How to Clean a Gun and Keep Your Head...

5 Civil Liberties

Unlike most constitutional amendments dealing with civil liberties, the Second Amendment, concerning the right to bear arms, historically has received relatively little attention from the U.S. Supreme Court. In fact, before 2008, the Court had not directly considered the Second Amendment in nearly seventy years, although gun control was a hot-button issue in the national and state legislatures. The federal government for its part, was also active in legislating on firearms issues, placing a waiting period on the purchase of weapons and prohibiting the ownership of certain types of automatic and semi-automatic weapons. And, many states have enacted similar restrictions. Washington, D.C., for example, passed a total ban on handgun ownership in 1976.

For much of its history, this law went relatively unchallenged. But, in 2003, Robert A. Levy, a lawyer who worked as a constitutional fellow at the libertarian Cato Institute, decided it was time to test the legality of the statute. Levy, who had never owned a gun personally, financed the litigation, recruited co-counsel, and hand-picked six plaintiffs who were willing to bring suit against the D.C. government. To illustrate the scope of the effects of the law, Levy made certain that the plaintiffs were diverse in many ways. They included three men and three women, whose ages varied from twenty to sixty. Four of the plaintiffs were white; two were black. They lived in a variety of neighborhoods and had a wide range of jobs, from lawyer to security guard.[1]

The case took five years to weave its way through the federal judicial system, eventually reaching the U.S. Supreme Court in time for its 2007–2008 term. The justices set the case for oral arguments and in June 2008 handed down a 5–4 decision. Writing for the majority in *D.C.* v. *Heller*, Justice Antonin Scalia acknowledged the problem that gun violence poses in American cities but declared that D.C.'s ban on handgun ownership was unconstitutional.

The right to bear arms is an enduring civil liberty established by the Second Amendment. At left, a gun safety pamphlet from the 1950s references the recreational aspects of hunting that were once taken for granted in the United States. At right, Dick Heller, the lead plaintiff in *D.C.* v. *Heller* (2008), awaits the Supreme Court's ruling, with pro- and anti-gun protesters surrounding him.

The Court's majority opinion also included language declaring that the Second Amendment guaranteed "the right of law abiding, responsible citizens to use arms in defense of hearth and home." This statement clarified a long-standing dispute about whether the amendment had been written to assure the preservation of a well-trained militia or whether the right to own a weapon also extended to ownership for private use. The majority's view was not well received by the four dissenting justices, who charged that the opinion of the Court created a "dramatic upheaval in the law."[2]

The case, however, put Second Amendment rights on the national agenda. During the Court's 2009–2010 term, it again considered the boundaries of this civil liberty. In the case of *McDonald* v. *City of Chicago* (2010) the Court extended its decision in *Heller*, binding state governments to the Second Amendment and broadening citizens' rights to bear arms. Wrote Justice Samuel A. Alito Jr., in the Court's majority opinion, "It is clear that the Framers . . . counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[3]

What Should I Know About . . .

After reading this chapter, you should be able to:

- **5.1** Trace the constitutional roots of civil liberties, p. 151.
- **5.2** Describe the First Amendment guarantee of freedom of religion, p. 154.
- **5.3** Outline the First Amendment guarantees of and limitations on freedom of speech, press, assembly, and petition, p. 157.
- **5.4** Summarize changes in the interpretation of the Second Amendment right to keep and bear arms, p. 163.
- **5.5** Analyze the rights of criminal defendants found in the Bill of Rights, p. 164.
- **5.6** Explain the origin and significance of the right to privacy, p. 172.
- **5.7** Evaluate how reforms to combat terrorism have affected civil liberties, p. 178.

Many of the most important protections of Americans' individual liberties are contained in the Bill of Rights, the first ten amendments to the U.S. Constitution. When the Bill of Rights was written, its drafters were not thinking about issues such as birth control, abortion, or same-sex marriage. Yet, many liberties not spelled out in the Constitution are covered by general principles expressed there. Some are even taken for granted.

civil liberties
The personal guarantees and freedoms that the government cannot abridge by law, constitution, or judicial interpretation.

civil rights
The government-protected rights of individuals against arbitrary or discriminatory treatment by governments or individuals.

Civil liberties are the personal guarantees and freedoms that the government cannot abridge, either by law, constitution, or judicial interpretation. As guarantees of "freedom to" action, they place limitations on the power of the government to restrain or dictate an individual's actions. **Civil rights,** in contrast, provide freedom against arbitrary or discriminatory treatment by government or individuals. (To learn more about civil rights, see **chapter 6**.)

Questions of civil liberties often present complex problems. We must decide how to determine the boundaries of speech and assembly. We must also consider how much infringement on our personal liberties we want to give the police or other government actors. Moreover, during times of war, it is important to consider what liberties should be accorded to those who oppose war or are suspected of anti-government activities.

Resolution of civil liberties questions often falls to the judiciary, which must balance the competing interests of the government and the people. Thus, in many of the cases discussed in this chapter, there is a conflict between an individual or group of individuals seeking to exercise what they believe to be a liberty, and the government, be it local, state, or national, seeking to control the exercise of that liberty in an attempt to keep order and preserve the rights (and safety) of others. In other cases, two liberties are in conflict, such as a physician's and her patients' rights to easy access to a medical clinic versus a pro-life advocate's liberty to picket that clinic. In this chapter, we will explore the various dimensions of civil liberties guarantees contained in the U.S. Constitution and the Bill of Rights.

- First, we will discuss *the roots of civil liberties* and *the Bill of Rights*.
- Second, we will survey the meaning of one of *the First Amendment guarantees: freedom of religion*.
- Third, we will consider the meanings of other *First Amendment guarantees: the freedoms of speech, press, assembly, and petition*.
- Fourth, we will review *the Second Amendment and the right to keep and bear arms*.
- Fifth, we will analyze *the rights of criminal defendants*.
- Sixth, we will explore *the right to privacy*.
- Finally, we will examine how *reforms to combat terrorism have affected civil liberties*.

ROOTS OF Civil Liberties: The Bill of Rights

★ **5.1 . . . Trace the constitutional roots of civil liberties.**

In 1787, most state constitutions explicitly protected a variety of personal liberties such as speech, religion, freedom from unreasonable searches and seizures, and trial by jury. It was clear that the new federal system established by the Constitution would redistribute power between the national government and the states. Without an explicit guarantee of specific civil liberties, could the national government be trusted to uphold the freedoms already granted to citizens by their states?

As discussed in **chapter 2**, recognition of the increased power that would be held by the new national government led Anti-Federalists to stress the need for a bill of rights. Anti-Federalists and many others were confident that they could control the actions of their own state legislators, but they did not trust the national government to be so protective of their civil liberties.

The notion of adding a bill of rights to the Constitution was not a popular one at the Constitutional Convention. When George Mason of Virginia proposed that such a bill be added to the preface of the proposed Constitution, his resolution was defeated unanimously.[4] In the subsequent ratification debates, Federalists argued that a bill of rights was unnecessary, putting forward three main arguments in opposition.

1. A bill of rights was unnecessary in a constitutional republic founded on the idea of popular sovereignty and inalienable, natural rights. Moreover, most state constitutions contained bills of rights, so federal guarantees were unnecessary.
2. A bill of rights would be dangerous. According to Alexander Hamilton in *Federalist No. 84*, since the national government was a government of enumerated powers (that is, it had only the powers listed in the Constitution), "Why declare that things shall not be done which there is no power to do?"
3. A national bill of rights would be impractical to enforce. Its validity would largely depend on public opinion and the spirit of the people and government.

Some Framers, however, grew to support the idea. After the Philadelphia convention, James Madison conducted a lively correspondence about the need for a national bill of rights with Thomas Jefferson. Jefferson was far quicker to support such guarantees than was Madison. But, the reluctant Madison soon found himself in a close race against James Monroe for a seat in the House of Representatives in the First Congress. The district was largely Anti-Federalist. In an act of political expediency, Madison issued a new series of public letters similar to *The Federalist Papers* in which he vowed to support a bill of rights. Once elected to the House, Madison made good on his promise and became the prime author of the Bill of Rights. Still, he considered Congress to have far more important matters to handle and viewed his work on the Bill of Rights as "a nauseous project."[5]

With fear of political instability running high, Congress worked quickly to approve Madison's draft. The proposed Bill of Rights was sent to the states for ratification in 1789, the same year the first Congress convened. By 1791, most of its provisions had been approved by the states.

The **Bill of Rights,** the first ten amendments to the Constitution, contains numerous specific guarantees against the encroachment of the new government, including those of free speech, press, and religion. (To learn more about the full text, see the Annotated Constitution that begins on page 62.) The Ninth and Tenth Amendments, favored by the Federalists, note that the Bill of Rights is not exclusive. The **Ninth Amendment** makes it clear that this special listing of rights does not mean that others do not exist. The **Tenth Amendment** reiterates that powers not delegated to the

Bill of Rights
The first ten amendments to the U.S. Constitution, which largely guarantee specific rights and liberties.

Ninth Amendment
Part of the Bill of Rights that makes it clear that enumerating rights in the Constitution or Bill of Rights does not mean that others do not exist.

Tenth Amendment
The final part of the Bill of Rights that defines the basic principle of American federalism in stating that the powers not delegated to the national government are reserved to the states or to the people.

national government are reserved to the states or to the people.

When were the states bound to the protections of the Bill of Rights? Until *Gitlow* v. *New York* (1925), involving Benjamin Gitlow (shown on the right), the executive secretary of the Socialist Party, it generally was thought that, despite the Fourteenth Amendment, the protections of the Bill of Rights did not apply to the states.

Photo courtesy: AP/Wide World Photos

The Incorporation Doctrine: The Bill of Rights Made Applicable to the States

The Bill of Rights was intended to limit the power of the national government to infringe on the rights and liberties of the citizenry. In *Barron* v. *Baltimore* (1833), the Supreme Court ruled that the Bill of Rights limited only the actions of the U.S. government and not those of the states.[6] In 1868, however, the Fourteenth Amendment was added to the U.S. Constitution. Its language suggested the possibility that some or even all of the protections guaranteed in the Bill of Rights might be interpreted to prevent state infringement of those rights. Section 1 of the Fourteenth Amendment reads: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." Questions about the scope of "liberty" as well as the meaning of "due process of law" continue even today to engage legal scholars and jurists.

due process clause
Clause contained in the Fifth and Fourteenth Amendments; over the years, it has been construed to guarantee to individuals a variety of rights.

substantive due process
Judicial interpretation of the Fifth and Fourteenth Amendments' due process clauses that protects citizens from arbitrary or unjust state or federal laws.

Until nearly the turn of the century, the Supreme Court steadfastly rejected numerous arguments urging it to interpret the **due process clause** found in the Fourteenth Amendment as making various provisions contained in the Bill of Rights applicable to the states. In 1897, however, the Court began to increase its jurisdiction over the states.[7] It began to hold states to a **substantive due process** standard whereby states had the legal burden to prove that their laws were a valid exercise of their power to regulate the health, welfare, or public morals of their citizens. Interferences with state power, however, were rare, and states passed sedition laws (laws that made it illegal to speak or write any political criticism that threatened to diminish respect for the government, its laws, or public officials), anticipating that the U.S. Supreme Court would uphold their constitutionality. When Benjamin Gitlow, a member of the Socialist Party, printed 16,000 copies of a manifesto in which he urged workers to overthrow the U.S. government, he was convicted of violating a New York state law that prohibited such advocacy. Although his conviction was upheld, in *Gitlow* v. *New York* (1925), the U.S. Supreme Court noted that the states were not completely free to limit forms of political expression, saying:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the *fundamental personal rights and "liberties"* protected by the due process clause of the Fourteenth Amendment from impairment by the states [emphasis added].[8]

incorporation doctrine
An interpretation of the Constitution that holds that the due process clause of the Fourteenth Amendment requires that state and local governments must also guarantee the rights stated in the Bill of Rights.

Gitlow, with its finding that states could not abridge free speech protections, was the first step in the slow development of what is called the **incorporation doctrine.** In *Near* v. *Minnesota* (1931), the U.S. Supreme Court further developed this doctrine by holding that a state law violated the First Amendment's freedom of the press. "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint by the state."[9]

Selective Incorporation and Fundamental Freedoms

Not all of the specific guarantees in the Bill of Rights have been made applicable to the states through the due process clause of the Fourteenth Amendment, as revealed in Table 5.1. Instead, the Court has used the process of **selective incorporation** to limit the rights of states by protecting against abridgement of **fundamental freedoms.** Fundamental freedoms are those liberties defined by the Court as essential to order, liberty, and justice. These freedoms are subject to the Court's most rigorous standard of review.

selective incorporation
A judicial doctrine whereby most but not all of the protections found in the Bill of Rights are made applicable to the states via the Fourteenth Amendment.

fundamental freedoms
Those rights defined by the Court to be essential to order, liberty, and justice and therefore entitled to the highest standard of review.

The rationale for selective incorporation was set out by the Court in *Palko* v. *Connecticut* (1937).[10] Frank Palko was charged with first-degree murder for killing two Connecticut police officers, found guilty of a lesser charge of second-degree murder, and sentenced to life imprisonment. Connecticut appealed. Palko was retried, found guilty of first-degree murder, and sentenced to death. Palko then appealed his second conviction, arguing that it violated the Fifth Amendment's prohibition against double jeopardy because the Fifth Amendment had been made applicable to the states by the due process clause of the Fourteenth Amendment.

The Supreme Court disagreed. In an opinion written by Justice Benjamin Cardozo, the Court ruled that the due process clause bound states only to those rights that were "of the very essence of a scheme of ordered liberty." The Fifth Amendment's double jeopardy clause was not, in the Court's view, among these rights. The Court's decision was overruled in 1969.

Today selective incorporation requires the states to respect freedoms of press, speech, and assembly, among other liberties. Other guarantees, such as those contained in the Third and Seventh Amendments (housing of soldiers and jury trials in civil cases), have not been incorporated because the Court has yet to consider them sufficiently fundamental to national notions of liberty and justice.

Table 5.1 ***How has selective incorporation made the Bill of Rights applicable to the states?***

Amendment	Right	Date	Case Incorporated
I	Speech	1925	*Gitlow* v. *New York*
	Press	1931	*Near* v. *Minnesota*
	Assembly	1937	*DeJonge* v. *Oregon*
	Religion	1940	*Cantwell* v. *Connecticut*
II	Bear arms	2010	*McDonald* v. *City of Chicago*
III	No quartering of soldiers		Not incorporated
IV	No unreasonable searches or seizures	1949	*Wolf* v. *Colorado*
	Exclusionary rule	1961	*Mapp* v. *Ohio*
V	Just compensation	1897	*Chicago, B&Q R.R. Co.* v. *Chicago*
	Self-incrimination	1964	*Malloy* v. *Hogan*
	Double jeopardy	1969	*Benton* v. *Maryland*
	Grand jury indictment		Not incorporated
VI	Right to counsel	1963	*Gideon* v. *Wainwright*
	Public trial	1948	*In re Oliver*
	Confrontation of witnesses	1965	*Pointer* v. *Texas*
	Impartial trial	1966	*Parker* v. *Gladden*
	Speedy trial	1967	*Klopfer* v. *North Carolina*
	Compulsory trial	1967	*Washington* v. *Texas*
	Criminal trial	1968	*Duncan* v. *Louisiana*
VII	Civil jury trial		Not incorporated
VIII	No cruel and unusual punishment	1962	*Robinson* v. *California*
	No excessive fines or bail		Not incorporated

Should children be required to pray in public schools? This is just one of the thorny questions the Supreme Court has addressed under the establishment clause.

Photo courtesy: Bettmann/Corbis

First Amendment Guarantees: Freedom of Religion

★ **5.2 . . . Describe the First Amendment guarantee of freedom of religion.**

As early as 1644, Roger Williams of Rhode Island said that there needed to be "a hedge or wall of separation between the garden of the church and the wilderness of the world." Thomas Jefferson, author of the Declaration of Independence, supported that view. Beginning in 1779, both Jefferson and his colleague James Madison opposed efforts by Patrick Henry in the Virginia House of Burgesses to pass legislation to assess taxes on citizens to support religious institutions. Jefferson's Bill for Religious Freedom was ultimately passed in 1786. It barred the use of state dollars to fund any place of religious worship or ministry in Virginia.

The Framers' distaste for a national church or religion was also reflected in the Constitution. Article VI, for example, provides that "no religious Test shall ever be required as a Qualification to any Office or Public Trust under the United States." This simple statement, however, did not completely reassure those who feared the new Constitution would curtail individual liberty. Thus, the First Amendment to the Constitution soon was ratified to allay those fears.

First Amendment
Part of the Bill of Rights that imposes a number of restrictions on the federal government with respect to civil liberties, including freedom of religion, speech, press, assembly, and petition.

establishment clause
The first clause of the First Amendment; it directs the national government not to sanction an official religion.

free exercise clause
The second clause of the First Amendment; it prohibits the U.S. government from interfering with a citizen's right to practice his or her religion.

The **First Amendment** to the Constitution begins, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This statement sets the boundaries of governmental action. The **establishment clause** directs the national government not to sanction an official religion. The **free exercise clause** ("or prohibiting the free exercise thereof") guarantees citizens that the national government will not interfere with their practice of religion. These guarantees, however, are not absolute. In the mid-1800s, Mormons traditionally practiced and preached polygamy, the taking of multiple wives. In 1879, when the Supreme Court was first called on to interpret the free exercise clause, it upheld the conviction of a Mormon under a federal law barring polygamy. The Court reasoned that to do otherwise would provide constitutional protections to a full range of religious beliefs, including those as extreme as human sacrifice. "Laws are made for the government of actions," noted the Court, "and while they cannot interfere with mere religious belief and opinions, they may with practices."[11] Later, in 1940, the Supreme Court observed that the First Amendment "embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation of society."[12]

The Establishment Clause

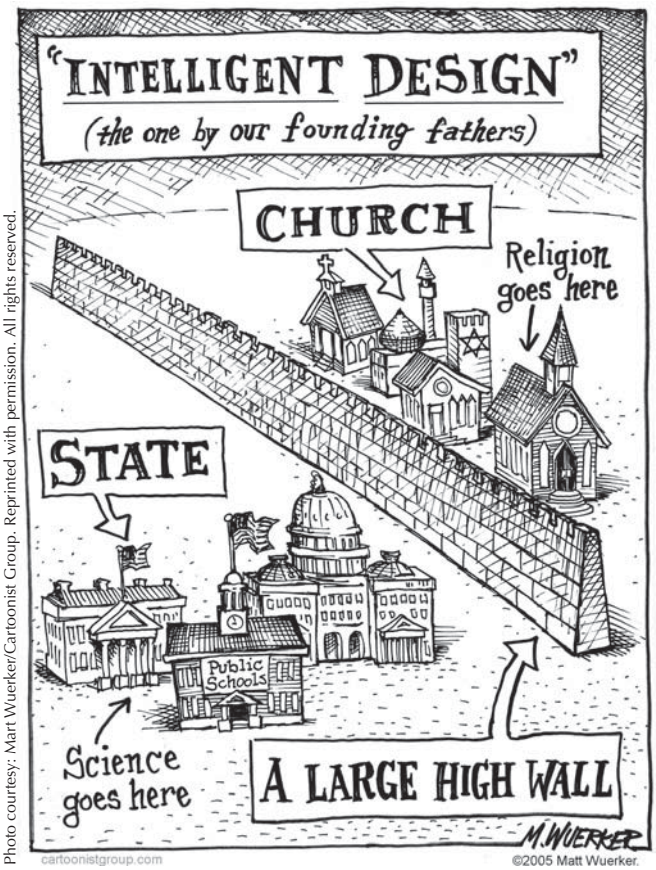
The separation of church and state has always been a thorny issue in American politics. A majority of Americans clearly value the moral teachings of their own religions, especially Christianity. U.S. coins are embossed with "In God We Trust." The U.S. Supreme Court asks for God's blessing on the Court. Every session of the U.S. House and Senate begins with a prayer, and both the House and Senate have their own chaplains. Over the years, the Court has been divided over how to interpret the establishment clause. Does this clause erect a total wall between church and state, as favored by Thomas Jefferson, or is some governmental accommodation of religion allowed? While the Supreme Court has upheld the constitutionality of many kinds of church/state entanglements such as public funding to provide sign language interpreters for deaf students in religious schools,[13] the Court has held fast to the rule of strict separation between church and state when issues of mandatory prayer in school are involved. In *Engel* v. *Vitale* (1962), for example, the Court ruled that the recitation in public school

classrooms of a brief nondenominational prayer drafted by the local school board was unconstitutional.[14] One year later, in *Abington School District* v. *Schempp* (1963), the Court ruled that state-mandated Bible reading or recitation of the Lord's Prayer in public schools was also unconstitutional.[15]

The Court has gone back and forth in its effort to come up with a workable way to deal with church/state questions. In 1971, in *Lemon* v. *Kurtzman*, the Court tried to carve out a three-part test for laws dealing with religious establishment issues. According to the ***Lemon* test,** a practice or policy was constitutional if it: (1) had a legitimate secular purpose; (2) neither advanced nor inhibited religion; and, (3) did not foster an excessive government entanglement with religion.[16] But, the Supreme Court often has sidestepped the *Lemon* test altogether and has appeared more willing to lower the wall between church and state so long as school prayer is not involved. In 1981, for example, the Court ruled unconstitutional a Missouri law prohibiting the use of state university buildings and grounds for "purposes of religious worship." The law had been used to ban religious groups from using school facilities.[17]

In 1995, the Court signaled that it was willing to lower the wall even further. In a case involving the University of Virginia, a 5–4 majority held that the university violated the free speech rights of a fundamentalist Christian group when it refused to fund the group's student magazine. The importance of this decision was highlighted by Justice David Souter, who noted in dissent: "The Court today, for the first time, approves direct funding of core religious activities by an arm of the state."[18] The Roberts Court, however, has demonstrated that there are boundaries to these accommodations. In 2010, in *Christian Legal Society* v. *Martinez*, the Court ruled that the University of California Hastings College of Law could deny recognition and therefore funding to the Christian Legal Society because the group limited its membership to those who shared a common faith orientation.

Why is separation of church and state important? This cartoon speaks to the First Amendment issue of separation of church and state. What point is the cartoonist trying to communicate? Do you agree with the cartoonist's depiction?



***Lemon* test**
Three-part test created by the Supreme Court for examining the constitutionality of religious establishment issues.

For more than a quarter-century, the Supreme Court basically allowed "books only" as an aid to religious schools, noting that the books go to children, not to the schools. But, in 2000, the Court voted 6–3 to uphold the constitutionality of a federal aid provision that allowed the government to lend books and computers to religious schools.[19] And, in 2002, by a bitterly divided 5–4 vote, the Supreme Court concluded that governments can give money to parents to allow them to send their children to private or religious schools.[20] Basically, the Court now appears willing to support programs so long as they provide aid to religious and nonreligious schools alike, and the money goes to persons who exercise free choice over how it is used.

Prayer in school also continues to be an issue. In 1992, the Court continued its unwillingness to allow organized prayer in public schools by finding unconstitutional the saying of prayer at a middle school graduation.[21] And, in 2000, the Court ruled that student-led, student-initiated prayer at high school football games violated the establishment clause.

Establishment issues, however, do not always focus on education. In 2005, for example, the Supreme Court in a 5–4 decision narrowly upheld the continued vitality of the *Lemon* test in holding that a privately donated courthouse display, which

included the Ten Commandments and 300 other historical documents illustrating the evolution of American law, was a violation of the First Amendment's establishment clause.[22]

But, in 2010, the Court appeared to reverse course. In a 5–4 decision, the Court ruled that a white cross erected on a World War I memorial on federal lands in the Mojave Desert was constitutional. According to Justice Anthony Kennedy, who wrote the majority opinion, the cross "is not merely a reaffirmation of Christian beliefs" but a symbol "often used to honor and respect" heroism. This opinion leaves state and local governments to ponder what kind of religious displays in public settings will be constitutional.[23]

The Free Exercise Clause

The free exercise clause of the First Amendment proclaims that "Congress shall make no law . . . prohibiting the free exercise [of religion]." Although the free exercise clause of the First Amendment guarantees individuals the right to be free from governmental interference in the exercise of their religion, this guarantee, like other First Amendment freedoms, is not absolute.

The free exercise clause may also pose difficult questions for the courts to resolve. In the area of free exercise, the Court often has had to confront questions of "What is a god?" and "What is a religious faith?"—questions that theologians have grappled with for centuries. In 1965, for example, in a case involving three men who were denied conscientious objector deferments during the Vietnam War because they did not subscribe to "traditional" organized religions, the Court ruled unanimously that belief in a supreme being was not essential for recognition as a conscientious objector.[24] Thus, the men were entitled to the deferments because their views paralleled those who objected to war and who belonged to traditional religions. In contrast, despite the Court's having ruled that Catholic, Protestant, Jewish, and Buddhist prison inmates must be allowed to hold religious services,[25] as early as 1987 the Court ruled that Islamic prisoners could be denied the same right for security reasons.[26]

Furthermore, when secular law comes into conflict with religious law, the right to exercise one's religious beliefs is often denied—especially if the religious beliefs in question are held by a minority or by an unpopular or "suspicious" group. Thus, the U.S. Supreme Court has interpreted the Constitution to mean that governmental interests can outweigh free exercise rights. State statutes barring the use of certain illegal drugs (such as peyote), snake handling, and polygamy—all practices once part of some religions—have been upheld as constitutional when states have shown compelling reasons to regulate or ban them.[27] Nonetheless, the Court has made it clear that the free exercise clause requires that a state or the national government cannot unfairly target one religion. In 1993, for example, the Court ruled that members of the Santería Church, an Afro-Cuban religion, had the right to sacrifice animals during religious services. In upholding that practice, the Court ruled that a city ordinance banning such practices was unconstitutionally aimed at the group, thereby denying its members the right to free exercise of their religion.[28]

Congress has mightily objected to many of the Court's rulings on religious freedom. In 2000, it responded by passing the Religious Freedom Restoration Act, which specifically made the use of peyote in religious services legal.[29] As a result, in 2006, the U.S. Supreme Court by a vote of 8–0, found that the use of hoasca tea, well-known for its hallucinogenic properties, was a permissible free exercise of religion for members of a Brazilian-based church. The Court noted that Congress had overruled its earlier decision and specifically legalized the use of other sacramental substances including peyote. Queried Justice Ruth Bader Ginsburg regarding the religious uses of hoasca tea and peyote, "if the government must accommodate one, why not the other?"[30]

First Amendment Guarantees: Freedoms of Speech, Press, Assembly, and Petition

★ **5.3 . . . Outline the First Amendment guarantees of and limitations on freedom of speech, press, assembly, and petition.**

The remaining guarantees protected by the First Amendment have been subject to varying degrees of scrutiny by the Supreme Court. During times of war, for example, the Court generally has allowed Congress and the chief executive extraordinary leeway in limiting First Amendment freedoms. Below, we provide historical background and current judicial interpretations of the freedoms of speech, press, assembly, and petition.

Freedoms of Speech and the Press

A democracy depends on a free exchange of ideas, and the First Amendment shows that the Framers were well aware of this fact. Historically, one of the most volatile areas of constitutional interpretation has been in the interpretation of the First Amendment's mandate that "Congress shall make no law … abridging the freedom of speech or of the press." Like the establishment and free exercise clauses of the First Amendment, the speech and press clauses have not been interpreted as absolute bans against government regulation. A lack of absolute meaning has led to thousands of cases seeking both broader and narrower judicial interpretations of the scope of the amendment. Over the years, the Court has employed a hierarchical approach in determining what the government can and cannot regulate, with some liberties getting greater protection than others. Generally, thoughts have received the greatest protection, and actions or deeds the least. Words have come somewhere in the middle, depending on their content and purpose.

THE ALIEN AND SEDITION ACTS When the First Amendment was ratified in 1791, it was considered to protect against **prior restraint** of speech or expression, or to guard against the prohibition of speech or publication before the fact. However, in 1798, the Federalist Congress with President John Adams's blessing enacted the Alien and Sedition Acts, which were designed to ban any criticism of the Federalist government by the growing numbers of Democratic-Republicans. These acts made the publication of "any false, scandalous writing against the government of the United States" a criminal offense. Although the law clearly ran in the face of the First Amendment's ban on prior restraint, the Adams administration and partisan Federalist judges successfully prosecuted and imposed fines and jail terms on at least ten Democratic-Republican newspaper editors. The acts became a major issue in the 1800 presidential election campaign, which led to the election of Thomas Jefferson, a vocal opponent of the acts. He quickly pardoned all who had been convicted under their provisions and the Democratic-Republican Congress allowed the acts to expire before the Federalist-controlled U.S. Supreme Court had an opportunity to rule on the constitutionality of these First Amendment infringements.

prior restraint
Constitutional doctrine that prevents the government from prohibiting speech or publication before the fact; generally held to be in violation of the First Amendment.

SLAVERY, THE CIVIL WAR, AND RIGHTS CURTAILMENTS After the public outcry over the Alien and Sedition Acts, the national government largely refrained from regulating speech. But, in its place, the states, which were not yet bound by the Bill of Rights through selective incorporation, began to prosecute those who published articles critical of governmental policies. In the 1830s, at the urging of abolitionists (those who sought an end to slavery), the publication or dissemination of any positive information about slavery became a punishable offense in the North. In the opposite vein, in the South, supporters of slavery enacted laws to prohibit publication of any

anti-slavery sentiments. Southern postmasters, for example, refused to deliver northern abolitionist newspapers, a step that amounted to censorship of the U.S. mail.

During the Civil War, President Abraham Lincoln took several steps that actually were unconstitutional. He made it unlawful to print any criticisms of the national government or of the Civil War, effectively suspending the free press protections of the First Amendment. Lincoln went so far as to order the arrest of several newspaper editors critical of his conduct of the war and ignored a Supreme Court decision saying that these practices were unconstitutional.

After the Civil War, states also began to prosecute individuals for seditious speech if they uttered or printed statements critical of the government. Between 1890 and 1900, for example, there were more than one hundred state prosecutions for sedition.[31] Moreover, by the dawn of the twentieth century, public opinion in the United States had grown increasingly hostile toward the commentary of Socialists and Communists who attempted to appeal to growing immigrant populations. Groups espousing socialism and communism became the targets of state laws curtailing speech and the written word. By the end of World War I, over thirty states had passed laws to punish seditious speech, and more than 1,900 individuals and over one hundred newspapers were prosecuted for violations.[32] In 1925, however, states' authority to regulate speech was severely restricted by the Court's decision to incorporate the free press provision of the First Amendment in *Gitlow* v. *New York*.

WORLD WAR I AND ANTI-GOVERNMENTAL SPEECH The next major national efforts to restrict freedom of speech and the press did not occur until Congress, at the urging of President Woodrow Wilson during World War I, passed the Espionage Act in 1917. Nearly 2,000 Americans were convicted of violating its various provisions, especially those that made it illegal to urge resistance to the draft or to prohibit the distribution of anti-war leaflets. In *Schenck* v. *U.S.* (1919), the Supreme Court upheld this act, ruling that Congress had a right to restrict speech "of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent."[33] Under this **clear and present danger test,** the circumstances surrounding an incident are important. Anti-war leaflets, for example, may be permissible during peacetime, but during World War I they were considered to pose too much of a danger to be permissible. *Schenck* is also famous for Chief Justice Oliver Wendell Holmes's comment that the false cry of "Fire!" in a crowded theater would not be protected speech.

clear and present danger test
Test articulated by the Supreme Court in *Schenck* v. *U.S.* (1919) to draw the line between protected and unprotected speech; the Court looks to see "whether the words used" could "create a clear and present danger that they will bring about substantive evils" that Congress seeks "to prevent."

For decades, the Supreme Court wrestled with what constituted a danger. Finally, in *Brandenburg* v. *Ohio* (1969), the Court fashioned a new test for deciding whether certain kinds of speech could be regulated by the government: the **direct incitement test.** Now, the government could punish the advocacy of illegal action only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[34] The requirement of "imminent lawless action" makes it more difficult for the government to punish speech and publication and is consistent with the Framers' notion of the special role played by these elements in a democratic society.

direct incitement test
Test articulated by the Supreme Court in *Brandenburg* v. *Ohio* (1969) that holds that advocacy of illegal action is protected by the First Amendment unless imminent lawless action is intended and likely to occur.

Protected Speech and Press

The expression of ideas through speech and the press is the cornerstone of a free society. As a result, the U.S. Supreme Court has accorded constitutional protection to a number of aspects of speech and the press, even though the content of such expression may be objectionable to some citizens or the government. Here, we discuss the implications of this protection with respect to prior restraint, symbolic speech, and hate speech.

LIMITING PRIOR RESTRAINT As we have seen with the Alien and Sedition Acts, although Congress attempted to limit speech before the fact as early as 1798, the U.S. Supreme Court did not take a firm position on this issue until the 1970s (but see *Near* v. *Minnesota* [1931] on page 152). In *New York Times Co.* v. *U.S.* (1971) (also called the

Pentagon Papers case), the Supreme Court ruled that the U.S. government could not block the publication of secret Department of Defense documents illegally furnished to the *Times* by anti-war activists.[35] In 1976, the U.S. Supreme Court went even further, noting in *Nebraska Press Association* v. *Stuart* that any attempt by the government to prevent expression carried "'a heavy presumption' against its constitutionality."[36] In this case, a trial court issued a gag order barring the press from reporting the lurid details of a crime. In balancing the defendant's constitutional right to a fair trial against the press's right to cover a story, the Nebraska trial judge concluded that the defendant's right carried greater weight. The Supreme Court disagreed, holding the press's right to cover the trial paramount. Still, judges are often allowed to issue gag orders affecting parties to a lawsuit or to limit press coverage of a case.

In 2005, for example, the Court ruled that a California state court judge's injunction banning all future comments made by a client against his attorney, in this case the high-profile attorney Johnnie Cochran, did not extend beyond Cochran's death.[37] The Court found that, in light of his death, Cochran had a diminished need for protection. Thus the prohibition was an overly broad exercise of prior restraint.

SYMBOLIC SPEECH In addition to the general protection accorded to pure speech, the Supreme Court has extended the reach of the First Amendment to **symbolic speech,** a means of expression that includes symbols or signs. In the words of Justice John Marshall Harlan, these kinds of speech are part of the "free trade in ideas."[38] Perhaps the most visible example of symbolic speech is the burning of the American flag as an expression of protest, discussed in **chapter 2**.

symbolic speech
Symbols, signs, and other methods of expression generally considered to be protected by the First Amendment.

The Supreme Court first acknowledged that symbolic speech was entitled to First Amendment protection in *Stromberg* v. *California* (1931).[39] There, the Court overturned a communist youth camp director's conviction under a state statute prohibiting the display of a red flag, a symbol of opposition to the U.S. government. In a similar vein, the right of high school students to wear black armbands to protest the Vietnam War was upheld in *Tinker* v. *Des Moines Independent Community School District* (1969).[40] In recent years, however, the Court has appeared less willing to support the standards established in *Tinker*.

In a case commonly referred to as the "Bong Hits 4 Jesus" case, the Court ruled that a student's free speech rights were not violated when he was suspended for displaying what the Court characterized as a "sophomoric" banner at an Olympic torch relay parade.[41]

How broad is the right to symbolic speech? In a 2007 case, the Supreme Court ruled that a school district was within its rights to suspend a student for displaying this banner, because it was intended to promote illegal drug use, even though it occurred off school property.

Photo courtesy: Clay Good/ZUMA

HATE SPEECH "As a thumbnail summary of the last two or three decades of speech issues in the Supreme Court," wrote eminent First Amendment scholar Harry Kalven Jr. in 1966, "we may come to see the Negro as winning back for us the freedoms the Communists seemed to have lost for us."[42] Still, says noted African American studies scholar Henry Louis Gates Jr., Kalven would be shocked to see the stance that some now take toward the First Amendment, which once protected protests, rallies, and agitation in the 1960s: "The byword among many black activists and black intellectuals is no longer the political imperative to protect free speech; it is the moral imperative to suppress 'hate speech.'"[43]

In the 1990s, a particularly thorny First Amendment issue emerged as cities and universities attempted to prohibit what they viewed as offensive hate speech. In *R.A.V.* v. *City of St. Paul* (1992), a St. Paul, Minnesota, ordinance that made it a crime to engage in speech or action likely to arouse "anger," "alarm," or "resentment" on the basis of race, color, creed, religion,

Free Speech or Hate Speech?

In 2005, a Danish newspaper published a series of editorial cartoons mocking the Islamic prophet Muhammad. The cartoons led to charges of racism, violence, and even death in several countries across the Muslim world. The paper defended its right to publish the cartoons but also apologized for offending anyone.

Two years later, as part of efforts to combat racism and hate crimes, the European Union (EU) agreed to criminalize statements that deny or trivialize the Holocaust, the mass killing of Jews during World War II. Based on this agreement, a German court sentenced an author to five years in prison for inciting racial hatred and for his denial of the Holocaust.

- **Did the Danish newspaper do anything wrong in publishing the cartoons that some people believed were racist and offensive? Why or why not?**
- **Was the EU's decision to criminalize speech that denies or trivializes the Holocaust justified? Why or why not?**
- **Would a similar ban on speech be possible in the United States? Should it be possible? Explain your answer.**

or gender was at issue. The Court ruled 5–4 that a white teenager who burned a cross on a black family's front lawn, thereby committing a hate crime under the ordinance, could not be charged under that law because the First Amendment prevents governments from "silencing speech on the basis of its content."[44] In 2003, the Court narrowed this definition, ruling that state governments could constitutionally restrict cross burning when it occurred with the intent of racial intimidation.[45]

Two-thirds of colleges and universities have banned a variety of forms of speech or conduct that creates or fosters an intimidating, hostile, or offensive environment on campus. To prevent disruption of university activities, some universities have also created free speech zones that restrict the time, place, or manner of speech. Critics, including the ACLU, charge that free speech zones imply that speech can be limited on other parts of the campus, which they see as a violation of the First Amendment. They have filed a number of suits in district court, but to date none of these cases has been heard by the Supreme Court.

Unprotected Speech and Press

Although the Supreme Court has allowed few governmental bans on most types of speech, some forms of expression are not protected. In 1942, the Supreme Court set out the rationale by which it would distinguish between protected and unprotected speech. According to the Court, libel, fighting words, obscenity, and lewdness are not protected by the First Amendment because "such expressions are no essential part of any exposition of ideals, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[46]

libel
Written statement that defames a person's character.

slander
Untrue spoken statements that defame the character of a person.

LIBEL AND SLANDER **Libel** is a written statement that defames the character of a person. If the statement is spoken, it is **slander.** In many nations—such as Great Britain, for example—it is relatively easy to sue someone for libel. In the United States, however, the standards of proof are much higher. A person who believes that he or she has been a victim of libel must show that the statements made were untrue. Truth is an absolute defense against the charge of libel, no matter how painful or embarrassing the revelations.

***New York Times Co.* v. *Sullivan* (1964)**
Case in which the Supreme Court concluded that "actual malice" must be proven to support a finding of libel against a public figure.

It is often more difficult for individuals the U.S. Supreme Court considers "public persons or public officials" to sue for libel or slander. ***New York Times Co.* v. *Sullivan* (1964)** was the first major libel case considered by the Supreme Court.[47] An Alabama state court found the *Times* guilty of libel for printing a full-page advertisement accusing Alabama officials of physically abusing African Americans during various civil rights protests. (The ad was paid for by civil rights activists, including former First Lady Eleanor Roosevelt.) The Supreme Court overturned the conviction and established that a finding of libel against a public official could stand only if there was a showing of "actual malice," or a knowing disregard for the truth. Proof that the statements were false or negligent was not sufficient to prove actual malice. Later the Court ruled that even intentional infliction of emotional distress was not sufficient.[48]

FIGHTING WORDS In the 1942 case of *Chaplinsky* v. *New Hampshire*, the Court stated that **fighting words,** or words that "by their very utterance inflict injury or tend or incite an immediate breach of peace," are not subject to the restrictions of the First Amendment.[49] Fighting words, which include "profanity, obscenity, and threats," are therefore able to be regulated by the federal and state governments.

fighting words
Words that, "by their very utterance inflict injury or tend to incite an immediate breach of peace." Fighting words are not subject to the restrictions of the First Amendment.

These words do not necessarily have to be spoken; fighting words can also come in the form of symbolic expression. For example, in 1968, a California man named Paul Cohen wore a jacket that said "Fuck the Draft. Stop the War" into a Los Angeles County courthouse. He was arrested and charged with disturbing the peace and engaging in offensive conduct, which the police feared would incite others to act violently toward Cohen. The trial court convicted Cohen, and this conviction was upheld by a state appellate court. However, when the case reached the Supreme Court in 1971, the Court reversed the lower courts' decisions and ruled that forbidding the use of certain words amounted to little more than censorship of ideas.[50]

OBSCENITY Through 1957, U.S. courts often based their opinions of what was obscene on an English common-law test that had been set out in 1868: "Whether the tendency of the matter charged as obscenity is to deprive and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall."[51] In *Roth* v. *U.S.* (1957), however, the Court abandoned this approach and held that, to be considered obscene, the material in question had to be "utterly without redeeming social importance," and articulated a new test for obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests."[52]

In many ways, the *Roth* test brought with it as many problems as it attempted to solve. Throughout the 1950s and 1960s, "prurient" remained hard to define, as the Supreme Court struggled to find a standard for judging actions or words. Moreover, it was very difficult to prove that a book or movie was "*utterly* without redeeming social value." Even some hardcore pornography passed muster under the *Roth* test, prompting some critics to argue that the Court fostered the increase in the number of sexually oriented publications designed to appeal to those living during the sexual revolution.

Richard M. Nixon made the growth in pornography a major issue when he ran for president in 1968. Nixon pledged to appoint to federal judgeships only those who would uphold law and order and stop coddling criminals and purveyors of porn. Once elected president, Nixon made four appointments to the Supreme Court, including Chief Justice Warren E. Burger, who wrote the opinion in *Miller* v. *California* (1973). There, the Court set out a test that redefined obscenity. To make it easier for states to regulate obscene materials, the justices concluded that lower courts must ask "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law." The courts also were to determine "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." And, in place of the contemporary community standards gauge used in *Roth*, the Court defined community standards to refer to the locality in question, under the rationale that what is acceptable in New York City might not be acceptable in Maine or Mississippi.[53]

Time and contexts clearly have altered the Court's and, indeed, much of America's perceptions of what works are obscene. But, the Supreme Court has allowed communities great leeway in drafting statutes to deal with obscenity and, even more importantly, other forms of questionable expression. In 1991, for example, the Court voted 5–4 to allow Indiana to ban totally nude erotic dancing, concluding that the statute furthered a substantial governmental interest, and therefore was not in violation of the First Amendment.[54]

While lawmakers have been fairly effective in restricting the sale and distribution of obscene materials, monitoring the Internet has proven difficult for Congress. Since 1996, Congress has passed several laws designed to prohibit the transmission of obscene or "harmful" materials over the Internet to anyone under age eighteen. For many years, the Supreme Court repeatedly found these laws unconstitutional.[55] But, in 2008, a seven-justice majority decided that the PROTECT Act, which outlawed the sale or transmission of child pornography, was not overly broad and did not abridge the freedom of speech guaranteed by the First Amendment.[56]

Freedoms of Assembly and Petition

"Peaceful assembly for lawful discussion cannot be made a crime," Chief Justice Charles Evans Hughes wrote in the 1937 case of *DeJonge* v. *Oregon*, which incorporated the First Amendment's freedom of assembly clause to apply to the states.[57] Despite this clear declaration, and an even more ringing declaration in the First Amendment, the fundamental freedoms of assembly and petition have been among the most controversial, especially in times of war. As with other First Amendment freedoms, the Supreme Court often has become the arbiter between the freedom of the people to express dissent and government's authority to limit controversy in the name of national security.

Because the freedom to assemble is hinged on peaceful conduct, the freedoms of assembly and petition are related directly to the freedoms of speech and of the press. If the words spoken or actions taken at any event cross the line of constitutionality, events such as parades or protests may no longer be protected by the Constitution. Absent that protection, leaders and attendees may be subject to governmental regulation and even arrest, incarceration, or civil fines.

The question of the right to petition the government has rarely been addressed by the U.S. Supreme Court. But, in 2010, the Court heard a case questioning the constitutionality of Washington State's Public Records Act. This law allowed the government

What does the First Amendment right to assembly protect? Under the First Amendment, citizens are given the right to peaceably assemble. Here, protesters gather on the steps of the California State Capitol in support of marriage rights for same-sex couples.

Photo courtesy: BRIAN BAER/MCT/Landov

to release the names of citizens who had signed a petition in support of a ballot initiative that would have banned gay couples from adopting children.[58] The plaintiffs who signed the "Preserve Marriage, Protect Children" petition did not want their names released because they feared harassment. The Court however, ruled that the disclosure of these names did not violate the First Amendment, but that states should consider whether the names of signatories on other initiative petitions require anonymity.

The Second Amendment: The Right to Keep and Bear Arms

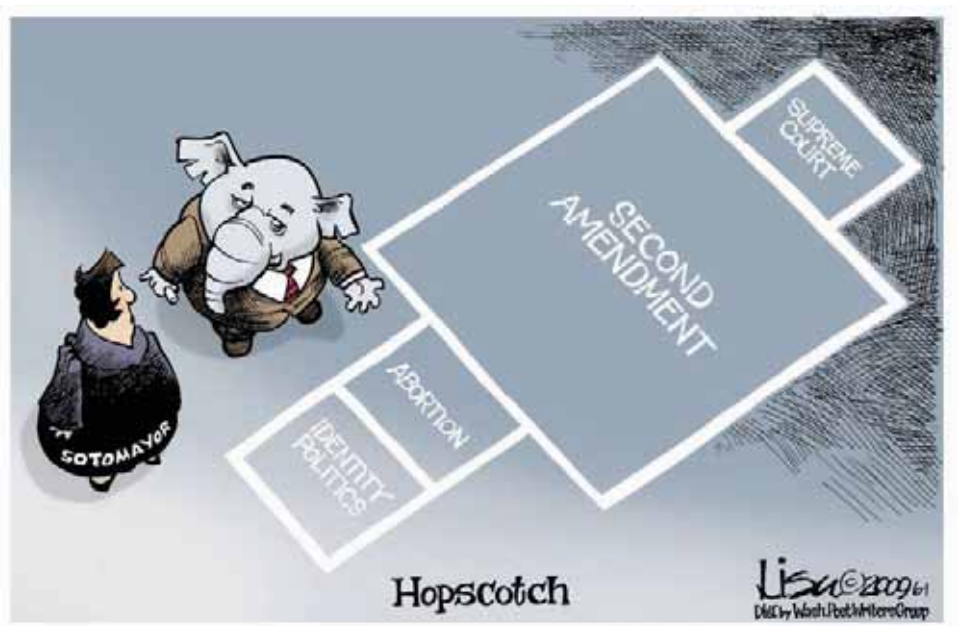
5.4 . . . Summarize changes in the interpretation of the Second Amendment right to keep and bear arms.

During colonial times, the colonists' distrust of standing armies was evident. Most colonies required all white men to keep and bear arms, and all white men in whole sections of the colonies were deputized to defend their settlements against Indians and European powers. These local militias were viewed as the best way to keep order and protect liberty.

The Second Amendment was added to the Constitution to ensure that Congress could not pass laws to disarm state militias. This amendment appeased Anti-Federalists, who feared that the new Constitution would cause them to lose the right to "keep and bear arms." It also preserved an unstated right—the right to revolt against governmental tyranny.

Through the early 1920s, few state statutes were passed to regulate firearms (and generally these laws dealt with the possession of firearms by slaves). The Supreme Court's decision in *Barron* v. *Baltimore* (1833), which refused to incorporate the Bill of Rights to the state governments, prevented federal review of those state laws.[59]

How important are Second Amendment rights to Supreme Court nominations? This cartoon, published during the nomination hearings of Justice Sonia Sotomayor, depicts the Second Amendment as a major stumbling block to a seat on the Supreme Court.



Gun Control

Many countries have very strict laws governing gun ownership. In Great Britain, it is illegal to own a handgun. In France, citizens may apply for a three-year permit only after demonstrating a clear need and undergoing an exhaustive background check. In Mexico, citizens may own only low-caliber guns after petitioning the Ministry of Defense for permission. A major problem that Mexico faces in controlling drug trafficking along the U.S.-Mexico border is that drug cartel members can cross into the United States and purchase guns legally.

- **Why is the issue of gun control so polarizing in the United States but not in some other countries?**
- **What type of international action, if any, should be taken to reduce the flow of guns across borders?**
- **To what extent should U.S. laws or policies on gun control be influenced by the laws and policies of other countries?**

Moreover, in *Dred Scott* v. *Sandford* (1857), Chief Justice Roger B. Taney listed the right to own and carry arms as a basic right of citizenship.[60]

In 1934, Congress passed the National Firearms Act in response to the increase in organized crime that occurred in the 1920s and 1930s as a result of Prohibition. The act imposed taxes on automatic weapons and sawed-off shotguns. In *U.S.* v. *Miller* (1939), a unanimous Court upheld the constitutionality of the act, stating that the Second Amendment was intended to protect a citizen's right to own ordinary militia weapons and not sawed-off shotguns.[61] For nearly seventy years following *Miller*, the Court did not directly address the Second Amendment. Then, as detailed in our opening vignette about *D.C.* v. *Heller* (2008), the Court ruled that the Second Amendment protected an individual's right to own a firearm for personal use in Washington, D.C.[62]

In light of the Court's ruling, the D.C. City Council adopted new gun control laws requiring gun registration and prohibiting assault weapons and large-capacity magazines. A U.S. District Court ruled that these laws were valid and within the scope of the *Heller* decision.[63] And, in 2010, the Supreme Court broadened the ownership rights in *Heller* to include citizens of all states. It also incorporated the Second Amendment.[64]

The Rights of Criminal Defendants

★ **5.5 . . . Analyze the rights of criminal defendants found in the Bill of Rights.**

writs of *habeas corpus*
Court orders in which a judge requires authorities to prove that a prisoner is being held lawfully and that allow the prisoner to be freed if the judge is not persuaded by the government's case. *Habeas corpus* rights imply that prisoners have a right to know what charges are being made against them.

***ex post facto* law**
Law that makes an act punishable as a crime even if the action was legal at the time it was committed.

bill of attainder
A law declaring an act illegal without a judicial trial.

Fourth Amendment
Part of the Bill of Rights that 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."

Article I of the Constitution guarantees a number of rights for those accused of crimes. The Constitution guarantees **writs of *habeas corpus*,** court orders in which a judge requires authorities to prove that a prisoner is being held lawfully and that allow the prisoner to be freed if the judge is not persuaded by the government's case. *Habeas corpus* rights also imply that prisoners have a right to know what charges are being made against them.

Article I of the Constitution also prohibits ***ex post facto* laws,** or laws that make an act punishable as a crime even if the action was legal at the time it was committed. And, Article I prohibits **bills of attainder,** laws declaring an act illegal without a judicial trial.

The Fourth, Fifth, Sixth, and Eighth Amendments supplement these rights with a variety of procedural guarantees, often called due process rights. In this section, we examine how the courts have interpreted and applied these guarantees in an attempt to balance personal liberty and national safety and security.

The Fourth Amendment and Searches and Seizures

The **Fourth Amendment** to the Constitution protects people from unreasonable searches by the federal government. Moreover, in some detail, it sets out what may not be searched unless a warrant is issued, underscoring the Framers' concern with preventing government abuses.

The purpose of this amendment was to deny the national government the authority to make general searches. Over the years, in a number of decisions, the Supreme Court has interpreted the Fourth Amendment to allow the police to search: (1) the person arrested; (2) things in plain view of the accused person; and, (3) places or things that the arrested person could touch or reach or are otherwise in the arrestee's immediate control.

Warrantless searches often occur if police suspect that someone is committing or is about to commit a crime. In these situations, police may stop and frisk the individual under suspicion. In 1989, the Court ruled that there need be only a "reasonable suspicion" for stopping a suspect—a much lower standard than probable cause.[65]

Searches can also be made without a warrant if consent is obtained. In the case of homes, this consent must come from all occupants present at the time of the search; the police cannot conduct a warrantless search of a home if one of the occupants objects.[66] In contrast, under the open fields doctrine first articulated by the Supreme Court in 1924, if you own a field, and even if you post "No Trespassing" signs, the police can search your field without a warrant to see if you are engaging in illegal activity such as growing marijuana, because you cannot reasonably expect privacy in an open field.[67]

In situations where no arrest occurs, police must obtain search warrants from a "neutral and detached magistrate" prior to conducting more extensive searches of houses, cars, offices, or any other place where an individual would reasonably have some expectation of privacy. [68] Thus, firefighters can enter your home to fight a fire without a warrant. But, if they decide to investigate the cause of the fire, they must obtain a warrant before their reentry.[69]

Cars have proven problematic for police and the courts because of their mobile nature. As noted by Chief Justice William H. Taft as early as 1925, "the vehicle can quickly be moved out of the locality or jurisdiction in which the warrant must be sought."[70] Over the years, the Court has become increasingly lenient about the scope of automobile searches. In 2002, for example, an unusually unanimous Court ruled that when evaluating if a border patrol officer acted lawfully in stopping a suspicious minivan, the totality of the circumstances had to be considered. Wrote Chief Justice William H. Rehnquist, the "balance between the public interest and the individual's right to personal security," tilts in favor of a "standard less than probable cause in brief investigatory stops." This ruling gave law enforcement officers more leeway to pull over suspicious motorists.[71] And, courts do not require search warrants in possible drunk driving situations. Thus, the police in some states can require you to take a Breathalyzer test to determine whether you have been drinking in excess of legal limits.[72]

Testing for drugs, too, is an especially thorny search and seizure issue. While many private employers and professional athletic organizations routinely require drug tests upon application or as a condition of employment, governmental requirements present constitutional questions about the scope of permissible searches and seizures. In 1989, the Supreme Court ruled that mandatory drug and alcohol testing of employees involved in accidents was constitutional.[73] In 1995, the Court upheld the constitutionality of random drug testing of public high school athletes.[74] And, in 2002, the Court upheld the constitutionality of a Tecumseh, Oklahoma, policy that required mandatory drug testing of high school students participating in any extracurricular activities. Thus, prospective band, choir, debate, or drama club members were subject to the same kind of random drug testing undergone by athletes.[75]

The Fifth Amendment: Self-Incrimination and Double Jeopardy

The **Fifth Amendment** provides a variety of guarantees that protect those who have been charged with a crime. It requires, for example, that individuals who are accused in the most serious cases be allowed to present their case before a grand jury, a group

Fifth Amendment
Part of the Bill of Rights that imposes a number of restrictions on the federal government with respect to the rights of persons suspected of committing a crime. It provides for indictment by a grand jury and protection against self-incrimination, and prevents the national government from denying a person life, liberty, or property without the due process of law. It also prevents the national government from taking property without just compensation.

of citizens charged with determining whether there is enough evidence for a case to go to trial. The Fifth Amendment also provides that "No person shall be . . . compelled in any criminal case to be a witness against himself." "Taking the Fifth" is shorthand for exercising one's constitutional right not to self-incriminate. The Supreme Court has interpreted this guarantee to be "as broad as the mischief against which it seeks to guard," finding that criminal defendants do not have to take the stand at trial to answer questions, nor can a judge make mention of their failure to do so as evidence of guilt.[76] Moreover, lawyers cannot imply that a defendant who refuses to take the stand must be guilty or have something to hide.

Miranda v. *Arizona* (1966)
A landmark Supreme Court ruling that held the Fifth Amendment requires that individuals arrested for a crime must be advised of their right to remain silent and to have counsel present.

Miranda rights
Statements that must be made by the police informing a suspect of his or her constitutional rights protected by the Fifth Amendment, including the right to an attorney provided by the court if the suspect cannot afford one.

This right not to incriminate oneself also means that prosecutors cannot use as evidence in a trial any of a defendant's statements or confessions that were not made voluntarily. As is the case in many areas of the law, however, judicial interpretation of the term voluntary has changed over time.

In earlier times, it was not unusual for police to beat defendants to obtain their confessions. In 1936, however, the Supreme Court ruled that convictions for murder based solely on confessions given after physical beatings were unconstitutional.[77] Police then began to resort to other measures to force confessions. Defendants, for example, were questioned for hours on end with no sleep or food, or threatened with physical violence until they were mentally beaten into giving confessions. In other situations, family members were threatened. In one case, a young mother accused of marijuana possession was told that her welfare benefits would be terminated and her children taken away from her if she failed to talk.[78]

***Miranda* v. *Arizona* (1966)** was the Supreme Court's response to these coercive efforts to obtain confessions that were not truly voluntary. On March 3, 1963, an eighteen-year-old girl was kidnapped and raped on the outskirts of Phoenix, Arizona. Ten days later, police arrested Ernesto Miranda, a poor, mentally disturbed man with a ninth-grade education. In a police-station lineup, the victim identified Miranda as her attacker. Police then took Miranda to a separate room and questioned him for two hours. At first he denied guilt. Eventually, however, he confessed to the crime and wrote and signed a brief statement describing the crime and admitting his guilt. At no time was he told that he did not have to answer any questions or that he could be represented by an attorney.

After Miranda's conviction, his case was appealed on the grounds that his Fifth Amendment right not to incriminate himself had been violated because his confession had been coerced. Writing for the Court, Chief Justice Earl Warren, himself a former district attorney and a former California state attorney general, noted that because police have a tremendous advantage in any interrogation situation, criminal suspects must be given greater protection. A confession obtained in the manner of Miranda's was not truly voluntary; thus, it was inadmissible at trial.

To provide guidelines for police to implement *Miranda*, the Court mandated that: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statements he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[79] In response to this mandate from the Court, police routinely began to read suspects what are now called their ***Miranda* rights,** a practice you undoubtedly have seen repeated over and over in movies and TV police dramas.

Although the Burger Court did not enforce the reading of *Miranda* rights as vehemently as had the Warren Court, Chief Justice Warren E. Burger, Warren's successor, acknowledged that they had become an integral part of established police procedures.[80] The more conservative Rehnquist and Roberts Courts, however, have been more willing to weaken *Miranda* rights, allowing coerced confessions and employing much more flexible standards for the admission of evidence.[81] (To learn more about a Roberts Court ruling that scales back *Miranda* rights, see Politics Now: Suspects Must Assert Right to Silence.)

Who was Ernesto Miranda? Even though Ernesto Miranda's confession was not admitted as evidence at his retrial, the testimony of his ex-girlfriend and the victim were enough to convince the jury of his guilt. He served nine years in prison before he was paroled. After his release, he routinely sold autographed cards inscribed with what are called the *Miranda* rights now read to all suspects. In 1976, four years after his release, Miranda was stabbed to death during a card game. Two *Miranda* cards were found on his body, and the person who killed him was read his *Miranda* rights upon his arrest.

Photo courtesy: AP/Wide World Photos

Suspects Must Assert Right to Silence

By Joan Biskupic

June 2, 2010
USA Today
www.usatoday.com

A divided Supreme Court scaled back the well-known *Miranda* right Tuesday and enhanced prosecutors' ability to assert that a suspect waived his right to remain silent even when he did not say so.

By a 5-4 vote, the justices said that once rights have been read and questioning begun, a suspect must clearly declare that he wants to remain silent and cannot simply be silent.

The decision in a Michigan case broke along ideological lines, with Justice Anthony Kennedy writing the opinion, joined by fellow conservatives. The four liberals dissented in an opinion by Justice Sonia Sotomayor, a former Manhattan prosecutor who warned that the decision "turns *Miranda* upside down."

She said defendants often use equivocal or colloquial language in attempting to invoke their right to silence and that requiring a clear declaration would weaken the right.

"There is no question that this decision authorizes lower courts to construe ambiguous situations in favor of police and prosecutors," said Stanford University law professor Robert Weisberg. . . .

Tuesday's case did not involve when a suspect should be read rights. Rather, it addressed what happens when a suspect declines to answer hours of questions, then makes a potentially incriminating statement and later says he had wanted to remain silent and that his statement was not made freely. . . .

"Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent," Kennedy wrote. He said [the defendant] waived his right by answering the detective's questions . . .

Sotomayor called their decision "a substantial retreat from the protection against compelled self-incrimination." She said it undercuts the "heavy burden" the government should have to show that a defendant gave up his right against self-incrimination. . . .

Critical Thinking Questions

1. Should a suspect have to signal their choice to remain silent? Why or why not?
2. How does this decision erode the protections of the *Miranda* decision?
3. How do you expect criminal rights to change in the coming years? Do you expect that *Miranda* rights will be eliminated? Why or why not?

The Fifth Amendment also mandates: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This is called the **double jeopardy clause** and it protects individuals from being tried twice for the same crime in the same jurisdiction. Thus, if a defendant is acquitted by a jury of a charge of murder, he or she cannot be retried in that jurisdiction for the offense even if new information is unearthed that could further point to guilt. But, if a defendant was tried in a state court, he or she could still face charges in a federal court or vice versa.

double jeopardy clause
Part of the Fifth Amendment that protects individuals from being tried twice for the same offense in the same jurisdiction.

The Fourth and Fifth Amendments and the Exclusionary Rule

In *Weeks* v. *U.S.* (1914), the U.S. Supreme Court adopted the **exclusionary rule,** which bars the use of illegally seized evidence at trial. Thus, although the Fourth and Fifth Amendments do not prohibit the use of evidence obtained in violation of their provisions, the exclusionary rule is a judicially created remedy to deter constitutional violations. In *Weeks*, for example, the Court reasoned that allowing police and prosecutors to use the "fruits of a poisonous tree" (a tainted search) would only encourage that activity.[82]

exclusionary rule
Judicially created rule that prohibits police from using illegally seized evidence at trial.

In balancing the need to deter police misconduct against the possibility that guilty individuals could go free, the Warren Court decided that deterring police misconduct was most important. In *Mapp* v. *Ohio* (1961), the Warren Court ruled that "all evidence obtained by searches and seizures in violation of the Constitution, is inadmissible in a state court."[83] This historic and controversial case put law enforcement officers on notice that if they found evidence in violation of any constitutional rights, those efforts would be for naught because the tainted evidence could not be used in federal or state trials.

In 1976, the Court noted that the exclusionary rule "deflects the truth-finding process and often frees the guilty."[84] Since then, the Court has carved out a variety of limited "good faith exceptions" to the exclusionary rule, allowing the use of tainted evidence in a variety of situations, especially when police have a search warrant and, in good faith, conduct the search on the assumption that the warrant is valid even though it is subsequently found invalid. Since the purpose of the exclusionary rule is to deter police misconduct, and in this situation there is no police misconduct, the courts have permitted the introduction at trial of the seized evidence. Another exception to the exclusionary rule is "inevitable discovery." Illegally seized evidence may be introduced if it would have been likely to be discovered in the course of continuing investigation.

The Court has continued to uphold the exclusionary rule. In a 2006 victory for advocates of defendants' rights, the Court ruled unanimously that the Fourth Amendment requires that any evidence collected under an anticipatory warrant—one presented by the police yet not authorized by a judge—would be inadmissible at trial as a violation of the exclusionary rule.[85]

The Sixth Amendment and the Right to Counsel

Sixth Amendment
Part of the Bill of Rights that sets out the basic requirements of procedural due process for federal courts to follow in criminal trials. These include speedy and public trials, impartial juries, trials in the state where crime was committed, notice of the charges, the right to confront and obtain favorable witnesses, and the right to counsel.

The **Sixth Amendment** guarantees to an accused person "the Assistance of Counsel in his defense." In the past, this provision meant only that an individual could hire an attorney to represent him or her in court. Since most criminal defendants are too poor to hire private lawyers, this provision was of little assistance to many who found themselves on trial. Recognizing this, Congress required federal courts to provide an attorney for defendants who could not to afford one. This was first required in capital cases (where the death penalty is a possibility);[86] eventually, attorneys were provided to the poor in all federal criminal cases.[87] The Court also began to expand the right to counsel to other state offenses but did so in a piecemeal fashion that gave the states little direction. Given the high cost of providing legal counsel, this ambiguity often made it cost-effective for the states not to provide counsel at all.

These ambiguities came to an end with the Court's decision in *Gideon* v. *Wainwright* (1963).[88] Clarence Earl Gideon, a fifty-one-year-old drifter, was charged with breaking into a Panama City, Florida, pool hall and stealing beer, wine, and some change from a vending machine. At his trial, he asked the judge to appoint a lawyer for him because he was too poor to hire one himself. The judge refused, and Gideon was convicted and given a five-year prison term for petty larceny. The case against Gideon had not been strong, but as a layperson unfamiliar with the law and with trial practice and procedure, he was unable to point out its weaknesses.

The apparent inequities in the system that had resulted in Gideon's conviction continued to bother him. Eventually, he requested some paper from a prison guard, consulted books in the prison library, and then drafted and mailed a writ of *certiorari* to the U.S. Supreme Court asking it to overrule his conviction.

In a unanimous decision, the Supreme Court agreed with Gideon and his court-appointed lawyer, Abe Fortas, a future associate justice of the Supreme Court. Writing

for the Court, Justice Hugo Black explained that "lawyers in criminal courts are necessities, not luxuries." Therefore, the Court concluded, the state must provide an attorney to indigent defendants in felony cases. Underscoring the Court's point, Gideon was acquitted when he was retried with a lawyer to argue his case.

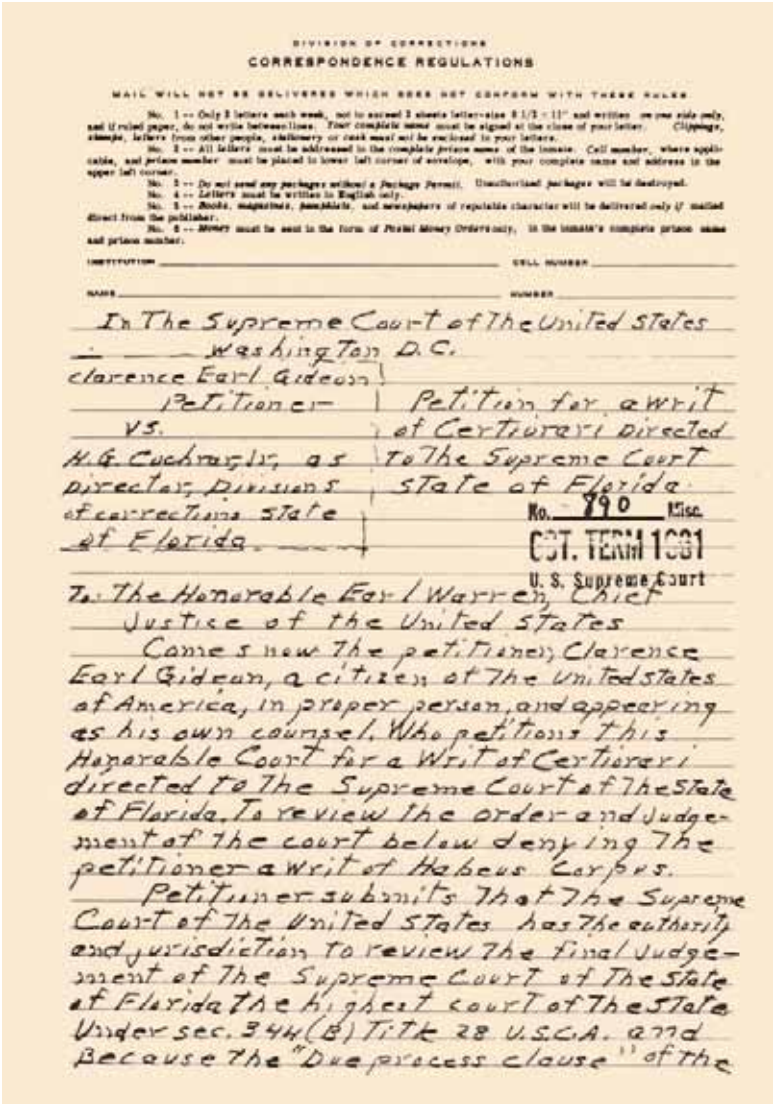
The Burger and Rehnquist Courts gradually expanded the *Gideon* rule. The justices first applied this standard to cases that were not felonies[89] and, later, to many cases where probation and future penalties were possibilities. In 2008, the Court also ruled that the right to counsel began at the accused's first appearance before a judge.[90]

The issue of legal representation also extends to questions of competence. Various courts have held that lawyers who fell asleep during trial, failed to put on a defense, or were drunk during the proceedings were "adequate." In 2005, however, the Supreme Court ruled that the Sixth Amendment's guarantees required lawyers to take reasonable steps to prepare for their clients' trial and sentencing, including examining their prior criminal history.[91]

The Sixth Amendment and Jury Trials

The Sixth Amendment (and, to a lesser extent, Article III of the Constitution) provides that a person accused of a crime shall enjoy the right to a speedy and public trial by an impartial jury—that is, a trial in which a group of the accused's peers act as a fact-finding, deliberative body to determine guilt or innocence. It also provides defendants the right to confront witnesses against them. The Supreme Court has held that jury trials must be available if a prison sentence of six or more months is possible.

What was the impact of* Gideon v. Wainwright *(1963)? When Clarence Earl Gideon wrote his petition for a writ of *certiorari* to the Supreme Court (asking the Court, in its discretion, to hear his case), he did not know that Chief Justice Earl Warren actually had instructed his law clerks to be on the lookout for a *habeas corpus* case (literally, "you have the body," which argues that the person in jail is being held unlawfully) that could be used to guarantee the assistance of counsel for defendants in criminal cases.



DIVISION OF CORRECTIONS
CORRESPONDENCE REGULATIONS

MAIL WILL NOT BE DELIVERED WHICH DOES NOT CONFORM WITH THESE RULES

No. 1 -- Only 3 letters each week, not to exceed 3 sheets letter-size 8 1/2 x 11" and written on one side only, and if ruled paper, do not write between lines. Your complete name must be signed at the close of your letter. Clippings, stamps, letters from other people, stationery or cash must not be enclosed in your letters.

No. 2 -- All letters must be addressed in the complete prison name of the inmate. Cell number, where applicable, and prison number must be placed in lower left corner of envelope, with your complete name and address in the upper left corner.

No. 3 -- Do not send any packages without a Package Permit. Unauthorized packages will be destroyed.

No. 4 -- Letters must be written in English only.

No. 5 -- Books, magazines, pamphlets, and newspapers of reputable character will be delivered only if mailed direct from the publisher.

No. 6 -- Money must be sent in the form of Postal Money Orders only, in the inmate's complete prison name and prison number.

INSTITUTION _____ CELL NUMBER _____

NAME _____ NUMBER _____

In The Supreme Court of The United States
Washington D.C.
Clarence Earl Gideon
Petitioner-
vs.
H.G. Cochran Jr, as director, Division of corrections State of Florida.
Petition for a writ of Certiorari directed to The Supreme Court State of Florida

No. 790 Misc.
OCT. TERM 1961
U. S. Supreme Court

To The Honorable Earl Warren, Chief Justice of the United States

Comes now the petitioner, Clarence Earl Gideon, a citizen of the United States of America, in proper person, and appearing as his own counsel. Who petitions this Honorable Court for a Writ of Certiorari directed to The Supreme Court of The State of Florida. To review the order and Judgement of the court below denying the petitioner a writ of Habeus Corpus.

Petitioner submits That The Supreme Court of the United States has the authority and jurisdiction to review the final Judgement of the Supreme Court of the State of Florida The highest court of the State Under sec. 344(B) Title 28 U.S.C.A. and Because the "Due process clause" of the

Photo courtesy: Supreme Court Historical Society

Impartiality is a requirement of jury trials that has undergone significant change, with the method of selecting jurors being the most frequently challenged part of the process. Historically, lawyers had used peremptory challenges (those for which no cause needs to be given) to exclude minorities from juries, especially when the defendant was a member of a minority group. In 1954, for example, the U.S. Supreme Court ruled that Hispanics were entitled to a jury trial that included other Hispanics.[92] And, in 1986, the Court ruled that the use of peremptory challenges specifically to exclude African American jurors violated the equal protection clause of the Fourteenth Amendment.[93]

In 1994, the Supreme Court answered the major remaining unanswered question about jury selection: can lawyers exclude women from juries through their use of peremptory challenges? This question came up frequently because in rape trials and

sex discrimination cases, one side or another often considers it advantageous to select jurors on the basis of their sex. The Supreme Court ruled that the equal protection clause prohibits discrimination in jury selection on the basis of gender. Thus, lawyers cannot strike all potential male jurors based on the belief that males might be more sympathetic to the arguments of a man charged in a paternity suit, a rape trial, or a domestic violence suit, for example.[94]

The right to confront witnesses at trial also is protected by the Sixth Amendment. In 1990, however, the Supreme Court ruled that this right was not absolute and the testimony of a six-year-old alleged child abuse victim via one-way closed circuit television was permissible. The clause's central purpose, said the Court, was to ensure the reliability of testimony by subjecting it to rigorous examination in an adversarial proceeding.[95] In this case, the child was questioned out of the presence of the defendant, who was in communication with his defense and prosecuting attorneys. The defendant, along with the judge and jury, watched the testimony.

The Eighth Amendment and Cruel and Unusual Punishment

Eighth Amendment
Part of the Bill of Rights that states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Among its protections, the **Eighth Amendment** prohibits "cruel and unusual punishments," a concept rooted in the English common-law tradition. Interestingly, today the United States is the only western nation to put people to death for committing crimes. Not surprisingly, there are tremendous regional differences in the imposition of the death penalty, with the South leading in the number of men and women executed each year.

The death penalty was in use in all of the colonies at the time the U.S. Constitution was adopted, and its constitutionality went unquestioned. In fact, in two separate cases in the late 1800s, the Supreme Court ruled that deaths by public shooting[96] and electrocution were not "cruel and unusual" forms of punishment in the same category as "punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like."[97]

In the 1960s, the NAACP Legal Defense and Educational Fund (LDF), believing that the death penalty was applied more frequently to African Americans than to members of other groups, orchestrated a carefully designed legal attack on its constitutionality.[98] Public opinion polls revealed that in 1971, on the eve of the LDF's first major death sentence case to reach the Supreme Court, public support for the death penalty had fallen below 50 percent. With the timing just right, in *Furman* v. *Georgia* (1972), the Supreme Court effectively put an end to capital punishment, at least in the short run.[99] The Court ruled that because the death penalty often was imposed in an arbitrary manner, it constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Following *Furman*, several state legislatures enacted new laws designed to meet the Court's objections to the arbitrary nature of the sentence. In 1976, in *Gregg* v. *Georgia*, Georgia's rewritten death penalty statute was ruled constitutional by the Supreme Court in a 7–2 decision.[100] (To learn more about the controversy over the death penalty, see Join the Debate: Should the Death Penalty Be Abolished?)

This ruling did not deter the NAACP LDF from continuing to bring death penalty cases before the Court. In 1987, a 5–4 Court ruled that imposition of the death penalty—even when it appeared to discriminate against African Americans—did not violate the equal protection clause.[101] It noted that even if statistics show clear discrimination, in order to reverse an individual sentence, there must be a showing of racial discrimination in the case at hand.

Four years later, a case involving the same defendant produced an equally important ruling on the death penalty and criminal procedure from the U.S. Supreme

Join the DEBATE | Should the Death Penalty Be Abolished?

The use of capital punishment, otherwise known as the death penalty, has declined considerably in the United States since its peak in 1999. Although there were almost 3,300 people on death row in 2009, only 106 people were sentenced to death, and 52 people were executed. According to a 2009 Gallup poll, public support for the death penalty has declined, with only 65 percent of the general public supporting the use of the death penalty today versus 80 percent in 1994.[a] The debate over the death penalty raises issues about the fundamental fairness of the U.S. system of justice. Many Americans worry that innocent people might be put to death, despite all the procedural safeguards in the court system to prevent mistakes. The Innocence Project, a nonprofit organization, has been working since 1992 to use DNA evidence to exonerate those wrongly convicted of crimes. As of February 2010, the group's efforts led to the release of 250 people, 16 of them on death row.

Supporters of the death penalty believe the consequence for taking someone else's life should be the loss of the criminal's life, and that doing so will deter other people from committing murder. However, while Texas executes more people than all of the rest of the states combined, it consistently has one of the highest murder rates in the country. Given these challenges, does the death penalty constitute cruel and unusual punishment? Is the death penalty fair? Should the death penalty be abolished?

To develop an ARGUMENT FOR abolition of the death penalty, think about how:

- **The death penalty seems to be cruel and unusual punishment.** Why is the United States alone among Western countries in its continued use of the death penalty? Do constitutional prohibitions against cruel and unusual punishment take on new meaning in a global context?
- **Innocent people may be put to death for crimes they did not commit.** How can an imperfect system ensure that only guilty people are executed? What are the consequences of executing an innocent person? Are the constitutional guarantees provided for criminal defendants sufficient to ensure a fair trial and just decision?
- **The death penalty has been applied unevenly with respect to race and gender.** How much more likely are minorities to be sentenced to death than whites for committing the same types of crimes? Does uneven application of the death penalty constitute a violation of the equal protection clause? Do gender and racial disparities in executions suggest that the death penalty is fundamentally unfair?

To develop an ARGUMENT AGAINST abolition of the death penalty, think about how:

- **Since 1976, the Supreme Court has repeatedly upheld the constitutionality of the death penalty.** Did the Framers of the U.S. Constitution view the death penalty as cruel and unusual punishment? With almost 3,300 people on death row in 37 states, can the death penalty be considered an unusual punishment? Doesn't the use of lethal injection limit the cruelness of the punishment as defined by the Eighth Amendment?
- **The availability of DNA testing and careful application of the rule of law can ensure that only guilty people are put to death.** In what ways do the constitutional guarantees provided to criminal defendants under the Fourth, Fifth, Sixth, and Eighth Amendments ensure that death penalty cases are fair and just? How do the decisions of the U.S. Supreme Court in cases dealing with the mentally retarded and minors ensure the fair application of the death penalty?
- **The death penalty is a cost-effective way to deter capital offenses.** How does the death penalty help to deter criminal activity? In what ways does the death penalty help states conserve money?

Photo courtesy: Courtesy Nick Anderson/Cartoonist Group. Reprinted with permission. All rights reserved.

How do states vary in their application of the death penalty? This cartoon offers a social commentary on the administration of the death penalty in Texas, which leads the nation in the number of executions.

[a]Lydia Saad, "Four Moral Issues Sharply Divide Americans," www.gallup.com.

Court. In the second case, the Court held that new issues could not be raised on appeal, even if there was some state error. The case, *McCleskey* v. *Zant* (1991), produced new standards designed to make it much more difficult for death-row inmates to file repeated appeals.[102] Justice Lewis Powell, one of those in the five-person majority, later said (after his retirement) that he regretted his vote and should have voted the other way.

Although the Supreme Court as recently as 2008 has upheld the constitutionality of the death penalty by lethal injection,[103] it has made some exceptions to this view. The Court, for example, has exempted two key classes of people from the death penalty: those who are mentally retarded and those under the age of eighteen.[104]

PROTECTING THE WRONGFULLY CONVICTED At the state level, a move to at least stay executions took on momentum in March 2000 when Governor George Ryan (R–IL) ordered a moratorium on all executions. Ryan, a death penalty proponent, became disturbed by new evidence collected as a class project by Northwestern University students. The students unearthed information that led to the release of thirteen men on the state's death row. The specter of allowing death sentences to continue in light of evidence showing so many men were wrongly convicted prompted Ryan's much publicized action. Soon thereafter, the Democratic governor of Maryland followed suit after receiving evidence that blacks were much more likely to be sentenced to death than whites; however, the Republican governor who succeeded him lifted the stay.

Before leaving office in January 2003, Illinois Governor Ryan continued his anti-death-penalty crusade by commuting the sentences of 167 death-row inmates, giving them life in prison instead. This action constituted the single largest anti-death-penalty action since the Court's decision in *Gregg*, and it spurred national conversation on the death penalty, which, in recent polls, has seen its lowest levels of support since 1978.

In another effort to verify that those on death row are not there wrongly, several states offer free DNA testing to death-row inmates. The U.S. Supreme Court recognized the potential exculpatory power of DNA evidence in *House* v. *Bell* (2006). In this case, the Court ruled a Tennessee death-row inmate who had exhausted other federal appeals was entitled to an exception to more stringent federal appeals rules due to DNA and related evidence suggesting his innocence.[105] However, the Court decided in 2009 that convicted inmates do not have a constitutional right to DNA testing.[106]

The Right to Privacy

★ **5.6 . . . Explain the origin and significance of the right to privacy.**

right to privacy
The right to be left alone; a judicially created principle encompassing a variety of individual actions protected by the penumbras cast by several constitutional amendments, including the First, Third, Fourth, Ninth, and Fourteenth Amendments.

To this point, we have discussed rights and freedoms that have been derived fairly directly from specific guarantees contained in the Bill of Rights. However, the U.S. Supreme Court also has given protection to rights not enumerated specifically in the Constitution. Although silent about the **right to privacy,** the Bill of Rights contains many indications that the Framers expected that some areas of life were off limits to governmental regulation. The liberty to practice one's religion guaranteed in the First Amendment implies the right to exercise private, personal beliefs. The guarantee against unreasonable searches and seizures contained in the Fourth Amendment similarly implies that persons are to be secure in their homes and should not fear that police will show up at their doorsteps without cause. As early as 1928, Justice Louis

The Living Constitution

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

—NINTH AMENDMENT

This amendment simply reiterates the belief that rights not specifically enumerated in the Bill of Rights exist and are retained by the people. It was added to assuage the concerns of Federalists, such as James Madison, who feared that the enumeration of so many rights and liberties in the first eight amendments to the Constitution would result in the denial of rights that were not enumerated.

Until 1965, the Ninth Amendment was rarely mentioned by the Court. In that year, however, it was used for the first time by the Court as a positive affirmation of a particular liberty—marital privacy. Although privacy is not mentioned in the Constitution, it was—according to the Court—one of those fundamental freedoms that the drafters of the Bill of Rights implied as retained. Since 1965, the Court has ruled in favor of a host of fundamental liberties guaranteed by the Ninth Amendment, often in combination with other specific guarantees, including the right to have an abortion.

CRITICAL THINKING QUESTIONS

1. How can the U.S. justice system dictate the definition of a fundamental right if the Constitution does not specifically enumerate that right?
2. How might public opinion affect judicial interpretations of the Ninth Amendment?
3. What other implied rights should be protected by the Ninth Amendment?

Brandeis hailed privacy as "the right to be left alone—the most comprehensive of rights and the right most valued by civilized men."[107] It was not until 1965, however, that the Court attempted to explain the origins of this right. (To learn more about the Ninth Amendment, see The Living Constitution: Ninth Amendment.)

Birth Control

Today, most Americans take access to birth control as a matter of course. Condoms are sold in the grocery store, and some television stations air ads for them. Easy access to birth control, however, wasn't always the case. Many states often barred the sale of contraceptives to minors, prohibited the display of contraceptives, or even banned their sale altogether. One of the last states to do away with these kinds of laws was Connecticut. It outlawed the sale of all forms of birth control and even prohibited physicians from discussing it with their married patients until the Supreme Court ruled its restrictive laws unconstitutional.

Griswold v. *Connecticut* (1965) involved a challenge to the constitutionality of an 1879 Connecticut law prohibiting the dissemination of information about and/or the sale of contraceptives.[108] In *Griswold*, seven justices decided that various portions of the Bill of Rights, including the First, Third, Fourth, Ninth, and Fourteenth Amendments, cast what the Court called "penumbras" (unstated liberties on the fringes or in the shadow of more explicitly stated rights), thereby creating zones of privacy, including a married couple's right to plan a family. Thus, the Connecticut

TIMELINE: The Supreme Court and the Right to Privacy

1965 ***Griswold* v. *Connecticut*—** The right to privacy is explained by the Court and used to justify striking down a Connecticut statute prohibiting married couples' access to birth control.

1973 ***Roe* v. *Wade***—The Court finds that a woman has a right to have an abortion based on her right to privacy.

1980 ***Harris* v. *McRae*—**The Court upholds the Hyde Amendment, ruling that federal funds cannot be used to pay for poor women's abortions.

1986 ***Bowers* v. *Hardwick***— The Court upholds Georgia's sodomy law, finding that gay men and lesbians have no privacy rights.

statute was ruled unconstitutional because it violated marital privacy, a right the Court concluded could be read into the U.S. Constitution through interpreting several amendments.

Later, the Court expanded the right to privacy to include the right of unmarried individuals to have access to contraceptives. "If the right of privacy means anything," wrote Justice William J. Brennan Jr., "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."[109] This right to privacy was to be the basis for later decisions from the Court, including the right to secure an abortion.

What was the outcome of Griswold *v.* Connecticut *(1965)?* In this photo, Estelle Griswold (left), executive director of the Planned Parenthood League of Connecticut, and Cornelia Jahncke, its president, celebrate the Supreme Court's ruling in *Griswold* v. *Connecticut* (1965). *Griswold* invalidated a Connecticut law that made selling contraceptives or disseminating information about contraception to married couples illegal.

Photo courtesy: Bettmann/Corbis

Abortion

In the early 1960s, two birth-related tragedies occurred. Severely deformed babies were born to European women who had been given the drug thalidomide while pregnant, and, in the United States, a nationwide measles epidemic

1989 ***Webster* v. *Reproductive Health Services*—** The Court comes close to overruling *Roe*; invites states to fashion abortion restrictions.

1992 ***Planned Parenthood of Southeastern Pennsylvania* v. *Casey*—**By the narrowest of margins, the Court limits *Roe* by abolishing its trimester approach.

2003 ***Lawrence* v. *Texas*—**In overruling *Bowers*, the Court, for the first time, concludes that the right to privacy applies to homosexuals.

2007 ***Gonzales* v. *Carhart*—**Supreme Court upholds the federal Partial Birth Abortion Ban Act.

resulted in the birth of babies with severe problems. The increasing medical safety of abortions and the growing women's rights movement combined with these tragedies to put pressure on the legal and medical establishments to support laws that would guarantee a woman's access to a safe and legal abortion.

By the late 1960s, fourteen states had voted to liberalize their abortion policies, and four states decriminalized abortion in the early stages of pregnancy. But, many women's rights activists wanted more. They argued that the decision to carry a pregnancy to term was a woman's fundamental right. In 1973, in one of the most controversial decisions ever handed down, seven members of the Court agreed with this position.

The woman whose case became the catalyst for pro-choice and pro-life groups was Norma McCorvey, an itinerant circus worker. The mother of a toddler she was unable to care for, McCorvey could not leave another child in her mother's care. So, she decided to terminate her second pregnancy. She was unable to secure a legal abortion and was frightened by the conditions she found when she sought an illegal abortion. McCorvey turned to two young Texas lawyers who were looking for a plaintiff to bring a lawsuit to challenge Texas's restrictive statute. McCorvey, who was unable to obtain a legal abortion, later gave birth and put the baby up for adoption. Nevertheless, she allowed her lawyers to proceed with the case using her as their plaintiff. Her lawyers used the pseudonym Jane Roe for McCorvey as they challenged the Texas law as enforced by Henry Wade, the district attorney for Dallas County, Texas.

When the case finally came before the Supreme Court, Justice Harry A. Blackmun, a former lawyer at the Mayo Clinic, relied heavily on medical evidence to rule that the Texas law violated a woman's constitutionally guaranteed right to privacy, which he argued included her decision to terminate a pregnancy. Writing for the majority in ***Roe* v. *Wade* (1973),** Blackmun divided pregnancy into three stages. In the first

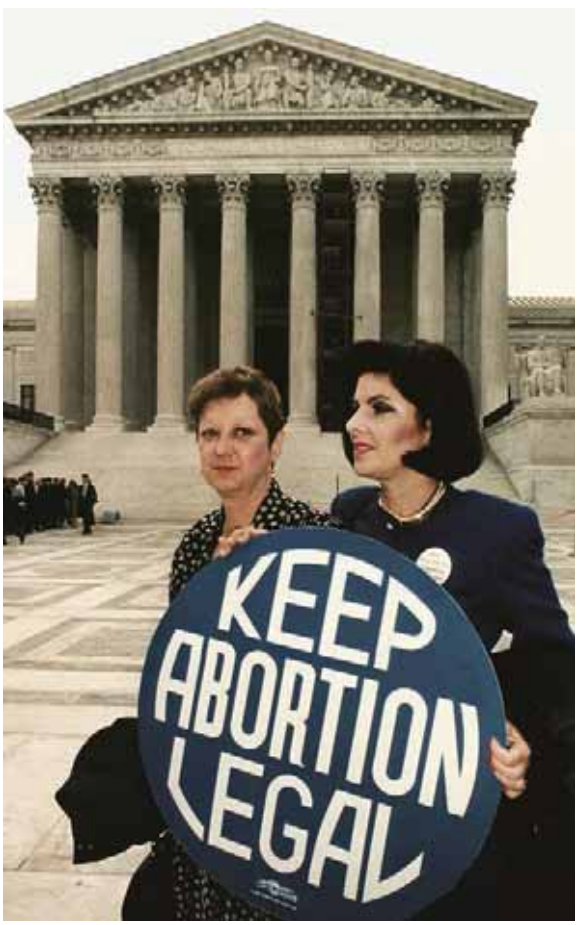
***Roe* v. *Wade* (1973)**
The Supreme Court found that a woman's right to an abortion was protected by the right to privacy that could be implied from specific guarantees found in the Bill of Rights applied to the states through the Fourteenth Amendment.

trimester, a woman's right to privacy gave her an absolute right (in consultation with her physician), free from state interference, to terminate her pregnancy. In the second trimester, the state's interest in the health of the mother gave it the right to regulate abortions—but only to protect the woman's health. Only in the third trimester—when the fetus becomes potentially viable—did the Court find that the state's interest in potential life outweighed a woman's privacy interests. Even in the third trimester, however, abortions to save the life or health of the mother were to be legal.[110]

Roe v. *Wade* unleashed a torrent of political controversy. Pro-life groups, caught off guard, scrambled to recoup their losses in Congress. Representative Henry Hyde (R–IL) persuaded Congress to ban the use of Medicaid funds for abortions for poor women, and the constitutionality of the Hyde Amendment was upheld by the Supreme Court in 1977 and again in 1980.[111] The issue soon became political—it was incorporated in the Republican Party's platform in 1980—and quickly polarized both major political parties.

Since that time, the right to an abortion and its constitutional underpinnings in the right to privacy have been under attack by well-organized pro-life groups. The administrations of Ronald Reagan and George Bush were strong abortion opponents,

Who was Jane Roe? Norma McCorvey first stepped into the national spotlight as the "Jane Roe" of *Roe* v. *Wade* (1973). But, in 1995, McCorvey made a surprising announcement—she had become pro-life. The photo on the left shows McCorvey at a pro-choice rally in 1987. The photo on the right shows her at a pro-life protest in Texas in 2003.



Photos courtesy: (left) Greg Gibson/Agence France Presse/Getty Images; (right) AP/Wide World Photos

and their Justice Departments regularly urged the Court to overrule *Roe*. They came close to victory in *Webster* v. *Reproductive Health Services* (1989).[112] In *Webster*, the Court upheld state-required fetal viability tests in the second trimester, even though these tests increased the cost of an abortion considerably. The Court also upheld Missouri's refusal to allow abortions to be performed in state-supported hospitals or by state-funded doctors or nurses. Perhaps most noteworthy, however, was that four justices seemed willing to overrule *Roe* v. *Wade* and that Justice Antonin Scalia publicly rebuked his colleague, Justice Sandra Day O'Connor, then the only woman on the Court, for failing to provide the critical fifth vote to overrule *Roe*.

After *Webster,* states began to enact more restrictive legislation. In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992), Justices O'Connor, Anthony Kennedy, and David Souter, in a jointly authored opinion, wrote that Pennsylvania could limit abortions so long as its regulations did not pose "an undue burden" on pregnant women.[113] The narrowly supported standard, by which the Court upheld a twenty-four-hour waiting period and parental consent requirements, did not overrule *Roe*, but clearly limited its scope by abolishing its trimester approach and substituting the undue burden standard for the trimester approach used in *Roe*.

In the early 1990s, newly elected pro-choice President Bill Clinton appointed two supporters of abortion rights, Ruth Bader Ginsburg and Stephen Breyer, to the Supreme Court. Meanwhile, Republican-controlled Congresses made repeated attempts to restrict abortion rights. In March 1996 and again in 1998, Congress passed and sent to President Clinton a bill to ban—for the first time—a specific procedure used in late-term abortions. The president repeatedly vetoed the federal Partial Birth Abortion Act. Many state legislatures, nonetheless, passed their own versions of the law. In 2000, the Supreme Court, however, ruled 5–4 in *Stenberg* v. *Carhart* that a Nebraska partial birth abortion statute was unconstitutionally vague because it failed to contain an exemption for a woman's health. The law, therefore, was unenforceable and called into question the partial birth abortion laws of twenty-nine other states.[114]

But, by October 2003, Republican control of the White House and both houses of Congress facilitated passage of the federal Partial Birth Abortion Ban Act. Pro-choice groups immediately filed lawsuits challenging the constitutionality of this law. The Supreme Court heard oral arguments on the challenge to the federal ban the day after the 2006 midterm elections. In a 5–4 decision, *Gonzales* v. *Carhart* (2007), the Roberts Court revealed the direction it was heading in abortion cases. Over the strong objections of Justice Ginsburg, Justice Kennedy's opinion for the majority upheld the federal act although, like the law at issue in *Stenberg*, it contained no exceptions for the health of the mother. This ruling was viewed as a significant step toward reversing *Roe* v. *Wade* altogether.

The Court's decision in *Gonzales* has empowered states to enact abortion regulations with new gusto. In 2010, for example, Nebraska enacted legislation prohibiting most abortions after 20 weeks. Other states, such as Oklahoma, have laws or are considering legislation that require doctors to show women an ultrasound image of the fetus before they are allowed to abort. And, in Utah, a new law categorizes self-induced abortions as homicide.[115]

Homosexuality

It was not until 2003 that the U.S. Supreme Court ruled that an individual's constitutional right to privacy, which provided the basis for the *Griswold* (contraceptives) and *Roe* (abortion) decisions, prevented states from criminalizing private sexual behavior. This monumental decision invalidated the laws of fourteen states.

Do all Americans deserve the same freedoms and liberties? Tyron Garner (left) and John Geddes Lawrence (center), the plaintiffs in *Lawrence* v. *Texas* (2003), are shown here with their attorney. The ruling in this case proved to be a huge victory for advocates of gay rights, as it deemed anti-sodomy laws unconstitutional.

Photo courtesy: AP/Wide World Photos

In *Lawrence* v. *Texas* (2003), six members of the Court overruled its decision in *Bowers* v. *Hardwick* (1986) which had upheld anti-sodomy laws—and found that the Texas law was unconstitutional; five justices found it violated fundamental privacy rights.[116] Justice Sandra Day O'Connor agreed that the law was unconstitutional, but concluded that it was an equal protection violation. (To learn more about the equal protection clause of the Fourteenth Amendment, see **chapter 6**.) Although Justice Antonin Scalia issued a stinging dissent, charging that "the Court has largely signed on to the so-called homosexual agenda," the majority of the Court was unswayed.

TOWARD REFORM: Civil Liberties and Combating Terrorism

★ **5.7 . . . Evaluate how reforms to combat terrorism have affected civil liberties.**

After September 11, 2001, the George W. Bush administration, Congress, and the courts all operated in what Secretary of State Condoleezza Rice dubbed "an alternate reality," where Bill of Rights guarantees were suspended in a time of war, just as they had been in the Civil War and in World Wars I and II.[117] The USA PATRIOT Act, the Military Commissions Act, and a series of secret Department of Justice memos all altered the state of civil liberties in the United States. Here, we detail the provisions of these actions, as well as subsequent actions by the Barack Obama administration, and explain how they have affected the civil liberties discussed in this chapter.

The First Amendment

Both the 2001 USA PATRIOT Act and the 2006 Military Commissions Act contain a variety of major and minor interferences with the civil liberties that Americans, as well as those visiting our shores, have come to expect. The USA PATRIOT Act, for example, violates the First Amendment's free speech guarantees by barring those who have been subject to search orders from telling anyone about those orders, even in situations where no need for secrecy can be proven. It also authorizes the Federal Bureau of Investigation to investigate citizens who choose to exercise their freedom of speech with no need to prove that any parts of their speech might be labeled illegal.

Another potential infringement of the First Amendment occurred right after the September 11, 2001, terrorist attacks, when it was made clear that members of the media were under strong constraints to report about only positive aspects of U.S. efforts to combat terrorism. And, while the Bush administration decried any leaks of information about its deliberations or actions, the administration selectively leaked information that led to conservative columnist Robert Novak revealing the identity of Valerie Plame, a CIA operative.

In addition, respect for religious practices fell by the wayside in the wake of the war on terrorism. For example, many Muslim detainees captured in Iraq and Afghanistan were fed pork, a violation of basic Islamic dietary laws. Some were stripped naked in front of members of the opposite sex, another religious violation.

The Fourth Amendment

The USA PATRIOT Act enhances the ability of the government to curtail specific search and seizure restrictions in four areas. First, it allows the government to examine an individual's private records held by third parties. This includes allowing the FBI to force anyone, including physicians, libraries, bookshops, colleges and universities, and Internet service providers, to turn over all records they have on a particular individual. Second, it expands the government's right to search private property without notice to the owner. Third, according to the American Civil Liberties Union, the act "expands a narrow exception to the Fourth Amendment that had been created for the collection of foreign intelligence information."[118] Finally, the act expands an exception for spying that collects "addressing information" about where and to whom communications are going, as opposed to what is contained in the documents.

Judicial oversight of these governmental powers is virtually nonexistent. Proper governmental authorities need only certify to a judge, without any evidence, that the requested search meets the statute's broad criteria. Moreover, the legislation deprives judges of the authority to reject such applications.

Other Fourth Amendment violations include the ability to conduct searches without a warrant. The government also does not have to demonstrate probable cause that a person has, or might, commit a crime. Thus, the USA PATRIOT Act also goes against key elements of the due process rights guaranteed by the Fifth Amendment.

Due Process Rights

Illegal incarceration and torture are federal crimes, and the Supreme Court ruled in 2004 that detainees have a right of *habeas corpus*.[119] However, the Bush administration argued that under the Military Commissions Act of 2006, alien victims of torture had significantly reduced rights of *habeas corpus*. The Military Commissions Act also eliminated the right to bring any challenge to "detention, transfer, treatment, trial, or conditions of confinement" of detainees. It

Where does the United States hold unlawful combatants? For much of the War on Terror, the U.S. government held detainees on a military base in Guantanamo Bay, Cuba, shown here. In 2009, President Barack Obama proposed closing the base and relocating prisoners to Illinois.

Photo courtesy: AP/Wide World Photos

ANALYZING VISUALS

Trying Suspected Terrorists

This political cartoon was published in November 2009, just days after Attorney General Eric Holder announced that Khalid Shaikh Mohammed would be tried in a Manhattan federal courthouse for his role in the September 11, 2001, terrorist attacks on the World Trade Center in New York City. Look at the cartoon and consider the questions .

- To what is the trial of Khalid Shaikh Mohammed being compared?
- Based on what is depicted in this cartoon, do you think the cartoonist supports plans to hold the trial in a federal courthouse located in New York City? Why or why not?
- Why might someone be opposed to trying suspected terrorists in courts so close to where the terrorist attacks occurred? Why might someone support such trials?
- Should Americans worry about protecting the civil liberties of non-U.S. citizens who have been accused of committing heinous attacks against the United States? Why or why not?

allowed the government to declare permanent resident aliens to be enemy combatants and enabled the government to jail these people indefinitely without any opportunity to file a writ of *habeas corpus*. In 2008, in a surprising setback for the Bush administration, the Roberts Court ruled parts of the act unconstitutional, finding that any detainees could challenge their extended incarceration in federal court.[120]

Many suspected terrorists have also been held against their will in secret offshore prisons, known as black sites. In September 2006, President Bush acknowledged the

existence of these facilities, moving fourteen such detainees to the detention facility at Guantanamo Bay, Cuba. The conditions of this facility sparked intense debate, as opponents cited numerous accusations of torture as well as possible violations of human rights. Those in support of the continued use of Guantanamo said that the detainees were unlawful combatants and not war criminals subject to the provisions of the Geneva Convention. After President Barack Obama took office in 2009, he vowed to close Guantanamo by January 2010 and move detainees to a facility in Illinois. While Obama did not meet that deadline, he appears to have made some efforts to change the policies enforced by the Bush administration by holding criminal trials and military tribunals for several existing Guantanamo detainees. (To learn more about the trials of Guantanamo detainees, see Analyzing Visuals: Trying Suspected Terrorists.)

The Sixth Amendment right to trial by jury has also been curtailed by recent federal activity. Although those declared enemy combatants can no longer be held indefinitely for trial by military tribunals, they still do not have access to the evidence against them, and additional evidence may be obtained through coercion or torture. Trials of enemy combatants are closed, and people tried in these courts do not have a right to an attorney of their choosing. The federal government's activity in these tribunals was limited by the Supreme Court,[121] but the Military Commissions Act returned these powers to the executive branch. The Obama administration, to the surprise of many observers, has done little to restore the rights revoked by these acts.

Finally, the Eighth Amendment's prohibition on cruel and unusual punishment has been the subject of great controversy. Since shortly after the terrorist attacks of September 11, 2001, there were rumors that many of the prisoners detained by the U.S. government were being treated in inhumane ways. In 2004, for example, photos of cruel treatment of prisoners held by the U.S. military in Abu Ghraib prison in Iraq surfaced. These photos led to calls for investigations at all levels of government. On the heels of this incident, the Justice Department declared torture "abhorrent" in a December 2004 legal memo. That position lasted but a short time. After Alberto Gonzales was sworn in as attorney general in February 2005, the department issued a secret memo endorsing harsh interrogation techniques. According to one Justice Department memo, interrogation practices were not to be considered illegal unless they produced pain equivalent to organ failure or death. Among the techniques authorized by the government were combinations of "painful physical and psychological tactics, including head-slapping, simulated drowning, and frigid temperatures."[122] The most controversial of these techniques is water-boarding, which simulates drowning. Although the Obama administration has harshly attacked the use of these kinds of tactics and techniques, it announced that those who committed these acts during the Bush administration would not be prosecuted.[123]

What Should I Have LEARNED?

Now that you have read this chapter, you should be able to:

★ **5.1 Trace the constitutional roots of civil liberties, p. 151.**

Most of the Framers originally opposed the Bill of Rights. Anti-Federalists, however, continued to stress the need for a bill of rights during the drive for ratification of the Constitution, and some states tried to make their ratification contingent on the addition of a bill of rights. Thus, during its first session, Congress sent the first ten amendments to the Constitution, the Bill of Rights, to the states for their ratification. Later, the addition of the Fourteenth Amendment allowed the Supreme Court to apply some of the amendments to the states through a process called selective incorporation.

★ 5.2 Describe the First Amendment guarantee of freedom of religion, p. 154.

The First Amendment guarantees freedom of religion. The establishment clause, which prohibits the national government from establishing a religion, does not, according to Supreme Court interpretation, create an absolute wall between church and state. While the national and state governments may generally not give direct aid to religious groups, many forms of aid, especially many that benefit children, have been held to be constitutionally permissible. In contrast, the Court has generally barred mandatory prayer in public schools. The Court has allowed some governmental regulation of religious practices under the free exercise clause.

★ 5.3 Outline the First Amendment guarantees of and limitations on freedom of speech, press, assembly, and petition, p. 157.

Historically, one of the most volatile areas of constitutional interpretation has been in the interpretation of the First Amendment's mandate that "Congress shall make no law . . . abridging the freedom of speech or of the press." Like the establishment and free exercise clauses of the First Amendment, the speech and press clauses have not been interpreted as absolute bans against government regulation. The Supreme Court has ruled against prior restraint, thus protecting freedom of the press. The Court has also protected symbolic speech and hate speech as long as it does not become action. Areas of speech and publication unprotected by the First Amendment include libel, fighting words, and obscenity and pornography. The freedoms of peaceable assembly and petition are directly related to the freedoms of speech and of the press. As with other First Amendment rights, the Supreme Court has become the arbiter between the people's right to dissent and the government's need to promote security.

★ 5.4 Summarize changes in the interpretation of the Second Amendment right to keep and bear arms, p. 163.

Initially, the right to bear arms was envisioned as dealing with state militias. Over the years, states and Congress have enacted various gun ownership restrictions with little Supreme Court interpretation. However, the Court ruled in *D.C.* v. *Heller* (2008) and *McDonald* v. *City of Chicago* (2010) that the Second Amendment protects an individual's right to own a firearm.

★ 5.5 Analyze the rights of criminal defendants found in the Bill of Rights, p. 164.

The Fourth, Fifth, Sixth, and Eighth Amendments provide a variety of procedural guarantees to individuals accused of crimes. The Fourth Amendment prohibits unreasonable searches and seizures, and the Court has generally refused to allow evidence seized in violation of this safeguard to be used at trial. The Fifth Amendment protects those who have been charged with crimes. It mandates the use of grand juries in cases of serious crimes. It also guarantees that "no person shall be compelled to be a witness against himself." The Supreme Court has interpreted this provision to require that the government inform the accused of his or her right to remain silent. This provision has also been interpreted to require that illegally obtained confessions must be excluded at trial. Finally, the Fifth Amendment's double jeopardy clause protects individuals from being tried twice for the same crimes in the same jurisdiction. The Sixth Amendment's guarantee of "assistance of counsel" has been interpreted by the Court to require that the government provide counsel to defendants unable to pay for it in cases where prison sentences may be imposed. The Sixth Amendment also requires an impartial jury, although the meaning of impartial continues to evolve through judicial interpretation. The Eighth Amendment's ban against "cruel and unusual punishments" has been held not to bar imposition of the death penalty.

★ 5.6 Explain the origin and significance of the right to privacy, p. 172.

The right to privacy is a judicially created right carved from the penumbras (unstated liberties implied by more explicitly stated rights) of several amendments, including the First, Third, Fourth, Ninth, and Fourteenth Amendments. The court has found unconstitutional statutes that limit access to birth control, prohibit abortion, and ban homosexual acts.

★ 5.7 Evaluate how reforms to combat terrorism have affected civil liberties, p. 178.

After the terrorist attacks of September 11, 2001, reforms enacted by Congress and the executive branch dramatically altered civil liberties in the United States. Critics charge that a host of constitutional guarantees have been significantly compromised, while supporters say that these reforms are necessary to protect national security in a time of war.

Test Yourself: Civil Liberties

5.1 Trace the constitutional roots of civil liberties, p. 151.

Which of the following amendments makes some of the provisions of the Bill of Rights applicable to the states?

A. Fifth
B. Tenth
C. Eleventh
D. Fourteenth
E. Fifteenth

5.2 Describe the First Amendment guarantee of freedom of religion, p. 154.

The U.S. Supreme Court has interpreted the establishment clause to mean that

A. reciting prayer in classrooms is constitutional, as long as the prayer is nondenominational.
B. state university grounds cannot be used for worship.
C. a privately owned display of the Ten Commandments in a courthouse is unconstitutional.
D. student-led, student-initiated prayer at high school football games is constitutional.
E. allowing the government to lend books and computers to religious schools is in violation of the First Amendment.

5.3 Outline the First Amendment guarantees of and limitations on freedom of speech, press, assembly, and petition, p. 157.

Which of the following is NOT considered a protected form of speech?

A. Carrying a "Bong Hits 4 Jesus" banner during a school-sanctioned parade
B. Wearing black armbands to protest a war
C. Publishing secret documents in a newspaper if they were furnished illegally
D. Displaying a symbol of opposition to the U.S. government
E. Burning the American flag

5.4 Summarize changes in the interpretation of the Second Amendment right to keep and bear arms, p. 163.

The U.S. Supreme Court first ruled that the Second Amendment protects an individual's right to own a firearm in certain jurisdictions

A. in the early 1800s, when laws were passed to limit possession of firearms by slaves.
B. when Justice Roger B. Taney considered the right to own and carry arms a basic right of citizenship.
C. in *D.C.* v. *Heller* in 2008.
D. when a law that made sawed-off shotguns illegal was overturned in the 1930s.
E. in *Barron* v. *Baltimore* in 1833.

5.5 Analyze the rights of criminal defendants found in the Bill of Rights, p. 164.

When suspects are arrested and read their *Miranda* rights, the authorities are informing them of rights established by the _____ Amendment of the U.S. Constitution.

A. Second
B. Third
C. Fourth
D. Fifth
E. Seventh

5.6 Explain the origin and significance of the right to privacy, p. 172.

The U.S. Supreme Court deemed the controversial 2003 federal Partial Birth Abortion Ban Act

A. a law that could only be passed by the states.
B. unconstitutional because it contained no health exceptions for the mother.
C. constitutional despite its lack of health exceptions for the mother.
D. unconstitutional because it violated the three-trimester rule created by *Roe* v. *Wade* (1973).
E. constitutional based on the precedent of *Harris* v. *McRae* (1980).

5.7 Evaluate how reforms to combat terrorism have affected civil liberties, p. 178.

Why has the USA PATRIOT Act been considered unconstitutional by groups such as the American Civil Liberties Union?

A. It curtails protections against illegal search and seizure.
B. The act violates Second Amendment rights.
C. Non-U.S. citizens have no right to bring challenge to "detention, transfer, treatment, trial, or conditions of confinement" under provisions of the act.
D. It eliminates a right to trial by jury.
E. The act legalizes harsh punishment of prisoners of war.

Essay Questions

1. What freedoms are guaranteed by the First Amendment to the U.S. Constitution?
2. Who was Clarence Earl Gideon, and what impact did he have on the rights of the accused?
3. How does the U.S. Constitution imply a right to privacy?

mypoliscilab Exercises

Apply what you learned in this chapter on MyPoliSciLab.

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Post-Test
Chapter Exam
Flashcards

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Video: D.C.'s Right to Bear Arms

Explore on **mypoliscilab.com**

Simulation: You Are a Police Officer
Simulation: You Are a Supreme Court Justice Deciding a Free Speech Case
Simulation: Balancing Liberty and Security in a Time of War
Comparative: Comparing Civil Liberties
Timeline: Civil Liberties and National Security

Key Terms

bill of attainder, p. 164
Bill of Rights, p. 151
civil liberties, p. 150
civil rights, p. 150
clear and present danger test, p. 158
direct incitement test, p. 158
double jeopardy clause, p. 167
due process clause, p. 152
Eighth Amendment, p. 170
establishment clause, p. 154
exclusionary rule, p. 167
ex post facto law, p. 164
Fifth Amendment, p. 165
fighting words, p. 161
First Amendment, p. 154
Fourth Amendment, p. 164
free exercise clause, p. 154
fundamental freedoms, p. 153
incorporation doctrine, p. 152
Lemon test, p. 155
libel, p. 160
Miranda rights, p. 166
Miranda v. *Arizona* (1966), p. 166
New York Times Co. v. *Sullivan* (1964), p. 160
Ninth Amendment, p. 151
prior restraint, p. 157
right to privacy, p. 172
Roe v. *Wade* (1973), p. 175
selective incorporation, p. 153
Sixth Amendment, p. 168
slander, p. 160
substantive due process, p. 152
symbolic speech, p. 159
Tenth Amendment, p. 151
writ of *habeas corpus*, p. 164

To Learn More on Civil Liberties

In the Library

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On the Web

To learn more about differing views on civil liberties, including debates related to the war on terrorism, go to the home pages for the following groups:
American Civil Liberties Union at **www.aclu.org**
People for the American Way at **www.pfaw.org**
American Center for Law and Justice at **www.aclj.org**
The Federalist Society at **www.fed-soc.org.**

To learn more about the Supreme Court cases discussed in this chapter, go to Oyez: U.S. Supreme Court Media at **www.oyez.org**, and search on the case name. Or, go to the Legal Information Institute of Cornell University's Law School at **www.law.cornell.edu/supet/cases/topic.htm**, where you can search cases by topic.

To learn more about the different sides of the abortion debate, go to FLITE (Federal Legal Information Through Electronics) at **www.fedworld.gov/supcourt/**.

To learn more about civil liberties protections for homosexuals, go to Human Rights Campaign at **www.hrc.org**, and Lambda Legal at **www.lambdalegal.org**.