

RIGHT TO PRIVACY

The key amendments that deal with the due process rights of individuals—those procedural rights that protect individuals from governmental interference—are the Fourth, Fifth, Sixth, and Seventh amendments.

Fourth Amendment

The Fourth Amendment has come under the scrutiny of both the federal and state governments in determining how far they can go in obtaining evidence. The key criterion in determining the legitimacy of the search is probable cause. That becomes the first component of the due process rights of individuals, which also applies to the states as a result of a similar clause in the Fourteenth Amendment. An exception to the probable cause component is the “plain view” characteristic. It allows police to obtain evidence that is in sight of the investigators. Situations such as emergencies, investigations requiring wiretapping, and the extent to which a police officer can search a car are also raised by the Fourth Amendment. Some of the major issues related to the Fourth Amendment are as follows:

- To what extent can police conduct a search without a warrant and obtain evidence to prosecute an individual?
- What methods can law officials use to obtain evidence?
- Can the right of privacy extend to social issues such as abortion?
- Can the government use wire taps without a court order?

Key Court Cases

***Wolf v Colorado* (1938)**

In the first incorporation case that dealt with the privacy section of the Fourth Amendment, the Supreme Court held that even though the exclusion of illegally obtained evidence, as stipulated by state law, was not mandated by the due process section of the Fourteenth Amendment, the court did say that the Fourteenth Amendment’s due process clause did apply to the states. They said the states could adopt other measures that would not fall below the minimum standards set forth in that amendment. The decision was overturned by *Mapp v Ohio*.

***Mapp v Ohio* (1961)**

A key state incorporation case, *Mapp v Ohio* established the exclusionary rule for states. The exclusionary rule determined that police may obtain only that evidence available through a legitimate search warrant. Other evidence found at the scene of the crime is not admissible in the trial; it must be excluded. This doctrine has been modified by the plain view doctrine. Many people have been critical of the exclusionary rule, suggesting that it prevents the police from obtaining legitimate evidence necessary to prosecute a criminal. Since *Mapp v Ohio*, other cases have created further exceptions. In *Nix v Williams* (1984) the court allowed “inevitable discovery” of tainted evidence—that is, evidence that eventually would have been discovered with a legal warrant. *United States v Leon* (1984) created a “good faith” doctrine, which stated that if the police obtained essential evidence in good faith and did not violate the spirit and intent of the Fourth Amendment, then that evidence would be allowed.

***United States v Leon* (1984)**

In this decision, the court created a “good faith” exception to the exclusionary rule, allowing the introduction of illegally obtained evidence where police can prove that the evidence was obtained without violating the core principles of *Mapp v Ohio*.

***Riley v California* (2014)**

The court unanimously held that the warrantless search and seizure of digital contents of a cell phone during an arrest is unconstitutional.

Fifth Amendment, Sixth Amendment, Seventh Amendment Procedural Due Process

"No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy . . . [nor] be compelled . . . to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . ."

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have . . . process for obtaining witnesses . . . and to have the Assistance of Counsel for his defense . . ."

"The right of trial by jury shall be preserved . . ."

Procedural due process can be viewed as a series of steps established by the Fifth, Sixth, and Seventh Amendments that protect the rights of the accused at every step of the investigation and limit how governmental power may be exercised. The following represent the steps taken: how the evidence is gathered (Fourth Amendment), the charges made by the police upon arrest (habeas corpus), the formal indictment and interrogation (allowance made for obtaining lawyers, witnesses), the trial (speedy and public trial, guarantees against self-incrimination, trial by an impartial jury), and the right to confront witnesses. Another kind of due process, substantive, places limits on the government as to the content of legislation and the extent to which government can use its power to enact unreasonable laws. Before looking at key cases, you should have a clear understanding of the intent of each of these steps. Habeas corpus, a right that cannot be taken away by government, found in the body of the Constitution in Article I Section 9, has also been called a writ of liberty. It directs the police to show cause why a person may be held for a crime. It has also been used by convicted criminals as a route to appeal their conviction from the state courts to the federal courts based on procedural issues.

An indictment is a formal list of charges made by a grand jury. When enough evidence is given to the grand jury, it develops a list of formal charges that is presented to the accused prior to trial.

A speedy trial has been defined by law on the federal level as one that must take place no more than a hundred days after arrest. Each state has laws addressing this issue. A public trial means it is held in a public courthouse. Depending upon the specific issue, the extent of public viewing and media coverage can be determined by the judge. The right to a jury trial does not necessarily mean the jurors will be identified by name. In the trial of the World Trade Center bombers, the jurors names were never revealed. In obtaining an adequate defense, the conditions in which a defendant can obtain a lawyer based on financial considerations and the exact time a lawyer is brought in are not defined. Double jeopardy means that once a verdict is handed down, the accused cannot be tried twice for the same crime. That does not mean that if you are found innocent of state charges you cannot be tried for a federal offense dealing with the same issue. That is what happened to the Los Angeles police involved in the beating of Rodney King.

Surveys taken have shown that much of the public is critical of how courts have interpreted these provisions. Crime and violence have become a national concern. Anticrime legislation and Supreme Court decisions have responded to the public's concern.

Some of the questions raised by these amendments are as follows:

- Can due process rights be suspended during times of national emergencies?
- Is live media coverage of trials allowable?
- Does a lawyer have to be assigned to a defendant who cannot afford one?
- At what point does the accused have the right to consult a lawyer?
- To what extent do the police have to advise the accused of his/her rights?

Key Court Cases

***Escobedo v Illinois* (1964)**

Danny Escobedo requested the assistance of a lawyer after he was arrested for the murder of his brother. The police would not grant the request even though there was a lawyer at the police station. Escobedo made a number of incriminating statements without a lawyer present—statements later used against him at the trial. The Supreme Court ruled Escobedo's due process rights of self-incrimination and right to counsel were violated and he was released from prison.

Required Court Case

***Gideon v Wainwright* (1964)**

Essential Fact: Gideon was refused the right to have an attorney after he robbed a pool hall. He was subsequently put on trial and had to defend himself.

Constitutional Issue: Was Gideon denied his Sixth Amendment right to have an attorney represent him?

Unanimous Decision: "The right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner's trial and conviction without the assistance of counsel violated the Sixth Amendment made applicable through the Fourteenth Amendment."

This landmark case established that the accused has the right to an attorney even if he or she cannot afford one.

***Miranda v Arizona* (1966)**

In one of the most publicized cases of its kind, Ernesto Miranda, mentally retarded, was accused and convicted of rape and kidnapping. He confessed to the crime under intense interrogation without any mention by the police of his right to obtain a lawyer or what consequences the answers to their questions would have on the outcome of the trial. The Supreme Court, in a landmark ruling, established the Miranda rights. Those rights directed the police to inform the accused upon arrest of the constitutional right to remain silent, that anything said can be used in court, that he has a right to consult with a lawyer at any time during the process, and that a lawyer will be provided if the accused cannot afford one. The accused must be asked if he understands these rights and be told that he has the right to remain silent and at any time request a lawyer. Since the *Miranda* ruling, the courts have begun to limit some of the rights established by these cases.

***New York v Quarles* (1984)**

The court created a "public safety" exception to the *Miranda* warnings allowing the police to arrest an accused criminal without reciting the *Miranda* rights where public safety is threatened.

Hamdi v Rumsfeld (2004)

Enemy combatants held in the United States have due process rights.

EIGHTH AMENDMENT

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

As part of the procedural due process, an accused has the right to post bail, an amount of money set by the court as a guarantee that the person will return to stand trial. This amount may not be excessive and is imposed based on the nature of the crime and the history of the accused. Critics of the system raise the issue that if the accused cannot afford the bail, even if it is not excessive, then the person is unduly punished prior to the trial.

Excessive fines and cruel and unusual punishment have resulted in some of the most passionate arguments revolving around the nature and extent of government-imposed punishment.

Some of the major issues posed by this amendment are as follows:

- What constitutes excessive bail?
- Is the death penalty cruel and unusual punishment?

Key Court Case

Gregg v Georgia (1976)

The landmark case, which held that “the punishment of death does not invariably violate the Constitution.” However, it did affirm standards and criteria set down in *Furman v Georgia* (1972), regarding discretion of judges and makeup of juries. Since *Gregg*, other criteria have been established regarding the types of cases that can result in the kinds of executions and how states impose death penalties. The court has also ruled that other forms of treatment of criminals while they are in prison can also be cruel and unusual. Such penalties as denial of medical assistance or an interpretation that narcotics addiction is a crime rather than an illness that can be treated violated the Eighth and Fourteenth Amendments.

These issues have resulted in a national debate regarding the best way to create a balance between society’s needs of protecting its citizens and the rights of the accused. A federal crime bill that created a “three strikes and you’re out” feature passed the Congress in 1994 and has been duplicated in many states. This bill mandates that life imprisonment be given for federal crimes if a criminal is convicted of three felonies.

NINTH AMENDMENT

Undefined Rights

“The enumeration in the Constitution, of certain rights, shall not be construed to deny . . . others retained by the people.”

Called by some the elastic clause of the Bill of Rights, the Ninth Amendment guarantees that those undefined rights not listed anywhere in the Constitution cannot be taken away. Such issues as abortion and the “right to die” have come under the umbrella of this amendment.

Gonzales v Oregon (2006)

The Supreme Court ruled that the federal government could not block Oregon’s Assisted Suicide Law by moving against physicians who assisted terminally ill patients by giving them medicine that would enable them to commit suicide.

KEY CONCEPT 3.B: THE FOURTEENTH AMENDMENT

Selective Incorporation and Nationalization of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment, which guarantees citizens protection from abuses by the federal government.

The **Big Idea, Liberty and Order**, is reflected by this concept.

"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."

We define civil rights as the substantive application of equal protection under the law to individuals. The concept of ordered liberty became the criterion for any incorporation of the Bill of Rights into the Fourteenth Amendment. Prior to the passage of the Fourteenth Amendment, the Bill of Rights was the only protection citizens had. Even the principles outlined in the Declaration of Independence, natural rights, inalienable rights, and the statement "all men are created equal" suggest that civil rights should be an integral part of our government. But the issue of slavery quickly brought to a stop any fulfillment of these principles. The *Dred Scott* case in 1857 established that slaves were property based on the due process clause of the Fifth Amendment.

KEY CONCEPT 3.C: EQUAL PROTECTION UNDER THE LAW AND SELECTIVE INCORPORATION

The equal protection clause and due process clause of the Fourteenth Amendment are provisions that protect the equal rights of individuals.

The **Big Idea, Civic Participation in a Representative Democracy**, is reflected by this concept.

Fourteenth Amendment Paves the Way for Incorporation Through Its Due Process Clause

The significance of the Fourteenth Amendment is that it aimed to nationalize the meaning of civil rights through the Incorporation Doctrine. On the surface it seemed states could no longer discriminate against their citizens. Yet one of the first key court cases after the passage of the amendment had a chilling effect on any thought of nationalization of the Bill of Rights. The slaughterhouse cases, in 1873, involved suits by individuals against states, accusing the states of the denial of property rights under the Fifth and Fourteenth Amendments. The Supreme Court dismissed the suits and ruled that the intent of the Fourteenth Amendment was to protect the freed slaves, not incorporate the Bill of Rights.

When a provision of the Civil Rights Act of 1875, which established the legality of access to public accommodations, theaters, hotels, and other public facilities, was challenged, the Supreme Court ruled that aspect of the congressional act unconstitutional. Its logic was that the Fourteenth Amendment applied only to the states "operating under cover of the law." But the definitive action by the court in *Plessy v Ferguson* in 1896 put the issue to rest. When Homer Plessy challenged the Louisiana state law that created two classes of railroad fares, the Supreme Court, using the fact that the passenger train had only an intrastate route, ruled that separate but equal facilities were constitutional under the equal protection provision of the Fourteenth Amendment.

The first time the Supreme Court applied a state case to the Bill of Rights, known as the Incorporation Doctrine, occurred in *Gitlow v New York* in 1925. Gitlow was convicted in New York of advocating the forcible overthrow of the government using violent means. The court ruled that he was in violation of a New York statute because his actions created a “bad tendency” that endangered the public welfare. More important was the statement made by the majority, which determined that “freedom of speech and of press—protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the 14th Amendment from impairment by the States.” For the first time, the Supreme Court ruled that there was a direct relationship among the Fourteenth Amendment, actions by the states, and the Bill of Rights. This selective incorporation reached its peak under the leadership of Earl Warren in the 1950s and 1960s. Each time the court made a ruling that incorporated an aspect of the Bill of Rights to the states, the concept of judicial federalism was defined more fully.

Even after the Supreme Court case nationalized the Bill of Rights in the *Gitlow* case, it reversed itself in a significant due process case, *Palko v Connecticut* (1937). This case involving the issue of double jeopardy gave Connecticut the right to try an individual a second time. The concept of applying the Fifth and Fourteenth Amendments’ due process provisions to citizens who believed their “privileges and immunities” were being violated by the state was rejected.

There is no doubt that the nationalization of the Bill of Rights through the incorporation of the Fourteenth Amendment has had a significant impact on state laws. From the interpretation of the First Amendment freedoms to the rights of the accused, the states increasingly have to be responsive to the principles of the Bill of Rights. However, decisions reached by the Rehnquist Court have tilted some of the power back to the states.

Key Incorporation Court Cases

- **GITLOW V NEW YORK (1925)**—Freedom of speech
- **PIERCE V SOCIETY OF SISTERS (1925)**—The court struck down an Oregon statute that required all children to attend public school. The decision significantly expanded coverage of the Due Process clause in the Fourteenth Amendment.
- **NEAR V MINNESOTA (1931)**—Freedom of the press
- **POWELL V ALABAMA (1932)**—Access to a lawyer in capital cases
- **DE JONGE V OREGON (1937)**—Freedom of assembly
- **CANTWELL V CONNECTICUT (1940)**—Freedom of religion
- **WOLF V COLORADO (1949)**—Unreasonable search and seizure

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CONTEMPORARY CONNECTION

The issue of police procedures resulting in the arrests and deaths of African Americans created a national discussion after New York City police used “stop and frisk” to search predominantly African Americans, after an incident in Ferguson, Missouri, where a police officer shot and killed an African American, and another in New York City after an African American was choked to death in a routine arrest.



Though the Bill of Rights does not explicitly guarantee individuals to the right to privacy, the guarantee of the Fourth Amendment against unreasonable searches and seizures and Supreme Court rulings interpreting the Fourth and Ninth Amendments have expanded that right. These cases have been among the most controversial cases the court has had to deal with. Every time there is a vacancy on the court, the nominee is questioned by the Senate as to whether the nominee could vote to overturn *Roe v Wade*. Nominees refuse to answer that question.

Key Privacy Supreme Court Cases:

***Griswold v Connecticut* (1965)**

The court struck down a Connecticut law that prohibited the use of contraceptives. The case arose after a doctor was arrested for distributing birth-control devices. Citing the privacy provision of the Fourth Amendment, the court stated that individuals had the right to privacy in the area of sexual relations.

Required Court Case

***Roe v Wade* (1973)**

Key Fact: Petitioner “Roe” wanted to terminate her pregnancy by having an abortion. Texas law prohibited abortions except in the case where a mother’s life is in danger.

Constitutional Issue: Did a right to privacy established in a prior Supreme Court case and protected by the Constitution’s Fourth Amendment give Roe the right to an abortion?

Majority Decision: Using the concept of being “secure in their persons,” the Supreme Court ruled that abortions are constitutionally protected. It set up a trimester system allowing unrestricted abortions in the first trimester but regulated abortions during the second trimester and allowed the states to ban abortion during the third trimester unless the mother’s or baby’s life was endangered. This decision has been most controversial and set the stage for a national debate.

Dissenting Decision: “I find nothing in the language or history of the Constitution to support the court’s judgment. The court simply fashions and announces a new constitutional right for pregnant mothers [410 U.S. 222] and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes.”

—Justice Byron White

***Board of Education of Independent School District No. 92 of Pottawatomie v Earls* (2008)**

The Court upheld the constitutionality of mandatory drug testing by public schools of students participating in extracurricular activities.

KEY CONCEPT 3.D: CIVIL RIGHTS

Civil rights policies are developed by both the federal and state governments and influenced by social movements as well as court decisions.

The **Big Idea, Competing Policy-Making Interests**, is reflected in this concept.