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Civil Liberties

The Bill of Rights, written in 1789, set forth to define the natural rights of the citizens of the United States. It was also intended to limit the new national government's ability to overstep its authority. The Fourth Amendment, for example, guards against unreasonable search and seizure. Specifically, the amendment states that it protects "the right of people to be secure in their persons, houses, papers, and effects." The Fourth Amendment also provides guidelines regarding obtaining a warrant in order to conduct a search.

Through this amendment, the government ensured that the people of the United States were guaranteed both their privacy and autonomy. However, interpreting the Fourth Amendment—as well as many other amendments—has posed significant challenges for the modern judiciary. Determining what constitutes an "unreasonable" search or when a law enforcement officer has "probable cause," especially, prove difficult in practice. Constantly evolving technology and social and political norms can also pose unique challenges for the criminal justice system.

Two cases decided during the Supreme Court's recent terms illustrate the ongoing challenges of the Fourth Amendment. In the first case, decided in 2012, the Court was asked to rule on whether law enforcement officers could plant GPS tracking devices on a suspected criminal's vehicle. The Court ultimately decided that, although the purpose of the search, monitoring a suspected criminal's activity, was the same as an extended investigation, implanting a tracking device on the suspect's vehicle compromised the suspect's expectation of privacy. Though the Court did not explicitly state that a warrant was necessary, observers noted that the ruling was construed in such a way that using a GPS device to track a suspect's activity without a warrant would be unlikely to stand up to legal challenge.[1]

In the second case, decided in 2014, the Court considered whether a warrant was necessary to search the content of a suspected criminal's cell phone. The justices unanimously ruled that a warrantless search of calls, messages, contacts, pictures, and other information was a breach

JUDICIAL INTERPRETATION HAS REDEFINED THE FOURTH AMENDMENT Unreasonable search and seizure, as defined by the Fourth Amendment, is an issue that has continuously troubled the Supreme Court. Above, police officers search a vehicle during the Prohibition Era. Below, a Department of Homeland Security agent uses technological devices to search a van at the U.S.-Mexico border.

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

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

of privacy that could not be justified under the Fourth Amendment's search and seizure clause. This ruling makes cell phones distinct from wallets, address books, keys, and other low-tech devices, which may be searched without a warrant.[2]

In each of these cases, the Supreme Court was asked to consider issues related to the Fourth Amendment that the Framers could never have imagined. The brilliance of the civil liberties codified by the First Congress is that the Bill of Rights remains a relatively stable statement of our natural rights as Americans, even as technology has evolved. With judicial interpretation, the sentiments expressed more than 200 years ago still apply to the modern world.

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Civil liberties are the personal guarantees and freedoms that government cannot abridge, by law, constitution, or judicial interpretation. As guarantees of "freedom to" action, they place limitations on the power of the government to restrain or dictate an individual's actions. **Civil rights,** in contrast, provide freedom from arbitrary or discriminatory treatment by government or individuals.

Questions of civil liberties often present complex problems. We must decide how to determine the boundaries of speech and assembly—or, how much control over our personal liberties we give to police or other law enforcement officials. Moreover, during times of war, it is important to consider the liberties accorded to those who oppose war or are suspected of anti-government activities.

Resolution of civil liberties questions often falls to the judiciary, which must balance the competing interests of the government and the people. Thus, in many of the cases discussed in this chapter, a conflict arises 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 clash, such as a physician's and her patient's right to easy access to a medical clinic such as Planned Parenthood versus a pro-life advocate's liberty to picket that clinic. In this chapter, we explore the various dimensions of civil liberties guarantees contained in the U.S. Constitution and the Bill of Rights.

Roots of Civil Liberties: The Bill of Rights

4.1 Trace the constitutional roots of civil liberties.

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

Recognition of the increased power of the new national government led Anti-Federalists to stress the need for a bill of rights. Anti-Federalists and many others were confident they could control the actions of their own state legislators, but they did not trust the national government to protect civil liberties.

The notion of including a bill of rights in the Constitution was not popular at the Constitutional Convention. When George Mason of Virginia suggested adding such a bill to the preface of the proposed Constitution, representatives unanimously

defeated his resolution.[3] In subsequent ratification debates, Federalists argued that a bill of rights was unnecessary, putting forward three main arguments in opposition.

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

Some Framers, however, came to support the idea. After the Philadelphia convention, James Madison conducted a lively correspondence with Thomas Jefferson about the need for a national bill of rights. Jefferson supported such guarantees far more quickly than did Madison. But, the reluctant Madison soon found himself in a close race against James Monroe for a seat in the House of Representatives in the First Congress. The district was largely Anti-Federalist. In an act of political expediency, Madison issued a new series of public letters similar to *The Federalist Papers,* in which he vowed to support a bill of rights. Once elected to the House, Madison made good on his promise and became the prime author of the Bill of Rights. Still, he considered Congress to have far more important matters to handle and viewed his work on the Bill of Rights as "a nauseous project."[4]

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

The **Bill of Rights,** the first ten amendments to the Constitution, contains numerous specific guarantees against encroachment by the new government, including those of free speech, press, and religion. The Ninth and Tenth Amendments, favored by the Federalists, note that the Bill of Rights is not exclusive. The **Ninth Amendment** makes clear that this special listing of rights does not mean that others do not exist. The **Tenth Amendment** reiterates that powers not delegated to the national government are reserved to the states or to the people.

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

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

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

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

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

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

The Framers intended the Bill of Rights to limit the national government's power to infringe on the rights and liberties of the citizenry. In *Barron* v. *Baltimore* (1833), the Supreme Court ruled that the Bill of Rights limited only the actions of the U.S. government and not those of the states.[5] In 1868, however, the Fourteenth Amendment was added to the U.S. Constitution. Its language suggested that some or even all protections guaranteed in the Bill of Rights might be interpreted to prevent state infringement of those rights. Section 1 of the Fourteenth Amendment reads: "No State shall . . . . deprive any person of life, liberty, or property, without due process of law." Questions about the scope of "liberty" as well as the meaning of "due process of law" continue even today to engage legal scholars and jurists.

Until nearly the turn of the twentieth century, the Supreme Court steadfastly rejected numerous arguments for interpreting the **due process clause** in the Fourteenth Amendment in such a way as to make various provisions in the Bill of Rights applicable to the states. In 1897, however, the Court began to increase its jurisdiction over the states by holding them to a **substantive due process** standard whereby they had the legal burden to prove that their laws constituted a valid exercise of power to regulate the health, welfare, or public morals of citizens.[6] Interference with state power,

WHEN DID THE COURT FIRST ARTICULATE THE DOCTRINE OF SELECTIVE INCORPORATION?

Until *Gitlow v. New York* (1925), involving Benjamin Gitlow (shown on the right testifying before Congress), the executive secretary of the Socialist Party, it generally was thought that, despite the Fourteenth Amendment, the limitations of the Bill of Rights did not apply to the states. After *Gitlow*, the Court gradually bound states to most of these provisions through a process known as selective incorporation.

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

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

however, was rare, and states passed sedition laws (laws that made it illegal to speak or write any political criticism that threatened to diminish respect for the government, its laws, or public officials), anticipating that the U.S. Supreme Court would uphold their constitutionality. When Benjamin Gitlow, a member of the Socialist Party, printed 16,000 copies of a manifesto in which he urged workers to overthrow the U.S. government, he was convicted of violating a New York state law that prohibited such advocacy. Although his conviction was upheld, in *Gitlow* v. *New York* (1925), the U.S. Supreme Court noted that states were not completely free to limit forms of political expression, saying:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the *fundamental personal rights and "liberties"* protected by the due process clause of the Fourteenth Amendment from impairment by the states [emphasis added].[7]

Gitlow, with its finding that states could not abridge free speech protections, was the first decision to clearly articulate the **incorporation doctrine.** In *Near* v. *Minnesota* (1931), the U.S. Supreme Court further developed this doctrine by holding that a state law violated the First Amendment's freedom of the press: "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint by the state."[8]

Selective Incorporation and Fundamental Freedoms

The Supreme Court has not made all specific guarantees in the Bill of Rights applicable to the states through the due process clause of the Fourteenth Amendment, as shown in Table 4.1. Instead, the Court has used the process of **selective incorporation** to limit

TABLE 4.1 WHEN DID SELECTIVE INCORPORATION MAKE THE BILL OF RIGHTS APPLICABLE TO THE STATES?

Amendment	Right	Date	Case Incorporated
I	Speech	1925	*Gitlow* v. *New York*
	Press	1931	*Near* v. *Minnesota*
	Assembly	1937	*DeJonge* v. *Oregon*
	Religion	1940	*Cantwell* v. *Connecticut*
II	Bear arms	2010	*McDonald* v. *City of Chicago*
III	No quartering of soldiers		Not incorporated
IV	No unreasonable searches or seizures	1949	*Wolf* v. *Colorado*
	Exclusionary rule	1961	*Mapp* v. *Ohio*
V	Just compensation	1897	*Chicago, B&Q R.R. Co.* v. *Chicago*
	Self-incrimination	1964	*Malloy* v. *Hogan*
	Double jeopardy	1969	*Benton* v. *Maryland*
	Grand jury indictment		Not incorporated
VI	Public trial	1948	*In re Oliver*
	Right to counsel	1963	*Gideon* v. *Wainwright*
	Confrontation of witnesses	1965	*Pointer* v. *Texas*
	Impartial trial	1966	*Parker* v. *Gladden*
	Speedy trial	1967	*Klopfer* v. *North Carolina*
	Compulsory trial	1967	*Washington* v. *Texas*
	Criminal trial	1968	*Duncan* v. *Louisiana*
VII	Civil jury trial		Not incorporated
VIII	No cruel and unusual punishment	1962	*Robinson* v. *California*
	No excessive bail	1971	*Schilb* v. *Kuebel*

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

the rights of states by protecting against abridgement of **fundamental freedoms.** These freedoms—defined by the Court as essential to order, liberty, and justice—are subject to the Court's most rigorous standard of review.

The Court set out the rationale for selective incorporation in *Palko* v. *Connecticut* (1937).[9] 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 due process clause of the Fourteenth Amendment had made the Fifth Amendment applicable to the states.

The Supreme Court disagreed. In an opinion written by Justice Benjamin Cardozo, the Court ruled that the due process clause bound states only to those rights that were "of the very essence of a scheme of ordered liberty." The Fifth Amendment's double jeopardy clause was not, in the Court's view, among these rights. The Court overruled its decision in 1969.[10]

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

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

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

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

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

First Amendment Guarantees: Freedom of Religion

4.2 Describe the First Amendment guarantee of freedom of religion.

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

The Establishment Clause

The separation of church and state has always generated controversy in American politics. A majority of Americans clearly value the moral teachings of their own religions, especially Christianity. U.S. coins are embossed with "In God We Trust." The U.S. Supreme Court asks for God's blessing on the Court. Every session of the U.S. House and Senate begins with a prayer, and both the House and Senate have their own chaplains. Through the years, the Court has been divided over the interpretation of the establishment clause. Does this clause erect a total wall between church and state, as favored by Thomas Jefferson, or does it allow some governmental accommodation of religion? While the Supreme Court has upheld the constitutionality of many kinds of church/state entanglements, such as public funding to provide sign language interpreters for deaf students in religious schools,[13] the Court has held fast to the rule of strict separation between church and state when issues of mandatory prayer in school are involved. In *Engel* v. *Vitale* (1962), for example, the Court ruled that the recitation in public school classrooms of a brief nondenominational prayer drafted by the local school board was unconstitutional.[14] One year later, in *Abington School District* v. *Schempp* (1963), the Court ruled that state-mandated Bible reading or recitation of the Lord's Prayer in public schools was also unconstitutional.[15]

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

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

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

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

Establishment issues, however, do not always focus on education. In 2005, for example, the Supreme Court, in a 5–4 decision, narrowly upheld the *Lemon* test by ruling that a privately donated courthouse display, which included the Ten Commandments and 300 other historical documents illustrating the evolution of American law, violated the First Amendment's establishment clause.[22]

But, in 2010, the Court appeared to reverse course. In a 5–4 decision, the Court ruled that a cross erected on a World War I memorial on federal lands was constitutional. And, in 2014, in a similarly divided decision, the Court ruled that local governmental bodies

SHOULD CHILDREN BE REQUIRED TO PRAY IN PUBLIC SCHOOLS?

School prayer is just one of the thorny questions the Supreme Court has addressed under the establishment clause. Though the Court has usually decided against prayer in schools, even when it is student-led, many educational institutions maintain this practice.

such as town councils can start their sessions with a prayer even if the prayer clearly favors one faith. Decisions such as these leave substantial grey area for governments trying to determine the constitutional boundaries of public religious displays.[23]

The Free Exercise Clause

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

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

Furthermore, when secular law conflicts with religious law, the right to exercise one's religious beliefs is often denied—especially if a minority or an unpopular or "suspicious" group hold the religious beliefs in question. Thus, the U.S. Supreme Court has interpreted the Constitution to mean that governmental interests can outweigh free exercise rights. The Court has upheld as constitutional state statutes barring the use of certain illegal drugs (such as peyote), snake handling, and polygamy—all practices once part of some religious observances—when states have shown compelling reasons to do so.[27]

Congress has mightily objected to many of the Court's rulings on religious freedom. In 1993, it responded by passing the Religious Freedom Restoration Act (RFRA), which was intended to prevent the federal government from making policy decisions that limit an individual's free exercise. Over time, this law has been used to question the constitutionality of laws banning the use of drugs such as peyote and hoasca tea, well known for their hallucinogenic properties, as well as other religious practices such as polygamy.[28] More recently, Christian corporations such as Hobby Lobby have used RFRA to challenge the constitutionality of the Affordable Care Act's provisions requiring employer-sponsored health plans to include coverage for contraceptives.[29]

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

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

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

Freedoms of Speech and the Press

A democracy depends on a free exchange of ideas, and the First Amendment shows that the Framers were well aware of this fact. Historically, one of the most volatile issues of constitutional interpretation has centered on the First Amendment's mandate that "Congress shall make no law . . . abridging the freedom of speech or of the press." As with the establishment and free exercise clauses of the First Amendment, the Court has not interpreted speech and press clauses as absolute bans on government regulation. This leeway in interpretation has led to thousands of cases seeking both broader and narrower judicial interpretations of the scope of the amendment. Over the years, the Court has employed a hierarchical approach in determining what the government can and cannot regulate, with some liberties getting greater protection than others. Generally, the Court has granted thoughts the greatest protection and actions or deeds the least. Words have fallen 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 states ratified the First Amendment in 1791, it was considered to protect against **prior restraint** of speech or expression, or to guard against the prohibition of speech or publication before the fact. Faced with increasing criticism of the Federalist government by Democratic-Republicans in 1798, the Federalist Congress, with President John Adams's blessing, enacted the Alien and Sedition Acts. These acts banned any criticism of the Federalist government by the growing numbers of Democratic-Republicans, making the publication of "any false, scandalous writing against the government of the United States" a criminal offense. Although the law clearly flew in the face of the First Amendment's ban on prior restraint, the Adams administration successfully prosecuted and 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 U.S. Supreme Court had an opportunity to rule on the constitutionality of these First Amendment infringements.

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

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

After the Civil War, states also began to prosecute individuals for seditious speech if they uttered or printed statements critical of the government. Between 1890 and 1900, for example, more than one hundred state prosecutions for sedition took place.[30] Moreover, by the dawn of the twentieth century, public opinion in the United States had grown increasingly hostile toward the commentary of Socialists and Communists who attempted to appeal to growing immigrant populations. Groups espousing socialism and communism became the targets of state laws curtailing speech and the written word (see the earlier discussion of *Gitlow* v. *New York*).

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

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

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

WORLD WAR I AND ANTI-GOVERNMENTAL SPEECH The next major efforts to restrict freedom of speech and the press did not occur until Congress, at the urging of President Woodrow Wilson during World War I, passed the Espionage Act in 1917. The government convicted nearly 2,000 Americans of violating its various provisions, especially prohibitions on urging resistance to the draft or distributing 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."[31] Under this **clear and present danger test** the circumstances surrounding an incident are important. Anti-war leaflets, for example, may be permissible during peacetime, but during World War I they were considered too dangerous. *Schenck* is also famous for Chief Justice Oliver Wendell Holmes's comment that the false cry of "Fire!" in a crowded theater would not be protected speech.

Still, 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 the government could regulate certain kinds of speech: 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."[32] 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.

Protected Speech and Press

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

LIMITING PRIOR RESTRAINT As we have seen with the Alien and Sedition Acts, although Congress attempted to limit speech before the fact as early as 1798, the U.S. Supreme Court did not take a firm position on this issue until the 1970s. In *New York Times Co.* v. *U.S.* (1971), also called the Pentagon Papers case, the Supreme Court ruled that the U.S. government could not block the publication of secret Department of Defense documents illegally furnished to the *Times* by anti-war activists.[33] In 1976, the U.S. Supreme Court went even further, noting in *Nebraska Press Association* v. *Stuart* that any attempt by the government to prevent expression carried "'a heavy presumption' against its constitutionality."[34] 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 had greater weight. The Supreme Court disagreed, holding the press's right to cover the trial paramount. Still, judges often have leeway to issue gag orders affecting parties to a lawsuit or to limit press coverage of a case.

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."[35] Perhaps the most visible example of symbolic speech is the burning of the American flag as an expression of protest.

The Supreme Court first acknowledged that symbolic speech was entitled to First Amendment protection in *Stromberg* v. *California* (1931).[36] In that case, 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,

Explore Your World

Free speech and free press are central values in most industrialized democracies such as the United States. In these countries, citizens and the media act as powerful watchdogs over the government's actions. However, in other countries such as Russia in the 1920s and North Korea today, the government controls and monitors the media. This means that the government's message—as illustrated in the posters below—may be the only viewpoint citizens can learn, understand, and espouse.

This Russian poster was created during the 1920s. It illustrates the rise of the Russian economy and advocates for the Russian government's Five Year Plan. Note the images of prominent Russian Communist Party leaders, including Joseph Stalin, on the engine.

This recent propaganda poster from North Korea depicts the image of a fist coming down on two people. The words on the poster, roughly translated, state, "Let's strike them with a single blow." This photo was taken at a rally against the South Korean president. Note how many people in the crowd have responded by raising a single fist.

CRITICAL THINKING QUESTIONS

1. How do these posters represent their country of origin? How do they represent other countries? What message does this send about global politics?
2. How do these posters use emotional appeals to induce support from citizens? Is this an appropriate tactic?
3. Can you think of any examples in which the U.S. government (or other western governments) employed tactics such as those seen in these posters? How were they similar, and how were they different?

hate speech
Any communication that belittles a person or group on the basis of characteristics.

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).[37]

In recent years, however, the Court has appeared less willing to support the standards established in *Tinker*. In a case commonly referred to as the "Bong Hits 4 Jesus" case, the Court ruled that a student's free speech rights were not violated when a school suspended him for displaying what the Court characterized as a "sophomoric" banner at an Olympic torch relay parade.[38]

HATE SPEECH "As a thumbnail summary of the last two or three decades of speech issues in the Supreme Court," wrote eminent First Amendment scholar Harry Kalven Jr. in 1966, "we may come to see the Negro as winning back for us the freedoms the Communists seemed to have lost for us."[39] Still, says noted African American studies scholar Henry Louis Gates Jr., Kalven would be shocked to see the stance that some now take toward the First Amendment, which once protected protests, rallies, and agitation in the 1960s: "The byword among many black activists and black intellectuals is no longer the political imperative to protect free speech; it is the moral imperative to suppress '**hate speech**,'" any communication that belittles a person or group on the basis of characteristics.[40]

In the 1990s, a particularly thorny First Amendment issue emerged as cities and universities attempted to prohibit what they viewed as hate speech. In *R.A.V.* v. *City of St. Paul* (1992), a St. Paul, Minnesota, ordinance that made it a crime to engage in speech or action likely to arouse "anger," "alarm," or "resentment" on the basis of race, color, creed, religion, or gender was at issue. The Court ruled 5–4 that a white teenager who burned a cross on a black family's front lawn, thereby committing a hate crime under the ordinance, could not face charges under that law because the First Amendment prevents governments from "silencing speech on the basis of its content."[41] 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.[42]

Three-quarters of colleges and universities have banned a variety of forms of speech or conduct that create or foster an intimidating, hostile, or offensive environment on

HOW BROAD IS THE RIGHT TO SYMBOLIC SPEECH?

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

campus. To prevent disruption of university activities, some universities have also established free speech zones that restrict the time, place, or manner of speech. Critics, including the American Civil Liberties Union, charge that free speech zones imply the limitation of speech 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 the Supreme Court has heard none of these cases.

Unprotected Speech and Press

Although the Supreme Court has allowed few governmental bans on most types of speech, some forms of expression lack protection. In 1942, the Supreme Court set forth the rationale by which it would distinguish between protected and unprotected speech. According to the Court, libel, fighting words, and obscenity 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."[43]

LIBEL AND SLANDER **Libel** is a false 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—suing someone for libel is relatively easy. In the United States, however, the standards of proof reach much higher. A person who believes that he or she has been a victim of libel must show that the statements made were untrue. Truth is an absolute defense against the charge of libel, no matter how painful or embarrassing the revelations.

Individuals that the U.S. Supreme Court considers "public persons or public officials" often find it more difficult to sue for libel or slander. ***New York Times Co.* v. *Sullivan* (1964)** was the first major libel case considered by the Supreme Court.[44] 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. (Civil rights activists, including former First Lady Eleanor Roosevelt, paid for the ad.) The Supreme Court overturned the conviction and established that a finding of libel against a public official could stand only if "actual malice," or a knowing disregard for the truth, was shown. Proof that the statements were false or negligent was not sufficient to demonstrate actual malice. Later the Court ruled that even intentional infliction of emotional distress was not sufficient.[45]

FIGHTING WORDS In 1942, the Court stated that **fighting words,** or words that "by their very utterance inflict injury or tend to incite an immediate breach of peace," are not subject to the restrictions of the First Amendment.[46] Federal and state governments can therefore regulate fighting words, which include "profanity, obscenity, and threats."

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."[47] 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."[48]

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, showing that a book or movie was "*utterly* without redeeming social value" proved a difficult task. Even some hardcore pornography passed muster under the *Roth* test, prompting some critics to argue that the Court fostered the increased number of sexually oriented publications designed to appeal to those living during the sexual revolution.

libel
False written statement that defames a person's character.

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

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

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

Richard M. Nixon made the growth in pornography a major issue when he ran for president in 1968. Nixon pledged to appoint to federal judgeships only those who would uphold law and order and stop coddling criminals and purveyors of porn. Once elected president, Nixon appointed four justices to the Supreme Court, including Chief Justice Warren E. Burger, who wrote the opinion in *Miller* v. *California* (1973). In that case, the Court set out a test redefining 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 would determine "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." The Court also noted that local standards might affect its assessment of obscenity, under the rationale that what the citizens of New York City find acceptable might not be the case in Maine or Mississippi.[49]

Time and contexts clearly have altered the Court's and, indeed, much of America's perceptions of what works are obscene. But, the Supreme Court has allowed communities great leeway in drafting statutes to deal with obscenity and, even more importantly, other forms of questionable expression. The Court, for example, has allowed some states to ban totally nude erotic dancing, concluding that the statutes furthered a substantial governmental interest in creating order in society and regulating morals, and therefore did not violate the First Amendment.[50] Other states continue to allow this practice.

The Internet, however, poses a particular challenge to the *Miller* test. Applying local standards is almost impossible in this context, since users in one state may easily access information generated in another state. Congress and the Supreme Court have struggled, in particular, to regulate the transmission of obscene or "harmful" materials over the Internet to anyone under age eighteen. The Court has upheld the constitutionality of one piece of legislation regulating the transmission of obscene content over the Internet, the PROTECT Act, which outlawed the sale or transmission of child pornography.[51]

HOW DO WE USE OUR RIGHT TO ASSEMBLE?

The First Amendment rights to assembly and petition are often seen in the form of protests, marches, and rallies. Here, protestors in California march in support of gay marriage rights following a federal appellate court's ruling on that issue.

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.[52] Despite this clear assertion, 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.

The freedoms of assembly and petition relate directly to those of speech and the press because the freedom to assemble hinges on peaceful conduct. If the words spoken or actions taken at any event cross the line of constitutionality, the First Amendment may no longer protect events such as parades or protests. Absent that protection, leaders and attendees may be subject to governmental regulation and even arrest, incarceration, or civil fines.

The U.S. Supreme Court has rarely addressed the question of the right to petition the government. But, in 2010, the Court heard a case questioning the constitutionality of Washington State's Public Records Act. This law allowed the government to release the names of citizens who had signed a petition in support of a ballot initiative that would have banned gay couples from adopting children. The plaintiffs who signed the "Preserve Marriage, Protect Children" petition did not want their names released because they feared harassment. The Court, however, ruled that disclosure of these names did not violate the First Amendment.[53]

The Second Amendment: The Right to Keep and Bear Arms

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

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

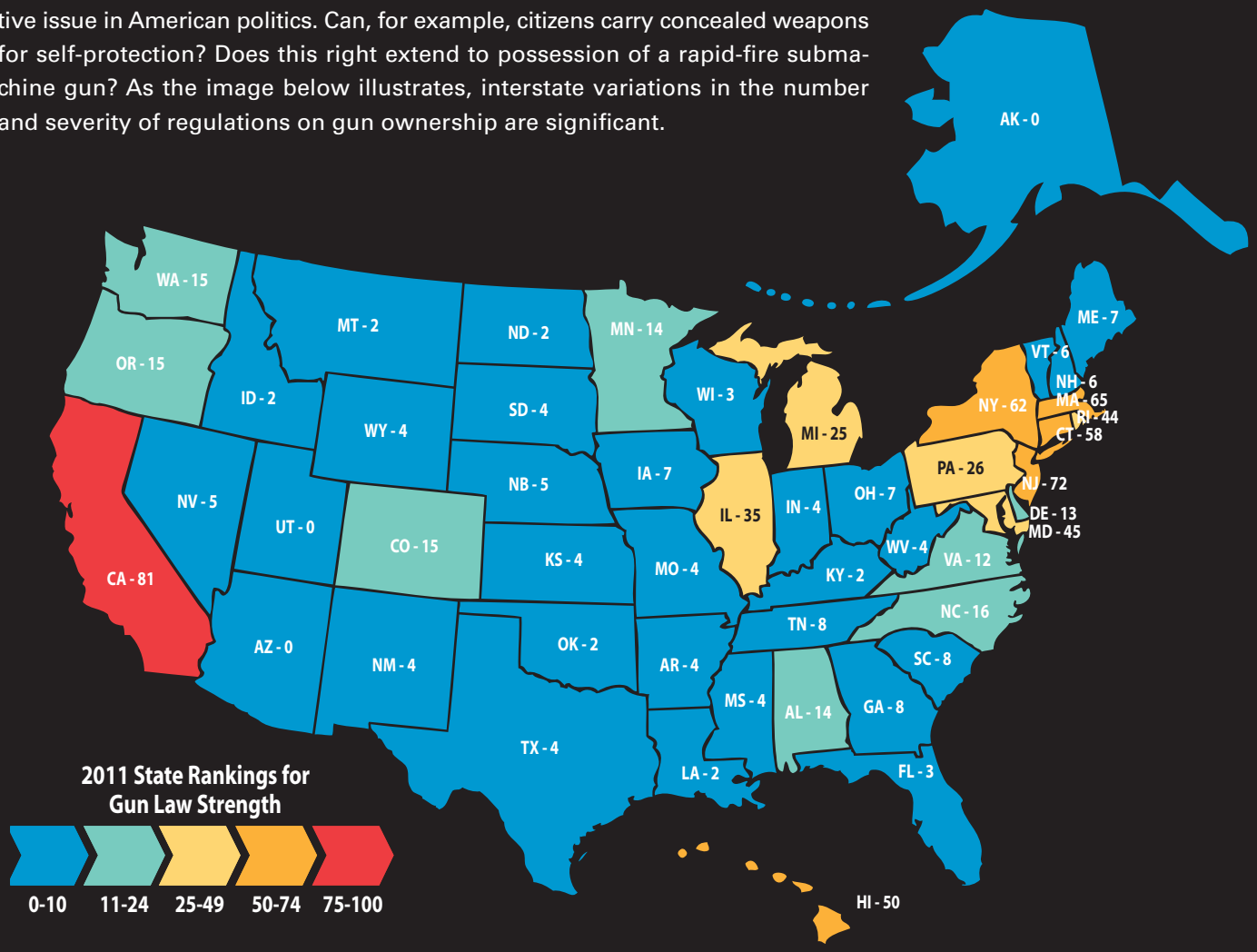
The Framers added the Second Amendment to the Constitution to ensure that Congress could not pass laws to disarm state militias. This amendment appeased Anti-Federalists, who feared that the new Constitution would abolish the right to "keep and bear arms." It also preserved an unstated right—the right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

Through the early 1920s, few state statutes were passed to regulate firearms (and generally these laws dealt with the possession of firearms by slaves). The Supreme Court's decision in *Barron* v. *Baltimore* (1833), which refused to incorporate the Bill of Rights to the state governments, prevented federal review of those state laws.[54] Moreover, in *Dred Scott* v. *Sandford* (1857), Chief Justice Roger B. Taney listed the right to own and carry arms as a basic right of citizenship.[55]

In 1934, Congress passed the National Firearms Act in response to the explosion of organized crime in the 1920s and 1930s, which stemmed from Prohibition. The act imposed taxes on automatic weapons and sawed-off shotguns. In *U.S.* v. *Miller* (1939), a unanimous Court upheld the constitutionality of the act, stating that the Second Amendment was intended only to protect a citizen's right to own ordinary militia weapons, which did not include sawed-off shotguns.[56]

How Do States Restrict the Right to Bear Arms?

The scope and application of the Second Amendment is a contentious and sensitive issue in American politics. Can, for example, citizens carry concealed weapons for self-protection? Does this right extend to possession of a rapid-fire submachine gun? As the image below illustrates, interstate variations in the number and severity of regulations on gun ownership are significant.



State Laws Governing Firearms

Right to carry concealed weapons | **Right to carry prohibited** | **License to purchase handguns** | **Handgun waiting periods** | **Gun bans** | **Long gun waiting periods**

CRITICAL THINKING QUESTIONS

1. How do gun control laws vary across the nation? What geographic patterns do you observe? Why do you observe these patterns?
2. Which gun control laws are most and least common? How do you explain these variations?
3. Should the national government have broader latitude to control ownership, sale, use, and manufacture of guns and firearms? Is it permissible under the constitution? Should this be a state responsibility?

SOURCES: Legal Community Against Violence's Web site and reports were the primary sources used for determining points awarded for each state. Visit www.LCAV.org. National Rifle Association Institute for Legislative Action, "Compendium of State Laws Governing Firearms."

For nearly seventy years following *Miller,* the Court did not directly address the Second Amendment. Then, in *D.C.* v. *Heller* (2008), the Court offered some clarification, ruling that the Second Amendment protected an individual's right to own a firearm for personal use in Washington, D.C.[57] In light of the Court's ruling, the D.C. City Council adopted new gun control laws requiring gun registration and prohibiting assault weapons and large-capacity magazines. A U.S. District Court ruled that these laws were valid and within the scope of the *Heller* decision.[58] And, in 2010, the Supreme Court broadened the ownership rights in *Heller* to include citizens of all states. It also incorporated the Second Amendment.[59]

The Rights of Criminal Defendants

4.5 Analyze the rights of criminal defendants found in the Bill of Rights.

Article I of the Constitution guarantees a number of rights for persons accused of crimes. Among those are **writs of *habeas corpus,*** or court orders in which a judge requires authorities to prove they are holding a prisoner lawfully and that allow the prisoner to be freed if the government's case does not persuade the judge. In addition, *habeas corpus* rights imply that prisoners have a right to know what charges are being made against them.

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

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

The Fourth Amendment and Searches and Seizures

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

The purpose of this amendment was to deny the national government the authority to make general searches. Thus, without a warrant the police may 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 that are otherwise in the arrestee's immediate control. In places where no arrest occurs and individuals would reasonably have some expectation of privacy—such as houses or offices—police must obtain search warrants from a "neutral and detached magistrate" prior to conducting more extensive searches.[60]

Cars, however, have proven problematic under this rule. Although individuals have an expectation of privacy in their own vehicles, cars "can quickly be moved out of the locality or jurisdiction in which the warrant must be sought."[61] Border patrol agents, therefore, have great leeway in pulling over suspicious motorists.[62] And, courts do not require search warrants in possible drunk driving situations.[63] However, police must allow citizens access to their vehicles during a search, and they may not implant GPS tracking devices on criminal suspects' vehicles.[64]

Testing for drugs, too, is an especially thorny search and seizure issue. Although 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.

writs of *habeas corpus*
Petition requesting that a judge order authorities to prove that a prisoner is being held lawfully and that allows the prisoner to be freed if the government's case does not persuade the judge. *Habeas corpus* rights imply that prisoners have a right to know what charges are being made against them.

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

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

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

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

In 1989, the Supreme Court ruled that mandatory drug and alcohol testing of employees involved in accidents was constitutional.[65] In 1995, the Court declared random drug testing of public high school athletes constitutional.[66] 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.[67]

Warrantless searches may also occur under several other circumstances. No warrant is necessary if police suspect that someone is committing or is about to commit a crime. In these cases, "reasonable suspicion" presents sufficient justification for stopping a suspect—a much lower standard than probable cause.[68] Police, for example, use reasonable suspicion to justify so-called "stop and frisk" searches. In these searches, law enforcement agents stop pedestrians and search for weapons or contraband. Questions, however, have been raised about racial bias in these searches, which occur more often among African Americans and Hispanics. Some judges have also ruled that police officers had no reasonable suspicion to apprehend individuals; in these cases, any evidence obtained in stop and frisk searches has been declared inadmissible in court.

In addition, if the police obtain consent for a search, no warrant is necessary. In the case of homes, consent must come from all occupants present at the time of the search.[69] Finally, warrantless searches are permissible in places where citizens cannot reasonably expect privacy. For example, under the open fields doctrine first articulated by the Supreme Court in 1924, if you own a field, and even if you post "No Trespassing" signs, the police can search your field without a warrant to see if you are engaging in illegal activity, such as growing marijuana.[70] Similarly, 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 they reenter.[71]

The Fifth Amendment: Self-Incrimination and Double Jeopardy

The **Fifth Amendment** provides a variety of guarantees protecting those charged with a crime. It requires, for example, that individuals accused in the most serious cases be allowed to present their case before a grand jury, a group of citizens charged with determining whether enough evidence exists for a case to go to trial. The Fifth Amendment also states that "No person shall be . . . compelled in any criminal case to be a witness against himself." "Taking the Fifth" is shorthand for exercising one's constitutional right not to self-incriminate. The Supreme Court has interpreted this guarantee to be "as broad as the mischief against which it seeks to guard," finding that criminal defendants do not have to take the stand at trial to answer questions, nor can a judge make mention of their failure to do so as evidence of guilt.[72] 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 he or she did not make voluntarily. As is the case in many areas of 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.[73] Police then began to resort to other measures for forcing confessions. Defendants, for example, faced questioning for hours on end with no sleep or food, or threats of physical violence until they were mentally beaten into giving confessions. In other situations, police threatened family members. In one case, authorities told a young mother accused of marijuana possession that her welfare benefits would be terminated and her children taken away if she failed to talk.[74]

***Miranda* v. *Arizona* (1966)** was the Supreme Court's response to coercive efforts used in obtaining 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 did police tell him that he did not have to answer any questions or that an attorney could represent him.

After Miranda's conviction, his case was appealed on the grounds that his Fifth Amendment right not to incriminate himself had been violated because the police had coerced his confession. 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, the law must grant criminal suspects 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."[75] In response to this mandate from the Court, police routinely began to read suspects what are now called their ***Miranda* rights,** a practice you undoubtedly have seen repeated over and over in movies and TV police dramas.

Although the Burger Court did not enforce the reading of *Miranda* rights as vehemently as had the Warren Court, Chief Justice Warren E. Burger, Warren's successor, acknowledged that they had become an integral part of established police procedures.[76] The more conservative Rehnquist and Roberts Courts, however, have been more willing to weaken *Miranda* rights, allowing coerced confessions and employing much more flexible standards for the admission of evidence.[77]

The Fifth Amendment also mandates: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Called the **double jeopardy clause,** it protects individuals from being tried twice for the same crime in the same jurisdiction. Thus, if a jury acquits a defendant of a murder charge, the defendant cannot be retried in that jurisdiction for the offense even if new information is unearthed that could further point to guilt. But, if a defendant was tried in a state court, he or she could still face charges in a federal court or vice versa. This provision is relatively clear and embedded in the law; the Court has heard little litigation on this issue in the past fifty years.

The Fourth and Fifth Amendments and the Exclusionary Rule

In *Weeks* v. *U.S.* (1914), the U.S. Supreme Court adopted the **exclusionary rule,** which bars the use of illegally seized evidence at trial. Thus, although the Fourth and Fifth Amendments do not prohibit the use of evidence obtained in violation of their provisions, the exclusionary rule is a judicially created remedy to deter constitutional violations. In *Weeks,* for example, the Court reasoned that allowing police and prosecutors to use the "fruits of a poisonous tree" (a tainted search) would only encourage that activity.[78]

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 more important. In *Mapp* v. *Ohio* (1961), the Warren Court ruled "all evidence obtained by searches and seizures in violation of the Constitution, is inadmissible in a state court."[79] This historic and controversial case put law enforcement officers on notice that if they violated any constitutional rights in the search for evidence, their efforts would be for naught because federal or state trials could not accept tainted evidence.

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

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

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

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

WHY WAS ERNESTO MIRANDA IMPORTANT TO THE DEVELOPMENT OF DEFENDANTS' RIGHTS?

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

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 the crime was committed, notice of the charges, the right to confront and obtain favorable witnesses, and the right to counsel.

In 1976, the Court noted that the exclusionary rule "deflects the truth-finding process and often frees the guilty."[80] 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. Since the purpose of the exclusionary rule is to deter police misconduct, and in this situation no police misconduct exists, the courts have permitted introduction of the seized evidence at trial. Another exception to the exclusionary rule is "inevitable discovery." Courts may allow illegally seized evidence if such evidence would likely have been discovered in the course of continuing investigation.

The Court has continued to uphold the exclusionary rule. In a 2006 victory for advocates of defendants' rights, the Court ruled unanimously that the Fourth Amendment requires that any evidence collected under an anticipatory warrant—one presented by the police yet not authorized by a judge—would be inadmissible at trial as a violation of the exclusionary rule.[81]

The Sixth Amendment and the Right to Counsel

The **Sixth Amendment** guarantees to an accused person "the Assistance of Counsel in his defense." In the past, this guarantee 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 gave little assistance to many who found themselves on trial. Recognizing this, Congress required federal courts to provide an attorney for defendants who could not afford one. Capital cases (in which the death penalty is a possibility) were the first to require this provision;[82] eventually, in all federal criminal cases, the poor received legal counsel.[83] The Court also began to expand the right to counsel to other state offenses but did so in a piecemeal fashion that gave the states little direction. Given the high cost of 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).[84] 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. The judge refused, and Gideon was convicted and given a five-year prison term for petty larceny. The case against Gideon had not been strong, but as a layperson unfamiliar with the law and with trial practice and procedure, he was unable to point out its weaknesses.

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

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

The Burger and Rehnquist Courts gradually expanded the *Gideon* rule. The justices first applied this standard to cases that were not felonies[85] and, later, to many cases in which probation and future penalties were possibilities. In 2008, the Court also ruled that the right to counsel began at the accused's first appearance before a judge.[86]

The issue of legal representation also extends to questions of competence. Various courts have held that lawyers who fell asleep during trial, failed to put forth a defense, or were drunk during the proceedings were "adequate." In 2005, however, the Supreme Court ruled that the Sixth Amendment's guarantees required lawyers to take reasonable steps to prepare for their clients' trial and sentencing, including examination of their prior criminal history.[87]

Take a Closer Look

The due process rights contained in the Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution provide a variety of protections for those accused of a crime. Perhaps nowhere are these privileges on display more than in American courtrooms, as shown in the photo below.

The Sixth Amendment provides a right to a trial by jury. This is the jury box.

The Sixth Amendment provides for a right to counsel for the accused. The defense sits to the judge's right, and the prosecution to the left.

The Sixth Amendment provides for a right to a speedy, public, and impartial trial in a court of law. According to the Fifth Amendment, however, no one may be tried twice for the same crime.

The Fifth Amendment prevents defendants from self-incrimination, but they may voluntarily take the stand. The Sixth Amendment provides for the right to confront witnesses.

The judge plays a crucial role in the sentencing process. The Eighth Amendment protects against excessive fines and bail, as well as cruel and unusual punishment.

CRITICAL THINKING QUESTIONS

1. Do the accused have any rights beyond those highlighted in this photo? Are those rights reflected or protected anywhere in the courtroom?
2. What observations can you make about the geography of the courtroom? How does the utilization of space reflect the goals of the American judicial system?
3. Does the American judicial system provide too many protections for those accused of a crime? Should suspected criminals be guilty until proven innocent?

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."

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 gives 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 jury selection being the most frequently challenged part of the process. Historically, lawyers had used peremptory challenges (those for which no cause needs to be given) to exclude women and minorities from juries, especially in certain types of cases. In 1954, however, the U.S. Supreme Court ruled that Hispanics were entitled to a jury trial that included other Hispanics.[88] And, in 1986, the Court ruled that the use of peremptory challenges specifically to exclude African American jurors violated the equal protection clause of the Fourteenth Amendment.[89]

In 1994, the Supreme Court answered the major remaining question about jury selection: can lawyers exclude women from juries through their use of peremptory challenges? This question arose 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 because of 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.[90]

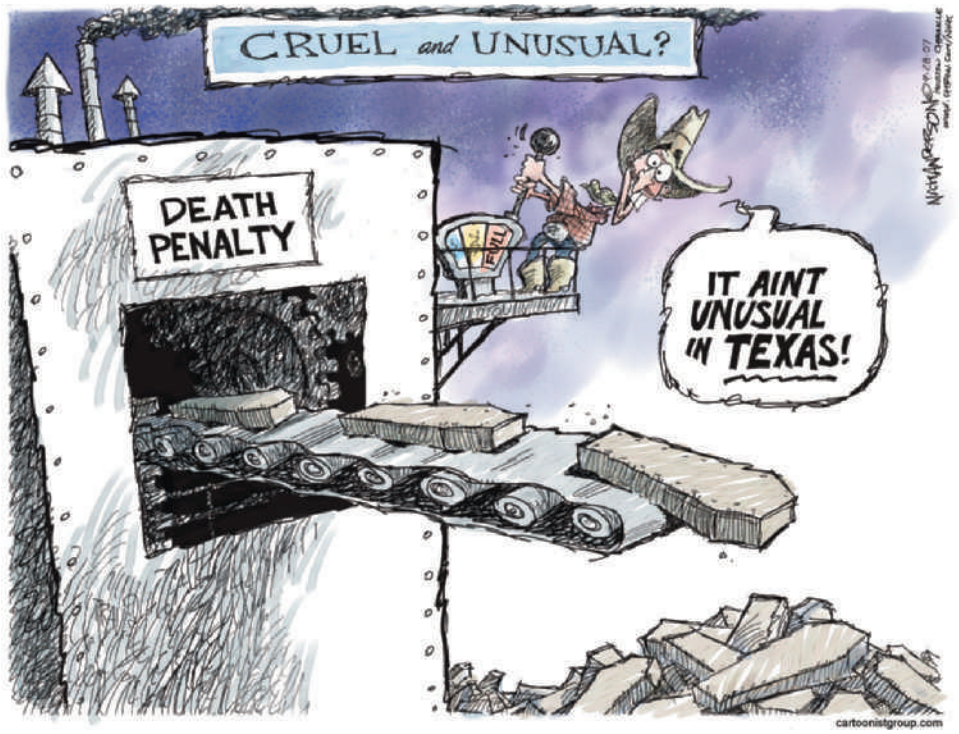
The right to confront witnesses at trial also is protected by the Sixth Amendment. In 1990, however, the Supreme Court ruled that this right was not absolute, and the testimony of a six-year-old alleged child abuse victim via one-way closed-circuit TV was permissible. The clause's central purpose, said the Court, was to ensure the reliability of testimony by subjecting it to rigorous examination in an adversarial proceeding.[91] 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

Among its protections, the **Eighth Amendment** prohibits "cruel and unusual punishments," a concept rooted in the English common-law tradition. Today the United States is the only western nation to put people to death for committing crimes. Not surprisingly, tremendous state-by-state differences exist in the imposition of the death penalty. Texas leads the nation in the number of executions each year.

The death penalty was in use in all colonies at the time they adopted the U.S. Constitution, and its constitutionality went unquestioned. In fact, in two separate cases in the late 1800s, the Supreme Court ruled that deaths by public shooting[92] 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."[93]

In the 1960s, the NAACP (National Association for the Advancement of Colored People) Legal Defense and Educational Fund (LDF), believing that African Americans received the death penalty more frequently than members of other groups, orchestrated a carefully designed legal attack on its constitutionality.[94] Public opinion polls revealed that in 1971, on the eve of the LDF's first major death sentence case to reach the Supreme Court, public support for the death penalty had fallen below 50 percent. With the timing just right, in *Furman* v. *Georgia* (1972), the Supreme Court effectively put an end to capital punishment, at least in the short run.[95] 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.



HOW DO STATES VARY IN THEIR APPLICATION OF THE DEATH PENALTY?

This cartoon offers a social commentary on the frequent administration of the death penalty in Texas, which leads the nation in the number of executions. The state of Texas has accounted for a third of the nation's executions since 1976, a fact that is particularly remarkable after considering that the death penalty is illegal in sixteen states and rarely used in many others.

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,* the Supreme Court in a 7–2 decision ruled that Georgia's rewritten death penalty statute was constitutional.[96]

This ruling did not deter the NAACP LDF from continuing to bring death penalty cases before the Court. In 1987, a 5–4 Court ruled that imposition of the death penalty—even when it appeared to discriminate against African Americans—did not violate the equal protection clause.[97] The Court noted that even if statistics show clear discrimination, reversal of an individual sentence required demonstration of racial discrimination in that particular case.

Four years later, a case involving the same defendant produced an equally important ruling on the death penalty and criminal procedure from the U.S. Supreme Court. In the second case, the Court held that new issues could not be raised on appeal, even if some state error existed. The case, *McCleskey* v. *Zant* (1991), produced new standards designed to make the filing of repeated appeals much more difficult for death-row inmates. Justice Lewis Powell, one of those in the five-person majority, said, after his retirement, that he regretted his vote and should have voted the other way.[98]

Although as recently as 2008 the Supreme Court has upheld the constitutionality of the death penalty by lethal injection,[99] it has made some exceptions. The Court, for example, has exempted two key classes of people from the death penalty: those who are what the law calls mentally retarded and those under the age of eighteen.[100]

PROTECTING THE WRONGFULLY CONVICTED At the state level, a move to at least stay executions gained 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

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

thirteen men on the state's death row. The specter of allowing death sentences to continue in the face of evidence indicating so many wrongful convictions prompted Ryan's much publicized action. Soon thereafter, the Democratic governor of Maryland followed suit after receiving evidence that blacks were much more likely to be sentenced to death than whites; however, the Republican governor who succeeded him lifted the stay.

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

In another effort to verify that those on death row are not there in error, several states offer free DNA testing to death-row inmates. The U.S. Supreme Court recognized the potential exculpatory power of DNA evidence in *House* v. *Bell* (2006). In this case, the Court ruled that a Tennessee death-row inmate who had exhausted other federal appeals was entitled to an exception to more stringent federal appeals rules because DNA and related evidence suggested his innocence.[101] The Supreme Court, further, has ruled that although inmates do not have an automatic right to DNA testing, it is within their civil rights to file a lawsuit seeking this relief.[102]

The Right to Privacy

4.6 Explain the origin and significance of the right to privacy.

To this point, we have discussed rights and freedoms that have been derived from specific guarantees contained in the Bill of Rights. However, the U.S. Supreme Court also has given protection to rights not enumerated specifically in the Constitution. Although silent about the **right to privacy,** the Bill of Rights contains many indications that the Framers expected some areas of life to be 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 suggests that persons are to be secure in their homes and should not fear that police will show up at their doorsteps without cause. As early as 1928, Justice Louis Brandeis hailed privacy as "the right to be left alone—the most comprehensive of rights and the right most valued by civilized men."[103] Not until 1965, however, did the Court attempt to explain the origins of this right.

Birth Control and Contraceptives

Today, most Americans take access to birth control for granted. Grocery stores sell condoms, and some TV stations air ads for them. Easy access to birth control, however, was not 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.[104] 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

WHAT WAS THE OUTCOME OF *GRISWOLD* V. *CONNECTICUT* (1965)?

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

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 to privacy to include the right of unmarried individuals to have access to contraceptives. "If the right of privacy means anything," wrote Justice William J. Brennan Jr., "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."[105] This right to privacy formed the basis for later decisions from the Court, including the right to secure an abortion.

Abortion

In the early 1960s, two groups of birth-related tragedies occurred. European women who had taken the drug thalidomide while pregnant gave birth to severely deformed babies, and, in the United States, a nationwide measles epidemic resulted in the birth of babies with major health 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 guaranteeing a woman's access to a safe and legal abortion.

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

The woman whose case became the catalyst for pro-choice and pro-life groups was Norma McCorvey, an itinerant circus worker. The mother of a toddler she was unable to care for, McCorvey could not leave another child in her mother's care. So, she decided to terminate her second pregnancy. She was unable to secure a legal abortion, and the conditions she found when seeking an illegal abortion frightened her. McCorvey turned to two young Texas lawyers who were aiming to challenge Texas's

The Living Constitution

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

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

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

CRITICAL THINKING QUESTIONS

1. How can the U.S. justice system dictate the definition of a fundamental right if the Constitution does not specifically enumerate that right?
2. Are there other implied rights that should be protected by the Ninth Amendment?

***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.

restrictive statute and were looking to bring a lawsuit with just such a plaintiff. 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 her as their plaintiff. Her lawyers used the pseudonym Jane Roe for McCorvey in their challenge of the Texas law as enforced by Henry Wade, the district attorney for Dallas County, Texas.

When the case finally came before the Supreme Court, Justice Harry A. Blackmun, a former lawyer at the Mayo Clinic, relied heavily on medical evidence to rule that the Texas law violated a woman's constitutionally guaranteed right to privacy, which, he argued, included her decision to terminate a pregnancy. Writing for the majority in ***Roe* v. *Wade* (1973),** Blackmun divided pregnancy into three stages. In the first trimester, a woman's right to privacy gave her an absolute right (in consultation with her physician), free from state interference, to terminate 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, the Court ruled that abortions to save the life or preserve the health of the mother were legal.[106]

Roe v. *Wade* unleashed a torrent of political controversy. Pro-life groups, caught off guard, scrambled to recoup their losses in Congress. Representative Henry Hyde (R–IL) persuaded Congress to ban the use of Medicaid funds for abortions for poor women, and the Supreme Court upheld the constitutionality of the Hyde Amendment in 1977 and again in 1980.[107] The issue soon became political—it was incorporated into the Republican Party's platform in 1980—and quickly polarized both major political parties.

Since that time, well-organized pro-life groups have attacked the right to an abortion and its constitutional underpinnings in the right to privacy. The administrations of Ronald Reagan and George Bush strongly opposed abortions, and their Justice Departments regularly urged the Court to overrule *Roe*. They came close to victory in *Webster* v. *Reproductive Health Services* (1989).[108] In *Webster,* the Court upheld state-required fetal viability tests in the second trimester, even though these tests increased

the cost of an abortion considerably. The Court also upheld Missouri's refusal to allow abortions to be performed in state-supported hospitals or by state-funded doctors or nurses. Perhaps most noteworthy, however, was that four justices seemed willing to overrule *Roe* v. *Wade* and that Justice Antonin Scalia publicly rebuked his colleague, Justice Sandra Day O'Connor, then the only woman on the Court, for failing to provide the critical fifth vote to overrule *Roe*.

After *Webster,* states began to enact more restrictive legislation. In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992), Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter, in a jointly authored opinion, wrote that Pennsylvania could limit abortions as long as its regulations did not pose "an undue burden" on pregnant women.[109] The narrowly supported standard, by which the Court upheld a twenty-four-hour waiting period and parental consent requirements, did not overrule *Roe,* but clearly limited its scope by abolishing its trimester approach and substituting the undue burden standard for the trimester approach used in *Roe*.

In the early 1990s, newly elected pro-choice President Bill Clinton appointed two supporters of abortion rights, Ruth Bader Ginsburg and Stephen Breyer, to the Supreme Court. Meanwhile, Republican-controlled Congresses made repeated attempts to restrict abortion rights. In March 1996 and again in 1998, Congress passed and sent to President Clinton a bill to ban—for the first time—a specific procedure used in late-term abortions. The president repeatedly vetoed the federal Partial Birth Abortion Ban Act. Many state legislatures, nonetheless, passed their own versions of the law. In 2000, the Supreme Court, however, ruled 5–4 in *Stenberg* v. *Carhart* that a Nebraska partial birth abortion statute was unconstitutionally vague because it failed to contain an exemption for a woman's health. The law, therefore, was unenforceable and called into question the partial birth abortion laws of twenty-nine other states.[110]

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

The Court's decision in *Gonzales* empowered governments to enact new regulations on abortion and contraceptives. Many states have, for example, enacted laws restricting abortions after twenty weeks. Other states have passed legislation requiring physicians to show women ultrasound photos of their fetuses before performing an abortion. And, still other states have approved acts categorizing self-induced abortions as homicide.

At the federal level, the Supreme Court's ruling in *Burwell* v. *Hobby Lobby Stores* is likely to make it more difficult for women to access contraception. In commenting on this case, Justice Ruth Bader Ginsburg noted that she believed her male colleagues have a "blind spot" regarding women, perhaps a telling forecast about the future of the reproductive rights cases flooding dockets nationwide.[111]

Homosexuality

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

In *Lawrence* v. *Texas* (2003), six members of the Court overruled its decision in *Bowers* v. *Hardwick* (1986), which had upheld anti-sodomy laws. They found the Texas law unconstitutional; five justices found it violated fundamental privacy rights.[112]

WHICH CASE LED TO GREATER DISCUSSION OF GAY RIGHTS ISSUES?

Tyron Garner (left) and John Geddes Lawrence (center), the plaintiffs in *Lawrence* v. *Texas* (2003), are shown here with their attorney. The ruling in this case proved to be a huge victory for advocates of gay and lesbian rights, as it deemed anti-sodomy laws unconstitutional. Following this decision, states began to debate laws related to marriage and other rights for same-sex couples.

Justice O'Connor agreed that the law was unconstitutional, but concluded it was an equal protection violation. Although Justice Antonin Scalia issued a stinging dissent, charging, "the Court has largely signed on to the so-called homosexual agenda," the majority of the Court was unswayed.

Toward Reform: Civil Liberties and Combating Terrorism

4.7 Evaluate how reforms to combat terrorism have affected civil liberties.

After September 11, 2001, the U.S. government began to operate in "an alternate reality," in which Bill of Rights guarantees were suspended in a time of war, just as they had been in the Civil War and in World Wars I and II.[113] The difference in the modern era, however, continues to be that the "war" has no direct enemy, and its timeline for completion is ever-changing. Here, we detail the provisions of actions, such as the USA PATRIOT Act and the Military Commissions Act, and explain how they have affected the civil liberties discussed in this chapter.

The First Amendment

Both the 2001 USA PATRIOT Act and the 2006 Military Commissions Act contain a variety of major and minor interferences with the civil liberties that Americans, as well as those visiting our shores, have come to expect. The USA PATRIOT Act, for example, violates the First Amendment's free speech guarantees by barring those who have been subject to search orders from telling anyone about those orders, even in situations in which no need for secrecy can be proven. It also authorizes the Federal Bureau of Investigation (FBI) to investigate citizens who choose to exercise their freedom of speech, without demonstrating that any parts of their speech might be labeled illegal.

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

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

The Fourth Amendment

The USA PATRIOT Act enhances the ability of the government to curtail specific search and seizure restrictions in four areas. First, it allows the government to examine an individual's private records held by third parties. This empowers the FBI to force anyone, including physicians, libraries, bookshops, colleges and universities, and phone and Internet service providers, to turn over all records on a particular individual. Second, it expands the government's right to search private property without notice to the owner. Third, according to the ACLU, the act "expands a narrow exception to the Fourth Amendment that had been created for the collection of foreign intelligence information."[114] Finally, the act expands an exception for spying that collects "addressing information" about where and to whom communications are going, as opposed to

what is contained in the documents. This fourth exception has been the subject of much controversy in the wake of revelations brought forth by former government contractor Edward Snowden, who played a major role in revealing the broad scope of the National Security Agency's surveillance and data collection on the actions of private citizens. Each day, billions of pieces of information about individuals' activities—including phone calls, text messages, emails, and Internet transmissions—are collected without probable cause and scanned by the government in an attempt to identify patterns of suspicious behavior that may be a threat to national security.

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

Other Fourth Amendment violations include the ability to conduct searches without a warrant. The government also does not have to demonstrate probable cause that a person has, or might, commit a crime. Thus, the USA PATRIOT Act also goes against key elements of the due process rights guaranteed by the Fifth Amendment. Although more recent policies have attempted to scale back the scope of the program somewhat, government data collection and observation of citizen activity remains common.

Due Process Rights

Illegal incarceration and torture are federal crimes, and the Supreme Court ruled in 2004 that detainees have a right of *habeas corpus*.[115] However, the Bush administration argued that under the Military Commissions Act of 2006, alien victims of torture had significantly reduced rights of *habeas corpus*. The Military Commissions Act also eliminated the right to challenge "detention, transfer, treatment, trial, or conditions of confinement" of detainees. It allowed the government to declare permanent resident aliens to be enemy combatants and enabled the government to jail these people indefinitely without any opportunity to file a writ of *habeas corpus*. In 2008, in a surprising setback for the Bush administration, the Roberts Court ruled the final provision unconstitutional, finding that any detainees could challenge their extended incarceration in federal court.[116]

Secret offshore prisons, known as black sites, have also held many suspected terrorists against their will. In September 2006, President Bush acknowledged the existence of these facilities, moving fourteen such detainees to the detention facility at Guantanamo Bay, Cuba. The conditions of this facility sparked intense debate, as opponents cited numerous accusations of torture as well as possible violations of human rights. Those in support of the continued use of Guantanamo declared the detainees unlawful combatants and not war criminals subject to the provisions of the Geneva Convention. After President Barack Obama took office in 2009, he vowed to close Guantanamo by January 2010 and move detainees to a facility in Illinois. By the end of 2014, however, Guantanamo Bay remained open and conditions at the facility are rapidly declining with temperatures routinely reaching over 110 degrees. Still, Congress and the president have repeatedly refused to relocate detainees—even those who are critically ill—to the United States in spite of the fact that each prisoner costs $3 million a year to house.

Federal activity has also curtailed the Sixth Amendment right to trial by jury. Those people detained as enemy combatants often do not have access to the evidence against them and are subject to coercion or torture in the gathering of additional evidence. Trials of enemy combatants are closed, and people tried in these courts do not have a right to an attorney of their choosing. The Supreme Court limited the federal government's activity in these tribunals, but the Military Commissions Act returned these powers to the executive branch.[117] The Obama administration, to the surprise of many observers, also has done little to restore the rights revoked by these acts, and has, in fact, further limited some detainees' ability to challenge their incarceration.

Finally, great controversy has surrounded the Eighth Amendment's prohibition on cruel and unusual punishment. Since shortly after the terrorist attacks of

WHAT ARE LIVING CONDITIONS LIKE FOR DETAINEES?

Prisoners of the war on terrorism live in maximum security prisons where their civil liberties are often compromised. Here, military police escort a detainee to his cell at Guantanamo Bay Detention Camp.

September 11, 2001, rumors abounded that many prisoners detained by the U.S. government faced inhumane treatment. In 2004, for example, photos of cruel treatment of prisoners held by the U.S. military in Abu Ghraib, Iraq surfaced. These photos led to calls for investigations at all levels of government. On the heels of this incident, the Justice Department declared torture "abhorrent" in a December 2004 legal memo. That position lasted but a short time. After Alberto Gonzales was sworn in as attorney general in February 2005, the Department of Justice issued a secret memo endorsing harsh interrogation techniques. According to one Justice Department memo, interrogation practices were not considered illegal unless they produced pain equivalent to that with organ failure or death. Among the techniques authorized by the government were combinations of "painful physical and psychological tactics, including head-slapping, simulated drowning, and frigid temperatures."[118] The most controversial of these techniques is waterboarding, which simulates drowning. Although the Obama administration has harshly attacked the use of such tactics and techniques, it announced that those who committed these acts during the Bush administration would not be prosecuted.[119]

Review the Chapter

Roots of Civil Liberties: The Bill of Rights

4.1 Trace the constitutional roots of civil liberties, p. 84.

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.

First Amendment Guarantees: Freedom of Religion

4.2 Describe the First Amendment guarantee of freedom of religion, p. 88.

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, the Court has held that many forms of aid, especially those that benefit children, are constitutionally permissible. In contrast, the Court has generally barred mandatory prayer in public schools. The Court has allowed some governmental regulation of religious practices under the free exercise clause.

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

4.3 Outline the First Amendment guarantees of and limitations on freedom of speech, press, assembly, and petition, p. 90.

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

The Second Amendment: The Right to Keep and Bear Arms

4.4 Summarize changes in the interpretation of the Second Amendment right to keep and bear arms, p. 97.

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

The Rights of Criminal Defendants

4.5 Analyze the rights of criminal defendants found in the Bill of Rights, p. 99.

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

The Right to Privacy

4.6 Explain the origin and significance of the right to privacy, p. 106.

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

Toward Reform: Civil Liberties and Combating Terrorism

4.7 Evaluate how reforms to combat terrorism have affected civil liberties, p. 110.

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

Learn the Terms

Study and **Review** the **Flashcards**

bill of attainder, p. 99
Bill of Rights, p. 85
civil liberties, p. 84
civil rights, p. 84
clear and present danger test, p. 92
direct incitement test, p. 92
double jeopardy clause, p. 101
due process clause, p. 85
Eighth Amendment, p. 104
establishment clause, p. 88
exclusionary rule, p. 101
ex post facto law, p. 99
Fifth Amendment, p. 100
fighting words, p. 95
First Amendment, p. 88
Fourth Amendment, p. 99
free exercise clause, p. 88
fundamental freedoms, p. 87
hate speech, p. 94
incorporation doctrine, p. 86
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libel, p. 95
Miranda rights, p. 101
Miranda v. *Arizona* (1966), p. 101
New York Times Co. v. *Sullivan* (1964), p. 95
Ninth Amendment, p. 85
prior restraint, p. 91
right to privacy, p. 106
Roe v. *Wade* (1973), p. 108
selective incorporation, p. 86
Sixth Amendment, p. 102
slander, p. 95
substantive due process, p. 85
symbolic speech, p. 92
Tenth Amendment, p. 85
writ of *habeas corpus,* p. 99

Test Yourself

Study and **Review** the **Practice Tests**

1. Which amendment did the Court use to make some provisions of the Bill of Rights applicable to the states?

a. Fifth
b. Tenth
c. Eleventh
d. Fourteenth
e. Fifteenth

2. Which of the following was NOT used as an argument against adding a bill of rights to the Constitution?

a. A constitutional republic is founded upon the idea of popular sovereignty and inalienable rights.
b. Federal guarantees were unnecessary because most state constitutions contained their own bills of rights.
c. The government should not enumerate what it could not do.
d. A national bill of rights would be nearly impossible to enforce.
e. The Constitution already contained protections for individual rights.

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

a. reciting prayer in classrooms is constitutional, as long as the prayer is nondenominational.
b. state university grounds cannot be used for worship.
c. a privately owned display of the Ten Commandments in a courthouse is unconstitutional.
d. faculty-led prayer at high school football games is constitutional.
e. governments may provide aid to religious schools as long as the aid goes to children and not to religious goals.

4. Which form of speech is protected under the First Amendment?

a. Libel
b. Symbolic speech
c. Slander
d. Fighting words
e. Obscenity

5. Which is NOT considered a protected form of speech?

a. Carrying a "Bong Hits 4 Jesus" banner during a school-sanctioned parade
b. Wearing black armbands to protest a war
c. Publishing secret documents in a newspaper
d. Displaying a symbol of opposition to the U.S. government
e. Burning the American flag

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

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

7. Traditionally, the Supreme Court has ruled that the Fourth Amendment requires a warrant for police to search

a. the person arrested.
b. things in plain view of the accused.
c. employees of the federal or state government.
d. places or things in the arrestee's immediate control.
e. the home of the accused.

8. When suspects are arrested and read their *Miranda* rights, the authorities are informing them of their ____ Amendment rights.

a. Second
b. Third
c. Fourth
d. Fifth
e. Seventh

9. The U.S. Supreme Court ruled that the controversial 2003 federal Partial Birth Abortion Ban Act was

a. a law that could be passed only by the states.
b. unconstitutional because it contained no health exceptions for the mother.
c. constitutional despite its lack of a health exception for the mother.
d. unconstitutional because it violated the three-trimester approach created by *Roe* v. *Wade* (1973).
e. constitutional based on the precedent established in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992).

10. The major act passed in the aftermath of September 11, 2001, to combat terrorism in the United States was the

a. Military Justice Act.
b. LIBERTY Act.
c. Detention and Retention Act.
d. Habeas Corpus Act.
e. USA PATRIOT Act.