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## THE CONSTITUTION AND CRIMINAL LAW

## THE FEDERAL SAFETY NET

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**Learning Objective:** Identify and explain the three reasons the U.S. Constitution plays a much larger role in criminal law today than in the past.

On May 23, 1957, three Cleveland, Ohio, police officers received an anonymous tip that a bombing suspect could be found in the home of Dollree Mapp. But this wasn't an ordinary case, and Ms. Mapp wasn't an ordinary citizen. The bombing victim was a well-known gambling racketeer, Don King. Mr. King would later promote some of the best boxers of the world, including Muhammad Ali, Larry Holmes, and Mike Tyson. Mr. King is a larger-than-life character who has had many encounters with the law. In the future, Ali, Holmes, and Tyson, and many other people would sue him. Several years before the bombing of his home, Mr. King killed a man for attempting to rob one of his gambling houses, and in 1967, he was convicted of second-degree murder. Ms. Mapp was also known to police. She was independent, feisty, and outspoken.

The officers appeared at Ms. Mapp's door, demanding entry. She refused to allow them to enter and called her lawyer, who told her to demand that the officers produce a warrant. She made the demand, and the officers left, only to return 3 hours later with 7 to 12 additional officers. When Ms. Mapp again demanded to see a search warrant, one of the officers waved a piece of paper in front of her, claiming it to be a warrant. Ms. Mapp grabbed the paper, and a scuffle began, during which Ms. Mapp shoved the paper down her blouse. In response, one of the officers reached down into Ms. Mapp's blouse and retrieved the paper. The officers then entered her home. They found the suspected bomber, who was later cleared of the crime, but they didn't stop there. They searched her home from top to bottom, during which they found obscene materials (by 1950s standards), arrested Ms. Mapp, and subsequently charged her with felony possession of obscenity.

As Ms. Mapp suspected, the police didn't have a warrant. But it was true that she had violated Ohio's obscenity law, and the state could prove it. At the time, Ohio permitted evidence that police obtained illegally to be used at trial. But this wasn't true everywhere; the states were split on the use of illegal evidence. This was true of many rights. Each state decided what rights criminal defendants enjoyed in their courts. And recall, most criminal prosecutions happen in state courts. The effect of these facts was that the United States Constitution's protections didn't mean much. But this would change in a big way, due, in part, to Ms. Mapp and many other people who have fought the system.<sup>1</sup>

### Why the U.S. Constitution Is Important

That the U.S. Constitution plays a much larger role in criminal law today than in the past is being referred to as **constitutionalism** in this book. As you will learn in this chapter, there are

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**Constitutionalism:** Having fundamental law that limits the authority of government. In this text, it is a reference to the increasingly important role of the U.S. Constitution to criminal law.

three reasons the U.S. Constitution is more important in criminal law, state and federal, today than in the past:

1. Incorporation doctrine
2. Expansion of rights
3. Exclusionary rule

America's current constitution is not its first; it's the second. The nation's first constitution was the Articles of Confederation and Perpetual Union of 1781. Under the Articles of Confederation, the states were superior to the national government. Believing that the weak national government was inhibiting the economic growth and military security of the young nation, the states sent delegates to Philadelphia in the summer of 1787 to "revise" the Articles of Confederation. These men, commonly known as the Framers, chose to scrap the Articles of Confederation and to write an entirely new constitution. They didn't have their states' permission to do this. In fact, they voted to keep their work secret until it was completed. Can you imagine a group of representatives to a Constitutional Convention meeting in secret today? Not likely. Either masses of people would descend on the gathering, insisting on openness, or the delegates would use texting and social media to continuously leak what was happening inside.

While the Framers intended to strengthen the federal government, they also wanted to leave the states as the primary governors. To accomplish these two objectives, they created a federal government that had specific, limited powers (that it didn't have under the Articles of Confederation) but left most governmental authority in the hands of the states. As you learned earlier, the states retained the general police power.

One of the issues that was debated at the Constitutional Convention was whether a list of individual rights should be included. The delegates advocating for a strong federal government, known as Federalists, opposed including a bill of rights. Among those men were James Madison and Alexander Hamilton. They had four reasons for their pushback against a bill of rights. First, they believed that the government's architecture, most notably federalism and the separation of powers, would protect the people from the centralization of power. Second, they didn't find a listing of rights necessary because the new Constitution didn't empower the federal government to violate liberty. In a third related argument, they believed that the protection of liberties was best handled by the states. And fourth, they believed it wasn't possible to identify and list all the freedoms of people, and to create a list would have the effect of limiting individual rights to what appears in the list. Ultimately, the Federalists won unanimous support to exclude a bill of rights. Consequently, the proposed Constitution identified only a few specific rights. These include **habeas corpus**, which provides courts with the authority to review detentions; prohibiting **ex post facto laws**, or the declaration that an act is criminal after it occurs; prohibiting legislatures from acting as judge and jury, known as **bills of attainder**; and finally, a guarantee of a jury trial in federal criminal cases.

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**Habeas corpus:** A Latin phrase that translates to "you have the body." In law, it is a command to bring a detained person to a court to determine if the detention is lawful.

But the absence of a full set of rights proved to be a problem when the proposed Constitution was sent to the states for ratification. Many people screamed foul, and several states preconditioned their ratifications on the addition of a bill of rights. To ensure that the required nine states, of 13, would ratify, the Framers agreed. Consequently, the Constitution was ratified in 1788 and became effective in 1789. That same year, the first Congress under the new Constitution proposed, as promised, 12 amendments. Ten of those amendments were ratified and went into force in 1791. Today, we know them as the Bill of Rights. As a side note, one of the two amendments that wasn't approved was finally ratified in 1992, 202 years later! The amendment isn't dramatic; it simply states that any raise Congress gives itself isn't effective until the next session of Congress. Congressional sessions are 2 years long. The other unratified amendment changed the calculation for the number of members in the House of Representatives. If it were to be ratified, the House of Representatives would grow from its current number of 435 to as many as 6,000. Congress can't seem to get its work done with 435 members of the House of Representatives and 100 senators. Imagine a House of Representatives with over 6,000 members!

Historical records make clear that the Bill of Rights was intended to apply to the federal government but not to the states. That meant that the federal government had to respect freedom of speech, couldn't force defendants to confess, and so on. But the states were free to respect these rights, or not. Consequently, rights varied from state to state. And remember, more than 90% of prosecutions take place in state courts. The differences in individual rights between the states were real.

The Civil War would result in a second phase of constitutional liberty and equality. Three new constitutional amendments were ratified during Reconstruction: the Thirteenth, Fourteenth, and Fifteenth. The Thirteenth Amendment abolished slavery and involuntary servitude, and the Fifteenth Amendment recognized the right of all men, including those formerly enslaved, to vote. Sorry, ladies—you didn't acquire the right to vote until the adoption of the Nineteenth Amendment in 1920. The Fourteenth Amendment, ratified in 1868, is the most important amendment to criminal law, and it is broken into five sections. Section 1 protects the following rights:

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**Ex post facto law:** A law that declares an act to be criminal after it has occurred. The Constitution forbids ex post facto laws.

**Bills of attainder:** A legislative decision to punish a person or legal entity (e.g., companies) without a judicial trial. The Constitution forbids bills of attainder.

**Privilege and immunities:** Found in both Article IV and the Fourteenth Amendment, these clauses guarantee a limited number of rights against the federal government and fair treatment of states between their citizens and citizens of other states.

**Equal protection:** Found expressly in the Fourteenth Amendment and implicitly in the Fifth Amendment, a guarantee that government won't, without a compelling reason, treat people differently because of race, national origin, religion, or alienage.

**Due process:** Found in the Fifth and Fourteenth Amendments, a requirement that government provide a fair process when taking life, liberty, or property. In addition to procedural requirements, due process also includes substantive rights, such as the right to privacy.

- **Citizenship:** All people born or naturalized in the United States, and subject to the jurisdiction of the United States, are citizens of the United States and of the state where they reside.
- **Privileges or immunities:** SCOTUS has defined this clause narrowly. It includes a few specific rights, including the right to travel between the states and the right to be protected from violence while in custody.
- **Equal protection:** This provision demands that the states not discriminate between people for racial, ethnic, and other reasons.
- **Due process:** Under this provision, a state may take a person's life, liberty, or property only after providing due process (fair process). SCOTUS has also held that this clause protects substantive rights, such as the right to privacy.

The Fifth Amendment also has a due process clause that is identical in language to the Fourteenth Amendment's due process clause. Remember that, at the time of its adoption, the Bill of Rights only limited the power of the federal government. This changed with the Fourteenth Amendment, which was intended to create a national minimum—a safety net—of fairness. And that is precisely what due process means: to have a fair process. The states are free to raise the safety net higher (e.g., to add or enlarge rights), but they must respect the safety net's minimum protections.

### Fairness in the States: Incorporation

Determining the height and width of the national safety net hasn't been easy. After all, the phrase "due process" is very vague. What is due, or fair? Does fairness include the rights found in the Bill of Rights, for example? Interestingly, courts were not pressed to answer this question for many decades. But eventually, they did, and that leads us to the first reason the United States Constitution means more to criminal law today than in the past: the incorporation doctrine. When SCOTUS first began considering the meaning of the Fourteenth Amendment's due process clause, the justices wrestled with different theories. These included the following:

**Theory 1. Independent meaning doctrine:** The Fourteenth Amendment's due process clause is not connected to the Bill of Rights. Some of the rights overlap, but the rights found in the Bill of Rights are not the basis of "due process," and therefore, they do not automatically apply in state courts.

**Theory 2. Fundamental fairness doctrine:** A right found in the Bill of Rights applies against a state when justice demands it. This decision is made on a case-by-case basis.

Theory 3. Total incorporation doctrine: The Bill of Rights *is* due process; all of the rights found in the first 10 amendments apply in state courts—automatically.

Theory 4. Total incorporation plus doctrine: As is true of total incorporation, all of the rights found in the Bill of Rights apply against the states. However, rights deemed fundamental that are not found in the Bill of Rights also apply.

Theory 5. Selective incorporation doctrine: Only the most important (fundamental) rights in the Bill of Rights apply against the states. Unlike fundamental fairness, this isn't a case-by-case determination. Once a right is found to be fundamental, it applies against the states, in all cases.

After years of disagreement between the justices, SCOTUS settled on the **selective incorporation doctrine**. Incorporation refers to extending a right found in the U.S. Constitution from the federal government to the states, using the due process clause. A right is “selected” to be applied to the states if it is (1) fundamental and (2) necessary to an ordered liberty. Said another way, a right is incorporated if it is really, really important. Today, nearly all of the rights found in the Bill of Rights have been incorporated. The first to be incorporated was the First Amendment's protection of free speech. That happened in 1925. Since then, SCOTUS has added, one by one, nearly all of the criminal law rights. The last “textual” right to be incorporated was the freedom from excessive fines in 2019. See Figure 2.1 for a listing of the status of each right found in the Bill of Rights.

In the last sentence, the word “textual” was enclosed in quotation marks to draw your attention to a detail about incorporation. A textual, or enumerated, right is one that you can find written in the Constitution, such as the Eighth Amendment's right to be free from excessive fines. But there are rights that are not written (unenumerated), but implicit. These too can be incorporated. This happened in 2020 in *Ramos v. Louisiana*.

The question in *Ramos* was whether the right to a jury trial includes the right to have all of the jurors agree to convict. The Constitution is silent on the number of jurors needed to convict. In fact, it has nothing to say about the number of jurors at all. However, SCOTUS decided in 1898 that in federal courts, juries of 12 are required, as is jury unanimity for conviction. Many years later, SCOTUS chose not to incorporate the unanimity requirement, and two states, Louisiana and Oregon, permitted convictions with as few as 10 of 12 jurors. In *Ramos*, SCOTUS reversed its earlier decisions and incorporated the right to jury unanimity, making *it* the most recently incorporated right, not the excessive fines clause.

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**Selective incorporation doctrine:** The determination that a right found in the Bill of Rights is fundamental and necessary to an ordered liberty, and therefore, applies to the states.

**FIGURE 2.1: ■ Is a Defendant Protected in State Court?**

<u>What Right?</u>	<u>Has it Been Incorporated by SCOTUS?</u>
First Amendment - speech	Yes, in <i>Gitlow v. New York</i> , 268 U.S. 652 (1925)
First Amendment - religion	Yes, in <i>Everson v. Board of Education</i> , 330 U.S. 1 (1947) and <i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940)
First Amendment - press	Yes, in <i>Near v. Minnesota</i> , 283 U.S. 697 (1931)
First Amendment - assembly	Yes, in <i>DeJonge v. Oregon</i> , 299 U.S. 353 (1937)
First Amendment -grievances	Yes, in <i>Edwards v. South Carolina</i> , 372 U.S. 229 (1963)
Second Amendment - arms	Yes, in <i>McDonald v. Chicago</i> , 561 U.S. 742 (2010)
Third Amendment - quartering of troops	No, but lower courts have said yes
Fourth Amendment	Yes, through several cases including <i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)
Fifth Amendment - grand jury	No
Fifth Amendment - self incrimination	Yes, in <i>Malloy v. Hogan</i> , 378 U.S. 1 (1964)
Fifth Amendment - double jeopardy	Yes, in <i>Benton v. Maryland</i> , 395 U.S. 784 (1969)
Fifth Amendment - takings	Yes, in <i>Chicago, Burlington &amp; Quincy Railroad Co. v. City of Chicago</i> , 166 U.S. 226 (1897)
Fifth Amendment - due process	Fourteenth Amendment has its own Due Process Clause
Sixth Amendment - counsel	Yes, in <i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)
Sixth Amendment - public trial	Yes, in <i>In re Oliver</i> , 333 U.S. 257 (1948)
Sixth Amendment - jury trial	Yes, in several cases upholding right to impartial jury, number of jurors, etc.
Sixth Amendment - speedy trial	Yes, in <i>Klopper v. North Carolina</i> , 386 U.S. 213 (1967)
Sixth Amendment - confront accusers	Yes, in <i>Pointer v. Texas</i> , 380 U.S. 400 (1965)
Sixth Amendment - compulsory process	Yes, in <i>Washington v. Texas</i> , 388 U.S. 400 (1965)
Sixth Amendment - notice of charge	Yes, in <i>In re Oliver</i> 333, U.S. 257 (1948)
Seventh Amendment - jury trial in civil cases	No
Eighth Amendment - cruel punishments	Yes, in <i>Robinson v. California</i> , 370 U.S. 660 (1962)
Eighth Amendment - excessive bail	No, but it is likely
Eighth Amendment - excessive fines	Yes, in <i>Timbs v. Indiana</i> , 586 U.S. ____ (2019)
Ninth Amendment	Although no right has been found exclusively through the 9th, it has been used as secondary support for rights found under the 14th
Tenth Amendment	Although it refers to powers of the people, no rights have ever been declared under the 10th

## DIGGING DEEPER 2.1

### Does a jury have to be unanimous to convict a defendant?

Case: *Ramos v. Louisiana*

Court: Supreme Court of the United States. Citation: 590 U.S. \_\_\_\_.

Year: 2020

Justice Gorsuch delivered the opinion of the Supreme Court.

[Facts]

Accused of a serious crime, Evangelisto Ramos insisted on his innocence and invoked his right to a jury trial. Eventually, 10 jurors found the evidence against him persuasive. But a pair of jurors believed that the State of Louisiana had failed to prove Mr. Ramos's guilt beyond a reasonable doubt; they voted to acquit.

In 48 states and in federal court, a single juror's vote to acquit is enough to prevent a conviction. But not in Louisiana. Along with Oregon, Louisiana has long punished people based on 10-to-2 verdicts like the one here. So instead of the mistrial he would have received almost anywhere else, Mr. Ramos was sentenced to life in prison without the possibility of parole.

Why do Louisiana and Oregon allow non-unanimous convictions? Though it's hard to say why these laws persist, their origins are clear. Louisiana first endorsed non-unanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to "establish the supremacy of the white race," and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.... Seeking to avoid unwanted national attention, and aware that this Court would strike down any policy of overt discrimination against African American jurors as a violation of the Fourteenth Amendment, the delegates sought to undermine African American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a "facially race-neutral" rule permitting 10-to-2 verdicts in order "to ensure that African American juror service would be meaningless."...

The Sixth Amendment promises that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The Amendment goes on to preserve other rights for criminal defendants but says nothing else about what a "trial by an impartial jury" entails.

Still, the promise of a jury trial surely meant *something*—otherwise, there would have been no reason to write it down....

One of these requirements was unanimity. Wherever we might look to determine what the term "trial by an impartial jury trial" meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.

The requirement of juror unanimity emerged in 14th-century England and was soon accepted as a vital right protected by the common law....

This same rule applied in the young American States. Six State Constitutions explicitly required unanimity. Another four preserved the right to a jury trial in more general terms.



But the variations did not matter much; consistent with the common law, state courts appeared to regard unanimity as an essential feature of the jury trial.

It was against this backdrop that James Madison drafted and the States ratified the Sixth Amendment in 1791. By that time, unanimous verdicts had been required for about 400 years. If the term “trial by an impartial jury” carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity....

Nor is this a case where the original public meaning was lost to time and only recently recovered. This Court has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity. As early as 1898, the Court said that a defendant enjoys a “constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of 12 persons.”...

*There can be no question either that the Sixth Amendment’s unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is “fundamental to the American scheme of justice” and incorporated against the States under the Fourteenth Amendment. This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth Amendment’s right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.*

The effect of the selective incorporation doctrine is that every judge in every courtroom in the United States has an obligation to enforce incorporated rights. And they do. Judges often tell local, state, and federal police that they are wrong. This is an awesome power that most judges around the world don’t possess. Said another way, people around the world aren’t as protected as Americans against governmental abuse. We will now turn to what rights are guaranteed, and later in this chapter, you will learn what happens when the police violate a person’s rights.

## QUESTIONS AND APPLICATIONS

1. Let’s role-play. You are a SCOTUS associate justice in the early 1900s. How would you have defined due process? Would it have included the rights found in the Bill of Rights? Or would you have defined due process differently? Explain your answer.
2. Are the following rights incorporated? Answer yes or no.
  - a. Freedom from self-incrimination
  - b. Grand jury indictment
  - c. Jury trial
  - d. Freedom from unreasonable searches and seizures

**Recidivism:** To commit a new crime after being punished for a different crime.

## TREAT ME FAIRLY

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**Learning Objective:** Describe the most significant constitutional rights that apply to criminal law.

Recall that there are three reasons the U.S. Constitution means more in criminal law today than in the past. Incorporation was the first; the horizontal expansion of the Bill of Rights. The second is the vertical expansion of those rights. Each right simply protects more than in 1791. Let's begin with the general idea of a fair process and then examine specific rights.

The due process clauses demand that the federal and state governments play by fair rules. They don't forbid the government from punishing people or making laws that burden individual rights. The clauses simply require that the government be reasonable when doing these things. Specifically, both clauses state that *"no person...shall be deprived of life, liberty, or property without due process of law."* When applying due process to a given situation, two questions must be asked: First, does due process apply to a case? And if it doesn't, what process is required?

Starting with the first question, the reach of the clauses is quite broad. If the government intends to take life or liberty or property, it must use a fair process. Defining these three interests, particularly liberty, is sometimes tricky outside of criminal law. But the most common forms of criminal punishment (e.g., death penalty, imprisonment, and fines) clearly fall within the zone of the three interests protected by due process. Therefore, question number one is easily answered in criminal law.

Let's now return to the thorny issue of what process is "due." You already know (I hope) that most of the rights in the Bill of Rights are part of due process. And we will soon examine these in greater detail. Before we do, let's think about rights that aren't found in the Bill of Rights. A few of these are explicitly found in the Constitution itself; others are "implicit" in due process.

### Ex Post Facto and Bills of Attainder

An example of a right found outside the Bill of Rights is the requirement that the government tell a person that an act is a crime and that it will be punished *before it occurs*. This principle is so obvious, so natural, that it doesn't need to be explained. Every time a parent tells a child "I am only going to tell you once," the idea that it isn't fair to punish without a warning is expressed. In law, the prohibition of retroactive lawmaking, or *ex post facto* (after the fact), is hundreds of years old. There is a Latin phrase that expresses this principle: *nullum crimen sine lege, nulla poena sine lege*, which roughly translates to "no crime or punishment without law." Before the Constitution, this rule was known as the *principle of legality*. Today, the Constitution demands a warning before punishment. First, the Constitution has two *ex post facto* clauses—Article I, Section 9 applies to Congress, and Article I, Section 10 applies to the states.

**Void for vagueness:** A criminal prohibition that is so imprecise that a person doesn't know if a specific act is prohibited. Vague statutes violate due process and are invalid.

**Overbreadth doctrine:** A criminal prohibition that includes acts that may be criminalized and constitutionally protected acts. Overbroad statutes are invalid.

There is more than one type of ex post facto law. All of the following are forbidden because they are ex post facto:

1. A law that declares an act, which is lawful when taken, to be a crime after it occurs.
2. A law that increases the punishment for a criminal act, after it occurs.
3. A law that changes the evidence or procedural rules to a defendant's disadvantage after the criminal act occurs.<sup>2</sup>

The prohibition of ex post facto laws guarantees that the government can't change the rules in the middle of a game or after the game is over to increase its chances of winning. A legislature may, however, change the rules in ways that favor a defendant. This is known as *legislative amelioration*. A real-life example of this is the First Step Act, a federal law that shortened the prison sentences of many offenders. In addition to early release, the offenders were provided with training and programming intended to reduce the likelihood that they would become involved in crime again, known as **recidivism**. The First Step Act was intended to address a couple of problems. One was the expense and unfairness of having the largest per capita prison population in the world. The second was the discovery of a racial disparity in punishment. Crack cocaine, more common among African Americans, resulted in much longer prison sentences than powder cocaine, which was more common among European Americans. Several thousand inmates were granted early release under the law.<sup>3</sup>

In addition to the Constitution's prohibition of ex post facto laws, due process guarantees a person a warning, known as "notice," of new crimes. The due process requirement of notice doubles down on the prohibition of ex post facto laws. In a specific case, it also requires that the defendant be fully apprised of the law that has been allegedly violated, the basic facts of the offense, and time to prepare a defense before trial. There are other procedural rights, both explicit and implicit in the Constitution.

Another right that is found directly in the Constitution is the freedom from bills of attainder. Like ex post facto laws, the federal government is prohibited from bills of attainder in Article I, Section 9 and the states in Article I, Section 10. A bill of attainder is a legislative act that punishes without trial. In the United States, only a court may try a person for a crime. Any legislative act that "punishes" is a bill of attainder, even if not strictly for a crime. For example, it was a bill of attainder for Congress to order that three federal employees not be paid for their work because Congress found them to be subversive communists.<sup>4</sup>

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**Facial challenge:** An assertion that a statute is invalid on its face and, therefore, should be stricken in its entirety.

**As-applied challenge:** An assertion that a statute is invalid as it is applied in a specific case, even though it is valid generally.

**Severability:** A doctrine that enables a court to remove unconstitutional provisions of a law, leaving the remainder of the law intact.

## Void for Vagueness

Remember the rule of lenity, which states that if multiple reasonable interpretations of a criminal statute are possible, the interpretation that most benefits the defendant is to be applied? Let's take that situation one step further. Imagine a law is so broad, so hard to pin down, that it's not possible for a person to know if their act violates the law—for example, if there was a law that forbids “causing trouble” to other people, what is “trouble”? Would playing loud music in a public park be a violation of the law if it annoys others? How about running up behind people and screaming, with the intention of startling them? Or what about an employer who fires an employee for stealing company funds, but it results in the employee's bankruptcy—hasn't the employer caused the employee trouble? Because this law isn't specific about what conduct is illegal, it violates due process. Specifically, it is **void for vagueness**.

In addition to not providing a person with notice of what acts will be punished, vague laws also overempower police and prosecutors by giving them the authority to decide what conduct should lead to arrest and prosecution. This violates the separation of powers because the authority to declare criminal laws belongs to the legislative branch. Also, too much discretion can lead to racial and other forms of discrimination, in violation of the Fourteenth Amendment's guarantee of equal protection. SCOTUS has invalidated many laws for being too vague. A city ordinance that criminalized “persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers” was held to be too vague,<sup>5</sup> and the court has invalidated several federal laws in recent years for being vague.<sup>6</sup>

## Overbreadth

The first cousin of void for vagueness is the **overbreadth doctrine**. A law that criminalizes acts that may be criminalized but also includes acts that are constitutionally protected is overbroad. Consider a free speech problem. The First Amendment protects speech, but with exceptions. Laws regulating speech must be written with precision to avoid including protected speech. For example, consider the following statute:

Criminal Code, Chapter 45. Child Sex Abuse: Images

Purpose: The intent of this law is to protect children under the age of 12 from sexual abuse.

Section 1: A child is any person under the age of 12 years old.

Section 2: A person who produces, distributes, sells, displays, or communicates any image of a child's genitals is guilty of a Class B felony.

The conduct the statute prohibits is clear, so the law is not vague. However, it is overbroad. Consider, for example, a medical school text that has images of nude children that is used to teach pediatric medicine. And what about a mom's photo of her baby playing in the bathtub? Both of these acts fall within the grasp of the law, yet they are protected expression under the First Amendment.

Often, vagueness and overbreadth are seen together. Let's consider the criminalization of cyberbullying. Ubiquitous smartphone use by children, widespread social media, and the

meanness that sometimes comes with youth have combined to make cyberbullying a common and harmful phenomenon. Lawmakers across the United States have scrambled to address it. But it is one of many crimes that is hard to define, at least in a way that is constitutional. For example, consider this law:

Criminal Code, Chapter 120: Cyberbullying and Cyberthreat Prevention Act

Section 1: Any person who shall use a computer network, social media, or other internet service to post a statement about another person that is insulting, harassing, annoying, or offensive shall be guilty of cyberbullying, a Class B misdemeanor.

Section 2: Any person who shall use a computer network, social media, or other internet service to post, on three or more occasions, statements directed at a specific person with the intent to cause the person to fear imminent serious bodily injury or death, and that a reasonable person would interpret the postings as a threat of imminent bodily injury or death and would also believe the person who made the posting has the ability to cause such harm, is guilty of cyberthreat, a Class A misdemeanor.

Section 1 of this law is vague. Reasonable people can, and will, disagree over what constitutes an insult, harassment, an annoyance, or what is offensive. Section 1 is also overbroad. Likely, you have not studied free speech, so you may not be aware that the First Amendment protects a wide range of expression, including “hate speech.” Although there are limits to the First



**PHOTO 2.1** Flag-burner Gregory Johnson won his case for burning the U.S. flag on free speech grounds.

Photo by Allan Tannenbaum/Getty Images

Amendment's protection of speech, including what is known as a "true threat," Section 1 criminalizes much more than true threats, and therefore, it is unconstitutionally overbroad. Section 2, on the other hand, is specific in its criminalization of true threat, so it is constitutional.

When confronted with an overbroad or vague criminal statute, a court has two options. First, it can treat the case as a **facial challenge** and strike down the entire law, or it can invalidate the specific prosecution under the theory the law is only invalid **as-applied**. This leaves the law standing to be used in the future.

In some instances, a court can "fix" the law by interpreting it narrowly or by removing the bad language, a process known as **severability**. In our cyberbullying and cyberthreat example, a reviewing court could invalidate the entire law, or it could leave Section 2 intact while invalidating Section 1.

Either way, the legislature has the authority to pass a new law or to amend the severed law, using language that doesn't offend the Constitution. In our child sex abuse images hypothetical example, the statute could be amended to specifically exempt images that serve medical and scientific purposes, and it could also require that children appear in sexually suggestive ways. These changes would narrow the law to better achieve its purpose—to prevent child sex abuse—and it would preclude the law from being used to unfairly prosecute parents, pediatricians, and medical school professors.

### Innocence, Reasonable Doubt, and Damnation

Even though it's not spelled out in the Constitution, the presumption of innocence has been recognized as a fundamental right since at least 1895.<sup>7</sup> This right places the burden of proving guilt squarely on the state.

You have already learned that the state must prove guilt beyond a reasonable doubt. As is true of the presumption of innocence, you won't find the beyond a reasonable doubt requirement anywhere in the Constitution. But SCOTUS has held that due process demands it. This is also true in juvenile delinquency cases.<sup>8</sup> As you read in Chapter 1, Blackstone posited that a high standard of proof, and other due process protections, will result in guilty persons going free. That is a tradeoff we make in a free society.

The beyond the reasonable doubt standard is an important feature of the U.S. criminal justice system. In theory, it reduces the number of wrongful convictions and keeps police and prosecutors in check. While it is a highly regarded right of defendants today, an interesting fact is that the original purpose of the standard wasn't to protect defendants. Rather, it was created to protect jurors and judges from eternal damnation. According to scholar James Q. Whitman, it was a mortal sin in old Christian law for a judge or juror to render a conviction while harboring a doubt about a defendant's guilt. The beyond a reasonable doubt standard was intended to protect the souls of those decision-makers.<sup>10</sup>

### First Amendment

Only 45 words in length, the First Amendment packs a punch:



Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Often referred to as the “first among equals,” the First Amendment protects six very important rights:

- Freedom of speech
- Freedom of press
- Freedom to exercise religion
- Freedom from the establishment of religion
- Freedom to assemble peaceably
- Freedom to petition the government to redress grievances

Laws that violate these rights can be stricken by the courts. Remember judicial review from the last chapter? In a criminal case, this means that the charges against a defendant are dismissed and the defendant is released. Of the six rights, controversies around free speech and religious freedom are most common. There is a lot of case law defining these rights and their limits. For example, you have already learned that the First Amendment’s protections have been incorporated. Even though the First Amendment only tells Congress to respect its rights, case law makes clear that the president of the United State, the states, and local forms of government must also respect them.

Another question that has been heavily litigated is what is meant by the word “speech.” Does the First Amendment limit its protection to oral communication? The courts have answered this clearly: no. All forms of expression—written, digital, nonverbal, and creative (art, sculpture, etc.)—are considered “speech.” And, on occasion, speech and conduct are combined. An example of this is what happened during the 1984 Republican National Convention held in Dallas, Texas. As part of a larger protest of the nomination of Ronald Reagan to be president, Gregory Johnson burned the flag of the United States in the streets near the convention. At the time, Texas made it a crime to desecrate venerated objects, including the flag. Johnson was criminally charged under the desecration statute. In this defense, Johnson asserted that what he did was protected under the First Amendment.

## DIGGING DEEPER 2.2

### Is burning the U.S. flag protected speech?

Case: *Texas v. Johnson*

Court: Supreme Court of the United States.

Citation: 491 U.S. 397

Year: 1989

Justice Brennan delivered the opinion of the Court.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question of whether his conviction is consistent with the First Amendment. We hold that it is not....

We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction....

The First Amendment forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."...

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."

Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, *Tinker v. Des Moines Independent Community School Dist.*, of a sit-in by blacks in a "whites only" area to protest segregation, *Brown v. Louisiana*, of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, and of picketing about a wide variety of causes....

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, refusing to salute the flag, and displaying a red flag, we have held, all may find shelter under the First Amendment.

That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood."...

"[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a shortcut from mind to mind. Causes and nations, political parties, lodges, and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design."

Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America." Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows:

"The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism."

In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication," to implicate the First Amendment.



The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements.

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or was threatened to occur because of Johnson's burning of the flag....

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." We thus conclude that the State's interest in maintaining order is not implicated on these facts....

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag....

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable....

We have not recognized an exception to this principle even where our flag has been involved. In *Street v. New York*, we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had "failed to show the respect for our national symbol which may properly be demanded of every citizen," we concluded that "the constitutionally guaranteed 'freedom to be intellectually. . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous."

Nor may the government, we have held, compel conduct that would evince respect for the flag. "To sustain the compulsory flag salute, we are required to say that a Bill of Rights which guards the individual's right to speak his own mind left it open to public authorities to compel him to utter what is not in his mind."

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."...

*Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction, because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol*

**Probable cause:** The standard of proof required by the Fourth Amendment to the Constitution of the United States for a search or seizure to be conducted. An officer has probable cause when the facts available to the officer warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present.

**Warrant:** A judicially issued authorization for police to conduct a search or seizure.

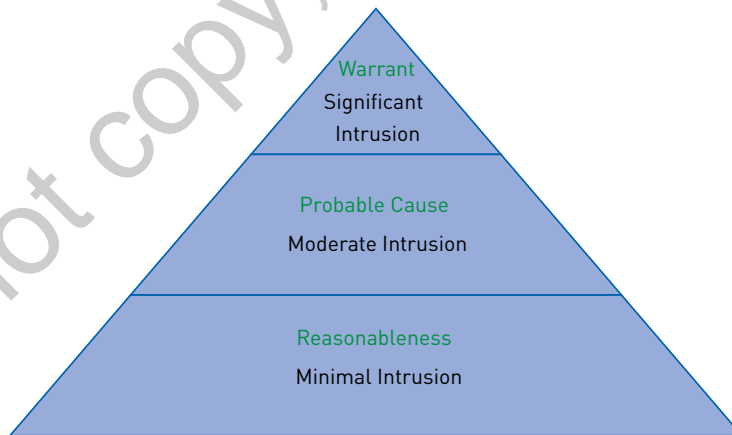
of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals (which held for Johnson) is therefore Affirmed.

The United States protects expression to a greater extent than any other country. The protection of speech includes ideas that are offensive. After all, there is no reason to protect speech that everyone agrees with. Even more, who would decide what speech is too offensive? Do you trust whoever is in power at any moment to decide what speech is acceptable or not? The prospect of the law becoming a political or personal moralistic tool of those in authority is why SCOTUS has chosen to leave it to individuals, through a “free market of ideas,” to decide. As Justice Robert Jackson wrote, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>11</sup> For this reason, racist, sexist, ageist, and other forms of “hate speech” are protected.

As is true of all rights, however, there are limits. SCOTUS has been careful in narrowly defining these limits and is cautious in creating new ones. Here is a short list of exceptions, though there are others:

- *Obscenity*. Seriously objectionable material, beyond common pornography.
- *Child pornography*. Because children are more likely to be harmed by involvement in pornography than are adults, child pornography may be punished. This includes

**FIGURE 2.2** ■ Fourth Amendment Pyramid



**Grand jury:** A group of citizens who decide if probable cause to believe a suspect has committed a crime exists.

**Indictment:** Also known as a true bill, a formal criminal charge issued by a grand jury.

**TABLE 2.1** ■ Requirements of Specific Searches and Seizures

Action	Description	Pyramid Location
Home search	With rare exceptions, police must have a warrant to search a home.	Top/Warrant
Plain view seizure	An officer may seize evidence that is in plain view, and probable cause exists to believe it is contraband or evidence of a crime.	Center/Probable cause
Automobile search	A car may be searched with probable cause to believe contraband or evidence of a crime will be found. A warrant isn't required.	Center/Probable cause
Terry frisk	Officer may "pat down" the outer clothing of a person subject to a Terry stop, provided a reasonable belief that the suspect is dangerous exists. Also named for the <i>Terry</i> case.	Bottom/Reasonableness
Terry stop	Officer may temporarily detain a suspect when there is a reasonable suspicion of criminality supported by specific and articulable facts. Named for <i>Terry v. Ohio</i> , 392 U.S. 1 (1968).	Bottom/Reasonableness
Search of an arrested person	For the safety of the officer and others, and for administrative reasons (to make a list of the arrestee's possessions), an arrested person may be searched without evidence that contraband will be found. The "search incident to arrest" is automatically authorized.	Bottom/Reasonableness

both involving a child in a sex act and exhibiting nude children in sexually suggestive ways. The objective of this free speech exception is to protect children from harm, not to prevent others from viewing the material. So digitally created, or virtual, images of child pornography are protected, unless they rise to the level of being obscene.

- *Defamation.* Written statements (libel) or oral statements (slander) that are untrue and harmful are not protected. The state may allow defamed people to sue and win money awards, but defamation may not be criminally punished.
- *True threats.* An expression that is intended to cause fear of imminent bodily harm or death, and if the speaker has the apparent ability to do what is threatened, may be criminalized. A true threat must be directed at a specific individual or group of people.
- *Incitement to imminent lawlessness.* Words that are likely to cause imminent lawlessness may be punished.

You will learn more about these exceptions when we explore the specific crimes that criminalize speech—for example, threat—later in the book.

## Second Amendment

The Second Amendment reads “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The relationship between the militia clause and the bear arms clause is unclear. Scholars and others continue to debate whether they are connected or independent of one another. If connected, then the right to bear arms only exists for members of the militia. If not, then all people possess a right to bear arms.

Regardless of the ongoing academic debate, SCOTUS found the two clauses to be independent in a case where it held that an individual has a right to possess a handgun in the home.<sup>12</sup> Two years later, the court incorporated the Second Amendment.<sup>13</sup> But the right to bear arms, as presently understood, is limited to a handgun in the home. Many states and the federal government regulate firearms in many other ways, including owning or possessing only certain types of guns, mandatory licensing or registration, safety training, prohibiting sales to people with criminal or psychological histories, restricting public possession, and limiting sales and distribution. These laws are being aggressively challenged, and it is likely that SCOTUS will soon better define the Second Amendment.

## Fourth Amendment

One of the most important protections of rights in criminal justice is the privilege against unreasonable searches and seizures. This right is found in the Fourth Amendment. It is short and to the point:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The amendment is fully incorporated, so all searches and seizures by any government officer must follow the amendment’s commands. The words “searches and seizures” have special Fourth Amendment meaning. A seizure of the person, for example, is more than just an “arrest.” Whenever a government officer makes a person feel unfree to leave the situation, a seizure has occurred, subject to a couple of conditions. First, the person’s conclusion that they were not free must be reasonable, and second, the government officer must be acting under official authority, not as a private person. The Framers listed the spaces protected by the amendment—persons, houses, and papers and effects. These three interests include almost everything—the human body, homes, apartments, cell phones, cloud accounts, automobiles, water bottles, and purses and wallets are all protected.

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**Suspect classification:** Laws that discriminate between people by race, alienage, national origin, and religion are suspect.

No right is absolute; the Fourth Amendment doesn't ban all searches. Of course, police officers conduct searches and seizures of people and things thousands of times every day. The Fourth Amendment establishes the rules police must follow when doing these things.

To understand those rules, review Figure 2.2. The baseline, or minimum, requirement of the Fourth Amendment is that the government act reasonably. Searches and seizures must *always* be reasonable; and sometimes, police only have to be reasonable. That is the bottom of the pyramid. In other cases, being reasonable isn't enough. The state must also have **probable cause**. It takes credible evidence, not just a suspicion or a hunch, to prove probable cause. Many searches and seizures are permitted when the government has probable cause and has acted reasonably. Finally, you see the warrant requirement at the top of the pyramid. A **warrant** is a court order to conduct a search, make an arrest, or seize property. Whenever a warrant is required, everything below it on the pyramid is also required (reasonable behavior and probable cause). The point of a warrant is to protect society's most private spaces by interposing a judge between the individual and the state. Only a neutral judge may issue a warrant, the officer who



**PHOTO 2.2** Supporters of gay marriage rally in front of the Supreme Court in Washington.

Photo by Allan Tannenbaum/Getty Images

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**Strict scrutiny test:** Laws that discriminate using a suspect classification or that encroach upon a fundamental right are reviewed by courts under the strict scrutiny test. To satisfy equal protection or due process, such laws must be supported by a legitimate compelling governmental interest, be narrowly tailored, and use the least restrictive means possible to accomplish the government's purpose.

has asked for the warrant must swear that the facts presented to establish probable cause are true, and the warrant must satisfy the particularity requirement. “Particularity” simply means details—what precisely is to be searched or seized. A warrant can’t authorize police to go on fishing expeditions.

To make sense of the pyramid, think of it in terms of the level of privacy that the government has intruded upon. Less is required of the government at the bottom of the pyramid because the individual’s privacy interests are minimal. The government’s privacy intrusion is the greatest at the top of the pyramid, so the full warrant, probable cause, and reasonableness requirements are required. There are many exceptions to the warrant requirement. In Table 2.1, you will find a list of some of the most common searches and seizures and where they fall on the pyramid. A more thorough discussion of the Fourth Amendment can be found in a criminal procedure textbook.

### Fifth Amendment

Another important set of criminal justice rights is found in the Fifth Amendment, which reads as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Under this Amendment, a defendant can’t be made to testify (at all); can’t be tried twice; is entitled to due process; and is entitled to have a group of citizens, known as a **grand jury**, decide whether charges, known as an **indictment** or true bill, should be filed in the first place. All of the rights in the Fifth Amendment, except indictment by grand jury, have been incorporated. Regardless, many states require grand jury indictment for serious crimes. When grand jury indictment isn’t required, a prosecutor can file the charge, known as an *information*, directly.

### Sixth Amendment

Like the Fifth Amendment, the Sixth is short but packed full of rights:

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**Substantial relationship test:** Laws that discriminate between people by sex are reviewed by courts under the substantial relationship test. To satisfy equal protection, such laws must be supported by an important and legitimate governmental interest, and the law is substantially related to that interest.

**Rational basis test:** The default test under the equal protection clause and due process clauses. It is applied whenever a law doesn’t involve a suspect classification or a fundamental right. The least demanding test under the Fourteenth Amendment, a law will survive review if it is supported by a legitimate governmental interest and the law is rationally related to that interest.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The reach of the amendment is clear: It only applies in criminal cases. Of the rights found in the Sixth Amendment, a speedy trial has been one of the most difficult and most contentious. SCOTUS has refused to set hard dates and has recognized that there are legitimate reasons for delays. Most states provide for a right to trial within 90 days if the defendant is in custody and 180 days if the defendant is free.

The speedy trial determination is case-specific. The impact COVID-19 will have on speedy trial and public trial rights is yet to be seen. There is precedent for delays due to natural causes. As a consequence of Hurricane Katrina in Louisiana, many trials were postponed well beyond the normal limits of speedy trial. Also, many courts chose to use virtual hearings and trials.

The rights to confrontation and cross-examination are inherent to the “orality” of the adversarial system. The adversarial system assumed that direct, real-time testimony that is subject to interrogation is the best way to find the truth. The state can’t introduce written statements or other evidence without producing the witness to testify at trial.

The Sixth Amendment’s right to counsel is a good example of the expansion of a right. First, it wasn’t incorporated until 1963, although SCOTUS had previously decided that it was incorporated in a very minimal way.<sup>14</sup> Beyond expanding it to the states, the right now applies to many cases it didn’t before. In the early years, only defendants charged with crimes that could be punished with death were entitled to counsel. Over time, the right expanded to felonies, then misdemeanors, and today, every defendant charged with a crime that may be punished with a single day in jail is entitled to have an attorney. This includes the right to have an attorney appointed at the government’s expense if a defendant can’t afford an attorney.

## Privacy

Privacy is not specifically protected by the Constitution. The Fourth Amendment has the effect of protecting privacy, but it isn’t a source of any specific right to privacy. SCOTUS has found, however, a number of privacy rights to be implicit in other rights. The most significant source is due process. Of course, due process is about procedure. But it also protects substantive rights. In some instances, the court has primarily relied on due process to protect privacy, but it has also thrown other rights into the mix. An example is the Ninth Amendment, which was the Framers’ way to express that there are more rights than appear in the Constitution. In spite of the obvious intent of the Framers, the Ninth Amendment has never been used by itself to secure a right. But it has been cited as a supporting cast member to the star of the show: substantive due process.

Several areas of private life have been deemed “fundamental” and protected under the due process clauses. These include reproductive, sexual, and marriage rights. The landmark case where the right to privacy was announced was *Griswold v. Connecticut*, 381 U.S. 479 (1965).



In *Griswold*, a Connecticut statute that criminalized prescribing contraceptives for married couples was invalidated. Justice Douglas wrote, “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.” Subsequently, this decision was extended to unmarried couples in *Eisenstadt v. Baird*, 405 U.S. 438. Additionally, the right to interracial marriage was found in *Loving v. Virginia*, 388 U.S. 1 (1967), the right of a woman to elect abortion in *Roe v. Wade*, 410 U.S. 113 (1973), the right to sex with a person of the same sex in *Lawrence v. Texas*, 539 U.S. 558 (2003), and the right to same-sex marriage in *Obergefell v. Hodges*, 576 U.S. 644 (2015).

## QUESTIONS AND APPLICATIONS

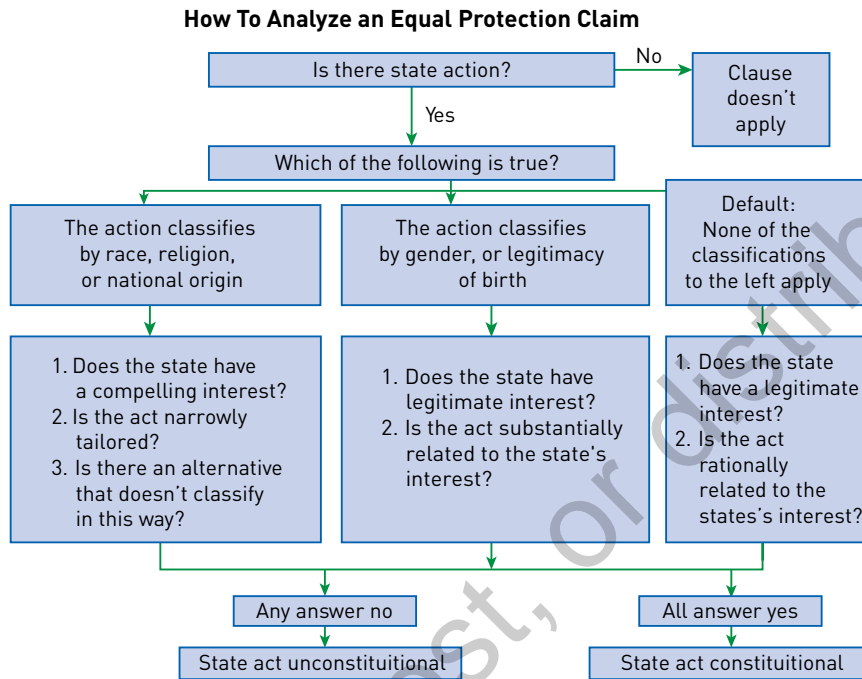
In Questions 1 and 2, identify the laws as either ex post facto or a bill of attainder.

1. Ty is convicted of theft and sentenced to 18 months in prison. During his second month in prison, the state legislature changed the theft statute to include orders of restitution in addition to jail time. The statute applied to all convictions that occur after the law is enacted and to all convictions that occurred within 2 years before the law was enacted. Ty received a notice from the court where he was convicted that he has been ordered to pay the victim of his theft \$2,500 in restitution.
2. Terri Trustworthy, a licensed financial investment consultant, was sued by a large group of investors who claimed they lost millions of dollars in savings due to her embezzlement and carelessness. The lawsuit is dismissed, and in response to pleas from the investors, Congress enacts a statute that finds Terri liable and orders her to repay the investors' losses.
3. Is the following law vague, overbroad, both, or neither? Explain your answer.  
 COVID-19 Health Emergency Protection Act  
 Any person who meets with a large number of people in any space, real or virtual, for any reason other than to provide important and essential services is guilty of a Class B misdemeanor.

In Questions 4 through 6, explain which right is implicated by each scenario and then list in which amendment that right is found.

4. State enacts a statute that declares it a misdemeanor to “utter, publish, or write any statement concerning the governor’s COVID-19 orders to wear masks, socially distance, or to close businesses that are not approved by the governor’s office.”
5. HappyTown City Police Officer James Smiley stops a man on the street for appearing to be grumpy. Officer Smiley asks him what is bothering him. The man replies, “I don’t have to talk to you,” and begins to walk away. Officer Smiley grabs the man and searches his body.
6. Darian is on trial for involuntary manslaughter. The prosecutor calls him to testify. He refuses, and the judge tells him that he will be found in contempt of court if he doesn’t take the stand.



**FIGURE 2.3** ■ How to Analyze Equal Protection Claim

## TREAT ME EQUALLY

**Learning Objective:** Describe the three levels of review under the equal protection clause and identify the classifications that fall under each.

In addition to protecting due process, the Fourteenth Amendment forbids the states from denying “to any person within its jurisdiction the equal protection of the laws.” Even though there isn’t an express counterpart that applies to the federal government, SCOTUS has held that the Fifth Amendment’s protection of due process includes the equal protection of the laws.<sup>15</sup> So today, both the federal government and the states must provide equal protection of the laws *and* due process.

A straightforward reading of the equal protection clause appears to demand that the states and federal government treat every person identically all the time. But this rarely happens—nor should it. Discriminating between people is both necessary and common. For example, few people would disagree that there should be a minimum age to drive a car or that a medical school education should be required to obtain a license to practice medicine. Thankfully, the equal protection clause hasn’t been interpreted to require the states to issue driver’s or medical

**Exclusionary rule:** A judicially created rule that requires evidence that is illegally obtained by the state to be excluded from the trial of the defendant.

licenses to 7-year-old applicants. But some forms of discrimination are more troubling than these examples. Indeed, the equal protection clause was specifically created to address racial discrimination, so there is, therefore, legitimate and illegitimate discrimination in the eyes of the equal protection clause. Stated another way, the law discriminates between different forms of discrimination. (I admit, that was fun to write.)

SCOTUS has developed a method of analysis for equal protection claims. The first step in the analysis is to determine whether the court should apply strict scrutiny, intermediate scrutiny, or rational basis review of the government's action. Most laws and government actions are constitutional if there is a rational basis for them. Under the *rational basis test*, the government must have a legitimate purpose for making the law, and the law must be rationally related to that purpose. Let's use our medical license example from earlier. The state has a legitimate interest in protecting people from poor medical care, and it is reasonable to assume that a person who graduates from medical school will be better prepared to provide quality medical care than a person who hasn't attended medical school, so the medical school requirement easily passes the rational basis test. The rational basis test is the default test that is used by courts to determine if the equal protection clause has been violated.

There are a few classifications, however, that are "suspect" under the equal protection clause. Over the years, SCOTUS has considered several factors when deciding if a classification is suspect. Included are whether people are grouped by immutable conditions, or biological traits, over which a person has no control; whether there is a history of discrimination against a group; and whether the group has a history of being disadvantaged in the political system. Applying these factors, race, alienage, national origin, and religion has been found to be **suspect classification**.

Suspect classifications are not tested under the rational basis test. Instead, the **strict scrutiny test** is applied. This is a hard test for a law to pass because it requires more than simple rationality. It demands these items:

1. The government must have a compelling interest in the regulation.
2. The law is narrowly tailored to accomplish that compelling interest.
3. The law uses the least restrictive means possible, or to put it another way, can the government accomplish its purpose in a way that doesn't classify people? If so, it must follow that path.

The first element concerns the government's interests, and the last two elements concern the means, or manner, it uses to accomplish its goal. To be compelling, an interest must be necessary, vital to the public good. For shorthand, think of this as the "damn good reason test." The second and third elements are focused on the means used to accomplish the damn good reason—did the government narrowly tailor the law to avoid the classification?

In addition to requiring a compelling purpose and a narrowly drafted law, another big difference between the strict scrutiny standard and the rational relationship standard is the burden of proof. If the rational basis test applies, the law is presumed constitutional and the person

challenging the law must prove it to be illegitimate or not designed to achieve its objective. In strict scrutiny review, however, the government must prove that its compelling interest is real; it must put on evidence that there is a problem, that the law will help solve that problem, and that the law is narrowly tailored.

Most, but not all, laws that are put under the strict scrutiny microscope are found to be unconstitutional. Although you will explore fundamental rights later in the chapter, it is worth noting now that the strict scrutiny test applies in a second situation: when laws burden fundamental rights. A law that makes it a crime to express dissatisfaction with the government encroaches on the First Amendment. It would, therefore, be subject to strict scrutiny when reviewed by a court for constitutionality. And by the way, the law would unquestionably fail.

A third test has developed that falls in between strict scrutiny and rational basis; it represents an intermediate level of judicial review. Known as the **substantial relationship test**, a law is constitutional if it furthers a legitimate and important governmental interest and is substantially related to the government's purpose. Sex classifications are an example.

Examples of common forms of discrimination that are not recognized as protected classes are age and wealth. Without a doubt, both exist. There are statutory laws that forbid age discrimination in employment and in certain other circumstances, but the Fourteenth Amendment does not provide any special protection. Income or wealth, on the other hand, is not protected by statute or the Constitution. Laws that distinguish by wealth only need to be rational. This is why people of greater income can be taxed at a higher rate than people of lower income and why it was legal for the government to send COVID-19 support checks to some people but not others. See Figure 2.3 for a flowchart of how to step through an equal protection problem.

Now, let's apply what you have learned about equal protection to criminal law. By its very nature, criminal law treats people differently. Criminals are punished; the general population isn't. Being a "criminal" doesn't put a person into a protected class, so criminal classifications have to pass the **rational relationship test**. The government's interest in protecting people from crime is a legitimate governmental purpose, and a law prohibiting and punishing an offender for constitutionally unprotected conduct is rationally related to that purpose. Consequently, criminal laws don't wrongly discriminate between offenders and others.

Although a law stands a good chance to be found constitutional when tested under the rational relationship standard, that doesn't always happen. The conviction of a police officer in Ohio is an example. The officer, aged 35, met a girl on a dating app. In their conversations, she claimed to be 18. They met and began to have sex, only to be discovered by her mother. The girl, as it turns out, was 14. The officer was charged with two crimes: statutory rape and sexual battery under a statute that prohibits sexual conduct when one person is a minor and "the offender is a peace officer, and the offender is more than two years older than the other person." The statutory rape charge was dismissed after the jury couldn't reach a verdict, but the judge found the defendant guilty on the count of sexual battery by a police officer.

The defendant challenged the law as violating equal protection, asserting that police officers shouldn't be treated differently from other people. The Ohio Supreme Court agreed. The battery law in question protected minors, and adults in some circumstances, from abuses by school officials, physicians, clerics, police, corrections officials, and other authority figures.

However, all of the other listed professionals could only be convicted if they used their position of authority to take advantage of a victim. For example, the law made it a crime for a mental health professional to “induce the other person to submit [to sex] by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes.” But no such connection between the authority of a police officer and the resulting crime existed under the statute. In the defendant’s case, there was no evidence that the victim knew, or that he used, his status as a police officer to coerce or lure her into sex. The law simply punished the defendant differently because he was a cop. The Ohio Supreme Court found the classification to be a violation of both the U.S. Constitution’s and Ohio Constitution’s guarantees of equal protection; it found the law to be irrational.<sup>16</sup>

Criminal laws that group people into protected classes are less likely to survive equal protection testing. Today, it is rare for a law to violate equal protection on its face. Most equal protection violations occur when race, ethnicity, and religion influence the decisions of police and prosecutors. A decision to pursue an investigation or prosecution may violate equal protection, even though the law itself doesn’t mention one of the protected statuses. This is known as *selective prosecution*.

What happened to Yick Wo is an example. In 1880, during a period of anti-Chinese sentiment in the United States, San Francisco enacted an ordinance that forbade laundries from operating in wooden buildings unless a permit was obtained. At the time, nearly all of the laundries in the city operated out of wooden buildings, which were susceptible to catching fire. At the time, there were over 300 laundries, most owned by people of Chinese descent. Yick Wo had operated his laundry for over 2 decades when the law went into effect. As required, he applied for a permit, but it was denied. As it turned out, there were over 200 applications from Chinese launderers. All but one was denied, while nearly every permit application was granted to white applicants. In violation of the law, Yick Wo continued to operate his business, was charged, convicted, and fined—and when he failed to pay the fine, jailed. He appealed his conviction, eventually reaching SCOTUS. The court held that while the law was neutral and its intent, to prevent fires in the city, legitimate, the manner in which it was enforced was racially discriminatory. The court dismissed Yick Wo’s charges and ordered his release, as well as the release of other launderers of Chinese descent who were jailed under the law.<sup>17</sup>

Today, concerns about the unequal treatment of racial minority groups by police are much in the news. In an effort to combat crime in high-crime areas, New York City employed a large “stop and frisk” program for a decade. The program was intended to be proactive attempt to prevent crime. Several million people were stopped and frisked for contraband and weapons during the life of the program—over 600,000 in 1 year alone. Most of the detainees were people in racial minority groups, which caused concern that race was playing a significant role in the decision-making of police officers. City officials, however, credited the stop-and-frisk program as a major factor in a decline in crime during the period of the program and claimed that data didn’t support the assertion that racist decisions were being made. Eventually, a federal district judge ruled that the program violated equal protection. That judge was later removed from the

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**New judicial federalism:** The interpretation of state constitutions independent from the U.S. Constitution. State constitutions may enlarge, but not reduce, the rights found in the U.S. Constitution.

case by the New York Court of Appeals for having suggested that the plaintiffs bring a lawsuit to challenge the program. Since she had shown a bias in favor of the lawsuit, the appellate court said she should have recused herself from the lawsuit that the plaintiffs eventually filed.<sup>18</sup>

In addition to race, ethnicity, and religion, laws sometimes classify by gender. This is illustrated by one case involving statutory rape laws. Statutory rape law presumes that young people are emotionally and psychologically incapable of consenting to sex. To protect minors from potentially harmful sexual liaisons, statutory rape laws make it a crime for an older person to have sex with a younger person under the age of consent within the state, regardless of whether the minor consents or even initiates and encourages the liaison. Laws vary considerably in the minimum and maximum ages for victims and offenders. For a long time, statutory rape laws were gendered; only males could commit the offense and only females were protected. When a 17-year-old male was convicted of the statutory rape of a 16-year-old girl, he challenged the law's sexual classification under the equal protection clause. The case made its way up to SCOTUS, which applied the substantial relationship test because the law classified the victims and offenders by gender. In a controversial decision, SCOTUS found the classification to be legitimate and substantially related to the purpose of the law: to protect girls from sexual intercourse and pregnancy at an age when the physical, emotional, and psychological consequences are particularly severe.<sup>19</sup>

## QUESTIONS AND APPLICATIONS

Identify whether the following classifications will be tested under the strict scrutiny, substantial relationship, or rational basis test. Explain your answer.

1. State law declares it a misdemeanor for a person to perform genital circumcision of a male younger than 1 year in age as part of a Brit milah or other Jewish practice.
2. State law declares that any person convicted of a felony shall lose the right to vote until that person's punishment has been completed.
3. A state legislature investigates the problem of binge drinking by youth. The legislators hear testimony that young men are more likely than girls to binge drink. Further, when the effects of alcohol on young men and women are compared, they discover that boys are more likely than girls to commit violent crime or to become involved in automobile accidents. Consequently, the state legislature, with the governor's signature, enacts a statute that permits men to begin drinking at 21 and women at 19.

## DON'T BE CRUEL

**Learning Objective: Identify the three rights found in the Eighth Amendment.**

Up to this point, you have learned about rights that limit the government's authority to declare acts to be crimes and other rights that empower defendants to demand a fair process. The Eighth

Amendment is concerned with the other end of the criminal justice process: punishment. It is shorter than the amendments discussed already:

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

There are three distinct rights in the Eighth Amendment—no excessive bail, no excessive fines, and no cruel and unusual punishment. The excessive fines and cruel and unusual punishments clauses have been incorporated, but the excessive bails clause has not. But it is expected to be, eventually, and all the states and the federal government have rules limiting bail and making pretrial release possible in many cases.

Defining cruelty isn't easy. Whatever it is, however, isn't what it used to be. Instead, cruelty is defined using society's "evolving standards of decency." Although familiar to early Americans, lopping off an ear and drawing-and-quartering (when a horse was used to split a person into four pieces) are no longer allowed. In two separate opinions, SCOTUS held that it is cruel and unusual punishment to execute the rapists of an adult and a child.<sup>20</sup> There are many cases that address the methods that may be used to execute offenders and the conditions of prison confinement. Prisoners are entitled to sanitary conditions, clothing, minimal nutrition, personal space, and medical care. It is unknown whether there is a limit to the length of imprisonment that may be imposed for minor crimes.

## QUESTIONS AND PROBLEMS

1. What are the three protections found in the Eighth Amendment?
2. When the Constitution was ratified, branding was still a lawful form of punishment in some of the states. If it could be proved that most people at that time believed branding to be acceptable, could we employ it today? What evidence would you need to answer this question? Explain your answer.

## DON'T USE ILLEGAL EVIDENCE

**Learning Objective: Define the exclusionary rule and identify its constitutional source and the case where it was incorporated.**

Remember Dollree Mapp from the opening of this chapter? Her Fourth Amendment right was violated by the officers who entered and searched her home without a warrant. The evidence they seized was used at trial to obtain her conviction. That may not be fair, but what is to be done is unclear. The Constitution declares rights, but it doesn't spell out what is to happen when those rights are violated.

Ms. Mapp appealed her case all the way to SCOTUS. Her appeal resulted in the third reason the Constitution means so much in criminal law today: the **exclusionary rule**. Read about this rule in your next Digging Deeper..

## DIGGING DEEPER 2.3

### Can illegally seized evidence be used to convict a defendant?

Case: *Mapp v. Ohio*, 367 U.S. 643

Court: SCOTUS

Year: 1961

MR. JUSTICE CLARK delivered the opinion of the court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code. As officially stated in the syllabus to its opinion, the Supreme Court of Ohio found that her conviction was valid though "based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home."....

The State says that, even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial... [even though the court had previously decided that illegally seized evidence may not be used in federal courts].

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise... the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties; so too, without that rule, the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."...

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus, the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. Moreover... "[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts."

*Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.*

In the abstract, the exercise of a right should be free. But in reality, there are costs. Litigation, civil and criminal, can be protracted, time-consuming, financially expensive, and invasive of

one's privacy. In some cases, there are social expenses. Through the exclusionary rule, evidence that police seize illegally is excluded from trial. That can jeopardize the possibility of bringing an offender to justice. That was true of Ms. Mapp. Her case was dismissed, and she was set free. She was later convicted of possession of a controlled substance, served time in prison, was released, and died in 2014 at the age of 91. But freedom doesn't occur automatically when the exclusionary rule is applied. If the state has other evidence, the case will proceed without the excluded evidence.

## QUESTIONS AND APPLICATIONS

1. Like judicial review, the exclusionary rule isn't in the Constitution. Should SCOTUS have the authority to create such rules? Construct arguments in favor of and in opposition to the court's creation of the exclusionary rule.
2. What are the costs and benefits of the exclusionary rule? Consider the individual, the community, and the legal system.

## DON'T FORGET STATE CONSTITUTIONS

**Learning Objective: Define new judicial federalism and provide one example of it in action.**

You are now familiar with the importance of the U.S. Constitution in criminal law. Much of the expansion of criminal procedure rights you learned about occurred during the 1960s, when Earl Warren was Chief Justice of SCOTUS. The period is often referred to as the Warren Court Era. Warren was appointed by President Dwight D. Eisenhower, but as a conservative who opposed what the Warren Court did, President Eisenhower referred to Warren's appointment as his "biggest damn fooled mistake." Warren retired in 1969 and was replaced by Warren E. Burger. Chief Justice Burger moved the court in a more conservative direction, often limiting the impact of the criminal justice decisions of the Warren Court.

Dismayed by the direction of the court, Justice William Brennan published an article in 1977, calling on the states to strengthen their constitutional protections.<sup>21</sup> For Brennan, if the U.S. Constitution wasn't going to expand its protection of the people, state constitutions should. This became known as **new judicial federalism**. In response, many state courts began turning to their own constitutions more than they had in the past. For example, in 2019 the Colorado Supreme Court held that under its constitution a police dog sniff of a vehicle for marijuana is a search requiring probable cause. The same sniff is not a search under the Fourth Amendment.<sup>22</sup> A few other state high courts have been somewhat aggressive in expanding rights beyond what the U.S. Constitution protects. For example, you learned earlier that gender-based discrimination under the federal equal protection clause is tested using the intermediate substantial relationship test. But the California Supreme Court reviews sex discrimination by the state by



the strict scrutiny standard.<sup>23</sup> In regard to an exception to the exclusionary rule that the U.S. Supreme Court adopted, and thereby permitting illegally seized evidence to be used against a defendant, the Pennsylvania Supreme Court wrote, “We flatly reject the notion.”<sup>24</sup> The lesson of these cases is clear: do not forget state constitutional law. While it may not reduce U.S. constitutional rights, it sometimes bolsters them.

## QUESTIONS AND PROBLEMS

1. New judicial federalism results in greater protection of rights in some states than in others. Is this fair to the people in the states with less protection? What can they do to change their rights?

## IN A NUTSHELL

The political DNA of the United States includes a suspicion of governmental authority and a respect for the rights of the individual. The Constitution’s Framers chose to divide the government, both horizontally and vertically, to protect liberty. The federal system can be complex, clunky, and inefficient. But to the Framers, that was a reasonable price to pay to guard against tyranny.

The Framers believed that people have a greater voice, and laws are better tailored to the needs of the people when created at the state and local levels. It is easy to understand their reasoning, given the size of the country at the time. There were fewer than 4 million people spread across 13 states at the time of the adoption of the Constitution. The largest state, Virginia, had a population of about 750,000 inhabitants, and the smallest state, Delaware, had only around 60,000. Consequently, they placed most governmental authority, including the police powers, with the states. Even today, 90% of all criminal cases are adjudicated in state courts. Most crimes, their punishment, and, to some extent, the defenses that may be asserted to criminal charges are made and enforced by the states.

But state authority is not without its limits. Although the individual rights found in the Constitution were originally intended to restrict the federal government and not the states, this changed after the Fourteenth Amendment was ratified. Through selection incorporation, most of what is found in the Bill of Rights, as well as the few rights found in the original Constitution, acts to restrict state authority. The practical impact of this on criminal law can’t be overstated. Every defendant in every courtroom in the United States can assert the Fourth Amendment’s protection against unreasonable searches and seizures, can demand a public jury trial of peers, is free from self-incrimination, and so on. When added to the more expansive interpretation of those rights, particularly after the 1960s, the United States Constitution is a powerful force of liberty.

## KEY TERMS

as-applied	overbreadth doctrine
bills of attainder	Privileges or immunities
constitutionalism	probable cause
Due process	rational relationship test
Equal protection	recidivism
exclusionary rule	selective incorporation doctrine
ex post facto laws	severability
facial challenge	strict scrutiny test
grand jury	substantial relationship test
habeas corpus	suspect classes
indictment	void for vagueness
new judicial federalism	warrant

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