against schools in Oklahoma and Texas to provide integrated graduate and law schools.

Motivating the Movement

Additional groups joined the NAACP in the effort to make the United States a place of equality. The Congress on Racial Equality, the Urban League, and the Southern Christian Leadership Conference, led by **Dr. Martin Luther King Jr.**, took up the cause of racial equality. The civil rights movement had a pivotal year in 1963, with both glorious and horrific consequences. On one hand, King assisted the grassroots protests in Birmingham and more than 200,000 people gathered in the nation's capital for the March on Washington. On the other hand, Mississippi NAACP leader Medgar Evers was shot and killed. In Birmingham, brutal police Chief Bull Connor turned fire hoses and police dogs on peaceful African American protesters.

Amid the face-offs and protests of the movement, in one of the darker but telling moments of the movement, authorities arrested Dr. Martin Luther King for leading a protest despite a court order forbidding civil rights demonstrations. From his cell in the Birmingham jail, he wrote his discourse on race relations at the time.

FOUNDATIONAL DOCUMENTS: "LETTER FROM A BIRMINGHAM JAIL"

Motivated by the Fourteenth Amendment's **equal protection clause**, on April 12, 1963—Good Friday, the Friday before Easter—the Alabama Christian Movement for Human Rights and the Southern Christian Leadership Conference sponsored a parade down the streets of Birmingham, Alabama, to protest the continued segregation of the city's businesses, public spaces, and other institutions. Three key leaders headed the march of about 50 participants: the Reverends Fred Shuttlesworth, Ralph Abernathy, and Dr. Martin Luther King Jr. Because the city feared disruption from the march, the protesters had been denied a parade permit, and, on those grounds, Dr. King and Ralph Abernathy were arrested and put in jail.

On the day of the march, "A Call for Unity," written by eight white clergymen from Birmingham and published in a Birmingham newspaper, called on the protesters to abandon their plans, arguing that the proper way to obtain equal rights was to be patient and let those in a position to negotiate do their job. While serving 11 days in solitary confinement in a Birmingham jail, Dr. King composed a response to the clergymens' request and, in so doing, laid out the foundations for the nonviolent resistance to segregation that guided the civil rights movement.



Source: Birmingham Public Library Archives

Fred Shuttlesworth (left), Ralph Abernathy (middle), and Martin Luther King Jr. lead the Good Friday March.

In any nonviolent campaign there are four basic steps: 1) Collection of the facts to determine whether injustices are alive. 2) Negotiation. 3) Self-purification and 4) Direct Action. We have gone through all of these steps in Birmingham.

Birmingham is probably the most thoroughly segregated city in the United States. Its ugly record of police brutality is known in every section of this country. Its unjust treatment of Negroes in the courts is a notorious reality. There have been more unsolved bombings of Negro homes and churches in Birmingham than any city in the nation. These are the hard, brutal and unbelievable facts. On the basis of these conditions Negro leaders sought to negotiate with the city fathers. But the political leaders consistently refused to engage in good faith negotiation . . . we had no alternative except that of preparing for direct action, whereby we would present our very bodies as a means of laying our case before the conscience of the local and the national community. We were not unmindful of the difficulties involved. So we decided to go through a process of self-purification. We started having workshops on nonviolence and repeatedly asked ourselves the questions, "Are you able to accept blows without retaliating?" "Are you able to endure the ordeals of jail?"

Dr. King also expressed disappointment in the white clergy, in whom he had hoped and expected to find allies. Yet he tried to understand their call for patience.

We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. For years now I have heard the word "Wait!" . . . I guess it is easy for those who have never felt the stinging darts of segregation to say, "Wait." But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate filled policemen curse, kick, brutalize and even kill your black brothers and sisters with impunity; when you see the vast majority of your twenty million Negro brothers smothering in an air tight cage of poverty in the midst of an affluent society; . . . when you are forever fighting a degenerating sense of "nobodiness;" then you will understand why we find it difficult to wait. There comes a time when the cup of endurance runs over, and men are no longer willing to be plunged into an abyss of injustice where they experience the bleakness of corroding despair. I hope, Sirs, you can understand our legitimate and unavoidable impatience.

Political Science Disciplinary Practices: Explain How Argument Influences Behaviors

Dr. King's "Letter from a Birmingham Jail" is an argument—or more precisely, a counterargument. King addresses each of the points the white clergy make in "A Call for Unity" to make a clear case for the need for nonviolent direct action. Think about the implications of that argument on the political behaviors of African Americans and whites.

Apply: Complete the following activities.

1. Explain how the four basic steps of a nonviolent campaign were carried out in Birmingham before the Good Friday demonstration.
2. Explain the implications of Dr. King's argument on breaking or upholding the law.
3. Compare the lawbreaking of the protestors marching without a permit to the lawbreaking King refers to by mobs.
4. Explain how the civil rights movement was motivated by constitutional provisions.

Then read the full "Letter from a Birmingham Jail" online.

Women's Rights Movement

Obtaining the franchise, the right to vote, was key to altering public policy toward women, and Susan B. Anthony led the way. In 1872, in direct violation of New York law, she walked into a polling place and cast a vote. An all-male jury later convicted her. She later authored the passage that would eventually make it into the Constitution as the Nineteenth Amendment (1920).

Women and Industry

Industrialization of the late 1800s brought more women into the workplace. They often worked for less pay than men in urban factories. In 1908, noted attorney Louis Brandeis defended an Oregon law preventing women from working long hours. Brandeis argued that women were less suited physically for longer hours and needed to be healthy to bear children. The Court upheld a state's right to make laws that treated women differently. This consideration protected the health and safety of women, but the double standard gave lawmakers justification to treat women differently.

Suffragists pressed on. By 1914, 11 states allowed women to vote. In the 1916 election, both major political parties endorsed the concept of women's suffrage in their platforms and Jeanette Rankin of Montana became the first woman elected to Congress. The following year, however, World War I completely consumed Congress and the nation and the issue of women's suffrage drifted into the background.

After the war ended, suffragist leader Alice Paul continued to press President Woodrow Wilson, eventually persuading him to support women's suffrage. President Wilson pardoned a group of arrested suffragists and spoke in favor of the amendment, influencing Congress's vote. The measure passed both houses in 1919 and was ratified as the **Nineteenth Amendment** in 1920.

From Suffrage to Action

What impact did the amendment have on voter turnout for women? An in-depth study of a Chicago election from the early 1920s found that 65 percent of potential women voters stayed home, many responding that it wasn't a woman's place to engage in politics or that the act would offend their husbands. Initially, men outvoted women by roughly 30 percent, but that statistic has changed and now turnout at the polls is higher for women than men.

Voting laws were not the states' only unfair practice. The Supreme Court had ruled in 1948 that states could prevent women from tending bar unless the establishment was owned by a close male relative and states were allowed to seat all-male juries. However, women made advancements in the workplace in the 1960s. In 1963, Congress passed the **Equal Pay Act** that required employers to pay men and women the same wage for the same job. However, even after the Equal Pay Act, it was still legal to deny women job opportunities. That is, equal pay applied only when women were hired to do the same jobs that men were hired to do. The 1964 Civil Rights Act protected women from discrimination in employment.

In addition, Betty Friedan, the author of *The Feminine Mystique*, encouraged women to speak their minds, to apply for male-dominated jobs, and to organize for equality in the public sphere. Friedan went on to cofound the **National Organization for Women (NOW)** in 1966.

Women and Equality

In the 1970s, Congress passed legislation to give equal opportunities to women in schools and on college campuses. Pro-equality groups pressured the Court to apply the **strict scrutiny** standard—the analysis by courts to guarantee legislation is narrowly tailored to avoid violation of laws—to policies that treated genders differently. The application of strict scrutiny can be seen most clearly in **Title IX** of the Education Amendments of 1972, which guaranteed that women have the same educational opportunities as men in programs receiving federal government funding. (See Topic 3.12.)

However, the women's movement fell short of some of its goals. The Court never declared that legal gender classification deserves the same level of strict scrutiny as classifications based on race. Additionally, the movement was unable to amend the Constitution to declare absolute equality of the sexes. The proposed **Equal Rights Amendment (ERA)** stated "Equality of rights under the law shall not be denied on account of sex" and gave Congress power to enforce this. The amendment passed both houses of Congress with the necessary two-thirds vote in 1972. Thirty of the thirty-eight states necessary to ratify the amendment approved the ERA within one year. At its peak, 35 states had ratified the proposal, but when the chance for full ratification expired in 1982, the ERA failed. Nonetheless, the 1970s was a successful decade for women gaining legal rights and elevating their political and legal status.

Roe v. Wade and the Pro-Life Response

The *Roe v. Wade* decision (see Topic 3.9), prevented government from outlawing abortion. Though seen as a victory among feminists, most of the population in the 1970s did not approve of the decision. The *Roe* decision likely harmed the credibility of the ERA's allies, such as the National Organization for Women (NOW), a group that advocated for women's rights. Many women's groups and other civil rights groups, such as the American Civil Liberties Union (ACLU), believed state restrictions on abortion denied a pregnant woman and her doctor the right to make a highly personal and private medical choice. The Court in *Roe v. Wade* agreed and decided that a state cannot deny a pregnant woman the right to an abortion during the first trimester of the pregnancy. In a 7:2 decision, the *Roe* opinion erased or modified statutes in most states, effectively legalizing abortion.

However, the battle over abortion has continued. States can still regulate abortion by requiring brief waiting periods and other restrictions. Anti-abortion or pro-life groups continue to press for legal rights for the unborn, many believing that life begins at conception and, for that reason, even a zygote—a fertilized egg—is entitled to legal protection. This argument for a legal recognition of fetal personhood is atop the pro-life movement's agenda.



THINK AS A POLITICAL SCIENTIST: EXPLAIN HOW THE IMPLICATIONS OF AN AUTHOR'S ARGUMENT AFFECT POLICIES

After a president nominates a judge to fill a vacancy in the Supreme Court, the Senate Judiciary Committee holds a hearing to question the nominee and decide if the full Senate will vote on the nominee. The responses given by the nominee to Senators' questions during the hearing are vital to receiving a majority vote before a formal appointment.

When Ruth Bader Ginsburg was nominated by President Bill Clinton for a Supreme Court position in 1993, one of the key areas she was questioned on during the confirmation hearing was abortion. Ginsburg's abortion views, specifically her thoughts on *Roe v. Wade* from a lecture she had given at New York University the previous year, came up in questioning. Below is an excerpt from that lecture.

Practice: The following excerpt was in *Time* magazine from Ruth Bader Ginsburg's lecture regarding the ruling in *Roe v. Wade* and its lasting effects. Read the excerpt, and then answer the questions that follow.

The seven to two judgment in *Roe v. Wade* declared "violative [in violation] of the Due Process Clause of the Fourteenth Amendment" a Texas criminal abortion statute that intolerably shackled a woman's autonomy; the Texas law "except[ed] from criminality only a life-saving procedure on behalf of the [pregnant woman]." Suppose the Court had stopped there, rightly declaring unconstitutional the most extreme brand of law in the nation, and had not gone on, as the Court did in *Roe*, to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force. Would there have been the twenty-year controversy we have witnessed,

reflected most recently in the Supreme Court's splintered decision in *Planned Parenthood v. Casey*? A less encompassing *Roe*, one that merely struck down the extreme Texas law and went no further on that day, I believe . . . might have served to reduce rather than to fuel controversy.

1. What is the main argument Ginsburg makes in the excerpt?
2. According to Ginsburg, how were policy or other Supreme Court rulings affected by the *Roe* decision?
3. According to Ginsburg, how might policy or other Supreme Court rulings have been affected had the *Roe* decision been different?

LGBTQ Rights and Equality

Like African Americans and women, those who identify as LGBTQ have been discriminated against and have sought and earned legal equality and rights to intimacy, military service, and marriage.

State and federal governments had long set policies that limited the freedoms and liberties of LGBTQ people. President Eisenhower signed an executive order banning any type of “sexual perversion,” as it was defined in the order, in any sector of the federal government. Congress enacted an oath of allegiance for immigrants to assure that they were neither communist nor gay. State and local authorities closed gay bars. Meanwhile, the military intensified its exclusion of homosexuals.

The first known public gay rights protest outside the White House took place in 1965. In 1973, psychiatrists removed homosexuality as a mental disorder from their chief diagnostic manual. Throughout the 1970s and 1980s, in part to seek legal protections and gain a political voice, homosexuals “came out” and began publicly proclaiming their sexual identity. A quest for legal marriage followed.

Debates regarding these issues are complex, with a wide array of overlapping constitutional principles. The states’ police powers, privacy, and equal protection are all involved. Federalism and geographic mobility create additional complexities. To what degree should the federal government intervene in governing marriage, a reserved power of the states? When gays and lesbians moved from one state to another, differing state laws concerning marriage, adoption, and inheritance brought legal standoffs as the Constitution’s full-faith-and-credit clause (Article IV) and the states’ reserved powers principle (Tenth Amendment) clashed.

Seeking Legal Intimacy

Traditionalists responded to the growing visibility of gays by passing laws that criminalized homosexual behavior. Though so-called anti-sodomy laws had been around for more than a century, in the 1970s, states passed laws that specifically criminalized same-sex relations and behaviors. In *Lawrence v. Texas* (2003), the court struck down a state law that declared “a person commits an offense if he engages in deviate sexual intercourse with another individual

of the same sex.” Lawrence’s attorneys argued that the equal protection clause voided this law because the statute specifically singled out gays and lesbians. The Court agreed.

Military

Up to the late 20th century, the U.S. military discharged or excluded homosexuals from service. In the 1992 presidential campaign, Democratic candidate Bill Clinton promised to end the ban on gays in the military. Clinton won the election but soon discovered that neither commanders nor the rank and file welcomed reversing the ban. In a controversy that mired the first few months of his presidency, Clinton compromised as the Congress passed the “**don’t ask, don’t tell**” policy in 1994. This rule prevented the military from asking about the private sexual status of its personnel but also prevented gays and lesbians from acknowledging or revealing it. In short, “don’t ask, don’t tell” was meant to cause both sides to ignore the issue and focus on defending the country.

The debate continued for 17 years. Surveys conducted among military personnel and leadership began to show a favorable response to allowing gays to serve openly. In December 2010, with President Obama’s support, the House and Senate voted to remove the “don’t ask, don’t tell” policy so all service members could openly serve their country.

Marriage

Not long after Hawaii’s state supreme court became the first statewide governing institution to legalize same-sex marriage in 1993, lawmakers elsewhere reacted to prevent such a policy change in their backyards. Utah was the first state to pass a law prohibiting the recognition of same-sex marriage. In a presidential election year at a time when public opinion was still decidedly against gay marriages, national lawmakers jumped to define and defend marriage in the halls of Congress. The 1996 **Defense of Marriage Act (DOMA)** defined marriage at the national level and declared that states did not have to accept same-sex marriages recognized in other states. The law also barred federal recognition of same-sex marriage for purposes of Social Security, federal income tax filings, and federal employee benefits. This was a Republican-sponsored bill that earned nearly every Republican vote. Democrats, however, were divided on it. Civil rights pioneer and Congressman John Lewis declared, “I have known racism. I have known bigotry. This bill stinks of the same fear, hatred, and intolerance.” The sole Republican vote against the law came from openly gay member Steve Gunderson who asked on the House floor, “Why shouldn’t my partner of 13 years be entitled to the same health insurance and survivor’s benefits that individuals around here, my colleagues with second and third wives, are able to give them?” The bill passed in the House 342 to 67 and in the Senate 85 to 14. By 2000, 30 states had enacted laws refusing to recognize same-sex marriages in their states or those coming from elsewhere.

If members of the LGBTQ community could legally marry, not only could they publicly enjoy the personal expressions and relationships that go with marriage, they could also begin to enjoy the practical and tangible benefits granted to heterosexual couples: financing a home together, inheriting a deceased partner's estate, and qualifying for spousal employee benefits. In order for these benefits to accrue, states would have to change their marriage statutes.

Initial Legalization The first notable litigation occurred in 1971 when Minnesota's highest court heard a challenge to the state's refusal to issue a marriage license to a same-sex couple. The Supreme Court upheld the decision to not recognize the marriage largely on the definition of marriage in the state's laws and in a dictionary.

These may seem like simple sources for courts to consult, but the issue is very basic: Should the state legally recognize same-sex partnerships and, if so, should the state refer to it as "marriage"? In the past two decades, the United States has battled over these two questions, as advocates sought for legal equality and as public opinion on these questions shifted dramatically.

Vermont was an early state to legally recognize same-sex relationships and did so via the Vermont Supreme Court. The legislature then passed Vermont's "civil unions" law, which declared that same-sex couples have "all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a civil marriage" but stopped short of calling the new legal union a "marriage." Massachusetts' high court also declared its traditional marriage statute out of line, which encouraged the state to legalize same-sex marriage there. What followed was a decade-long battle between conservative opposition and LGBTQ advocates, first in the courts and then at the ballot box, creating a patchwork of marriage law across the United States. By 2011, more than half of the public consistently favored legalizing same-sex marriage, and support for it has generally grown since.

Two Supreme Court rulings secured same-sex marriage nationally. The first was filed by New York state resident Edith Windsor, legally married in Canada to a woman named Thea Spyer. Spyer died in 2009. Under New York state law, Windsor's same-sex marriage was recognized, but it was not recognized under federal law, which governed federal inheritance taxes. Windsor thus owed taxes in excess of \$350,000. A widow from a traditional marriage in the same situation would have saved that amount. The Court saw the injustice and ruled that DOMA created "a disadvantage, a separate status, and so a stigma" on same-sex marriage that was legally recognized by New York.

After separate rulings in similar cases at the sixth and ninth circuit courts of appeals, the Supreme Court decided to hear *Obergefell v. Hedges* (2015). In that case, the Court considered two questions: Does the Fourteenth Amendment require a state to issue a marriage license to two people of the same sex?" and "Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?" If the answer to the first question is

“yes,” then the second question becomes moot. On June 26, 2015, the Court ruled 5:4 that states preventing same-sex marriage violated the Constitution. Justice Anthony Kennedy wrote the opinion, his fourth pro-gay rights opinion in nearly 20 years.

Issues Since *Obergefell* Within a year of the same-sex marriage ruling, the percent of cohabiting married same-sex couples rose from about 38 to 49, according to *Congressional Quarterly*. Now the Court has ruled that states cannot deny gays the right to marry, but not all Americans have accepted the ruling. Some public officials refused to carry out their duties to issue marriage licenses, claiming that doing so violated their personal or religious views of marriage. In 2016, about 200 state-level anti-LGBT bills were introduced (only four became law). Though the *Obergefell* decision was recent and was determined by a close vote of the Court, public opinion is moving in such a direction that the ruling is on its way to becoming settled law. Yet controversies around other public policies—such as hiring or firing people because they are transgender, refusing to rent housing to same-sex couples, or refusing business services, such as catering, for same-sex weddings—affect the LGBT community and have brought debates and changes in the law.

Workplace Discrimination

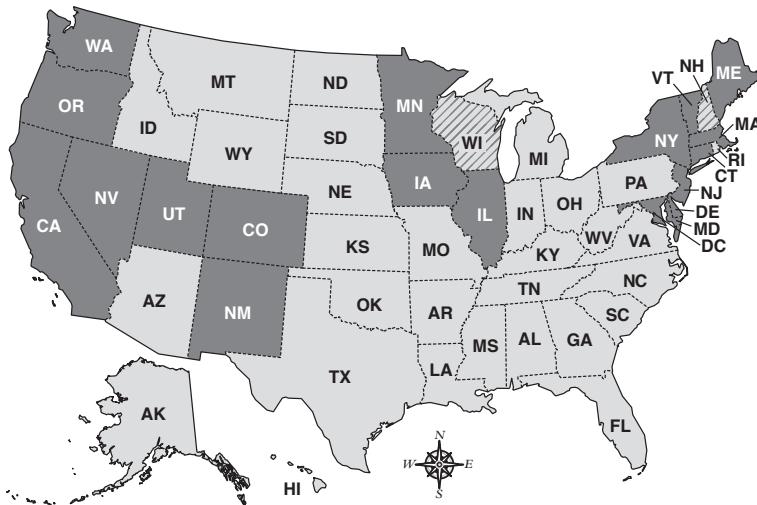
When the 1964 Civil Rights Act prevented employers from refusing employment or firing employees for reasons of race, color, sex, nationality, or religion, it did not include homosexuality or gender identity as reasons. No federal statute has come to pass that would protect LGBT groups. Twenty-two states and the District of Columbia barred such discriminatory practices and afforded a method for victims of such discrimination to take action against the employer. Conservatives argued that these policies created a special class for the LGBT community and were thus unequal and unconstitutional. (The map on the next page shows the states’ employment protections in 2018.) However, a 2020 landmark Supreme Court decision in *Bostock v. Clayton County* held that workplace discrimination was illegal throughout the nation under Title VII of the 1964 Civil Rights Act.



Source: Getty Images

In 1990, the Boy Scouts dismissed a Scoutmaster because he was gay. The Scoutmaster won a civil suit at the state level, but the Supreme Court ruled against him, stating the Boy Scouts could create and enforce its own policies in regard to membership under the First Amendment protection of “expressive association.” Since then, Boy Scouts of America has changed its position on allowing gays, but some believe *Bostock* does not change the doctrine of expressive association.

LGBT Employment Protections before Bostock, 2018



Employment Protections for LGBT Population

- Employment non-discrimination law covers sexual orientation and gender identity
- Employment non-discrimination law covers sexual orientation, though federal law offers some protection
- No employment non-discrimination law covering sexual orientation or gender identity, though federal law offers some protections

Until June 15, 2020, about half the states allowed employment discrimination against LGBT persons. On that date, the Supreme Court ruled in *Bostock v. Clayton County, Georgia*, that workplace discrimination was illegal under Title VII of the Civil Rights Act of 1964, a landmark ruling for workplace fairness.

Sexual harassment is another expression of workplace discrimination. In the 1986 case *Meritor Savings Bank v. Vinson*, the Supreme Court ruled that sexual harassment creates unlawful discrimination against women by fostering a hostile work environment and is a violation of Title VI of the 1964 Civil Rights Act. Sexual harassment became a major issue in 2017 when a number of women came forward to accuse men in prominent positions in government, entertainment, and the media of sexual harassment. In a number of the high-profile cases, the accused men lost their jobs and the victims received financial compensation. In a show of solidarity and to demonstrate how widespread the problem of sexual harassment is, the #MeToo movement went viral. Anyone who had experienced sexual harassment or assault was asked to write #MeToo on a social media platform. Millions of women took part. A 2016 report by the Equal Employment Opportunity Commission found that between 25 and 85 percent of women experience sexual harassment at work but most are afraid to report it for fear of losing their jobs.

Refusal to Serve and Religious Freedom

The 1964 Civil Rights Act did not include LGBT persons when it defined the persons to whom merchants could not refuse service, the so-called public accommodations section of the law. So, depending on the state, businesses

might have the legal right to refuse products and services to same-sex couples planning a wedding. In reaction to *Obergefell*, a movement sprang up to enshrine in state constitutions wording that would protect merchants or employees for this refusal, particularly if it is based on the merchant's religious views. How can the First Amendment promise freedom of religion if the state can mandate participation in some event or ceremony that violates the individual's religious beliefs? About 45 of these bills were introduced in 22 states in the first half of 2017. Debate and litigation continue in an effort to resolve the clash between religious liberty and equal protection.

Transgender Issues

How schools and other government institutions handle where transgender citizens go to the restroom or what locker room they use is another area of conflict. Several "bathroom bills" have surfaced at statehouses across the country. The issue has also been addressed at school board meetings and in federal courts. President Obama's Department of Education issued a directive based on an interpretation of language from Title IX to guarantee transgendered students the right to use whatever bathroom matched their gender identity. President Donald Trump's administration rescinded that interpretation. The reversal won't change policy everywhere, but it returns to the states and localities the prerogative to shape policy on student bathroom use, at least for now as courts are also examining and ruling on the issue.

REFLECT ON THE ESSENTIAL QUESTION

Essential Question: *How have Constitutional provisions supported and motivated social movements? On separate paper, complete the chart below.*

Social Movements

KEY TERMS AND NAMES

Bostock v. Clayton County

Lawrence v. Texas (2003)

Defense of Marriage Act (1996)

"Letter from a Birmingham Jail"

"don't ask, don't tell" (1994)

National Women's Organization

Equal Pay Act (1963)

Nineteenth Amendment (1920)

equal protection clause

Obergefell v. Hodges (2015)

Equal Rights Amendment (1972)

strict scrutiny

King Jr., Martin Luther

Title IX (1972)

Government Responses to Social Movements

"It's really just a variation on Title VI of the Civil Rights Act of 1964. Instead of 'race, color or national origin,' we substituted 'sex.'"

—Congressional Staffer Bunny Sandler, regarding Title IX, 1972

Essential Question: How has the government responded to social movements?

Social movements have challenged the status quo and traditions of society throughout the nation's history. The inevitable resulting conflicts have often required the government to step in with legislation or a Supreme Court ruling to settle the matter. The desegregation of public K–12 schools, prevention of discrimination in employment, commercial service, college programs, and voting required the government to step in with legislation or a Supreme Court ruling to settle the matter.

Reconstruction and Its Legacy

During the Civil War, a Republican-dominated Congress outlawed slavery in the capital city and President Abraham Lincoln issued the Emancipation Proclamation. After the Confederacy surrendered and after Lincoln's assassination, Radical Republicans in the Congress took the lead. Three constitutional amendments were ratified to free the slaves (Thirteenth Amendment), to declare African Americans citizens assuring due process (Fourteenth Amendment), and to give African Americans voting rights (Fifteenth Amendment).

Defining Equality and Discrimination

The **Fourteenth Amendment** (1868) became the foundation for policy and social movements for equality. The Fourteenth Amendment had a host of provisions to protect freed slaves. It promised U.S. citizenship to anyone born or naturalized in the United States. The Fourteenth Amendment required states to guarantee privileges and immunities to its own citizens as well as those from other states. The due process clause (see Topic 3.8) ensured all citizens would be afforded due process in court as criminal defendants or in other areas of law.

The amendment's **equal protection clause** prohibited state governments from denying persons within their jurisdiction equal protection of the laws.

Section 1 of the Fourteenth Amendment is the section used most often in legal cases. It reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

—Fourteenth Amendment, U.S. Constitution

Like the other Reconstruction amendments, the Fourteenth Amendment was obviously directed at protecting freed slaves, making them citizens, and ensuring equal treatment from the states. But since neither slaves nor African Americans are specifically mentioned in the amendment, several other groups—women, ethnic minorities, LGBTQ people—have benefitted from it in their search for equality. Criminal defendants have made claims against states to establish new legal standards. Because of the Fourteenth Amendment, children born to U.S. citizens as well as children born in the United States to immigrant parents—documented or undocumented—are recognized as U.S. citizens.

Federal Actions During Reconstruction	
Thirteenth Amendment	Outlawed slavery across the United States, trumping the Tenth Amendment's reserved powers to the states.
Fourteenth Amendment	Guaranteed U.S. citizenship to anyone born or naturalized in the United States. The equal protection clause protected individuals' rights when in other jurisdictions [states].
Fifteenth Amendment	Prohibited states from denying the vote to anyone "on account of race, color, or previous condition of servitude."
Civil Rights Act of 1875	Made it illegal for privately owned places of public accommodation—trains, hotels, and taverns—to make distinctions between black and white patrons. Also, it outlawed discrimination in jury selection, public schools, churches, cemeteries, and transportation.
Civil Rights Cases (1883)	The conservative Court overruled the Civil Rights Act of 1875 and enabled discrimination in commercial affairs.
Plessy v. Ferguson (1896)	The Supreme Court ruled that the equal protection clause was not violated by segregated public places, claiming " separate but equal " facilities satisfied the Fourteenth Amendment. Segregation and Jim Crow continued for two more generations.

Circumventing the Franchise

The **Fifteenth Amendment** was passed to guarantee no citizen would be denied the right to vote on account of race. However, many former Confederates and slave owners wanted to return African Americans to second-class status by taking away that right to vote. The South began requiring property or literacy qualifications to vote. Several states elevated the **literacy test**—a test of reading skills required before one could vote—into their state constitutions. A **poll tax**—a simple fee required of voters—became one of the most effective ways to turn black voters away. The **grandfather clause**, which allowed states to recognize a registering voter as it would have recognized his grandfather, prevented thousands of blacks from voting while it allowed illiterate and poor whites to be exempt from the literacy test and poll tax. The **white primary**—a primary in which only white men could vote—also became a popular method for states to keep African Americans out of the political process. These state-level loopholes did not violate the absolute letter of the Constitution because they never prevented blacks from voting “on account of race, color, or previous condition of servitude,” as the Fifteenth Amendment prohibits.

Disenfranchisement, economic reprisals, and discrimination against African Americans followed. States created a body of law that segregated the races in the public sphere. These **Jim Crow laws**—named after a disrespected character in a minstrel show in which whites performed in “blackface”—separated blacks and whites on trains, in theaters, in public restrooms, and in public schools.

The Courts Assert Equality

By mid-20th century, the Supreme Court had started to deliver decisions in favor of civil rights groups and their goal of integration. The NAACP (see Topic 3.10) had already filed several suits in U.S. district courts to overturn *Plessy v. Ferguson* (1896), which had provided the justification for K-12 segregation. The group filed suits across the South and found a greater number of willing plaintiffs and fewer white reprisals in the border South. With assistance from sociologists Kenneth and Mamie Clark, two academics from New York, the NAACP improved its strategy. In addition to arguing that segregation was morally wrong, they argued that separate schools were psychologically damaging to black children. In experiments run by the Clarks, when black children were shown two dolls identical except for their skin color and asked to choose the “nice doll,” they chose the white doll. When asked to choose the doll that “looks bad,” they chose the dark-skinned doll. With these results, the Clarks argued that the segregation system caused feelings of inferiority in the black child. Armed with this scientific data, attorneys sought strong, reliable plaintiffs who could withstand the racist intimidation and reprisals that followed the filing of a lawsuit.



MUST-KNOW SUPREME COURT CASE: BROWN V. BOARD OF EDUCATION OF TOPEKA, KANSAS (1954)

The Constitutional Question Before the Court: Do state school segregation laws violate the equal protection clause of the Fourteenth Amendment?

The Decision: Yes, 9:0 for Brown

Before Brown: In 1896, the case of *Plessy v. Ferguson* reached the Supreme Court. In this effort, civil rights activists and progressive attorneys argued that Louisiana's state law segregating train passengers by race violated the Fourteenth Amendment's equal protection clause. In a 7:1 decision, the Court ruled that as long as states provided separate but equal facilities, they were in compliance with the Constitution.

Facts: Topeka, Kansas, student Linda Brown's parents and several other African American parents similarly situated filed suit against the local school board in hopes of overturning the state's segregation law. In fact, the NAACP had filed similar cases in three other states and against the segregated schools of the District of Columbia. The Supreme Court took all these cases at once, and they were together called *Brown v. Board of Education*.

Reasoning: The petitioners, led by Thurgood Marshall, put forth arguments found in social science research that the racially segregated system did damage to the black child's psyche and instilled feelings of inferiority. The inevitably unequal schools—unequal financially, unequal in convenience of location—created significant differences between them. Marshall and the NAACP argued that even in the rare cases where black and white facilities and education were the same tangibly, the separation itself was inherently unequal. In fact, part of this strategy resulted in southern governments and school boards increasing funding late in the game so black and white educational systems would appear equal during the coming court battles. Black leaders felt true integration was the only way to ever truly reach equality.

Chief Justice Earl Warren and all eight associate justices agreed and ruled in favor of striking down segregation and overturning *Plessy* to satisfy the equal protection clause of the Fourteenth Amendment. *Brown's* unanimous ruling came in part as a result of former politician and current Chief Justice Earl Warren pacing the halls and shaping his majority opinion as he tried to bring the questionable or reluctant justices over to the majority.

Majority Opinion by Mr. Justice Warren: Here, unlike *Sweatt v. Painter* [a case in which the Court ordered the University of Texas Law School to admit a black applicant because the planned "law school for Negroes" would have been grossly inferior], there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws. . . .

We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Since Brown: The *Brown* decision of May 17, 1954, decided the principle of segregation but did not determine a timeline for when this drastic societal change would happen or how it would happen. So the Court invited litigants to return and present arguments. In *Brown II*, the Court determined that segregated school systems should desegregate "with all deliberate speed" and that the lower federal courts would serve as venues to determine if that standard was met. That is, black parents could take local districts to U.S. district courts to press for integration.

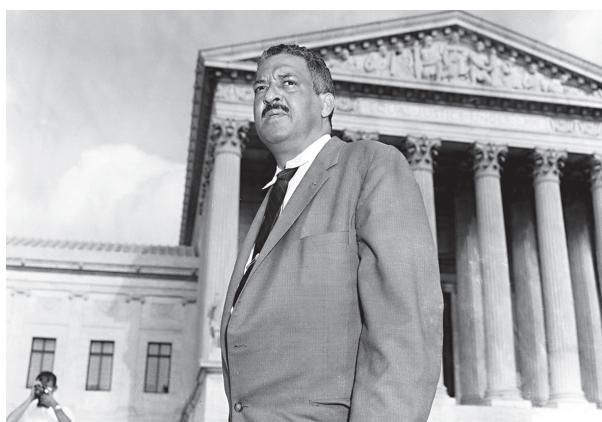
It took a decade before any substantial integration occurred in the Deep South and a generation before black-to-white enrollments were proportional to the populations of their respective school districts.

Political Science Disciplinary Practices: Analyze and Interpret Supreme Court Decisions

As you read above, Chief Justice Warren wanted to make certain this ruling was unanimous. He also wanted to make sure that the wording in the ruling was in plain language so that everyone reading it could understand the rationale. The opinion is also relatively brief. You may read the entire opinion, which you can do online at Oyez or other sites.

Apply: Complete the following activities.

1. Explain why the Court based its decision on factors other than "the tangible factors in the Negro and white schools."
2. Identify the constitutional clause at issue, and describe the type of evidence on which the NAACP relied to make its case.
3. Explain the reasoning of the Court's unanimous opinion.
4. Describe the differences between the opinion in *Brown* and the opinion in *Plessy*.



Source: Granger, NYC

The great-grandson of a slave, Thurgood Marshall was a leader in shaping civil rights law well before he became the first African American justice on the Supreme Court in 1967.

Legislating Toward Equality

As the events of the early 1960s unfolded, President John F. Kennedy (JFK) became a strong ally for civil rights leaders. His brother Robert Kennedy, the nation's attorney general, dealt closely with violent, ugly confrontations between southern civil rights leaders and brutal state authorities. Robert persuaded President Kennedy to act on civil rights. President Kennedy began hosting black leaders at the White House and embraced victims of the violence. By mid-1963, Kennedy buckled down to battle for a comprehensive civil rights bill.

President Kennedy addressed Congress on June 11, 1963, informing the nation of the legal remedies of his proposal. "They involve," he stated, "every American's right to vote, to go to school, to get a job, and to be served in a public place without arbitrary discrimination." Kennedy's bill became the center of controversy over the next year and became the most sweeping piece of civil rights legislation to date. The proposal barred unequal voter registration requirements and prevented discrimination in public accommodations. It empowered the attorney general to file suits against discriminating institutions, such as schools, and to withhold federal funds from noncompliant programs. Finally, it outlawed discriminatory employment practices.



THINK AS A POLITICAL SCIENTIST: EXPLAIN HOW A REQUIRED SUPREME COURT CASE RELATES TO A PRIMARY SOURCE

Laws can lay the groundwork for later more comprehensive legislation. For example, the Civil Rights Act of 1875 was passed after five years of contentious debate. The law guaranteed equal protection in public accommodations for African Americans. Yet in 1883, the Supreme Court limited the effects of the law by ruling that it applied to government institutions but its application to private individuals and businesses was unconstitutional. Many years later, the *Brown v. Board of Education* case continued efforts for equality.

Practice: Read the excerpt below from the Civil Rights Act of 1875, and answer the questions that follow.

Section 1. Be it enacted, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Section 2. That any persons who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby....

1. What is a similarity between the Civil Rights Act of 1875 and the decision in *Brown v. Board of Education*?
 2. What events or conditions necessitated the *Brown* decision after the passage of the Civil Rights Act of 1875?
-

The Turning Tide of Public Opinion

By the early 1960s, nationwide popular opinion favored action for civil rights. In one poll, 72 percent of the nation believed in residential integration and a full 75 percent believed in school integration. Kennedy's popularity, however, was dropping; his 66 percent approval rating had sunken below 50 percent. The main controversy in his plan was the bill's public accommodations provision. Many Americans—even those opposed to segregation in the public sphere—still believed in a white shop owner's legal right to refuse service to a black patron. But Kennedy held fast to what became known as **Title II** of the law and sent the bill to Capitol Hill on June 19, 1963.

By mid-1963, the national media had vividly presented the civil rights struggle to otherwise unaffected people. Shocking images of racial violence published in the *New York Times* and national periodicals such as *Time* and *Life* were eye-opening. Television news broadcasts that showed violence at Little Rock, standoffs at southern colleges, slain civil rights workers, and Bull Connor's aggressive Birmingham police persuaded some northerners to support the movement. Suddenly the harsh, unfair conditions of the South were very real to the nation. In a White House meeting with black labor leader A. Phillip Randolph and Martin Luther King Jr., President Kennedy reportedly joked when someone criticized Connor: "I don't think you should be totally harsh on Bull Connor. After all, Bull Connor has done more for civil rights than anyone in this room."

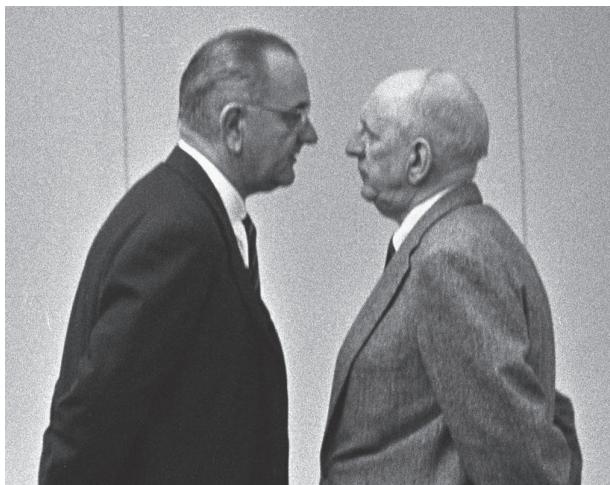
President Johnson and the 1964 Civil Rights Act

On November 22, 1963, Kennedy was slain by a gunman in Dallas. Within an hour, Vice President Lyndon Baines Johnson (LBJ) of Texas was sworn in as the 36th president. Onlookers and black leaders wondered how the presidential agenda might change. Johnson had supported the 1957 Civil Rights Act but only after he moderated it. Civil rights leaders hadn't forgotten Johnson's southern roots or the fact that he and Kennedy had not seen eye to eye.

Fortunately, President Johnson took up the fight. "No memorial oration or eulogy could more eloquently honor President Kennedy's memory," Johnson stated to the nation, "than the earliest passage of the civil rights bill for which he fought so long." Days later, on Thanksgiving, Johnson promoted the bill again: "For God made all of us, not some of us, in His image. All of us, not just some of us, are His children."

Johnson was a much better shepherd for this bill than Kennedy. Johnson, having been a leader in Congress, was skilled at both negotiation and compromise. He had a better chance to gain support for legislation as the

folksy, towering Texan than Kennedy had as the elite, overly polished Ivy League patriarch. Johnson was notorious for “the treatment,” an up close and personal technique of muscling lawmakers into seeing things his way. Johnson beckoned lawmakers to the White House for close face-to-face persuasion that some termed “nostril examinations.”



Source: Wikimedia Commons

President Johnson (left) was known for getting “up close and personal” to push his agenda. He is shown here with Senator Richard Russell (D-GA).

With LBJ’s support, the bill had a favorable outlook. On February 10, after the House had debated for less than two weeks and with a handful of amendments, the House passed the bill 290 to 130. The fight in the Senate was much more difficult. A total of 42 senators added their names as sponsors of the bill. Northern Democrats, Republicans, and the Senate leadership formed a coalition behind the bill that made passage of this law possible. After a 14-hour filibuster by West Virginia’s Robert C. Byrd, a cloture vote was finally taken. (For more on cloture and filibusters, see Topic 2.2.) The final vote came on June 19 when the civil rights bill passed by 73 to 27, with 21 Democrats and six Republicans in dissent.

The ink from Johnson’s signature was hardly dry when a Georgia motel owner refused service to African Americans and challenged the law. He claimed it exceeded Congress’s authority and violated his constitutional right to operate his private property as he saw fit. In debating the bill, Congress had asserted that its power over interstate commerce granted it the right to legislate in this area. Most of this motel’s customers had come across state lines. By a vote of 9:0, the Court in *Heart of Atlanta Motel v. United States* (1964) agreed with Congress.

KEY PROVISIONS OF THE CIVIL RIGHTS ACT OF 1964

- Required equal application of voter registration rules (Title I)
- Banned discrimination in public accommodations and public facilities (Titles II and III)
- Empowered the Attorney General to initiate suits against noncompliant, still segregated schools (Title IV)
- Cut off federal funding for discriminating government agencies (Title VI)
- Outlawed discrimination in hiring based on race, color, religion, sex, or national origin (Title VII)

Impact of the Civil Rights Act of 1964

In April 2014, President Barack Obama gave a speech at a ceremony in Austin, Texas, in honor of the 50th anniversary of President Lyndon Johnson's signing of the Civil Rights Act of 1964. Obama reminded listeners that LBJ himself had grown up in poverty, that he had seen the struggles of Latino students in the schools where he taught, and that he pulled those experiences and his prodigious skills as a politician together to pass this landmark law. "Because of the laws President Johnson signed," Obama said, "new doors of opportunity and education swung open . . . Not just for blacks and whites, but also for women and Latinos and Asians and Native Americans and gay Americans and Americans with a disability. . . . And that's why I'm standing here today."

The **Civil Rights Act of 1964** established the Equal Employment Opportunity Commission, which investigates allegations of discrimination in hiring and firing. The law helped set the stage for passage of an immigration reform bill in 1965, which did away with national origin quotas and increased the diversity of the U.S. population. Senator Hubert Humphrey said before the bill's passage: "We have removed all elements of second-class citizenship from our laws by the Civil Rights Act. We must in 1965 remove all elements in our immigration law which suggest there are second-class people." Instruction in schools in students' first language, even if it is not English, relates back to the Civil Rights Act of 1964, which prohibits discrimination on the basis of national origin. The Americans with Disabilities Act, passed in 1990, was modeled on the 1964 law and forbade discrimination in public accommodation on the basis of disability. Cases in the news today—from transgender use of bathrooms to wedding cakes for a same-sex couple—relate back to the bedrock provisions of the Civil Rights Act of 1964.

Impact on Women's Rights

Successes for African Americans' rights in the 1960s led the way for women to make gains in the following decade. **Title IX** of the Education Amendments of 1972, which amended the 1964 Civil Rights Act, guaranteed that women have the same educational opportunities as men in programs receiving federal government funding. Two congresswomen, Patsy Mink (D-HI) and Edith Green (D-OR), introduced the bill, which passed with relative ease.

The law states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.” This means colleges must offer comparable opportunities to women. Schools don’t have to allow females to join football and wrestling teams—though some have—nor must schools have precisely the same number of student athletes from each gender. However, any school receiving federal dollars must be cognizant of the pursuits of women in the classroom and on the field and maintain gender equity.

To be compliant with Title IX, colleges must make opportunities available for male and female college students in substantially proportionate numbers based on their respective full-time undergraduate enrollment. Additionally, schools must try to expand opportunities and accommodate the interests of the underrepresented sex.

The controversy over equality, especially in college sports, has created a conundrum for many who work in the field of athletics. Fair budgeting and maintaining programs for men and women that satisfy the law has at times been difficult. Some critics of Title IX claim female interest in sports simply does not equal that of young men and, therefore, a school should not be required to create a balance. In 2005, the Office of Civil Rights began allowing colleges to conduct surveys to assess student interest among the sexes. Title IX advocates, however, compare procedures like these to the burden of the freedom-of-choice option in the early days of racial integration. Federal lawsuits have resulted in courts forcing Louisiana State University to create women’s soccer and softball teams and requiring Brown University to maintain school-funded varsity programs for girls.

In 1972, about 30,000 women competed in college varsity-level athletics. Today, more than five times that many do. When the U.S. women’s soccer team won the World Cup championship in 1999, President Clinton referred to them as the “Daughters of Title IX.”

Voting Rights Act of 1965 and the Franchise

The 1964 Civil Rights Act addressed discrimination in voting registration but lacked the necessary provisions to fully guarantee African Americans the vote. Before World War II, about 150,000 black voters were registered throughout the South, about 3 percent of the region’s black voting-age population. In 1964, African American registration in the southern states varied from 6 to 66 percent but averaged 36 percent.

BY THE NUMBERS		
REGISTERED AFRICAN AMERICAN VOTERS		
BEFORE AND AFTER THE 1965 VOTING RIGHTS ACT		
	1964	1971
Alabama	18%	54%
Arkansas	42%	81%
Georgia	28%	64%
Mississippi	6%	60%
North Carolina	44%	43%

What do the numbers show? What impact did the 1965 Voting Rights Act have on black voter registration? Which states had the lowest voter registration before the law? Which states experienced the greatest increases in registration? Is there a regional trend regarding registration among these southern states?

Twenty-fourth Amendment In 1962, Congress passed a proposal for the **Twenty-fourth Amendment**, which outlaws the poll tax in any federal, primary, or general election. At the time, only five states still charged such a tax. By January 1964, the required number of states had ratified the amendment. It did not address any taxes for voting at the state or local levels, but the Supreme Court ruled those unconstitutional in the 1966 *Harper v. Virginia Board of Elections* case.

Citizen Protest in Selma Many loopholes to the Fifteenth Amendment had been dismantled, yet intimidation and literacy tests still limited the number of registered African American voters. Dr. King had focused attention on Selma, Alabama, a town where African Americans made up about 50 percent of the population but only 1 percent of registered voters. Roughly 9,700 whites voted in the town compared to only 325 blacks. To protest this inequity, King organized a march from Selma to Alabama's capital, Montgomery. Alabama state troopers violently blocked the mostly black marchers at the Edmund Pettus Bridge as they tried to cross the Alabama River. Mounted police beat these activists and fired tear gas into the crowd. Two northerners died in the incident.

Again, the media offered vivid images that brought great attention to the issue of civil rights. President Johnson had handily won the 1964 presidential election, and the Democratic Party again dominated Congress. In a televised speech before Congress, Johnson introduced his voting rights bill, ending with a line that defined the movement: “We shall overcome.”

The **Voting Rights Act** was signed into law on August 6, 1965, 100 years after the Civil War. It passed with greater ease than the 1964 Civil Rights Act. The law empowered Congress and the federal government to oversee state elections in southern states. It addressed states that used a “test or device” to determine voter qualifications or any state or voting district with less than 50 percent of its voting-age population actually registered to vote. The law effectively ended the literacy test.

The law also required these states to ask for *preclearance* from the U.S. Justice Department before they could enact new registration policies. If southern states attempted to invent new, creative loopholes to diminish black suffrage, the federal government could stop them.

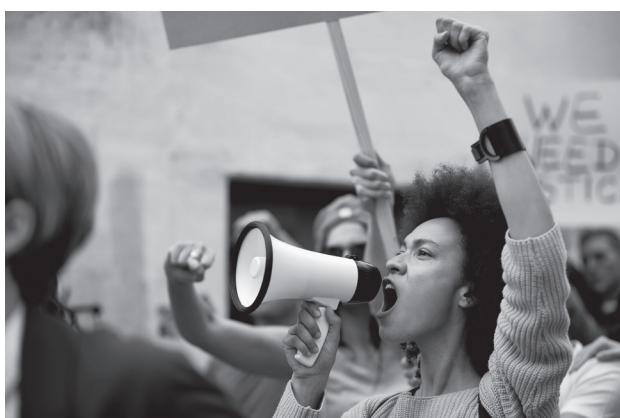
REFLECT ON THE ESSENTIAL QUESTION

Essential Question: *How has the government responded to social movements? On separate paper, complete the chart below.*

Government Response to Social Movements	Effects of the Government's Action

KEY TERMS AND NAMES

<i>Brown v. Board of Education</i> (1954)	poll taxes
Civil Rights Act of 1875	"separate but equal"
Civil Rights Act of 1964	Thirteenth Amendment (1865)
Civil Rights Cases (1883)	Title II (Civil Rights Act of 1964)
equal protection clause	Title IX (Educational Amendments Act of 1972)
Fifteenth Amendment (1870)	Voting Rights Act of 1965
Fourteenth Amendment (1868)	Twenty-fourth Amendment (1964)
grandfather clause	white primary
Jim Crow laws	white flight
literacy test	
<i>Plessy v. Ferguson</i> (1896)	



Source: Getty Images

The recent concern over civil rights violations led to protests headed by Black Lives Matter. In 2020, as many as 26 million people participated in protests and civil disobedience. This movement was ignited by the killing of African Americans by police, making Black Lives Matter one of the largest social movements in U.S. history.

Balancing Minority and Majority Rights

... the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect and to violate would be oppression."

—Thomas Jefferson, First Inaugural Address, 1801

Essential Question: How has the Supreme Court allowed the restriction of the civil rights of minorities and at other times protected those rights?

A constitutional democracy, such as the United States, is founded on the concept of majority rule. Without protections of minority rights, tyranny and oppression can develop. The framers saw the need for upholding the will of the people while still preventing possible abuses of power. When tension between those with power and those without power arises, the court system is often left to determine whose rights will be protected.

Desegregation

During and after Reconstruction, policymakers continued to draw lines between the races. They separated white and black citizens on public carriers, in public restrooms, in theaters, and in public schools. Jim Crow laws (see Topic 3.11) had become the accepted practice in many southern states to guarantee segregation.

"Separate but Equal"

Institutionalized separation was tested in *Plessy v. Ferguson* (1896). Challenging Louisiana's separate coach law, Homer Adolph Plessy, a man with one-eighth African blood and thus subject to the statute, sat in the white section of a train. He was arrested and convicted and then appealed his conviction to the Supreme Court. His lawyers argued that separation of the races violated the Fourteenth Amendment's **equal protection clause**. The Supreme Court saw it differently, however, and sided with the state's right to segregate the races in public places, claiming "**separate but equal**" facilities satisfied the amendment. One lone dissenter, Justice John Marshall Harlan, decried the decision (as he had in the *Civil Rights Cases*) as a basic violation of the rights of freed African Americans. Harlan's dissent was only a minority opinion. Segregation and Jim Crow continued for two more generations.

Fulfilling the Spirit of Brown

The *Brown v. Board of Education* decision overturned the separate but equal doctrine and started desegregating schools in the 1950s and early 1960s. Soon, interest groups and civil rights activists questioned the effectiveness of the *Brown* decision on schools across the nation. The ruling met with varying degrees of compliance from state to state and from school district to school district. Activists and civil rights lawyers took additional cases to the Supreme Court to ensure both the letter and the spirit of the *Brown* ruling. From 1958 until the mid-1970s, a series of lawsuits—most filed by the NAACP and most resulting in unanimous pro-integration decisions—brought greater levels of integration in the South and in cities in the North.

The *Brown* ruling and the *Brown II* clarification spelled out the Court's interpretation of practical integration, but a variety of reactions followed. The so-called "Little Rock Nine"—African American students who would be the first to integrate their local high school—faced violent confrontations as they entered school on their first day at Central High School in 1957. School officials and the state government asked for a delay until tempers could settle and until a safer atmosphere would allow for smoother integration. The NAACP countered in court and appealed this case to the high bench. In *Cooper v. Aaron* (1958), the Court ruled potential violence was not a legal justification to delay compliance with *Brown*.

In other southern localities, school administrators tried to weaken the impact of the desegregation order by creating measures such as **freedom-of-choice plans** that placed the transfer burden on black students seeking a move to more modern white schools. Intimidation too often prevented otherwise willing students to ask for a transfer. In short, "all deliberate speed" had resulted in a deliberate delay. In 1964, only about one-fifth of the school districts in the previously segregated southern states taught whites and blacks in the same buildings. In the Deep South, only 2 percent of the black student population had entered white schools. And in many of those instances, there were only one or two token black students who had to stand up to an unwelcoming school board and face intimidation from bigoted whites. Rarely did a white student request a transfer to a historically black school. Clearly, the intention of the *Brown* ruling had been thwarted.

Balancing Enrollments

By the late 1960s, the Court ruled the freedom-of-choice plans, by themselves, an unsatisfactory remedy for integration. The Supreme Court addressed a federal district judge's solution to integrate a North Carolina school district in *Swann v. Charlotte-Mecklenburg* (1971). The judge had set a mathematical ratio as a goal to achieve higher levels of integration. The district's overall white-to-black population ratio was roughly 71 to 29 percent. The district judge ordered the school district to assign students to schools across the district to roughly reflect the same proportion of black-to-white student enrollment in each building. The Supreme Court later approved his decision and thus sanctioned mathematical ratios to achieve school integration in another unanimous decision.

The *Swann* opinion ended a generation of litigation necessary to achieve integration, but it did not end the controversy. A popular movement against busing for racial balance sprang up as protesters questioned the placement of students at distant schools based on race. Though the constitutionality of busing grew out of a southern case, cases from Indianapolis, Dayton, Buffalo, Detroit, and Denver brought much protest. Those protests included efforts to sabotage buses as well as seek legal means to stop similar rulings. The antibusing movement grew strong enough to encourage the U.S. House of Representatives to propose a constitutional amendment to outlaw busing for racial balance, though the Senate never passed it. White parents in scores of cities transferred their children from public schools subject to similar rulings or relocated their families to adjacent suburban districts to avoid rulings. This situation, known as **white flight**, became commonplace as inner cities became blacker and the surrounding suburbs became whiter.



Source: A. Y. Owen, Getty Images

President Dwight Eisenhower dispatched the 101st Airborne Division to Arkansas to escort African American students into Little Rock's Central High School, executing a court order to desegregate.

BY THE NUMBERS
DESEGREGATED DISTRICTS 1964

Percent of African Americans Attending Schools with Whites

South	Alabama	0.03
	Arkansas	0.81
	Florida	2.65
	Georgia	0.37
	Louisiana	1.12
	Mississippi	0.02
	North Carolina	1.41
	South Carolina	0.10
	Tennessee	5.33
	Texas	7.26
Border	Virginia	5.07
	Delaware	57.8
	DC	86.0
	Kentucky	62.5
	Maryland	51.7
	Missouri	44.1
	Oklahoma	31.7
	West Virginia	88.1

What do the numbers show? What percentage of African American students attended with whites? How effective was the *Brown* ruling in integrating previously segregated schools? What states reached the highest integration levels? Describe the factors that kept the percentage of African Americans in traditionally white schools low.

In an attempt to mandate racial integration across adjacent districts, the NAACP tried to convince the Supreme Court to approve a multidistrict integration order from the Detroit area that otherwise followed the *Swann* model. The Court stopped short of approving this plan (by a close vote of 5:4) in its 1974 ruling in the Detroit case of *Milliken v. Bradley*, noting that if the district boundaries were not drawn for the purpose of racial segregation, therefore, interdistrict busing is not justified by the *Brown* decision. In his dissent, former NAACP attorney and then current justice on the Supreme Court, Thurgood Marshall wrote, “School district lines, however innocently drawn, will surely be perceived as fences to separate the races when . . . white parents withdraw their children from the Detroit city schools and move to the suburbs in order to continue them in all-white schools.”



THINK AS A POLITICAL SCIENTIST: COMPARE THE OPINION OF A REQUIRED SUPREME COURT CASE TO A NON-REQUIRED CASE

It took many years and numerous Supreme Court cases to get public schools to fully comply with integration required by the *Brown* decision. In one such case, *Cooper v. Aaron* (1958), the school board and superintendent of the Eastern District of Arkansas asked that integration plans be stalled for two and a half years to guarantee the safety of students. The district court granted the request, but the U.S. Court of Appeals reversed the decision. The Supreme Court then held that the supremacy clause required the state to abide by the *Brown* ruling, and Justice Frankfurter wrote a concurring opinion to the per curiam decision.

Practice: Read the opinion from Justice Frankfurter and answer the question below.

By working together, by sharing in a common effort, men of different minds and tempers, even if they do not reach agreement, acquire understanding and thereby tolerance of their differences. This process was under way in Little Rock. The detailed plan formulated by the Little Rock School Board, in the light of local circumstances, had been approved by the United States District Court in Arkansas as satisfying the requirements of this Court's decree in *Brown v. Board of Education*. . . . the right of colored children to the equal protection of the laws guaranteed by the Constitution, Amend. 14, had peacefully and promisingly begun. The condition in Little Rock before this process was forcibly impeded by those in control of the government of Arkansas was thus described by the District Court, and these findings of fact have not been controverted:

Up to this time, no crowds had gathered about Central High School and no acts of violence or threats of violence in connection with the carrying out of the plan had occurred. Nevertheless, out of an abundance of caution, the school authorities had frequently conferred with the Mayor and Chief of Police of Little Rock about taking appropriate steps by the Little Rock police to prevent any possible disturbances or acts of violence. . . .

On the few tragic occasions in the history of the Nation, North and South, when law was forcibly resisted or systematically evaded, it has signaled the breakdown of constitutional processes of government on which ultimately rest the liberties of all. Violent resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society. What could this mean but to acknowledge that disorder under the aegis [authority] of a State has moral superiority over the law of the Constitution? For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system, but of the presuppositions of a democratic society. The State "must . . . yield to an authority that is paramount to the State."

1. What are Justice Frankfurter's reasons for the Court decision?
2. How do these reasons support the decision in *Brown v. Board of Education*?

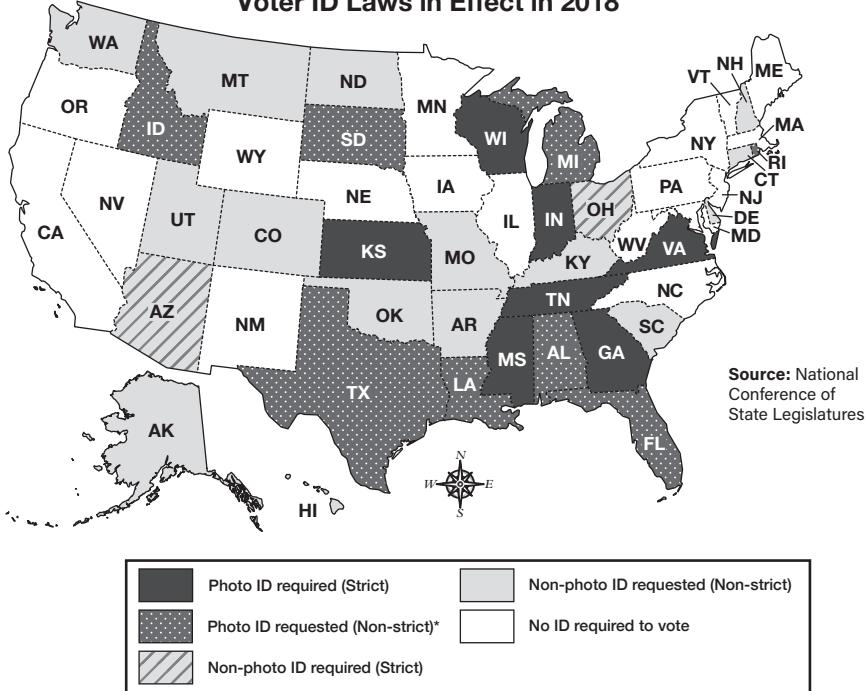
Electoral Balance

The Voting Rights Act of 1965 (see Topic 3.11) was the single greatest improvement for African Americans' access to the ballot box. By 1967, black voter registration in six southern states had increased from about 30 to more than 50 percent. African Americans soon held office in greater numbers. Within five years of the law's passage, several states saw marked increases in their numbers of registered voters. The original law expired in 1971, but Congress has renewed the Voting Rights Act several times, most recently in 2006.

Section 2 of the Voting Rights Act of 1965 further requires that voting districts not be drawn in such a way as to "improperly dilute minorities' voting power." The Supreme Court in *Thornburg v. Gingles* (1982) determined that recently drawn districts in North Carolina "discriminated against blacks by diluting the power of their collective vote," and the Court established criteria for determining whether vote dilution has occurred. The Court also ruled that **majority-minority districts**—voting districts in which a minority race or group of minorities make up the majority—can be created to redress situations in which African Americans were not allowed to participate fully in elections, a right secured by the Voting Rights Act.

Over time, as the makeup of the Court changed, the Court has revised its position. The Court ruled in 1993 in *Shaw v. Reno* that if redistricting is done on the basis of race, the actions must be held to strict scrutiny in order to meet the requirement of the equal protection clause, yet race must also be considered

Voter ID Laws in Effect in 2018



to satisfy the requirements of the Voting Rights Act, bringing into question the “colorblind” nature of the Constitution. Justice Blackmun, in his dissent to *Shaw v. Reno*, noted that “[i]t is particularly ironic that the case in which today’s majority chooses to abandon settled law . . . is a challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction.”

The Court once again interpreted the law, upholding the rights of the majority, in its 2017 ruling in *Cooper v. Harris*, by determining that districts in North Carolina were unconstitutionally drawn because they relied on race as the dominant factor.

REFLECT ON THE ESSENTIAL QUESTION

Essential Questions: How has the Supreme Court allowed the restriction of the civil rights of minorities and at other times protected those rights? On separate paper, complete the chart below.

Restrictions of Minority Rights

Protections of Minority Rights

KEY TERMS AND NAMES

Brown v. Board of Education (1954)
equal protection clause
freedom-of-choice plans
majority-minority districts

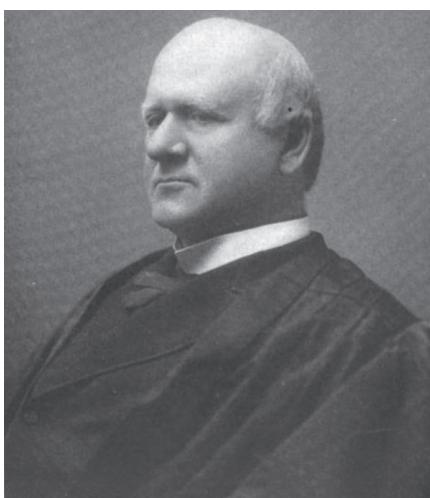
Plessy v. Ferguson (1896)
“separate but equal”
Swann v. Charlotte-Mecklenburg (1970)

Source: Wikimedia Commons

Associate Justice John Marshall Harlan (shown here in 1899) wrote the sole dissent in *Plessy v. Ferguson*:

“In the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.

“Our constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. . . .The arbitrary separation of citizens on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.”



Affirmative Action

"The only way you get to the goal of colorblindness is to be color conscious along the way."

—Judge Harry Edwards, PBS: *That Delicate Balance*, 1982

Essential Question: How has affirmative action shaped the Supreme Court's restriction or protection of the civil rights of minorities?

Affirmative action is the label placed on institutional efforts to diversify by race, gender, or otherwise. Companies and government entities have practiced affirmative action in recruitment, in awarding government contracts, and in college admissions over the years. The federal government somewhat supports the practice but does not require states to enforce this policy. Since 1996, eight states have banned race-based affirmative action in college admissions of state schools through voter referenda.

Seeking Diversity

Presidents Kennedy and Johnson helped define the key terms as they developed policy in the hope of creating an equal environment for the races. Both men knew that merely overturning "separate but equal" would not bring true equality. Kennedy issued an executive order to create the Committee on Equal Employment Opportunity and mandated that federal projects "take affirmative action" to ensure that hiring was free of racial bias. Johnson went a step further in his own executive order requiring federal contractors to "take affirmative action" in hiring prospective minority contractors and employees. President Johnson also said in a speech at Howard University, "You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, 'you are free to compete with all the others,' and still justly believe you have been completely fair."

Civil rights organizations, progressives, and various institutions agree with Kennedy's ideas and Johnson's statements. The federal government, states, colleges, and private companies have echoed these sentiments in their hiring and admissions practices. Yet, affirmative action has been mired in controversy since the term was coined.

Blindness of Competing State Interests

Two current schools of thought generally divide into a pro- or anti-affirmative action line, though neither willingly accepts those labels. One group believes that our government institutions and society should follow *Brown* and later decisions and be blind to issues of race and gender. Another group, influenced by feminists and civil rights organizations, asks government and the private sector to develop policies that will create parity by elevating those individuals and groups who have been discriminated against in the past. The debate on affirmative action includes Supreme Court justices who insist that the Constitution is colorblind and other justices who maintain that it forbids racial classifications only when they are designed to harm minorities, not help them.

These two groups have divergent views on college admissions and hiring practices. Colleges and companies have set aside spots for applicants with efforts to accept or hire roughly the same percent of minorities who exist in a locality or in the nation. Institutions that use such numeric standards refer to these as “targets,” while those opposed call them “quotas.”



THINK AS A POLITICAL SCIENTIST: EXPLAIN HOW POLITICAL PRINCIPLES AND POLICIES APPLY TO DIFFERENT SCENARIOS

The principle of equal protection has been interpreted and refined many times in the nation’s history. For more than 50 years, the government has looked to the Supreme Court for rulings on affirmative action cases. The Supreme Court has decided on affirmative action cases in different ways for different reasons. In fact, on the same day—June 23, 2003—the Court handed down different decisions on two affirmative action cases, both involving racial factors in admissions at the University of Michigan. In one case, *Gratz v. Bollinger*, the Court ruled in favor of the petitioner, concluding that the undergraduate admissions practices violated the equal protection clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. In the other case, *Grutter v. Bollinger*, the Court ruled that the admissions practices of the University of Michigan Law School did not violate the equal protection clause of the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964.

Practice: Read the synopses of both *Gratz v. Bollinger* and *Grutter v. Bollinger* at oyez.org or a similar site. Then study the decisions and reasoning in each case as expressed in the majority opinions. Explain why the different scenarios behind the cases led to different legal conclusions on the principle of equal protection.

Supreme Court and Affirmative Action

The issue of affirmative action came to a head in the decision in *Regents of the University of California v. Bakke* (1978). This case addressed the UC Davis medical school and its admission policy. The school took in 100

applicants annually and had reserved 16 spots for minorities and women. Allan Bakke, a white applicant, was denied admission and sued to contest the policy. He and his lawyers discovered that his test scores and application in objective measurements were better than some of the minorities and women who were admitted ahead of him. He argued that the university violated the equal protection clause and denied his admission because of his race.



Source: Wikimedia Commons

A 2003 protest in Washington, DC, as the Supreme Court was preparing to hear arguments in two University of Michigan cases that challenged affirmative action policies in college admissions. Nearly 75,000 attended the rally to defend the gains made by the affirmative action policy.

Reverse Discrimination

In this reverse-discrimination case, the Court sided with Bakke in a narrow 5:4 ruling, leaving the public and policymakers wondering what was constitutional and what was not. As far as mandatory quotas are concerned, this case made them unconstitutional. Yet the Court, through its nine different opinions (all justices gave an interpretation), made it clear that the concept of affirmative action was permitted, provided the assisted group had suffered past discrimination and the state has a compelling governmental interest in assisting this group. Clearly, recruitment of particular groups could continue, but government institutions could not be bound by hard and fast numeric quotas.

Since Bakke

The ruling was a victory for those who believed in equality of opportunity, but it by no means ended the debate. Since *Bakke*, the Court has upheld a law that set aside 10 percent of federal construction contracts for minority-owned firms. It overturned a similar locally sponsored set-aside policy. Then it upheld a federal policy that guaranteed a preference to minorities applying for broadcast licenses.

Legal scholars and government students alike are confused by this body of law. Quotas have a hard time passing the strict scrutiny test that is applied to them. To give preference, a pattern of discriminatory practices must be proven.

The Court heard two more cases regarding admissions policies from the University of Michigan. The Michigan application process worked on a complex numeric point system that instantly awarded 20 extra points for ethnic minorities including African Americans, Hispanics, and Native Americans. By contrast, an excellent essay was awarded only one point. Though the school did not use a quota system per se, the point breakdown resembled something close to what *Bakke* banned. The Court reaffirmed its 1978 stance and made it plain by rejecting the University of Michigan's use of fixed quotas for individual undergraduate applicants, though it upheld the practice for admission to the university's law school. In 2016, the Supreme Court ruled race-based admissions at the University of Texas were permissible only under a standard of strict judicial scrutiny. A federal judge ruled in 2019 that Harvard's race-based admissions process of capping the number of Asian American students was not discriminatory.

REFLECT ON THE ESSENTIAL QUESTION

Essential Question: How has affirmative action shaped the Supreme Court's restriction or protection of the civil rights of minorities? On separate paper, complete the chart below.

Affirmative Action Being Protected
by the Supreme Court

Affirmative Action Being Restricted
by the Supreme Court

KEY TERMS AND NAMES

affirmative action

Regents of the University of California v. Bakke (1978)

CHAPTER 11 Review:

Learning Objectives and Key Terms

TOPIC 3.10: Explain how constitutional provisions have supported and motivated social movements. (PRD-1.A)

Constitutional and Legislative Protections (PRD-1.A.1)	Civil Rights Movement (PRD-1.A.2)
Defense of Marriage Act (1996) “don’t ask, don’t tell” (1994) Equal Pay Act (1963) equal protection clause Equal Rights Amendment (1972) <i>Lawrence v. Texas</i> (2003) Nineteenth Amendment (1920) <i>Obergefell v. Hodges</i> (2015) strict scrutiny Title IX (1972)	King Jr., Martin Luther “Letter from a Birmingham Jail” National Women’s Organization

TOPIC 3.11: Explain how the government has responded to social movements. (PMI-3.A)

Government Responses to Social Movements (PMI-3.A.1)	
<i>Brown v. Board of Education</i> (1954)	poll taxes
Civil Rights of 1875	“separate but equal”
Civil Rights Act of 1964	Thirteenth Amendment (1865)
Civil Rights Cases (1883)	Title II (Civil Rights Act of 1964)
equal protection clause	Title IX (Educational Amendments Act of 1972)
Fifteenth Amendment (1870)	Voting Rights Act of 1965
Fourteenth Amendment (1868)	Twenty-fourth Amendment (1964)
grandfather clause	white primary
Jim Crow laws	white flight
literacy test	
<i>Plessy v. Ferguson</i> (1896)	

TOPIC 3.12: Explain how the Court has at times allowed the restriction of the civil rights of minority groups and at other times has protected those rights. (CON-6.A)

Protecting Rights (CON-6.A.1)	Restricting Rights (CON-6.A.1)
<i>Brown v. Board of Education</i> (1954) Fourteenth Amendment (1868) majority-minority districts <i>Swann v. Charlotte-Mecklenburg</i> (1970)	freedom-of-choice plans <i>Plessy v. Ferguson</i> (1896) “separate but equal”

TOPIC 3.13: Explain how the Court has at times allowed the restriction of the civil rights of minority groups and at other times has protected those rights. (CON-6.A)

Debate Over Affirmative Action (CON-6.A.2)	
affirmative action	<i>Regents of the University of California v. Bakke</i> (1978)

CHAPTER 11 CHECKPOINT:

Civil Rights

Topics 3.10–3.13

MULTIPLE-CHOICE QUESTIONS

Questions 1 and 2 refer to the cartoon below.



Source: Mike Keefe, InToon.com

1. Which of the following best describes the message of the political cartoon?
 - (A) The policy of affirmative action should not be allowed in the United States.
 - (B) The Supreme Court has limited the way colleges can recruit minorities.
 - (C) The college admissions process should be blind to the applicant's color.
 - (D) The Supreme Court refuses to consider the constitutionality of affirmative action policies.
2. Which of the following constitutional principles coincides with the topic in this cartoon?
 - (A) Due process
 - (B) Equal protection
 - (C) Citizenship
 - (D) Free expression

- 3.** Which statement accurately describes the NAACP's strategy to desegregate schools?
- (A) The chief focus was on the Constitution's Bill of Rights to secure equal education.
 - (B) The organization primarily filed cases for plaintiffs in the Deep South states.
 - (C) The NAACP battled for equal education at college and graduate schools before the K-12 level.
 - (D) The NAACP's intent was to lobby Congress and state legislatures to desegregate schools.
- 4.** The 1972 congressional act commonly referred to as "Title IX" does which of the following?
- (A) Guarantees equal funding and opportunities for men and women in school programs
 - (B) Guarantees entrance into restaurants and theaters and other public accommodations to people of all races
 - (C) Guarantees equal access to all sports teams in college
 - (D) Guarantees the same number of women as men be admitted to public universities

Questions 5 and 6 refer to the passage below.

[A]ll government contracting agencies shall include in every government contract hereafter entered into the following provisions: "In connection with the performance of work under this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin . . . [in] employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship . . .

"(2) The contractor will, in all solicitations or advertisements for employees . . . state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin."

—President John F. Kennedy, Executive Order 10925, 1961

5. Based on the text passage, with which of the following statements would the author most likely agree?
- (A) The government should be blind to company hiring and firing practices.
 - (B) Business firms should act affirmatively to hire and promote African American workers.
 - (C) Contractors hired by the government should employ equal numbers of black and white employees.
 - (D) The federal government promotes equal opportunity.
6. Which of the following federal statutes contains similar ideas and principles as the above executive order?
- (A) Civil Rights Act of 1957
 - (B) Civil Rights Act of 1964
 - (C) Voting Rights Act of 1965
 - (D) Equal Housing Act of 1968

FREE-RESPONSE QUESTIONS

Concept Application

1. A Senate Judiciary subcommittee gave unanimous approval today to a proposed constitutional amendment that would allow both Congress and the states to ban or regulate abortion. . . . [an earlier] piece of anti-abortion legislation . . . would define life as beginning at conception, thus giving a fetus constitutional rights and making abortion illegal. The proposed amendment considered today, sponsored by Senator Orrin G. Hatch, Republican of Utah, the subcommittee chairman, declares “a right to abortion is not secured by this Constitution” and that Congress and the states “shall have the concurrent power to restrict and prohibit abortions.” The amendment would permit a state law to have precedence if it was more restrictive than legislation approved by Congress.

—*New York Times*/Associated Press on the Hatch Amendment, 1981

After reading the scenario, respond to A, B, and C below:

- (A) Describe the objective of the proposed amendment.
- (B) In the context of this scenario, explain how ratification of this proposed amendment could alter U.S. policy.
- (C) In the context of the scenario, explain other steps Senator Hatch or backers of the amendment could take to achieve similar ends if this proposal fails.

Quantitative Analysis

White Citizens' Views Toward Integration 1942-1963 (Percent Favorable)

	EDUCATION			TRANSPORTATION			RESIDENTIAL		
	"White students and Negro students should go to the same schools."			There should not be "separate sections for Negroes on streetcars and buses."			No difference if "a Negro with the same income and education . . . moved into your block."		
	Total	South	North	Total	South	North	Total	South	North
1942	30	2	40	44	4	57	35	12	42
1956	49	15	61	60	27	73	51	38	58
1963	62	31	73	79	52	89	64	51	70

Source: Thernstrom and Thernstrom, *America in Black and White*, 1997

Numbers indicate the percent of respondents answering “yes” or agreeing with the statement.

2. Use the information graphic above to answer the following questions.
 - (A) Identify a trend in white public opinion toward integration.
 - (B) Describe a similarity or difference in white attitude toward integration as illustrated in the graphic.
 - (C) Draw a conclusion about the similarity or difference identified in B.
 - (D) Explain how the data in the graphic relates to the advancement of equality in political institutions.

SCOTUS Comparison

3. In the mid-1970s, California resident Allan Bakke, a white, 35-year old man, applied to the University of California-Davis medical school. The school's affirmative action policy set aside 16 of the 100 spots exclusively for qualified minority applicants. The medical school denied Bakke's admission while it accepted minorities with lower grade point averages (GPAs) and test scores. Bakke alleged the state university violated both the 1964 Civil Rights Act and the Constitution in rejecting his application based on his race while accepting applicants of a minority status with lower GPAs and test scores.

In the decision of *Regents of the University of California v. Bakke* (1978), the U.S. Supreme Court held in a unique 5:4 ruling, that the university had violated the 1964 statute, but that using race as a criterion in higher education admissions was constitutionally permissible. The Court did not declare the practice of affirmative action unconstitutional but did declare that overly strict racial guidelines violate the Constitution.

- (A) Identify the constitutional clause relevant to both *Regents of the University of California v. Bakke* (1978) and *Brown v. Board of Education* (1954).
- (B) Explain how the rulings differed in the *Bakke* and *Brown* cases.
- (C) Describe an action that students who oppose the *Bakke* ruling can take to limit its impact.

UNIT 3: Review

Noted groups and individuals have pushed for the civil liberties promised in the Bill of Rights. Though at times states have infringed on free speech, free religion, and rights of the accused, the Supreme Court has generally restored these liberties. This process has occurred on a case-by-case basis via the selective incorporation doctrine. The Court has prevented government censorship, protected people from aggressive police and overzealous school administrators, set standards to allow localities to define public obscenity, and prevented excessive entanglements of church and state.

Women, African Americans, and other ethnic and political minorities have pushed for fairness and equality because they were overlooked at the U.S. founding and by state and federal governments during the decades that followed. The Bill of Rights, later amendments, and subsequent laws were meant to afford these groups and individuals real justice and freedoms. Brave, principled leaders and organized groups had to press the government to fully deliver these freedoms.

The Supreme Court's evolving interpretation of the Fourteenth Amendment's equal protection clause eventually required states to treat citizens equally. From *Brown v. Board of Education* to the current debate about affirmative action, civil rights have been on the front burner of public policy. Women's rights came partially with the ratification of the Nineteenth Amendment in 1920 but more fully after Congress mandated equal pay and a fair footing in college. Homosexuals have successfully sought to serve openly in the military and have won the right to marry.

MULTIPLE-CHOICE QUESTIONS

1. Under what circumstance can police conduct searches?
 - (A) If they have a court-issued warrant
 - (B) If they have slight suspicion of wrongdoing
 - (C) If they have been asked to do so by a crime victim
 - (D) If they have been tipped off by an anonymous source

Questions 2 and 3 refer to the passage below.

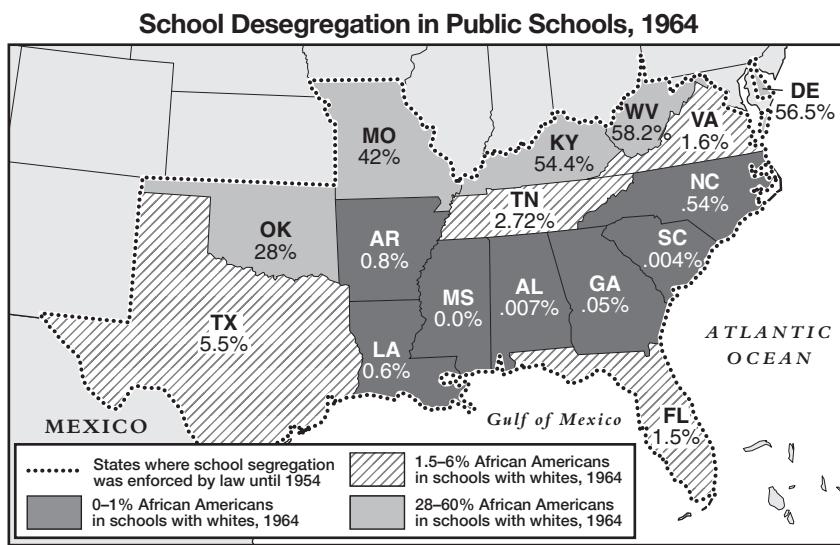
It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.

—Justice Anthony Kennedy, Majority Opinion in
Obergefell v. Hodges (2015)

2. Which statement best summarizes Justice Kennedy's opinion?
 - (A) Some level of burden on the liberty of same-sex couples is acceptable.
 - (B) The framers of the Constitution did not support legal marriage of gays and lesbians.
 - (C) Same-sex couples are unfairly harmed by state-level decision making.
 - (D) Gay couples have the right to all tangible benefits under civil unions but not in marriage.
3. Which of the following constitutional provisions would the author cite to support the opinion?
 - (A) The equal protection clause of the Fourteenth Amendment
 - (B) The establishment clause of the First Amendment
 - (C) The reserved powers clause of the Tenth Amendment
 - (D) The due process clause of the Fifth Amendment
4. What action was taken several years after the *Brown v. Board of Education* ruling to more fully integrate schools?
 - (A) States spent more money to make all-black schools equal to all-white schools.
 - (B) Congress amended the Constitution to require racial balance in public schools.
 - (C) Interest groups convinced Congress to fund traditionally all-black schools at a level equal to mostly-white schools.
 - (D) Federal courts mandated enrollment ratios that required busing students to distant schools.

5. What must a suing party prove to win a libel lawsuit?
- A factual mistake was made in reporting.
 - The offending party acted maliciously and caused damages.
 - An unfair criticism of public officials was made.
 - His or her reputation was tarnished.

Questions 6 and 7 refer to the graphic below.



6. Which of the following statements best reflects the data in the map?
- More than half of Tennessee's African American student population attended desegregated schools in 1964.
 - The most racially segregated state in 1964 was South Carolina.
 - No school had desegregated more than 50 percent of its schools.
 - West Virginia had desegregated the highest percentage of African American students.
7. Based on your knowledge and the map, which of the following is true regarding school desegregation?
- The *Brown v. Board of Education* (1954) ruling resulted in immediate and widespread desegregation.
 - Federal judges in the states with the least desegregation slowed the integration process.
 - Once the equal protection clause was added to the Constitution, the rate of desegregation increased.
 - Disagreement with the *Brown v. Board of Education* decision slowed the rate of desegregation.

8. Which of the following is an accurate comparison of the two court cases?

	<i>Brown v. Board Of Education</i>	<i>Roe v. Wade</i>
(A)	Required all-black schools to have facilities and faculties of the same quality as all-white schools	Brought vocal opposition to abortion and encouraged legislatures to reshape abortion policy
(B)	Required students to be bused	Made abortion illegal in all states
(C)	Concluded that "separate but equal" schools are impossible	Assured a pregnant woman's right to have an abortion in the first trimester
(D)	Upheled the separation of races in public accommodations	Upheld states' police powers to regulate safety, health, and morals

9. An employee wrongly terminated from her job because of race or gender should contact which government institution or office for help?
- (A) Equal Employment Opportunity Commission
 - (B) Local police
 - (C) Federal Bureau of Investigation
 - (D) Secretary of State
10. 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 Amendment protects citizens against the states.
 - (D) The Fifth Amendment protects citizens against criminal charges, while the Fourteenth Amendment protects citizens against civil lawsuits.

Questions 11 and 12 refer to the table below.

Public Opinion on Burning the U.S. Flag

Poll Question: “*Do you favor or oppose a constitutional amendment that would allow Congress and state governments to make it illegal to burn the American flag?*”

Year	Favor	Oppose	No Opinion
1990	68	27	5
1995	62	36	2
1999	63	35	2

Source: Gallup

- 11.** Which of the following can you conclude from the data in the table?
- (A) Most Americans place free speech rights above punishment for burning the U.S. flag.
 - (B) Most Americans see flag burning as protected speech.
 - (C) Most Americans would never burn the flag and therefore have no concern about the issue.
 - (D) Most Americans support limits on certain types of symbolic speech.
- 12.** Based on your knowledge and the above data, which of the following is an accurate statement regarding flag burning and free speech?
- (A) Because of these opinions, the number of public flag burnings greatly changed.
 - (B) A constitutional amendment allowing legislatures to criminalize flag burning was eventually ratified.
 - (C) Despite failed attempts to amend the Constitution around this issue, flag burning remains protected speech.
 - (D) Most of the public does not have a position on the legality of flag burning, making the law uncertain.

FREE-RESPONSE QUESTIONS

Concept Application

The following is an excerpt from the *Federalist Papers*.

1. The most considerable of the remaining objections is that the plan of the [Constitutional] Convention contains no bill of rights. . . . the constitutions of several of the States are in a similar predicament . . . The Constitution proposed by the convention contains, as well as the constitution of this State, a number of such provisions. . . . “The privilege of the writ of habeas corpus shall not be suspended, . . . “No bill of attainder or ex-post-facto law shall be passed.” . . . “The trial of all crimes, except in cases of impeachment, shall be by jury . . . Section 3, of the same article “Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.” . . .

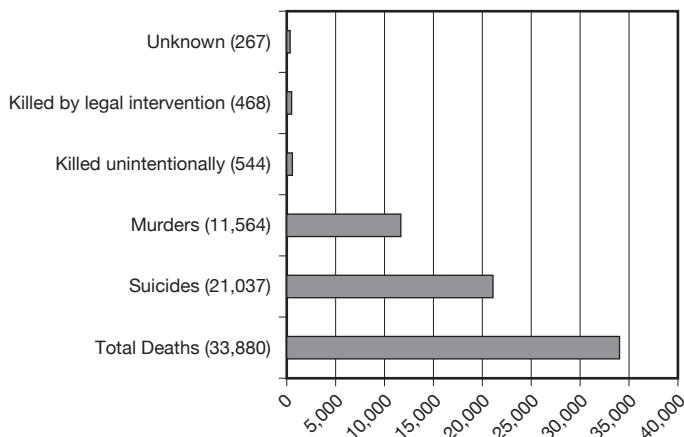
—Alexander Hamilton, *Federalist No. 84*, 1788

After reading the scenario, respond to A, B, and C below:

- (A) Describe the objection to the Constitution in the scenario.
- (B) In the context of the scenario, explain how Hamilton defends the proposed Constitution’s commitment to protecting liberty.
- (C) Explain how the outcome of this debate balanced the power of government while protecting individual’s civil liberties.

Quantitative Analysis

**Average Number of U.S. Deaths Per Year
from Gun Violence (2011–2015)**



2. Use the information in the graph on the previous page to answer the questions below.
- (A) Based on the data in the graph, identify the most common type of death from guns.
 - (B) Describe a similarity or difference in the data presented in the chart.
 - (C) Draw a conclusion about how a gun-control interest group might use this information to promote its cause.
 - (D) Explain how those protecting Second Amendment liberties might respond to this information.

SCOTUS Comparison

3. In 2012, Charlie Craig and David Mullins, a gay couple preparing for their marriage, entered Masterpiece Cake Shop in Lakewood, Colorado, to purchase a wedding cake. The baker and owner Jack Phillips refused to provide Craig and Mullins their desired wedding cake, based on his religious beliefs and his disapproval of gay marriage. Craig and Mullins filed a complaint with Colorado's Civil Rights Division, claiming Phillips violated the Colorado Anti-Discrimination Act (CADA), a state law preventing discrimination in public accommodations. The state government found probable cause against Phillips, but he appealed to the Supreme Court on the grounds Colorado's law and enforcement violated his First Amendment right.

The Supreme Court examined the issue in *Masterpiece Cake Shop, Ltd. v. Colorado Civil Rights Commission* and ultimately found for Phillips. Though the Court did not rule broadly on whether or not the First Amendment enables a merchant or public accommodation to refuse service to gays, the Court looked specifically at and spoke specifically to the state's disregard for Phillips' religious claim with "elements of a clear and impermissible hostility."

- (A) Identify the constitutional provision that is common in both *Masterpiece Cake Shop, Ltd. v. Colorado Civil Rights Commission* (2018) and *Wisconsin v. Yoder* (1972).
- (B) Based on the constitutional provision identified in part A, explain how the facts of *Wisconsin v. Yoder* (1972) led to a similar holding as from the Court's holding in *Masterpiece Cake Shop, Ltd. v. Colorado Civil Rights Commission* (2018).
- (C) Describe an action that Colorado residents who disagree with the decision in *Masterpiece Cake Shop, Ltd. v. Colorado Civil Rights Commission* (2018) might take in response.



WRITE AS A POLITICAL SCIENTIST: SUPPORT AN ARGUMENT WITH RELEVANT EVIDENCE

Throughout this course you have examined foundational documents and Supreme Court cases, analyzing their evidence and the reasoning they use to back up their arguments. Use what you have learned from reading and analyzing others' arguments to write your own.

After you have developed a claim or thesis statement that takes a defensible position and lays out a line of reasoning (see page 257), gather the evidence you need to support it. The task requires that you use at least one piece of evidence from one of several foundational documents the prompt identifies. In addition, you must use a second piece of evidence from any other foundational document not used as your first piece of evidence, or your second piece of evidence could come from your knowledge of course concepts.

Suppose, for example, that you are given the following prompt for an argument essay: "Develop an argument that explains whether the federal government went too far in restricting civil liberties after the September 11 terrorist attacks." After reading the prompt, identify the Big Idea or core principle it relates to and focus your essay on that concept rather than the particulars of the attacks. You are told that at least one piece of evidence must come from one of the following foundational documents:

The Constitution

The Declaration of Independence

First piece of evidence:

- Chances are good you might go straight to the Fourth Amendment for evidence related to what the government can and cannot do in relation to searches. It says that people have the right to be secure in their homes, safe from government searches without probable cause and a warrant.
- You might also, however, recognize that the USA PATRIOT Act relates to First Amendment protections, since some searches may be made on the basis of a person's speech.
- The Fifth Amendment also provides possible evidence to use in your argument, since it guarantees everyone due process of law. Searches under the USA PATRIOT Act sometimes do not follow standard processes of law.
- Remembering that the initiative to combat terror through surveillance was an executive order by President Bush, you may also look to Article II of the Constitution for evidence related to your subject.

Any of the sections of the Constitution listed above could provide your first piece of evidence in an argument about civil liberties after September 11.

- You would also think about what evidence you might find in the Declaration of Independence, the second identified foundational document. Evidence from that might include the long list of grievances the colonists had against the British government, some of which described government intrusions and harassments.

Second piece of evidence:

- While you are considering the evidence from one of the required foundational documents, you might also be thinking of evidence from other sources you could gather to use in your argument. This evidence might include information you

remember about the USA PATRIOT Act, objections over access to cell phone metadata, and the political science concepts of public safety and order and their tension with liberty.

Application: As you complete the argument essay below, take time to think through all the possible pieces of evidence you can use to support your claim. Be sure that at least one piece is from one of the required foundational documents, and be sure to list at least two pieces of evidence, the second (and any additional ones) from a different source from the first.

For current free response question samples, check the College Board's website.

Argument Essay

4. The 1964 Civil Rights Act prevents merchants, public accommodations, and employers from denying service and practicing discrimination in employment based on defined criteria. Develop an argument explaining whether Congress should alter or maintain this law.

Use at least one piece of evidence from one of the following foundational documents:

- Bill of Rights
- Commerce Clause
- “Letter from a Birmingham Jail”

In your response, you should do the following:

- Respond to the prompt with a defensible claim or thesis that establishes a line of reasoning.
- Support your claim or thesis with at least TWO pieces of specific and relevant evidence:
 - One piece of evidence must come from one of the foundational documents listed above.
 - A second piece of evidence can come from any other foundational document not used as your first piece of evidence, or it may be from your knowledge of course concepts.
- Use reasoning to explain why your evidence supports your claim or thesis.
- Respond to an opposing or alternative perspective using refutation, concession, or rebuttal.