Civil Liberties
WHAT SHOULD I KNOW ABOUT . . .

- the roots of civil liberties and the Bill of Rights?
- First Amendment guarantees of freedom of religion?
- First Amendment guarantees of freedom of speech, press, assembly, and petition?
- the Second Amendment right to keep and bear arms?
- the rights of criminal defendants?
- the right to privacy?
- civil liberties and combating terrorism
When the Bill of Rights, which contains many of the most important protections of individual liberties, was written, its drafters were not thinking about issues such as abortion, gay rights, physician assisted suicide, or any of the other personal liberties discussed in this chapter.

The Constitution is nonabsolute in the nature of most civil liberties. Civil liberties are the personal guarantees and freedoms that the federal government cannot abridge, either by law or judicial interpretation. As guarantees of “freedom to” action, they place limitations on the power of the government to restrain or dictate individual’s actions. Civil rights, in contrast, provide “freedom from” a host of discriminatory actions and place the burden of protecting individuals on the government. (Civil rights are discussed in 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, in an era of a war on terrorism, it is important to consider what liberties should be accorded to those suspected of terrorist activity.

Civil liberties cases often fall to the judiciary, who 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. Many of the Supreme Court’s recent decisions, as well as actions of the George W. Bush administration in the aftermath of the September 11, 2001, terrorist attacks, are discussed in this...
chapter as we 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 discuss the meanings of other First Amendment guarantees: freedom of speech, press, assembly, and petition.
- Fourth, we will discuss the Second Amendment and the right to keep and bear arms.
- Fifth, we will analyze the reasons for many of the rights of criminal defendants found in the Bill of Rights and how those rights have been expanded and contracted by the U.S. Supreme Court.
- Sixth, we will discuss 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

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 didn't 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.¹ In the subsequent ratification debates, Federalists argued that a bill of rights was unnecessary. Not only did most state constitutions already contain those protections, but Federalists believed it was foolhardy to list things that the national government had no power to do.

Some Federalists, however, supported the idea. After the Philadelphia convention, for example, 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, who continued to doubt their utility. Madison believed that a list of protected rights might suggest that those not enumerated were not protected. Politics soon intervened, however, when Madison 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. So, 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.
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 reads “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Tenth Amendment
Part of the Bill of Rights that reiterates powers not delegated to the national government are reserved to the states or to the people.

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 ranging from economic liberty to criminal procedural rights to protection from arbitrary governmental action.

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.”2

The insistence of Anti-Federalists on a bill of rights, the fact that some states conditioned their ratification of the Constitution on the addition of these guarantees, and the disagreement among Federalists about writing specific liberty guarantees into the Constitution led to prompt congressional action to put an end to further controversy. This was a time when national stability and support for the new government particularly were needed. Thus, in 1789, Congress sent the proposed Bill of Rights to the states for ratification, which occurred in 1791.

The Bill of Rights, the first ten amendments to the Constitution, contains numerous specific guarantees, including those of free speech, press, and religion (for the full text, see the annotated Constitution that begins on page •••). The Ninth and Tenth Amendments, in particular, highlight Anti-Federalist fears of a too-powerful national government. The Ninth Amendment, strongly favored by Madison, makes it clear that this special listing of rights does not mean that others don’t exist. The Tenth Amendment reiterates that powers not delegated to the national government are reserved to the states or to the people.

The Incorporation Doctrine: The Bill of Rights made Applicable to the States
The Bill of Rights was intended to limit the powers 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 national Bill of Rights limited only the actions of the U.S. government and not those of the states.3 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.

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.4 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. As a consequence, states continued to pass 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 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 law that prohibited such advocacy. Although his conviction was upheld, in *Gitlow v. New York* (1925), the Supreme Court noted that the states were not completely free to limit forms of political expression:

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].

*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. After *Gitlow*, it took the Court six more years to incorporate another First Amendment freedom—that of the press. *Near v. Minnesota* (1931) was the first case in which the Supreme Court found that a state law violated freedom of the press as protected by the First Amendment. The Supreme Court ruled that “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.”

**Selective Incorporation and Fundamental Freedoms**

Not all 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. Fundamentally, most but not all of the protections found in the Bill of Rights are made applicable to the states via the Fourteenth Amendment.

**TABLE 5.1** The Selective Incorporation of the Bill of Rights

<table>
<thead>
<tr>
<th>Amendment</th>
<th>Right</th>
<th>Date</th>
<th>Case Incorporated</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Speech</td>
<td>1925</td>
<td><em>Gitlow v. New York</em></td>
</tr>
<tr>
<td>I</td>
<td>Press</td>
<td>1931</td>
<td><em>Near v. Minnesota</em></td>
</tr>
<tr>
<td>I</td>
<td>Assembly</td>
<td>1937</td>
<td><em>DeJonge v. Oregon</em></td>
</tr>
<tr>
<td>I</td>
<td>Religion</td>
<td>1940</td>
<td><em>Cantwell v. Connecticut</em></td>
</tr>
<tr>
<td>II</td>
<td>Bear arms</td>
<td></td>
<td>Not incorporated</td>
</tr>
<tr>
<td>III</td>
<td>No quartering of soldiers</td>
<td></td>
<td>Not incorporated (The quartering problem has not reoccurred since colonial times.)</td>
</tr>
<tr>
<td>IV</td>
<td>No unreasonable searches or seizures</td>
<td>1949</td>
<td><em>Wolf v. Colorado</em></td>
</tr>
<tr>
<td>V</td>
<td>Exclusionary rule</td>
<td>1961</td>
<td><em>Mapp v. Ohio</em></td>
</tr>
<tr>
<td>V</td>
<td>Self-incrimination</td>
<td>1964</td>
<td><em>Malloy v. Hogan</em></td>
</tr>
<tr>
<td>V</td>
<td>Grand jury indictment</td>
<td></td>
<td>Not incorporated (The trend in state criminal cases is away from grand juries.)</td>
</tr>
<tr>
<td>VI</td>
<td>Public trial</td>
<td>1948</td>
<td><em>In re Oliver</em></td>
</tr>
<tr>
<td>VI</td>
<td>Right to counsel</td>
<td>1963</td>
<td><em>Gideon v. Wainwright</em></td>
</tr>
<tr>
<td>VI</td>
<td>Confrontation of witnesses</td>
<td>1965</td>
<td><em>Pointer v. Texas</em></td>
</tr>
<tr>
<td>VI</td>
<td>Impartial trial</td>
<td>1966</td>
<td><em>Parker v. Gladden</em></td>
</tr>
<tr>
<td>VI</td>
<td>Speedy trial</td>
<td>1967</td>
<td><em>Klopfer v. North Carolina</em></td>
</tr>
<tr>
<td>VI</td>
<td>Compulsory trial</td>
<td>1967</td>
<td><em>Washington v. Texas</em></td>
</tr>
<tr>
<td>VI</td>
<td>Criminal jury trial</td>
<td>1968</td>
<td><em>Duncan v. Louisiana</em></td>
</tr>
<tr>
<td>VII</td>
<td>Civil jury trial</td>
<td></td>
<td>Not incorporated (Chief Justice Warren Burger wanted to abolish these trials.)</td>
</tr>
<tr>
<td>VIII</td>
<td>No cruel and unusual punishment</td>
<td>1962</td>
<td><em>Robinson v. California</em></td>
</tr>
<tr>
<td>VIII</td>
<td>No excessive fines or bail</td>
<td></td>
<td>Not incorporated</td>
</tr>
</tbody>
</table>
Damental 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. (See chapter 6, pp. xxx–xx, for a more complete discussion of standards of review.)

Selective incorporation requires the states to respect freedoms of press, speech, and assembly, among other rights. Other guarantees contained in the Second, Third, and Seventh Amendments, such as the right to bear arms, have not been incorporated because the Court has yet to consider them sufficiently fundamental to national notions of liberty and justice.

The rationale for selective incorporation was set out by the Court in *Palko v. Connecticut* (1937). 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 upheld Palko’s second conviction and the death sentence. They also chose not to bind states to the Fifth Amendment’s double jeopardy clause and concluded that protection from being tried twice (double jeopardy) was not a fundamental freedom. Palko died in Connecticut’s gas chamber one year later. *Palko* was overruled in 1969.

**First Amendment Guarantees: Freedom of Religion**

Many of the Framers were religious men, but they knew what evils could arise if the new nation was not founded with religious freedom as one of its core ideals. Although many colonists had fled Europe to escape religious persecution, most colonies actively persecuted those who did not belong to their predominant religious groups. Nevertheless, in 1774, the colonists uniformly were outraged when the British Parliament passed a law establishing Anglicanism and Roman Catholicism as official religions in the colonies. The First Continental Congress immediately sent a letter of protest announcing its “astonishment that a British Parliament should ever consent to establish . . . a religion [Catholicism] that has deluged [England] in blood and dispersed bigotry, persecution, murder and rebellion through every part of the world.”

In President Thomas Jefferson’s view, there was to be a near impenetrable wall of separation between church and state. Moreover, the Framers’ distaste for a national church or religion was 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.

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 (“Congress shall make no law respecting an establishment of religion”) directs the national government not to involve itself in 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." 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."9

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 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,11 the Court has held fast to the rule of strict separation between church and state when issues of prayer in school are involved. In Engel v. Vitale (1962), the Court first ruled that the recitation in public school classrooms of a twenty-two-word non-denominational prayer drafted by the local school board was unconstitutional.12

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 secular purpose; (2) neither advanced nor inhibited religion; and, (3) did not foster an excessive government entanglement with religion.13 But, since the early 1980s, 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.14

This decision was taken by many members of Congress as a sign that this principle could be extended to secondary and even primary schools. In 1984, Congress passed the Equal Access Act, which bars public schools from discriminating against groups of students on the basis of "religious, political, philosophical or other content of the speech at such meetings." The constitutionality of this law was upheld in 1990.15 In 1993, the Court also ruled that religious groups must be allowed to use public schools after hours if that access is also given to other community groups.16

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 groups’ 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.”

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. 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. 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. 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. Court watchers now are waiting to see how the addition of two new justices to the Court will affect these closely divided opinions.

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. 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. (To learn more about one municipality’s efforts to restrict free exercise, see Politics Now: How Can Protesters Go?)

The 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, snake handling, and polygamy—all practices of particular religious sects—have been upheld as constitutional when states have shown compelling reasons to regulate these practices. Nonetheless, the Court has made it clear that the free exercise clause requires that a state or the national government remain neutral toward 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. Earlier, however, in 1990, the Court ruled that the free exercise clause allowed Oregon to ban the use of sacramental peyote (an illegal hallucinogenic drug) in some Native American tribes’ traditional religious services.

Thinking Globally

Saudi Arabia and Free Exercise of Religion

In Saudi Arabia, public demonstration of religious affiliation or sentiment is forbidden except for Sunni Muslims who follow the austere Wahhabi interpretation of Islam. Public worship by non-Muslims is banned, and places of worship other than mosques are not permitted. The kingdom’s Shi’a Muslim minority’s religious practice is tightly controlled, and the construction of Shi’a mosques and religious community centers is restricted.

- Is it surprising that some countries officially support one religion at the expense of others? Why or why not?
- To what extent, should the United States pressure its allies, like Saudi Arabia, to adhere more closely to American constitutional values of freedom of religion?
- What criteria would you use to evaluate the level of religious freedom in a country?
This decision prompted a dramatic outcry. Congressional response was passage of the Religious Freedom Restoration Act, which specifically made the use of peyote in religious services legal.24 As recently as 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 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?"25

Although conflicts between religious beliefs and the government are often difficult to settle, the Court has attempted to walk the fine line between the free exercise and establishment clauses. 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.26 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,27 the Court ruled that Islamic prisoners can be denied the same right for security reasons.28

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

Today, some members of Congress criticize the movie industry and reality television shows for pandering to the least common denominator of society. Other groups criticize popular musicians for lyrics that denigrate women. Such criticism often comes with calls for increased restrictions and greater regulation of media outlets. This leads many civil libertarians to believe that the rights to speak, print, and assemble freely are being seriously threatened.29 (To learn more about content regulation, see chapter 15.)

Freedom 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 items 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 only 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 blessings 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 successfully prosecuted. Partisan Federalist judges 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 con-
victed under their provisions and the Democratic-Republican Congress allowed the acts to expire before the Federalist-controlled Supreme Court had an opportunity to rule on the constitutionality of these infringements 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, began to prosecute those who published articles critical of governmental policies. In the 1830s, at the urgings 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 refused to deliver northern abolitionist papers, a step that amounted to censorship of the 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 the Civil War, effectively suspending the free press protections of the First Amendment. He also suspended what is often called the “liberty writ,” the writ of habeas corpus. This removed the judiciary’s right to determine whether prisoners are being held lawfully and to free prisoners that a court determines are being held illegally. 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. 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 the growing immigrant population. 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. In 1925, however, states’ authority to regulate speech was severely restricted by the Court’s decision in Gitlow v. New York. (For more on Gitlow, see p. 000.)

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.” Under this test, known as the clear and present danger test, the circumstances surrounding an incident are important. Under Schenck, 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.

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.” 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.

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.

writ of habeas corpus A court order in which a judge requires authorities to prove that a prisoner is being lawfully held. Habeas corpus rights also imply that prisoners have a right to know what charges are being made against them.

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.”

direct incitement test A 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.
Why was the Pentagon Papers case important? A headline from the New York Times details legal proceedings in the Pentagon Papers case, New York Times Co. v. U.S., which was an important decision in establishing the boundaries of prior restraint.

Protected Speech and Publications

As discussed, the Supreme Court refuses to uphold the constitutionality of legislation that amounts to prior restraint of the press. Other types of speech and publication are also protected by the Court, including symbolic speech and hate speech.

PRIOR RESTRAINT With only a few exceptions, the Court has made it clear that it will not tolerate prior restraint of speech. For example, 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.34 In 1976, the Supreme Court went even further, noting in Nebraska Press Association v. Stuart (1976) that any attempt by the government to prevent expression carried "a heavy presumption" against its constitutionality.35 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, however, the Court ruled that a trial judge's prohibition defaming statements about a deceased public figure, in this case the high-profile attorney Johnnie Cochran, violated the First Amendment's protection of the right to free speech.36 The Court found that Cochran's death diminished his need for protection, and 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."37 To learn more about symbolic speech, see Ideas into Action: Political Speech and Mandatory Student Fees.

The Supreme Court first acknowledged that symbolic speech was entitled to First Amendment protection in Stromberg v. California (1931).38 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).39 Burning the American flag also has been held a form of protected symbolic speech, as discussed in chapter 2.
HATE SPEECH, UNPOPULAR SPEECH, AND SPEECH ZONES “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.” Still, says noted African American scholar Henry Louis Gates Jr., Kalven would be shocked to see the stance that some blacks 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.’”

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, 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.” 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.

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 reached the Supreme Court.

Unprotected Speech and Publications

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.
ideas into action

political student fees

universities across the united states often charge mandatory student fees that are used to pay for various activities and services across campus. these may include a range of health services (including sex education), student unions, technology, student publications, transportation, community service groups, and political organizations. mandatory fees have increased in recent years at most universities, sometimes more sharply than tuition increases, especially at public universities. at the university of wisconsin, madison, for example, mandatory student fees increased nearly 20 percent in 2007, while tuition increased about 5 percent.

the practice of charging mandatory fees can be controversial. in march 2000, the u.s. supreme court ruled unanimously in board of regents v. southworth that public universities could charge students a mandatory activity fee that could be used to facilitate extracurricular student political speech as long as the programs are neutral in their application.

scott southworth, a law student at the university of wisconsin, believed that the university’s mandatory fee was a violation of his first amendment right to free speech. he, along with several other law students, objected that their fees went to fund liberal groups. they particularly objected to the support of eighteen of the 125 various groups on campus that benefited from the mandatory activity fee, including the lesbian, gay, bisexual, and transgender center, the international socialist organization, and the campus women’s law center. the court ruled against southworth and for the university, underscoring the importance of universities being a forum for the free exchange of political and ideological ideas and objectives.

— should universities be allowed to charge mandatory fees to all students, even those who do not use some of the services?
— visit the web site of your university or a university near you. what kind of mandatory fees are currently in place, and where do such fees go? how difficult is it to find information on the subject?
— are you aware of any student organizations whose request for school funding has been rejected? if so, what reasons were given?
— how is paying for student organizations a way universities can reinforce rights guaranteed by the first amendment?

libel is a written statement that defames the character of a person. 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.”

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 more difficult. 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.

it is often more difficult for individuals the 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. 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.
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.\(^46\) Fighting words, which include “profanity, obscenity, and threats,” are therefore able to be regulated by the federal and state governments.

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.\(^47\)

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.”\(^48\) 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.”\(^49\)

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.” In general, even some hardcore pornography passed muster under the Roth test, prompting some 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.

What are the boundaries of free assembly? Members of an activist group calling itself the Granny Peace Brigade exercise their constitutional right to assemble in New York City to protest the Iraq War. In April of 2006, eighteen members of the group ranging in age from 59 to 91 were acquitted of two counts of disorderly conduct stemming from a protest against the war at a military recruitment center in Times Square. The judge ruled that the “grannies” had been wrongly arrested because there was credible evidence that they had left room for people to enter and leave the recruitment center.

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.
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 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.50

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.51

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. The U.S. Supreme Court has repeatedly found these laws unconstitutional.52 Yet, in 2008, a seven-justice majority decided in *United States U.S. v. Williams* that the PROTECT Act, which outlawed pandering of material believed to be child pornography, was not overly broad and did not abridge the freedom of speech guaranteed by the First Amendment.53

** 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.54 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 or actions taken at any event cross the line of constitutionality, the event itself may no longer be protected constitutionally. Absent that protection, leaders and attendees may be subject to governmental regulation and even criminal arrest, incarceration, or civil fines.

**The Second Amendment: The 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.
What did the Brady Bill accomplish? President Bill Clinton signs the Brady Bill into law. He is flanked by Vice President, which imposed a five day waiting period on handgun purchases, Al Gore, Attorney General Janet Reno, and James and Sarah Brady and their children.

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” as well as 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. Moreover, in *Dred Scott v. Sandford* (1857) (see chapter 3), Chief Justice Roger B. Taney listed the right to own and carry arms as a basic right of citizenship.

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 (such as machine guns) 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 unregistered sawed-off shotguns, which were at issue.

*Miller* was the last time the Supreme Court directly addressed the Second Amendment. In *Quilici v. Village of Morton Grove* (1983), the Supreme Court refused to review a lower court’s ruling upholding the constitutionality of a local ordinance banning handguns against a Second Amendment challenge.

In the aftermath of the assassination attempt on President Ronald Reagan in 1981, many lawmakers called for passage of gun control legislation. At the forefront of that effort was Sarah Brady, the wife of James Brady, the presidential press secretary who was badly wounded and left partially disabled by John Hinckley Jr., President Reagan’s assailant. In 1993, her efforts helped to win passage of the Brady Bill, which imposed a federal mandatory five-day waiting period on the purchase of handguns.

Perhaps more important than the Brady Bill was the ban on assault weapons signed by President Bill Clinton as part of the Violent Crime Control and Law Enforcement Act in

**Thinking Globally**

**Gun Control in Europe**

Many European 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 completing an exhaustive background check. Laws in Switzerland and Germany are equally restrictive.

- Why is the issue of gun central so polarizing in the United States but not in Europe?
- Do you support any restrictions on the right to keep and bear arms? If so what? If not, why not?
1994. This provision, which prohibited Americans from owning many of the most powerful types of guns, carried a ten-year time limit. It expired just before the 2004 presidential and congressional elections. Neither President George W. Bush nor the Republican-controlled Congress made any serious efforts to renew it, causing critics to charge that their inaction was political and prompted by pro-gun interests such as the National Rifle Association—a major donor to Republicans.

The Rights of Criminal Defendants

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. 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 apply to actions committed before the laws were passed. And, Article I prohibits *bills of attainder*, legislative acts that inflict punishment on individuals without judicial action.

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. But, still, the language that the Framers chose left numerous questions to be answered, including the definition of an unreasonable search.

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

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**Writ of habeas corpus**
A court order in which a judge requires authorities to prove that a prisoner is being held lawfully and that allows 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**
From the Latin for “after the fact,” a law that applies to actions committed before the law was passed. Prohibited by the Constitution.

**bill of attainder**
A legislative act that inflicts punishment on individuals without any kind of judicial action. Prohibited by the Constitutions.

**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.”
could touch or reach or are otherwise in the arrestee’s immediate control. In 1995, the Court resolved a decades-old constitutional dispute by ruling unanimously that, barring reasonable exceptions, police must knock and announce their presence before entering a house or apartment to execute a search. But, in 2006, the Court ruled in a 5–4 decision that even if police refused to knock, evidence improperly seized could be used in cases where police had a valid warrant.

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. Thus, a suspected drug courier may be stopped for brief questioning but only a frisk search (for weapons) is permitted. A person’s answers to the questions may shift reasonable suspicion to probable cause, thus permitting the officer to search further. But, except at borders between the United States and Mexico and Canada (or international airports within U.S. borders), searches require probable cause.

Searches can also be made without a warrant if consent is obtained, and the Court has ruled that consent can be given by a variety of persons. It has ruled, for example, that police can search a bedroom occupied by two persons as long as they have the consent of one of them. The same standard, however, does not apply to houses. In 2006, the Court ruled that the police could not conduct a warrantless search of a home if one of the occupants objected.

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. Police cannot get search warrants, for example, to require you to undergo surgery to remove a bullet that might be used to incriminate you, since your expectation of bodily privacy outweighs the need for evidence. But, 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. In some or blood states, refusing a test may result in the automatic loss of your license.

Until passage of the USA Patriot Act, homes, too, were presumed to be private. 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. 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 illegally growing marijuana, because you cannot reasonably expect privacy in an open field.

In 2001, in a decision that surprised many commentators, by a vote of 5–4, the Supreme Court ruled that drug evidence obtained by using a thermal imager (without a warrant) on a public street to locate the defendant’s marijuana hothouse was obtained in violation of the Fourth Amendment. In contrast, the use of low-flying aircraft and helicopters to detect marijuana fields or binoculars to look in a yard have been upheld because officers simply were using their eyesight, not a new technological tool such as the thermal imager.

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.” Over the years, the Court has become increasingly lenient about the scope of automobile searches.

In 2002, 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.
testing for drugs is an especially thorny search and seizure issue. If the government can require you to take a Breathalyzer test, can it require you to be tested for drugs? In the wake of growing public concern over drug use, in 1986, President Ronald Reagan signed an executive order requiring many executive branch employees to undergo drug tests. In 1997, Congress passed a similar law authorizing random drug searches of all congressional employees.

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. In 1995, the Court upheld the constitutionality of random drug testing of public high school athletes. 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.

In general, all employers can require pre-employment drug screening. However, because governments are unconditionally bound by the constitutional search provisions of the Fourth Amendment, public employees enjoy more protection in the area of drug testing than do employees of private enterprises.

Another issue is the constitutionality of drug testing in regard to family law. In 2001, in a 6–3 decision, the Court ruled that compulsory testing of women for cocaine use and reporting positive results to law enforcement officials to generate evidence for law enforcement officials and not to give medical treatment to the women was unconstitutional.

The Fifth Amendment: Self-Incrimination and Double Jeopardy

The Fifth Amendment 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. Moreover, lawyers cannot imply that a defendant who refuses to take the stand must be guilty or have something to hide.

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. Police then began to resort to other measures to force confessions. Defendants, for example, were given the third degree—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.

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...
provisions, the exclusionary rule is a judicially created remedy to deter constitutional violations. 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.84

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.”85 This historic and controversial case put law enforcement officers on notice that they must follow the Constitution and the rules of evidence, or risk having their evidence excluded at trial.

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.84

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**Who was Ernesto Miranda?**

Even though Ernesto Miranda’s confession was not admitted as evidence at his retrial, his ex-girlfriend’s testimony and that of the victim were enough to convince the jury of his guilt. He served nine years in prison before he was released on parole. 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 in Phoenix in a bar fight 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.

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.

**Double Jeopardy Clause**

Part of the Fifth Amendment that protects individuals from being tried twice for the same offense.

**Exclusionary Rule**

Judicially created rule that prohibits police from using illegally seized evidence at trial.
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.” 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.” Evidence illegally seized may be introduced if it would have been discovered anyway 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.87

The Sixth Amendment 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 afford one. This was first required in capital cases (where the death penalty is a possibility); eventually, attorneys were provided to the poor in all federal criminal cases.88 Similarly, in 1932, the Supreme Court directed states to furnish lawyers to defendants in capital cases. 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). 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 habeas corpus petition 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 felonies89 and, later, to many cases where probation and future penalties were possibilities.
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. The current Court has agreed to hear another case addressing this issue.

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.

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. Although potential individual jurors who have prejudged a case are not eligible to serve, no groups can be systematically excluded from serving. In 1880, for example, the Supreme Court ruled that African Americans could not be excluded from state jury pools (lists of those eligible to serve).92 And, in 1975, the Court ruled that barring women from jury service violated the mandate that juries be made up of a “fair cross section” of the community.93

In 1986, the Court expanded the requirement that juries reflect a fair cross section of the community. Historically, lawyers had used peremptory challenges (those for which no cause needs to be given) to exclude African Americans from juries, especially when African Americans were criminal defendants. In Batson v. Kentucky (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.94

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.95

What was the impact of Gideon v. Wainwright? When Clarence Earl Gideon wrote out his petition for a writ of certiorari to the Supreme Court (asking the Court, in its discretion, to hear his case), he had no way of knowing that his case would lead to the landmark ruling on the right to counsel, Gideon v. Wainwright (1963). Nor did he know that Chief Justice Earl Warren actually had instructed his law clerks to be on the lookout for a habeas corpus petition (literally, “you have the body”) which argues that the person in jail is there in violation of some statutory or constitutional right that could be used to guarantee the assistance of counsel for defendants in criminal cases.
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. In *Maryland v. Craig* (1990), the Court ruled that, constitutionally, 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.96 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**

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.

In the 1500s, religious heretics and those critical of the English Crown were subjected to torture to extract confessions, and then were condemned to an equally hideous death by the rack, disembowelment, or other barbarous means. The English Bill of Rights, written in 1687, safeguarded against “cruel and unusual punishments” as a result of public outrage against those practices. The same language found its way into the U.S. Bill of Rights. Prior to the 1960s, however, little judicial attention was paid to the meaning of that phrase, especially in the context of the death penalty.

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 shooting97 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.”98

In the 1960s, the NAACP Legal Defense 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.99 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 to 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.100 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.101 To learn more about the controversy over the death penalty, See Join the Debate: The Death Penalty.

This ruling did not deter the LDF from continuing to bring death penalty cases before the Court. In one 1987 case, 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.102 It noted that even if statistics show clear discrimination, 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 Court. In the second case, the Court found that new issues could not be raised on appeal, even if there was some state error. The case, *McCleskey v. Zant*, produced new standards designed to make it much more difficult for death-row inmates to file repeated appeals. 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.

The Supreme Court has exempted two key classes of people from the death penalty: those who are mentally retarded and those under the age of eighteen. In 2002, the Court ruled that mentally retarded convicts could not be executed. This 6–3 decision reversed what had been the Court’s position on executing the retarded since 1989, a thirteen-year period when several retarded men were executed. In 2005, the Court ruled in a 5–4 decision that standards of decency that evolved sufficiently in the United States, as well as internationally, so that executing those who committed murders as minors was against the Eighth Amendment’s ban on cruel and unusual punishment.

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 which 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. The Court also revisited what can be considered cruel and unusual punishment in 2006 when it unanimously ruled that death-row inmates could challenge the drugs and procedures involved in lethal injections. This “invitation” was followed by the Court’s acceptance of a case challenging the use of lethal injection as a possible violation of the Eighth Amendment’s cruel and unusual clause. Many states issued a moratorium on the death penalty until the Court decided the case. In April 2008, the Court ruled in a 7–2 decision that lethal injection did not constitute cruel and unusual punishment. To learn more about the methods used by each state to execute death row inmates, see Figure 5.1.

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**Thinking Globally**

The Death Penalty and Extradition

Mexico, which has no death penalty, will not extradite to the United States anyone facing possible execution here. To guarantee extradition of criminals, U.S. prosecutors must agree to seek no more than life in prison. Other countries, including France and Canada, also demand such assurances from the U.S. government.

- Were you surprised to learn that international agreements between nations can limit the types of sentences handed down to fugitives from the law? Why would justice officials agree to penalty in such cases? forgo the death
- Canada, Australia, the European Union, and most of Central and South America have abolished the death penalty. What makes the United States so different in this regard?
Overview: Challenges to the use of the death penalty are rising. In 2007, the United States Supreme Court agreed to take the case of Baze v. Rees, which questioned whether execution by lethal injection—the method used by thirty-six states—was potentially so painful as to violate the Eighth Amendment ban on cruel and unusual punishment. When the Court took the case, it in effect put a moratorium on executions until it ruled in the spring of 2008 that the method did not violate the Constitution. In 2007, forty-one people were put to death, the fewest since 1999, and New Jersey became the first state since 1965 to abolish the use of the death penalty. Although individuals and government entities are having second thoughts about the death penalty, not everyone agrees that there is a problem. The federal government and thirty-eight of the states use the death penalty, and in 1994 President Bill Clinton expanded the federal death penalty to apply to over sixty different crimes, including drug trafficking in large amounts.

The debate over the use of capital punishment raises issues about the fundamental fairness of our system of justice. A major concern is that innocent people might be put to death, despite all the procedural safeguards in our court system to prevent mistakes. It is, of course, regrettable when someone is convicted of a crime he or she did not commit, even when they are only fined or imprisoned. Obviously there is no way of making amends when someone is executed.

Some of the current controversy related to the death penalty comes from advances in the use of DNA evidence. Tests of blood or semen can reliably link a specific individual to a crime scene. The Innocence Project, a nonprofit organization, has been working since 1992 to use DNA evidence to exonerate those wrongly convicted of crimes. As of March 2008, the group’s efforts have led to the release of 214 people, 16 of them on death row. In addition, between 1977 and 2007, another 108 people have been released from death rows because mistakes were made in eyewitness accounts, line-ups, police questioning, and court proceedings. The obvious question is whether there were others who should have been released.

The major justification for the death penalty is captured in the slogan: “A life for a life.” The consequence for taking someone else’s life is the loss of the criminal’s life. The expectation that accompanies this reasoning is that such a consequence will deter people from becoming murderers. There does not, however, appear to be a correlation between the death penalty and low homicide rates. Texas, for example, executes more people than all the rest of the states combined. In 2007, Texas executed 26 out of the 41 individuals put to death in the United States. Yet, Texas consistently has one of the highest murder rates in the country. As a whole, southern states use the death penalty more than any other region, but the homicide rate in 2007 for the South was 42 per 100,000 people, in contrast to the 17 per 100,000 people in the Northeast and Midwest.

Another concern with the death penalty is the racial and gender disparities in those who are executed. It is extremely rare for a woman to be sent to the death chamber. And, a person is less likely to be executed if he or she is white. In 2007, for example, 53 percent of the 41 people executed were white, 37 percent were African American, and 10 percent were Hispanic—figures that do not match these groups’ percentages in the general population. A crucial aspect of the debate regarding the death penalty is disagreement about whether the court system is biased and if convictions and executions reflect more general patterns of discrimination in society.

Arguments for the Death Penalty

- The death penalty is just because it is used primarily to execute those who take the lives of others. Killing someone is the most egregious crime and act of violence, and societies must respond with the most severe punishment possible for murderers.
- The death penalty will deter at least some people from
committing capital offenses. Although some murders will occur in a fit of rage and passion, we need to make those who plot to kill another human being think about the possible consequences if they go ahead with their plan.

- It is costly to keep convicted murderers in prison for the rest of their lives. The cost to taxpayers to keep someone in prison is about $30,000 per year. It makes little economic sense for society to clothe, feed, and care for a murderer for the rest of his or her life.

Arguments against the Death Penalty

- Mistakes are inevitably going to be made, and innocent people are going to be put to death for crimes they did not commit. The consequence of executing an innocent person is beyond remedy. We simply cannot risk mistakes when life is at stake.

- The United States is alone among Western countries in continuing to have the death penalty. Canada, Australia, and all European nations are among the 91 countries that have completely abolished the death penalty. The United States is in the company of repressive nations like China, Saudi Arabia, and Malaysia in its use of the death penalty.

- It actually costs more to execute someone than it does to imprison the person for life. The Urban Institute released a study on March 6, 2008, that showed the state of Maryland spent an average of $37.2 million for each of the five executions it conducted since it reinstated the death penalty in 1978. Although this figure is higher than those cited in other studies, the general finding is consistent with analyses that cite the high costs of appeals in capital cases and the high costs of running death rows.

How do states vary in their application of the death penalty? The death penalty has been the subject of much of the litigation under the Eighth Amendment's cruel and unusual punishment clause. This cartoon offers a social commentary on the administration of the death penalty in Texas, which by far leads the nation in the number of executions.

Continuing the Debate

1. Should the states and the federal government abolish the death penalty? If not, for what crimes should the death penalty be allowed?
2. How, if at all, can mistakes in our criminal justice system be avoided? Do gender and racial disparities in executions suggest that the system is unfair?
3. Is it likely that the existence of the death penalty would dissuade someone from committing a murder? What evidence would you use to support an argument for a deterrence effect?

To Follow the Debate Online, Go To:

- http://www.prodeathpenalty.com, which advocates keeping and expanding the use of the death penalty and includes a list of print and media resources plus links to other supportive sites.
- http://www.deathpenaltyinfo.org for a wide array of studies and statistics on the death penalty as well as coverage of current events related to the death penalty and arguments.
- http://pewforum.org/death-penalty/, which provides information, statistics, and arguments related to the death penalty.

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 Supreme Court also has given protection to rights not enumerated specifically in the Constitution or Bill of Rights.

Although the Constitution is 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 Brandeis hailed privacy as “the right to be left alone—the most comprehensive of rights and the right most valued by civilized men.” 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.)
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. 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 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 of 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.” This right to privacy was to be the basis for later decisions from the Court, including the right to secure an abortion.

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 resulted in the birth of more 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 constitutional 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. The Texas law allowed abortions only when they were necessary to save the life of the mother. 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. Here 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 trimester, a woman’s right to privacy gave her an absolute right (in consultation with her physician), free from state interference, to terminate a 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.112

*Roe v. Wade* unleashed a torrent of political controversy. Anti-abortion 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. The issue also polarized both major political parties.

From the 1970s through the present, 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, and their Justice Departments regularly urged the Court to overrule Roe. They came close to victory in Webster v. Reproductive Health Services (1989). 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. The narrowly supported standard, by which the Court upheld 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 judicial standard used by the Court in Roe.

In 1993, newly elected pro-choice President Bill Clinton, a Democrat, ended bans on fetal tissue research, abortions at military hospitals, and federal financing for
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 of many Federalists who believed that it would be impossible to enumerate every fundamental liberty and right. To assuage the concerns of Anti-Federalists, the Ninth Amendment underscores that rights not listed or spelled out are retained by the people.

James Madison, in particular, 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. So, he drafted this amendment to clarify a rule about how the Constitution and Bill of Rights were to be construed.

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

- How can the U.S. justice system dictate the definition of a fundamental right if the Constitution does not specifically enumerate such rights?
- How might public opinion affect judicial interpretations of the Ninth Amendment?

Who was Jane Roe? A once very popular anti-abortion group, Operation Rescue staged large-scale protests in front of abortion clinics across the nation, gaining a surprising new member—Norma McCorvey, the “Jane Roe” of Roe v. Wade (1973). In 1995, McCorvey announced that she had become pro-life and said she had been exploited by pro-choice groups.
overseas population control programs. He also lifted the federal gag rule, a regulation enacted in 1987 that barred public health clinics receiving federal dollars from discussing abortion. (These policies were later reversed by George W. Bush). Clinton also ended the ban on testing RU-486, or mifepristone, a pill for medically induced, nonsurgical abortions, which ultimately was made available in the United States to women with a doctor’s prescription late in 2000. President Clinton also appointed two supporters of abortion rights, Ruth Bader Ginsburg and Stephen Breyer, to the Supreme Court.

While President Clinton was attempting to shore up abortion rights through judicial appointments, Republican 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 vetoed the federal Partial Birth Abortion Act over the objections of many of its supporters, including the National Right to Life Committee. Many state legislatures, nonetheless, passed their own versions of the act. 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.

By October 2003, however, Republican control of the White House and both houses of Congress facilitated passage of the federal Partial Birth Abortion Ban Act. Pro-choice groups such as Planned Parenthood, the Center for Reproductive Rights, and the American Civil Liberties Union immediately filed lawsuits challenging the constitutionality of this law. The Supreme Court heard oral argument 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 Ruth Bader Ginsburg, Justice Anthony 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.
Do all Americans deserve the same freedoms and liberties? Tyron Garner and John Geddes Lawrence, the plaintiffs in Lawrence v. Texas, embrace a supporter after the Supreme Court’s decision.

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 the state of Texas from criminalizing private sexual behavior. This monumental decision invalidated the laws of fourteen states.

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. Justice Sandra Day O’Connor agreed that the law was unconstitutional, but concluded that it was an equal protection violation. (See chapter 6 for a detailed discussion of the equal protection clause of the Fourteenth Amendment.) 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.

The Right to Die

In 1990, the Supreme Court ruled 5–4 that parents could not withdraw a feeding tube from their comatose daughter after her doctors testified that she could live for many more years if the tube remained in place. Writing for the majority, Chief Justice William H. Rehnquist rejected any attempts to expand the right of privacy into this thorny area of social policy. The Court did note, however, that individuals could terminate medical treatment if they were able to express, or had done so in writing via a living will, their desire to have medical treatment terminated in the event they became incompetent.

In 1997, the U.S. Supreme Court ruled unanimously that terminally ill persons do not have a constitutional right to physician assisted suicide. The Court’s action upheld the laws of New York and Washington State that make it a crime for doctors to give life-ending drugs to mentally competent but terminally ill patients who wish to die. But, Oregon enacted a right-to-die or assisted suicide law approved by Oregon voters that allows physicians to prescribe drugs to terminally ill patients. In November 2001, however, U.S. Attorney General John Ashcroft issued a legal opinion determining that assisted suicide is not “a legitimate medical purpose,” thereby putting physicians following the Oregon law in jeopardy of federal prosecution. His memo also called for the revocation of physicians’ drug prescription licenses, putting the state and the national government in conflict in an area that Republicans historically have argued is the province of state authority. Oregon officials immediately (and successfully) sought a court order blocking Ashcroft’s attempt to interfere with implementation of Oregon law. Later, a federal judge ruled that Ashcroft had overstepped his authority on every point.

The U.S. Supreme Court agreed with the lower court on many points. In Gonzales v. Oregon (2006), President Bush’s new attorney general, Alberto Gonzales, argued that Oregon’s Death with Dignity Act was a violation of the federal Controlled Substances Act (CSA) of 1970 and that the “Ashcroft directive” was consistent with the public interest. The Court, however, disagreed and upheld Oregon’s law by a 6–3 vote. Gonzales v. Oregon was a case watched closely by groups on both sides of the right-to-die debate.
Toward Reform: Civil Liberties and Combating Terrorism

Since September 11, 2001, the Bush administration, Congress, and the courts have all been operating in what Secretary of State Condoleezza Rice has dubbed “an alternate reality,” where Bill of Rights guarantees must be suspended in a time of war. The USA Patriot Act, the Military Commissions Act, and a series of secret Department of Justice memos have altered the state of civil liberties in the United States. Here, we detail the provisions of these actions 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. In this section, we point out some of the potential First Amendment problems arising from these acts. 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 FBI 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 only positive aspects of U.S. efforts to combat terrorism. And, while the Bush administration decried any leaks of information about their deliberations or actions the administration selectively leaked information that led to conservative columnist Robert Novak revealing the identity of Valerie Plame, a CIA operative dealing with weapons of mass destruction.

In addition, respect for religious practices fell by the wayside, in the wake of the wake on terropism. For example, many Muslim detainees captured in Iraq and Afghanistan were fed pork, a violation of basic Muslim tenets. Some were stripped naked in front of members of the opposite sex, which also violates their religion.

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 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 customer. Second, it
How should we treat those accused of terrorism? In the wake of the 9/11 terrorist attacks, the U.S.-supported Afghani Northern Alliance captured a U.S. citizen, John Walker Lindh, and handed him over to U.S. forces. Lindh was returned to the United States, and a ten-count indictment charged him with conspiring with al-Qaeda to kill U.S. nationals. His confession allegedly occurred after a period during which he was left shackled and naked and denied food, water, and treatment for an injury. Additionally, he was questioned without a lawyer although his parents had requested that one be appointed for him. Lindh ultimately pled guilty to one count of "supplying services as a foot soldier," and was sentenced to up to twenty years in prison. The Military Commissions Act, passed by Congress and signed into law by President Bush just before the 2006 midterm elections, authorizes potentially harsher treatment of U.S. citizens accused of engaging in terrorist activities or aiding terrorists; civil liberties advocates question its constitutionality.

Who is most responsible for protecting civil liberties? In 2007, questions about CIA and FBI interrogation techniques led to the resignation of Attorney General Alberto Gonzales. His successor, Michael Mukasey, is shown here testifying before the Senate Judiciary Committee.

expands the government’s right to search private property without notice to the owner. Third, according to the ACLU, the Act "expands a narrow exception to the Fourth Amendment that had been created for the collection of foreign intelligence information." 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 new 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 denies judges 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 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 has ruled that detainees have a right to *habeas corpus*.129 However, the Bush administration argued that under the Military Commissions Act, alien victims of torture have significantly reduced rights of *habeas corpus*. The Military Commission Act also eliminates the right to bring any challenge to "detention, transfer, treatment, trial, or conditions of confinement" of detainees. It allows the government to declare permanent resident aliens to be enemy combatants and enables the government to jail these people indefinitely without any opportunity to file a writ of *habeas corpus*. In 2008, the Roberts Court ruled parts of the act unconstitutional, finding that any detainees could challenge their extended incarceration in federal court.130

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

**Analyzing Visuals**

This diagram illustrates the process of water-boarding, an interrogation technique used by the United States during George W. Bush's presidency when questioning detainees. Study the process. Then, consider the following questions:

- **HOW** might water-boarding violate the Constitution?
- **HOW** might you justify the use of water-boarding and other interrogation techniques that many nations classify as torture?
- **GIVEN** the threats of terrorism against the United States, which civil liberties guarantees in the Constitution would you be willing to give up? Why?
existence of these facilities, moving fourteen such detainees to the detention facility at Guantanamo Bay, Cuba.

The Seventh 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 the evidence can be obtained through coercion or torture. These trials 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, but the Military Commissions Act returned these powers to the executive branch.

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, there were rumors that many of the prisoners detained by the U.S. government were treated in ways that violated the Geneva Convention. 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. Provisions of this memo leaked to the press constituted “an expansive endorsement of the harshest interrogation techniques ever used by the Central Intelligence Agency.” 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.” The most controversial of these techniques is water-boarding, which simulates drowning. (To learn more about this technique, see Analyzing Visuals: Water-boarding.)

The controversy over these interrogation techniques was one of the reasons for the ultimate resignation of Attorney General Gonzales. Questions about the appropriateness of such interrogation techniques were the main focus of the confirmation hearings of his successor, Michael Mukasey.

**WHAT SHOULD I HAVE LEARNED?**

- **What are the roots of civil liberties and the Bill of Rights in the United States?**

  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.

- **What are the First Amendment guarantees of freedom of religion?**

  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 organized prayer in public schools. The Court largely has adopted an accommodationist approach when interpreting the free exercise clause by allowing some governmental regulation of religious practices.
What are the First Amendment guarantees of freedom of speech, press, assembly, and petition?

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. Some areas of speech and publication are unconditionally protected by the First Amendment. Among these are prior restraint, symbolic speech, and hate speech. Other areas of speech and publication, however, are unprotected by the First Amendment. These include libel, fighting words, and obscenity and pornography. The freedoms of peaceful 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 often become the arbiter between the right of the people to express dissent and government’s right to limit controversy in the name of security.

What is the Second Amendment right to keep and bear arms?

Initially, the right to bear arms was envisioned as one dealing with state militias. Over the years, states and Congress have enacted various gun ownership restrictions with little Supreme Court interpretation as a guide to their ultimate constitutionality.

What rights are guaranteed to criminal defendants in the United States?

The Fourth, Fifth, Sixth, and Eighth Amendments provide a variety of procedural guarantees to individuals accused of crimes. In particular, 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. Among other rights, the Fifth Amendment 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.

The Sixth Amendment’s guarantee of “assistance of counsel” has been interpreted by the Supreme 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.

What does the right to privacy encompass and what is the U.S. Supreme Court’s rationale for this right?

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. Statutes limiting access to birth control or abortion or banning homosexual acts have been ruled unconstitutional violations of the right to privacy. The Court, however, appears poised to allow some states to opt to allow their citizens the right to die under a physician’s supervision.

How have reforms to combat terrorism affected civil liberties?

After the terrorist attacks of September 11, 2001, reforms enacted by the Bush administration and Congress have dramatically altered civil liberties in the United States. Critics charge that a host of constitutional guarantees have been significantly compromised, while supporter say that these reforms are necessary for national security in a time of war.
Key Terms

Bill of Rights, p. •••
Bill of attainder, p. •••
Civil liberties, p. •••
Civil rights, p. •••
Clear and present danger test, p. •••
Direct incitement test, p. •••
Double jeopardy clause, p. •••
Due process clause, p. •••
Eighth Amendment, p. •••
Establishment clause, p. •••
Exclusionary rule, p. •••
Ex post facto law, p. •••
Fifth Amendment, p. •••
Fighting words, p. •••
First Amendment, p. •••
Fourth Amendment, p. •••
Free exercise clause, p. •••
Fundamental freedoms, p. •••
Incorporation doctrine, p. •••
Libel, p. •••
Miranda rights, p. •••
Ninth Amendment, p. •••
Prior restraint, p. •••
Right to privacy, p. •••
Selective incorporation, p. •••
Sixth Amendment, p. •••

Slander, p. •••
Substantive due process, p. •••
Symbolic speech, p. •••
Tenth Amendment, p. •••
Writ of habeas corpus, p. •••

Researching Civil Liberties

In the Library


On the Web

To compare differing views on civil liberties, including debates related to the war on terrorism, go to the home pages for the following groups:
The American Civil Liberties Union, http://www.aclu.org
People for the American Way, http://www.pfaw.org
American Center for Law and Justice, http://www.aclj.org
To learn more about the Supreme Court cases discussed in this
chapter, go to Oyez: U.S. Supreme Court Media,
http://www.oyez.org, and search on the case name. Or, go to
the Legal Information Institute of Cornell University’s Law
School, http://www.law.cornell.edu/supet/cases/
topic.htm, where you can search cases
by topic.
To compare the different sides of the abortion debate, go to
FLITE (Federal Legal Information Through Electronics) at
http://www.fedworld.gov/supcourt/, and Roe
in a Nutshell at http://hometown.aol.com/abrbng/
roens.htm.
For more on civil liberty protections for homosexuals, go to
Human Rights Campaign at http://www.hrc.org, and Lambda