



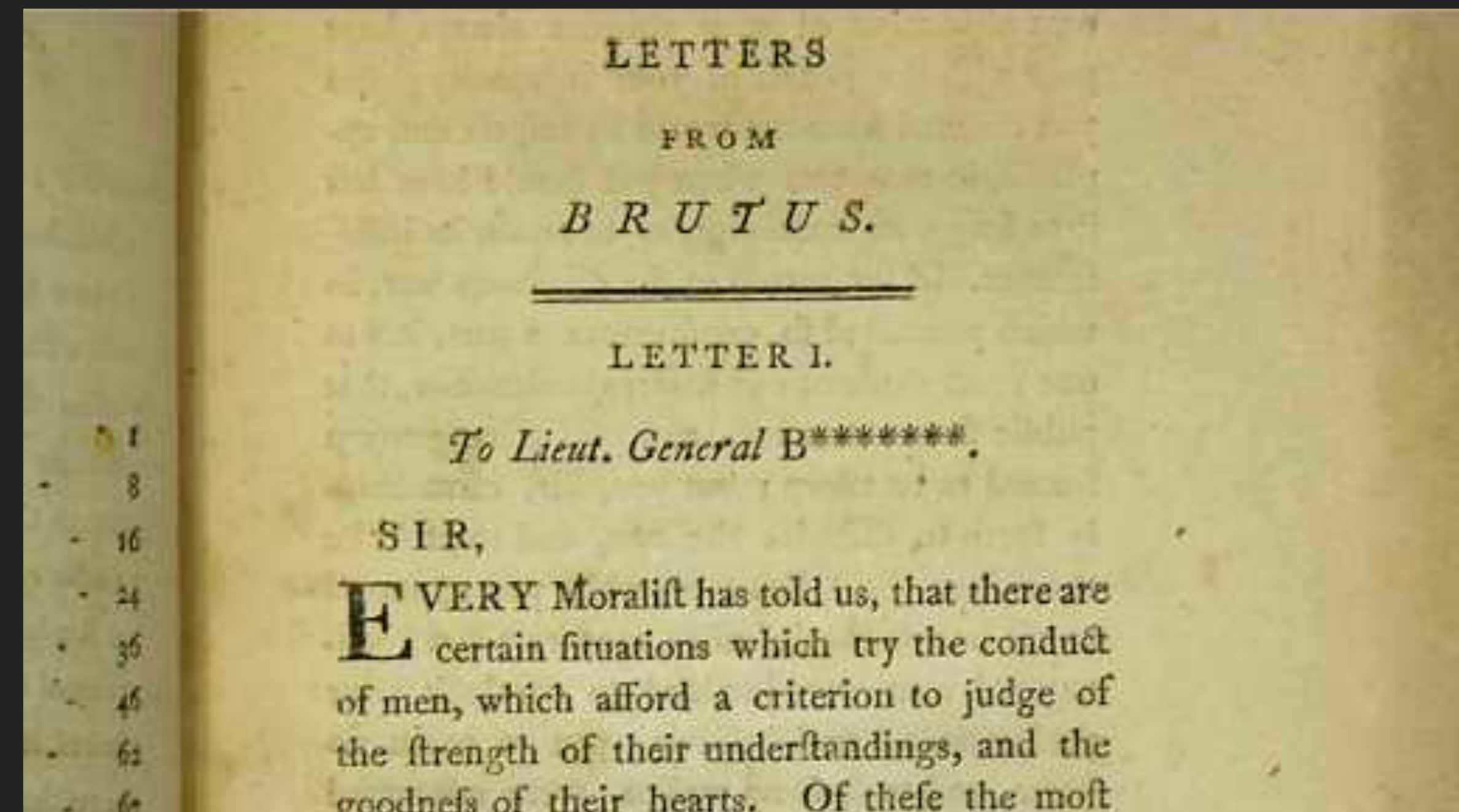
MR. POGREBA, PARKER SCHOOL
Unit 6: Balancing Rights with Safety

“They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.”

Benjamin Franklin, 1775

CONTINUITY AND CHANGE

- ▶ Franklin's quote exemplifies one of the core tensions embedded in the U.S. Constitution: to what extent should law and society privilege **public order** and **safety** versus **individual freedoms**.
- ▶ The key is to remember that government policy and interpretation of this tension has changed over time, sometimes with contradictory outcomes.
- ▶ We'll discuss.



Selective Incorporation

SELECTIVE INCORPORATION

SELECTIVE INCORPORATION

- ▶ The Bill of Rights originally only applied to the states. In 1833, the Supreme Court affirmed.
- ▶ The **Fourteenth Amendment** began to change this. It says no state can “deprive any person of life, liberty, or property, without **due process of law**.”
 - ▶ **Substantive Due process** asks whether the laws themselves are fair/constitutional.
 - ▶ **Procedural due process** asks whether enforcement of the law meets these standards.
- ▶ This began the process of **selective incorporation**, in which limits on federal government are applied to state and local governments.
- ▶ The 5th Amendment’s **just compensation clause** was seen as a state obligation in 1897, the 2nd in 2010.

THE UNCONSTITUTIONALITY OF THE 14th AMENDMENT

AND THE EVILS RESULTING FROM
SUBVERSIVE USE OF ITS
“EQUAL PROTECTION” CLAUSE

YIKES

SELECTIVE INCORPORATION OVER TIME

Table 1: Major Cases Affecting the Doctrine of Selective Incorporation

Case	Year	Provision	Amendment
<i>Gitlow v. New York</i>	1925	Freedom of speech	First
<i>Near v. Minnesota</i>	1931	Freedom of the press	First
<i>Powell v. Alabama</i>	1932	Right to counsel in capital cases	Sixth
<i>De Jonge v. Oregon</i>	1937	Freedom of assembly, right to petition	First
<i>Cantwell v. Connecticut</i>	1940	Free exercise of religion	First
<i>Everson v. Board of Education</i>	1947	No establishment of religion	First
<i>In re Oliver</i>	1948	Right to public trial	Sixth
<i>Wolf v. Colorado</i>	1949	Right against unreasonable search and seizure	Fourth
<i>Mapp v. Ohio</i>	1961	Exclusionary rule	Fourth (and Fifth)
<i>Robinson v. California</i>	1962	Right against cruel and unusual punishment	Eighth
<i>Gideon v. Wainwright</i>	1963	Right to counsel in felony cases	Sixth



The Second Amendment

THE 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.”
- ▶ This **militia phrase** has made the Second perhaps the most contentious of the Bill of Rights.
- ▶ Why?
- ▶ **Gun ownership was common** and protected during the time of the Constitution, was so were **regulations on ownership**, including bans and registries.



JAMES OBERGFELL AFTER THE COURT RULING

THE SECOND AMENDMENT

- ▶ The fundamental question of the Second Amendment is whether it protects a **collective right** of a state to defend against federal incursion or an **individual right** to bear arms.
- ▶ Some argue that the real purpose of the 2A **was to defend slavery**:
 - ▶ “It was obvious, whether North or South, that no militia was going to stop a foreign invasion. The war proved that beyond a reasonable doubt.¹²⁷ What the militia could do rather well, however, as George Mason noted, was keep slave owners safe.” —Prof. Carol Anderson, *The Second*



JAMES OBERGFELL AFTER THE

THE SECOND AMENDMENT

- ▶ Others argue **it saves lives**:
 - ▶ “Armed citizens, however, prevent countless crimes and have saved many lives. What’s more, the most vulnerable people—including women, the elderly, and those who live in high crime neighborhoods—are among the greatest beneficiaries of the Second Amendment.” —Prof Nelson Lund



JAMES OBERGFELL AFTER THE

GUN RIGHTS AND THE COURT

- ▶ The first Court ruling on the 2nd Amendment was *U.S. v. Miller* (1939), a 9-0 decision that denied the right to own a sawed-off shotgun and affirmed that the **Second Amendment referred to the militia**, calling it the "**obvious purpose**" of the amendment.
- ▶ In 2008, the Court ruled 5-4 in *D.C. v. Heller* that there is an individual right to bear arms.
- ▶ In 2010, the Court ruled 5-4 in *McDonald v. Chicago*, extending the Heller decision to the whole country, arguing that gun ownership is a "**fundamental**" and "**deeply rooted**" right.
- ▶ Much of the current debate centers around issues like **universal background checks**, the **gun show loophole**, and restrictions on **assault weapons**.



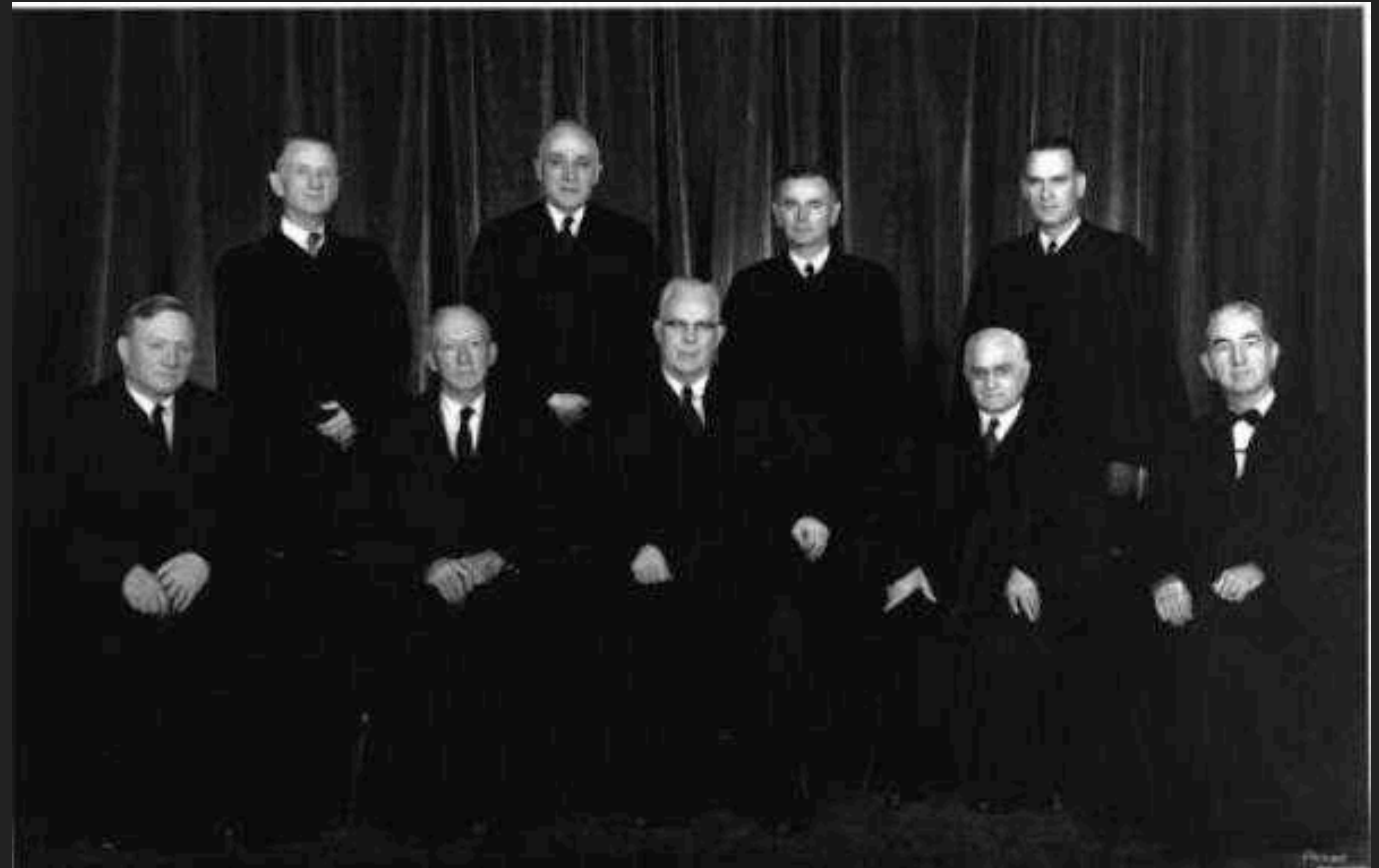
BORK AND REAGAN



Rights of the Accused

THE 4TH AMENDMENT

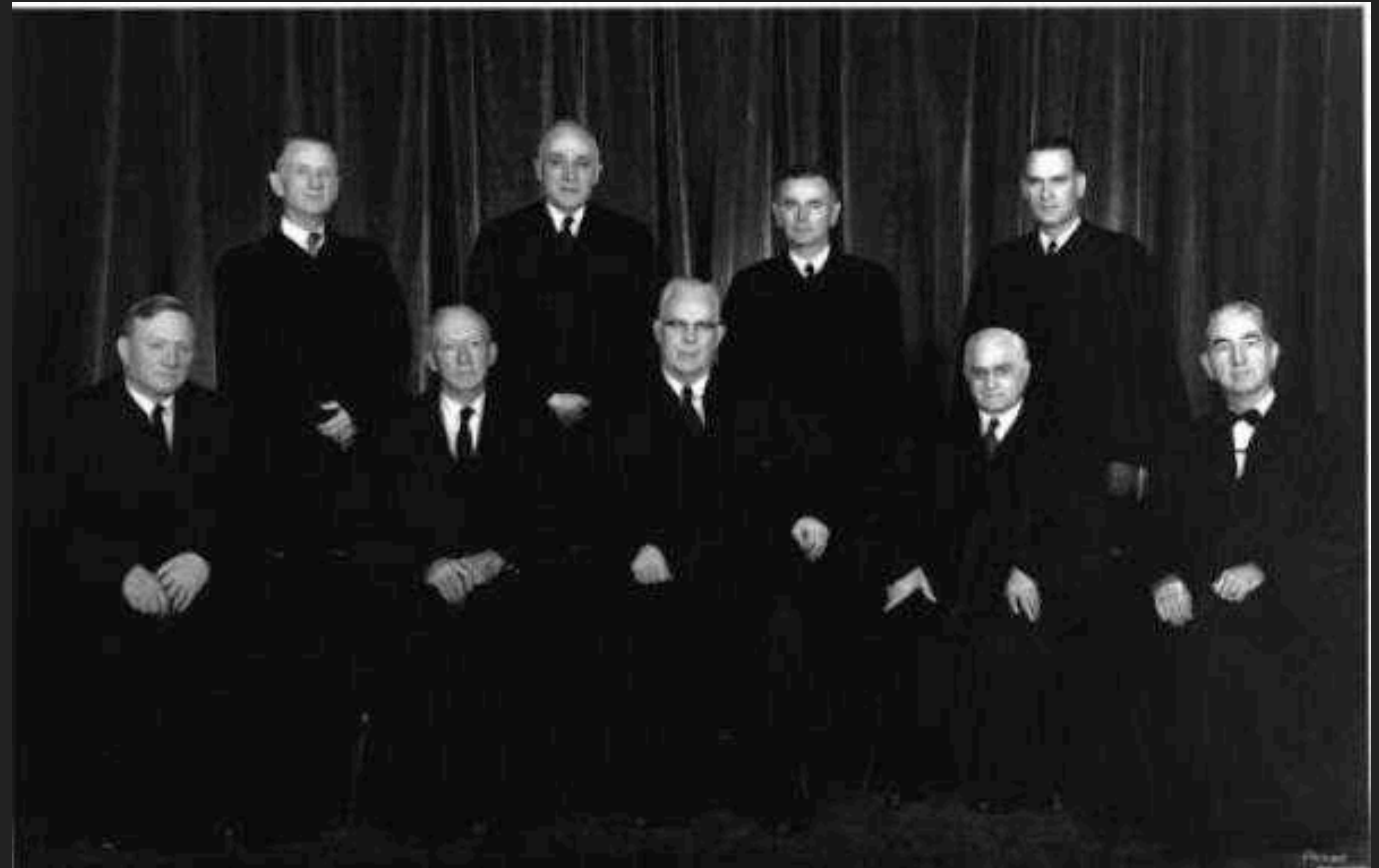
- ▶ The 4th Amendment reads: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
- ▶ What are some key elements?



SUPREME COURT, 1958-1962

THE 4TH AMENDMENT

- ▶ The 4th Amendment reads: The right of the people to be secure in their **persons, houses, papers, and effects**, against **unreasonable searches and seizures**, shall not be violated, and no **Warrants shall issue, but upon probable cause**, supported by Oath or affirmation, and **particularly describing the place to be searched, and the persons or things to be seized**.
- ▶ Broadly, it protects against unwarranted government intrusion into the lives and homes of citizens.



SUPREME COURT, 1958-1962

THE EVOLVING FOURTH

- ▶ **Mapp v. Ohio** (1961) applied the **exclusionary rule**—the idea that illegally obtained evidence could not be used in court—to the states.
 - ▶ This right was eroded by:
 - ▶ **Inevitable discovery rule**
 - ▶ **Good faith exception**
 - ▶ Garbage exemption
 - ▶ Thermal imaging/grow lights
- ▶ **Terry v. Ohio** (1968) ruled that **police may search suspects for safety purposes.**
 - ▶ Stop and Frisk laws



DOLLREE MAPP

FIFTH AMENDMENT

No Self-
Incrimination

“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 offence 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.”

Right to a grand jury

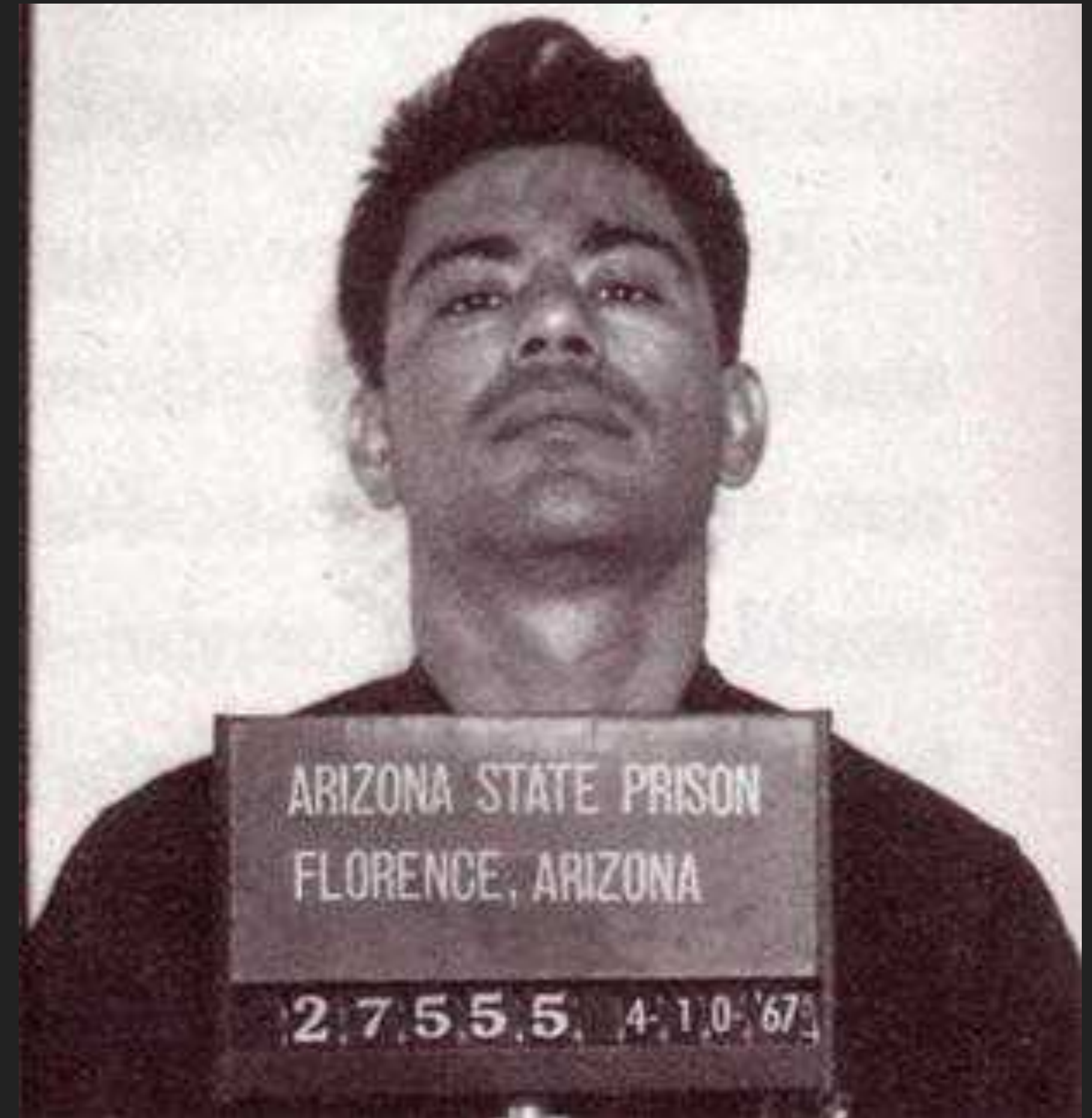
Double jeopardy

Due process

Just compensation

RIGHTS OF THE FIFTH

- ▶ A **grand jury** must bring charges (a true bill) in all federal felony cases.
- ▶ One may not lose life, liberty or property without **due process of law**.
- ▶ One may not face **double jeopardy** for the same alleged crime.
- ▶ One may not be forced to incriminate oneself.
 - ▶ **Right to remain silent**
 - ▶ The **Miranda v. Arizona (1966)** decision held that police must notify a suspect of the right to remain silent and to an attorney.



ERNESTO MIRANDA

RIGHTS OF THE FIFTH

- ▶ Another critical area of the 5th is the **just compensation clause**, which holds that private property cannot be taken for public gain without just payment.
- ▶ In practice, this has meant that the government can exercise **eminent domain**, which allows the government to seize property for public good if compensation is made.
- ▶ **Kelo v. City of New London (2005)** was a 5-4 decision that affirmed this right.



SIXTH AMENDMENT

Speedy and
Public Trial

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.

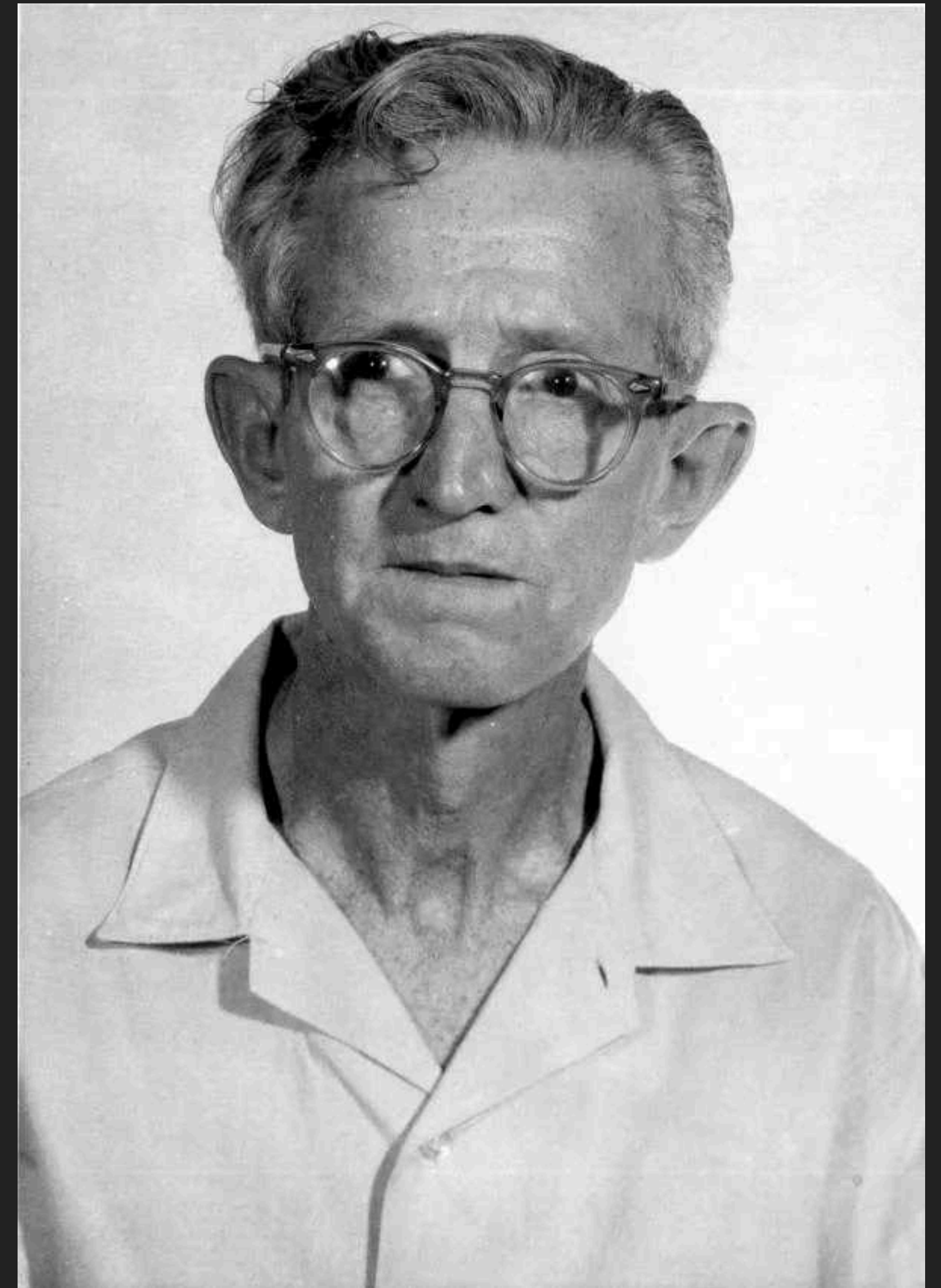
Witnesses must be
presented

Impartial Jury in
Area of Crime

Right to an Attorney

RIGHTS OF THE SIXTH

- ▶ In 1932, the Supreme Court said that defendants in capital cases have the right to an attorney.
- ▶ **Gideon v. Wainwright (1963)** established that those who cannot afford attorneys must be provided one in state trials.
- ▶ Today, however, the **system is in crisis**. Massive underfunding leads to a system where 98% of defendants take **plea deals** rather than go to trial.



CLARENCE GIDEON

8TH AMENDMENT

What is cruel
and unusual
punishment?

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

What is
excessive bail?

RIGHTS OF THE EIGHTH

- ▶ In 1972, the Supreme Court ruled the death penalty was unconstitutional because its application was arbitrary, i.e. unusual.
- ▶ In 1976, the Court reversed, arguing its application depended on the case.
- ▶ Today, there is a federal death penalty and it is legal in 27 states.
- ▶ Its application is plagued with issues of racism, classism, and potential execution of the innocent.
- ▶ Defenders of the death penalty argue that it was only meant to stop torture and that the death penalty was routine in 1789.

