Photo courtesy: Bebeto Matthews/AP/Wide World Photos

5

Civil Liberties

ON FEBRUARY 15, 2003, more than 100,000 demonstrators gathered outside the United Nations (UN) headquarters in New York City to protest the impending U.S.-led war with Iraq. The event was attended by citizens from across the country, including a number of celebrities, from actress Susan Sarandon to activists such as Archbishop Desmond Tutu and Martin Luther King III. However, many of the anti-war demonstrators also protested the barricades that police had set up at the UN's Dag Hammarskjöld Plaza and adjacent streets, which prevented them from moving about freely.

New York City officials argued that the barricades were erected for safety and security reasons. However, protesters, backed by the New York Civil Liberties Union, claimed that the limitations infringed upon their First Amendment right to peaceably assemble. Further, citing the civil rights era march from Selma to Montgomery, Alabama, they argued that a marching protest would have had greater impact than any stationary protest.[1]

Alleged prohibitions on Americans' right to peaceably assemble were not confined to New York City. In St. Louis, students were arrested for carrying protest signs outside a designated "protest zone" at a speech given by President George W. Bush. On college campuses across the nation, students wishing to express opposition to the Iraq War were confined to "free speech zones."[2]

During the war on terrorism and Operation Iraqi Freedom, as in previous times of war, balancing civil liberties with national security has been a difficult and contentious process. President Bush, as evidenced by the USA Patriot Act and its progeny, has indicated that he believes it is necessary to suspend some civil liberties normally enjoyed by citizens. Others, including the American Civil Liberties Union and its affiliates, charge that in a time of war, the United States should be a model of civil liberties protections for the nations we fight against, many of which practice massive civil liberties abuses. The atrocities committed by some members of the U.S. military as well as U.S. contractors on Iraqi prisoners as well as those at Guantanamo Bay, Cuba serve to highlight civil liberties abuses, even though prisoners never enjoy the full range of rights guaranteed to U.S. citizens.

CHAPTER OUTLINE

- The First Constitutional Amendments: The Bill of Rights
- First Amendment Guarantees: Freedom of Religion
- First Amendment Guarantees: Freedom of Speech, Press, and Assembly
- The Second Amendment: The Right to Keep and Bear Arms
- The Rights of Criminal Defendants
- The Right to Privacy

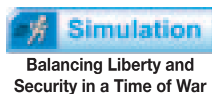
civil liberties
The personal guarantees and freedoms that the federal government cannot abridge by law, constitution, or judicial interpretation.

civil rights
The goverment-protected rights of individuals against arbitrary or discriminatory treatment.

When the Bill of Rights, which contains many of the most important protections of individual liberties, was written, its drafters were not thinking about issues such as abortion, gay rights, physician assisted suicide, or any of the other personal liberties discussed in this chapter. As a result, the Constitution is nonabsolute in the nature of most **civil liberties,** personal guarantees and freedoms that the government cannot abridge, either by law or by judicial interpretation. Civil liberties guarantees place limitations on the power of the government to restrain or dictate how individuals act. Thus, when we discuss civil liberties such as those found in the Bill of Rights, we are concerned with limits on what governments can and cannot do. **Civil rights,** in contrast, are the goverment-protected rights of individuals against arbitrary or discriminatory treatment. (Civil rights are discussed in chapter 6.)

Questions of civil liberties often present complex problems. As illustrated in the opening vignette, we must decide as a society how much infringement on our personal liberties we want to give the police. We must also consider if we want to have different rules for searching our homes, classrooms, lockers, dorm rooms, and cars. And, do we want to give the Federal Bureau of Investigation (FBI) the right to tap the phones of suspected terrorists or to hold them in jail without access to a lawyer without probable cause? Moreover, in an era of a war on terrorism, it is important to consider what liberties should be accorded to those suspected of terrorist activity.

Civil liberties cases often fall to the judiciary, who must balance the competing interests of the government and the people. Thus, in many of the cases discussed in this chapter, there is a conflict between an individual or group of individuals seeking to exercise what they believe to be a liberty, and the government, be it local, state, or national, seeking to control the exercise of that liberty in an attempt to keep order and preserve the rights (and safety) of others. In other cases, two liberties are in conflict, such as a physician's and her patients' rights to easy access to a medical clinic versus a pro-life advocate's liberty to picket that clinic.



Balancing Liberty and Security in a Time of War

In the wake of September 11, 2001, Americans' perceptions about civil liberties and what they are willing to allow the government to do experienced a sea change. The federal government was given unprecedented authority to curtail civil liberties on a scope never before seen. When any political commentators or civil libertarians voiced concerns about the USA Patriot Act and its consequences—the ability to do so being a hallmark of a free society—not only were their voices drowned out by many politicians and other pundits but their patriotism was attacked as well.

Moreover, during the 2001–2002 term of the Supreme Court of the United States, the justices were forced from their chambers for the first time since they moved into the Supreme Court building in 1935. Threats of airborne anthrax closed the Court and several Senate buildings. While the nation was worrying about terrorist attacks from abroad or from within, a quiet revolution in civil liberties continued apace. The five conservative and four moderate Supreme Court justices—who served together from 1994 through the 2004 term, longer than any other group of justices since 1820—proceeded to make major changes in long-standing practices in a wide range of civil liberties issues.[3] Similarly, the Bush administration continued to advocate new restrictions on civil liberties. Many of the Court's recent decisions, as well as actions of the Bush administration, are discussed in this chapter as we explore the various dimensions of civil liberties guarantees contained in the U.S. Constitution and the Bill of Rights.

- First, we will discuss *the Bill of Rights,* the reasons for its addition to the Constitution, and its eventual application to the states via the incorporation doctrine.
- Second, we will survey the meaning of one of *the First Amendment guarantees: freedom of religion*.

- Third, we will discuss the meanings of other *First Amendment guarantees: freedom of speech, press, and assembly*.
- Fourth, we will discuss *the second Amendment* and *the right to keep and bear arms*.
- Fifth, we will analyze the reasons for many of *the rights of criminal defendants* found in the Bill of Rights and how those rights have been expanded and contracted by the U.S. Supreme Court.
- Finally, we will discuss the meaning of *the right to privacy* and how that concept has been interpreted by the Court.

THE FIRST CONSTITUTIONAL AMENDMENTS: THE BILL OF RIGHTS

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

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

Photo courtesy: UPI IMAGES/Landov

Radio personality Howard Stern was suspended by Clear Channel Communications in February, 2004 for "vulgar, offensive, and insulting" content on his syndicated morning show. Stern and critics of the George W. Bush Administration later speculated that his suspension and subsequent firing were actually the result of his recent, anti-Bush rhetoric.

The notion of adding a bill of rights to the Constitution was not a popular one at the Constitutional Convention. When George Mason of Virginia proposed that such a bill be added to the preface of the proposed Constitution, his resolution was defeated unanimously.[4] In the subsequent ratification debates, Federalists argued that a bill of rights was unnecessary. Not only did most state constitutions already contain those protections, but Federalists believed it was foolhardy to list things that the national government had no power to do.

Some Federalists, however, supported the idea. After the Philadelphia convention, for example, James Madison conducted a lively correspondence about the need for a national bill of rights with Thomas Jefferson. Jefferson was far quicker to support such guarantees than was Madison, who continued to doubt their utility. He believed that a list of protected rights might suggest that those not enumerated were not protected. Politics soon intervened, however, when Madison found himself in a close race against James Monroe for a seat in the House of Representatives in the First Congress. The district was largely Anti-Federalist. So, in an act of political expediency, Madison issued a new series of public letters similar to *The Federalist Papers* in which he vowed to support a bill of rights.

Once elected to the House, Madison made good on his promise and became the prime author of the Bill of Rights. Still, he considered Congress to have far more important matters to handle and viewed his work on the Bill of Rights "a nauseous project."[5]

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

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

Ninth Amendment
Part of the Bill of Rights that reads "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The **Bill of Rights,** the first ten amendments to the Constitution, contains numerous specific guarantees, including those of free speech, press, and religion (for the full text, see the annotated Constitution that begins on page 68). The Ninth and Tenth Amendments, in particular, highlight Anti-Federalist fears of a too-powerful national government. The **Ninth Amendment,** strongly favored by Madison, makes it clear that this special listing of rights does not mean that others don't exist. The Tenth Amendment reiterates that powers not delegated to the national government are reserved to the states or to the people.

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

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

due process clause
Clause contained in the Fifth and Fourteenth Amendments. Over the years, it has been construed to guarantee to individuals a variety of rights ranging from economic liberty to criminal procedural rights to protection from arbitrary governmental action.

Until nearly the turn of the century, the Supreme Court steadfastly rejected numerous arguments urging it to interpret the **due process clause** found in the Fourteenth

The Living Constitution

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

—Ninth Amendment

This amendment simply reiterates the belief of many Federalists who believed that it would be impossible to enumerate every fundamental liberty and right. To assuage the concerns of Anti-Federalists, the Ninth Amendment underscores that rights not enumerated are retained by the people.

James Madison, in particular, feared that the enumeration of so many rights and liberties in the first eight amendments to the Constitution would result in the denial of rights that were not enumerated. So, he drafted this amendment to clarify a rule about how the Constitution and Bill of Rights were to be construed.

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

Amendment as making various provisions contained in the Bill of Rights applicable to the states. In 1897, however, the Court began to increase its jurisdiction over the states.[7] It began to hold states to a **substantive due process** standard whereby states had the legal burden to prove that their laws were a valid exercise of their power to regulate the health, welfare, or public morals of their citizens. Interferences with state power, however, were rare. As a consequence, states continued to pass sedition laws (laws that made it illegal to speak or write any political criticism that threatened to diminish respect for the government, its laws, or public officials), anticipating that the Supreme Court would uphold their constitutionality. These expectations changed dramatically in 1925. Benjamin Gitlow, a member of the Socialist Party, was convicted of violating a New York law that prohibited the advocacy of the violent overthrow of the government. Gitlow had printed 16,000 copies of a manifesto in which he urged workers to rise up to overthrow the U.S. government. Although Gitlow's conviction was upheld, in *Gitlow* v. *New York* (1925), the Supreme Court noted that the states were not completely free to limit forms of political expression:

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

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

Photo courtesy: AP/Wide World Photos

Until *Gitlow* v. *New York* (1925), involving Benjamin Gitlow, the executive secretary of the Socialist Party, it generally was thought that the Fourteenth Amendment did not apply the protections of the Bill of Rights to the states. Here Gitlow, right, is shown testifying before a congressional committee, which was investigating un-American activities.

Gitlow, with its finding that states could not abridge free speech protections, was the first step in the slow development of what is called the **incorporation doctrine.** After *Gitlow,* it took the Court six more years to incorporate another First Amendment freedom—that of the press. *Near* v. *Minnesota* (1931) was the first case in which the Supreme Court found that a state law violated freedom of the press as protected by the First Amendment. Jay Near, the publisher of a weekly Minneapolis newspaper, regularly attacked a variety of groups—African Americans, Catholics, Jews, and labor union leaders. Few escaped his hatred. Near's paper was shut down under the authority of a state criminal libel law banning "malicious, scandalous, or defamatory" publications. Near appealed the closing of his paper, and the Supreme Court ruled that "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint."[9]

incorporation doctrine
An interpretation of the Constitution that holds that the due process clause of the Fourteenth Amendment requires that state and local governments also guarantee those rights.

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

fundamental freedoms
Those rights defined by the Court to be essential to order, liberty, and justice.

Selective Incorporation and Fundamental Freedoms

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

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

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

The Supreme Court upheld Palko's second conviction and the death sentence. They also chose not to bind states to the Fifth Amendment's double jeopardy clause and concluded that protection from being tried twice (double jeopardy) was not a fundamental freedom. Palko died in Connecticut's gas chamber one year later.

TABLE 5.1 The Selective Incorporation of the Bill of Rights

Amendment	*Right*	*Date*	*Case Incorporated*
I	Speech	1925	*Gitlow* v. *New York*
	Press	1931	*Near* v. *Minnesota*
	Assembly	1937	*DeJonge* v. *Oregon*
	Religion	1940	*Cantwell* v. *Connecticut*
II	Bear arms		Not incorporated (A test has not been presented to the Court in recent history.)
III	No quartering of soldiers		Not incorporated (The quartering problem has not recurred since colonial times.)
IV	No unreasonable searches or seizures	1949	*Wolf* v. *Colorado*
	Exclusionary rule	1961	*Mapp* v. *Ohio*
V	Just compensation	1897	*Chicago, B&C RR Co.* v. *Chicago*
	Self-incrimination	1964	*Malloy* v. *Hogan*
	Double jeopardy	1969	*Benton* v. *Maryland* (overruled *Palko* v. *Connecticut*)
	Grand jury indictment		Not incorporated (The trend in state criminal cases is away from grand juries.)
VI	Public trial	1948	*In re Oliver*
	Right to counsel	1963	*Gideon* v. *Wainwright*
	Confrontation	1965	*Pointer* v. *Texas*
	Impartial trial	1966	*Parker* v. *Gladden*
	Speedy trial	1967	*Klopfer* v. *North Carolina*
	Compulsory trial	1967	*Washington* v. *Texas*
	Criminal jury trial	1968	*Duncan* v. *Louisiana*
VII	Civil jury trial		Not incorporated (Chief Justice Warren Burger wanted to abolish these trials.)
VIII	No cruel and unusual punishment	1962	*Robinson* v. *California*
	No excessive fines or bail		Not incorporated

FIRST AMENDMENT GUARANTEES: FREEDOM OF SPEECH, PRESS, AND ASSEMBLY

TODAY, SOME MEMBERS OF CONGRESS criticize the movie industry and reality television shows including *Survivor* and *The Bachelor* for pandering to the least common denominator of society. Other groups criticize popular performers such as Eminem for lyrics that promote violence in general, and against women in particular. Janet Jackson's "wardrobe malfunction" as well as Kid Rock's antics at the 2004 Super Bowl, however, launched renewed calls for increased restrictions, the imposition of significant fines on broadcasters, and greater regulation of the airwaves. Today, many civil libertarians believe that the rights to speak, print, and assemble freely are being seriously threatened.[35] (For more details on content regulation, see chapter 15.)

Freedom of Speech and the Press

A democracy depends on a free exchange of ideas, and the First Amendment shows that the Framers were well aware of this fact. Historically, one of the most volatile areas

Comparing Civil Liberties

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

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

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

Slavery, the Civil War, and Rights Curtailments. After the public outcry over the Alien and Sedition Acts, the national government largely got out of the business of regulating speech. But, in its place, the states, which were not yet bound by the Bill of Rights, began to prosecute those who published articles critical of governmental policies. In the 1830s, at the urgings of abolitionists (those who sought an end to slavery), the publication or dissemination of any positive information about slavery became a punishable offense in the North. In the opposite vein, in the South, supporters of slavery enacted laws to prohibit publication of any anti-slavery sentiments. Southern postmasters refused to deliver northern abolitionist papers, a step that amounted to censorship of the mail.

During the Civil War, President Abraham Lincoln effectively suspended the free press provision of the First Amendment (as well as many other sections of the Constitution). He went so far as to order the arrest of the editors of two New York papers who were critical of him. Far from protesting against these blatant violations of the First Amendment, Congress acceded to them. In one instance, William McCardle, a Mississippi newspaper editor who had written in opposition to Lincoln and the Union occupation, was jailed by a military court without having any charges brought against him. He appealed his detainment to the U.S. Supreme Court, arguing that he was being held unlawfully. Congress, fearing that a victory for McCardle would hurt Lincoln's national standing and prompt other similarly treated Confederate editors to follow his lead, enacted legislation prohibiting the Supreme Court from issuing a judgment in any cases involving convictions for publishing statements critical of the United States. Because Article II of the Constitution gives Congress the power to determine the jurisdiction of the Court, the Court was forced to conclude in *Ex parte McCardle* (1869) that it had no authority to rule in the matter.[36]

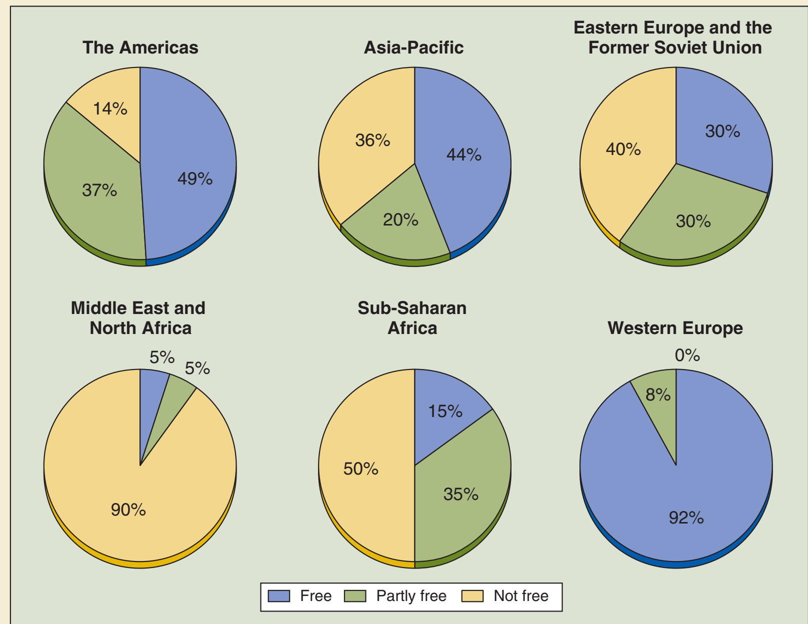
Civil Liberties and National Security

After the Civil War, states also began to prosecute individuals for seditious speech if they uttered or printed statements critical of the government. Between 1890 and 1900, for example, there were more than one hundred state prosecutions for sedition.[37]

Global Perspective

FREEDOM OF THE PRESS (BY REGION)

Americans are quite correctly proud of the independent voice exercised by the U.S. press. But, how do press freedoms in the United States compare with those found in other countries? And, just how free is the American press? Global comparisons can be made along three dimensions. First is the legal environment: what rules and regulations govern media content? Second is the political environment: how much political control is exercised over the content of the news media? Third is the economic environment: who owns the media and how are media outlets financed?



Source: Freedom House, "Global Press Freedoms Deteriorate," and "Freedom of the Press 2003: Table of Global Press Freedom Rankings," both at www.freedomhouse.org/media.

Using these three factors, Freedom House, a nonprofit organization that serves as a watchdog on the relationship between the media and government, issues a report each year on the degree of print, broadcast, and Internet freedom in every country in the world. In 2003, it concluded that the United States was tied for 15th place, along with Monaco and Andorra. Denmark, Iceland, and Sweden were tied for 1st. Closer to home, Canada tied for 23rd place and Mexico for 80th. This ranking placed Canada in the free category, which indicates no significant restrictions on the press, and Mexico in the partly free category, which means some media restrictions exist.

Other countries in the partly free category included Bolivia, where government and opposition supporters threatened and physically harassed journalists, and Romania, where the government engaged in legal harassment of independent media outlets. Russia, tied for 147th, was judged not to have a free press. The government had nearly complete control of the broadcast media—it passed laws and used financial pressure to restrict critical coverage of its policies. These restrictions were particularly true with respect to its handling of the long and bloody war in the break-away province of Chechnya, which has been described as Russia's Vietnam. Morocco was also judged to be not free because of its use of anti-terrorism legislation to limit and punish speech offenses. Iraq continued to be labeled as not having a free press even after the fall of Saddam Hussein due to the widespread violence in the country that claimed the lives of several journalists and the imposition of ambiguous rules governing the media. It tied for 142nd place.

The five countries with the least free press were Libya, Myanmar (Burma), Turkmenistan, Cuba, and North Korea (which came in last, at 193rd). Overall, 73 countries (38 percent) were judged to have a free press, 49 had a partly free press (25 percent), and 71 (37 percent) did not have a free press. If the populations of the countries in these three categories were combined, we would find that in 2003, only 17 percent of the world's population enjoyed a free press. As the charts above indicate, there was considerable variation among different parts of the world. Only in West Europe do more than 50 percent of the countries have a free press. The Americas (North and South America) just miss reaching this level. Asia-Pacific (those countries in Asia that are in the Pacific Ocean or border it) has the next highest percentage of countries with a free press.

In general, 2003 was not a particularly good year for freedom of the press. Ten states went down in their ranking and only two—Sierra Leone and Kenya—showed improvement, moving from not free to partly free. As a result of these shifts, 5 percent fewer people enjoyed a free press and 5 percent more lived in countries with no free press at all.

Questions

1. What factors would you look at in judging whether a country had a free press?
2. Are economic, political, or cultural factors most important in making the press free?

Join the Debate

THE USA PATRIOT ACT

OVERVIEW: The Declaration of Independence forcefully espouses the principles that all individuals have "certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness," and that it is government's purpose to guarantee the secure enjoyment of these rights. To assure these liberties, government must necessarily use legitimate police force to ensure safety within its borders, and it must use military force to defend the state from outside aggression.

A considerable problem for democratic peoples in free and open societies is how to define the limits of government intervention in the private sphere. This problem becomes particularly acute during times of national crisis and armed conflict. Establishing the line between the government's constitutional duty to "provide for the common defence" and to "secure the blessings of liberty" is complicated. It becomes even more complex when those who threaten America's national security use the freedom and rights found in the United States as a means through which to wage war. To help defend against those wishing to use the openness of American society for harmful ends, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, otherwise known as the USA Patriot Act, was signed into law on October 26, 2001, in response to the terrorist attacks on New York City and the Pentagon on September 11, 2001.

The events of 9/11 have thrust the question concerning the balance between liberty and security to the forefront of national discussion, and questions abound regarding the wisdom or folly of the USA Patriot Act. Will the act help defend the United States against terrorist activity, or will it allow the government to abuse its power in the name of national security? Isn't it necessary that government narrow the scope of civil rights and liberties in times of national distress, as has been the case throughout most of American history—for example, when Abraham Lincoln suspended habeas corpus in his effort to preserve the United States? Or, conversely, hasn't American history also demonstrated that injustices have been committed in the name of national security—for example, the U.S. government's internment of Japanese American citizens during World War II?

Arguments for the USA Patriot Act

- **The USA Patriot Act allows the government to use new technologies to address new threats.** Those engaged in terrorist activities today use sophisticated technologies. The USA Patriot Act allows the government to wage the war on terrorism by using the same and superior technologies to find and prosecute those engaged in terrorism and to help reduce the threat of terrorist attacks.
- **The USA Patriot Act dismantles the wall of legal and regulatory policies erected to limit sharply the sharing of information between intelligence, national security, and law enforcement communities.** Prior policy essentially prohibited various government agencies from communicating and coordinating domestic and national

Moreover, by the dawn of the twentieth century, public opinion in the United States had grown increasingly hostile toward the commentary of Socialists and Communists who attempted to appeal to the growing immigrant population. Groups espousing socialism and communism became the targets of state laws curtailing speech and the written word. By the end of World War I, over thirty states had passed laws to punish seditious speech, and more than 1,900 individuals and over one hundred newspapers were prosecuted for violations.[38] In 1925, however, states' authority to regulate speech was severely restricted by the Court's decision in *Gitlow* v. *New York*. (For more on *Gitlow,* see p. 161.)

World War I and Anti-Governmental Speech. The next major national efforts to restrict freedom of speech and the press did not occur until Congress passed the Espionage Act in 1917. Nearly 2,000 Americans were convicted of violating its various provisions, especially those that made it illegal to urge resistance to the draft or to prohibit the distribution of anti-war leaflets. In *Schenck* v. *U.S.* (1919), the Supreme Court upheld this act, ruling that Congress had a right to restrict speech "of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent."[39] Under this test, known as the **clear and present danger test,** the circumstances surrounding an incident are important. Under *Schenck,* anti-war leaflets, for example, may be permissible during peacetime, but during World War I they were considered to pose too much of a danger to be permissible.

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

security activities, thus restricting the flow of valuable information that could prevent terrorist attacks. Now, government agencies can coordinate surveillance activities across domestic and national security policy domains.

- **The USA Patriot Act allows government agencies to use the procedures and tools already available to investigate organized and drug crime.** The USA Patriot Act uses techniques already approved by the courts in investigating such crimes as wire fraud, money laundering, and drug trafficking. These techniques include roving wire taps and judicially approved search warrants, notice of which may be delayed in certain narrow circumstances.

Arguments Against the USA Patriot Act

- **Certain provisions of the USA Patriot Act may violate an individual's right to privacy.** For example, section 216 allows law enforcement officials to get a warrant to track which Web sites a person visits and to collect certain information in regard to an individual's e-mail activity. There need not be any suspicion of criminal activity—all law enforcement authorities need do is to certify that the potential information is relevant to an ongoing criminal investigation.
- **The USA Patriot Act violates the civil rights and liberties of legal immigrants.** The act permits the indefinite detention of immigrants and other noncitizens. The Attorney General may detain immigrants merely upon "reasonable grounds" that one is involved in terrorism or engaged in activity that poses a danger to national security, and this detention may be indefinite until determination is made that such an individual threatens national security.
- **Safeguards to prevent direct government surveillance of citizens have been reduced.** The Patriot Act repeals certain precautions in regard to the sharing of information between domestic law enforcement agencies and the intelligence community. These safeguards were put in place during the Cold War after the revelation that the Central Intelligence Agency (CIA) and the Federal Bureau of Investigation (FBI) had been conducting joint investigations on American citizens during the McCarthy era and civil rights movement—including surveillance of Martin Luther King Jr.—for political purposes.

Questions

1. Does the USA Patriot Act balance liberty with security? If so, how does it strike that balance? If not, what do you think could be done to redress the imbalance?
2. Is the USA Patriot Act a necessary law? If so, what, in your view, can be done to rectify its flaws? If not, what should be done to ensure the security of the United States against terrorist activity?

Selected Readings

Nat Hentoff. *The War on the Bill of Rights—and the Gathering Resistance.* Seven Stories Press, 2003.

Stephen M. Duncan. *War of a Different Kind: Military Force and America's Search for Homeland Security.* Annapolis, MD: United States Naval Institute, 2004.

For decades, the Supreme Court wrestled with what constituted a danger. Finally, in *Brandenburg* v. *Ohio* (1969), the Court fashioned a new test for deciding whether certain kinds of speech could be regulated by the government: the **direct incitement test.** Now, the government could punish the advocacy of illegal action only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[40] The requirement of "imminent lawless action" makes it more difficult for the government to punish speech and publication and is consistent with the Framers' notion of the special role played by these elements in a democratic society.

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

Protected Speech and Publications

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

Prior Restraint. With only a few exceptions, the Court has made it clear that it will not tolerate prior restraint of speech. For example, in *New York Times Co.* v. *Sullivan* (1971) (also called the Pentagon Papers case), the Supreme Court ruled that the U.S. government could not block the publication of secret Department of Defense documents illegally furnished to the *Times* by anti-war activists.[41] In 1976, the Supreme

Court went even further, noting in *Nebraska Press Association* v. *Stuart* (1976) that any attempt by the government to prevent expression carried " 'a heavy presumption' against its constitutionality."[42] In this case, a trial court issued a gag order barring the press from reporting the lurid details of a crime. In balancing the defendant's constitutional right to a fair trial against the press's right to cover a story, the Nebraska trial judge concluded that the defendant's right carried greater weight. The Supreme Court disagreed, holding the press's right to cover the trial paramount. Still, judges are often allowed to issue gag orders affecting parties to a lawsuit or to limit press coverage of a case.

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

Symbolic Speech.

In addition to the general protection accorded to pure speech, the Supreme Court has extended the reach of the First Amendment to **symbolic speech,** a means of expression that includes symbols or signs. In the words of Justice John Marshall Harlan, these kinds of speech are part of the "free trade in ideas."[43] For more on symbolic speech, see On Campus: Political Speech and Mandatory Student Fees.

The Supreme Court first acknowledged that symbolic speech was entitled to First Amendment protection in *Stromberg* v. *California* (1931).[44] There, the Court overturned a communist youth camp director's conviction under a state statute prohibiting the display of a red flag, a symbol of opposition to the U.S. government. In a similar vein, the right of high school students to wear black armbands to protest the Vietnam War was upheld in *Tinker* v. *Des Moines Independent Community School District* (1969).[45]

Burning the American flag also has been held a form of protected symbolic speech. In 1989, a sharply divided Supreme Court (5–4) reversed the conviction of Gregory Johnson, who had been found guilty of setting fire to an American flag during the 1984 Republican National Convention in Dallas.[46] There was a major public outcry against the Court. President George Bush and numerous members of Congress called for a constitutional amendment banning flag burning. Others, including Justice William J. Brennan Jr., noted that if it had not been for acts similar to Johnson's, the United States would never have been created nor would a First Amendment guaranteeing the right of political protest exist.

Unable to pass a constitutional amendment, Congress passed the Federal Flag Protection Act of 1989, which authorized federal prosecution of anyone who intentionally desecrated a national flag. Johnson and his colleagues burned another flag and were again convicted. Their conviction was overturned by a 5–4 vote of the Supreme Court. The majority concluded that this federal law "suffered from the same fundamental flaw" as had the earlier Texas state law.[47] Since that decision, Congress has tried several times unsuccessfully to pass a constitutional amendment to ban flag burning.

Hate Speech, Unpopular Speech, and Speech Zones.

"As a thumbnail summary of the last two or three decades of speech issues in the Supreme Court," wrote eminent First Amendment scholar Harry Kalven Jr. in 1966, "we may come to see the Negro as winning back for us the freedoms the Communists seemed to have lost for us."[48] Still, says noted African American scholar Henry Louis Gates Jr., Kalven would be shocked to see the stance that some blacks now take toward the First Amendment, which once protected protests, rallies, and agitation in the 1960s: "The byword among many black activists and black intellectuals is no longer the political imperative to protect free speech; it is the moral imperative to suppress 'hate speech.' "[49]

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In the 1990s, a particularly thorny First Amendment area emerged as cities and universities attempted to prohibit what they viewed as offensive hate speech. In *R.A.V.* v. *City of St. Paul* (1992), a St. Paul, Minnesota, ordinance that made it a crime to engage in speech or action

On Campus

Political Speech and Mandatory Student Fees

In March 2000, the U.S. Supreme Court ruled unanimously in *Board of Regents* v. *Southworth* that public universities could charge students a mandatory activity fee that could be used to facilitate extracurricular student political speech as long as the programs are neutral in their application.[a]

Scott Southworth, while a law student at the University of Wisconsin, believed that the university's mandatory fee was a violation of his First Amendment right to free speech. He, along with several other law students, objected that their fees went to fund liberal groups. They particularly objected to the support of eighteen of the 125 various groups on campus that benefited from the mandatory activity fee, including the Lesbian, Gay, Bisexual, and Transgender Center, the International Socialist Organization, and the campus women's center.[b]

In ruling against Southworth and for the university, the Court underscored the importance of universities being a forum for the free exchange of political and ideological ideas and perspectives. The *Southworth* case performed that function on the Wisconsin campus even before it was argued before the Supreme Court. A student-led effort called the Southworth Project, for which over a dozen law and journalism students each earned two credits, was begun to make sure that the case was reported on campus in an accurate and sophisticated way. The Southworth Project, said a political science professor, gave "a tremendous boost to the visibility and the thinking process about the case."[c] In essence, the case made the Constitution and what it means come alive on the Wisconsin campus as students pondered the effects of First Amendment protections on their ability to learn in a university atmosphere.

Photo courtesy: Tim Dillon © USA Today. *Reprinted with permission.*

Colleen Jungbluth, front, and other Wisconsin students as they awaited a ruling on their First Amendment lawsuit.

[a] *Board of Regents* v. *Southworth*, 529 U.S. 217 (2000).

[b] "U.S. Court Upholds Student Fees Going to Controversial Groups," *Toronto Star* (March 23, 2000): NEXIS.

[c] Mary Beth Marklein, "Fee Fight Proves a Learning Experience," *USA Today* (November 30, 1999): 8D.

likely to arouse "anger," "alarm," or "resentment" on the basis of race, color, creed, religion, or gender was at issue. The Court ruled 5–4 that a white teenager who burned a cross on a black family's front lawn, thereby committing a hate crime under the ordinance, could not be charged under that law because the First Amendment prevents governments from "silencing speech on the basis of its content."[50] In 2003, the Court narrowed this definition, ruling that state governments could constitutionally restrict cross burning when it occurred with the intent of racial intimidation.[51]

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

Unprotected Speech and Publications

Although the Supreme Court has allowed few governmental bans on most types of speech, some forms of expression are not protected. In 1942, the Supreme Court set out the rationale by which it would distinguish between protected and unprotected speech. According to the Court, libel, fighting words, obscenity, and lewdness are not protected by the First

Amendment because "such expressions are no essential part of any exposition of ideals, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[52]

libel
False written statements or written statements tending to call someone's reputation into disrepute.

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

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

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

It is often more difficult for individuals the Supreme Court considers "public persons or public officials" to sue for libel or slander. ***New York Times Co.* v. *Sullivan* (1964)** was the first major libel case considered by the Supreme Court.[53] An Alabama state court found the *Times* guilty of libel for printing a full-page advertisement accusing Alabama officials of physically abusing African Americans during various civil rights protests. (The ad was paid for by civil rights activists, including former First Lady Eleanor Roosevelt.) The Supreme Court overturned the conviction and established that a finding of libel against a public official could stand only if there was a showing of "actual malice," or a knowing disregard for the truth. Proof that the statements were false or negligent was not sufficient to prove actual malice.

In reality, the concept of actual malice can be difficult and confusing. In 1991, the Court directed lower courts to use the phrases "knowledge of falsity" and "reckless disregard of the truth" when giving instructions to juries in libel cases.[54] The actual malice standard also makes it difficult for public officials or persons to win libel cases. Still, many prominent people file libel suits each year; most are settled out of court. For example, actor Tom Cruise dropped his $200 million libel suit against a publisher who claimed he had a videotape of Cruise engaged in a homosexual act when a Los Angeles judge entered a statement that Cruise was not gay into the court record.[55]

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

Fighting Words. In the 1942 case of *Chaplinsky* v. *New Hampshire,* the Court stated that **fighting words,** or words that, "by their very utterance inflict injury or tend or incite an immediate breach of peace" are not subject to the restrictions of the First Amendment.[56] Fighting words, which include "profanity, obscenity, and threats," are therefore able to be regulated by the federal and state governments.

These words do not necessarily have to be spoken; fighting words can also come in the form of symbolic expression. For example, in 1968, a California man named Paul Cohen wore a jacket that said "Fuck the Draft. Stop the War" into a Los Angeles county courthouse. He was arrested and charged with disturbing the peace and engaging in offensive conduct. The trial court convicted Cohen, and this conviction was upheld by a state appellate court. However, when the case reached the Supreme Court in 1971, the Court reversed the lower courts' decisions and ruled that forbidding the use of certain words amounted to little more than censorship of ideas.[57]

In 2004, as the presiding officer of the Senate, Vice President Dick Cheney caused quite a stir after he swore at Senator Patrick Leahy (D–VT). Cheney was frustrated by Leahy's actions as ranking minority member on the Judiciary Committee. Senate Democrats kept several Bush judicial nominations from reaching the floor; Cheney's use of an expletive—although not a fighting word—was widely discussed.

Obscenity. Through 1957, U.S. courts often based their opinions of what was obscene on an English common-law test that had been set out in 1868: "Whether the tendency of the matter charged as obscenity is to deprive and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall."[58] In *Roth* v. *U.S.* (1957), however, the Court abandoned this approach and held that, to be considered obscene, the material in question had to be "utterly without redeeming social importance," and articulated a new test for obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests."[59]

■ Obscenity has been a popular topic of conversation in recent years. For example, in 2004, Vice President Dick Cheney (below) received attention in the media for cursing at Senator Patrick Leahy (at left). The inappropriate language was the result of an argument about Cheney's ties to Haliburton, Inc., a Texas energy firm that has received several contracts for rebuilding efforts in Iraq.

Photo courtesy: left, Mark Wilson/Getty Images; right, Reuters/Corbis

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

Richard M. Nixon made the growth in pornography a major issue when he ran for president in 1968. Nixon pledged to appoint to federal judgeships only those who would uphold law and order and stop coddling criminals and purveyors of porn. Once elected president, Nixon made four appointments to the Supreme Court, including Chief Justice Warren Burger, who wrote the opinion in *Miller* v. *California* (1973). There, the Court set out a test that redefined obscenity. To make it easier for states to regulate obscene materials, the justices concluded that lower courts must ask "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law." The courts also were to determine "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." And, in place of the contemporary community standards gauge used in *Roth,* the Court defined community standards to refer to the locality in question, under the rationale that what is acceptable in New York City might not be acceptable in Maine or Mississippi.[60]

Time and contexts clearly have altered the Court's and, indeed, much of America's perceptions of what works are obscene. But, the Supreme Court has allowed communities great leeway in drafting statutes to deal with obscenity and, even more important, other forms of questionable expression. In 1991, for example, the Court voted 5–4 to allow Indiana to ban totally nude erotic dancing, concluding that the statute furthered a substantial governmental interest, and therefore was not in violation of the First Amendment.[61]

Congress and Obscenity. While lawmakers have been fairly effective in restricting the sale and distribution of obscene materials, Congress has been particularly concerned with two obscenity and pornography issues: (1) federal funding for the arts; and, (2) the distribution of obscenity and pornography on the Internet.

Visual Literacy
What Speech Is Protected by the Constitution?

In 1990, concern over the use of federal dollars by the National Endowment for the Arts (NEA) for works with controversial religious or sexual themes led to passage of legislation requiring the NEA to "[take] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" when it makes annual awards. Several performance artists believed that Congress could not regulate the content of speech solely because it could be offensive; they challenged the statute in federal court. In 1998, the Supreme Court upheld the legislation, ruling that, because decency was only one of the criteria in making funding decisions, the act did not violate the First Amendment.[62]

Monitoring the Internet has proven more difficult for Congress. In 1996, it passed the Communications Decency Act, which prohibited the transmission of obscene materials over the Internet to anyone under age eighteen. In 1997, the Supreme Court ruled in *Reno* v. *American Civil Liberties Union* that the act violated the First Amendment because it was too vague and overbroad.[63] In reaction to the decision, Congress passed the Child Online Protection Act (COPA) in 1998. The new law broadened the definition of pornography to include any "visual depiction that is, or appears to be, a minor engaging in sexually explicit conduct." The act also redefined "visual depiction" to include computer-generated images, shifting the focus of the law from the children who were involved in pornography to protection of children who could see the images via the Internet.[64] The act targeted material "harmful to minors" but applied only to World Wide Web sites, not chat rooms or e-mail. It also targeted only materials used for "commercial purposes."

The ACLU and online publishers immediately challenged the constitutionality of the act, and a U.S. court of appeals in Philadelphia ruled the law was unconstitutional because of its reliance on "community standards" as articulated in *Miller,* which are not enforceable on the Internet. While this case was on appeal to the Supreme Court, Congress enacted the Children's Internet Protection Act, which prohibited public libraries receiving federal funds from allowing minors access to the Web without anti-pornography filters. Meanwhile, in *Ashcroft* v. *Free Speech Coalition* (2002), the Court ruled that Congress had gone too far in a laudable effort to stamp out child pornography.[65] Six justices agreed that the law was too vague because "communities with a narrow view of what words and images are suitable for children might be able to censor Internet content, putting it out of reach of the entire country."[66]

Congressional reaction was immediate. Within two weeks of the Court's decision, lawmakers were drafting more specific legislation to meet the Court's reservations. New regulations were enacted in 2003 as part of an anti-crime bill. In this legislation, Congress further limited the kinds of cyber pornography subject to regulation and allowed those accused of creating and marketing such pornography to "escape conviction if they could show they did not use actual children to produce sexually explicit images."[67] In 2004, the Supreme Court struck down as unconstitutional Congress's latest effort to limit cyberporn. The Court also continued to block enforcement of COPA.[68]

Freedoms of Assembly and Petition

"Peaceful assembly for lawful discussion cannot be made a crime," Chief Justice Charles Evans Hughes wrote in the 1937 case of *DeJonge* v. *Oregon,* which incorporated the First Amendment's freedom of assembly clause.[69] Despite this clear declaration, and an even more ringing declaration in the First Amendment, the fundamental freedoms of assembly and petition have been among the most controversial, especially in times of war. As with other First Amendment freedoms, the Supreme Court often has become the arbiter between the freedom of the people to express dissent and government's authority to limit controversy in the name of national security.

Because the freedom to assemble is hinged on peaceful conduct, the freedoms of assembly and petition are related directly to the freedoms of speech and of the press. If the words or actions taken at any event cross the line of constitutionality, the event itself may constitutionally no longer be protected. Absent that protection, leaders and attendees may be subject to governmental regulation and even criminal charges or civil fines.

THE SECOND AMENDMENT: THE RIGHT TO KEEP AND BEAR ARMS

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

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

Through the early 1920s, few state statutes were passed to regulate firearms (and generally these laws dealt with the possession of firearms by slaves). The Supreme Court's decision in *Barron* v. *Baltimore* (1833), which refused to incorporate the Bill of Rights to the state governments, prevented federal review of those state laws.[70] Moreover, in *Dred Scott* v. *Sandford* (1857) (see chapter 3), Chief Justice Roger B. Taney listed the right to own and carry arms as a basic right of citizenship.[71]

In 1934, Congress passed the National Firearms Act in response to the increase in organized crime that occurred in the 1920s and 1930s as a result of Prohibition. The act imposed taxes on automatic weapons (such as machine guns) and sawed-off shotguns. In *U.S.* v. *Miller* (1939), a unanimous Court upheld the constitutionality of the act, stating that the Second Amendment was intended to protect a citizen's right to own ordinary militia weapons and not unregistered sawed-off shotguns, which were at issue.[72] *Miller* was the last time the Supreme Court directly addressed the Second Amendment. In *Quilici* v. *Village of Morton Grove* (1983), the Supreme Court refused to review a lower court's ruling upholding the constitutionality of a local ordinance banning handguns against a Second Amendment challenge.[73]

In the aftermath of the assassination attempt on President Ronald Reagan in 1981, many lawmakers called for passage of gun control legislation. At the forefront of that effort was Sarah Brady, the wife of James Brady, the presidential press secretary who was badly wounded and left partially disabled by John Hinckley Jr., President Reagan's assailant. In 1993, her efforts helped to win passage of the Brady

Photo courtesy: Marcy Nighswander/AP/Wide World Photos

President Bill Clinton signs the Brady Bill into law flanked by Vice President Al Gore, Attorney General Janet Reno, and James and Sarah Brady and their children.

Bill, which imposed a federal mandatory five-day waiting period on the purchase of handguns.

In 1994, in spite of extensive lobbying by the powerful National Rifle Association (NRA), Congress passed and President Bill Clinton signed the $30.2 billion Violent Crime Control and Law Enforcement Act. In addition to providing money to states for new prisons and law enforcement officers, the act banned the manufacture, sale, transport, or possession of nineteen different kinds of semi-automatic assault weapons.

Gun Rights and Gun Control

In 1997, the U.S. Supreme Court ruled 5–4 that the section of the Brady Bill requiring state officials to conduct background checks of prospective handgun owners violated principles of state sovereignty.[74] The background check provision, while important, is not critical to the overall goals of the Brady Bill because a federal record-checking system went into effect in late 1998.

More important to the Brady Bill was the ban on assault weapons. This provision, which prohibited Americans from owning many of the most violent types of guns, carried a ten-year time limit. It expired just before the 2004 presidential and congressional elections. However, neither President Bush nor the Republican-controlled Congress made any serious steps toward renewal, causing many to charge that the move was political and prompted by anti-gun-control interests such as the National Rifle Association, who were major players in the Republican electoral efforts.

THE RIGHTS OF CRIMINAL DEFENDANTS

due process rights
Procedural guarantees provided by the Fourth, Fifth, Sixth, and Eighth Amendments for those accused of crimes.

THE FOURTH, FIFTH, SIXTH, AND EIGHTH Amendments supplement constitutional guarantees against writs of *habeas corpus*, *ex post facto* laws, and bills of attainder by providing a variety of procedural guarantees (often called **due process rights**) for those accused of crimes. Particular amendments, as well as other portions of the Constitution, specifically provide procedural guarantees to protect individuals accused of crimes at all stages of the criminal justice process. As is the case with the First Amendment, many of these rights have been interpreted by the Supreme Court to apply to the states. In interpreting the amendments dealing with what are frequently termed "criminal rights," the courts have to grapple not only with the meaning of the amendments but also with how their protections are to be implemented.

Over the years, many individuals criticized liberal Warren Court decisions of the 1950s and 1960s, arguing that its rulings gave criminals more liberties than their victims. The Warren Court made several provisions of the Bill of Rights dealing with the liberties of criminal defendants applicable to the states through the Fourteenth Amendment. It is important to remember that most procedural guarantees apply to individuals charged with crimes—that is, they apply before the individuals have been tried. These liberties were designed to protect those wrongfully accused, although, of course, they often have helped the guilty. But, as Justice William O. Douglas once noted, "Respecting the dignity even of the least worthy citizen . . . raises the stature of all of us."[75]

Many commentators continue to argue, however, that only the guilty are helped by the American system and that criminals should not go unpunished because of simple police error. The dilemma of balancing the liberties of the individual against those of society permeates the entire debate, as well as judicial interpretations of the liberties of criminal defendants.

Fourth Amendment
Part of the Bill of Rights that reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourth Amendment and Searches and Seizures

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

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

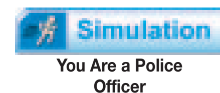
The purpose of this amendment was to deny the national government the authority to make general searches. The English Parliament often had issued general writs of assistance that allowed such searches. These general warrants were used against religious and political dissenters, a practice the Framers wanted banned. But, still, the language that they chose left numerous questions to be answered, including the definition of an unreasonable search.

Over the years, in a number of decisions, the Supreme Court has interpreted the Fourth Amendment to allow the police to search: (1) the person arrested; (2) things in plain view of the accused person; and, (3) places or things that the arrested person could touch or reach or are otherwise in the arrestee's immediate control. In 1995, the Court also resolved a decades-old constitutional dispute by ruling unanimously that police must knock and announce their presence before entering a house or apartment to execute a search. But, said the Court, there may be reasonable exceptions to the rule to account for the likelihood of violence or the imminent destruction of evidence.[76]

Warrantless searches often occur if police suspect that someone is committing or is about to commit a crime. In these situations, police may stop and frisk the individual under suspicion. In 1989, the Court ruled that there need be only a "reasonable suspicion" for stopping a suspect—a much lower standard than probable cause.[77] Thus, a suspected drug courier may be stopped for brief questioning but only a frisk search (for weapons) is permitted. A person's answers to the questions may shift reasonable suspicion to probable cause, thus permitting the officer to search further. But, except at borders between the United States and Mexico and Canada (or international airports within U.S. borders), a search requires probable cause.

The Court also ruled in 2001 on a California policy that required individuals, as a condition of their probation, to consent to warrantless searches of their person, property, homes, or vehicles, thus limiting a probationer's Fourth Amendment protections against unreasonable searches and seizures.[78] The Court did not give blanket approval to searches; instead, a unanimous Court said that a probation officer must have a reasonable suspicion of wrongdoing—a lesser standard than probable cause afforded to most citizens.

Searches can also be made without a warrant if consent is obtained, and the Court has ruled that consent can be given by a variety of persons. It has ruled, for example, that police can search a bedroom occupied by two persons as long as they have the consent of one of them.[79]



You Are a Police Officer

In situations where no arrest occurs, police must obtain search warrants from a "neutral and detached magistrate" prior to conducting more extensive searches of houses, cars, offices, or any other place where an individual would reasonably have some expectation of privacy.[80] Police cannot get search warrants, for example, to require you to undergo surgery to remove a bullet that might be used to incriminate you, since your expectation of bodily privacy outweighs the need for evidence.[81] But, courts do not require search warrants in possible drunk driving situations. Thus, the police in some states can require you to take a Breathalyzer test to determine whether you have been drinking in excess of legal limits.[82]

Homes, too, are presumed to be private. Firefighters can enter your home to fight a fire without a warrant. But, if they decide to investigate the cause of the fire, they must obtain a warrant before their reentry.[83] In contrast, under the open fields doctrine first articulated by the Supreme Court in 1924, if you own a field, and even if you post "No Trespassing" signs, the police can search your field without a warrant to see if you are illegally growing marijuana, because you cannot reasonably expect privacy in an open field.[84]

In 2001, in a decision that surprised many commentators, by a vote of 5–4, the Supreme Court ruled that drug evidence obtained by using a thermal imager (without a warrant) on a public street to locate the defendant's marijuana hothouse was obtained in violation of the Fourth Amendment.[85] In contrast, the use of low-flying aircraft and helicopters to detect marijuana fields or binoculars to look in a yard have been upheld because officers simply were using their eyesight, not a new technological tool such as the thermal imager.[86]

Cars have proven problematic for police and the courts because of their mobile nature. As noted by Chief Justice William H. Taft as early as 1925, "the vehicle can quickly be moved out of the locality or jurisdiction in which the warrant must be sought."[87] Over the years, the Court has become increasingly lenient about the scope of automobile searches.

Privacy and Rights of the Accused

In 2002, an unusually unanimous Court ruled that when evaluating if a border patrol officer acted lawfully in stopping a suspicious minivan, the totality of the circumstances had to be considered. Wrote Chief Justice William H. Rehnquist, the "balance between the public interest and the individual's right to personal security," tilts in favor of a "standard less than probable cause in brief investigatory stops." This ruling gave law enforcement officers more leeway to pull over suspicious motorists.[88]

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

While many private employers and professional athletic organizations routinely require drug tests upon application or as a condition of employment, governmental requirements present constitutional questions about the scope of permissible searches and seizures. In 1989, the Supreme Court ruled that mandatory drug and alcohol testing of employees involved in accidents was constitutional.[89] In 1995, the Court upheld the constitutionally of random drug testing of public high school athletes.[90] And, in 2002, the Court upheld the constitutionality of a Tecumseh, Oklahoma, policy that required mandatory drug testing of high school students participating in any extracurricular activities. Thus, prospective band, choir, debate, or drama club members were subject to the same kind of random drug testing undergone by athletes. Two students who wanted to participate on an academic team sued, arguing that the policy violated their Fourth Amendment right to be free from unreasonable searches and seizures. The Supreme Court disagreed, saying that the school policy was reasonable in furtherance of the school's interest in the prevention and detection of drug abuse. Relying on its rationale in its earlier opinion allowing for the testing of athletes, the Court went on to say that findings of individual suspicion were not necessary for the search of any one student to be reasonable.[91]

Another question has arisen concerning the constitutionality of compulsory drug testing for pregnant women. In 2001, in a 6–3 decision, the Court ruled that the testing of women for cocaine usage and subsequent reporting of positive tests to law enforcement officials was unconstitutional. When pregnant women in South Carolina sought medical care for their pregnancies, they were not told that their urine tests were also tested for cocaine. Thus, some women were arrested after they unknowingly were screened for illegal drug use and then tested positive. The majority of the Court found that the immediate purpose of the drug test was to generate evidence for law enforcement officials and not to give medical treatment to the women. Thus, the women's right to privacy was violated unless they specifically consented to the tests.[92]

In *Chandler* v. *Miller* (1997), the U.S. Supreme Court refused to allow Georgia to require all candidates for state office to pass a urinalysis drug test thirty days before qualifying for nomination or election, concluding that its law violated the search and seizure clause.[93] In general, all employers can require pre-employment drug screening. However, because governments are unconditionally bound by the lawful search provisions of the Fourth Amendment, public employees enjoy more protection in the area of drug testing than do employees of private enterprises.[94]

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

The Fifth Amendment and Self-Incrimination

The **Fifth Amendment** provides that "No person shall be . . . compelled in any criminal case to be a witness against himself." "Taking the Fifth" is shorthand for exercis-

ing one's constitutional right not to self-incriminate. The Supreme Court has interpreted this guarantee to be "as broad as the mischief against which it seeks to guard," finding that criminal defendants do not have to take the stand at trial to answer questions, nor can a judge make mention of their failure to do so as evidence of guilt.[95] Moreover, lawyers cannot imply that a defendant who refuses to take the stand must be guilty or have something to hide.

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

In earlier times, it was not unusual for police to beat defendants to obtain their confessions. In 1936, however, the Supreme Court ruled that convictions for murder based solely on confessions given after physical beatings were unconstitutional.[96] Police then began to resort to other measures to force confessions. Defendants, for example, were given the third degree—questioned for hours on end with no sleep or food, or threatened with physical violence until they were mentally beaten into giving confessions. In other situations, family members were threatened. In one case a young mother accused of marijuana possession was told that her welfare benefits would be terminated and her children taken away from her if she failed to talk.[97]

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

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

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

Although the Burger Court did not enforce the reading of *Miranda* rights as vehemently as had the Warren Court, Chief Justice Warren Burger, Warren's successor, acknowledged that they had become an integral part of established police procedures.[98] The Rehnquist Court, however, has been more tolerant of the use of coerced confessions and has employed a much more flexible standard to allow their admissibility. In 1991, for example, it ruled that the use of a coerced confession in a criminal trial does not automatically invalidate a conviction if its admission is deemed a "harmless error," that is, if the other evidence is sufficient to convict.[99]

But, in 2000, in an opinion written by Chief Justice William H. Rehnquist, the Court reaffirmed the central holding of *Miranda,* ruling that defendants must be read *Miranda* warnings. The Court went on to say that, despite an act of Congress that stipulated that voluntary statements made during police interrogations were admissible at trial, without *Miranda* warnings, no admissions could be trusted to be truly voluntary.[100]

Photo courtesy: Paul S. Howell/Getty Images

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

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

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

The Fourth and Fifth Amendments and the Exclusionary Rule

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

In *Weeks* v. *U.S.* (1914), the U.S. Supreme Court adopted the **exclusionary rule,** which bars the use of illegally seized evidence at trial. Thus, although the Fourth and Fifth Amendments do not prohibit the use of evidence obtained in violation of their provisions, the exclusionary rule is a judicially created remedy to deter constitutional violations. In *Weeks,* for example, the Court reasoned that allowing police and prosecutors to use the "fruits of a poisonous tree" (a tainted search) would only encourage that activity.[101]

In balancing the need to deter police misconduct against the possibility that guilty individuals could go free, the Warren Court decided that deterring police misconduct was most important. In *Mapp* v. *Ohio* (1961), the Warren Court ruled that "all evidence obtained by searches and seizures in violation of the Constitution, is inadmissible in a state court."[102] This historic and controversial case put law enforcement officers on notice that if they found evidence in violation of any constitutional rights, those efforts would be for naught because the tainted evidence could not be used in federal or state trials. In contrast, the Burger and Rehnquist Courts and, more recently, Congress gradually have chipped away at the exclusionary rule.

In 1976, the Court noted that the exclusionary rule "deflects the truth-finding process and often frees the guilty."[103] Since then, the Court has carved out a variety of limited "good faith exceptions" to the exclusionary rule, allowing the use of tainted evidence in a variety of situations, especially when police have a search warrant and, in good faith, conduct the search on the assumption that the warrant is valid—though it is subsequently found invalid. Since the purpose of the exclusionary rule is to deter police misconduct, and in this situation there is no police misconduct, the courts have permitted the introduction at trial of the seized evidence. Another exception to the exclusionary rule is "inevitable discovery." Evidence illegally seized may be introduced if it would have been discovered anyway in the course of continuing investigation.

The Sixth Amendment and the Right to Counsel

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

The **Sixth Amendment** guarantees to an accused person "the Assistance of Counsel in his defense." In the past, this provision meant only that an individual could hire an attorney to represent him or her in court. Since most criminal defendants are too poor to hire private lawyers, this provision was of little assistance to many who found themselves on trial. Recognizing this, Congress required federal courts to provide an attorney for defendants who could not to afford one. This was first required in capital cases (where the death penalty is a possibility); eventually, attorneys were provided to the poor in all federal criminal cases.[104] Similarly, in 1932, the Supreme Court directed states to furnish lawyers to defendants in capital cases.[105] It also began to expand the right to counsel to other state offenses but did so in a piecemeal fashion that gave the states little direction. Given the high cost of providing legal counsel, this ambiguity often made it cost-effective for the states not to provide counsel at all.

These ambiguities came to an end with the Court's decision in *Gideon* v. *Wainwright* (1963).[106] Clarence Earl Gideon, a fifty-one-year-old drifter, was charged with breaking into a Panama City, Florida, pool hall and stealing beer, wine, and some change from a vending machine. At his trial, he asked the judge to appoint a lawyer for him because he was too poor to hire one himself. The judge refused, and Gideon was convicted and given a five-year prison term for petty larceny. The case against Gideon had not been strong, but as a layperson unfamiliar with the law and with trial practice and procedure, he was unable to point out its weaknesses.

The apparent inequities in the system that had resulted in Gideon's conviction continued to bother him. Eventually, he borrowed some paper from a prison guard, con-

sulted books in the prison library, and then drafted and mailed a petition to the U.S. Supreme Court asking it to overrule his conviction.

In a unanimous decision, the Supreme Court agreed with Gideon and his court-appointed lawyer, Abe Fortas, a future associate justice of the Supreme Court. Writing for the Court, Justice Hugo Black explained that "lawyers in criminal courts are necessities, not luxuries." Therefore, the Court concluded, the state must provide an attorney to indigent defendants in felony cases. Underscoring the Court's point, Gideon was acquitted when he was retried with a lawyer to argue his case.

In 1972, the Burger Court expanded the *Gideon* rule, holding that "even in prosecutions for offenses less serious than felonies, a fair trial may require the presence of a lawyer."[107] Seven years later, the Court clarified its decision by holding that defendants charged with offenses where imprisonment is a possibility but not actually imposed do not have a Sixth Amendment right to counsel.[108] Thirty years later, the Rehnquist Court expanded *Gideon* even further by revisiting the "actual imprisonment" standard announced in the 1972 and 1979 cases. In 2002, a 5–4 majority held that if a defendant received a suspended sentence and probation for a minor crime but could be sentenced in future if he or she violated the conditions of probation, then the defendant must be provided with a lawyer.[109]

The Sixth Amendment and Jury Trials

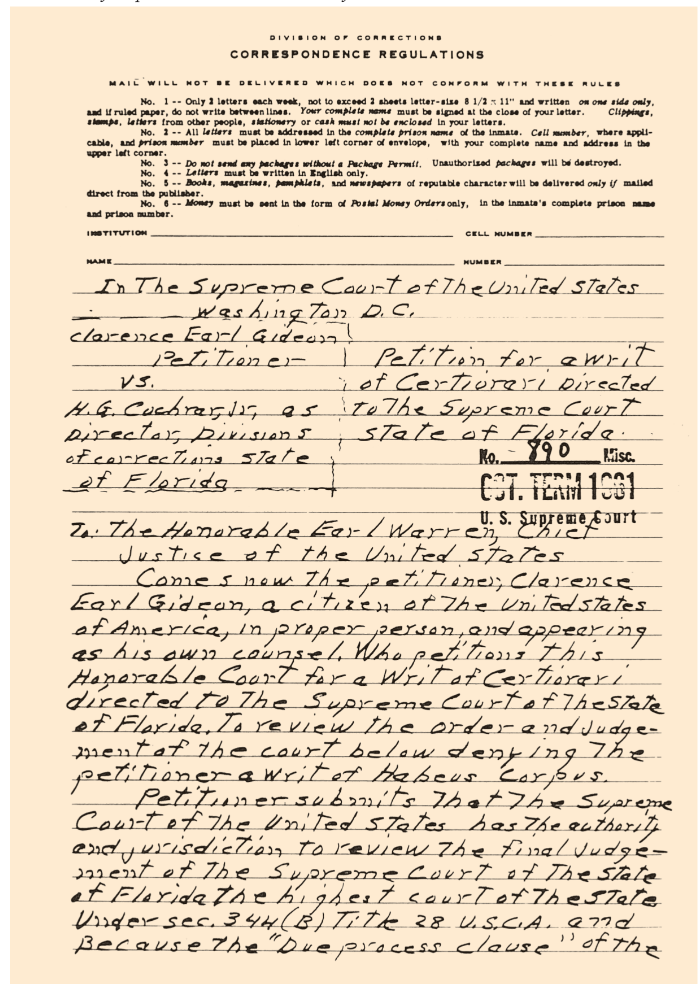
The Sixth Amendment (and, to a lesser extent, Article III of the Constitution) provides that a person accused of a crime shall enjoy the right to a speedy and public trial by an impartial jury—that is, a trial in which a group of the accused's peers act as a fact-finding, deliberative body to determine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

Impartiality is a requirement of jury trials that has undergone significant change, with the method of selecting jurors being the most frequently challenged part of the process. Although potential individual jurors who have prejudged a case are not eligible to serve, no groups can be systematically excluded from serving. In 1880, for example, the Supreme Court ruled that African Americans could not be excluded from state jury pools (lists of those eligible to serve).[110] And, in 1975, the Court ruled that to bar women from jury service violated the mandate that juries be a "fair cross section" of the community.[111]

In 1986, the Court expanded the requirement that juries reflect a fair cross section of the community. Historically, lawyers had used peremptory challenges (those for which no cause needs to be given) to exclude African Americans from juries, especially when African Americans were criminal defendants. In *Boston* v. *Kentucky* (1986), the Court ruled that the use of peremptory challenges specifically to exclude African American jurors violated the equal protection clause of the Fourteenth Amendment.[112]

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

Photo courtesy: Supreme Court Historical Society



DIVISION OF CORRECTIONS

CORRESPONDENCE REGULATIONS

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

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

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

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

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

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

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

INSTITUTION ______ CELL NUMBER ______

NAME ______ NUMBER ______

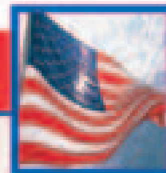
In The Supreme Court of The United States
washington D.C.
clarence Earl Gideon | Petition for awrit
Petitioner | of Certiorari Directed
VS. | to The Supreme Court
H.G. Cochran, Jr, as | state of Florida.
Director, Divisions | No. 890 Misc.
of corrections state | OCT. TERM 1961
of Florida | U. S. Supreme Court

To: The Honorable Earl Warren, Chief Justice of the United states

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

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

Politics Now



Civil Liberties in Times of War

In *Federalist No. 47*, James Madison warned against unchecked executive power, which had "affected to render the Military independent of and superior to the Civil Power" and had "deprive[ed them], in many Cases of the Benefits of Trial by Jury." Anxiety about tyranny prompted the Framers to place freedom from arbitrary detention at the core of liberty interests protected by the U.S. Constitution.[a] Still, in the wake of the 9/11 terrorist attacks, Congress passed the Authorization for Use of Military Force, giving the president power to "use all necessary appropriate force" against "nations, organizations, or persons" that he deemed to have "Planned, authorized, committed or aided" in the completion of those attacks.

The president then sent U.S. troops to Afghanistan to subdue al Qaeda and to quell the supporting Taliban regime. Soon thereafter, members of the U.S.-supported Afghani Northern Alliance captured, among others, two U.S. citizens in Afghanistan, John Walker Lindh and Yaser Hamdi, who were then handed over to U.S. forces.

The executive branch made the decision to prosecute Lindh for "assisting the Taliban government in opposing the warlords of the Northern Alliance." He was returned to the United States, and a ten-count indictment charged him with conspiring with al-Qaeda to kill U.S. nationals. His confession allegedly was made after he was shackled, naked, and denied food, water, and treatment for an injury. Additionally, he was questioned without a lawyer although his parents had requested that one be appointed for him. Eventually, Lindh agreed to cooperate with government investigators, pled to one count of "supplying services as a foot soldier," and was sentenced to up to twenty years in prison.

In sharp contrast, Hamdi, who although a U.S. citizen had spent much of his life in Saudi Arabia, was sent to a U.S. detention facility at Guantanamo Bay, Cuba, where he was held with no access to the outside world or to an attorney. From there, he was sent to a U.S. military base in Virginia and then to a naval brig in South Carolina. The Department of Justice declined to bring any charges against Hamdi and instead designated him an "enemy combatant."

In July 2002, Hamdi's father filed suit on his son's behalf, seeking a review of the legality of his son's detention. His habeas corpus petition alleged that the government was holding his son in violation of the Fifth and Fourteenth Amendments. A federal judge ordered the United States to allow an attorney to meet with Hamdi in private. While this decision was being appealed, Hamdi was held in solitary confinement with no access to his lawyer. The case finally ended up before the U.S. Supreme Court, where Hamdi, yet to be charged with a crime, argued that his basic civil liberties as an American citizen were being denied. The U.S. government countered that by designating Hamdi an enemy combatant, it was justified holding him in the United States indefinitely—without formal charges or proceedings—until it decided that access to counsel or other actions were warranted.

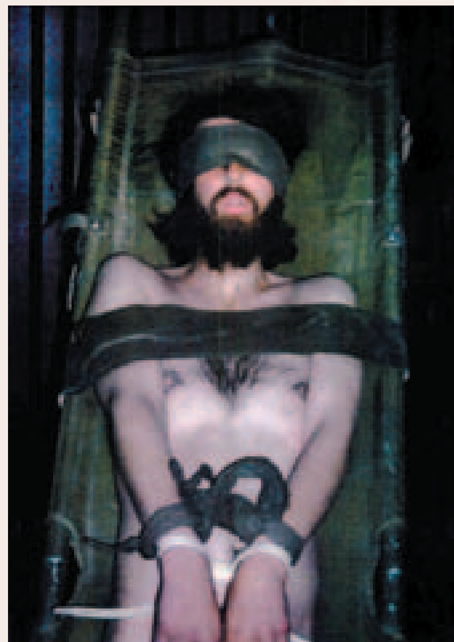


Photo courtesy: AFP/CORBIS

In this photo, John Walker Lindh is shown in shackles after he was captured in Afghanistan.

In June 2004, the U.S. Supreme Court ruled that "a state of war is not a blank check for the president" to deny basic civil liberties to U.S. citizens held in captivity. The Court went on to say that citizens must be apprised of the charges against them and allowed access to lawyers.[b] Although the Court affirmed the right of the president to detain citizens as enemy combatants, it reiterated that such prisoners must be given the right to challenge their captivity before a neutral fact-finder.

Hamdi was released in October 2004, but as a condition of his release he had to renounce his U.S. citizenship and return to Saudi Arabia. This agreement meant that he was never formally charged or brought to trial. Other U.S. citizens still held as enemy combatants are challenging their detainments in federal courts.

Questions

1. How can the government protect citizens in times of terrorist threats without denying citizens constitutionally guaranteed civil liberties?
2. Should the government be allowed to hold indefinitely noncitizens suspected of being or aiding terrorists? Why, or why not?

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[1]Lawyers Committee for Human Rights, "Assessing the New Normal: Liberty and Security for the Post September 11 United States," September 2003, 49–50.

[2]*Hamdi et al.* v. *Rumsfeld,* No. 03-6696 (decided June 28, 2004).

In 1994, the Supreme Court answered the major remaining unanswered question about jury selection: can lawyers exclude women from juries through their use of peremptory challenges? This question came up frequently because in rape trials and sex discrimination cases, one side or another often considers it advantageous to select jurors on the basis of their sex. The Supreme Court ruled that the equal protection clause prohibits discrimination in jury selection on the basis of gender. Thus, lawyers cannot strike all potential male jurors based on the belief that males might be more sympathetic to the arguments of a man charged in a paternity suit, a rape trial, or a domestic violence suit, for example.

The right to confront witnesses at trial also is protected by the Sixth Amendment. In 1990, however, the Supreme Court ruled that this right was not absolute. In *Maryland* v. *Craig* (1990), the Court ruled that constitutionally the testimony of a six-year-old alleged child abuse victim via one-way closed circuit television was permissible. The clause's central purpose, said the Court, was to ensure the reliability of testimony by subjecting it to rigorous examination in an adversarial proceeding.[113] In this case, the child was questioned out of the presence of the defendant, who was in communication with his defense and prosecuting attorneys. The defendant, along with the judge and jury, watched the testimony.

The Eighth Amendment and Cruel and Unusual Punishment

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

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

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

The death penalty was in use in all of the colonies at the time the U.S. Constitution was adopted, and its constitutionality went unquestioned. In fact, in two separate cases in the late 1800s, the Supreme Court ruled that deaths by public shooting[114] and electrocution were not "cruel and unusual" forms of punishment in the same category as "punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like."[115]

In the 1960s, the NAACP Legal Defense Fund (LDF), believing that the death penalty was applied more frequently to African Americans than to members of other groups, orchestrated a carefully designed legal attack on its constitutionality.[116] Public opinion polls revealed that in 1971, on the eve of the LDF's first major death sentence case to reach the Supreme Court, public support for the death penalty had fallen to below 50 percent. With the timing just right, in *Furman* v. *Georgia* (1972), the Supreme Court effectively put an end to capital punishment, at least in the short run.[117] The Court ruled that because the death penalty often was imposed in an arbitrary manner, it constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Following *Furman,* several state legislatures enacted new laws designed to meet the Court's objections to the arbitrary nature of the sentence. In 1976, in *Gregg* v. *Georgia,* Georgia's rewritten death penalty statute was ruled constitutional by the Supreme Court in a 7–2 decision.[118]

Race and the Death Penalty

Photo courtesy: Frank Polich/Reuters/Landov

Amid questions about the fallibility of America's capital punishment system, Illinois Governor George Ryan commuted the sentences of 167 death row inmates two days before leaving office in 2003. He had earlier declared a moratorium on execution in Illinois.

This ruling did not deter the LDF from continuing to bring death penalty cases before the court. In *McCleskey* v. *Kemp* (1987), a 5–4 Court ruled that imposition of the death penalty—even when it appeared to discriminate against African Americans—did not violate the equal protection clause.[119] Despite the testimony of social scientists and evidence that Georgia was eleven times more likely to seek the death penalty against a black defendant, the Court upheld Warren McCleskey's death sentence. It noted that even if statistics show clear discrimination, there must be a showing of racial discrimination in the case at hand. Five justices concluded that there was no evidence of specific discrimination proved against McCleskey at his trial. Within hours of that defeat, McCleskey's lawyers filed a new appeal, arguing that the informant who gave the only testimony against McCleskey at trial had been placed in McCleskey's cell illegally.

Four years later, McCleskey's death sentence challenge again produced an equally important ruling on the death penalty and criminal procedure from the U.S. Supreme Court. In the second *McCleskey* case, *McCleskey* v. *Zant* (1991), the Court found that the issue of the informant should have been raised during the first appeal, in spite of the fact that McCleskey's lawyers initially were told by the state that the witness was not an informer. *McCleskey* v. *Zant* produced new standards designed to make it much more difficult for death-row inmates to file repeated appeals.[120] Ironically, the informant against McCleskey was freed the night before McCleskey was electrocuted. Justice Lewis Powell, one of those in the five-person majority, later said (after his retirement) that he regretted his vote and should have voted the other way.

The Supreme Court has exempted two key classes of people from the death penalty: those under the age of fifteen and those who are mentally retarded. In 2002, the Court ruled that mentally retarded convicts could not be executed.[121] This 6–3 decision reversed what had been the Court's position on executing the retarded since 1989, a thirteen-year period when several retarded men were executed. Because many states have different standards for assessing retardation, it threw into chaos the laws of twenty states that permit these executions, including Texas, where the governor recently had vetoed legislation banning execution of the retarded. And, the opinion represented a rare win in the Supreme Court for death penalty opponents, who have been faring far better in the individual states. In fact, the Court's majority opinion took special note of the fact that eighteen of the thirty-eight states with the death penalty did not allow the execution of the retarded.[122]

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

Over the past thirteen years, over a hundred persons have been released from death row after DNA tests proved they did not commit the crimes for which they were convicted.[123] In New York, twenty individuals on death row were later found innocent with proof derived from evidence other than DNA.[124] In addition, before leaving office in January 2003, Illinois Governor Ryan commuted the sentences of 167 death row inmates, giving them life in prison instead of death. Ryan also pardoned another four men who had given coerced confessions. This action constituted the single largest anti–death penalty action since the Court's decision in *Gregg*, and it spurred national conversation on the death penalty, which, in recent polls, has seen its lowest levels of support since 1978.

THE RIGHT TO PRIVACY

TO THIS POINT, we have discussed rights and freedoms that have been derived fairly directly from specific guarantees contained in the Bill of Rights. However, the Supreme Court also has given protection to rights not enumerated specifically in the Constitution or Bill of Rights.

Although the Constitution is silent about the **right to privacy,** the Bill of Rights contains many indications that the Framers expected that some areas of life were off limits to governmental regulation. The liberty to practice one's religion guaranteed in the First Amendment implies the right to exercise private, personal beliefs. The guarantee against unreasonable searches and seizures contained in the Fourth Amendment similarly implies that persons are to be secure in their homes and should not fear that police will show up at their doorsteps without cause. As early as 1928, Justice Louis

right to privacy
The right to be let alone; a judicially created doctrine encompassing an individual's decision to use birth control or secure an abortion.

Photo courtesy: Bettmann/Corbis

In this 1965 photo, Estelle Griswold (left), executive director of the Planned Parenthood League of Connecticut, and Cornelia Jahncke, its president, celebrate the Supreme Court's ruling in *Griswold* v. *Connecticut*.

Brandeis hailed privacy as "the right to be left alone—the most comprehensive of rights and the right most valued by civilized men."[125] It was not until 1965, however, that the Court attempted to explain the origins of this right.

Birth Control

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

Griswold v. *Connecticut* (1965) involved a challenge to the constitutionality of an 1879 Connecticut law prohibiting the dissemination of information about and/or the sale of contraceptives.[126] In *Griswold,* seven justices decided that various portions of the Bill of Rights, including the First, Third, Fourth, Ninth, and Fourteenth Amendments, cast what the Court called "penumbras" (unstated liberties on the fringes or in the shadow of more explicitly stated rights), thereby creating zones of privacy, including a married couple's right to plan a family. Thus, the Connecticut statute was ruled unconstitutional because it violated marital privacy, a right the Court concluded could be read into the U.S. Constitution through interpreting several amendments.

Later, the Court expanded the right of privacy to include the right of unmarried individuals to have access to contraceptives. "If the right of privacy means anything," wrote Justice William J. Brennan Jr., "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."[127] Contraceptive rights, however, are often limited for those under age eighteen by state or federal policy. This right to privacy was to be the basis for later decisions from the Court, including the right to secure an abortion.

Abortion

In the early 1960s, two birth-related tragedies occurred. Severely deformed babies were born to European women who had been given the drug thalidomide while pregnant, and, in the United States, a nationwide measles epidemic resulted in the birth of more babies with severe problems. The increasing medical safety of abortions and the growing women's rights movement combined with these tragedies to put pressure on the legal and medical establishments to support laws that would guarantee a woman's access to a safe and legal abortion.

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

The woman whose case became the catalyst for pro-choice and anti-abortion groups was Norma McCorvey, an itinerant circus worker. The mother of a toddler she was unable to care for, McCorvey could not leave another child in her mother's care. So, she decided to terminate her second pregnancy. She was unable to secure a legal

abortion and was frightened by the conditions she found when she sought an illegal, back-alley abortion. McCorvey turned to two young Texas lawyers who were looking for a plaintiff to bring a lawsuit to challenge Texas's restrictive statute. The Texas law allowed abortions only when they were necessary to save the life of the mother. McCorvey, who was unable to obtain a legal abortion, later gave birth and put the baby up for adoption. Nevertheless, she allowed her lawyers to proceed with the case using her as their plaintiff. They used the pseudonym Jane Roe for McCorvey as they challenged the Texas law as enforced by Henry Wade, the district attorney for Dallas County, Texas.

Photo courtesy: LM Otero/AP/Wide World Photos

A once very popular anti-abortion group, Operation Rescue, staged large scale protests in front of abortion clinics across the nation gaining a surprising new member—Norma McCorvey, the"Jane Roe" of *Roe* v. *Wade* (1973). In 1995, she announced that she had become pro-life.

When the case finally came before the Supreme Court, Justice Harry A. Blackmun, a former lawyer at the Mayo Clinic, relied heavily on medical evidence to rule that the Texas law violated a woman's constitutionally guaranteed right to privacy, which he argued included her decision to terminate a pregnancy. Writing for the majority in ***Roe* v. *Wade* (1973),** Blackmun divided pregnancy into three stages. In the first trimester, a woman's right to privacy gave her an absolute right (in consultation with her physician), free from state interference, to terminate her pregnancy. In the second trimester, the state's interest in the health of the mother gave it the right to regulate abortions—but only to protect the woman's health. Only in the third trimester—when the fetus becomes potentially viable—did the Court find that the state's interest in potential life outweighed a woman's privacy interests. Even in the third trimester, however, abortions to save the life or health of the mother were to be legal.[128]

Roe v. *Wade* unleashed a torrent of political controversy. Anti-abortion groups, caught off guard, scrambled to recoup their losses in Congress. Representative Henry Hyde (R–IL) persuaded Congress to ban the use of Medicaid funds for abortions for poor women, and the constitutionality of the Hyde Amendment was upheld by the Supreme Court in 1977 and again in 1980.[129] The issue also polarized both major political parties.

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

From the 1970s through the present, the right to an abortion and its constitutional underpinnings in the right to privacy have been under attack by well-organized anti-abortion groups. The administrations of Ronald Reagan and George Bush were strong advocates of the anti-abortion position, regularly urging the Court to overrule *Roe*. They came close to victory in *Webster* v. *Reproductive Health Services* (1989).[130] In *Webster,* the Court upheld state-required fetal viability tests in the second trimester, even though these tests would increase the cost of an abortion considerably. The Court also upheld Missouri's refusal to allow abortions to be performed in state-supported hospitals or by state-funded doctors or nurses. Perhaps most noteworthy, however, was that four justices seemed willing to overrule *Roe* v. *Wade* and that Justice Antonin Scalia publicly rebuked his colleague, Justice Sandra Day O'Connor, then the only woman on the Court, for failing to provide the critical fifth vote to overrule *Roe*.

After *Webster,* states began to enact more restrictive legislation. In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992), the most important abortion case since *Roe,* Justices O'Connor, Anthony Kennedy, and David Souter, in a jointly authored opinion, wrote that Pennsylvania could limit abortions so long as its regulations did not pose "an undue burden" on pregnant women.[131] The narrowly supported standard, by which the Court upheld a twenty-four-hour waiting period and parental consent requirements, did not overrule *Roe,* but clearly limited its scope by abolishing its trimester approach and substituting the undue burden standard.

Analyzing Visuals

PARTIAL BIRTH ABORTION BAN

In the photograph, as members of Congress look on, President George W. Bush signs the Partial Birth Abortion Ban Act of 2003 at the Ronald Reagan Building and International Trade Center in Washington, D.C. Standing behind the president are, from left, Speaker of the House Dennis Hastert (R–IL), Senator Orrin Hatch (R–UT), Representative James Sensenbrenner (R–WI), Senator Rick Santorum (R–PA), Representative James Oberstar (D–MN), and Senator Mike DeWine (R–OH). After examining the photograph, answer the following critical thinking questions: Do you think that the photographer is making any specific statement about the civil liberties of American women? Are the members of Congress viewing the signing representative of Congress as a whole? Of the general U.S. public?

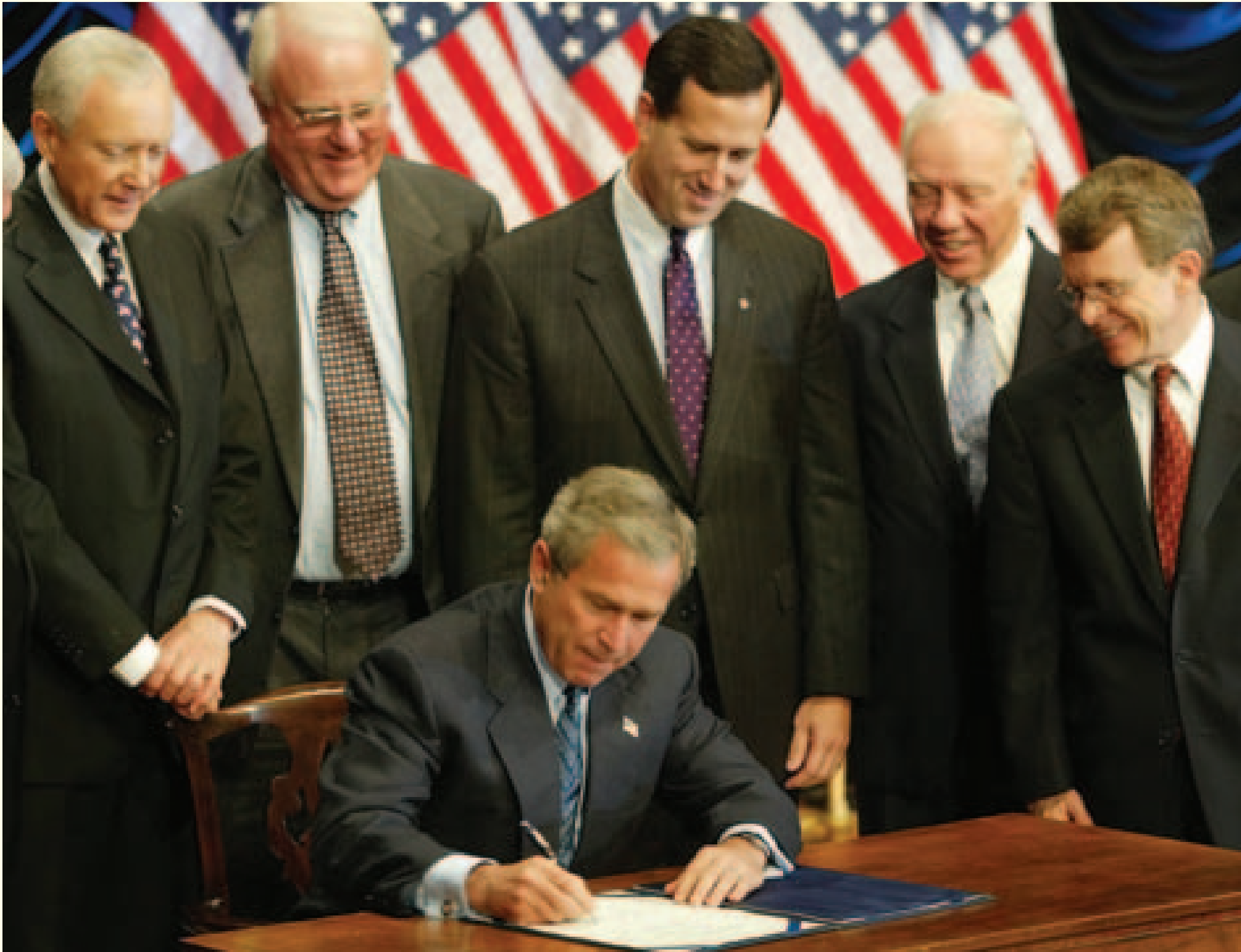


Photo courtesy: Pablo Martinez Monsivais/AP/Wide World Photos

In 1993, newly elected pro-choice President Bill Clinton ended bans on fetal tissue research, abortions at military hospitals, and federal financing for overseas population control programs, and he lifted the gag rule, a federal regulation enacted in 1987 that barred public health clinics receiving federal dollars from discussing

abortion (policies later reversed by George W. Bush).[132] Clinton also ended the ban on testing of RU-486, the so-called French abortion pill, which ultimately was made available in the United States to women with a doctor's prescription late in 2000.

President Clinton used the occasion of his first appointment to the U.S. Supreme Court to select a longtime supporter of abortion rights, Ruth Bader Ginsburg, to replace Justice Byron White, one of the original dissenters in *Roe*. Most commentators believe that this was an important first step in shifting the Court away from any further curtailment of abortion rights, as was the later appointment of Justice Stephen Breyer in 1994.

While President Clinton was attempting to shore up abortion rights through judicial appointments, Republican Congresses made repeated attempts to restrict abortion rights. In March 1996 and again in 1998, Congress passed and sent to President Clinton a bill to ban—for the first time—a specific procedure used in late-term abortions.[133] The president vetoed the Partial Birth Abortion Act over the objections of many of its supporters, including the National Right to Life Committee. Many state legislatures, however, passed their own versions of the act. In 2000, the Supreme Court, however, ruled 5–4 in *Stenberg* v. *Carhart* that a Nebraska partial birth abortion statute was unconstitutionally vague and therefore unenforceable, calling into question the laws of twenty-nine other states with their own bans on late-term procedures.[134] At the same time, it ruled that a Colorado law that prohibited protestors from coming within eight feet of women entering clinics was constitutional.[135] This bubble law was designed to create an eight-foot buffer zone around women as they walked through protesters into a clinic.

By October 2003, however, Republican control of the White House and both houses of Congress facilitated passage of the federal Partial Birth Abortion Ban Act. Pro-choice groups such as Planned Parenthood, the Center for Reproductive Rights, and the American Civil Liberties Union immediately filed lawsuits challenging the constitutionality of this law. At this writing, three federal district courts have ruled it unconstitutional.

Homosexuality

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

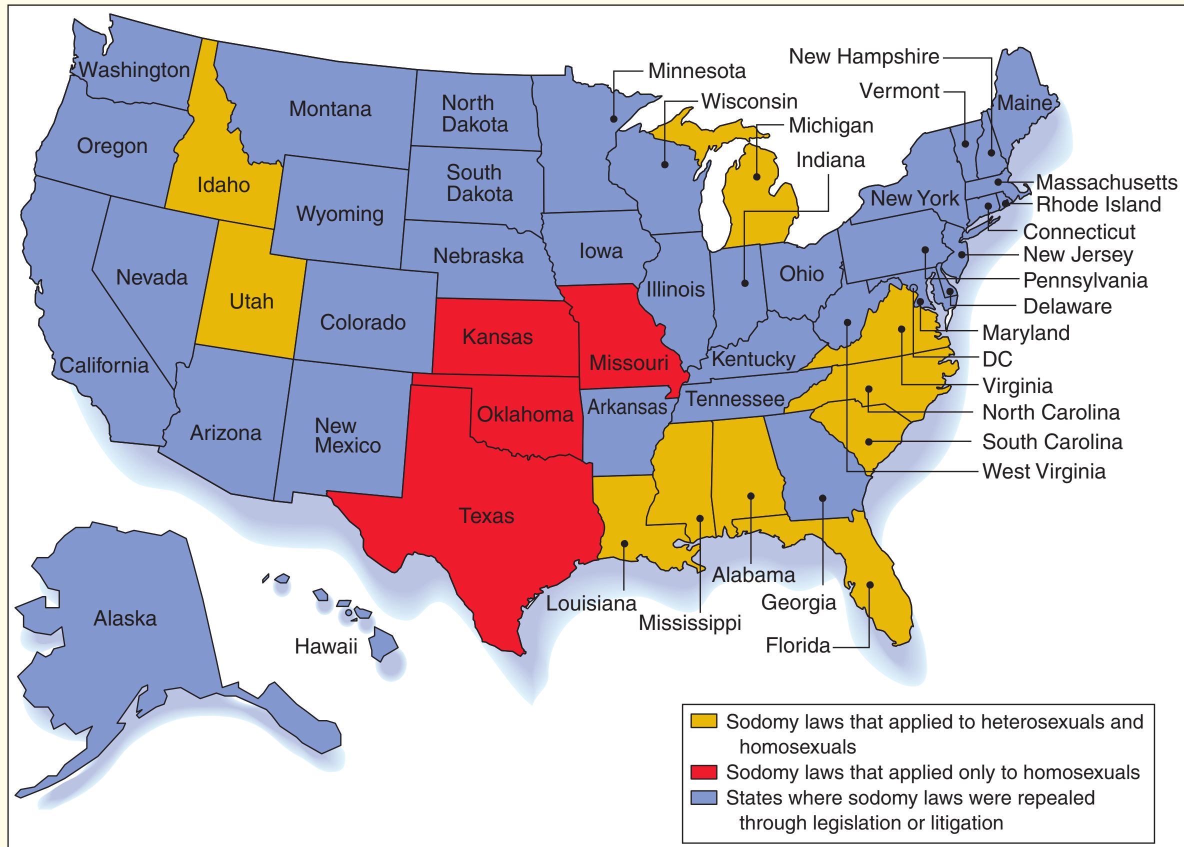
In *Lawrence* v. *Texas* (2003), six members of the Court overruled a 1986 decision[136] and found that the Texas law was unconstitutional; five justices found it to violate fundamental privacy rights. Justice Sandra Day O'Connor agreed that the law was unconstitutional, but concluded that it was an equal protection violation. (See chapter 6 for a detailed discussion of the equal protection clause of the Fourteenth Amendment.) Although Justice Antonin Scalia issued a stinging dissent, charging that "the Court has largely signed on to the so-called homosexual agenda," the majority of the Court was unswayed.[137]

Just three years before, the Court upheld a challenge to the Boy Scouts' refusal to allow a gay man to become a scoutmaster.[138] There, the majority of the Court found that a private club's First Amendment right to freedom of association allowed it to use its own moral code to select troop leaders. While the public largely supported the Boy Scouts decision, it also approved of the Court's resolution of the challenge to the Texas sodomy law.[139] A poll taken just before the 2003 ruling showed that the public disagreed with the Court's 1986 decision by a margin of 57 to 38 percent.[140]

Analyzing Visuals

STATE SODOMY LAWS

Before the Supreme Court's decision in *Lawrence* v. *Texas* (2003), fourteen states still had some sort of sodomy law on their books. The Court's decision effectively invalidated these laws. After studying the U.S. map and its depiction of individual state laws, answer the following critical thinking questions: Which states had laws that apply only to homosexuals? What was the legal position of the majority of states? How might the states' positions have influenced the Court's decision?



The Right to Die

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

a living will, their desire to have medical treatment terminated in the event they became incompetent.[141]

In 1997, the U.S. Supreme Court ruled unanimously that terminally ill persons do not have a constitutional right to physician assisted suicide. The Court's action upheld the laws of New York and Washington State that make it a crime for doctors to give life-ending drugs to mentally competent but terminally ill patients who wish to die.[142] But, Oregon enacted a right-to-die or assisted suicide law approved by Oregon voters that allows physicians to prescribe drugs to terminally ill patients. In November 2001, however, Attorney General John Ashcroft issued a legal opinion determining that assisted suicide is not "a legitimate medical purpose," thereby putting physicians who follow their state law in jeopardy of federal prosecution.[143] His memo also called for the revocation of the physicians' drug prescription licenses, putting the state and the national government in conflict in an area that Republicans historically have argued is the province of state authority. Oregon officials immediately (and successfully) sought a court order blocking Ashcroft's attempt to interfere with implementation of Oregon law.[144] Later, a federal judge ruled that Ashcroft had overstepped his authority on every point.[145]

SUMMARY

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

2. **First Amendment Guarantees: Freedom of Religion**
   The First Amendment guarantees freedom of religion. The establishment clause, which prohibits the national government from establishing a religion, does not, according to Supreme Court interpretation, create an absolute wall between church and state. While the national and state governments may generally not give direct aid to religious groups, many forms of aid, especially many that benefit children, have been held to be constitutionally permissible. In contrast, the Court has generally barred organized prayer in public schools. The Court largely has adopted an accommodationist approach when interpreting the free exercise clause by allowing some governmental regulation of religious practices.

3. **First Amendment Guarantees: Freedom of Speech, Press, and Assembly**
   Historically, one of the most volatile areas of constitutional interpretation has been in the interpretation of the First Amendment's mandate that "Congress shall make no law . . . abridging the freedom of speech or of the press." Like the establishment and free exercise clauses of the First Amendment, the speech and press clauses have not been interpreted as absolute bans against government regulation.

   Some areas of speech and publication are unconditionally protected by the First Amendment. Among these are prior restraint, symbolic speech, and hate speech. Other areas of speech and publication, however, are unprotected by the First Amendment. These include libel, fighting words, and obscenity and pornography.

   The freedoms of peaceable assembly and petition are directly related to the freedoms of speech and of the press. As with other First Amendment rights, the Supreme Court has often become the arbiter between the right of the people to express dissent and government's right to limit controversy in the name of security.

4. **The Second Amendment: The Right to Keep and Bear Arms**
   Initially, the right to bear arms was envisioned as one dealing with state militias. Over the years, states and Congress have enacted various gun ownership restrictions with little Supreme Court interpretation as a guide to their ultimate constitutionality.

5. **The Rights of Criminal Defendants**
The Fourth, Fifth, Sixth, and Eighth Amendments provide a variety of procedural guarantees to individuals accused of crimes. In particular, the Fourth Amendment prohibits unreasonable searches and seizures, and the Court has generally refused to allow evidence seized in violation of this safeguard to be used at trial.

Among other rights, the Fifth Amendment guarantees that "no person shall be compelled to be a witness against himself." The Supreme Court has interpreted this provision to require that the government inform the accused of his or her right to remain silent. This provision has also been interpreted to require that illegally obtained confessions must be excluded at trial.

The Sixth Amendment's guarantee of "assistance of counsel" has been interpreted by the Supreme Court to require that the government provide counsel to defendants unable to pay for it in cases where prison sentences may be imposed. The Sixth Amendment also requires an impartial jury, although the meaning of impartial continues to evolve through judicial interpretation.

The Eighth Amendment's ban against "cruel and unusual punishments" has been held not to bar imposition of the death penalty.

6. **The Right to Privacy**
The right to privacy is a judicially created right carved from the penumbras (unstated liberties implied by more explicitly stated rights) of several amendments, including the First, Third, Fourth, Ninth, and Fourteenth Amendments. Statutes limiting access to birth control or abortion or banning homosexual acts have been ruled unconstitutional violations of the right to privacy. The Court, however, has not extended privacy rights to include the right to die.

KEY TERMS

Bill of Rights, p. 160
civil liberties, p. 158
civil rights, p. 158
clear and present danger test, p. 170
direct incitement test, p. 171
due process clause, p. 160
due process rights, p. 178
Eighth Amendment, p. 185
establishment clause, p. 164
exclusionary rule, p. 182
Fifth Amendment, p. 180
fighting words, p. 174
First Amendment, p. 164
Fourth Amendment, p. 178
free exercise clause, p. 164
fundamental freedoms, p. 162
incorporation doctrine, p. 162
libel, p. 174
Miranda rights, p. 181
Miranda v. *Arizona* (1966), p. 181
New York Times Co. v. *Sullivan* (1964), p. 174
Ninth Amendment, p. 160
prior restraint, p. 168
right to privacy, p. 187
Roe v. *Wade* (1973), p. 188
selective incorporation, p. 162
Sixth Amendment, p. 182
slander, p. 174
substantive due process, p. 161
symbolic speech, p. 172

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WEB EXPLORATIONS

To view an original copy of the Bill of Rights, see
http://www.archives.gov/national_archives_experience/charters/bill_of_rights.html

For groups with opposing views on how the First Amendment should be interpreted, see
http://www.au.org/
http://www.pfaw.org/
http://www.aclj.org/

For more information on the *Agostini* v. *Felton* case see
http://supct.law.cornell.edu:8080/supct/html/96-552.ZD.html

For more information on the National Endowment for the Arts, see
http://www.arts.endow.gov/

For more information on *Chandler* v. *Miller*, see
http://supct.law.cornell.edu/supct/html/96-126.ZS.html

For other privacy issues, see
http://www.epic.org/ and
http://www.privacy.org/

To compare the different sides of the abortion debate, go to FLITE: Federal Legal Information Through Electronics at
http://www.fedworld.gov/supcourt/
and Roe in a Nutshell at
http://hometown.aol.com/abtrbng/roeins.htm

For more on gay rights and recent court cases, see
http://www.infoplease.com/ipa/A0194028.html

To learn more about the right to die movement, see
http://www.hemlock.org/home.jsp