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Civil Liberties and Public Policy

Politics in Action: Free Speech on Campus



The Board of Regents of the University of Wisconsin System requires students at the university's Madison campus to pay an activity fee that supports various campus services and extracurricular student activities. In the university's view, such fees enhance students' educational experiences by promoting extracurricular activities, stimulating advocacy and debate on diverse points of view, enabling participation in campus administrative activity, and providing opportunities to develop social skills—all consistent with the university's broad educational mission. Registered student organizations (RSOs) expressing a wide range of views are eligible to receive a portion of the fees, which the student government administers subject to the university's approval.

There has been broad agreement that the process for approving RSO applications for funding is administered in a viewpoint-neutral fashion. RSOs may also obtain funding through a student referendum. Some students, however, sued the university, alleging that the activity fee violated their First Amendment rights because it forced them to support expressions of views they did not share. They argued that the university must grant them the choice not to fund RSOs that engage in political and ideological expression offensive to their personal beliefs.

The Supreme Court held in a unanimous decision in *Board of Regents of University of Wisconsin System v. Southworth* that if a university determines that its mission is well served if students have the means to engage in dynamic discussion on a broad range of issues, it may

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Characterize defendants' rights and identify issues that arise in their implementation, p. 130.

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Assess how civil liberties affect democratic government and how they both limit and expand the scope of government, p. 145.



These UCLA students are exercising their right to protest, an important civil liberty. Determining the boundaries of civil liberties often raises complex questions and may involve balancing competing values.



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The Big Picture Ensure that your civil liberties are being upheld. Author George C. Edwards III breaks down the civil liberties that the United States Constitution guarantees, and he discusses how different rights can sometimes conflict with one another.



The Basics What are civil liberties and where do they come from? In this video, you will learn about our First Amendment guarantees and about protections the Bill of Rights provides those accused of crimes. In the process, you'll discover how our liberties have changed over time to reflect our changing values and needs.



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Rights of the accused



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In Context Uncover the importance of civil liberties in a changing American society. University of Massachusetts at Boston political scientist Maurice T. Cunningham identifies the origins of our civil liberties and evaluates the clash between national security and civil liberties in a post-9/11 age.



Thinking Like a Political Scientist What are some of the challenges facing political scientists in regards to civil liberties? In this video, University of Massachusetts at Boston political scientist Maurice T. Cunningham raises some of the thought-provoking questions regarding civil liberties that have arisen during the last decade.



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In the Real World The American legal system and the American people have both struggled over whether the death penalty should be imposed in this country. In this segment, we'll hear what citizens have to say about the death penalty.



So What? Want to stage a protest in your community? Find out what protections and rights you are entitled to as a demonstrator—as well as what limitations you must work within. Author George C. Edwards III lays out the American civil liberty laws and gives examples of how students have exercised their rights in the past.



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impose a mandatory fee to sustain such dialogue. The Court recognized that inevitably the fees subsidize speech that some students find objectionable or offensive. Thus, the Court held that a university must protect students' First Amendment rights by requiring viewpoint neutrality in the allocation of funding support.

The University of Wisconsin case is the sort of complex controversy that shapes American civil liberties. Debates about the right to abortion, the right to bear arms, the separation of church and state, and similar issues are constantly in the news. Some of these issues arise from conflicting interests. The need to protect society against crime often conflicts with society's need to protect the rights of people accused of crime. Other conflicts derive from strong differences of opinion about what is ethical, moral, or right. To some Americans, abortion is murder, the taking of a human life. To others, a woman's choice whether to bear a child, free of governmental intrusion, is a fundamental right. Everyone, however, is affected by the extent of our civil liberties.

Deciding complex questions about civil liberties requires balancing competing values, such as maintaining an open system of expression while protecting individuals from the excesses such a system may produce. Civil liberties are essential to democracy. How could we have free elections without free speech, for example? But does it follow that critics of officials should be able to say whatever they want, no matter how untrue? And who should decide the extent of our liberty? Should it be a representative institution such as Congress or a judicial elite such as the Supreme Court?

The role of the government in resolving civil liberties controversies is also the subject of much debate. Conservatives usually advocate narrowing the scope of government, yet many conservatives strongly support government-imposed limits on abortion and government-sanctioned prayers in public schools. They also want government to be less hindered by concern for defendants' rights. Liberals, who typically support a broader scope of government, usually want to limit government's role in prohibiting abortion and encouraging religious activities and to place greater constraints on government's freedom of action in the criminal justice system.

Civil liberties are constitutional and other legal protections of individuals against government actions. Americans' civil liberties are set down in the **Bill of Rights**, the first 10 amendments to the Constitution. At first glance, many questions about civil liberties issues may seem straightforward. For example, the Bill of Rights' guarantee of a free press appears to mean that Americans can write what they choose. In the real world of American law, however, these issues are subtle and complex.

Disputes about civil liberties often end up in court. The Supreme Court of the United States is the final interpreter of the content and scope of our liberties; this ultimate power to interpret the Constitution accounts for the ferocious debate over presidential appointments to the Supreme Court.

Throughout this chapter you will find special features titled "You Are the Judge." Each feature describes an actual case heard by the Supreme Court and asks you to decide the case and then compare your decision with that of the Court.

To understand the specifics of American civil liberties, we must first understand the Bill of Rights.

The Bill of Rights

4.1 Trace the process by which the Bill of Rights has been applied to the states.

By 1787, all state constitutions had bills of rights, some of which survive, intact, to this day. Although the new U.S. Constitution had no bill of rights, the state ratifying conventions made its inclusion a condition of ratification. The First Congress passed the Bill of Rights in 1789 and sent it to the states for ratification. In 1791, these amendments became part of the Constitution.

civil liberties

The constitutional and other legal protections against government actions. Our civil liberties are formally set down in the Bill of Rights.

Bill of Rights

The first 10 amendments to the U.S. Constitution, which define such basic liberties as freedom of religion, speech, and press and guarantee defendants' rights.

Issues of civil liberties present many vexing problems for the courts to resolve.

- For example, is a display of the Ten Commandments on a government site simply a recognition of their historic importance to the development of law or an impermissible use of government power to establish religion?



□ The Bill of Rights—Then and Now

The Bill of Rights ensures Americans' basic liberties, such as freedom of speech and religion, and protection against arbitrary searches and being held for long periods without trial (see Table 4.1). When the Bill of Rights was ratified, British abuses of the colonists' civil liberties were still a fresh and bitter memory. Colonial officials had jailed newspaper editors, arrested citizens without cause, and detained people and forced them to confess at gunpoint or worse. Thus, the first 10 amendments enjoyed great popular support.

Political scientists have discovered that people are devotees of rights in theory but that their support often wavers when it comes time to put those rights into practice.¹ For example, Americans in general believe in freedom of speech, but many citizens would oppose letting the Ku Klux Klan speak in their neighborhood or allowing public schools to teach about atheism or homosexuality. In addition, Americans seem willing to trade civil liberties for security when they feel that the nation is threatened, as in the case of terrorism.² As you will see in this chapter, because few rights are absolute, we cannot avoid the difficult questions of balancing civil liberties and other individual and societal values.

TABLE 4.1 THE BILL OF RIGHTS

These amendments were passed by Congress on September 25, 1789, and ratified by the states on December 15, 1791.

Amendment I—Religion, Speech, Assembly, Petition

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

Amendment II—Right to Bear Arms

A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Amendment III—Quartering of Soldiers

No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV—Searches and Seizures

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 persons or things to be seized.

Amendment V—Grand Juries, Double Jeopardy, Self-Incrimination, Due Process, Eminent Domain

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

Amendment VI—Criminal Court Procedures

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

Amendment VII—Trial by Jury in Common-Law Cases

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States.

Amendment VIII—Bails, Fines, and Punishment

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

Amendment IX—Rights Retained by the People

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

Amendment X—Rights Reserved to the States

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

□ The Bill of Rights and the States

Take another look at the **First Amendment**. Note the first words: “Congress shall make no law. . . .” The Founders wrote the Bill of Rights to restrict the powers of the new national government. In 1791, Americans were comfortable with their state governments; after all, every state constitution had its own bill of rights. Thus, a literal reading of the First Amendment suggests that it does not prohibit a state government from passing a law prohibiting the free exercise of religion, free speech, or freedom of the press.

What happens, however, if a state passes a law violating one of the rights protected by the federal Bill of Rights and the state’s constitution does not prohibit this abridgment of freedom? In 1833, the answer to that question was “nothing.” The Bill of Rights, said the Court in *Barron v. Baltimore*, restrained only the national government, not states and cities.

An opening toward a different answer was provided by the **Fourteenth Amendment**, one of the three “Civil War amendments,” which was ratified in 1868. The Fourteenth Amendment declares,

∴ No state shall make or enforce any law which shall abridge the privileges or
∴ immunities of citizens of the United States nor shall any state deprive any person
∴ of life, liberty, or property, without due process of law; nor deny to any person
∴ within its jurisdiction the equal protection of the laws.

Nonetheless, in the Slaughterhouse Cases (1873), the Supreme Court gave a narrow interpretation of the Fourteenth Amendment’s *privileges or immunities clause*, concluding it applied only to national citizenship and not state citizenship and thus did little to protect rights against state actions.

In 1925, in *Gitlow v. New York*, however, the Court relied on the Fourteenth Amendment to rule that a state government must respect some First Amendment rights. Specifically, the Court said that freedoms of speech and press “were fundamental personal rights and liberties protected by the **due process clause** of the Fourteenth Amendment from impairment by the states.” In effect, the Court interpreted the Fourteenth Amendment to say that states could not abridge the freedoms of expression protected by the First Amendment.

This decision began the development of the **incorporation doctrine**, the legal concept under which the Supreme Court has nationalized the Bill of Rights by making most of its provisions applicable to the states through the Fourteenth Amendment. In *Gitlow*, the Supreme Court held only parts of the First Amendment to be binding on the states. Gradually, and especially during the 1960s, the Court applied most of the Bill of Rights to the states (see Table 4.2). Many of the decisions that nationalized provisions of the Bill of Rights were controversial. Nevertheless, today the Bill of Rights guarantees individual freedoms against infringement by state and local governments as well as by the national government. Only the Third and Seventh Amendments, the grand jury requirement of the Fifth Amendment, and the prohibition against excessive fines and bail in the Eighth Amendment have not been applied specifically to the states.

Freedom of Religion

4.2

Distinguish the two types of religious rights protected by the First Amendment and determine the boundaries of those rights.



The First Amendment contains two elements regarding religion and government. These elements are commonly referred to as the establishment clause and the free exercise clause. The **establishment clause** states that “Congress shall make no law respecting an establishment of religion.”

First Amendment

The constitutional amendment that establishes the four great liberties: freedom of the press, of speech, of religion, and of assembly.

Barron v. Baltimore

The 1833 Supreme Court decision holding that the Bill of Rights restrained only the national government, not the states and cities.

Fourteenth Amendment

The constitutional amendment adopted after the Civil War that declares “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Gitlow v. New York

The 1925 Supreme Court decision holding that freedoms of press and speech are “fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states” as well as by the federal government.

due process clause

Part of the Fourteenth Amendment guaranteeing that persons cannot be deprived of life, liberty, or property by the United States or state governments without due process of law.

incorporation doctrine

The legal concept under which the Supreme Court has nationalized the Bill of Rights by making most of its provisions applicable to the states through the Fourteenth Amendment.

establishment clause

Part of the First Amendment stating that “Congress shall make no law respecting an establishment of religion.”

TABLE 4.2 THE INCORPORATION OF THE BILL OF RIGHTS

Date	Amendment	Right	Case
1925	First	Freedom of speech	<i>Gitlow v. New York</i>
1931	First	Freedom of the press	<i>Near v. Minnesota</i>
1937	First	Freedom of assembly	<i>De Jonge v. Oregon</i>
1940	First	Free exercise of religion	<i>Cantwell v. Connecticut</i>
1947	First	Establishment of religion	<i>Everson v. Board of Education</i>
1958	First	Freedom of association	<i>NAACP v. Alabama</i>
1963	First	Right to petition government	<i>NAACP v. Button</i>
2010	Second	Right to bear arms	<i>McDonald v. Chicago</i>
	Third	No quartering of soldiers	Not incorporated ^a
1949	Fourth	No unreasonable searches and seizures	<i>Wolf v. Colorado</i>
1961	Fourth	Exclusionary rule	<i>Mapp v. Ohio</i>
1897	Fifth	Guarantee of just compensation	<i>Chicago, Burlington, and Quincy RR v. Chicago</i>
1964	Fifth	Immunity from self-incrimination	<i>Mallory v. Hogan</i>
1969	Fifth	Immunity from double jeopardy	<i>Benton v. Maryland</i>
	Fifth	Right to grand jury indictment	Not incorporated
1932	Sixth	Right to counsel in capital cases	<i>Powell v. Alabama</i>
1948	Sixth	Right to public trial	<i>In re Oliver</i>
1963	Sixth	Right to counsel in felony cases	<i>Gideon v. Wainwright</i>
1965	Sixth	Right to confrontation of witnesses	<i>Pointer v. Texas</i>
1966	Sixth	Right to impartial jury	<i>Parker v. Gladden</i>
1967	Sixth	Right to speedy trial	<i>Klopfer v. North Carolina</i>
1967	Sixth	Right to compulsory process for obtaining witnesses	<i>Washington v. Texas</i>
1968	Sixth	Right to jury trial for serious crimes	<i>Duncan v. Louisiana</i>
1972	Sixth	Right to counsel for all crimes involving jail terms	<i>Argersinger v. Hamlin</i>
	Seventh	Right to jury trial in civil cases	Not incorporated
1962	Eighth	Freedom from cruel and unusual punishment	<i>Robinson v. California</i>
	Eighth	Freedom from excessive fines or bail	Not incorporated
1965	Ninth	Right of privacy	<i>Griswold v. Connecticut</i>

^aThe quartering of soldiers has not occurred under the Constitution.

free exercise clause

A First Amendment provision that prohibits government from interfering with the practice of religion.

The **free exercise clause** prohibits the abridgment of citizens' freedom to worship or not to worship as they please. Sometimes these freedoms conflict. The government's practice of providing chaplains on military bases is one example of this conflict; some accuse the government of establishing religion in order to ensure that members of the armed forces can freely practice their religion. Usually, however, the establishment clause and the free exercise clause cases raise different kinds of conflicts. Religious issues and controversies have assumed importance in political debate in recent years,³ so it is not surprising that interpretations of the Constitution are intertwined with partisan politics.

□ The Establishment Clause

Some nations, such as Great Britain, have an established church that is officially supported by the government and recognized as a national institution. A few American colonies had official churches, but the religious persecutions that incited many colonists to move to America discouraged any desire that the First Congress might have had to

establish a national church in the United States. Thus, the First Amendment prohibits an established national religion.

It is much less clear, however, what else the First Congress intended to include in the establishment clause. Some people argued that it meant only that the government could not favor one religion over another. In contrast, Thomas Jefferson argued that the First Amendment created a “wall of separation” between church and state, forbidding not just favoritism but also any support for religion at all. These interpretations continue to provoke argument, especially when religion is mixed with education, as occurs with such issues as government aid to church-related schools and prayer in public schools.

EDUCATION Proponents of aid to church-related schools argue that it does not favor any specific religion. Some opponents reply that the Roman Catholic Church has by far the largest religious school system in the country and gets most of the aid. It was Lyndon B. Johnson, a Protestant, who in 1965 obtained the passage of the first substantial aid to parochial elementary and secondary schools. He argued that the aid went to students, not schools, and thus should go wherever the students were, including church-related schools.

In *Lemon v. Kurtzman* (1971), the Supreme Court declared that laws that provide aid to church-related schools must do the following:

1. Have a secular legislative purpose
2. Have a primary effect that neither advances nor inhibits religion
3. Not foster an excessive government “entanglement” with religion

Since that time, the Court has had to draw a fine line between aid that is permissible and aid that is not. For instance, the Court has allowed religiously affiliated colleges and universities to use public funds to construct buildings. Public funds may also be used to provide students in parochial schools with textbooks, computers and other instructional equipment, lunches, and transportation to and from school and to administer standardized testing services. However, schools may not use public funds to pay teacher salaries or to provide transportation for students on field trips. The theory underlying these decisions is that it is possible to determine that buildings, textbooks, lunches, school buses, and national tests are not used to support sectarian education. However, determining how teachers handle a subject in class or focus a field trip may require complex and constitutionally impermissible regulation of religion.

In an important loosening of its constraints on aid to parochial schools, the Supreme Court decided in 1997 in *Agostini v. Felton* that public school systems could send teachers into parochial schools to teach remedial and supplemental classes to needy children. In a landmark decision in 2002, the Court in *Zelman v. Simmons-Harris* upheld a program that provided some families in Cleveland, Ohio, with vouchers they could use to pay tuition at religious schools.

RELIGIOUS ACTIVITIES IN PUBLIC SCHOOLS In recent decades, the Supreme Court has also been opening public schools to religious activities. The Court decided that public universities that permit student groups to use their facilities must allow student religious groups on campus to use the facilities for religious worship.⁴ In the 1984 Equal Access Act, Congress made it unlawful for any public high school receiving federal funds (almost all of them do) to keep student groups from using school facilities for religious worship if the school opens its facilities for other student meetings.⁵ In 2001, the Supreme Court extended this principle to public elementary schools.⁶ Similarly, in 1993, the Court required public schools that rent facilities to organizations to do the same for religious groups.⁷

Beyond the question of use of facilities there is the question of use of public funds for religious activities in public school contexts. In 1995, the Court held that

Lemon v. Kurtzman

The 1971 Supreme Court decision that established that aid to church-related schools must (1) have a secular legislative purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion.

Zelman v. Simmons-Harris

The 2002 Supreme Court decision that upheld a state program providing families with vouchers that could be used to pay for tuition at religious schools.

4.1

Engel v. Vitale

The 1962 Supreme Court decision holding that state officials violated the First Amendment when they wrote a prayer to be recited by New York's schoolchildren.

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School District of Abington Township, Pennsylvania v. Schempp

The 1963 Supreme Court decision holding that a Pennsylvania law requiring Bible reading in schools violated the establishment clause of the First Amendment.

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the University of Virginia was constitutionally required to subsidize a student religious magazine on the same basis as other student publications.⁸ However, in 2004, the Court held that the state of Washington could exclude students pursuing a devotional theology degree from its general scholarship program.⁹

The threshold of constitutional acceptability becomes higher when public funds are used more directly for education. Thus, school authorities may not permit religious instructors to come into public school buildings during the school day to provide religious education,¹⁰ although they may release students from part of the compulsory school day to receive religious instruction elsewhere.¹¹ In 1980, the Court also prohibited the posting of the Ten Commandments on the walls of public classrooms.¹²

Two particularly contentious topics related to religion in public schools are school prayer and the teaching of “alternatives” to the theory of evolution.

SCHOOL PRAYER School prayer is perhaps the most controversial religious issue. In *Engel v. Vitale* (1962) and *School District of Abington Township, Pennsylvania v. Schempp* (1963), the Court aroused the wrath of many Americans by ruling that recitations of prayers (in the former case) or Bible passages (in the latter) as part of classroom exercises in public schools violated the establishment clause. In the 1963 decision, the justices observed that “the place of religion in our society is an exalted one . . . [but] in the relationship between man and religion, the State is firmly committed to a position of neutrality.”

It is *not* unconstitutional, of course, to pray in public schools. Students may pray silently as much as they wish. What the Constitution forbids is the sponsorship or encouragement of prayer, directly or indirectly, by public school authorities. Thus, the Court has ruled that school-sponsored prayer at a public school graduation¹³ and student-led prayer at football games were unconstitutional.¹⁴ When several Alabama laws authorized schools to hold one-minute periods of silence for “meditation or voluntary prayer,” the Court rejected this approach because the state made it clear that the purpose of the statute was to return prayer to the schools. The Court indicated that a less clumsy approach would pass its scrutiny.¹⁵



One of the most controversial issues regarding the First Amendment's prohibition of the establishment of religion is prayer in public schools. Although students may pray on their own, school authorities may not sponsor or encourage prayer. Some schools violate the law, however.

- What was your experience with prayer in school?

Many school districts have simply ignored the Supreme Court’s ban on school prayer and continue to allow prayers in their classrooms. Some religious groups and many members of Congress, especially conservative Republicans, have pushed for a constitutional amendment permitting prayer in school. A majority of the public consistently supports school prayer.¹⁶

EVOLUTION Fundamentalist and evangelical Christian groups have pressed some state legislatures to mandate the teaching of “creation science”—their alternative to Darwin’s theory of evolution—in public schools. Louisiana, for example, passed a law requiring schools that taught Darwinian theory to teach creation science, too. In 1987, the Supreme Court ruled that this law violated the establishment clause.¹⁷ The Court had already held, in a 1968 case, that states cannot prohibit Darwin’s theory of evolution from being taught in the public schools.¹⁸ More recently, some groups have advocated, as an alternative to evolution, “intelligent design,” the view that living things are too complicated to have resulted from natural selection and thus must be the result of an intelligent cause. Although they claim that their belief has no religious implications, lower courts have begun to rule that requiring teachers to present intelligent design as an alternative to evolution is a constitutionally unacceptable promotion of religion in the classroom.

PUBLIC DISPLAYS The Supreme Court’s struggle to interpret the establishment clause is also evident in areas other than education. In 2005, the Supreme Court found that two Kentucky counties violated the establishment clause value of official religious neutrality when they posted large, readily visible copies of the Ten Commandments in their courthouses. The Court concluded that the counties’ ostensible and predominant purpose was to advance religion.¹⁹ However, the Court did not hold that a governmental body can never integrate a sacred text constitutionally into a governmental display on law or history. Thus, in 2005, the Court also upheld the inclusion of a monolith inscribed with the Ten Commandments among the 21 historical markers and 17 monuments surrounding the Texas State Capitol. The Court argued that simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the establishment clause. Texas’s placement of the Commandments monument on its capitol grounds was a far more passive use of those texts than their posting in elementary school classrooms and also served a legitimate historical purpose.²⁰

Displays of religious symbols during the holidays have prompted considerable controversy. In 1984, the Court found that Pawtucket, Rhode Island, could set up a Christmas nativity scene on public property—along with Santa’s house and sleigh, Christmas trees, and other symbols of the Christmas season.²¹ Five years later, the Court extended the principle to a Hanukkah menorah placed next to a Christmas tree. The Court concluded that these displays had a secular purpose and provided little or no benefit to religion. At the same time, the Court invalidated the display of the nativity scene without secular symbols in a courthouse because, in this context, the county gave the impression of endorsing the display’s religious message.²²

Why It Matters to You

The Establishment Clause

What if the Constitution did not prohibit the establishment of religion? If a dominant religion received public funds and was in a position to control health care, public education, and other important aspects of public policy, these policies might be quite different from what they are today. In addition, the potential for conflict between followers of the established religion and adherents of other religions would be substantial.

The Court's basic position is that the Constitution does not require complete separation of church and state; it mandates accommodation of all religions and forbids hostility toward any. At the same time, the Constitution forbids government endorsement of religious beliefs. Drawing the line between neutrality toward religion and promotion of it is not easy; this dilemma ensures that cases involving the establishment of religion will continue to come before the Court.

□ The Free Exercise Clause

The First Amendment also guarantees the free exercise of religion. This guarantee seems simple enough. Whether people hold no religious beliefs, practice voodoo, or go to church, temple, or mosque, they should have the right to practice religion as they choose. In general, Americans are tolerant of those with religious views outside the mainstream, as you can see in "America in Perspective: Tolerance for the Free Speech Rights of Religious Extremists."

The matter is, of course, more complicated. Religions sometimes forbid actions that society thinks are necessary; conversely, religions may require actions that society finds unacceptable. For example, what if a religion justifies multiple marriages or the use of illegal drugs? Muhammad Ali, the boxing champion, refused induction into the armed services during the Vietnam War because, he said, military service would violate his Muslim faith. Amish parents often refuse to send their children to public schools. Jehovah's Witnesses and Christian Scientists may refuse to accept blood transfusions and certain other kinds of medical treatment for themselves or their children.

America in Perspective

Tolerance for the Free Speech Rights of Religious Extremists

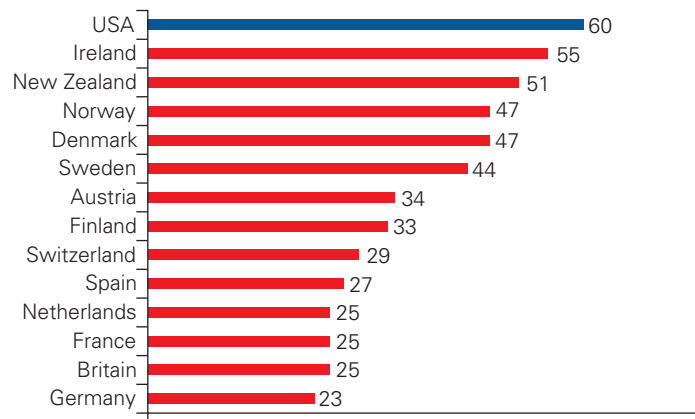
Despite 9/11, Americans are more tolerant of the free speech rights of religious extremists than are people in other democracies with developed economies.

Question: There are some people whose views are considered extreme by the majority. Consider religious extremists, that is, people who believe that their

religion is the only true faith and all other religions should be considered enemies. Do you think such people should be allowed to hold public meetings to express their views?

CRITICAL THINKING QUESTION

Why do you think Americans are so tolerant?



Percent for allowing meetings of religious extremists

SOURCE: Authors' analysis of 2008 International Social Survey Program data.



Cassius Clay was the world heavyweight boxing champion before he converted to Islam, changed his name to Muhammad Ali, and was drafted during the war in Vietnam. Arguing that he opposed war on religious grounds, he refused to join the army. The federal government prosecuted him for draft dodging, and he was stripped of his title. In 1971, the Supreme Court overturned his conviction for draft evasion. He is pictured here at the Houston induction center in 1967.

Consistently maintaining that people have an inviolable right to *believe* what they want, the courts have been more cautious about the right to *practice* a belief. What if, the Supreme Court once asked, a person “believed that human sacrifices were a necessary part of religious worship?” Not all religious practices receive constitutional protection. Thus, over the years, the Court has upheld laws and regulations forbidding polygamy, prohibiting business activities on Sunday (restricting the commerce of Orthodox Jews, for whom Sunday is a workday), denying tax exemptions to religious schools that discriminate on the basis of race,²³ allowing the building of a road through ground sacred to some Native Americans, and even prohibiting a Jewish air force captain from wearing his yarmulke while on duty (Congress later intervened to permit military personnel to wear yarmulkes).

At the same time, Congress and the Supreme Court have granted protection to a range of religiously motivated practices. The Court allowed Amish parents to take their children out of school after the eighth grade, reasoning that the Amish community was well established and that its children would not burden the state.²⁴ More broadly, although a state can compel parents to send their children to an accredited school, parents have a right to choose religious schools rather than public schools for their children’s education. A state may not require Jehovah’s Witnesses or members of other religions to participate in public school flag-saluting ceremonies. Congress has also decided—and the courts have upheld—that people can become conscientious objectors to war on religious grounds. In 2012, the Court held that just as the establishment clause prevents the government from appointing ministers, the free exercise clause prevents it from interfering with the freedom of religious groups to select their own. Thus, religious groups are not subject to employment discrimination laws.²⁵

What kind of laws that affect religious practices might be constitutional? In 1988, in upholding Oregon’s prosecution of persons using the drug peyote as part of their religious rituals (*Employment Division v. Smith*), the Court decided that state laws interfering with religious practices but not specifically aimed at religion were constitutional. As long as a law did not single out religious practices because they were engaged in for religious reasons, it could apply to conduct even if the conduct were religiously inspired.²⁶ However, the Religious Freedom Restoration Act, which Congress passed in 1993 and which applies only to the national government,²⁷ requires laws to meet a more restrictive standard: a law or regulation cannot interfere with religious



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Simulation: You Are a
Police Officer

practices unless the government can show that it was narrowly tailored and in pursuit of a “compelling interest.” The Court in a 2006 decision allowed a small religious sect to use a hallucinogenic tea in its rituals despite the federal government’s attempts to bar its use.²⁸

In 2000, Congress passed legislation that, in accordance with the “compelling interest” standard, made it more difficult for local governments to enforce zoning or other regulations against religious groups and required governments to allow those institutionalized in state facilities (such as prisons) to practice their faith. The Supreme Court upheld this law in 2005.²⁹ You can examine a free exercise case involving local laws in “You Are the Judge: The Case of Animal Sacrifices.”

Freedom of Expression

4.3

Differentiate the rights of free expression protected by the First Amendment and determine the boundaries of those rights.



democracy depends on the free expression of ideas. Thoughts that are muffled, speech that is forbidden, and meetings that cannot be held are the enemies of the democratic process. Totalitarian governments know this, which is why they go to enormous trouble to limit expression.

Americans pride themselves on their free and open society. Freedom of conscience is absolute; Americans can *believe* whatever they want. The First Amendment plainly forbids the national government from limiting freedom of *expression*—that is, the right to say or publish what one believes. Is freedom of expression, then, like freedom of conscience, *absolute*? Most experts answer “no.” Supreme Court justice Oliver Wendell Holmes offered a classic example of impermissible speech in 1919: “The most stringent protection of free speech would not protect a man in falsely shouting ‘fire’ in a theater and causing a panic.”

You Are the Judge

The Case of Animal Sacrifices

The church of Lukumi Babalu Aye, in Hialeah, Florida, practiced Santeria, a Caribbean-based mix of African ritual, voodoo, and Catholicism. Central to Santeria is the ritual sacrifice of animals—at birth, marriage, and death rites as well as at ceremonies to cure the sick and initiate new members.

Offended by these rituals, the city of Hialeah passed ordinances prohibiting animal sacrifices in religious ceremonies. The church challenged the constitutionality of these laws, claiming they violated the free exercise clause of the First Amendment because the ordinances essentially barred the practice of Santeria. The city, the Santerians claimed, was discriminating against a religious minority. Besides, many other forms of killing animals were legal, including fishing, using animals in medical research, selling lobsters to be boiled alive, and feeding live rats to snakes.

YOU BE THE JUDGE:

Do the Santerians have a constitutional right to sacrifice animals in their religious rituals? Does the city’s interest in protecting animals outweigh the Santerians’ requirement for animal sacrifice?

DECISION:

In 1993, the Court overturned the Hialeah ordinances that prohibited the use of animal sacrifice in religious ritual. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the justices concluded that governments that permit other forms of killing animals may not then ban sacrifices or ritual killings. In this instance, the Court found no compelling state interest that justified the abridgment of the freedom of religion.

Given that not all speech is permissible, the courts have had to address two questions in deciding where to draw the line separating permissible from impermissible speech. First, can the government censor speech that it thinks will violate the law? Second, what constitutes *speech* (or press) within the meaning of the First Amendment and thus deserves constitutional protection, and what does not? Holding a political rally to attack an opposing candidate's stand receives First Amendment protection. Obscenity and libel and incitements to violence and overthrow of the government do not. But just how do we know, for example, what is obscene? To complicate matters further, certain forms of nonverbal speech, such as picketing, are considered symbolic speech and receive First Amendment protection. Judges also have had to balance freedom of expression against competing values, such as public order, national security, and the right to a fair trial. Then there are questions regarding commercial speech. Does it receive the same protection as religious and political speech? Regulating the publicly owned airwaves raises yet another set of difficult questions.

One controversial freedom of expression issue involves so-called hate speech. Advocates of regulating hate speech forcefully argue that, for example, racial insults, like fighting words, are “undeserving of First Amendment protection because the perpetrator’s intent is not to discover the truth or invite dialogue, but to injure the victim.”³⁰ In contrast, critics of hate speech policy argue that “sacrificing free speech rights is too high a price to pay to advance the cause of equality.”³¹ In 1992, the Supreme Court ruled that legislatures and universities may not single out racial, religious, or sexual insults or threats for prosecution as “hate speech” or “bias crimes.”³²

□ Prior Restraint

In the United States, the First Amendment ensures that even if the government frowns on some material, a person’s right to publish it is all but inviolable. That is, it ensures there will not be **prior restraint**, government actions that prevent material from being published—or, in a word, censorship. A landmark case involving prior restraint is *Near v. Minnesota* (1931). A blunt newspaper editor called local officials a string of names including “grafters” and “Jewish gangsters.” The state closed down his business, preventing him from publishing, but the Supreme Court ordered the paper reopened.³³ Of course, the newspaper editor—or anyone else—could later be punished for violating a law or someone’s rights *after* publication.

The extent of an individual’s or group’s freedom from prior restraint does depend in part, however, on who that individual or group is. Expressions of students in public school may be limited more than those of adults in other settings. In 1988, the Supreme Court ruled that a high school newspaper was not a public forum and could be regulated in “any reasonable manner” by school officials.³⁴ In 2007, the Court held that the special characteristics of the school environment and the governmental interest in stopping student drug abuse allow schools to restrict student expressions that they reasonably regard as promoting such abuse.³⁵

The Supreme Court has also upheld restrictions on the right to publish in the name of national security. Wartime often brings censorship to protect classified information. These restrictions often have public support; few would find it unconstitutional if a newspaper, for example, were hauled into court for publishing troop movement plans during a war. Nor have the restrictions upheld been limited to wartime censorship. The national government has successfully sued former CIA agents for failing to meet their contractual obligations to submit books about their work to the agency for censorship, even though the books revealed no classified information.³⁶ In recent years, WikiLeaks has published hundreds of thousands of classified government documents covering a wide range of foreign policy issues. The U.S. Department of Justice has opened a criminal probe of WikiLeaks founder Julian Assange.

prior restraint

Government actions preventing material from being published. Prior restraint is usually prohibited by the First Amendment, as confirmed in *Near v. Minnesota*.

Near v. Minnesota

The 1931 Supreme Court decision holding that the First Amendment protects newspapers from prior restraint.

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Schenck v. United States

A 1919 Supreme Court decision upholding the conviction of a socialist who had urged resistance to the draft during World War I. Justice Holmes declared that government can limit speech if the speech provokes a “clear and present danger” of substantive evils.

Nevertheless, the courts are reluctant to issue injunctions prohibiting the publication of material even in the area of national security. The most famous case regarding prior restraint and national security involved the publication of stolen Pentagon papers. You can examine this case in “You Are the Judge: The Case of the Purloined Pentagon Papers.”

Free Speech and Public Order

In wartime and peacetime, considerable conflict has arisen over the tradeoff between free speech and the need for public order. During World War I, Charles T. Schenck, the secretary of the American Socialist Party, distributed thousands of leaflets urging young men to resist the draft. Schenck was charged with impeding the war effort. The Supreme Court upheld his conviction in *Schenck v. United States* (1919). Justice Holmes declared that government could limit speech if it provokes a clear and present danger of substantive evils. Only when such danger exists can government restrain speech. It is difficult to say, of course, when speech becomes dangerous rather than simply inconvenient for the government.

The courts confronted the issue of free speech and public order during the 1950s. In the late 1940s and early 1950s, there was widespread fear that communists had infiltrated the government. American anticommunism was a powerful force, and the national government was determined to jail the leaders of the Communist Party. Senator Joseph McCarthy and others in Congress persecuted people whom they thought were subversive, based on the Smith Act of 1940, which forbade advocating the violent overthrow of the American government. In *Dennis v. United States* (1951), the Supreme Court upheld prison sentences for several Communist Party leaders for conspiring to advocate the violent overthrow of the government—even in the absence of evidence that they actually urged people to commit specific

You Are the Judge

The Case of the Purloined Pentagon Papers

During the Johnson administration, the Department of Defense amassed an elaborate secret history of American involvement in the Vietnam War that included hundreds of documents, many of them secret cables, memos, and war plans. Many documented American ineptitude and South Vietnamese duplicity. One former Pentagon official, Daniel Ellsberg, who had become disillusioned with the Vietnam War, managed to retain access to a copy of these Pentagon papers. Hoping that revelations of the Vietnam quagmire would help end American involvement, he decided to leak the Pentagon papers to the *New York Times*.

The Nixon administration pulled out all the stops in its effort to embarrass Ellsberg and prevent publication of the Pentagon papers. Nixon’s chief domestic affairs adviser, John Ehrlichman, approved a burglary of Ellsberg’s psychiatrist’s office, hoping to find damaging information on Ellsberg. (The burglary was bungled, and it eventually led to Ehrlichman’s conviction and imprisonment.) In the courts, Nixon administration lawyers sought an injunction against the *Times* that would have

ordered it to cease publication of the secret documents. Government lawyers argued that national security was being breached and that Ellsberg had stolen the documents from the government. The *Times* argued that its freedom to publish would be violated if an injunction were granted. In 1971, the case of *New York Times v. United States* was decided by the Supreme Court.

YOU BE THE JUDGE:

Did the *Times* have a right to publish secret, stolen Department of Defense documents?

DECISION:

In a 6-to-3 decision, a majority of the justices agreed that the “no prior restraint” rule prohibited prosecution before the papers were published. The justices also made it clear that if the government brought prosecution for theft, the Court might be sympathetic. No such charges were filed.

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Roth v. United States

A 1957 Supreme Court decision ruling that “obscenity is not within the area of constitutionally protected speech or press.”

The prevailing political climate often determines what limits the government will place on free speech. During the early 1950s, Senator Joseph McCarthy’s persuasive—if unproven—accusations that many public officials were communists created an atmosphere in which the courts placed restrictions on freedom of expression—restrictions that would be unacceptable today.

acts of violence. Although the activities of this tiny, unpopular group resembled yelling “Fire!” in an empty theater rather than a crowded one, the Court ruled that a communist takeover was so grave a danger that government could squelch their threat. Thus, it concluded that protecting national security outweighed First Amendment rights.

Soon the political climate changed, however, and the Court narrowed the interpretation of the Smith Act, making it more difficult to prosecute dissenters. In later years, the Court has found that it is permissible to advocate the violent overthrow of the government in the abstract but not actually to incite anyone to imminent lawless action (*Yates v. United States* [1957]; *Brandenburg v. Ohio* [1969]).

The 1960s brought waves of protest over political, economic, racial, and social issues and, especially, the Vietnam War. Many people in more recent times have engaged in public demonstrations, such as those opposing the war in Iraq or protesting against Wall Street. Courts have been quite supportive of the right to protest, pass out leaflets, or gather signatures on petitions—as long as it is done in public places. People may even distribute campaign literature anonymously.³⁷ First Amendment free speech guarantees do not apply when a person is on private property,³⁸ however, although a state may include politicking in shopping centers within its own free speech guarantee.³⁹ Moreover, cities cannot bar residents from posting signs on their own property.⁴⁰

□ Obscenity

Obscenity is one of the more perplexing of free speech issues. In 1957, in *Roth v. United States*, the Supreme Court held that “obscenity is not within the area of constitutionally protected speech or press.” Deciding what is obscene, however, has never been an easy matter. Obviously, public standards vary from time to time, place to place, and person to person. Much of today’s MTV would have been banned only a few decades ago. What might be acceptable in Manhattan’s Greenwich Village would shock residents of some other areas of the country. Works that some people call obscene might be good entertainment or even great art to others. At one time or another, the works of Aristophanes, Mark Twain, and even the “Tarzan” stories by Edgar Rice Burroughs

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Miller v. California

A 1973 Supreme Court decision holding that community standards be used to determine whether material is obscene in terms of appealing to a “prurient interest” and being “patently offensive” and lacking in value.

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were banned. The state of Georgia banned the acclaimed film *Carnal Knowledge* (a ban the Supreme Court struck down in 1974).⁴¹

The Court tried to clarify its doctrine by spelling out what could be classified as obscene and thus outside First Amendment protection in the 1973 case of *Miller v. California*. Warren Burger, chief justice at the time, wrote that materials were obscene under the following circumstances:

1. The work, taken as a whole, appealed “to a prurient interest in sex.”
2. The work showed “patently offensive” sexual conduct that was specifically defined by an obscenity law.
3. The work, taken as a whole, lacked “serious literary, artistic, political, or scientific value.”

Decisions regarding whether material was obscene, said the Court, should be based on average people (in other words, juries) applying the contemporary standards of local—not national—communities.

The Court did provide “a few plain examples” of what sort of material might fall within this definition of obscenity. Among these examples were “patently offensive representations of ultimate sexual acts ... actual or simulated,” “patently offensive representations of masturbation or excretory functions,” or “lewd exhibition of the genitals.” Cities throughout the country duplicated the language of *Miller* in their obscenity ordinances. The qualifying adjectives *lewd* and *offensive* prevent communities from banning anatomy texts, for example, as obscene. The difficulty remains in determining what is *lewd* or *offensive*.

In addition to the difficulty in defining obscenity, another reason why obscenity convictions can be difficult to obtain is that no nationwide consensus exists that offensive material should be banned—at least not when it is restricted to adults. In many communities the laws are lenient regarding pornography, and prosecutors know that they may not get a jury to convict, even when the disputed material is obscene as defined by *Miller*. Thus, obscene material is widely available in adult bookstores, video stores, and movie theaters.



Many people are concerned about the impact of violent video games on children. Although government can regulate depictions of some sexual material, it cannot regulate depictions of violence.

Despite the Court's best efforts to define obscenity and determine when it can be banned, state and local governments continue to struggle with the application of these rulings. In one famous case, a small New Jersey town tried to get rid of a nude dancing parlor by using its zoning power to ban all live entertainment. The Court held that the measure was too broad, restricting too much expression, and was thus unlawful.⁴² However, the Court has upheld laws specifically banning nude dancing when their effect on overall expression was minimal.⁴³ Jacksonville, Florida, tried to ban drive-in movies containing nudity. You can examine the Court's reaction in "You Are the Judge: The Case of the Drive-in Theater."

Regulations such as rating systems for movies and television aimed at keeping obscene material away from the young, who are considered more vulnerable to its harmful influences, have wide public support, and courts have consistently ruled that states may protect children from obscenity. Also strongly supported by the public and the courts are laws designed to protect the young against pornographic exploitation. It is a violation of federal law to receive sexually explicit photographs of children through the mail or over the Internet, and in 1990 the Supreme Court upheld Ohio's law forbidding the possession of child pornography.⁴⁴

Advances in technology have created a new wrinkle in the obscenity issue. The Internet and the World Wide Web make it easier to distribute obscene material rapidly, and a number of online information services have taken advantage of this opportunity. In 1996, Congress passed the Communications Decency Act, banning obscene material and criminalizing the transmission of indecent speech or images to anyone under 18 years of age. This law made no exception for material that has serious literary, artistic, political, or scientific merit as outlined in *Miller v. California*, and in 1997, the Supreme Court overturned it as being overly broad and vague and thus a violation of

You Are the Judge

The Case of the Drive-in Theater

Almost everyone concedes that *sometimes* obscenity should be banned by public authorities. One instance might be when a person's right to show pornographic movies clashes with another's right to privacy. Showing dirty movies in an enclosed theater or in the privacy of your own living room is one thing. Showing them in public places where anyone, including schoolchildren, might inadvertently see them is something else. Or is it?

The city of Jacksonville, Florida, wanted to limit the showing of certain kinds of movies at drive-in theaters. Its city council reasoned that drive-ins were public places and that drivers passing by would be involuntarily exposed to movies they might prefer not to see. Some members of the council argued that drivers distracted by steamy scenes might even cause accidents. So the council passed a local ordinance forbidding movies showing nudity (defined in the ordinance as "bare buttocks ... female bare breasts, or human bare pubic areas") at drive-in theaters.

Arrested for violating the ordinance, a Mr. Erznoknik challenged the constitutionality of the ordinance. He claimed that the law was overly broad and banned nudity,

not obscenity. The lawyers for the city insisted that the law was acceptable under the First Amendment. The government, they claimed, had a responsibility to forbid a "public nuisance," especially one that might cause a traffic hazard.

YOU BE THE JUDGE:

Did Jacksonville's ban on nudity in movies at drive-ins go too far, or was it a constitutional limit on free speech?

DECISION:

In *Erznoknik v. Jacksonville* (1975), the Supreme Court held that Jacksonville's ordinance was unconstitutionally broad. The city council had gone too far; it could end up banning movies that might not be obscene. The ordinance would, said the Court, ban a film "containing a picture of a baby's buttocks, the nude body of a war victim or scenes from a culture where nudity is indigenuous." Said Justice Powell for the Court, "Clearly, all nudity cannot be deemed obscene."

4.1

libel

The publication of false and malicious statements that damage someone's reputation.

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New York Times v. Sullivan

A 1964 Supreme Court decision establishing that, to win damage suits for libel, public figures must prove that the defamatory statements were made with "actual malice" and reckless disregard for the truth.

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free speech.⁴⁵ In 2002, the Court overturned a law banning virtual child pornography on similar grounds.⁴⁶ (Apparently the Supreme Court views the Internet similarly to print media, with similar protections against government regulation.) In 1999, however, the Court upheld prohibitions on obscene e-mail and faxes.

In 2011, the Court ruled that a California law banning the sale or rental of violent video games to minors violated the First Amendment because the games communicate ideas.⁴⁷ Depictions of violence, the Court added, have never been subject to government regulation and thus do not qualify for the same exceptional treatment afforded to obscene materials. The California law imposed a restriction on the content of protected speech and was invalid because the state could not show that it served a compelling government interest and was narrowly tailored to serve that interest.

□ Libel and Slander

Another type of expression not protected by the First Amendment is defamation, false statements that are malicious and damage a person's reputation. **Libel** refers to written defamation, *slander* to spoken defamation.

Of course, if politicians could collect damages for every untrue thing said about them, the right to criticize the government—which the Supreme Court termed "the central meaning of the First Amendment"—would be stifled. No one would dare be critical for fear of making a factual error. To encourage public debate, the Supreme Court has held in cases such as *New York Times v. Sullivan* (1964) that statements about public figures are libelous only if made with malice and reckless disregard for the truth. Public figures have to prove to a jury, in effect, that whoever wrote or said untrue statements about them knew that the statements were untrue and intended to harm them. This standard makes libel cases difficult for public figures to win because it is difficult to prove that a publication was intentionally malicious.⁴⁸

Why It Matters to You

Libel Law

It is difficult for public figures to win libel cases. Public figures will likely lose even if they can show that the defendant made defamatory falsehoods about them. This may not be fair, but it is essential for people to feel free to criticize public officials. Fear of losing a lawsuit would have a chilling effect on democratic dialogue.

Private individuals have a lower standard to meet for winning libel lawsuits. They need show only that statements made about them were defamatory falsehoods and that the author was negligent. Nevertheless, it is unusual for someone to win a libel case, and most people do not wish to draw attention to critical statements about themselves.

If public debate is not free, there can be no democracy, yet in the process of free debate some reputations will be damaged (or at least bruised), sometimes unfairly. Libel cases must thus balance freedom of expression with respect for individual reputations. In one widely publicized case, General William Westmoreland, once the commander of American troops in South Vietnam, sued CBS over a documentary it broadcast called *The Uncounted Enemy*. It claimed that American military leaders in Vietnam, including Westmoreland, systematically lied to Washington about their success there to make it appear that the United States was winning the war. The evidence, including CBS's own internal memoranda, showed that the documentary made errors of fact. Westmoreland sued CBS for libel. Ultimately, the power of the press—in this case, a sloppy, arrogant press—prevailed. Fearing defeat at the trial, Westmoreland settled for a mild apology.⁴⁹

An unusual case that explored the line between parody and libel came before the Supreme Court in 1988, when Reverend Jerry Falwell sued *Hustler* magazine. *Hustler* editor Larry Flynt had printed a parody of a Campari Liquor ad about various celebrities called “First Time” (in which celebrities related the first time they drank Campari, but with an intentional double meaning). When *Hustler* depicted the Reverend Jerry Falwell having had his “first time” in an outhouse with his mother, Falwell sued. He alleged that the ad subjected him to great emotional distress and mental anguish. The case tested the limits to which a publication could go to parody or lampoon a public figure. The Supreme Court ruled that they can go pretty far—all nine justices ruled in favor of the magazine.⁵⁰

□ Symbolic Speech

Freedom of speech, more broadly interpreted, is a guarantee of freedom of expression. In 1965, school authorities in Des Moines, Iowa, suspended Mary Beth Tinker and her brother John when they wore black armbands to protest the Vietnam War. The Supreme Court held that the suspension violated the Tinkers’ First Amendment rights. The right to freedom of speech, said the Court, went beyond the spoken word.⁵¹

As discussed in the chapter on the Constitution, when Gregory Johnson set a flag on fire at the 1984 Republican National Convention in Dallas to protest nuclear weapons, the Supreme Court decided that the state law prohibiting flag desecration violated the First Amendment (*Texas v. Johnson* [1989]). Burning the flag, the Court said, constituted speech and not just dramatic action.⁵² When Massachusetts courts ordered the organizers of the annual St. Patrick’s Day parade to include the Irish-American Gay, Lesbian, and Bisexual Group of Boston, the Supreme Court declared that a parade is a form of protected speech, and thus that the organizers are free to include or exclude whomever they want.

Wearing an armband, burning a flag, and marching in a parade are examples of **symbolic speech**: actions that do not consist of speaking or writing but that express an opinion. Court decisions have classified these activities somewhere between pure speech and pure action. The doctrine of symbolic speech is not precise; for example, although burning a flag is protected speech, burning a draft card is not.⁵³ In 2003, the Court held that states may make it a crime to burn a cross with a purpose to intimidate, as long as the law clearly gives prosecutors the burden of proving that the act was intended as a threat and not as a form of symbolic expression.⁵⁴ Despite the imprecisions, these cases make it clear that First Amendment rights are not limited by a rigid definition of what constitutes speech.

□ Free Press and Fair Trials

The Bill of Rights is an inexhaustible source of potential conflicts among different types of freedoms. One is the conflict between the right of the press to print what it wants and the right to a fair trial. The quantity of press coverage given to the trial of Michael Jackson on charges of child sexual abuse was extraordinary, and little of it was sympathetic to Jackson. Defense attorneys argue that such publicity can inflame the community—and potential jurors—against defendants and compromise the fairness of a trial. It may very well.

Nevertheless, the Court has *never* upheld a restriction on the press in the interest of a fair trial. The Constitution’s guarantee of freedom of the press entitles journalists to cover every trial. When a Nebraska judge issued a gag order forbidding the press to report any details of a particularly gory murder (or even to report the gag order itself), the outraged Nebraska Press Association took the case to the Supreme Court. The Court sided with the editors and revoked the gag order.⁵⁵ In 1980, the Court reversed a Virginia judge’s order to close a murder trial to the public and the press. “The trial of a criminal case,” said the Court, “must be open to the public.”⁵⁶ A pretrial hearing,

Texas v. Johnson

A 1989 case in which the Supreme Court struck down a law banning the burning of the American flag on the grounds that such action was symbolic speech protected by the First Amendment.

symbolic speech

Nonverbal communication, such as burning a flag or wearing an armband. The Supreme Court has accorded some symbolic speech protection under the First Amendment.

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Zurcher v. Stanford Daily

A 1978 Supreme Court decision holding that a search warrant could be applied to a newspaper without necessarily violating the First Amendment rights to freedom of the press.

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commercial speech

Communication in the form of advertising, which can be restricted more than many other types of speech.

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though, is a different matter. In a 1979 case, the Supreme Court permitted a closed hearing on the grounds that pretrial publicity might compromise the defendant's right to fairness. Ultimately, the only feasible measure that the judicial system can take against the influence of publicity in high-profile cases is to sequester the jury, thereby isolating it from the media and public opinion.

Occasionally a reporter withholds some critical evidence that either the prosecution or the defense wants in a criminal case, information that may be essential for a fair trial. Reporters argue that "protecting their sources" should exempt them from revealing notes from confidential informants. Some states have passed *shield laws* to protect reporters in these situations. In most states, however, reporters have no more rights than other citizens once a case has come to trial. The Supreme Court ruled in *Branzburg v. Hayes* (1972) that in the absence of shield laws, the right of a fair trial preempts the reporter's right to protect sources. After a violent confrontation with student protestors at Stanford University, the police got a search warrant and marched off to the *Stanford Daily* to obtain photographs of the scene they could use to make arrests. The paper argued that its files were protected by the First Amendment, but the decision in *Zurcher v. Stanford Daily* (1978) sided with the police.

□ Commercial Speech

As we have seen, not all forms of communication receive the full protection of the First Amendment. Laws restrict **commercial speech**, such as advertising, far more extensively than expressions of opinion on religious, political, or other matters. The Federal Trade Commission (FTC) decides what kinds of goods may be advertised on radio and television and regulates the content of such advertising. These regulations have responded to changes in social mores and priorities. At one time, for example, tampons could not be advertised on TV and cigarettes could; today, the situation is the reverse.

The FTC attempts to ensure that advertisers do not make false claims for their products, but "truth" in advertising does not prevent misleading promises. For example, when ads imply that the right mouthwash or deodorant will improve one's love life, that dubious message is perfectly legal.

Nevertheless, laws may regulate commercial speech on the airwaves in ways that would clearly be impossible in the political or religious realm—even to the point of forcing a manufacturer to say certain words. For example, the makers of Excedrin pain reliever were forced to add the words "on pain other than headache" in their commercials describing tests that supposedly supported the product's claims of superior effectiveness. (The test results were based on the pain that women experienced after giving birth.)

Although commercial speech is regulated more rigidly than other types of speech, the courts have been broadening its protection under the Constitution. For years, many states had laws that prohibited advertising for professional services—such as legal and engineering services—and for certain products ranging from eyeglasses and prescription drugs to condoms and abortions. Advocates of these laws claimed that they were designed to protect consumers against misleading claims, while critics charged that the laws prevented price competition. The courts have struck down many such restrictions as violations of freedom of speech, including restrictions on advertising casino gambling in states where such gambling is legal.⁵⁷ In general, the Supreme Court has allowed the regulation of commercial speech when the speech concerns unlawful activity or is misleading, but otherwise regulations must advance a substantial government interest and be no more extensive than necessary to serve that interest.⁵⁸

□ Regulation of the Public Airwaves

The Federal Communications Commission (FCC) regulates the content, nature, and very existence of radio and television broadcasting. Although newspapers do not need licenses, radio and television stations do. A licensed station must comply with

regulations, including the requirement that it devote a certain percentage of broadcast time to public service, news, children's programming, political candidates, or views other than those its owners support. The rules are more relaxed for cable channels, which can specialize in a particular type of broadcasting because consumers pay for, and thus have more choice about, the service.

This sort of governmental interference would clearly violate the First Amendment if it were imposed on the print media. For example, Florida passed a law requiring newspapers in the state to provide space for political candidates to reply to newspaper criticisms. The Supreme Court, without hesitation, voided this law (*Miami Herald Publishing Company v. Tornillo* [1974]). In contrast, in *Red Lion Broadcasting Company v. Federal Communications Commission* (1969), the Court upheld similar restrictions on radio and television stations, reasoning that such laws were justified because only a limited number of broadcast frequencies were available.

One FCC rule regulating the content of programs restricts the use of obscene words. Comedian George Carlin had a famous routine called "Filthy Words" that could never be said over the airwaves. A New York City radio station tested Carlin's assertion by airing his routine. The ensuing events proved Carlin right. In 1978, the Supreme Court upheld the commission's policy of barring these words from radio or television when children might hear them.⁵⁹ Similarly, the FCC twice fined New York radio personality Howard Stern \$600,000 for indecency. Had Stern's commentaries been carried by cable or satellite instead of the airwaves, he could have expressed himself with impunity because cable is viewed as private communication between individuals. (In 2006, he made the move to satellite transmission.)

The Supreme Court has held that government has a legitimate right to regulate sexually oriented programming on cable television but that any such regulation must be narrowly tailored to serve a compelling government interest in the least restrictive way. Congress had passed a law banning transmission for most of the day so that children would not be exposed to such programming. The Court concluded that targeted blocking, in which subscribers can ask their cable companies to block a signal to their homes, is less restrictive and a feasible and effective means of furthering government's compelling interests, so banning transmission could not be justified.⁶⁰

Miami Herald Publishing Company v. Tornillo

A 1974 case in which the Supreme Court held that a state could not force a newspaper to print replies from candidates it had criticized, illustrating the limited power of government to restrict the print media.

Red Lion Broadcasting Company v. Federal Communications Commission

A 1969 case in which the Supreme Court upheld restrictions on radio and television broadcasting similar to those it had overturned in *Miami Herald Publishing Company v. Tornillo*. It reasoned that such regulations are justified because there are only a limited number of broadcasting frequencies available.



Although the Supreme Court ruled in *Roth v. United States* that obscenity is not protected by the First Amendment, determining just what is obscene has proven difficult. Popular radio personality Howard Stern pressed the limits of obscenity rules when he worked for radio stations using the public airwaves. Ultimately, he moved to satellite radio, where the rules are much less restrictive.

□ Campaigning

A relatively recent dimension of free speech relates to the effort of both the national and state governments to limit the role of money in political campaigns. The Federal Election Campaign Act of 1971 included limits on campaign contributions to candidates for the presidency and Congress, disclosure and reporting requirements, and public financing of presidential elections. In *Buckley v. Valeo* (1976) the Court upheld these provisions. However, it also ruled that spending money to influence elections is a form of constitutionally protected free speech. Thus, the Court voided parts of the law that limited total campaign expenditures, independent expenditures by individuals and groups, and expenditures by candidates from their personal or family funds.

In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA), often referred to as the McCain-Feingold Act. It banned unrestricted (“soft money”) donations made directly to political parties (often by corporations, unions, or wealthy individuals) and the solicitation of those donations by elected officials. It also limited advertising that unions, corporations, and nonprofit organizations could engage in up to 60 days prior to an election, and restricted political parties’ use of their funds for advertising on behalf of candidates (in the form of “issue ads” or “coordinated expenditures”). The Supreme Court upheld most of the law in 2003,⁶¹ but in 2007 it held that issue ads that do not urge the support or defeat of a candidate may not be banned in the months preceding a primary or general election.⁶² In *Citizens United v. Federal Election Commission* (2010), the Supreme Court made a broader decision, striking down provisions of McCain-Feingold in holding that the First Amendment prohibits government from restricting political broadcasts in candidate elections when those broadcasts are funded by corporations or unions.

Arizona created a public financing system for state candidates and provided them matching funds if a privately financed candidate’s expenditures, combined with the expenditures of independent groups made in support of or opposition to that candidate, exceeded the publicly financed candidate’s initial state allotment. The Court held that the law violated the First Amendment rights of candidates who raise private money because they may be reluctant to spend money to speak if they know that it will give rise to counter-speech paid for by the government.⁶³

Freedom of Assembly

4.4

Describe the rights to assemble and associate protected by the First Amendment and their limitations.

The last of the great rights guaranteed by the First Amendment is the freedom to “peaceably assemble.” Commentators often neglect this freedom in favor of the more trumpeted freedoms of speech, press, and religion, yet it is the basis for forming interest groups, political parties, and professional associations as well as for picketing and protesting. There are two facets of the freedom of assembly.

□ Right to Assemble

The first facet is the literal right to assemble—that is, to gather together in order to make a statement. This freedom can conflict with other societal values when it disrupts public order, traffic flow, peace and quiet, or bystanders’ freedom to go about their business without interference. Within reasonable limits, called *time, place, and manner restrictions*, freedom of assembly includes the rights to parade, picket, and protest.



White supremacists and people opposing them square off. The Supreme Court has generally upheld the right of any group, no matter how controversial or offensive, to peaceably assemble, as long as the group's demonstrations remain on public property.

Whatever a group's cause, it has the right to demonstrate. For example, in 2011, the Supreme Court upheld the right of the congregation of a small church to picket military funerals to communicate its belief that God hates the United States for its tolerance of homosexuality, particularly in America's military.⁶⁴

However, no group can simply hold a spontaneous demonstration anytime, anywhere, and any way it chooses. Usually, a group must apply to the local city government for a permit and post a bond of a few hundred dollars as a sort of security deposit. The governing body must grant a permit as long as the group pledges to hold its demonstration at a time and place that allows the police to prevent major disruptions. There are virtually no limitations on the content of a group's message. One important case arose when the American Nazi Party applied to march in the streets of Skokie, Illinois, a Chicago suburb with a sizable Jewish population, including many survivors of Hitler's death camps. You can examine the Court's decision in "You Are the Judge: The Case of the Nazis' March in Skokie."

Protest that verges on harassment tests the balance between freedom and order. Members of pro-life groups such as "Operation Rescue" have lined up outside abortion clinics to protest abortion and to shame clients into staying away or even harass them if they do visit the clinics. Rights are in conflict in such cases: a woman seeking to terminate her pregnancy has the right to obtain an abortion; the demonstrators have the right to protest the very existence of the clinic. The courts have acted to restrain these protestors, setting limits on how close they may come to the clinics and upholding damage claims of clients against the protestors. In one case, pro-life demonstrators in a Milwaukee, Wisconsin, suburb paraded outside the home of a physician who was reported to perform abortions. The town board forbade future picketing in residential neighborhoods. In 1988, the Supreme Court agreed that the right of residential privacy was a legitimate local concern and upheld the ordinance.⁶⁵ In 1994, Congress passed a law enacting broad new penalties against abortion protestors.

□ Right to Associate

The second facet of freedom of assembly is the right to associate with people who share a common interest, including an interest in political change. In a famous case at the height of the civil rights movement, Alabama tried to harass the state chapter of the

You Are the Judge

The Case of the Nazis' March in Skokie

Hitler's Nazis slaughtered 6 million Jews in death camps like Bergen-Belsen, Auschwitz, and Dachau. Many of the survivors migrated to the United States, and thousands settled in Skokie, Illinois, a suburb just north of Chicago with a heavily Jewish population.

The American Nazi Party in the Skokie area was a ragtag group of perhaps 25 to 30 members. Its headquarters was a storefront building on the West Side of Chicago, near an area with an expanding African American population. After Chicago denied them a permit to march in an African American neighborhood, the American Nazis announced their intention to march in Skokie. Skokie's city government required that they post a \$300,000 bond to obtain a parade permit. The Nazis claimed that the high bond was set in order to prevent their march and that it infringed on their freedoms of speech and assembly. The American Civil Liberties Union (ACLU), despite its loathing of the Nazis, defended the Nazis' claim and their right to march. The ACLU lost half its Illinois membership because it took this position.

YOU BE THE JUDGE:

Do Nazis have the right to parade, preach anti-Jewish propaganda, and perhaps provoke violence in a community peopled with survivors of the Holocaust? What rights or obligations does a community have to maintain order?

DECISION:

A federal district court ruled that Skokie's ordinance did restrict freedom of assembly and association. No community could use its power to grant parade permits to stifle free expression. In *Collins v. Smith* (Collins was the Nazi leader, and Smith was the mayor of Skokie), the Supreme Court let this lower-court decision stand. In fact, the Nazis did not march in Skokie, settling instead for some poorly attended demonstrations in Chicago.

NAACP v. Alabama

The 1958 Supreme Court decision that the right to assemble meant Alabama could not require the state chapter of NAACP to reveal its membership list.

National Association for the Advancement of Colored People (NAACP) by requiring it to turn over its membership list. The Court found this demand an unconstitutional restriction on freedom of association (*NAACP v. Alabama* [1958]).

In 2006, some law schools argued that congressional legislation that required them to grant military recruiters access to their students violated the schools' freedoms of speech and association (because they were forced to have recruiters on campus). Upholding the law, the Supreme Court concluded that it regulated conduct, not speech. In addition, nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the law restricts what they may say about the military's policies. Nor does the law force a law school to accept members it does not desire, and students and faculty are free to voice their disapproval of the military's message.⁶⁶

Right to Bear Arms

4.5

Describe the right to bear arms protected by the Second Amendment and its limitations.

F

ew issues generate as much controversy as gun control. In an attempt to control gun violence, many communities have passed restrictions on owning and carrying handguns. National and state and local laws have also mandated background checks for gun buyers and limited the sale of certain types of weapons altogether. Yet other laws have required that guns be stored in a fashion to prevent their theft or children from accessing and firing them. Some groups, most notably the National Rifle Association, have invested millions of dollars to fight almost all gun control efforts, arguing that they violate the Second Amendment's guarantee of a right to bear arms. Many advocates of gun control argue that the Second

Point to Ponder

In its humorous way, this cartoon shows that constitutional rights are sometimes in conflict.

Is there any way to prioritize our basic rights?



"The way I see it, the Constitution cuts both ways. The First Amendment gives you the right to say what you want, but the Second Amendment gives me the right to shoot you for it."

Amendment applies only to the right of states to create militias. Surprisingly, the Supreme Court has rarely dealt with gun control.

In 2008, however, the Court directly faced the issue. A law in the District of Columbia restricted residents from owning handguns, excluding those registered prior to 1975 and those possessed by active and retired law enforcement officers. The law also required that all lawfully owned firearms, including rifles and shotguns, be unloaded and disassembled or bound by a trigger lock or similar device. The Supreme Court in *District of Columbia v. Heller* (2008) held that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia and to use that arm for traditionally lawful purposes, such as self-defense within the home. Similarly, the requirement that any lawful firearm in the home be disassembled or bound by a trigger lock is unconstitutional because it makes it impossible for citizens to use arms for the core lawful purpose of self-defense. In 2010 in *McDonald v. Chicago*, the Court extended the Second Amendment's limits on restricting an individual's right to bear arms to state and local gun control laws.

Nevertheless, like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, prohibitions on concealed weapons are permissible, as are limits on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, laws imposing conditions and qualifications on the commercial sale of arms, and laws restricting "dangerous and unusual weapons" that are not typically used for self-defense or recreation.

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This mother and daughter attending the National Rifle Association's annual meeting are enjoying the right to bear arms. This right is not absolute, however.

Defendants' Rights

4.6 Characterize defendants' rights and identify issues that arise in their implementation.

The Bill of Rights contains only 45 words that guarantee the freedoms of religion, speech, press, and assembly. Most of the remaining words concern the rights of people accused of crimes. The Founders intended these rights to protect the accused in *political* arrests and trials; British abuse of colonial political leaders was still fresh in the memory of American citizens. Today the courts apply the protections in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments mostly in criminal justice cases.

It is useful to think of the criminal justice system as a funnel. Following a *crime* there is (sometimes) an *arrest*, which is (sometimes) followed by a *prosecution*, which is (sometimes) followed by a *trial*, which (usually) results in a *verdict* of innocence or guilt. The funnel gets smaller and smaller. For example, the ratio of crimes reported to arrests made is about five to one. At each stage of the criminal justice system, the Constitution protects the rights of the accused (see Figure 4.1).

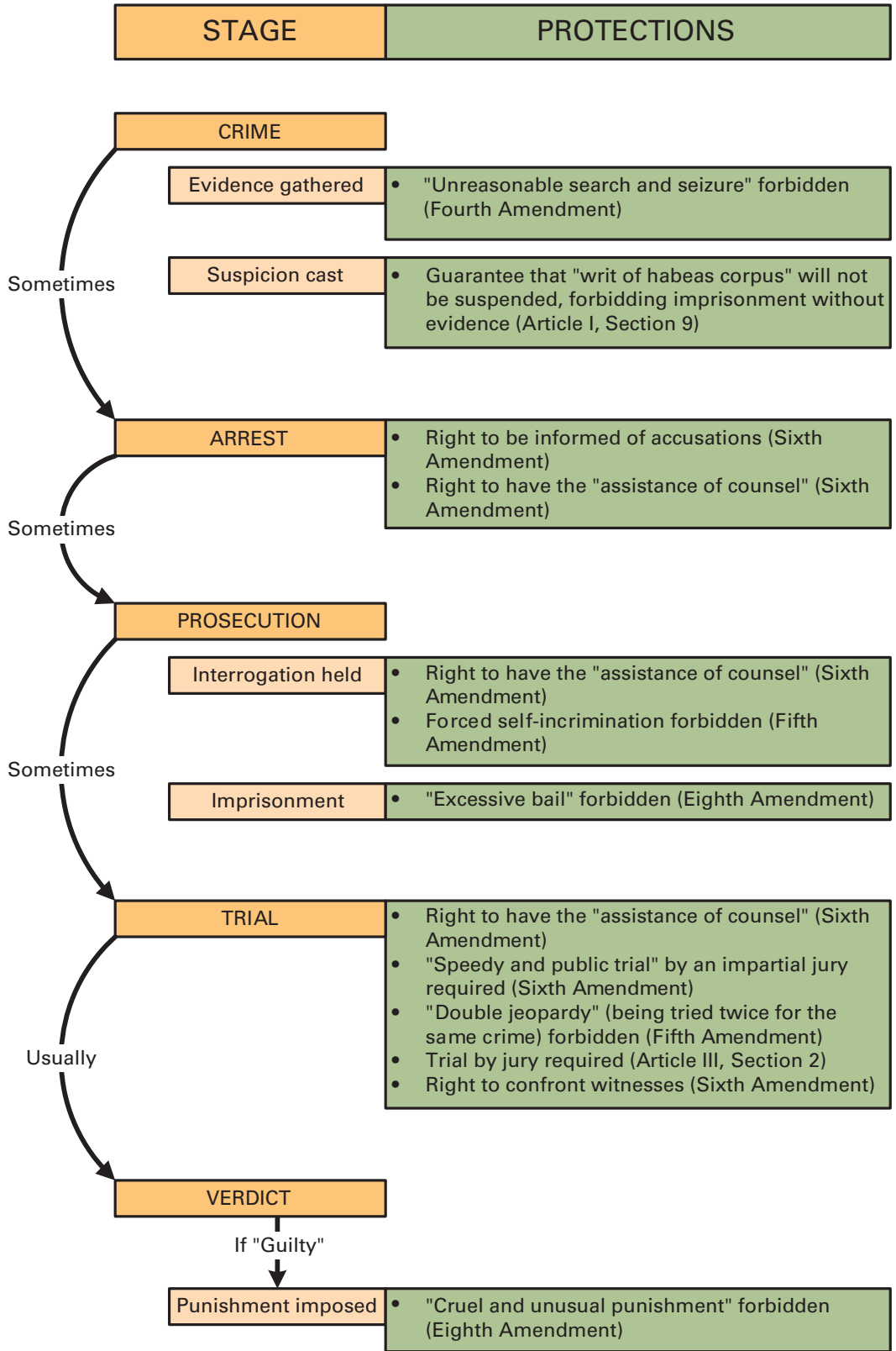
The language of the Bill of Rights comes from the late 1700s and is often vague. For example, just how speedy is a “speedy trial”? How “cruel and unusual” does a punishment have to be in order to violate the Eighth Amendment? The courts continually must rule on the constitutionality of actions by police, prosecutors, judges, and legislatures—actions that a citizen or group could claim violate certain rights. Defendants' rights, just like those rights protected by the First Amendment, are not clearly defined in the Bill of Rights.

One thing is clear, however. The Supreme Court's decisions have extended specific provisions of the Bill of Rights—one by one—to the states as part of the general process

of incorporation we discussed earlier. Virtually all the rights we discuss in the following sections affect the actions of both national and state authorities. Incorporation is especially important because most cases regarding defendants' rights come from the states.

FIGURE 4.1 THE CONSTITUTION AND THE STAGES OF THE CRIMINAL JUSTICE SYSTEM

Although our criminal justice system is complex, it can be broken down into stages. The Constitution protects the rights of the accused at every stage.



□ Searches and Seizures

probable cause

4.1

The situation in which the police have reasonable grounds to believe that a person should be arrested.

4.2

unreasonable searches and seizures

4.3

Obtaining evidence in a haphazard or random manner, a practice prohibited by the Fourth Amendment. Probable cause and/or a search warrant are required for a legal and proper search for and seizure of incriminating evidence.

4.4

4.5

search warrant

A written authorization from a court specifying the area to be searched and what the police are searching for.

4.6

exclusionary rule

4.7

The rule that evidence cannot be introduced into a trial if it was not constitutionally obtained. The rule prohibits use of evidence obtained through unreasonable search and seizure.

4.8

Police cannot arrest a citizen without reason. Before making an arrest, police need what the courts call **probable cause**, reasonable grounds to believe that someone is guilty of a crime.

In addition to needing evidence to make an arrest, police often need to get physical evidence—a car thief’s fingerprints, a snatched purse—to use in court. To prevent abuse of police power, the Fourth Amendment forbids **unreasonable searches and seizures**. That is, certain conditions for searches must be met.

A search can occur if a court has issued a **search warrant**. Courts can issue a warrant only if there is probable cause to believe that a crime has occurred or is about to occur. These written warrants must specify the area to be searched and the material sought in the police search.

A search can take place without a warrant (as most do) if probable cause of a crime exists, if the search is necessary to protect an officer’s safety, if the search is limited to material relevant to the suspected crime or within the suspect’s immediate control, or if there is a need to prevent the imminent destruction of evidence.⁶⁷ The Supreme Court has also held that police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.⁶⁸

In various rulings, the Supreme Court has upheld a wide range of warrantless searches. For example, the Court has upheld aerial searches to secure key evidence in cases involving marijuana growing and environmental violations, roadside checkpoints in which police randomly examine drivers for signs of intoxication,⁶⁹ the use of narcotics-detecting dogs at a routine stop for speeding,⁷⁰ and the search of a passenger and car following a routine check of the car’s registration.⁷¹ The Court also has approved warrantless “hot pursuit” of criminal suspects and has upheld warrantless car stops and “stop-and-frisk” encounters with passengers and pedestrians based on reasonable suspicion of criminal activity, rather than the higher standard of probable cause. It has approved mandatory drug testing of transportation workers and high school athletes with no individualized suspicion at all. Searches of K–12 students require only that there be a reasonable chance of finding evidence of wrongdoing, rather than probable cause.⁷² In 2012, the Court held that officials may strip-search anyone arrested for any offense before admitting them to jails, even if the officials do not suspect the presence of contraband.⁷³

However, some decisions offer more protection against searches. The Court has held that although officers may order a driver and passengers out of a car while issuing a traffic citation and may search for weapons to protect themselves from danger, they cannot search a car if there is no threat to the officer’s safety.⁷⁴ In 2009, the Court decided that the police may search a vehicle incident to an arrest only if it is reasonable to believe the arrestee might access the vehicle at the time of the search (to obtain a weapon or destroy evidence, for example) or that the vehicle contains evidence of the offense of arrest. They cannot search vehicles for evidence of other crimes.⁷⁵ Similarly, the Supreme Court prohibited highway checkpoints designed to detect ordinary criminal wrongdoing, such as possessing illegal drugs,⁷⁶ and it ruled that an anonymous tip that a person is carrying a gun is not sufficient justification for a police officer to stop and frisk that person.⁷⁷ In addition, the Court found that police use of a thermal imaging device to detect abnormal heat (needed for growing marijuana) in a home violated the Fourth Amendment.⁷⁸ In 2012, the Court held that the government’s installation of a G.P.S. device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constituted a “search” and required a warrant.⁷⁹

What happens if evidence used in court was obtained through unreasonable search and seizure? In a 1914 decision, the Supreme Court established the **exclusionary rule**, preventing prosecutors from introducing illegally seized evidence in court. Until 1961, however, the exclusionary rule applied only to the federal government. The Court broadened its application in the case of a Cleveland woman named Dollree Mapp. The local police had broken into Mapp’s home looking for a suspected bombing fugitive, and while there, they searched it and found a cache of obscene materials. Mapp was convicted of possessing them. She appealed her case to the federal courts, claiming that

since the police had no probable cause to search for obscene materials, the evidence should not be used against her. In an important decision, *Mapp v. Ohio*, the Supreme Court ruled that the evidence had been seized illegally and reversed Mapp's conviction. Since then, the exclusionary rule, treated as part of the Fourth Amendment, has been incorporated within the rights that restrict the states as well as the federal government.

Mapp v. Ohio

The 1961 Supreme Court decision ruling that the Fourth Amendment's protection against unreasonable searches and seizures must be extended to the states.

Why It Matters to You

The Exclusionary Rule

The exclusionary rule, in which courts disregard evidence obtained illegally, has been controversial. Although critics view the rule as a technicality that helps criminals to avoid justice, this rule protects defendants (who have not been proven guilty) from abuses of police power.

Critics of the exclusionary rule, including some Supreme Court justices, argue that its strict application may permit guilty persons to go free because of police carelessness or innocent errors. The guilty, they say, should not go free because of a "technicality." Supporters of the exclusionary rule respond that the Constitution is not a technicality and that—because everyone is presumed innocent until proven guilty—defendants' rights protect the *accused*, not the guilty. You can examine one contemporary search-and-seizure case in "You Are the Judge: The Case of Ms. Montoya."

You Are the Judge

The Case of Ms. Montoya

Rosa Elvira Montoya de Hernandez arrived at the Los Angeles International Airport on Avianca Flight 080 from Bogotá, Colombia. Her first official encounter was with U.S. Customs inspector Talamantes, who noticed that she spoke no English. Interestingly, Montoya's passport indicated eight recent quick trips from Bogotá to Los Angeles. She had \$5,000 in cash but no pocket-book or credit cards.

Talamantes and his fellow customs officers were suspicious. Stationed in Los Angeles, they were hardly unaware of the fact that Colombia was a major drug supplier. They questioned Montoya, who explained that her husband had a store in Bogotá and that she planned to spend the \$5,000 at Kmart and JC Penney, stocking up on items for the store.

The inspector, somewhat wary, handed Montoya over to female customs inspectors for a search. These agents noticed what the Supreme Court later referred to delicately as a "firm fullness" in Montoya's abdomen. Suspicions, already high, increased. The agents applied for a court order to conduct pregnancy tests, X-rays, and other examinations, and eventually they found 88 balloons containing 80 percent pure cocaine in Montoya's alimentary canal.

Montoya's lawyer argued that this constituted unreasonable search and seizure and that her arrest and

conviction should be set aside. There was, he said, no direct evidence that would have led the officials to suspect cocaine smuggling. The government argued that the arrest had followed from a set of odd facts leading to reasonable suspicion that something was amiss.

YOU BE THE JUDGE:

Was Montoya's arrest based on a search-and-seizure incident that violated the Fourth Amendment?

DECISION:

The Supreme Court held that U.S. Customs agents were well within their constitutional authority to search Montoya. Even though collection of evidence took the better part of two days, Justice Rehnquist, the opinion's author, remarked wryly that "the rudimentary knowledge of the human body which judges possess in common with the rest of mankind tells us that alimentary canal smuggling cannot be detected in the amount of time in which other illegal activities may be investigated through brief ... stops."

4.1

Fifth Amendment

A constitutional amendment designed to protect the rights of persons accused of crimes, including protection against double jeopardy, self-incrimination, and punishment without due process of law.

4.2

4.3

self-incrimination

The situation occurring when an individual accused of a crime is compelled to be a witness against himself or herself in court. The Fifth Amendment forbids involuntary self-incrimination.

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Beginning in the 1980s, the Court has made some exceptions to the exclusionary rule, including allowing the use of illegally obtained evidence when this evidence led police to a discovery that they eventually would have made without it.⁸⁰ The justices also decided to establish the good-faith exception to the rule; evidence can be used if the police who seized it mistakenly thought they were operating under a constitutionally valid warrant.⁸¹ In 1995, the Court held that the exclusionary rule does not bar evidence obtained illegally as the result of clerical errors.⁸² In 2006, it held that a police failure to abide by the rule requiring them to knock and announce themselves before entering a home was not a justification for suppressing the evidence they found upon entry with a warrant.⁸³ The Court even allowed evidence illegally obtained from a banker to be used to convict one of his customers.⁸⁴ In a 2009 decision, *Herring v. United States*, the Court held that the exclusionary rule does not apply when there is isolated police negligence rather than systematic error or reckless disregard of constitutional requirements.

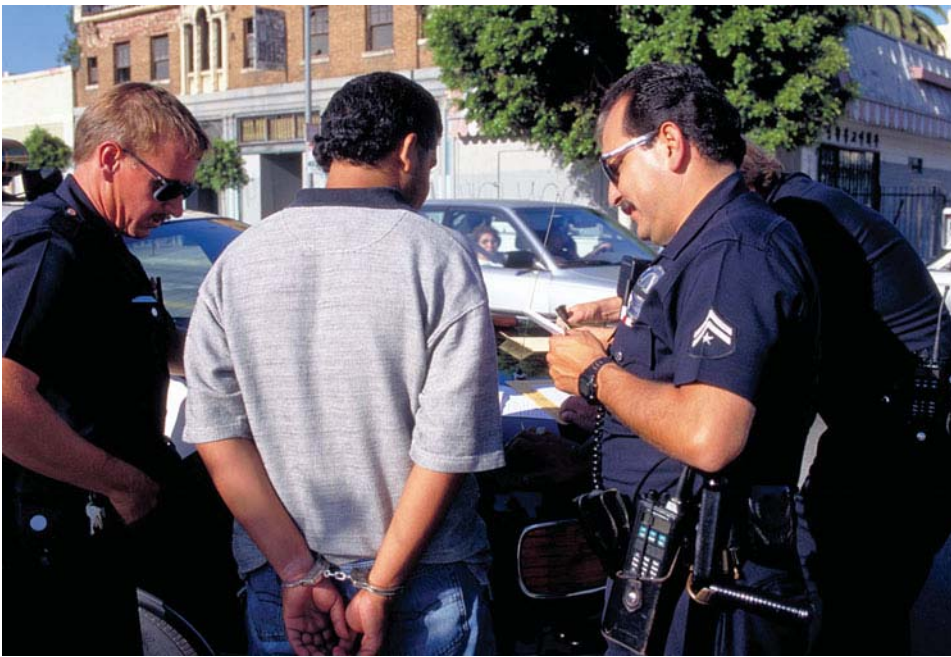
THE WAR ON TERRORISM The *USA Patriot Act*, passed just six weeks after the September 11, 2001, terrorist attacks, gave the government broad new powers for the wiretapping, surveillance, and investigation of terrorism suspects. Attorney General John Ashcroft also eased restrictions on domestic spying in counterterrorism operations, allowing agents to monitor political or religious groups without any connection to a criminal investigation. The Patriot Act gave the federal government the power to examine a terrorist suspect's records held by third parties, such as doctors, libraries, bookstores, universities, and Internet service providers. It also allowed searches of private property without probable cause and without notice to the owner until after the search has been executed, limiting a person's opportunities to challenge a search. Congress reauthorized the law in 2006 with few changes.

In December 2005, reports revealed that President George W. Bush had ordered the National Security Agency, without the court-approved warrants ordinarily required for domestic spying, to monitor the international telephone calls and e-mail messages of people inside the United States. In 2008, Congress overhauled the nation's surveillance law, the Foreign Intelligence Surveillance Act, allowing officials to use broad warrants to eavesdrop on large groups of foreign targets rather than requiring individual warrants, for wiretapping purely foreign communications like phone calls and e-mail messages that pass through American telecommunications switches. In targeting and wiretapping Americans, however, officials must obtain individual warrants from the special intelligence court, although in emergency circumstances, they can wiretap for at least seven days without a court order if they assert that "intelligence important to the national security of the United States may be lost."

□ Self-Incrimination

Suppose that evidence has been gathered and the police are ready to make an arrest. In the American system, the burden of proof rests on the police and the prosecutors. The **Fifth Amendment** forbids forced **self-incrimination**, stating that no person "shall be compelled to be a witness against himself." Whether in a congressional hearing, a courtroom, or a police station, suspects need not provide evidence that can later be used against them. However, the government may guarantee suspects *immunity*—exemption from prosecution in exchange for suspects' testimony regarding their own and others' misdeeds.

You have probably seen television shows in which an arrest is made and the arresting officers recite, often from memory, a set of rights to the arrestee. The recitation of these rights is authentic and originated from a famous court decision—perhaps the most important modern decision in criminal law—involving an Arizona man named Ernesto Miranda.⁸⁵



Miranda v. Arizona

The 1966 Supreme Court decision that sets guidelines for police questioning of accused persons to protect them against self-incrimination and to protect their right to counsel.

One of the most important principles of constitutional law is that defendants in criminal cases have rights. Probable cause and/or a search warrant are required for a legal search for and seizure of incriminating evidence. Here police officers read the suspect his rights based on the Supreme Court's decision in *Miranda v. Arizona*.

Miranda was picked up as a prime suspect in the rape and kidnapping of an 18-year-old girl. Identified by the girl from a police lineup, he was questioned by police for two hours. During this time, they did not tell him of either his constitutional right against self-incrimination or his right to counsel. Miranda said enough to lead eventually to a conviction. The Supreme Court reversed his conviction on appeal, however. In *Miranda v. Arizona* (1966), the Court established guidelines for police questioning. Suspects must be told the following:

- They have a constitutional right to remain silent and may stop answering questions at any time.
- What they say can be used against them in a court of law.
- They have a right to have a lawyer present during questioning, and the court will provide them with a lawyer if they cannot afford their own.

Ironically, when Ernesto Miranda himself was murdered, police read the suspect his “Miranda rights.”

In the decades since the *Miranda* decision, the Supreme Court has made a number of exceptions to its requirements. In 1991, for example, the Court held that a coerced confession introduced in a trial does not automatically taint a conviction. If other evidence is enough for a conviction, then the coerced confession is a “harmless error” that does not necessitate a new trial.⁸⁶ The Court also declared that criminal suspects seeking to protect their right to remain silent must clearly state they are invoking it.⁸⁷

Nevertheless, in 2000 in *Dickerson v. U.S.*, the Court made it clear that it supported the *Miranda* decision and that Congress was not empowered to change it. In 2010, the Court held that police may take a second run at questioning a suspect who has invoked his or her Miranda rights, but they must wait until 14 days after the suspect has been released from custody.⁸⁸ In 2011, the Court declared that officials must take greater care to explain rights to children when the police question them.⁸⁹

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4.1

Sixth Amendment

A constitutional amendment designed to protect individuals accused of crimes. It includes the right to counsel, the right to confront witnesses, and the right to a speedy and public trial.

4.2

4.3

Gideon v. Wainwright

The 1963 Supreme Court decision holding that anyone, however poor, accused of a felony where imprisonment may be imposed has a right to a lawyer.

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The Fifth Amendment prohibits not only coerced confessions but also coerced crimes. The courts have overturned convictions based on *entrapment*, in which law enforcement officials encouraged persons to commit crimes (such as accepting bribes or purchasing illicit drugs) that they otherwise would not have committed. “You Are the Judge: The Case of the Enticed Farmer” addresses this issue.

□ The Right to Counsel

A crucial *Miranda* right is the right to counsel. The **Sixth Amendment** has always guaranteed the right to counsel in federal courts. In state courts a guaranteed right to counsel traces back only to 1932, when the Supreme Court, in *Powell v. Alabama*, ordered the states to provide an attorney for poor defendants in capital crime cases (cases in which the death penalty could be imposed). Most crimes are not capital crimes, however, and most crimes are tried in state courts. It was not until 1963, in *Gideon v. Wainwright*,⁹⁰ that the Supreme Court extended the right to an attorney for everyone accused of a felony in a state court. Subsequently, the Court went a step further, holding that whenever imprisonment could be imposed, a lawyer must be provided for the accused (*Argersinger v. Hamlin* [1972]). In addition, the Supreme Court found that a trial court’s erroneous deprivation of a criminal defendant’s right to *choose* a counsel entitles him or her to reversal of his conviction.⁹¹ In 2011, however, the Court held that in some circumstances states are not obligated to provide counsel in civil contempt cases carrying the potential for imprisonment.⁹²

□ Trials

The Sixth Amendment (and the Constitution’s protection against the suspension of the writ of *habeas corpus*) guarantees that persons who are arrested have a right to be brought before a judge. This guarantee applies at two stages of the judicial process. First, those detained have a right to be informed of the accusations against them. Second, they have a right to a *speedy and public trial, by an impartial jury*.

You Are the Judge

The Case of the Enticed Farmer

In 1984, Keith Jacobson, a 56-year-old farmer who supported his elderly father in Nebraska, ordered two magazines and a brochure from a California adult bookstore. He expected nude photographs of adult males but instead found photographs of nude boys. He ordered no other magazines.

Three months later, Congress changed federal law to make the receipt of such materials illegal. Finding his name on the mailing list of the California bookstore, two government agencies repeatedly enticed Jacobson through five fictitious organizations and a bogus pen pal with solicitations for sexually explicit photographs of children. After 26 months of enticement, Jacobson finally ordered a magazine and was arrested for violating the Child Protection Act.

He was convicted of receiving child pornography through the mail, which he undoubtedly did. Jacobson

claimed, however, that he had been entrapped into committing the crime.

YOU BE THE JUDGE:

Was Jacobson an innocent victim of police entrapment, or was he truly seeking child pornography?

DECISION:

The Court agreed with Jacobson. In *Jacobson v. United States* (1992), it ruled that the government had overstepped the line between setting a trap for the “unwary innocent” and the “unwary criminal” and failed to establish that Jacobson was independently predisposed to commit the crime for which he was arrested. Jacobson’s conviction was overturned.

Despite the drama of highly publicized trials, trials are in fact relatively rare. In American courts, 90 percent of all criminal cases begin and end with a guilty plea. Most of these cases are settled through a process called **plea bargaining**. A plea bargain results from a bargain struck between a defendant's lawyer and a prosecutor to the effect that a defendant will plead guilty to a lesser crime (or fewer crimes) in exchange for a state not prosecuting that defendant for a more serious (or additional) crime.

Critics of the plea-bargaining system believe that it permits many criminals to avoid the full punishment they deserve. After decades of new laws to toughen sentencing for criminals, however, prosecutors have gained greater leverage to extract guilty pleas from defendants, often by using the threat of more serious charges with mandatory sentences or other harsher penalties.

The plea-bargaining process works to the advantage of both sides; it saves the state the time and money that would be spent on a trial, and it permits defendants who think they might be convicted of a serious charge to plead guilty to a lesser one. A study of sentencing patterns in three California counties discovered that a larger proportion of defendants who went to trial ended up going to prison compared with those who pleaded guilty and had no trial. In answer to their question "Does it pay to plead guilty?" the researchers gave a qualified yes.⁹³ Good or bad, plea bargaining is a practical necessity. Only a vast increase in resources would allow the court system to cope with a trial for every defendant. In 2012, the Supreme Court recognized the dominant role plea bargaining plays in criminal law when it held in two cases⁹⁴ that defendants have a right to an effective lawyer during pretrial negotiations.

The defendants in the 300,000 cases per year that actually go to trial are entitled to many rights, including the Sixth Amendment's provision for a speedy trial by an impartial jury. An impartial jury includes one that is not racially biased (in which potential jurors of the defendant's race have been excluded).⁹⁵ Lawyers for both sides spend hours questioning prospective jurors in a major case. Defendants, of course, prefer a jury that is biased toward them, and those who can afford it do not leave jury selection to chance. A sophisticated technology of jury selection has developed. Jury consultants—often psychologists or other social scientists—develop profiles of jurors likely to be sympathetic or hostile to a defendant.

The Constitution does not specify the size of a jury; in principle, it could be anywhere from 1 to 100 people. Tradition in England and America has set jury size at 12, although in petty cases 6 jurors are sometimes used. Traditionally, too, a jury had to be unanimous in order to convict. The Supreme Court has eroded both traditions, permitting states to use fewer than 12 jurors and to convict with a less-than-unanimous vote. Federal courts still employ juries of 12 persons and require unanimous votes for a criminal conviction.

In recent years, the Supreme Court has aggressively defended the jury's role in the criminal justice process—and limited the discretion of judges in sentencing. In several cases, the Court has held that other than a previous conviction, any fact of the case that might increase the penalty for a convicted defendant beyond what the law usually allows or what such defendants usually receive must be submitted to a jury and proved beyond a reasonable doubt.⁹⁶ These decisions ensure that the judge's authority to sentence derives wholly from the jury's verdict.

The Sixth Amendment also gives defendants the right to confront the witnesses against them. The Supreme Court has held that prosecutors cannot introduce testimony into a trial unless the accused can cross-examine the witness.⁹⁷ This is so even if the witness is providing facts such as lab reports.⁹⁸ Moreover, defendants have the right to question those who prepared the reports.⁹⁹

Defendants also have a right to know about evidence that may exonerate them. In 2010, the Court held that due process prohibits a state from withholding evidence that is favorable to a defendant's defense and key to determining a defendant's guilt or punishment.¹⁰⁰

plea bargaining

A bargain struck between the defendant's lawyer and the prosecutor to the effect that the defendant will plead guilty to a lesser crime (or fewer crimes) in exchange for the state's promise not to prosecute the defendant for a more serious (or additional) crime.

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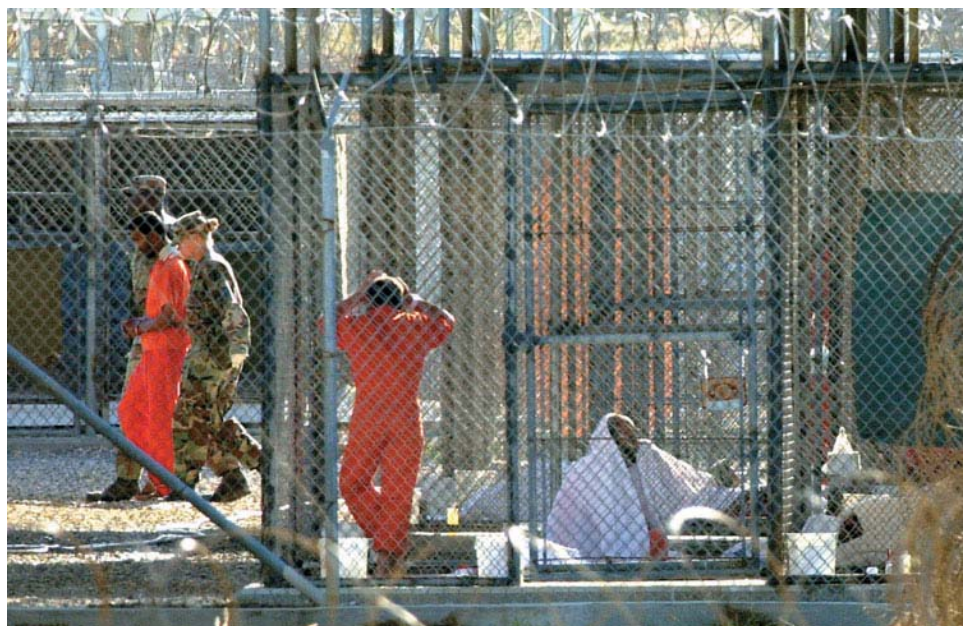
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THE WAR ON TERRORISM Normally, these guarantees present few issues. However, in the aftermath of the September 11, 2001, terrorist attacks, the FBI detained more than 1,200 persons as possible dangers to national security. Of these persons, 762 were illegal aliens (mostly Arabs and Muslims), and many of them languished in jail for months until cleared by the FBI. For the first time in U.S. history, the federal government withheld the names of detainees, reducing their opportunities to exercise their rights for access to the courts and to counsel. The government argued that releasing the names and details of those arrested would give terrorists a window on the terror investigation. In 2004, the Supreme Court refused to consider whether the government properly withheld names and other details about these prisoners. However, in other cases, the Court found that detainees, both in the United States and at the naval base at Guantánamo Bay, Cuba, had the right to challenge their detention before a judge or other neutral decision maker (*Hamdi v. Rumsfeld* and *Rasul v. Bush* [2004]).

In a historic decision in 2006 (*Hamdan v. Rumsfeld*), the Supreme Court held that the procedures President Bush had approved for trying prisoners at Guantánamo Bay lacked congressional authorization and violated both the Uniform Code of Military Justice and the Geneva Conventions. The flaws the Court cited were the failure to guarantee defendants the right to attend their trial and the prosecution's ability under the rules to introduce hearsay evidence, unsworn testimony, and evidence obtained through coercion. Equally important, the Constitution did not empower the president to establish judicial procedures on his own.

Later that year, Congress passed the Military Commissions Act (MCA), which specifically authorized military commissions to try alien unlawful enemy combatants and denied access to the courts for aliens who were detained by the United States government as enemy combatants or who were waiting for the government to determine whether they were enemy combatants. This allowed the United States government to detain such aliens indefinitely without prosecuting them in any manner.

However, in 2008, the Supreme Court held in *Boumediene v. Bush* that foreign terrorism suspects held at Guantánamo Bay have constitutional rights to challenge their detention in U.S. courts. "The laws and Constitution are designed to survive, and remain in force, in extraordinary times," the Court proclaimed as it declared unconstitutional the provision of the MCA that stripped the federal courts of jurisdiction



Prisoners held at the U.S. naval base at Guantánamo Bay, Cuba, present difficult issues of prisoners' rights.

to hear habeas corpus petitions from detainees seeking to challenge their designation as enemy combatants. The Court also found that the procedure established for reviewing enemy combatant status failed to offer the fundamental procedural protections of habeas corpus.

□ Cruel and Unusual Punishment

Punishments for citizens convicted of a crime range from probation to the death penalty. The **Eighth Amendment** forbids **cruel and unusual punishment**, although it does not define the phrase. Since 1962, when it was incorporated, this provision of the Bill of Rights has applied to the states.

What constitutes cruel and unusual punishment? In 2011, the Supreme Court upheld a lower court order that found that conditions in California's overcrowded prisons were so bad that they violated the ban on cruel and unusual punishment and thus the state had to release some of the prisoners.¹⁰¹ The Court has also held that it is a violation of the cruel and unusual punishment clause to sentence a juvenile offender to life in prison without parole for a crime.¹⁰² (For another case related to cruel and unusual punishment, see "You Are the Judge: The Case of the First Offender.") Almost the entire constitutional debate over cruel and unusual punishment, however, has centered on the death penalty. More than 3,300 people are currently on death row, nearly half of them in California, Texas, and Florida.

The Court first confronted the question of whether the death penalty is inherently cruel and unusual punishment in *Furman v. Georgia* (1972), when it overturned Georgia's death penalty law because the state imposed the penalty in a "freakish" and "random" manner. Following this decision, 35 states passed new death penalty laws to address the Court's concerns. Thus, some states, to prevent arbitrariness in punishment, mandated death penalties for some crimes. In *Woodson v. North Carolina* (1976), the Supreme Court ruled against such mandatory death penalties. The Court has upheld the death penalty itself, however, concluding in *Gregg v. Georgia* (1976), that capital punishment is "an expression of society's outrage at particularly offensive conduct. . . . It is an extreme sanction, suitable to the most extreme of crimes."

Eighth Amendment

The constitutional amendment that forbids cruel and unusual punishment.

cruel and unusual punishment

Court sentences prohibited by the Eighth Amendment.

Gregg v. Georgia

The 1976 Supreme Court decision that upheld the constitutionality of the death penalty, as "an extreme sanction, suitable to the most extreme of crimes."

You Are the Judge

The Case of the First Offender

Ronald Harmelin of Detroit was convicted of possessing 672 grams of cocaine (a gram is about one-thirtieth of an ounce). Michigan's mandatory sentencing law required the trial judge to sentence Harmelin, a first-time offender, to life imprisonment without possibility of parole. Harmelin argued that this was cruel and unusual punishment because it was "significantly disproportionate," meaning that, as we might say, the punishment did not fit the crime. Harmelin's lawyers argued that many other crimes more serious than cocaine possession would net similar sentences.

YOU BE THE JUDGE:

Was Harmelin's sentence cruel and unusual punishment?

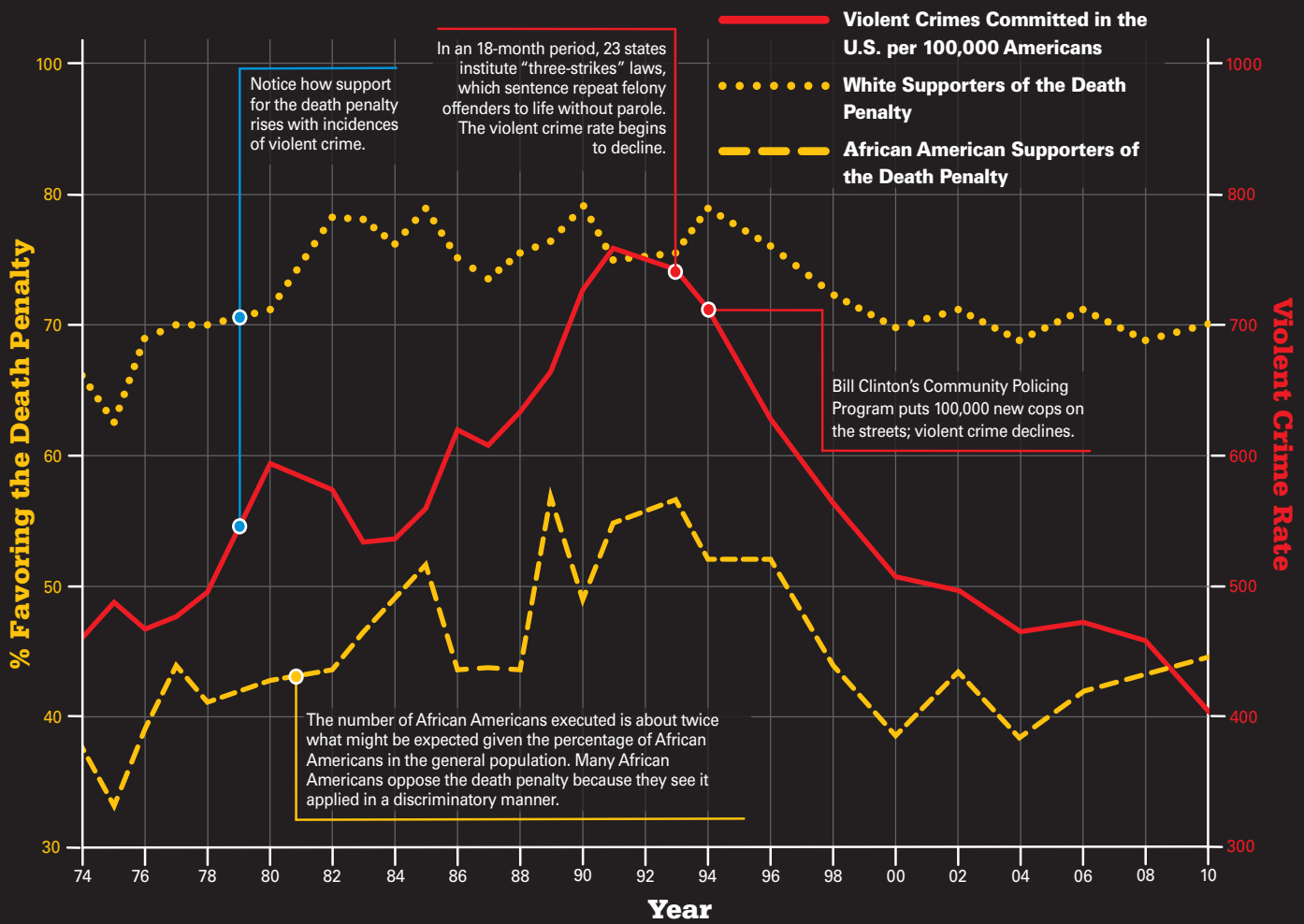
DECISION:

The Court upheld Harmelin's conviction in *Harmelin v. Michigan* (1991), spending many pages to explain that severe punishments were quite commonplace, especially when the Bill of Rights was written. Severity alone does not qualify a punishment as "cruel and unusual." The severity of punishment was up to the legislature of Michigan, which, the justices observed, knew better than they the conditions on the streets of Detroit. Later, Michigan reduced the penalty for possession of small amounts of cocaine and released Harmelin from jail.

Should the Government Apply the Death Penalty?

The United States is the only advanced democracy that practices capital punishment. Proponents argue that the death penalty is a deterrent to violent crimes, but since the early 1990s, public support for it has somewhat declined. A majority of Americans still support the death penalty, but the strength of this support differs by race.

Death Penalty Supporters by Race



SOURCE: Data from General Social Survey, 1972-2010; Bureau of Justice Statistics, U.S. Department of Justice.

Investigate Further

Concept How widespread is American support for using the death penalty? A majority of Americans endorse capital punishment, but support is far stronger among whites than African Americans. This difference is due in part to the fact that African Americans are more likely to be on death row than non-Hispanic whites.

Connection Is the death penalty related to violent crime rates? When violent crime goes up nationally, so does support for the death penalty because supporters believe it will decrease the violent crime rate. However, this idea is contested by death penalty opponents and those who see other explanations for less crime.

Cause What might account for the drop in the violent crime rate? There are at least two reasons not related to the death penalty for the decline of violent crime: increased federal spending to put more cops on the street, and states using stiffer sentencing for repeat felony offenders.

Shortly before retiring from the bench in 1994, Supreme Court Justice Harry Blackmun renounced the death penalty, declaring that its administration “fails to deliver the fair, consistent and reliable sentences of death required by the Constitution” (*Callins v. Collins* [1994]). Social scientists have shown that minority murderers whose victims were white are more likely to receive death sentences than are white murderers or those whose victims were not white. For example, about 80 percent of the murder victims in cases resulting in an execution were white, even though only 50 percent of murder victims generally are white. Nevertheless, in *McCleskey v. Kemp* (1987), the Supreme Court concluded that the death penalty did not violate the equal protection of the law guaranteed by the Fourteenth Amendment. The Court insisted that the unequal distribution of death penalty sentences was constitutionally acceptable because there was no evidence that juries intended to discriminate on the basis of race.

Today, the death penalty remains a part of the American criminal justice system. About 1,100 persons have been executed since the Court’s decision in *Gregg*. The Court has also made it more difficult for death row prisoners to file petitions that would force legal delays and appeals to stave off execution, it has made it easier for prosecutors to exclude jurors opposed to the death penalty (*Wainwright v. Witt*, 1985), and it has allowed “victim impact” statements detailing the character of murder victims and their families’ suffering to be used against a defendant. Most Americans support the death penalty, although there is evidence that racism plays a role in the support of whites.¹⁰³ It is interesting to note that the European Union prohibits the death penalty in member countries.

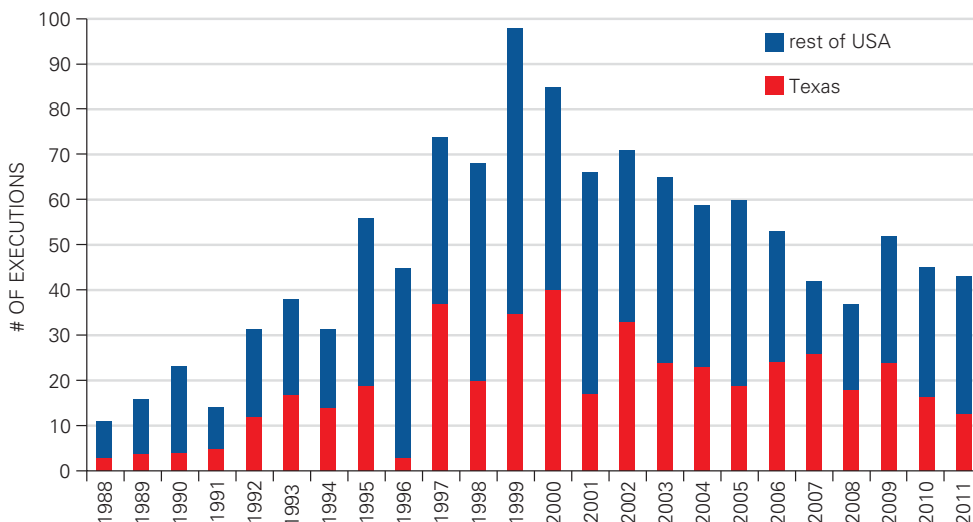
In recent years, however, evidence that courts have sentenced innocent people to be executed has reinvigorated the debate over the death penalty. Attorneys have employed the new technology of DNA evidence in a number of states to obtain the release of dozens of death row prisoners. Governor George Ryan of Illinois declared a moratorium on executions in his state after researchers proved that 13 people on death row were innocent. Later, he commuted the death sentences of all prisoners in the state. In general, there has been a decline in executions, as you can see in Figure 4.2.

McCleskey v. Kemp

The 1987 Supreme Court decision that upheld the constitutionality of the death penalty against charges that it violated the Fourteenth Amendment because minority defendants were more likely to receive the death penalty than were white defendants.

FIGURE 4.2 THE DECLINE OF EXECUTIONS

Supreme Court decisions, new DNA technology, and perhaps a growing public concern about the fairness of the death penalty have resulted in a dramatic drop in the number of death sentences—from 98 in 1999 to 43 in 2010. Texas leads the nation in executions, representing 30 percent of the national total in 2011. Texas prosecutors and juries are no more apt to seek and impose death sentences than those in other states that have the death penalty. However, once a death sentence is imposed there, prosecutors, the courts, the pardon board, and the governor are united in moving the process along.



SOURCES: Death Penalty Information Center; Texas Execution Information Center.

In addition, the Supreme Court has placed constraints on the application of the death penalty, holding that the Constitution barred the execution of the mentally ill (*Ford v. Wainwright*, 1986); mentally retarded persons (*Atkins v. Virginia*, 2002); those under the age of 18 when they committed their crimes (*Roper v. Simmons*, 2005); and those convicted of raping women (*Coker v. Georgia*, 1977) and children (*Kennedy v. Louisiana*, 2008) where the crime did not result, and was not intended to result, in the victim's death. In *Kennedy*, the Court went beyond the question in the case to rule out the death penalty for any individual crime—as opposed to offenses against the state, like treason or espionage—where the victim's life was not taken. In addition, the Court has required that a jury, not just a judge, find that an aggravating circumstance is associated with a murder when a state requires that for imposing death penalty (*Ring v. Arizona*, 2002). The Court also required lawyers for defendants in death penalty cases to make reasonable efforts to fight for their clients at a trial's sentencing phase (*Rompilla v. Beard* [2005]).

Debate over the death penalty continues. In 2008, the Supreme Court upheld the use of lethal injection, concluding that challengers to this method of execution must show not only that a state's method “creates a demonstrated risk of severe pain,” but also that there were alternatives that were “feasible” and “readily implemented” that would “significantly” reduce that risk.¹⁰⁴ You can see what some students are doing about the injustices they perceive in the death penalty system in “Young People and Politics: College Students Help Prevent Wrongful Deaths.”

Young People & Politics

College Students Help Prevent Wrongful Deaths

The Center on Wrongful Convictions at Northwestern University investigates possible wrongful convictions and represents imprisoned clients with claims of actual innocence. The young staff, including faculty, cooperating outside attorneys, and Northwestern University law students, pioneered the investigation and litigation of wrongful convictions—including the cases of nine innocent men sentenced to death in Illinois.

Undergraduates as well as law students have been involved in establishing the innocence of men who had been condemned to die. One instance involved the case of a man with an IQ of 51. The Illinois Supreme Court stayed his execution, just 48 hours before it was due to be carried out, because of questions about his mental fitness. This stay provided a professor and students from a Northwestern University investigative journalism class with an opportunity to investigate the man's guilt.

They tracked down and re-interviewed witnesses. One eyewitness recanted his testimony, saying that investigators had pressured him into implicating the man. The students found a woman who pointed to her ex-husband as the killer. Then a private investigator interviewed the ex-husband, who made a videotaped statement claiming he killed in self-defense. The students literally helped to save the life of an innocent man.

On January 11, 2003, Governor George H. Ryan of Illinois chose Lincoln Hall at Northwestern University's

School of Law to make a historic announcement. He commuted the death sentences of all 167 death row prisoners in Illinois (he also pardoned 4 others based on innocence the previous day). The governor felt it was fitting to make the announcement there, before “the students, teachers, lawyers, and investigators who first shed light on the sorrowful conditions of Illinois' death penalty system.”

In addition to saving the lives of wrongfully convicted individuals in Illinois, the Northwestern investigations have also helped trigger a nationwide reexamination of the capital punishment system. To learn more about the Center on Wrongful Convictions, visit its Web site at <http://www.law.northwestern.edu/wrongfulconvictions/>.

CRITICAL THINKING QUESTIONS

1. Why do you think college students and others were better able to determine the truth about the innocence of condemned men than were the police and prosecutors at the original trial?
2. Are there other areas of public life in which students can make important contributions through their investigations?

The Right to Privacy

4.7 Outline the evolution of a right to privacy and its application to the issue of abortion.

The members of the First Congress who drafted the Bill of Rights and enshrined American civil liberties would never have imagined that Americans would go to court to argue about wiretapping, surrogate motherhood, abortion, or pornography. New technologies have raised ethical issues unimaginable in the eighteenth century and focused attention on the question of privacy rights.

□ Is There a Right to Privacy?

Nowhere does the Bill of Rights say that Americans have a **right to privacy**. Clearly, however, the First Congress had the concept of privacy in mind when it crafted the first 10 amendments. Freedom of religion implies the right to exercise private beliefs, the Third Amendment prohibited the government from forcing citizens to quarter soldiers in their homes during times of peace, protections against “unreasonable searches and seizures” make persons secure in their homes, and private property cannot be seized without “due process of law.” In 1928, Justice Brandeis hailed privacy as “the right to be left alone—the most comprehensive of the rights and the most valued by civilized men.”

The idea that the Constitution guarantees a right to privacy was first enunciated in a 1965 case involving a Connecticut law forbidding the use of contraceptives. It was a little-used law, but a doctor and a family planning specialist were arrested for disseminating birth control devices. The state reluctantly brought them to court, and they were convicted. The Supreme Court, in the case of *Griswold v. Connecticut*, wrestled with the privacy issue. Seven justices finally decided that the explicitly stated rights in the Constitution implied a right to privacy, including a right to family planning between husband and wife. Supporters of privacy rights argued that this ruling was reasonable enough, for what could be the purpose of the Fourth Amendment, for example, if not to protect privacy? Critics of the ruling—and there were many of them—claimed that the Supreme Court was inventing protections not specified by the Constitution.

There are other areas of privacy rights, including the sexual behavior of gays and lesbians, as discussed in the chapter on civil rights. The most important application of privacy rights, however, came in the area of abortion. The Supreme Court unleashed a constitutional firestorm in 1973 that has not yet abated.

□ Controversy over Abortion

In 1972, the Supreme Court heard one of the most controversial cases ever to come before the Court. Under the pseudonym of “Jane Roe,” a Texas woman named Norma McCorvey sought an abortion. She argued that the state law allowing the procedure only to save the life of a mother was unconstitutional. Texas argued that states had the power to regulate moral behavior, including abortions. The Court ruled in *Roe v. Wade* (1973) that a right to privacy under the due process clause in the Fourteenth Amendment extends to a woman’s decision to have an abortion, but that right must be balanced against the state’s two legitimate interests for regulating abortions: protecting prenatal life and protecting the woman’s health. Saying that these state interests become stronger over the course of a pregnancy, the Court resolved this balancing test by tying state regulation of abortion to the woman’s current trimester of pregnancy. *Roe* forbade any state control of abortions during the first trimester; it permitted states to regulate abortion procedures, but only in a way that protected the mother’s health, in the second trimester; and it allowed the states to ban abortion during the third trimester, except when the mother’s life or health was in danger. This decision unleashed a storm of protest.

right to privacy

The right to a private personal life free from the intrusion of government.

Roe v. Wade

The 1973 Supreme Court decision holding that a state ban on abortions was unconstitutional. The decision forbade state control over abortions during the first trimester of pregnancy, permitted states to limit abortions to protect the mother’s health in the second trimester, and permitted states to ban abortion during the third trimester.

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Planned Parenthood v. Casey

A 1992 case in which the Supreme Court loosened its standard for evaluating restrictions on abortion from one of “strict scrutiny” of any restraints on a “fundamental right” to one of “undue burden” that permits considerably more regulation.

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Since *Roe v. Wade*, women have received more than 50 million legal abortions in the United States, more than a million in 2011. Abortion is a common experience: 22 percent of all pregnancies (excluding miscarriages) end in abortion. At current rates, about 3 in 10 American women will have had an abortion by the time they reach age 45. Moreover, a broad cross section of U.S. women has abortions. Fifty-seven percent of women having abortions are in their twenties; 61 percent have one or more children; 45 percent have never married; 42 percent have incomes below the federal poverty level; and 78 percent report a religious affiliation. No racial or ethnic group makes up a majority: 36 percent of women obtaining abortions are white non-Hispanic, 30 percent are black non-Hispanic, 25 percent are Hispanic, and 9 percent are of other racial backgrounds.¹⁰⁵

Yet the furor has never subsided. Congress has passed numerous statutes forbidding the use of federal funds for abortions. Many states have passed similar restrictions. For example, Missouri forbade the use of state funds or state employees to perform abortions. The Court upheld this law in *Webster v. Reproductive Health Services* (1989).

In 1992, in *Planned Parenthood v. Casey*, the Court changed its standard for evaluating restrictions on abortion from one of “strict scrutiny” of any restraints on a “fundamental right” to one of “undue burden,” which permits considerably more regulation. The Court upheld a 24-hour waiting period, a parental or judicial consent requirement for minors, and a requirement that doctors present women with information on the risks of the operation. The Court struck down a provision requiring a married woman to tell her husband of her intent to have an abortion, however, and the majority also affirmed their commitment to the basic right of a woman to obtain an abortion.

One area of controversy has been a procedure termed “partial birth” abortion. In 2000, the Court held in *Sternberg v. Carhart* that Nebraska’s prohibition of partial birth abortions was unconstitutional because the law placed an undue burden on women seeking an abortion by limiting their options to less safe procedures, provided no exception for cases where the health of the mother was at risk, and did not clearly specify prohibited procedures. In 2003, Congress passed a law banning partial birth abortions, providing an exception to the ban in order to save the life of a mother but no

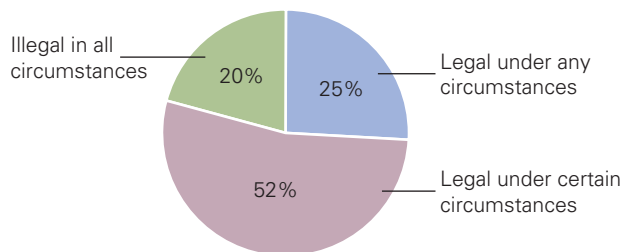


Abortion is perhaps the nation’s most divisive issue, raising strong emotions on both sides of the debate. Here pro-life activists pray across the street from the Washington, D.C., offices of Planned Parenthood.

FIGURE 4.3 THE ABORTION DEBATE

In few areas of public opinion research do scholars find more divided opinion than abortion. Some people feel very strongly about the matter, enough so that they are “single-issue voters” unwilling to support any candidate who disagrees with them. The largest group takes a middle position, supporting the principle of abortion but also accepting restrictions.

Question: Do you think abortions should be legal under any circumstances, legal only under certain circumstances, or illegal in all circumstances?



SOURCE: Gallup Poll, May 3–6, 2012.

exception to preserve a mother’s health, as it found that the procedure was never necessary for a woman’s health. In *Gonzales v. Carhart* (2007), the Supreme Court upheld that law, finding it was specific and did not subject women to significant health risks or impose an undue burden on a woman’s right to an abortion. The Court also took pains to point out that the law would not affect most abortions, which are performed early in a pregnancy, and that safe alternatives to the prohibited procedure are available.

Americans are deeply divided on the issue of abortion (see Figure 4.3). Proponents of choice believe that access to abortion is essential if women are to be fully autonomous human beings. Opponents call themselves pro-life because they believe that the fetus is fully human and that an abortion therefore deprives a human of the right to life. These positions are irreconcilable, making abortion a politician’s nightmare. Wherever a politician stands on this divisive issue, a large number of voters will be enraged.

With passions running so strongly on the issue, some advocates have taken extreme action. In the last two decades, abortion opponents have bombed a number of abortion clinics and murdered several physicians who performed abortions.

As mentioned earlier in the chapter, women’s right to obtain an abortion has clashed with protesters’ rights to free speech and assembly. In 1994, the Court consolidated the right to abortion established in *Roe* with the protection of a woman’s right to enter an abortion clinic to exercise that right. Citing the government’s interest in preserving order and maintaining women’s access to pregnancy services, the Court upheld a state court’s order of a 36-foot buffer zone around a clinic in Melbourne, Florida.¹⁰⁶ That same year, Congress passed the Freedom of Access to Clinic Entrances Act, which makes it a federal crime to intimidate abortion providers or women seeking abortions. In 2000, the Court upheld a 100-foot restriction on approaching someone at a health care facility to discourage abortions.¹⁰⁷ In another case, it decided that abortion clinics could invoke the federal racketeering law to sue violent antiabortion protest groups for damages.¹⁰⁸

Understanding Civil Liberties

4.8

Assess how civil liberties affect democratic government and how they both limit and expand the scope of government.

American government is both democratic and constitutional. America is democratic because it is governed by officials who are elected by the people and, as such, are accountable for their actions. The American government is constitutional because it has a fundamental organic law, the Constitution, that limits the things that government may do. By restricting the

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government, the Constitution limits what the people can empower the government to do. The democratic and constitutional components of government can produce conflicts, but they also reinforce one another.

□ Civil Liberties and Democracy

The rights ensured by the First Amendment—the freedoms of speech, press, and assembly—are essential to a democracy. If people are to govern themselves, they need access to all available information and opinions in order to make intelligent, responsible, and accountable decisions. If the right to participate in public life is to be open to all, then Americans—in all their diversity—must have the right to express their opinions.

Individual participation and the expression of ideas are crucial components of democracy, but so is majority rule, which can conflict with individual rights. The majority does not have the freedom to decide that there are some ideas it would rather not hear, although at times the majority tries to enforce its will on the minority. The conflict is even sharper in relation to the rights guaranteed by the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments. These rights protect all Americans, but they also make it more difficult to punish criminals. It is easy—although misleading—for the majority to view these guarantees as benefits for criminals at the expense of society.

With some notable exceptions, the United States has done a good job in protecting the rights of diverse interests to express themselves. There is little danger that a political or economic elite will muffle dissent. Similarly, the history of the past five decades is one of increased protections for defendants' rights, and defendants are typically not among the elite. Ultimately, the courts have decided what constitutional guarantees mean in practice. Although federal judges, appointed for life, are not directly accountable to popular will,¹⁰⁹ "elitist" courts have often protected civil liberties from the excesses of majority rule.

□ Civil Liberties and the Scope of Government

Civil liberties in America are both the foundation for and a reflection of our emphasis on individualism. When there is a conflict between an individual or a group attempting to express themselves or worship as they please and an effort by a government to constrain them in some fashion, the individual or group usually wins. If protecting the freedom of an individual or group to express themselves results in inconvenience or even injustice for the public officials they criticize or the populace they wish to reach, so be it. Every nation must choose where to draw the line between freedom and order. In the United States, we generally choose liberty.

Today's government is huge and commands vast, powerful technologies. Americans' Social Security numbers, credit cards, driver's licenses, and school records are all on giant computers to which the government has immediate access. It is virtually impossible to hide from the police, the FBI, the Internal Revenue Service, or any governmental agency. Because Americans can no longer avoid the attention of government, strict limitations on governmental power are essential. The Bill of Rights provides these vital limitations.

Thus, in general, civil liberties limit the scope of government. Yet substantial government efforts are often required to protect the expansion of rights that we have witnessed thus far. Those seeking abortions may need help reaching a clinic, defendants may demand that lawyers be provided to them at public expense, advocates of unpopular causes may require police protection, and litigants in complex lawsuits over matters of birth or death may rely on judges to resolve their conflicts. It is ironic—but true—that an expansion of freedom may require a simultaneous expansion of government.

Review the Chapter



Listen to **Chapter 4** on **MyPoliSciLab**

The Bill of Rights

- 4.1** Trace the process by which the Bill of Rights has been applied to the states, p. 107.

Under the incorporation doctrine, most of the freedoms outlined in the Bill of Rights limit the states as well as the national government. The due process clause of the Fourteenth Amendment provides the basis for this protection of rights.

Freedom of Religion

- 4.2** Distinguish the two types of religious rights protected by the First Amendment and determine the boundaries of those rights, p. 109.

The establishment clause of the First Amendment prohibits government sponsorship of religion, religious exercises, or religious doctrine, but government may support religious-related activities that have a secular purpose if this does not foster excessive entanglement with religion. The free exercise clause guarantees that people may hold any religious views they like, but government may at times limit practices related to those views.

Freedom of Expression

- 4.3** Differentiate the rights of free expression protected by the First Amendment and determine the boundaries of those rights, p. 116.

Americans enjoy wide protections for expression, both spoken and written, including symbolic and commercial speech. Free expression is protected even when it conflicts with other rights, such as the right to a fair trial. However, the First Amendment does not protect some expression, such as libel, fraud, obscenity, and incitement to violence, and government has more leeway to regulate expression on the public airwaves.

Freedom of Assembly

- 4.4** Describe the rights to assemble and associate protected by the First Amendment and their limitations, p. 126.

The First Amendment protects the right of Americans to assemble to make a statement, although time, place, and manner restrictions on parades, picketing, and protests are permissible. Citizens also have the right to associate with others who share a common interest.

Right to Bear Arms

- 4.5** Describe the right to bear arms protected by the Second Amendment and its limitations, p. 128.

Most people have a right to possess firearms and use them for traditionally lawful purposes. However, government may limit this right to certain classes of people, certain areas, and certain weapons, and may require qualifications for purchasing firearms.

Defendants' Rights

- 4.6** Characterize defendants' rights and identify issues that arise in their implementation, p. 130.

The Bill of Rights provides defendants with many rights, including protections against unreasonable searches and seizures, self-incrimination, entrapment, and cruel and unusual punishment (although the death penalty is not inherently constitutionally unacceptable). Defendants also have a right to be brought before a judicial officer when arrested, to have the services of counsel, to receive a speedy and fair trial (including by an impartial jury), and to confront witnesses who testify against them. They also must be told of their rights. Nevertheless, the implementation of each of these rights requires judges to make nuanced decisions about the meaning of relevant provisions of the Constitution.

The Right to Privacy

- 4.7** Outline the evolution of a right to privacy and its application to the issue of abortion, p. 143.

Beginning in the 1960s, the Supreme Court articulated a right to privacy, as implied by the Bill of Rights. This right has been applied in various domains and is the basis for a woman's right to an abortion under most, but not all, circumstances.

Understanding Civil Liberties

- 4.8** Assess how civil liberties affect democratic government and how they both limit and expand the scope of government, p. 145.

The rights of speech, press, and assembly are essential to democracy. So is majority rule. When any of the Bill of Rights, including defendants' rights, conflicts with majority rule, rights prevail.

There is a paradox about civil liberties and the scope of government. Civil liberties, by definition, limit the scope of government action, yet substantial government efforts may be necessary to protect the exercise of rights.

Learn the Terms



Study and Review the Flashcards

civil liberties, p. 107
Bill of Rights, p. 107
First Amendment, p. 109
Fourteenth Amendment, p. 109
due process clause, p. 109
incorporation doctrine, p. 109
establishment clause, p. 109
free exercise clause, p. 110

prior restraint, p. 117
libel, p. 122
symbolic speech, p. 123
commercial speech, p. 124
probable cause, p. 132
unreasonable searches and seizures, p. 132
search warrant, p. 132

exclusionary rule, p. 132
Fifth Amendment, p. 134
self-incrimination, p. 134
Sixth Amendment, p. 136
plea bargaining, p. 137
Eighth Amendment, p. 139
cruel and unusual punishment, p. 139
right to privacy, p. 143

Key Cases

Barron v. Baltimore (1833)
Gitlow v. New York (1925)
Lemon v. Kurtzman (1971)
Zelman v. Simmons-Harris (2002)
Engel v. Vitale (1962)
School District of Abington Township, Pennsylvania v. Schempp (1963)
Near v. Minnesota (1931)
Schenck v. United States (1919)

Roth v. United States (1957)
Miller v. California (1973)
New York Times v. Sullivan (1964)
Texas v. Johnson (1989)
Zurcher v. Stanford Daily (1978)
Miami Herald Publishing Company v. Tornillo (1974)
Red Lion Broadcasting Company v. Federal Communications Commission (1969)

NAACP v. Alabama (1958)
Mapp v. Ohio (1961)
Miranda v. Arizona (1966)
Gideon v. Wainwright (1963)
Gregg v. Georgia (1976)
McCleskey v. Kemp (1987)
Roe v. Wade (1973)
Planned Parenthood v. Casey (1992)

Test Yourself



Study and Review the Practice Tests

1. Prior to the Supreme Court ruling in *Gitlow v. New York*, how were state governments restricted by the Bill of Rights?

- Only the First Amendment restricted state governments, with the Bill of Rights in its entirety applying just to the national government.
- The Bill of Rights restricted state governments just as it did the national government.
- The Bill of Rights did not restrict state governments but did restrict the national government.
- The Bill of Rights restricted state governments on a case-by-case basis as it did the national government.
- The Bill of Rights restricted state action only on a case-by-case basis while restricting the national government generally.

2. The legal concept under which the Supreme Court has nationalized the Bill of Rights is the

- incorporation doctrine.
- establishment doctrine.
- inclusion doctrine.
- privileges and immunities clause.
- due process clause.

3. What was the Supreme Court's decision in the case of *Gitlow v. New York*, and what was its reasoning? Why was this decision significant?

4. Which of the following statements best explains the Supreme Court's interpretation of what the government may do to regulate religion?

- It can prohibit religious beliefs and practices it considers inappropriate.
- It can prohibit religious beliefs and practices so long as it does not specifically target a religion.
- It can prohibit some religious practices but not religious beliefs.
- It can prohibit neither religious beliefs nor religious practices.
- It can prohibit religious practices and beliefs for only certain religions.

5. Imagine that you are an administrator at a public university and the Christian Fellowship has petitioned to use university facilities. According to Supreme Court decisions on the matter of religion and public schools, you

- can deny the Christian Fellowship the use of the university facilities.

- b. must allow the Christian Fellowship to use the facilities, just like the Political Science Club and other student organizations.
- c. must allow the Christian Fellowship to use the facilities as long as its activities there do not include worship.
- d. must put the question to a vote of your student body.
- e. must require the Christian Fellowship group to file a religious exemption before you grant its request.

6. Concerning the establishment clause of the First Amendment, the Supreme Court has found that drawing the line between neutrality toward religion and promotion of it is difficult. Discuss a Supreme Court case that illustrates this. Why do you think drawing this line is so difficult?

7. Court decisions concerning symbolic speech

- a. have clearly defined symbolic speech and what type of symbolic speech is protected.
- b. have clearly defined symbolic speech but have ruled that it is never protected.
- c. have extended protections to only some forms of symbolic speech.
- d. have ruled that symbolic speech is always protected.
- e. have not directly addressed the matter of symbolic speech.

8. What measures can a court take in order to guarantee the right to a fair trial in the face of media scrutiny?

- a. The court can limit journalists' access to particularly sensitive trials.
- b. The court can exercise prior restraint against the publication of information that might influence the jury.
- c. The court can force journalists to hold back sensitive information until after the trial has ended.
- d. The court can threaten journalists with fines and imprisonment for revealing sensitive information.
- e. The Supreme Court has never upheld a restriction on the press in the interest of a fair trial.

9. The Constitution allows more regulation of the public airwaves than of the printed press.

True _____ False _____

10. Why does the Supreme Court allow more rigid regulation of commercial speech than other forms of speech?

11. The First Amendment to the U.S. Constitution reads, "Congress shall make no law ... restricting the freedom of speech." Based on your understanding of Supreme Court cases discussed in this chapter, how well do you think the Supreme Court has protected the First Amendment protections of freedom of speech? Explain your answer.

12. Which statement is true?

- a. Because the First Amendment mentions only assembly, there is no constitutional freedom of association.
- b. There can be no restrictions on assembling to express opposition to government action.
- c. There are virtually no limitations on the content of a protest group's message.
- d. States can demand the names of members of a group interested in political change.
- e. Governments do not have to protect protestors from violence by onlookers.

13. Suppose that you are in charge of deciding whether to provide permits to pro-choice and pro-life supporters who wish to assemble in your community and advocate their political positions. How might you balance this right to assemble with the government's necessity to ensure order, consistent with your understanding of this constitutional protection and Supreme Court decisions?

14. Which of the following are constitutional limits to the right to keep and bear arms?

- a. limits on concealed weapons
- b. limits on firearms possession by the mentally ill
- c. limits on carrying firearms in schools
- d. limits on the commercial sales of firearms
- e. All of the above restrictions on the right to keep and bear arms are permissible.

15. In the case of *District of Columbia v. Heller* (2008), the Supreme Court struck down a law that outlawed the possession of handguns in our nation's capital. What was the Court's primary reasoning? Do you agree or disagree with the decision? In your opinion, how did the Court balance the right to bear arms with the need of the government to provide order in society? Explain your answer.

16. Each of the following protections is found in the Fifth and Sixth Amendments, except

- a. the right to a speedy trial by an impartial jury.
- b. the right to counsel.
- c. the right to plea bargain.
- d. the right to remain silent.
- e. All of the above are rights protected in the Fifth and Sixth Amendments.

17. The Fourth Amendment to the Constitution requires police officers to have a warrant to search or arrest a criminal suspect.

True _____ False _____

18. What is the exclusionary rule and what are some exceptions to it, as identified by the U.S. Supreme Court?

19. What are the main arguments advanced by advocates and critics of the death penalty? Which set of arguments do you agree with more, and why? Has the Supreme Court ruled that the death penalty is “cruel and unusual punishment”? Why or why not?

20. Which of the following is NOT a constitutional restriction on abortion?

- a. forbidding the use of state funds for abortions
- b. requiring parental consent for a minor seeking an abortion
- c. requiring married women to tell their husbands of their intent to have an abortion
- d. banning “partial birth” abortions
- e. requiring doctors to present women with the risks of having an abortion

21. Is there a right to privacy in the Bill of Rights and, if so, how has it evolved over time? Defend your answer, referring to Supreme Court cases.

22. Which statement is correct?

- a. Majority rule can conflict with individual rights.
- b. Supreme Court decisions have restricted individual rights over the past century.

- c. The individual usually loses in conflicts over restrictions on free speech.
- d. Civil liberties generally expand the scope of government.
- e. The Constitution protects rights by restricting majority rule.

23. When thinking about citizens’ rights, one can distinguish between the rights of an individual citizen and the rights of society as a whole. Based on what you have learned in this chapter, under what circumstances are the courts and the government more likely to give preference to individual rights over the rights of society? By the same token, under what circumstances are concerns for society as a whole likely to override individual rights?

24. The Bill of Rights was designed to protect individuals from the tyranny of government. But as civil liberties have expanded, promoting democracy, they have also expanded the scope of government. How might you resolve the apparent contradiction between the expansion of democracy and scope of government? How well do you think the Bill of Rights balances these two considerations?

Explore Further

WEB SITES

www.freedomforum.org

Background information and recent news on First Amendment issues.

www.eff.org

Web site concerned with protecting online civil liberties.

www.aclu.org

Home page of the American Civil Liberties Union, offering information and commentary on a wide range of civil liberties issues.

www.firstamendmentcenter.org/category/religion

Background on freedom of religion in the United States and discussion of major church–state cases.

www.firstamendmentcenter.org/category/speech

Background on freedom of speech in the United States and discussion of major free speech issues.

www.firstamendmentcenter.org/category/press

Background on freedom of the press in the United States and discussion of major free press issues.

www.cc.org

Christian Coalition home page, containing background information and discussion of current events.

www.deathpenaltyinfo.org

The Death Penalty Information Center, providing data on all aspects of the death penalty.

www.guttmacher.org

The Guttmacher Institute, a nonpartisan source of information on all aspects of abortion.

reproductiverights.org/en

Center for Reproductive Rights Web site.

www.nrlc.org

National Right to Life Web site.

FURTHER READING

Adler, Renata. *Reckless Disregard*. New York: Knopf, 1986. The story of two monumental conflicts between free press and individual reputations.

Baker, Liva. *Miranda: The Crime, the Law, the Politics*. New York: Atheneum, 1983. An excellent book-length treatment of one of the major criminal cases of our time.

Baumgartner, Frank R., Suzanne L. De Boef, and Amber E. Boydston. *The Decline of the Death Penalty and the Discovery of Innocence*. New York: Cambridge University Press, 2008. Explains changes in public support for the death penalty and the number of executions.

Garrow, David J. *Liberty and Sexuality*. New York: Macmillan, 1994. The most thorough treatment of the development of the law on the right to privacy and abortion.

Heymann, Philip B. *Terrorism, Freedom, and Security*.

Cambridge, MA: MIT Press, 2004. Thoughtfully balances concerns for freedom with those of safety from terrorism.

Irons, Peter. *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court*. New York:

Penguin Books, 1990. Accounts of 16 Americans over a period of 50 years who took their cases to the Supreme Court in defense of civil liberties.

Levy, Leonard W. *The Emergence of a Free Press*. New York: Oxford University Press, 1985. A major work on the Framers' intentions regarding freedom of expression.

Levy, Leonard W. *The Establishment Clause: Religion and the First Amendment*. New York: Macmillan, 1986. The author argues that it is unconstitutional for government to provide aid to any religion.

Lewis, Anthony. *Make No Law: The Sullivan Case and the First Amendment*. New York: Random House, 1991. A well-written story of the key case regarding American libel law and an excellent case study of a Supreme Court case.

Rose, Melody. *Safe, Legal, and Unavailable: Abortion Politics in the United States*. Washington, DC: CQ Press, 2007. Explores how many women do not have the ability to exercise their constitutional right to an abortion.