

BILL OF RIGHTS



Chapter 5

The Bill of Rights and Civil Liberties

How are your rights defined and protected under the Constitution?

■ 5.1 Introduction

In the summer of 1917, the United States was desperately trying to mobilize its army to fight in World War I. The government instituted a military draft to raise enough troops to go to war. It also launched a campaign to increase public support for the war effort. To limit dissent, Congress passed the Espionage Act. Among other things, this law stated that any effort to undermine the war effort would be considered a criminal act.

Many Americans were opposed to the war and the draft. One of the most outspoken opponents was Charles Schenck, the general secretary of the American Socialist Party. Schenck and his fellow socialists took a strong stand against the draft, which they regarded as an unconstitutional violation of individual rights. They believed that Americans should not be forced to serve in the military against their will.

To promote this view, Schenck organized a mass mailing of antidraft leaflets to young men in the Philadelphia area. These flyers called the draft “involuntary servitude” and urged draftees to call for its repeal.

Some recipients found the leaflets offensive and complained to authorities. Schenck was arrested and charged under the Espionage Act. At his trial, he was declared guilty of violating the law by conspiring to undermine the war effort. Schenck appealed to the Supreme Court, arguing that the Espionage Act violated his right to free speech.

This 1949 painting by Arthur Szyk celebrates the Bill of Rights

Speaking of Politics

civil liberties

Basic freedoms that are guaranteed under the Constitution, such as freedom of speech and freedom of religion. These rights are protections from governmental intrusion or abuse.

civil rights

Guarantees of equal rights and equal treatment under the law. Unlike civil liberties, civil rights are not protections from government abuse, but rights that government must provide to its citizens, such as trial by jury and voting rights.

incorporation

The process by which the Supreme Court applies the Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment.

libel

Publishing false information about someone with intent to cause harm.

slander

Orally spreading false information about someone with intent to cause harm.

prior restraint

An attempt by government to prevent the publication or broadcast of material considered harmful.

self-incrimination

Statements, usually made under oath, suggesting that the person speaking is guilty of a crime.

double jeopardy

The prosecution of a person a second time for a crime for which the defendant has already been tried once and found not guilty. Double jeopardy is prohibited under the Fifth Amendment.

In a unanimous opinion, written by Justice Oliver Wendell Holmes Jr., the Court held that Schenck's conviction was constitutional. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," Holmes wrote. In the Court's view, Schenck's publications created "a clear and present danger" to a nation engaged in war. "When a nation is at war," wrote Holmes, "many things that might be said in time of peace . . . will not be endured so long as men fight." In such cases, the Court said, public safety should prevail over individual rights.

Schenck spent six months in prison for his crime. Ironically, by the time the Supreme Court decided the case, in March 1919, the war was over and the draft had been suspended. The *Schenck v. United States* decision did set a larger precedent, however. It allowed the courts to apply a "balancing test" in free speech cases, weighing the rights of individuals against the broader needs of society.

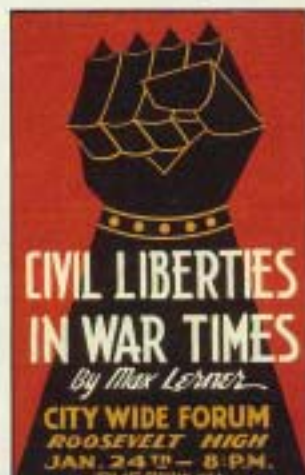
Key Rights and Liberties

Civil Liberties

Freedom of speech
Freedom of religion
Freedom of the press
Freedom of assembly
Freedom from unreasonable search and seizure

Civil Rights

Right to due process
Right to trial by jury
Right to legal counsel
Right to vote
Right to petition the government for a redress of grievances



When the nation is engaged in war, limitations on civil liberties become more stringent. This poster advertises a forum on how civil liberties change during wartime.

5.2 Defining and Protecting Your Rights and Liberties

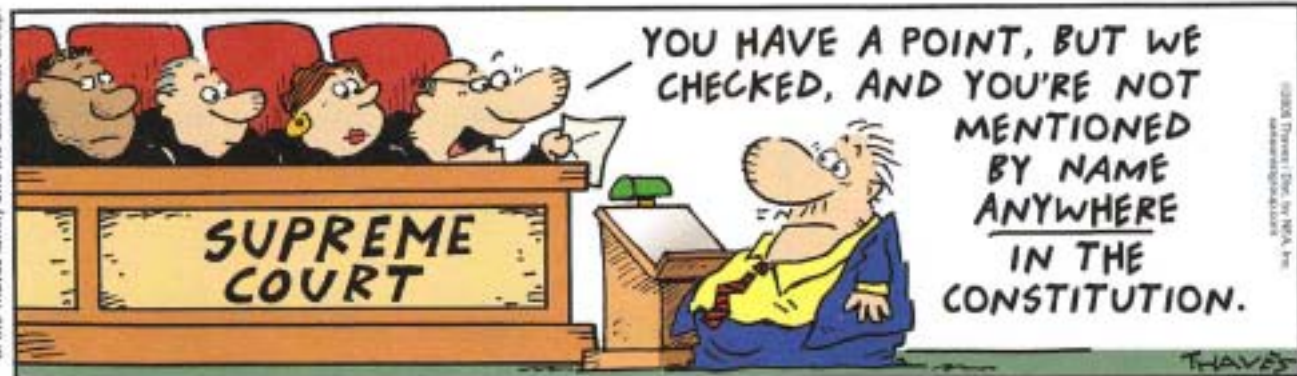
The *Schenck* case illustrates the role played by the Supreme Court in defining constitutional rights. When the framers wrote the Constitution, they said almost nothing about the protection of individual rights and liberties from government abuses. They spelled out many things the government *could* do but said very little about what it could not do. That omission was rectified by the Bill of Rights, the first ten amendments to the Constitution. These amendments guarantee two types of rights: **civil liberties** and **civil rights**.

Defining Civil Liberties and Civil Rights

Civil liberties are basic freedoms that are considered to be the birthright of all individuals. Thomas Jefferson and his fellow authors of the Declaration of Independence would have called them natural rights, or unalienable rights. In addition to the Declaration's "Life, Liberty and the pursuit of Happiness," these liberties include such rights as freedom of speech, freedom of religion, and freedom of assembly. Because civil liberties are regarded as a person's birthright, they are not something that the government can legitimately take away or infringe on.

Civil rights, on the other hand, are rights that come with being a member of society. They are not protections *from* government. Instead, they are guarantees *by* government of equal rights and fair treatment under the law. Included in this group are the right to trial by jury, the right to legal counsel, and the right to vote. These rights were among the main goals of the civil rights movement that began in the mid-1950s.

With the Bill of Rights added to the Constitution, Americans were guaranteed a broad range of civil rights and civil liberties. But these were only formal guarantees. The enforcement of these rights was another matter. In fact, James Madison worried that the Bill of Rights might serve as little more than a "parchment barrier" against government abuses. These rights and freedoms would be safeguarded only when protections were built into the structure of government. That is where the role of the Supreme Court and other federal courts has come into play.



Some judges have argued that the Supreme Court may use judicial review only to enforce rights and provisions that are specifically mentioned in the Constitution. Early on, that strict view meant that the Court did little to enforce constitutional rights in the states. Eventually, however, the Court adopted a looser view and began to apply the Bill of Rights more broadly under the terms of the Fourteenth Amendment.

Early Challenges in Enforcing the Bill of Rights

The Bill of Rights defines rights and liberties in sweeping terms. For example, the First Amendment says, "Congress shall make no law . . . abridging the freedom of speech." Does that mean government cannot limit speech in any way?

Before free speech and other rights on paper could be safeguarded, the language of the Bill of Rights had to be interpreted and applied under actual circumstances. That task would fall to the Supreme Court under its power of judicial review, a power established in the case of *Marbury v. Madison*.

Marbury laid the foundation for the Supreme Court's enforcement of the Bill of Rights, but it was only the first step. Next the Court had to decide whether the Bill of Rights applied to actions by state governments. Its first answer to this question was no. In 1833, the Court concluded in *Barron v. Baltimore* that the Bill of Rights applied only to actions of the federal government. As a result, the Court could do little to prevent states from infringing on basic rights and liberties.

After the Civil War, some people hoped that the Court's limited enforcement of the Bill of Rights would change. For support, they looked to the Fourteenth Amendment, which was ratified in 1868. The amendment states,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

At first, the Supreme Court interpreted the amendment very narrowly. For example, in the case of *Plessy v. Ferguson* (1896), the Court declared that racial segregation in the South did not violate the Fourteenth Amendment's **Equal Protection Clause** as long as "separate but equal" facilities were provided for all races.

The Supreme Court's reluctance to make the Bill of Rights binding on the states meant that very few cases involving civil rights or liberties came before it in the 1800s. As a leading rights organization later observed, "The Bill of Rights was like an engine no one knew how to start."

New Hope in a New Century

In the early 1900s, however, two newly formed groups began to have some success in broadening the Court's application of the Fourteenth Amendment. These groups were the National Association for the Advancement of Colored People and the American Civil Liberties Union.

The two groups had different goals. The NAACP fought for civil rights, initially by challenging segregation laws in court. The ACLU, in contrast, focused its attention on cases involving civil liberties, such as freedom of speech. However, both groups sought to give voice to citizens who felt their rights were being violated.

In 1919, not long after the decision in the *Schenck* case, free speech advocates suffered another Court

loss, this time in the case of *Abrams v. United States*. This case involved a group of Russian-born political activists who were arrested for handing out leaflets critical of U.S. actions against Russia's new revolutionary government. Using the same argument applied in *Schenck*, the Supreme Court agreed that the language in the leaflets posed a "clear and present danger" to American society.

Although the *Abrams* decision represented another defeat for free speech, this time Justice Holmes voiced an important dissent to the Court's majority opinion. He said that the "clear and present danger" argument should be applied only in cases where public safety was actually at risk. Only an emergency, he wrote, "warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'" Holmes's dissent would later influence the Court to take a more protective stance on free speech.

Incorporation: Applying the Bill of Rights to the States

Not long after the *Abrams* case, the Court handed down a crucial decision that would expand the reach of the Bill of Rights. The case in question, *Gitlow v. New York*, involved another group of activists. This group also was arrested for handing out leaflets, this time calling for an uprising to create a socialist government. The members of the group were prosecuted and convicted in 1919 under a New York law forbidding "dangerous" speech.

Benjamin Gitlow appealed his conviction to the Supreme Court, claiming that the New York law violated his First Amendment right to free speech. Lawyers for the state argued that the Bill of Rights did not apply to state laws and that the Court did not have jurisdiction to decide the case.

The Court disagreed. In a groundbreaking decision handed down in 1925, the Court reversed its previous position and said that the Due Process Clause of the Fourteenth Amendment did extend the First Amendment to the states. This process of applying the Bill of Rights to the states through Supreme Court decisions is known as **incorporation**.

On the free speech issue, however, the Court held that the New York law did not violate the Constitution. Gitlow's conviction was upheld, though he was later pardoned by the governor of New York.

Incorporation of the Bill of Rights

First Amendment Freedom of speech, press, religion, and assembly	Fully incorporated
Second Amendment Right to bear arms	Not incorporated
Third Amendment No quartering of soldiers	Not incorporated
Fourth Amendment Protection from unreasonable search and seizure	Fully incorporated
Fifth Amendment Rights of the accused	Mostly incorporated
Sixth Amendment Right to a fair trial	Fully incorporated
Seventh Amendment Right to a jury trial in civil cases	Not incorporated
Eighth Amendment Protection from excessive bail and punishments	Mostly incorporated

Supreme Court decisions have extended most of the rights and liberties in the Bill of Rights to the states. Exceptions, such as the Second and Third amendments, have either been rejected for incorporation or not yet been tested in Court cases. The Ninth and Tenth amendments are not listed because they do not safeguard specific rights and thus are not subject to incorporation.

The *Gitlow* case focused on freedom of speech. Subsequent cases have extended other rights protected in the Bill of Rights to the states. This table shows which amendments have been similarly incorporated.

The Role of the Supreme Court Today

Every year, thousands of people petition to appeal legal cases to the Supreme Court. Most of these cases involve a constitutional issue. They often involve a conflict over rights and liberties guaranteed in the Bill of Rights. Sometimes the conflict is between an individual or a group and the government. Other times, it is between one individual or group and another.

The role of the Supreme Court is not to retry the original case, but rather to review the legal decisions made by the lower courts. In the *Gitlow* case, for example, the Court considered whether Gitlow's earlier conviction under a New York law violated the First Amendment. After reviewing the court record and hearing the arguments, the Court upheld Gitlow's conviction.

What would have happened if the Supreme Court had sided with Gitlow? When the Supreme Court finds that a lower court's decision is unconstitutional, it may decide to reverse the decision. Often, however, it returns the case to a lower appeals court. That lower court may alter its original decision to conform to the Court's opinion, dismiss the case, or order a new trial.

When the Supreme Court makes a decision on an issue, that decision becomes a precedent, or example, for all courts to follow in similar cases in the future. Occasionally the Court overturns its own precedents. This happened in 1954, when the Court rejected its "separate but equal" decision on segregation that had been made in *Plessy v. Ferguson*. The Court found in *Brown v. Board of Education* that "separate educational facilities are inherently unequal." Segregated schools were, therefore, a violation of the Fourteenth Amendment's guarantee of equal protection of the laws.

5.3 Your First Amendment Rights

Many people regard the First Amendment as the most important amendment in the Bill of Rights. It guarantees various rights, including the freedoms of religion, speech, the press, and assembly. These rights are critical to life in a democratic society.

Freedom of Religion: The Establishment Clause

The First Amendment begins with freedom of religion. It reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This statement can be divided into two parts: the Establishment Clause and the Free Exercise Clause.

The Establishment Clause guarantees the separation of church and state. Influenced by European tradition, most places in colonial America had an official church. In the colonies, everyone had to pay taxes to support the church, and in some places, only church members could vote. Some communities even made church attendance mandatory. These practices discriminated against people who did not follow the established religion.

The founders of this country believed that having a state-sponsored church was incompatible with freedom of religion. Thomas Jefferson later wrote that a "wall of separation" should exist between church and state.

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In 2000, the Supreme Court concluded that pregame prayers at public school football games violated the separation of church and state, as established under the First Amendment. Critics have challenged the decision, arguing that it represents an infringement of religious freedom.

Still, religious references do exist in government. For example, politicians say “so help me God” when taking the oath of office. The phrase “In God We Trust” appears on currency. And Congress opens its daily sessions with prayer. Some critics say that these practices violate the founding ideals. Others argue that the founders never meant to deny religion a place in public life. The issue of church-state separation has provoked heated battles over the years.

One battle took place in 1875. In response to a growing number of Catholic schools, Congressman James Blaine proposed a constitutional amendment to deny public funding to religiously affiliated schools. The Blaine Amendment failed on the national stage, but many states adopted similar laws. Today, more than 35 state constitutions have a version of the law.

Still, until the early 20th century, most students were educated in church-sponsored schools. Even as public education expanded, prayers and Bible readings continued in many schools. In general, the courts considered such practices acceptable.

In the landmark case *Engel v. Vitale* (1962), the Court changed course and struck down a New York law that provided a daily prayer for students to recite. Although the Establishment Clause had previously been interpreted to mean Congress could not create a national church, the Court ruled that it also banned state-sponsored prayer, even if voluntary and nondenominational, in public schools.

The Court’s decision on the *Engel* case remains unpopular with many Americans, but it has led to a greater division between religious teaching and public education. Since school attendance is mandatory, the Court has argued that religious teachings in public schools would amount to forced teaching of religion by government.

In 1971, the Supreme Court decided in *Lemon v. Kurtzman* that the practice of using public funds to support private religious schools was unconstitutional. This case established a three-point “Lemon test” to determine if and when a government action violates the Establishment Clause. To be constitutional, a government action must

- have a **secular**, or nonreligious, purpose.
- neither help nor hurt religion.
- not result in an “excessive entanglement” of the government and religion.

Freedom of Religion: The Free Exercise Clause

The Free Exercise Clause establishes that all people are free to follow the religious practices of their choice. They are also free to follow no religion. If a person’s religious faith conflicts with the law of the land, however, the law must prevail. This principle was established as a legal precedent in 1879 in the case of *Reynolds v. United States*.

George Reynolds was a member of the Mormon Church who followed the practice of polygamy, or having more than one spouse at a time. This practice violated a federal law, leading to Reynolds’s arrest and conviction in a Utah court. He appealed his conviction on the grounds that the law against polygamy violated his free exercise of his religion.

In deciding against Reynolds, the Court drew a distinction between religious beliefs and religious practices. It pointed out that although the law may not interfere with beliefs, it may interfere with practices. The Court argued that if people were able to disregard any law because it violated their religious beliefs, the effect would be “to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”

The Court continued that line of reasoning in the 1940 case of *Minersville School District v. Gobitis*. In that case, the Court decided against two children who were suspended from school for refusing to say the Pledge of Allegiance. As Jehovah’s Witnesses, they viewed pledging allegiance to the flag as a form of idolatry prohibited by the Bible. Many supporters of religious freedom condemned the decision.

Just three years later, however, the Court reversed itself. In *West Virginia State Board of Education v. Barnette*, the Court said that Jehovah’s Witnesses could refuse to salute the flag. Their right to do so was protected under their First Amendment rights to religious freedom and free speech. In later cases, the Court has held that the government must show a compelling interest in forcing people to obey a law that violates their religious convictions.

Freedom of Speech

Freedom of speech is the second right listed in the First Amendment. It acts like an anchor for all the other rights in the amendment, because they are all linked in one way or another to free expression.

After its decisions in *Schenck*, *Abrams*, and *Gitlow*, the Supreme Court has generally supported freedom of speech. It has taken exception, however, to forms of speech that are harmful to others. Two clear examples of this are **libel** and **slander**—forms of speech, either written or spoken, that make false statements with intent to harm. Another form of speech not protected under the First Amendment is **obscenity**, or speech offensive to conventional standards of decency.

The issue of public safety was the key factor in the Court's early decisions limiting free speech. In 1969, however, the Court took a closer look at the "clear and present danger" test as advised by Justice Holmes in his *Abrams* dissent. The opportunity to do so came in the case of *Brandenburg v. Ohio*, which centered on a Ku Klux Klan leader who was arrested for giving a speech advocating illegal activities.

In its decision, the Court offered a two-part test to determine whether a "clear and present danger" exists that might justify suppressing free speech. First, such speech has to be "directed to inciting or producing imminent lawless action." Second, the speech must be "likely to incite or produce such action." The Court found that the Klan leader's speech, though containing hateful statements, was unlikely to produce any unlawful actions. Thus, the *Brandenburg* case did not pass the "clear and present danger" test.

In 1989, the Court extended this protection to include **symbolic speech**, or conduct that conveys a message without spoken words. Five years earlier, Gregory Lee Johnson had been arrested in Texas for burning a flag to protest government policies. His actions violated a state law against "flag desecration."

In *Texas v. Johnson*, the Court concluded that flag burning as an expression of opinion was protected symbolic speech. It said that a state could not prohibit such actions, even if it found them offensive. The Court struck down the Texas law as a violation of the First Amendment right to free speech.

The Court has also held that some forms of pornography are protected speech, although the government may restrict children's access to sexually graphic materials. In 1996, Congress tried to do just that by passing the Communications Decency Act. The act was designed to regulate pornography on the Internet. The Court struck it down a year later in *Reno v. American Civil Liberties Union*. The Court found that the law was so vague that it could have limited most speech on the Internet.

In this decision, as in its flag-burning decision, the Court has made it clear that to protect all speech, some offensive speech must be allowed to exist. That trade-off is one of the cornerstones of a free society.



The Supreme Court determined that the First Amendment protects the right to symbolic free speech. These demonstrators are exercising this right by dressing as prisoners to protest the operation of the Guantánamo Bay Detention Camp.

Freedom of the Press

Free speech can be interpreted to include most forms of expression. Nevertheless, freedom of the press was listed separately in the First Amendment to underscore its importance in a free society. "Were it left to me to decide whether we should have a government without newspapers or newspapers without government," wrote Thomas Jefferson, "I should not hesitate a moment to prefer the latter."

By specifically protecting the press, the First Amendment makes it clear that free speech covers the media as well as individuals. However, this has not stopped government officials from trying to stop the publication of material they dislike. In *Near v. Minnesota* (1931), the Court declared such attempts at **prior restraint** to be unconstitutional.

The *Near* case involved a newspaper that Minnesota officials wanted to shut down. The paper had published articles exposing political corruption. The Court declared that a government had no right to call for prior restraint. Keeping information from being published could be allowed only under very special circumstances, such as protecting national security. If officials were worried about possibly libelous articles, they could sue the publisher after the materials were in print.

In 1971, during the Vietnam War, the federal

government did invoke "national security" as grounds for prior restraint. It did so after a former government employee, Daniel Ellsberg, leaked classified documents to the *New York Times*. He leaked this information to show that officials had been lying about the war's progress. After the *Times* published excerpts of the so-called Pentagon Papers, authorities sought to halt any further publication of the information.

In *New York Times Co. v. United States*, the Supreme Court decided against the government. The release of the papers, it said, had no notable impact on national security. This decision helped limit future efforts to use national security as a pretext for censoring the press.

The reporting on the Pentagon Papers was accurate. But what about news reports that are false? The First Amendment does not protect against libel. The fact is, however, that journalists sometimes make mistakes. Unless it can be shown that their errors were intentional and were meant to do harm, journalists are not guilty of libel.

Freedom of Assembly and the Right to Petition

Finally, the First Amendment protects "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The right to petition the government to solve problems was

The right to peaceful assembly is an important guarantee of the First Amendment. It allows people to gather and express their views in public, either through speech or through symbolic actions, such as marches and protests. In 2011, demonstrators gathered at the Texas State Capitol to protest against proposed budget cuts to education.



originally considered the more important of the two. But over time, the right to assemble has taken on a larger role and has been the issue in many cases.

In keeping with the principle of peaceable assembly, many communities require groups that want to gather in public places to apply for permits and to follow certain rules. Some officials have used these requirements to limit the activities of groups they dislike. In 1937, for example, Frank Hague, the mayor of Jersey City, New Jersey, refused to grant the Committee of Industrial Organization (CIO) a permit to assemble simply because he disliked labor unions. The union took Hague to court.

In *Hague v. CIO*, the Court decided in favor of the labor union. It found that Mayor Hague had applied the permit law unfairly to limit the CIO's freedom of assembly. Although the Court acknowledged a city's right to set rules for the use of public spaces, it said that such rules must be enforced equally for all groups. Such rules should also be limited to "neutral" issues, such as the time, place, and nature of the meetings.

The right to petition has been the subject of only a few Court cases. One key case, however, arose during the civil rights movement. This case concerned the NAACP's efforts to encourage African Americans who had suffered from discrimination to take their cases to court. The state of Virginia accused the NAACP of breaking a state law by seeking out legal business. The purpose of such laws is usually to prevent unethical lawyers from launching lawsuits for their own gain.

In *NAACP v. Button* (1963), however, the Court concluded that the civil rights group was not seeking financial gain. It was, instead, helping people petition the government for their lawful rights. On that basis, the NAACP's efforts were protected under the First Amendment.

■ 5.4 Protections Against Abuses of Government Power

More than any other amendments in the Bill of Rights, the Second, Third, and Fourth were a response to the suppression of rights under British colonial rule. In the years leading up to the American Revolution, Britain often used its military authority to infringe on the liberties of colonists. These three amendments



In this cartoon, this man is excessively armed to defend himself against a burglar. The Second Amendment protects an individual's right to bear arms for self-defense, but some states still require gun owners to register their firearms and impose regulations on how and where firearms may be used.

were designed to ensure that such abuses would not take place under the new American government.

The Second Amendment and the Right to Bear Arms

The Second Amendment says, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In colonial times, people relied on local militias to provide security for their communities. The militias went on to play a key role in the revolution. After the war, British philosopher Richard Price praised these militias as model security forces for a democratic nation:

Free states ought to be bodies of armed citizens, well regulated and well disciplined, and always ready to turn out, when properly called upon, to execute the laws, to quell riots, and to keep the peace. Such, if I am rightly informed, are the citizens of America.

Although the Constitution allowed Congress to create a national army and navy, the framers were wary of standing armies. They feared that the central government might use a powerful army to suppress citizens' rights. Militias, in their view, provided a better guarantee of freedom and security. They also

knew that militia members usually supplied their own weapons. So they worded the Second Amendment to ensure that the government would not be able to take away people's weapons, thereby weakening the militias.

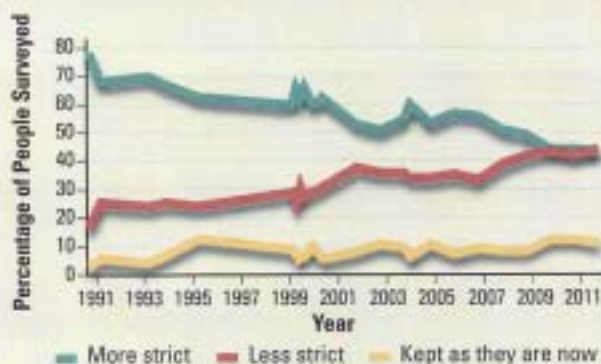
Interpretations of the Second Amendment have varied over the years. This amendment has not been incorporated, which means that most regulation of firearms is in the hands of state and local governments.

The federal government made no attempt to regulate weapons until the early 20th century. In 1934, however, an increase in violent, gang-related shootings and an attempt on President Franklin Roosevelt's life led to the passage of the first federal gun control law. This law placed a tax on certain powerful firearms and required background checks on buyers in order to limit the sale of such guns. In some cases, gun owners also had to register their weapons.

The Supreme Court upheld limitations on firearms in *United States v. Miller* (1939). In that case, the Court supported the conviction of two men who had failed to register a sawed-off shotgun, a particularly deadly weapon. Because militias never used sawed-off shotguns for common defense, the Court determined that government had the right to regulate such weapons.

American Attitudes Toward Gun Control, 1991–2011

Between 1990 and 2011, public opinion on laws restricting the sale of firearms has varied. In a survey conducted by the Gallup Organization during these years, Americans responded to the following question: In general, do you feel that the laws covering the sale of firearms should be made more strict, less strict, or kept as they are now?



Source: The Gallup Organization, 2011.

Justice James Clark McReynolds declared, "We cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."

Almost 70 years later, however, in *District of Columbia v. Heller* (2008), the Court struck down a law that banned the possession and registration of handguns in Washington, D.C. Justice Antonin Scalia maintained that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation." However, those who support and those who oppose gun control continue to dispute over the meaning of the Second Amendment and an individual's right to bear arms.

The Third and Fourth Amendments: Protecting Your Home and Person

The Third and Fourth amendments are designed to protect the privacy and property rights of citizens from abuses by law enforcement authorities or the military.

The Third Amendment prohibits citizens from being forced to take soldiers into their homes. Under British rule, colonists had sometimes been required to quarter, or feed and house, British soldiers. Many colonists saw this quartering law as another tool British authorities used to intimidate them.

Although the Third Amendment has had little direct application since colonial times, it offers a general guarantee for the privacy and sanctity of people's homes. As Justice Joseph Story once wrote, the purpose of the Third Amendment is "to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion."

The idea that people have a right to a certain amount of privacy also influenced the Fourth Amendment. This amendment forbids "unreasonable searches and seizures" of individuals or their property without a properly executed **warrant**, or written approval from a judge. This means that law enforcement officials may not search a person's home or property without prior consent or a legal order. A warrant must be based on **probable cause**, or reasonable suspicion of criminal behavior. It must also be very specific in describing the place to be searched and the persons or things to be seized.



Under certain circumstances, law enforcement officials may carry out blanket searches to protect public safety. Here, police in New York City, New York, search a vehicle at a checkpoint during a counterterrorism inspection in 2011. The place that the police set up their checkpoint was at a bustling street near the New York Stock Exchange.

In some cases, however, the police do not need a warrant for a legal search. For example, they may search a person or property if they see criminal evidence in plain view or have probable cause to believe that a suspect is trying to destroy such evidence. Also, the Court has held that searches of students and their possessions by school officials do not require warrants.

The Supreme Court has heard numerous cases involving search and seizure. One case, *Katz v. United States* (1967), hinged on recordings of a suspect's conversation made from a public phone booth. Because the recording device was placed outside the booth and recorded only the suspect's voice, the police believed they did not need a warrant. But the Court disagreed. It concluded that a warrant was required, because the suspect had a "reasonable expectation of privacy" in a phone booth.

A year later, however, another Court decision gave law enforcement officials greater latitude to search individuals. The case, *Terry v. Ohio* (1968), involved three men whose behavior caused a police officer to suspect that they were about to rob a store. After questioning the men, the officer frisked

them by patting down the outside of their clothing. Two of the suspects had guns, and they were later convicted for carrying concealed weapons. The men appealed their conviction, however, claiming that the officer did not have probable cause to frisk them. They argued that he had no evidence, other than his "hunch" that they were about to commit a crime.

The Court decided that the officer's observations provided adequate cause for the search. It said that his actions and suspicions were reasonable given the behavior of the suspects. This "stop and frisk" rule has given the police more power to try to prevent serious crimes before they happen.

■ 5.5 Your Rights in the Legal System

The next four amendments—the Fifth, Sixth, Seventh, and Eighth—concern the protection of rights in the judicial process. These amendments were designed to ensure that the justice system neither abused fundamental liberties nor punished innocent people under the pretext of preserving law and order.

The Fifth Amendment protects individuals from self-incrimination. The police are required to follow a procedure to ensure that suspects are aware of their rights.



The Fifth Amendment: Your Rights When Accused of a Crime

If you have ever seen an arrest depicted on television, you have probably heard the words, “You have the right to remain silent.” These words are based on the Fifth Amendment, which protects individuals from **self-incrimination**, or saying anything that might imply their own guilt.

This ban on self-incrimination was meant to prevent law enforcement officials from pressuring suspects into admitting guilt for a crime they did not commit. In *Miranda v. Arizona* (1966), the Court set forth a procedure for ensuring that suspects know their rights. Chief Justice Earl Warren described this procedure in his written opinion:

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney.

These rights of the accused became known as Miranda rights.

The Fifth Amendment protects other rights as well. It says that no one shall be subjected to **double jeopardy**. This means that if a person is tried for a crime and found not guilty, prosecutors cannot try that person again for the same crime. It also states that no one may be “deprived of life, liberty, or property, without due process of law.” This protec-

tion, known as the Due Process Clause, also appears in the Fourteenth Amendment.

The Fifth Amendment also contains the **Takings Clause**. It says that the government may not take private property for public use “without just compensation.” Government may exercise a power known as eminent domain to secure private property for a public purpose, such as the construction of a road. But it must pay a fair price for the property.

The Sixth and Seventh Amendments: Your Right to a Fair Trial

The Sixth Amendment explains how criminal trials should be conducted to protect the rights of the accused. The Seventh Amendment guarantees trial by jury in most civil lawsuits. Civil cases are those that do not involve criminal matters.

The Sixth Amendment says that criminal trials must be carried out quickly, publicly, and in front of an impartial jury. The defendant has the right to legal counsel and to see all the evidence used in the trial.

The right to legal counsel was the focus of the 1963 Court case of *Gideon v. Wainwright*. Clarence Earl Gideon was a poor, uneducated ex-convict who was arrested for theft in Florida. Unable to afford an attorney, he asked the court to provide him free legal counsel. Because Florida courts provided such services only in death penalty cases, the judge turned him down. Gideon was found guilty and sentenced to five years in prison.

While in prison, Gideon educated himself on his legal rights and filed an appeal that eventually made its way to the Supreme Court. There the justices sided with Gideon, arguing that the Sixth Amendment guarantee of legal counsel should not depend on the defendant's ability to pay. Gideon was appointed a lawyer and had his case retried. This time, he was found not guilty. Today anyone facing charges who cannot afford an attorney can have one appointed at the government's expense.

At times, a defendant's Sixth Amendment rights may come into conflict with other rights and liberties. For example, freedom of the press is a key civil liberty, and the news media have a right to cover public trials. But if this coverage affects a trial's outcome, the accused may be denied due process of law. This was the issue before the Court in the case of *Sheppard v. Maxwell*.

On July 4, 1954, Sam Sheppard's wife was murdered at the couple's home near Cleveland, Ohio. Sheppard claimed that an armed intruder had knocked him unconscious and then killed his wife. Nonetheless, he was charged with the crime and found guilty. Throughout the trial, the Cleveland press covered the story relentlessly, often in a manner that implied Sheppard's guilt.



Media coverage on a court case may influence trial results and deny due process rights to defendants. In this picture, the media are ready to cover the court hearing of football star D.J. Simpson, who was on trial for the murder of his wife. Because of the far-reaching coverage of this trial, people across the United States had formed opinions on the innocence of Simpson before the jury had reached a verdict.

Sheppard appealed his conviction while in prison, arguing that biased press coverage had prevented him from getting a fair trial. After hearing the case in 1966, the Court overturned the murder conviction, agreeing that coverage of the trial had "inflamed and prejudiced the public." Sheppard was retried in the lower court and found not guilty.

Although the Court acknowledged the media's First Amendment rights in *Sheppard v. Maxwell*, it said that press coverage should not be allowed to interfere with a defendant's right to due process. In cases where intense media coverage might unfairly influence a trial, the trial should be moved to another location or the jury should be isolated from all news coverage.

The Eighth Amendment: Your Protection from Excessive Bail and Punishments

The Eighth Amendment protects people in the criminal justice system from excessive bail, fines, or cruel and unusual punishments. Bail is money given over to the court in exchange for a suspect's release until his or her trial begins.

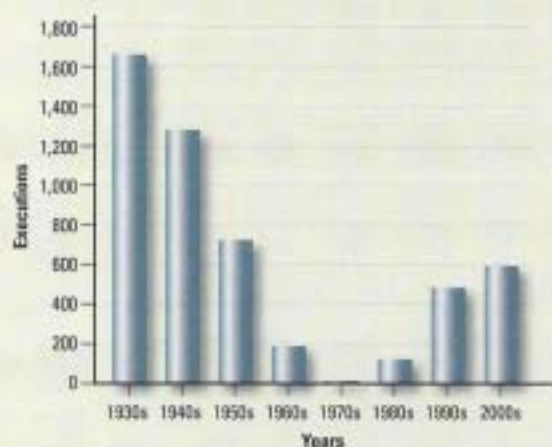
Most of the legal challenges to this amendment have involved the prohibition of cruel and unusual punishment. The Supreme Court has acknowledged that beliefs of what is "cruel and unusual" may change over time. For example, when the amendment was written, public whipping was a common punishment. Today such a punishment would be considered cruel and unusual.

Some Americans today hold that **capital punishment**, or the death penalty, is also a cruel and unusual punishment. However, most death penalty cases have focused on the method of execution, such as hanging, not on the death sentence itself. In the 1890 case of *In re Kemmler*, the Court said that any method of execution is acceptable, as long as it does not involve "torture or lingering death."

In the 1972 case of *Furman v. Georgia*, however, the Court focused on the death penalty itself. It concluded that capital punishment was cruel and unusual when it was inconsistently and unequally applied from one case to another. The Court observed that all too often, two people convicted of a capital crime received very different penalties. One might be sentenced to life in prison while the other was condemned to death.

Legal Executions in the United States, 1930–2009

Legal executions in the United States steadily declined from the 1930s through the 1970s. In 1972, the Supreme Court imposed a ban on capital punishment. A Court decision reinstated the death penalty in 1976, however, and the number of executions has risen since then.



Source: U.S. Department of Justice, 2010.

The Court's decision in *Furman v. Georgia* halted all executions in the United States. Convicts on death row received reprieves. In most cases, their death sentences were converted to life in prison.

By 1976, many states had altered their laws so that capital punishment was applied more consistently. That year, in *Gregg v. Georgia*, the Court concluded that the death penalty was constitutional under the new laws. Most states reinstated capital punishment as a sentencing option. Still, limits on capital punishment exist. Juveniles and mentally retarded persons, for example, may not be executed.

5.6 Rights and Powers of the States and the People

The last two amendments, the Ninth and Tenth, are the most general amendments in the Bill of Rights. The Ninth Amendment is designed to offer protection for rights and liberties not specifically mentioned in the other amendments. The Tenth Amendment is meant to preserve the balance of power between the federal and state governments.

The Ninth Amendment: Your Rights Beyond Those Listed in the Constitution

The Ninth Amendment is the Bill of Rights' "safety net." It states that other rights and liberties may exist beyond those listed in the Constitution, and it offers protection for those **unenumerated rights**. Some of these unlisted rights were later protected under other amendments and laws. For more than 150 years, however, the Supreme Court rarely cited the Ninth Amendment and never clearly defined what rights it might include.

In 1965, in the case of *Griswold v. Connecticut*, some justices on the Court declared that the Ninth Amendment includes the right to privacy. Estelle Griswold, an official with the Planned Parenthood League of Connecticut, had been arrested for providing medical advice to married couples on how to prevent pregnancy. Her actions violated a Connecticut law that prohibited the use of contraceptives. In its decision, the Court declared that the law violated marital privacy rights. Eight years later, in *Roe v. Wade* (1963), the Court extended the right to privacy to include a woman's right to have an abortion.

Although the Constitution does not specifically mention privacy, the Court said that it was an implied right in the First, Third, and Fourth amendments. The Ninth Amendment provides further support, the Court said, by stating that a right need not be cited in the Constitution to be valid. The scope of the right to privacy remains a contested issue, however, and has not been fully resolved by the Court.

The Tenth Amendment: Powers Reserved for the States and the People

The Tenth Amendment is concerned more with federalism, or the balance of federal and state powers, than with individual rights. It limits the powers of the federal government to those granted under the Constitution, reserving other powers for the states and the people.

Under our federal system of government, the states must uphold laws enacted by Congress. When state laws clash with federal laws, federal law takes precedence under the Supremacy Clause of Article VI.

Many areas of the law, however, are not mentioned in the Constitution or granted to the federal government. Laws governing marriage and divorce are just one example. The power to regulate these



In this photograph, Estelle Griswold (left) and Cornelia Jahncke celebrate the legal victory in the 1965 case of *Griswold v. Connecticut*. Both were working with the Planned Parenthood League of Connecticut when Griswold was arrested for providing contraceptive information to married couples. The Supreme Court struck down a state law banning the use of contraceptives. At the same time, the Court introduced the idea that the right to privacy is supported by the Bill of Rights.

and many other matters that shape our daily lives is reserved for the states.

At times, the Supreme Court has struck down federal laws that overstepped the government's constitutional authority. One example was the decision in the case of *United States v. Morrison*

(2000). This case focused on a law, the Violence Against Women Act, that allowed victims of domestic violence to sue their attackers in federal court. The Court struck down this law, saying that violent crime between individuals was an issue for the states, not the federal government.

Summary

The first ten amendments were added to the Constitution to safeguard civil liberties and civil rights. However, it took many years for the Supreme Court to apply the Bill of Rights to the actions of state and local governments.

The role of the judiciary The Bill of Rights defines rights and liberties in broad, abstract terms. The judicial branch interprets the first ten amendments and applies them to actual circumstances.

Protecting basic civil liberties The First Amendment protects the freedoms of religion, speech, the press, and assembly. It also guarantees the right to petition the government.

Preventing abuses of power The Second, Third, and Fourth amendments are designed to protect the rights of citizens from government abuses of power.

Safeguards under the legal system The Fifth, Sixth, Seventh, and Eighth amendments define and protect rights under the judicial system.

Powers of the states and the people The Ninth Amendment protects other, unnamed rights not specified in the Bill of Rights. The Tenth Amendment reserves powers not granted to the federal government to the states or the people.

Do you support the First Amendment?

Since 1997, the First Amendment Center has conducted an annual survey on the state of the First Amendment. One thousand Americans are randomly contacted by telephone and asked if they can name their First Amendment rights. They are then read the text of the amendment and asked questions that probe their feelings about the rights it protects.

Do you support the First Amendment, or do you think it goes too far in some cases? Find out by taking the “State of the First Amendment” survey for yourself. Record your answers on a sheet of paper. Then compare your views with those who participated in the 2012 survey.

State of the First Amendment, 2012

- As you may know, the First Amendment is a part of the U.S. Constitution. Can you name any of the specific rights that are guaranteed by the First Amendment?

Agree
Disagree
- The First Amendment became part of the U.S. Constitution more than 200 years ago. This is what it says:

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

Based on your own feelings about the First Amendment, please tell me whether you agree or disagree with the following statement: The First Amendment goes too far in the rights it guarantees.

Agree
Disagree

Now please tell me whether you agree or disagree with the following statements:
- Musicians should be allowed to sing songs with lyrics that others might find offensive.

Agree
Disagree
- Overall, the news media try to report the news without bias.

Agree
Disagree
- It is important for our democracy that the news media act as a watchdog on government.

Agree
Disagree
- Public schools should be allowed to discipline students who use their own personal computers at home to post material that school officials say is offensive.

Agree
Disagree
- In the event of a national emergency, the government should be allowed to take control of the Internet and limit access to social media and to Web outlets such as AOL and Yahoo.

Strongly agree
Mildly agree
Mildly disagree
Strongly disagree

Results of the 2012 "State of the First Amendment" Survey

Answers chosen most are shown in red.

8. The government should be allowed to prosecute Internet users who illegally distribute copyrighted music and movies online.

Strongly agree
Mildly agree
Mildly disagree
Strongly disagree

9. People should be allowed to record or photograph the activities of the police in public as long as they do not interfere with what the police are doing.

Strongly agree
Mildly agree
Mildly disagree
Strongly disagree

10. As long as no money is being made, someone should be able to post copyrighted material online or on social media without paying rights fees.

Strongly agree
Mildly agree
Mildly disagree
Strongly disagree

11. Even if the money is being made, someone should be able to post copyrighted material online or on social media without paying rights fees.

Strongly agree
Mildly agree
Mildly disagree
Strongly disagree

1. First Amendment Rights Americans are able to identify:

Freedom of the press: 13%
Freedom of speech: 65%
Freedom of religion: 28%
Right to petition: 4%
Right of assembly: 13%

2. The First Amendment goes too far in the rights it guarantees.

Agree: 13%
Disagree: 81%

3. Musicians should be allowed to sing songs with lyrics that others might find offensive.

Agree: 69%
Disagree: 27%

4. Overall, the news media try to report the news without bias.

Agree: 33%
Disagree: 62%

5. It is important for our democracy that the news media act as a watchdog on government.

Agree: 75%
Disagree: 20%

6. Public schools should be allowed to discipline students who use their personal computers at home to post material that school officials say is offensive.

Agree: 34%
Disagree: 57%

7. In the event of a national emergency, the government should be allowed to take control of the Internet and limit access to social media and to Web outlets such as AOL and Yahoo.

Strongly agree: 17%
Mildly agree: 16%
Mildly disagree: 15%
Strongly disagree: 44%

8. The government should be allowed to prosecute Internet users who illegally distribute copyrighted music and movies online.

Strongly agree: 32%
Mildly agree: 27%
Mildly disagree: 15%
Strongly disagree: 18%

9. People should be allowed to record or photograph the activities of the police in public as long as they do not interfere with what the police are doing.

Strongly agree: 66%
Mildly agree: 19%
Mildly disagree: 7%
Strongly disagree: 5%

10. As long as no money is being made, someone should be able to post copyrighted material online or on social media without paying rights fees.

Strongly agree: 24%
Mildly agree: 22%
Mildly disagree: 19%
Strongly disagree: 23%

11. Even if money is being made, someone should be able to post copyrighted material online or on social media without paying rights fees.

Strongly agree: 10%
Mildly agree: 13%
Mildly disagree: 23%
Strongly disagree: 41%