CHAPTER 4

CIVIL LIBERTIES AND PUBLIC POLICY

CHAPTER OUTLINE AND LEARNING OBJECTIVES

THE BILL OF RIGHTS

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

FREEDOM OF RELIGION

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

FREEDOM OF EXPRESSION

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

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UNDERSTANDING CIVIL LIBERTIES

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

Politics in Action

FREE SPEECH ON CAMPUS

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

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

The Supreme Court held in a unanimous decision in *Board of Regents of University of Wisconsin System v. Southworth* that, if a university determines that its mission is well served when students have the means to engage in dynamic discussion on a broad range of issues, it may impose a mandatory fee to sustain such dialogue. The Court recognized that inevitably such a fee will subsidize speech that some students find objectionable or offensive. Thus, the Court held that a university must protect students' First Amendment rights by requiring viewpoint neutrality in the allocation of funding support.

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

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

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

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

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

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

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

Issues of civil liberties present many vexing problems for the courts to resolve. For example, is a display of the Ten Commandments on a government site simply a recognition of their historic importance to the development of law or an impermissible use of government power to establish religion?

THE BILL OF RIGHTS

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

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

The Bill of Rights—Then and Now

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

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

The Bill of Rights and the States

Take another look at the **First Amendment**. Note the first words: "Congress shall make no law...." The Founders wrote the Bill of Rights to restrict the powers of the new national government. What happens, however, if a state law that violates one of the rights protected by the federal Bill of Rights and the state's constitution does not prohibit this abridgment of freedom? In 1833, the answer to that question was "nothing." The Bill of Rights, said the Supreme Court in ***Barron v. Baltimore***, restrained only the national government, not states or cities.

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

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

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

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

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

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

TABLE 4.1 THE BILL OF RIGHTS

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

Amendment I—Religion, Speech, the Press, Assembly, Petition
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
Amendment II—Right to Bear Arms
A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.
Amendment III—Quartering of Soldiers
No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.
Amendment IV—Searches and Seizures
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
Amendment V—Grand Juries, Double Jeopardy, Self-Incrimination, Due Process, Eminent Domain
No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
Amendment VI—Criminal Court Procedures
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
Amendment VII—Trial by Jury in Common-Law Cases
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.
Amendment VIII—Bails, Fines, and Punishment
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
Amendment IX—Rights Retained by the People
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
Amendment X—Rights Reserved to the States
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

SOURCE: U.S Constitution, the Ten Amendments

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

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

Nonetheless, in the Slaughterhouse Cases (1873), the Supreme Court gave a narrow interpretation of the Fourteenth Amendment's *privileges or immunities clause* (discussed in detail in Chapter 3), concluding that it applied only to national citizenship and not state citizenship and thus did little to protect citizens against state actions.

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

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

This decision began the development of the **incorporation doctrine**, the legal concept under which the Supreme Court has nationalized the Bill of Rights by making most of its provisions applicable to the states through the Fourteenth Amendment. In *Gitlow*, the Supreme Court held only parts of the First Amendment to be binding on the states. Gradually, and especially during the 1960s, the Court applied most of the Bill of Rights to the states (see Table 4.2). Many of the decisions that nationalized provisions of the Bill of Rights were controversial. Nevertheless, today the Bill of Rights guarantees

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

TABLE 4.2 THE INCORPORATION OF THE BILL OF RIGHTS

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

[a]The quartering of soldiers has not occurred under the Constitution.

individual freedoms against infringement by state and local governments as well as by the national government. Only the Third and Seventh Amendments, the grand jury requirement of the Fifth Amendment, and the prohibition against excessive fines and bail in the Eighth Amendment have not been applied specifically to the states.

FREEDOM OF RELIGION

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

The First Amendment contains two elements regarding religion and government. These elements are commonly referred to as the establishment clause and the free exercise clause. The **Establishment clause** states that "Congress shall make no law respecting an establishment of religion." The **Free exercise clause** prohibits the abridgment of citizens' freedom to worship or not to worship as they please. Sometimes these freedoms conflict. The government's practice of providing chaplains on military bases is one example of this conflict; some accuse the government of establishing religion in order to ensure that members of the armed forces can freely practice their religion. Usually, however, establishment clause and free exercise clause cases raise different kinds of conflicts. Religious issues and controversies have

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

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

assumed importance in political debate in recent years,[3] so it is not surprising that interpretations of the Constitution are intertwined with partisan politics.

The Establishment Clause

Some nations, such as Great Britain, have an established church that is officially supported by the government and recognized as a national institution. Some American colonies at one time had official churches, but the religious persecutions that incited many colonists to move to America discouraged the First Congress from establishing a national church in the United States. Thus, the First Amendment prohibits an established national religion.

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

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

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

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

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

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

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

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

RELIGIOUS ACTIVITIES IN PUBLIC SCHOOLS In recent decades, the Supreme Court has also been opening public schools to religious activities. The Court decided that public universities that permit student groups to use their facilities must allow student religious groups on campus to use the facilities for religious worship.[4] In the 1984 Equal Access Act, Congress made it unlawful for any public high school receiving federal funds (almost all of them do) to keep student groups from using school facilities for religious worship if the school opens its facilities for other student

meetings.[5] In 2001 the Supreme Court extended this principle to public elementary schools.[6] Similarly, in 1993, the Court required public schools that rent facilities to secular organizations to do the same for religious groups.[7]

Beyond the use of school facilities there is the question of the use of public funds for religious activities in public school contexts. In 1995 the Court held that the University of Virginia was constitutionally required to subsidize a student religious magazine on the same basis as other student publications.[8] However, in 2004 the Court held that the state of Washington could exclude students pursuing a devotional theology degree from its general scholarship program.[9]

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

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

SCHOOL PRAYER In *Engel v. Vitale* (1962) and *School District of Abington Township, Pennsylvania v. Schempp* (1963), the Supreme Court aroused the wrath of many Americans by ruling that requiring public school students to recite a prayer violates the establishment clause; in the second case, it made a similar ruling about requiring students to recite passages from the Bible. In the 1963 decision, the justices observed that "the place of religion in our society is an exalted one … [but] in the relationship between man and religion, the State is firmly committed to a position of neutrality."

It is *not* unconstitutional, of course, to pray in public schools. Students may pray silently as much as they wish. What the Constitution forbids is the sponsorship or encouragement of prayer, directly or indirectly, by public school authorities. Thus the Court has ruled that school-sponsored prayer at a public school graduation[13] and student-led prayer at football games are unconstitutional.[14] When several Alabama laws authorized public schools to hold one-minute periods of silence for "meditation or voluntary prayer," the Court rejected its approach because the state made it clear that the purpose of the statute was to return prayer to public schools.[15]

Engel v. Vitale
The 1962 Supreme Court decision holding that state officials violated the First Amendment when they required that a prayer be recited by public schoolchildren.

School District of Abington Township, Pennsylvania v. Schempp
The 1963 Supreme Court decision holding that a Pennsylvania law requiring Bible reading in schools violated the establishment clause of the First Amendment.

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

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

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

PUBLIC DISPLAYS The Supreme Court has also struggled to interpret the establishment clause in other areas. In 2005 the Court found that two Kentucky counties violated the establishment clause when they posted large, readily visible copies of the Ten Commandments in their courthouses, concluding that the counties' primary purpose was to advance religion.[19] However, the Court did not hold that it is never constitutional for a governmental body to integrate a sacred text constitutionally into a governmental display on law or history. Thus in 2005, the Court held that Texas could include a monolith inscribed with the Ten Commandments among the 21 historical markers and 17 monuments surrounding the Texas State Capitol. The Court argued that a display that simply has religious content or promotes a message consistent with a religious doctrine does not run afoul of the establishment clause. Texas's placement of the Commandments monument on its capitol grounds was a far more passive use of those texts than their posting in elementary school classrooms and also served a legitimate historical purpose.[20] The Court has also upheld saying a prayer to open a legislative session.[21]

Displays of religious symbols during the holidays have prompted considerable controversy. In 1984 the Court found that Pawtucket, Rhode Island, could set up a Christmas nativity scene on public property—along with Santa's house and sleigh, Christmas trees, and other symbols of the Christmas season.[22] Five years later, the Court extended the principle to a Hanukkah menorah placed next to a Christmas tree. The Court concluded that these displays had a secular purpose and provided little or no benefit to religion. At the same time, the Court invalidated the display of the nativity scene in a courthouse because it was not accompanied by secular symbols and thus gave the impression of endorsing a religious message.[23]

WHY IT MATTERS TODAY

The Establishment Clause

What if the Constitution did not prohibit the establishment of religion? If a dominant religion received public funds and was in a position to control health care, public education, and other important aspects of public policy, public policies might well reflect the values and beliefs of that religion. In addition, the potential for conflict between followers of the established religion and adherents of other religions would be substantial.

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

The Free Exercise Clause

The First Amendment also guarantees the free exercise of religion. This guarantee seems simple enough. Whether people hold no religious beliefs, practice voodoo, or go to a church, a temple, or a mosque, they should have the right to practice religion as they choose. In general, Americans are tolerant of those with religious views outside the mainstream, as you can see in Figure 4.1.

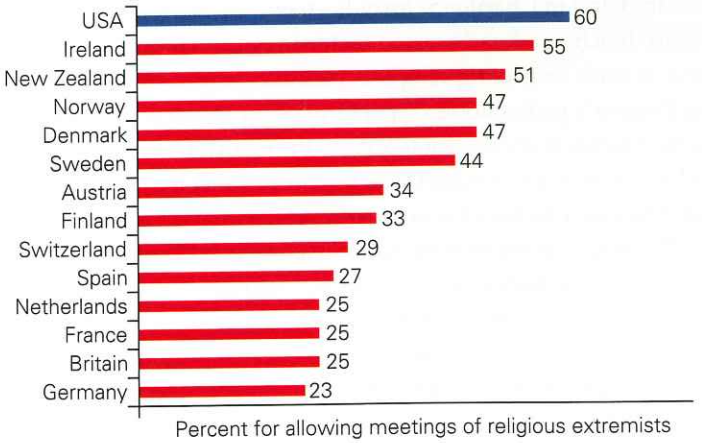
The constitutional guarantee to the free exercise of religion is, of course, more complicated. Religions sometimes forbid actions that society thinks are necessary; conversely, religions may require actions that society finds unacceptable. For example, what if a religion justifies multiple marriages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

Consistently maintaining that people have an inviolable right to *believe* whatever they want, the courts have been more cautious about the right to *practice* a belief. What if, the Supreme Court once asked, a person "believed that human sacrifices were a necessary part of religious worship?" Not all religious practices receive constitutional protection. Thus, over the years, the Court has upheld laws and regulations forbidding polygamy, prohibiting business activities on Sunday (restricting the commerce

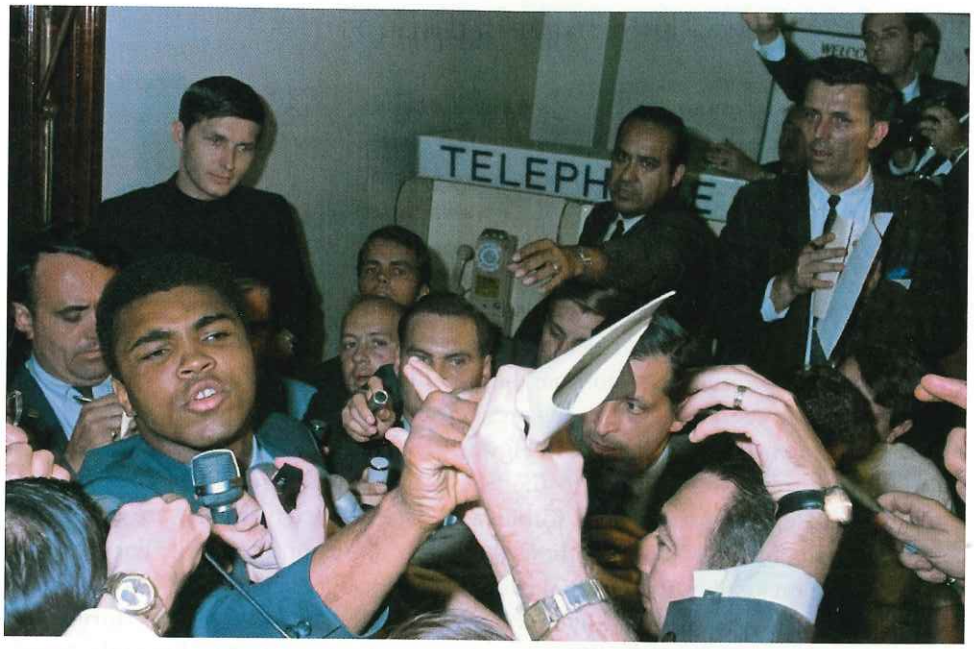
FIGURE 4.1 TOLERANCE FOR THE FREE SPEECH RIGHTS OF RELIGIOUS EXTREMISTS

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

Survey Question: There are some people whose views are considered extreme by the majority. Consider religious extremists, that is, people who believe that their religion is the only true faith and all other religions should be considered enemies. Do you think such people should be allowed to hold public meetings to express their views?



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



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

of Orthodox Jews, for whom Sunday is a workday), denying tax exemptions to religious schools that discriminate on the basis of race,[24] allowing the building of a road through ground sacred to some Native Americans, and even prohibiting a Jewish air force captain from wearing his yarmulke while on duty. (Congress later intervened to permit military personnel to wear yarmulkes.)

At the same time, Congress and the Supreme Court have granted protection to a range of religiously motivated practices. The Court has allowed Amish parents to take their children out of school after the eighth grade, reasoning that the Amish community is well established and that its children will not burden the state.[25] More broadly, parents have a right to send their children to accredited religious schools rather than public schools. A state may not require Jehovah's Witnesses or members of other religions to participate in public school flag-saluting ceremonies. Congress has also decided—and the courts have affirmed—that people can become conscientious objectors to war on religious grounds. The free exercise clause also prevents government from interfering with the freedom of religious groups to select their own personnel. Thus, religious groups are not subject to laws that prohibit discrimination in employment.[26] In 2014 the Court held that requiring family-owned corporations run on religious principles to pay for insurance coverage for contraception violated a federal law protecting religious freedom.[27] The next year, it held that the 1964 Civil Rights Act (discussed in detail in Chapter 5) forbids an employer from making an applicant's religious practice (such as a head scarf) a factor in employment decisions.[28]

What kind of laws restricting religious practices might be constitutional? In 1988, in upholding Oregon's prosecution of persons using the drug peyote as part of their religious rituals (*Employment Division v. Smith*), the Court decided that a state law could apply to conduct, even if the conduct was religiously inspired, as long as that law did not single out religious practices because they were engaged in for religious reasons.[29] However, the Religious Freedom Restoration Act, which Congress passed in 1993 and which applies only to the national government,[30] requires laws to meet a more restrictive standard: a law or regulation cannot interfere with religious practices unless the government can show that it is narrowly tailored and in pursuit of a "compelling interest." The Court in a 2006 decision allowed a small religious sect to use a hallucinogenic tea in its rituals despite the federal government's attempts to bar its use.[31]

In 2000, Congress passed legislation that, in accordance with the "compelling interest" standard, made it more difficult for local governments to enforce zoning or

YOU ARE THE JUDGE

THE CASE OF ANIMAL SACRIFICES

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

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

YOU BE THE JUDGE

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

DECISION

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

other regulations on religious groups and required governments to allow those institutionalized in state facilities (such as prisons) to practice their faith. The Supreme Court upheld this law in 2005,[32] and in 2015 upheld the right of a Muslim prisoner to grow a short beard.[33]

Now imagine that "You Are the Judge" in the case, involving a city's ban on ritual animal sacrifices, which appears above.

FREEDOM OF EXPRESSION

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

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

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

Given that not all speech is permissible, the courts have had to address two questions in deciding where to draw the line separating permissible from impermissible speech. First, can the government censor speech that it thinks will violate the law? Second, what constitutes *speech* (or press) within the meaning of

the First Amendment and thus deserves constitutional protection, and what does not? Holding a political rally to attack an opposing candidate's stand receives First Amendment protection. Obscenity and libel and incitements to violence and overthrow of the government do not. But just how do we know, for example, what is obscene? To complicate matters further, certain forms of nonverbal speech, such as picketing, are considered symbolic speech and receive First Amendment protection. Judges also have had to balance freedom of expression against competing values, such as public order, national security, and the right to a fair trial. Then there are questions regarding commercial speech. Does it receive the same protection as religious and political speech? Regulating the publicly owned airwaves raises yet another set of difficult questions.

One controversial freedom of expression issue involves so-called hate speech. Advocates of regulating hate speech forcefully argue that, for example, racial insults, like fighting words, are "undeserving of First Amendment protection because the perpetrator's intent is not to discover the truth or invite dialogue, but to injure the victim."[34] In contrast, critics of hate speech policy argue that "sacrificing free speech rights is too high a price to pay to advance the cause of equality."[35] In 1992, the Supreme Court ruled that legislatures and universities may not single out racial, religious, or sexual insults or threats for prosecution as "hate speech" or "bias crimes."[36]

Prior Restraint

prior restraint
Government actions that prevent material from being published. As confirmed in *Near v. Minnesota*, prior restraint is usually prohibited by the First Amendment

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

In the United States, the First Amendment ensures that even if the government frowns on some material, a person's right to publish it is all but inviolable. That is, it ensures that there will not be **prior restraint**, government actions that prevent material from being published—or, in a word, censorship. A landmark case involving prior restraint is ***Near v. Minnesota*** (1931). A blunt newspaper editor called local officials a string of names, including "grafters" and "Jewish gangsters." The state closed down his business,[37] preventing him from publishing, but the Supreme Court ordered the paper reopened. Of course, the newspaper editor could later be punished for violating a law or someone's rights (such as not to be libeled) *after* publication.

The extent of an individual's or group's freedom from prior restraint does depend in part, however, on who that individual or group is. Expressions of students in public school may be limited more than those of adults in other settings. In 1988 the Supreme Court ruled that a high school newspaper was not a public forum and could be regulated in "any reasonable manner" by school officials.[38] In 2007, the Court held that the special characteristics of the school environment and the governmental interest in stopping student drug abuse allow schools to restrict student expressions that they reasonably regard as promoting such abuse.[39]

In the name of national security, the Supreme Court has also upheld restrictions on the right to publish. Wartime often brings widely supported censorship to protect classified information. Few want to publish troop movement plans during a war. The constitutional restrictions have not been limited to wartime censorship. Former CIA officials have to meet their contractual obligations to submit books about their work to the agency for censorship, even though the books reveal no classified information.[40] In recent years, WikiLeaks has published hundreds of thousands of classified government documents covering a wide of range of foreign policy issues. The U.S. Department of Justice has opened a criminal probe of WikiLeaks founder Julian Assange. The government is similarly pursuing Edward Snowden for divulging documents related to electronic surveillance.

Nevertheless, the courts are reluctant to issue injunctions prohibiting the publication of material, even on the grounds of national security. The most famous case regarding prior restraint and national security involved stolen papers concerning the war in Vietnam. Now imagine that "You Are the Judge." In "The Case of the Purloined

YOU ARE THE JUDGE

THE CASE OF THE PURLOINED PENTAGON PAPERS

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

The Nixon administration pulled out all the stops in its effort to embarrass Ellsberg and prevent publication of the Pentagon papers. Nixon's chief domestic affairs adviser, John Ehrlichman, approved a burglary of Ellsberg's psychiatrist's office, hoping to find damaging information on Ellsberg. (The burglary was bungled, and it eventually led to Ehrlichman's conviction and imprisonment.) In the courts, Nixon administration lawyers sought an injunction against the *Times* that would have ordered it to cease publication of the secret documents. Government lawyers argued that national security was being breached and that Ellsberg had stolen the documents from the government. The *Times* argued that its freedom to publish would be violated if an injunction were granted. In 1971, the case of *New York Times v. United States* was decided by the Supreme Court.

YOU BE THE JUDGE

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

DECISION

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

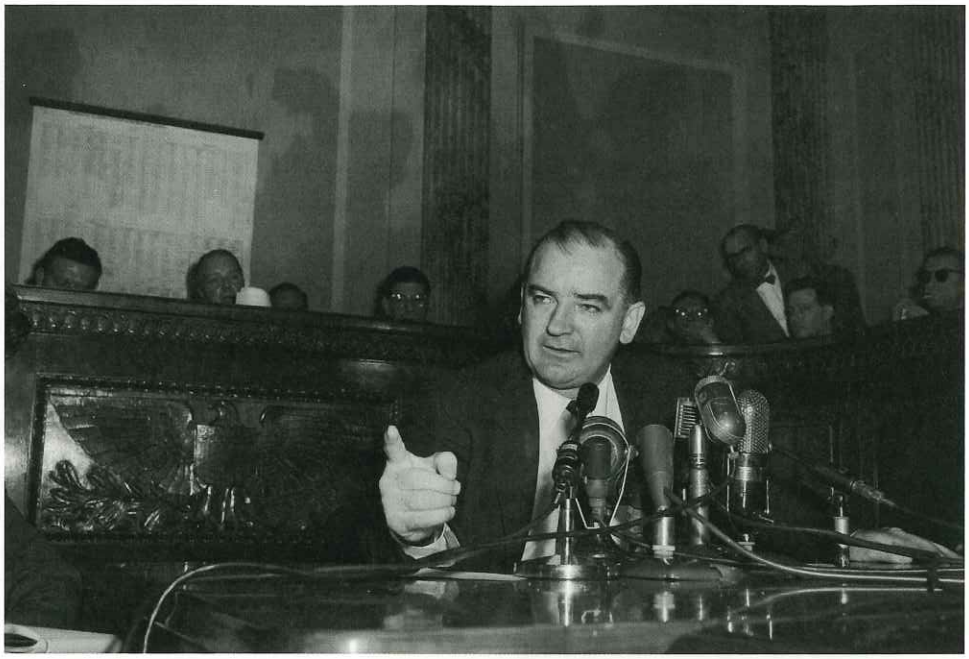
Pentagon Papers" above, examine the arguments for and against the right of the *New York Times* to publish leaked Department of Defense documents.

Free Speech and Public Order

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

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

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



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

that they actually urged people to commit specific acts of violence. Although the activities of this tiny, unpopular group resembled yelling "Fire!" in an *empty* theater rather than a crowded one, the Court ruled that a communist takeover was so grave a danger that the government could squelch the threat. Thus, the Court concluded that protecting national security outweighed First Amendment rights.

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

The 1960s brought waves of protest over political, economic, racial, and social issues, and, especially, the Vietnam War. Many people in more recent times have engaged in public demonstrations, such as those opposing the war in Iraq or protesting against Wall Street. Courts have been quite supportive of the right to protest, pass out leaflets, or gather signatures on petitions—as long as it is done in public places. People may even distribute campaign literature anonymously.[41] First Amendment free speech guarantees do not apply when a person is on private property,[42] however, although a state may include within its own free speech guarantee politicking in shopping centers.[43] Moreover, cities cannot bar residents from posting signs on their own property,[44] and they cannot impose more stringent restrictions on signs directing the public to the meeting of a non-profit group than on signs conveying other messages.[45]

Obscenity

Roth v. United States
A 1957 Supreme Court decision ruling that "obscenity is not within the area of constitutionally protected speech or press."

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

were banned. The state of Georgia banned the acclaimed film *Carnal Knowledge* (the Supreme Court struck down the ban in 1974).[46]

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

Miller v. California
A 1973 Supreme Court decision holding that community standards be used to determine whether material is obscene, defined as appealing to a "prurient interest," being "patently offensive," and lacking in "serious literary, artistic, political, or scientific value."

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

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

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

The challenge of defining obscenity makes it difficult to obtain an obscenity conviction. So does the absence of a nationwide consensus that offensive material should be banned—at least not when it is restricted to adults. In many communities the laws on pornography are lenient; prosecutors know that they may not get a jury to convict, even when the disputed material is obscene as defined by *Miller*. Thus obscene material is widely available both on- and offline.

Despite the Court's best efforts to define obscenity and determine when it can be banned, state and local governments continue to struggle with the application of these rulings. In one famous case, a small New Jersey town tried to get rid of a nude dancing parlor by using its zoning power to ban all live entertainment. The Court held that the measure was too broad, restricting too much expression, and was thus unlawful.[47] However, the Court has upheld laws specifically banning nude dancing when their effect on overall expression was minimal.[48] In another obscenity case, Jacksonville, Florida, tried to ban drive-in movies containing nudity. You can examine the Court's reaction in the Jacksonville case, in "The Case of the Drive-in Theater," which follows next.

Regulations such as rating systems for movies and television that are aimed at keeping obscene material away from the young, who are considered more vulnerable to harmful influences, have wide public support; courts have consistently ruled that states may protect children from obscenity. The public and the courts also strongly support laws designed to protect the young from being exploited in pornography. It is a violation of federal law to send or receive sexually explicit photographs of children through the mail or over the Internet, and in 1990 the Supreme Court upheld Ohio's law forbidding the possession of child pornography.[49]

Advances in technology have created a new wrinkle in the obscenity issue. The Internet and the World Wide Web make it easier to distribute obscene material rapidly, and a number of online information services have taken advantage of this opportunity. In 1996 Congress passed the Communications Decency Act, banning obscene material online and criminalizing the electronic transmission of indecent speech or images to anyone under 18 years of age. This law made no exception for material

YOU ARE THE JUDGE

THE CASE OF THE DRIVE-IN THEATER

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

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

Arrested for violating the ordinance, a Mr. Erznoznik challenged the constitutionality of the ordinance. He claimed that the law was overly broad and banned nudity, not obscenity. The lawyers for the city insisted that the law was acceptable under the First Amendment. The government, they claimed, had a responsibility to forbid a "public nuisance," especially one that might cause a traffic hazard.

YOU BE THE JUDGE

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

DECISION

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

that has serious literary, artistic, political, or scientific merit as outlined in *Miller v. California*. In 1997, the Supreme Court overturned it as being overly broad and vague and thus a violation of free speech.[50] In 2002, the Court overturned a law banning virtual child pornography on similar grounds.[51] (Apparently the Supreme Court views the Internet similarly to print media, with similar protections against government regulation.) In 1999, however, the Court upheld prohibitions on obscene e-mail and faxes.

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

In 2011 the Court ruled that a California law banning the sale or rental of violent video games to minors violated the First Amendment because the games communicate ideas.[52] Depictions of violence, the Court added, have never been subject to government regulation and thus do not qualify for the same exceptional treatment afforded to obscene materials. The California law imposed a restriction on the content of protected speech and was invalid because the state could not show that it served a compelling government interest and was narrowly tailored to serve that interest.

Libel and Slander

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

Of course, if politicians could collect damages for every untrue thing said about them, the right to criticize the government—which the Supreme Court termed "the central meaning of the First Amendment"—would be stifled. No one would dare be critical for fear of making a factual error. To encourage public debate, the Supreme Court has held in cases such as ***New York Times v. Sullivan*** (1964) that statements about public figures are libelous only if made with malice and reckless disregard for the truth. Public figures have to prove to a jury, in effect, that whoever wrote or said untrue statements about them knew that the statements were untrue and intended to harm them. This standard makes libel cases difficult for public figures to win because it is difficult to prove that a publication was intentionally malicious.[53]

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

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

WHY IT MATTERS TODAY

Libel Law

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

To win libel lawsuits, *private individuals* have a lower standard to meet than public figures do. They need to show only that statements about them are defamatory falsehoods and that those who made the statements were negligent. Nevertheless, it is unusual for someone to pursue a libel case; most people do not wish to draw attention to critical statements about themselves.

If public debate is not free, there can be no democracy, yet in the process of free debate some reputations will be damaged (or at least bruised), sometimes unfairly. Libel cases must thus balance freedom of expression with respect for individual reputations. In one widely publicized case, General William Westmoreland, once the commander of American troops in South Vietnam, sued CBS over a documentary it broadcast called *The Uncounted Enemy*. It claimed that American military leaders in Vietnam, including Westmoreland, systematically lied to Washington to make it appear that the United States was winning the war. The evidence, including CBS's own internal memoranda, showed that the documentary made errors of fact. Westmoreland sued CBS for libel. Ultimately, the power of the press—in this case, a sloppy, arrogant press—prevailed. Fearing defeat at the trial, Westmoreland settled for a mild apology from CBS.[54]

An unusual case that explored the line between parody and libel came before the Supreme Court in 1988, when Reverend Jerry Falwell sued *Hustler* magazine. *Hustler* had printed a parody of a Campari Liquor ad about various celebrities called "First Time," in which celebrities related the first time they drank Campari; the phrase "first time" had an intentional double meaning. When *Hustler* depicted the Reverend Jerry Falwell having had his "first time" in an outhouse with his mother, Falwell sued. He alleged that the ad subjected him to great emotional distress and mental anguish. The case tested the limits to which a publication could go to parody or lampoon a public figure. The Supreme Court ruled that they can go pretty far—all nine justices ruled in favor of the magazine.[55]

Symbolic Speech

Freedom of speech, broadly interpreted, is a guarantee of freedom of expression. In 1965, school authorities in Des Moines, Iowa, suspended Mary Beth Tinker and her brother John when they wore black armbands to school to protest the Vietnam War.

The Supreme Court held that the suspension violated the Tinkers' First Amendment rights. The right to freedom of speech, said the Court, went beyond the spoken word.[56]

As discussed in Chapter 2, when Gregory Lee Johnson set a flag on fire at the 1984 Republican National Convention in Dallas to protest nuclear weapons, the Supreme Court decided that the state law prohibiting flag desecration violated the First Amendment (***Texas v. Johnson*** [1989]). Burning the flag, the Court said, constituted symbolic speech and not just dramatic action.[57] When Massachusetts courts ordered the organizers of the annual St. Patrick's Day parade to include the Irish-American Gay, Lesbian, and Bisexual Group of Boston, the Supreme Court declared that a parade is a form of protected speech and thus that the organizers are free to include or exclude whomever they want (the organizers lifted the ban in 2015).

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

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

Wearing an armband, burning a flag, and marching in a parade are examples of **symbolic speech**: actions that do not consist of speaking or writing but that express an opinion. Court decisions have classified these activities somewhere between pure speech and pure action. The doctrine of symbolic speech is not precise; for example, although burning a flag is protected speech, burning a draft card is not.[58] In 2003 the Court held that states may make it a crime to burn a cross with a purpose to intimidate, as long as the law clearly gives prosecutors the burden of proving that the act was intended as a threat and not as a form of symbolic expression.[59] In 2015, the Court upheld Texas's refusal to allow specialty license plates bearing the Confederate battle flag because the speech was government rather than individual speech.[60] Despite the imprecisions, these cases make it clear that First Amendment rights are not limited by a rigid definition of what constitutes speech.

The conflicting rights of free press and fair trials provide a dilemma for the courts. Here, Michael Jackson arrives in the Santa Barbara County courthouse in California for his trial on charges of molesting children. The trial received an enormous amount of press coverage, most of it critical of Jackson.

Free Press and Fair Trials

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

Nevertheless, the Court has *never* upheld a restriction on the press in the interest of a fair trial. The constitutional guarantee of freedom of the press entitles journalists to cover every trial. When a Nebraska judge issued a gag order forbidding the press to report any details of a particularly gory murder (or even to report the gag order itself), the outraged Nebraska Press Association took the case to the Supreme Court. The Court sided with the editors and revoked the gag order.[61] In 1980 the Court reversed a Virginia judge's order to close a murder trial to the public and the press. "The trial of a criminal case," said the Court, "must be open to the public."[62] A pretrial hearing, though, is a different matter. In a 1979 case, the Supreme Court permitted a closed hearing on the grounds that pretrial publicity might compromise the defendant's right to fairness. Ultimately, the only feasible measure that the judicial system can take against the influence of publicity in high-profile cases is to sequester the jury, thereby isolating it from the media and public opinion.

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

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

Commercial Speech

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

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

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

Nevertheless, laws may regulate commercial speech on the airwaves in ways that would clearly be impossible in the political or religious realm. Laws may actually require manufacturers to include certain words in their advertising. For example, the makers of Excedrin pain reliever were required to add to their commercials the words "on pain other than headache." (The claim of superior effectiveness was based on tests of how Excedrin relieved pain that many women experience after giving birth.)

Although commercial speech is regulated more rigidly than other types of speech, the courts have been broadening its protection under the Constitution. For years, many states had laws that prohibited advertising for professional services—such as legal and engineering services—and for certain products ranging from eyeglasses and prescription drugs to condoms and abortions. Advocates of these laws claimed that they were designed to protect consumers against misleading claims, while critics charged that the laws prevented price competition. The courts have struck down many such restrictions—including restrictions on advertising casino gambling where such gambling is legal—as violations of freedom of speech,[63] In general, the Supreme Court has allowed the regulation of commercial speech when the speech concerns unlawful activity or is misleading, but otherwise regulations must advance a substantial government interest and be no more extensive than necessary to serve that interest.[64]

Regulation of the Public Airwaves

The Federal Communications Commission (FCC) regulates the content, nature, and very existence of radio and television broadcasting. Although newspapers do not need licenses, radio and television stations do. A licensed station must comply with regulations, including a requirement that it devote a certain percentage of broadcast time to public service, news, children's programming, political candidates, or views other than those its owners support. The rules are more relaxed for cable channels, which can specialize in a particular type of broadcasting because consumers pay for, and thus have more choice about, the service.

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

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

Miami Herald Publishing Company v. Tornillo
A 1974 case in which the Supreme Court held that a state could not force a newspaper to print replies from candidates it had criticized. The case illustrates the limited power of government to restrict the print media.

Red Lion Broadcasting Company v. Federal Communications Commission
A 1969 case in which the Supreme Court upheld restrictions on radio and television broadcasting similar to those it had overturned in *Miami Herald Publishing Company v. Tornillo*. The Court reasoned that regulating radio and television broadcasting is justified because there are only a limited number of broadcasting frequencies available.

One FCC rule regulating the content of programs restricts the use of obscene words. Comedian George Carlin had a famous routine about words that could never be said over the airwaves. A New York City radio station tested the FCC rule by airing his routine. The ensuing events proved Carlin right. In 1978 the Supreme Court upheld the commission's policy of barring obscene words from radio or television when children might hear them.[65] Similarly, the FCC twice fined New York radio personality Howard Stern $600,000 for indecency. Had Stern's commentaries been carried by cable or satellite instead of the airwaves, he could have expressed himself with impunity because cable is viewed as private communication between individuals. (In 2006, Stern made the move to satellite radio.)

The Supreme Court has held that government has a legitimate right to regulate sexually oriented programming on cable television but that any regulation designed to do that must be narrowly tailored to serve a compelling government interest in the least restrictive way. In 1996 Congress had passed a law banning transmission of such programming for most of the day so that children would not be exposed to it. The Court concluded that targeted blocking, which allows subscribers to ask their cable companies to block specific channels, is less restrictive and a feasible and effective means of furthering the government's compelling interest, so banning transmission could not be justified.[66]

Campaign Spending

A relatively recent dimension of free speech relates to the effort of both the national and state governments to limit the role of money in political campaigns. The Federal Election Campaign Act of 1971 included limits on campaign contributions to candidates for the presidency and Congress, disclosure and reporting

requirements, and public financing of presidential elections. In *Buckley v. Valeo* (1976) the Court upheld these provisions. However, it also ruled that spending money to influence elections is a form of constitutionally protected speech. Thus, the Court voided those parts of the law that limited total campaign expenditures, independent expenditures by individuals and groups, and expenditures by candidates from their personal or family funds.

In 2002, Congress passed the Bipartisan Campaign Reform Act, often referred to as the McCain-Feingold Act. It banned unrestricted ("soft money") donations made directly to political parties (often by corporations, unions, or wealthy individuals) and the solicitation of those donations by elected officials. It also limited advertising that unions, corporations, and nonprofit organizations could engage in up to 60 days prior to an election, and it restricted political parties' use of their funds for advertising on behalf of candidates in the form of "issue ads" or "coordinated expenditures". The Supreme Court upheld most of the law in 2003,[67] but in 2007 it held that issue ads that do not urge the support or defeat of a candidate may not be banned in the months preceding a primary or general election.[68]

In *Citizens United v. Federal Election Commission* (2010), the Supreme Court made a broader decision, striking down provisions of McCain-Feingold in holding that the First Amendment prohibits government from restricting political broadcasts in candidate elections when those broadcasts are funded by corporations or unions. Further limiting the reach of campaign finance laws, in 2014 the Court struck down as violating the First Amendment the overall limits that an individual could contribute to all federal candidates and the limit that an individual could contribute to political party committees every two years.[69]

Arizona created a public financing system for state candidates and provided them matching funds if a privately financed candidate's expenditures, combined with the expenditures of independent groups made in support of or opposition to that candidate, exceeded the publicly financed candidate's initial state allotment. The Court held that the law violated the First Amendment rights of candidates who raise private money because they may be reluctant to spend money to speak if they know that it will give rise to counter-speech paid for by the government.[70]

FREEDOM OF ASSEMBLY

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

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

Right to Assemble

The first facet is the literal right to assemble—that is, to gather together in order to make a statement. This freedom can conflict with other societal values when it disrupts public order, traffic flow, peace and quiet, or bystanders' freedom to go about their business without interference. Within reasonable limits, called *time, place,* and *manner restrictions*, freedom of assembly includes the rights to parade, picket, and protest. Whatever a group's cause, it has the right to demonstrate. For example, in 2011 the Supreme Court upheld the right of the congregation of a small church to picket military funerals to communicate its belief that God hates the United States for its tolerance of homosexuality, particularly in America's military.[71]

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

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

Protest that verges on harassment tests the balance between freedom and order. Pro-life advocates protest abortion outside abortion clinics and seek to shame or even harass clients into staying away. Thus, rights are in conflict: a woman has the right to obtain an abortion; the demonstrators have the right to protest the very existence of the clinic. The courts have acted to restrain these demonstrators, setting limits on how close they may come to clinics and upholding clinic clients' damage claims, and Congress has enacted broad penalties against abortion protestors. In 2014, however, the Supreme Court ruled that a buffer zone around a Massachusetts clinic restricted access to public space and was not narrowly tailored to balance rights.[72] Pro-life demonstrators in a Milwaukee, Wisconsin, suburb paraded outside the home of a physician who performed abortions. The town board forbade future picketing in residential neighborhoods. The Supreme Court agreed that the right to residential privacy is a legitimate local concern and upheld the ordinance.[73]

Right to Associate

The second facet to freedom of assembly is the right to associate with people who share a common interest, including an interest in political change. In a famous case at the height of the civil rights movement, Alabama tried to harass the state chapter of the National Association for the Advancement of Colored People (NAACP) by requiring it to turn over its membership list. In ***NAACP v. Alabama*** (1958), the Supreme Court found this demand an unconstitutional restriction on freedom of association.

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

In 2006 some law schools argued that a law that required them to grant military recruiters access to their students violated the schools' freedoms of speech and association. Siding with the government, the Supreme Court concluded that the law

YOU ARE THE JUDGE

THE CASE OF THE NAZIS' MARCH IN SKOKIE

Hitler's Nazis slaughtered 6 million Jews in death camps like Auschwitz. Many of the survivors migrated to the United States, and thousands settled in Skokie, Illinois, a suburb just north of Chicago, eventually establishing a large Jewish community there.

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

YOU BE THE JUDGE

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

DECISION

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

regulated conduct, not speech. In addition, it argued, nothing about recruiting suggests that law schools must agree with any speech by recruiters, and nothing in the law restricts what law schools may say about the military's policies. Nor does the law force law schools to accept students and faculty it does not desire, and students and faculty are free to voice their disapproval of the military's message.[74]

RIGHT TO BEAR ARMS

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

Few issues generate as much controversy as gun control. In an attempt to control gun violence, many communities have passed restrictions on owning and carrying handguns. National, state, and local laws have also mandated background checks for gun buyers and limited the sale of certain types of weapons altogether. Yet other laws have required that guns be stored so as to prevent their being stolen or used by children.

Some groups, most notably the National Rifle Association, have invested millions of dollars to fight almost all gun control efforts, arguing that they violate the Second Amendment's guarantee of a right to bear arms. Many advocates of gun control argue that the Second Amendment applies only to the right of states to create militias. Surprisingly, the Supreme Court has rarely dealt with gun control.

In 2008, however, the Court directly faced the issue. A District of Columbia law restricted most residents from owning handguns. The law also required that, when not in use, all lawfully owned firearms, including rifles and shotguns, be unloaded

Point to Ponder

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

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

WHAT DO YOU THINK?

Is there any way to prioritize our basic rights?

and disassembled or bound by a trigger lock or similar device. In *District of Columbia v. Heller* (2008), the Supreme Court held that the Second Amendment protects an individual right to possess a firearm, that the right is unconnected with service in a militia, and that an individual may use a firearm for lawful purposes, such as self-defense within the home. Similarly, the requirement that any lawful firearm be disassembled or bound by a trigger lock when not in use is unconstitutional because it makes it impossible for citizens to use arms for self-defense. In 2010 in *McDonald v. Chicago*, the Court extended the Second Amendment's limits on restricting an individual's right to bear arms to state and local gun control laws.

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

DEFENDANTS' RIGHTS

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

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

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

It is useful to think of the criminal justice system as a funnel. Following a *crime* there is (sometimes) an *arrest*, which is (sometimes) followed by a *prosecution*, which is (sometimes) followed by a *trial*, which (usually) results in a *verdict* of innocence or guilt. The funnel gets smaller and smaller. For example, the ratio of crimes reported to arrests made is about five to one. At each stage of the process, the Constitution protects the rights of the accused (see Figure 4.2).

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

One thing is clear, however. The Supreme Court's decisions have extended specific provisions of the Bill of Rights—one by one—to the states as part of the general process of incorporation we discussed earlier. Virtually all the rights we discuss in the following sections affect the actions of both national and state authorities. Incorporation is especially important because most cases involving defendants' rights originate in the states.

Searches and Seizures

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

Police often need to get physical evidence—a car thief's fingerprints, a snatched purse—to use in court. To prevent the abuse of police power, the Fourth Amendment forbids **unreasonable search and seizure**. It requires police to meet certain conditions.

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

A search can take place without a warrant (as most do) if probable cause of a crime exists, if the search is necessary to protect an officer's safety, if the search is limited to material relevant to a suspected crime or within the suspect's immediate control, or if there is a need to prevent the imminent destruction of evidence.[75] The Supreme Court has also held that police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with serious injury.[76] The police can also use

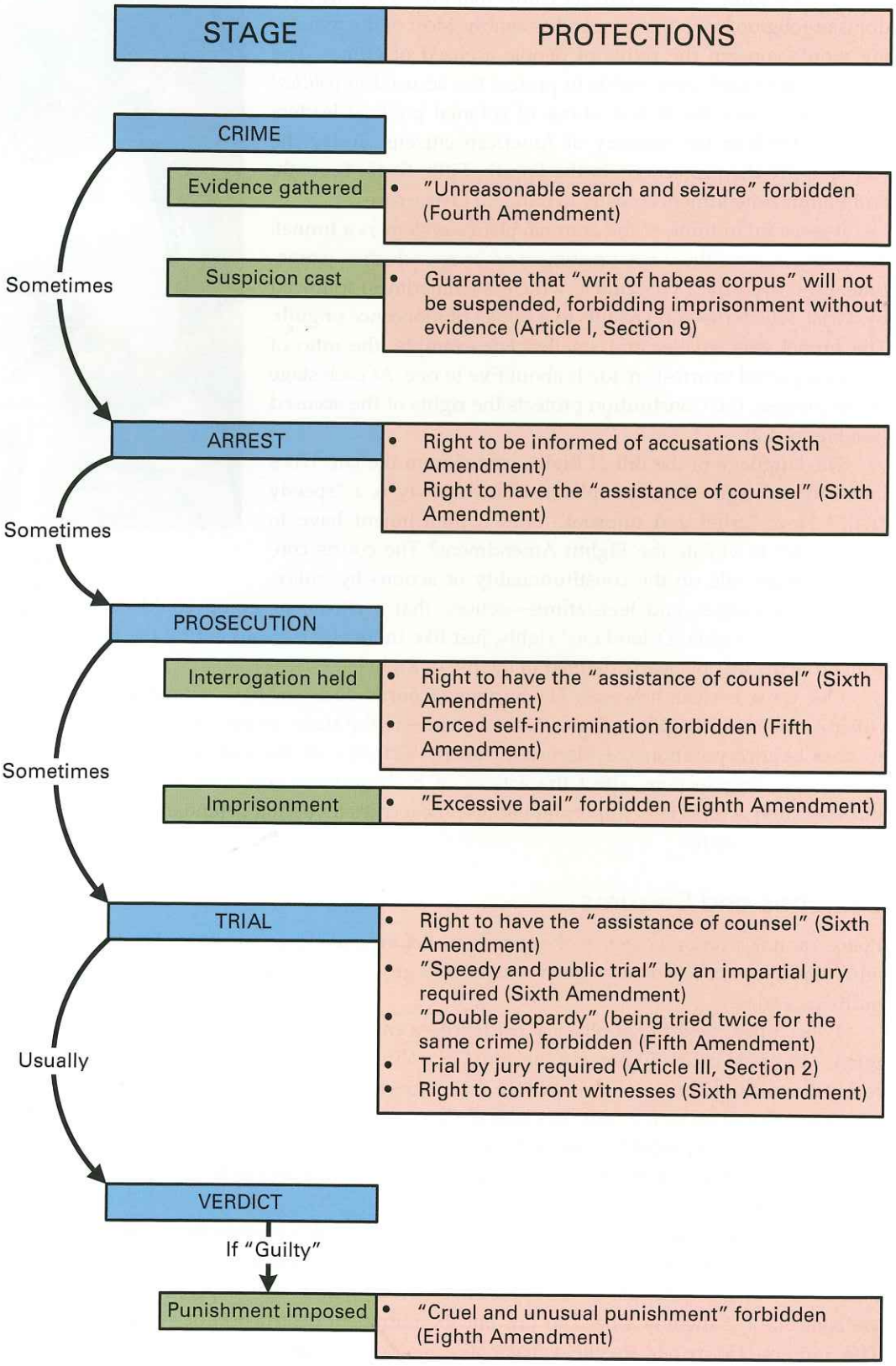
probable cause
Reasonable grounds for believing that a person is guilty of a crime. In order to make a lawful arrest, the police must have probable cause.

unreasonable searches and seizures
Obtaining evidence in an unlawful manner, a practice prohibited by the Fourth Amendment. The police must have probable cause and/or a search warrant in order to make a legal and proper search for and seizure of incriminating evidence and seize such evidence.

search warrant
A written authorization from a court specifying the area to be searched and what the police may search for.

FIGURE 4.2 THE CONSTITUTION AND THE STAGES OF THE CRIMINAL JUSTICE SYSTEM

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



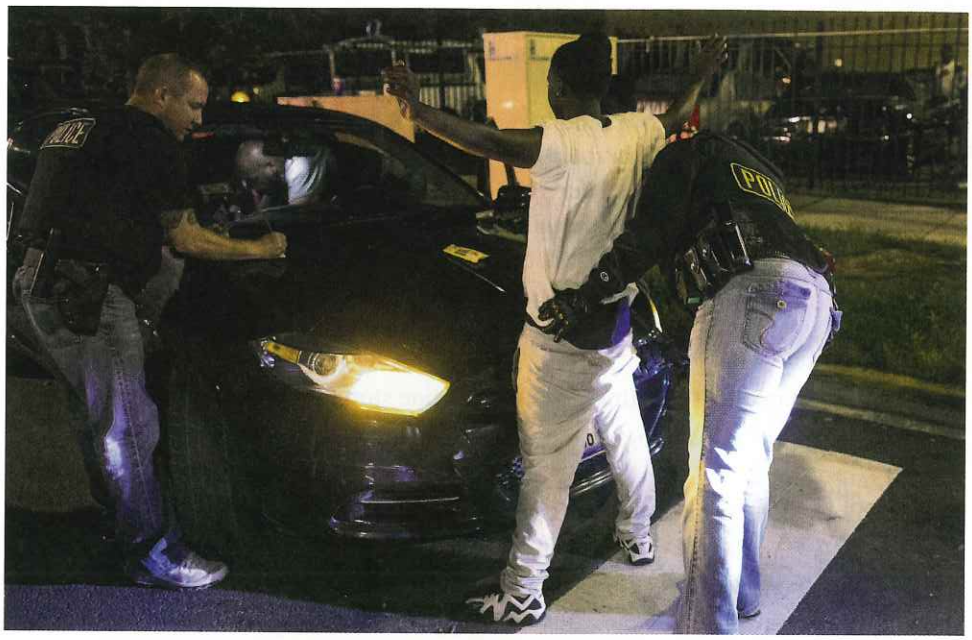
evidence after an illegal stop of a person if they conducted their search after learning that the person had a valid outstanding arrest warrant that was unconnected to the conduct that prompted the stop.[77]

In various rulings, the Supreme Court has upheld a wide range of warrantless searches, including

- aerial searches to secure key evidence in cases involving marijuana growing and environmental violations[78]
- breath tests of motorists[79]
- roadside checkpoints in which police randomly examine drivers for signs of intoxication[80]
- the use of narcotics-detecting dogs at a routine stop for speeding[81]
- the search of a passenger and car following a routine check of the car's registration[82]
- "hot pursuit" of criminal suspects[83]
- car stops[84] and "stop-and-frisk"[85] encounters with passengers and pedestrians when they are based on reasonable suspicion of criminal activity, rather than the higher standard of probable cause
- mandatory drug testing of those in safety sensitive positions[86] and high school athletes,[87] even those who are not suspected of using drugs
- the search of K–12 students with only a reasonable chance of finding evidence of wrongdoing, rather than probable cause[88]
- strip-searching anyone arrested for any offense before admitting them to jails, even if the officials do not suspect the presence of contraband[89]
- taking and analyzing a cheek swab of an arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure.[90]

However, some decisions have offered more protection against searches. The Court has held that police may not

- search a car if there is no threat to their safety, although they may order a driver and passengers out of a car while issuing a traffic citation and may search for weapons to protect themselves from danger[91]
- use highway checkpoints designed to detect ordinary criminal wrongdoing, such as possessing illegal drugs[92]
- stop and frisk a person on the basis of an anonymous tip that the person is carrying a gun[93]
- use a thermal imaging device to detect abnormal heat (needed for growing marijuana) in a home[94]
- install a GPS device on a target's vehicle and use that device to monitor the vehicle's movements without a search warrant[95]
- search a cell phone without a warrant in most circumstances[96]
- extend a traffic stop in order to conduct a dog sniff for drugs absent reasonable suspicion[97]
- test the blood of motorists without a warrant[98]
- inspect hotel and motel guest registries without permission from a judge[99]
- search a vehicle incident to an arrest unless it is reasonable to believe the arrestee might access the vehicle at the time of the search (to obtain a weapon or destroy evidence, for example) or that the vehicle contains evidence of the specific offense of an arrest; they cannot search vehicles for evidence of other crimes.[100]



Determining the limits of the protection against unreasonable search and seizure has occupied the Supreme Court for decades. Here Chicago police officers search a vehicle and a woman.

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

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

What happens if evidence used in court was obtained through unreasonable search and seizure? In a 1914 decision, the Supreme Court established the **exclusionary rule**, which prevents prosecutors from introducing illegally seized evidence in court. Decades later the Cleveland police broke into Dollree Mapp's home, looking for a suspected bombing fugitive. While there, they searched it and found a cache of obscene materials. Mapp was convicted of possessing them. She appealed her case to the federal courts, claiming that since the police had no probable cause to search for obscene materials, the evidence should not have been used against her. In an important decision, ***Mapp v. Ohio***, the Supreme Court ruled that the evidence had been seized illegally and reversed Mapp's conviction. Since then, the exclusionary rule, treated as part of the Fourth Amendment, has been incorporated within the rights that restrict the states as well as the federal government.

WHY IT MATTERS TODAY

The Exclusionary Rule

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

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

Since the 1980s, the Supreme Court has made some exceptions to the exclusionary rule, including allowing the use of illegally obtained evidence when this evidence leads police to a discovery that they eventually would have made without it.[101] The justices also have decided to establish a good-faith exception to the rule; evidence can

YOU ARE THE JUDGE

THE CASE OF MS. MONTOYA

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

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

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

Montoya's lawyer argued that the tests constituted unreasonable search and seizure and that her arrest and conviction should be set aside. There was, he said, no direct evidence that would have led the officials to suspect cocaine smuggling. The government argued that the arrest had followed from a set of odd facts leading to a reasonable suspicion that something was amiss.

YOU BE THE JUDGE

Did Montoya's arrest violate the Fourth Amendment protection against unreasonable search and seizure?

DECISION

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

be used in court if the police who seized it mistakenly thought they were operating under a constitutionally valid warrant[102] or reasonably thought they were following the law. [103] In 1995 the Court held that the exclusionary rule does not bar evidence obtained illegally as the result of clerical errors.[104] In 2006 it held that a police failure to abide by the rule requiring them to knock and announce themselves before entering a home was not a justification for suppressing the evidence they found upon entry with a warrant.[105] The Court has even allowed evidence illegally obtained from a banker to be used to convict one of his customers.[106] In a 2009 decision, *Herring v. United States*, the Court held that the exclusionary rule does not apply when there is isolated police negligence rather than systematic error or reckless disregard of constitutional requirements.

THE WAR ON TERRORISM The *USA Patriot Act*, passed just six weeks after the September 11, 2001, terrorist attacks, gave the government broad new powers to engage in wiretapping and surveillance when investigating terrorism suspects. Attorney General John Ashcroft also eased restrictions on domestic spying in counterterrorism operations, allowing agents to monitor political or religious groups without any connection to a criminal investigation. The Patriot Act gave the federal government the power to examine a terrorist suspect's records held by third parties, such as doctors,

libraries, bookstores, universities, and Internet service providers. It also allowed the government to search private property without probable cause and without notifying the owner until after the search had been executed, limiting the owner's opportunities to challenge the search. Congress reauthorized the law in 2006 with few changes.

Without the court-approved warrants ordinarily required for domestic spying, President George W. Bush in 2001 ordered the National Security Agency (NSA) to monitor the international telephone calls and e-mail messages of people inside the United States. In 2008 Congress overhauled the nation's surveillance law, the Foreign Intelligence Surveillance Act (FISA), allowing officials to use broad warrants to eavesdrop on large groups of foreign suspects and ending the requirement that officials obtain a warrant for each individual suspect, as long as they wiretapped only communications (phone calls, e-mail messages, and texts) to and from foreigners that happened to pass through American telecommunications switches. In order to wiretap Americans, however, officials must obtain individual warrants from the special FISA court—although in an emergency they are permitted to wiretap an American suspect for up to seven days without a court order.

The NSA tracked Americans' calls using numbers that had not been vetted in accordance with court-ordered procedures. Intelligence court judges ruled that under the "special needs" doctrine the NSA's collection and examination of Americans' communications data to track possible terrorists does not violate the Fourth Amendment. The NSA also collected and stored all phone records of American citizens and tracked their use of the Internet and their financial transactions. President Obama has proposed ending the systematic collection of data about Americans' calling, storing the bulk records at phone companies, and requiring the NSA to receive judicial permission before obtaining specific records.

Self-Incrimination

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

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

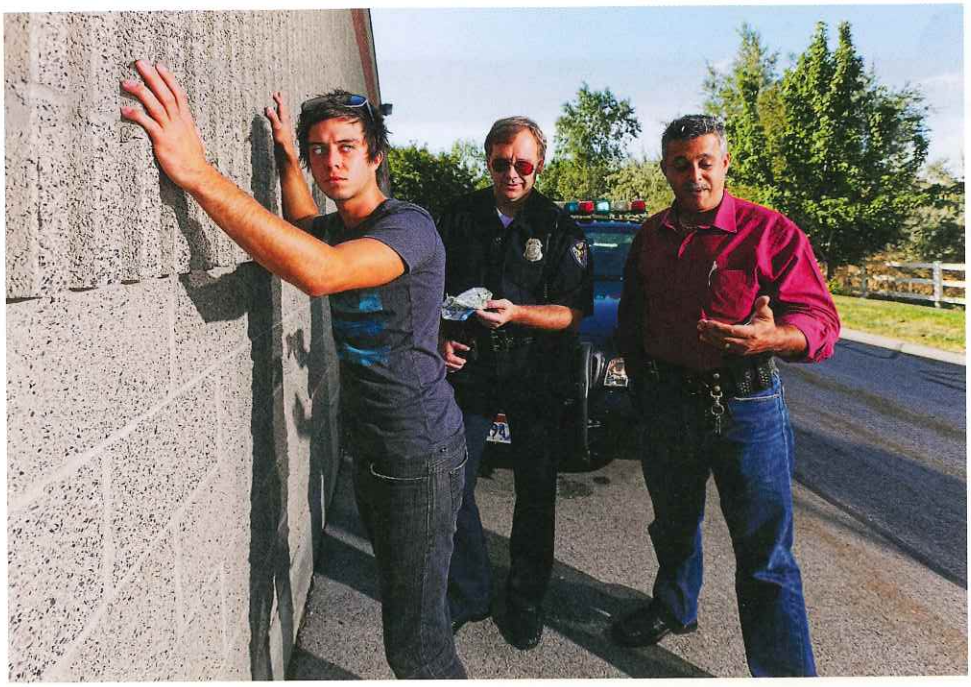
self-incrimination
Being a witness against oneself. The Fifth Amendment forbids involuntary self-incrimination.

You have probably seen television shows in which an arrest is made and the arresting officers recite, often from memory, a set of rights to the arrestee. The recitation of these rights is authentic and originated from a famous court decision—perhaps the most important modern decision in criminal law—involving an Arizona man named Ernesto Miranda.[107]

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

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

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



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

Ironically, when Ernesto Miranda himself was murdered, police read the suspect in his murder his "Miranda rights."

In the decades since the *Miranda* decision, the Supreme Court has made a number of exceptions to its requirements. In 1991, for example, the Court held that a coerced confession introduced in a trial does not automatically taint a conviction. If other evidence is enough for a conviction, then the coerced confession is a "harmless error" that does not necessitate a new trial.[108] The Court has also declared that criminal suspects seeking to protect their right to remain silent must clearly state they are invoking it.[109]

Nevertheless, in 2000 in *Dickerson v. U.S.*, the Court made it clear that it supported the *Miranda* decision and that Congress was not empowered to change it. In 2010 the Court held that police may take a second run at questioning a suspect who has invoked his or her Miranda rights, but they must wait until 14 days after the suspect has been released from custody.[110] In 2011 the Court declared that officials must take greater care to explain rights to children when they question them.[111]

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

The Right to Counsel

A crucial *Miranda* right is the right to counsel. The **Sixth Amendment** has always guaranteed the right to counsel in federal courts. In state courts a guaranteed right to counsel traces back only to 1932, when the Supreme Court, in *Powell v. Alabama*, ordered the states to provide an attorney for poor defendants in capital crime cases (cases in which the death penalty could be imposed). Most crimes are not capital crimes, however, and most crimes are tried in state courts. It was not until 1963, in ***Gideon v. Wainwright***,[112] that the Supreme Court extended the right to an attorney for everyone accused of a felony in a state court. Subsequently, the Court went a step further, holding that whenever imprisonment can be imposed, a lawyer must be provided for the accused (*Argersinger v. Hamlin* [1972]). In addition, the Supreme Court

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

Gideon v. Wainwright
The 1963 Supreme Court decision holding that anyone accused of a felony where imprisonment may be imposed has a right to a lawyer. The decision requires the government to provide a lawyer to anyone so accused who is too poor to afford one.

YOU ARE THE JUDGE

THE CASE OF THE ENTICED FARMER

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

Three months later, Congress changed federal law to make the receipt of such materials illegal. Finding his name on the mailing list of the California bookstore, two government agencies repeatedly enticed Jacobson to send away for sexually explicit photographs of children. (They did so by creating five fictitious organizations and a bogus pen pal who solicited Jacobson to order the photographs.) After 26 months of enticement, Jacobson finally ordered a magazine. He was then arrested for violating the Child Protection Act.

He was convicted of receiving child pornography through the mail, which he undoubtedly did. Jacobson claimed, however, that he had been entrapped into committing the crime.

YOU BE THE JUDGE

Was Jacobson an innocent victim of police entrapment? Would he have sought child pornography if he had not been enticed to do so?

DECISION

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

has found that a trial court's erroneous deprivation of a criminal defendant's right to *choose* a counsel entitles him or her to reversal of his conviction.[113] In 2011, however, the Court held that in civil contempt cases carrying the potential for imprisonment states are not obligated to provide counsel.[114]

Trials

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

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

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

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

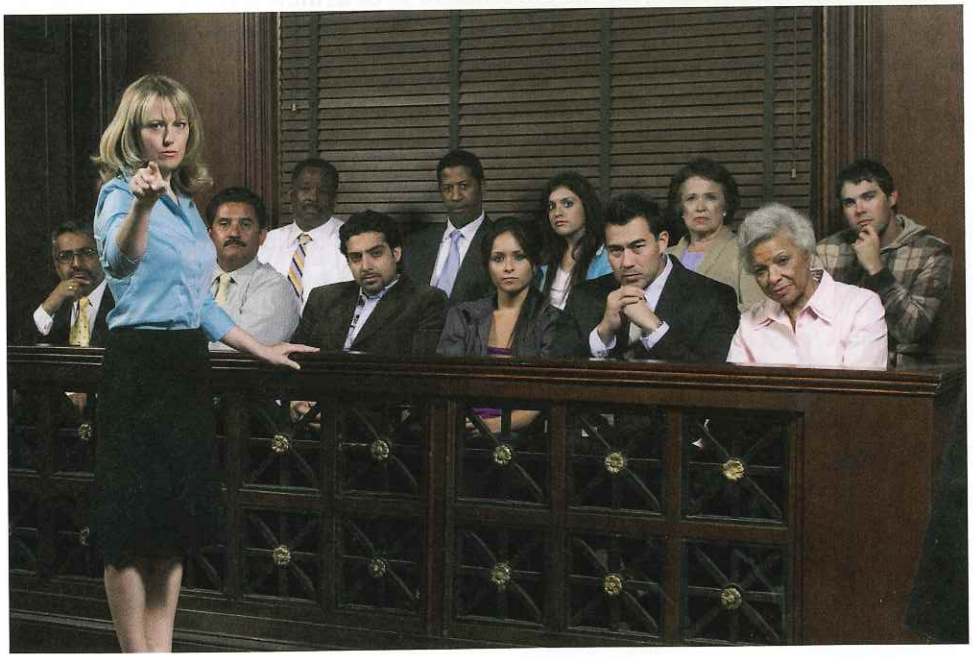
The plea-bargaining process works to the advantage of both sides; it saves the state the time and money that would be spent on a trial, and it permits defendants

who think they might be convicted of a serious charge to plead guilty to a lesser one. A study of sentencing patterns in three California counties discovered that a larger proportion of defendants who went to trial ended up going to prison compared with those who pleaded guilty and had no trial. In answer to their question "Does it pay to plead guilty?" the researchers gave a qualified yes.[115] Good or bad, plea bargaining is a practical necessity. Only a vast increase in resources would allow the court system to cope with a trial for every defendant. In 2012 the Supreme Court recognized the dominant role plea bargaining plays in criminal law when it held in two cases that defendants have a right to an effective lawyer during pretrial negotiations.[116]

The defendants in the 300,000 cases per year that actually go to trial are entitled to many rights, including the right to a speedy trial by an impartial jury, which is guaranteed by the Sixth Amendment. An impartial jury includes one that is not racially biased (one from which potential jurors of the defendant's race have been excluded).[117] Lawyers for both sides spend hours questioning prospective jurors in a major case. Defendants, of course, prefer a jury that is biased toward them, and those who can afford it do not leave jury selection to chance. A sophisticated technology of jury selection has developed. Jury consultants—often psychologists or other social scientists—develop profiles of jurors likely to be sympathetic or hostile to a defendant.

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

In recent years, the Supreme Court has aggressively defended the jury's role in the criminal justice process—and limited the discretion of judges in sentencing. To protect jury deliberations, jurors are forbidden to testify later about them.[118] In several cases, the Court has held that, other than a previous conviction, any fact that might increase the penalty for a convicted defendant beyond what the law usually allows or what such defendants usually receive must be submitted to a jury and proved beyond a reasonable doubt.[119] These decisions ensure that the judge's authority to sentence derives wholly from the jury's verdict.



The right to a fair trial is central to our view of justice. Yet trials are relatively rare in the U.S. Most cases are decided through plea bargaining.

The Sixth Amendment also gives defendants the right to confront the witnesses against them. The Supreme Court has held that prosecutors cannot introduce testimony into a trial unless the accused can cross-examine the witness.[120] This is so even if the witness is providing facts such as lab reports.[121] Moreover, defendants have the right to question those who prepare such reports.[122]

Defendants also have a right to know about evidence that may exonerate them. In 2010 the Supreme Court held that due process prohibits a state from withholding evidence that is favorable to a defendant's defense and key to determining a defendant's guilt or punishment.[123]

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

In a historic decision in 2006 (*Hamdan v. Rumsfeld*), the Supreme Court held that the procedures President Bush had approved for trying prisoners at Guantánamo Bay lacked congressional authorization and violated both the Uniform Code of Military Justice and the Geneva Conventions. The flaws the Court cited were (1) the failure to guarantee defendants the right to attend their trial and (2) the prosecution's ability under the rules to introduce hearsay evidence, unsworn testimony, and evidence obtained through coercion. Equally important, the Court declared, the Constitution did not empower the president to establish judicial procedures on his own.

Later that year, Congress passed the Military Commissions Act (MCA), which specifically authorized military commissions to try alien, unlawful enemy combatants and denied such combatants access to the courts. It also denied access for those alien detainees who were waiting for the government to determine whether they were enemy combatants. The MCA allowed the U.S. government to detain such aliens indefinitely without prosecuting them in any manner.

However, in 2008, the Supreme Court held in *Boumediene v. Bush* that foreign terrorism suspects held at Guantánamo Bay have constitutional rights to challenge their detention in U.S. courts. "The laws and Constitution are designed to survive, and remain in force, in extraordinary times," the Court proclaimed as it declared unconstitutional the provision of the MCA that stripped the federal courts of jurisdiction to hear habeas corpus petitions from detainees seeking to challenge their designation as enemy combatants. The Court also found that the procedure established for reviewing enemy combatant status failed to offer the fundamental procedural protections of habeas corpus.

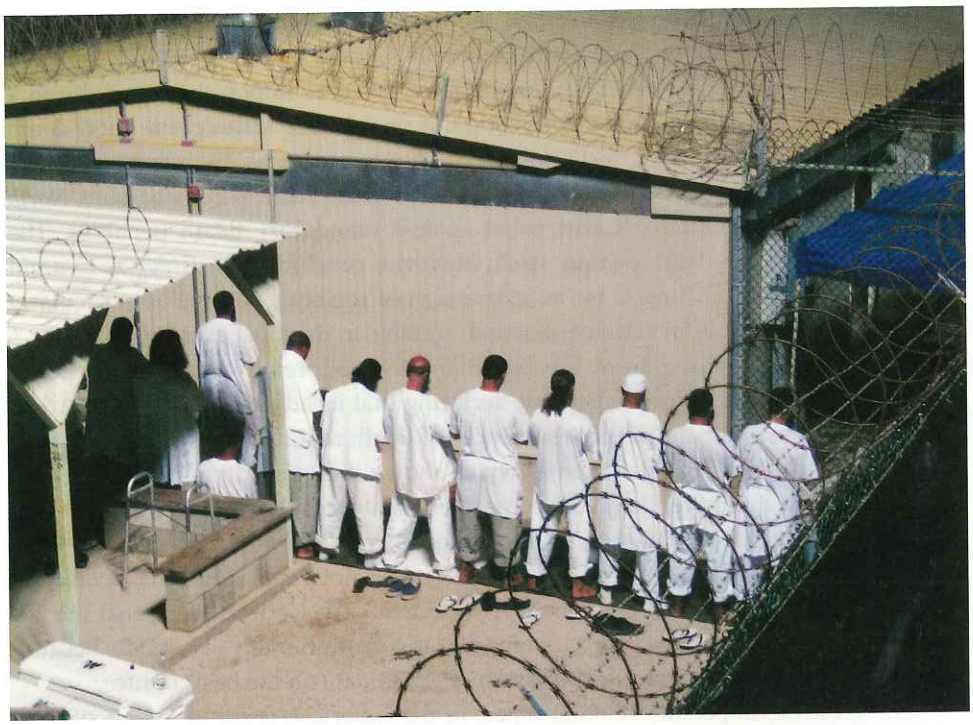
Cruel and Unusual Punishment

Eighth Amendment
The constitutional amendment that forbids cruel and unusual punishment.

cruel and unusual punishment
Court sentences prohibited by the Eighth Amendment.

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

What constitutes cruel and unusual punishment? In 2011 the Supreme Court upheld a lower court order that found that conditions in California's overcrowded



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

prisons were so bad that they violated the ban on cruel and unusual punishment and thus the state had to release some of the prisoners.[124] The Court has also held that it is a violation of the cruel and unusual punishment clause to sentence a juvenile offender to life in prison without parole for a crime.[125] (For another case related to cruel and unusual punishment, see "You Are the Judge: The Case of the First Offender," which follows below.) Almost the entire constitutional debate over cruel and unusual punishment, however, has centered on the death penalty. More than 3,000 people are currently on death row, nearly half of them in California, Texas, and Florida.[126]

YOU ARE THE JUDGE

THE CASE OF THE FIRST OFFENDER

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

YOU BE THE JUDGE

Was Harmelin's sentence cruel and unusual punishment?

DECISION

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

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

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

Shortly before retiring from the bench in 1994, Supreme Court justice Harry Blackmun denounced the death penalty, declaring that its administration "fails to deliver the fair, consistent and reliable sentences of death required by the Constitution" (*Callins v. Collins* [1994]). Social scientists have shown that minority murderers whose victims are white are more likely to receive death sentences than are white murderers or those whose victims are not white. Nevertheless, in ***McCleskey v. Kemp*** (1987), the Supreme Court concluded that the death penalty does not violate the equal protection of the law guaranteed by the Fourteenth Amendment. The Court insisted that the unequal distribution of death penalty sentences was constitutionally acceptable because there was no evidence that juries intended to discriminate on the basis of race.

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

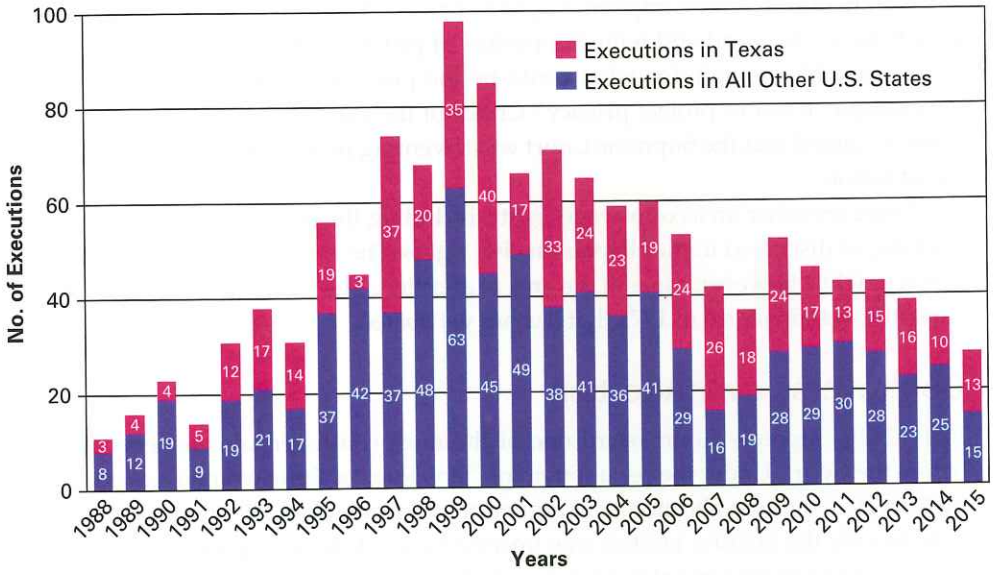
Today, the death penalty remains a part of the American criminal justice system. More than 1,400 persons have been executed since the Court's decision in *Gregg*. The Court has also made it more difficult for death row prisoners to file petitions that would force legal delays and appeals to stave off execution, and it has made it easier for prosecutors to exclude jurors opposed to the death penalty (*Wainwright v. Witt*, 1985). The Court has also allowed "victim impact" statements—statements that describe murder victims and detail how their families have suffered on account of losing them—to be used against defendants. Most Americans support the death penalty,[127] although there is evidence that racism plays a role in the opinions of whites.[128] It is interesting to note that the European Union prohibits the death penalty in member countries.

In recent years evidence that courts have sentenced innocent people to be executed has reinvigorated the debate over the death penalty. Attorneys have employed the new technology of DNA evidence in a number of states to obtain the release of dozens of death row prisoners. In 1999 Governor George Ryan of Illinois declared a moratorium on executions in his state after researchers (including college students at Northwestern University) proved that 13 people on death row were innocent. Later, he commuted the death sentences of all prisoners in the state. In general, there has been a decline in executions, as you can see in Figure 4.3.

In addition, the Supreme Court has placed constraints on the application of the death penalty, holding that the Constitution bars the execution of the mentally ill (*Ford v. Wainwright* [1986]); mentally retarded persons (*Atkins v. Virginia* [2002]) or the intellectually disabled (*Hall v. Florida* [2014]); those under the age of 18 when they commit their crimes (*Roper v. Simmons* [2005]); and those convicted of raping women (*Coker v. Georgia* [1977]) and children (*Kennedy v. Louisiana* [2008]) where the crime did not result, and was not intended to result, in the victim's death. In *Kennedy*, the Court ruled out the death penalty where the victim is an individual—as opposed to offenses against the state, like treason or espionage—where the victim's life was not taken. In addition, the Court has required that a jury, not just a judge, find that an aggravating circumstance is associated with a murder when a state requires such a circumstance for imposing the death penalty (*Ring v. Arizona* [2002]). The Court has also required lawyers for defendants in death penalty cases to make reasonable efforts to fight for their clients at a trial's sentencing phase (*Rompilla v. Beard* [2005]).

FIGURE 4.3 THE DECLINE OF EXECUTIONS

Supreme Court decisions, new DNA technology, and perhaps a growing public concern about the fairness of the death penalty have resulted in a dramatic drop in the number of death sentences—from 98 in 1999 to 28 in 2015. Texas led the nation in executions, representing 46 percent of the national total in 2015. Texas prosecutors and juries are no more apt to seek and impose death sentences than those in other states that have the death penalty. However, once a death sentence is imposed there, prosecutors, the courts, the pardon board, and the governor are united in moving the process along.



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

Debate over the death penalty continues. In 2008 the Supreme Court upheld the use of lethal injection, concluding that those who challenge this method of execution must show not only that a state's method "creates a demonstrated risk of severe pain," but also that there are alternatives that are "feasible" and "readily implemented" that would "significantly" reduce that risk.[129]

THE RIGHT TO PRIVACY

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

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

Is There a Right to Privacy?

Nowhere does the Bill of Rights explicitly say that Americans have a **right to privacy**. Clearly, however, the First Congress had a concept of privacy in mind when it crafted the first ten amendments. Freedom of religion implies the right to exercise private beliefs. The Third Amendment prohibits the government from forcing citizens to quarter soldiers in their homes during times of peace. Protections against "unreasonable searches and seizures" make persons secure in their homes. Private property cannot be seized without "due process of law." In 1928 Justice Louis Brandeis hailed privacy as

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

"the right to be left alone—the most comprehensive of the rights and the most valued by civilized men."

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

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

Controversy over Abortion

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

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

Since *Roe v. Wade*, there have been more than 53 million legal abortions in the United States. Abortion is a common experience: about one fifth of all pregnancies (excluding miscarriages) end in abortion. At current rates, about 3 in 10 American women will have had an abortion by the time they reach age 45. Moreover, a broad cross section has abortions. Fifty-seven percent of women having abortions are in their twenties; 61 percent have one or more children; 45 percent have never married; 42 percent have incomes below the federal poverty level; and 78 percent report a religious affiliation. No racial or ethnic group makes up a majority: 36 percent of women obtaining abortions are white non-Hispanic, 30 percent are black non-Hispanic, 25 percent are Hispanic, and 9 percent are of other racial backgrounds.[130]

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

Planned Parenthood v. Casey
A 1992 case in which the Supreme Court loosened its standard for evaluating restrictions on abortion from one of "strict scrutiny" of any restraints on a "fundamental right" to abortion to one in which regulations not impose an "undue burden" on women.

In 1992, in ***Planned Parenthood v. Casey***, the Court changed its standard for evaluating restrictions on abortion from one of "strict scrutiny" of any restraints on

Abortion is perhaps the nation's most divisive issue, raising strong emotions on both sides of the debate. Here pro-life activists pray across the street from the Washington, D.C., offices of Planned Parenthood, an organization that provides reproductive services, health care, and abortions to many low-income women.

a "fundamental right" to one of "undue burden," which permits considerably more regulation. The Court upheld a 24-hour waiting period, a parental or judicial consent requirement for minors, and a requirement that doctors present women with information on the risks of the operation. The Court struck down a provision requiring a married woman to tell her husband of her intent to have an abortion; however, the majority of the justices also affirmed their commitment to the basic right to abortion.

One area of controversy has involved a procedure termed by its opponents as "partial birth" abortion. In 2003 Congress passed a law banning partial birth abortions, providing an exception to the ban in order to save the life of a mother but no exception to preserve a mother's health, on the grounds that the procedure was never necessary for a woman's health. In *Gonzales v. Carhart* (2007), the Supreme Court upheld that law, finding it was specific and did not subject women to significant health risks or impose an undue burden on women. The Court also took pains to point out that the law would not affect most abortions, which are performed early in a pregnancy, and that safe alternatives to the prohibited procedure are available.

Americans are deeply divided on the issue of abortion (see Figure 4.4). Proponents of choice believe that access to legal abortions is essential if women are to be fully autonomous human beings and are to be protected from the dangers of illegal abortions. Opponents call themselves pro-life because they believe that the fetus is fully human and that an abortion therefore deprives a human of the right to life. These positions are irreconcilable; wherever a politician stands on this divisive issue, a large number of voters will be enraged.

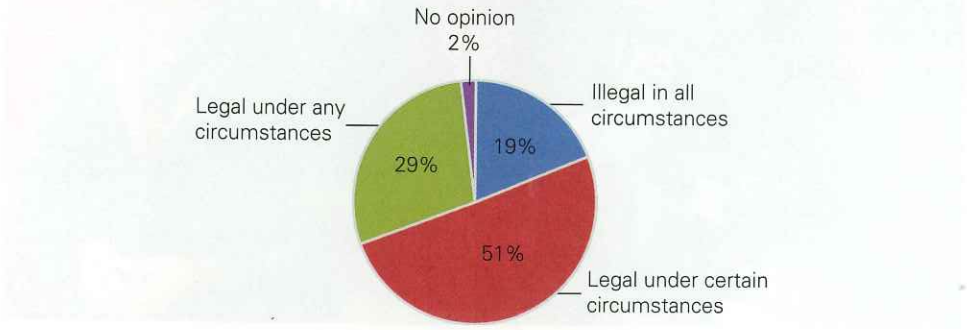
With passions running so strongly on the issue, some pro-life advocates have taken extreme action. In the last two decades, abortion opponents have bombed a number of abortion clinics and murdered several physicians who performed abortions.

As mentioned earlier in the section on the right to assemble, women's right to obtain abortions has clashed with protesters' rights to free speech and assembly. The Supreme Court has consolidated the right to abortion established in *Roe* with the protection of a woman's right to enter an abortion clinic to exercise that right and the government's interest in preserving order by upholding buffer zones around abortion clinics.[131] In 1994 Congress passed the Freedom of Access to Clinic Entrances Act, which makes it a federal crime to intimidate abortion providers or women seeking abortions. The Supreme Court also decided that abortion clinics could sue violent anti-abortion protest groups for damages.[132]

FIGURE 4.4 THE ABORTION DEBATE

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

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



SOURCE: Gallup Poll, May 4–8, 2016

Recently many state legislatures have passed laws restricting abortion providers, limiting medication abortion, increasing abortion reporting requirements, restricting acceptable reasons for abortions, limiting insurance coverage of abortion, and banning abortions after 20 weeks post-fertilization. As a result of these laws it is difficult for women to obtain an abortion in some parts of the country.

In 2016 the Supreme Court offered relief to those seeking to have an abortion. The state of Texas had required that physicians performing abortions have active admitting privileges at a hospital near the abortion facility and that the facility meet the minimum standards for ambulatory surgical centers under Texas law. The goal of these provisions was to limit abortions, and they were succeeding as most abortion facilities would have to close. Following its decision in *Casey*, the Court held in *Whole Woman's Health v. Hellerstedt* that both requirements placed a substantial obstacle in the path of women seeking an abortion and thus violated the Constitution by creating an undue burden on abortion access. This decision is sure to generate more challenges to state restrictions.

UNDERSTANDING CIVIL LIBERTIES

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

American government is both democratic and constitutional. America is democratic because it is governed by officials who are elected by the people and, as such, are accountable for their actions. The American government is constitutional because it has a fundamental organic law, the Constitution, that limits the things that government may do. By restricting the government, the Constitution limits what the people can empower the government to do. The democratic and constitutional components of government can produce conflicts, but they also reinforce one another.

Civil Liberties and Democracy

The rights ensured by the First Amendment—particularly the freedoms of speech, press, and assembly—are essential to a democracy. If people are to govern themselves, they need access to all available information and opinions in order to make intelligent

and responsible decisions. If the right to participate in public life is to be open to all, then Americans—in all their diversity—must have the right to express their opinions.

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

With some notable exceptions, the United States has done a good job of protecting the rights of diverse interests to express themselves. There is little danger that a political or economic elite will muffle dissent. Similarly, the history of the past five decades is one of increased protections for defendants' rights, and defendants are typically not among the elite. Ultimately, the courts have decided what constitutional guarantees mean in practice. Although federal judges, appointed for life, are not directly accountable to popular will,[133] "elitist" courts have often protected civil liberties from the excesses of majority rule.

Civil Liberties and the Scope of Government

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

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

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

REVIEW THE CHAPTER

THE BILL OF RIGHTS

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

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

FREEDOM OF RELIGION

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

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

FREEDOM OF EXPRESSION

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

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

FREEDOM OF ASSEMBLY

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

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

RIGHT TO BEAR ARMS

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

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

DEFENDANTS' RIGHTS

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

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

THE RIGHT TO PRIVACY

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

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