Chapter 4

Civil Liberties

Figure 4.1 Those concerned about government surveillance have found a champion in Edward Snowden, a former contractor for the U.S. government who leaked thousands of classified documents to journalists in June 2013. These documents revealed the existence of multiple global surveillance programs run by the National Security Agency. (credit: modification of work by Bruno Sanchez-Andrade Nuño)

Chapter Outline

Introduction

Americans have recently confronted situations in which government officials appeared not to provide citizens their basic freedoms and rights. Protests have erupted nationwide in response to the deaths of African Americans during interactions with police. Many people were deeply troubled by the revelations of Edward Snowden (**Figure 4.1**) that U.S. government agencies are conducting widespread surveillance, capturing not only the conversations of foreign leaders and suspected terrorists but also the private communications of U.S. citizens, even those not suspected of criminal activity.

These situations are hardly unique in U.S. history. The framers of the Constitution wanted a government that would not repeat the abuses of individual liberties and rights that caused them to declare independence from Britain. However, laws and other "parchment barriers" (or written documents) alone have not protected freedoms over the years; instead, citizens have learned the truth of the old saying (often attributed to Thomas Jefferson but actually said by Irish politician John Philpot Curran), "Eternal vigilance is the price of liberty." The actions of ordinary citizens, lawyers, and politicians have been at the core of a vigilant effort to protect constitutional liberties.

But what are those freedoms? And how should we balance them against the interests of society and other individuals? These are the key questions we will tackle in this chapter.

4.1 What Are Civil Liberties?

Learning Objectives

By the end of this section, you will be able to:

- Define civil liberties and civil rights
- Describe the origin of civil liberties in the U.S. context
- Identify the key positions on civil liberties taken at the Constitutional Convention
- Explain the Civil War origin of concern that the states should respect civil liberties

The **U.S. Constitution**—in particular, the first ten amendments that form the Bill of Rights—protects the freedoms and rights of individuals. It does not limit this protection just to citizens or adults; instead, in most cases, the Constitution simply refers to "persons," which over time has grown to mean that even children, visitors from other countries, and immigrants—permanent or temporary, legal or undocumented—enjoy the same freedoms when they are in the United States or its territories as adult citizens do. So, whether you are a Japanese tourist visiting Disney World or someone who has stayed beyond the limit of days allowed on your visa, you do not sacrifice your liberties. In everyday conversation, we tend to treat freedoms, liberties, and rights as being effectively the same thing—similar to how separation of powers and checks and balances are often used as if they are interchangeable, when in fact they are distinct concepts.

DEFINING CIVIL LIBERTIES

To be more precise in their language, political scientists and legal experts make a distinction between civil liberties and civil rights, even though the Constitution has been interpreted to protect both. We typically envision **civil liberties** as being limitations on government power, intended to protect freedoms that governments may not legally intrude on. For example, the First Amendment denies the government the power to prohibit "the free exercise" of religion; the states and the national government cannot forbid people to follow a religion of their choice, even if politicians and judges think the religion is misguided, blasphemous, or otherwise inappropriate. You are free to create your own religion and recruit followers to it (subject to the U.S. Supreme Court deeming it a religion), even if both society and government disapprove of its tenets. That said, the way you practice your religion may be regulated if it impinges on the rights of others. Similarly, the Eighth Amendment says the government cannot impose "cruel and unusual punishments" on individuals for their criminal acts. Although the definitions of *cruel* and *unusual* have expanded over the years, as we will see later in this chapter, the courts have generally and consistently interpreted this provision as making it unconstitutional for government officials to torture suspects.

Civil rights, on the other hand, are guarantees that government officials will treat people equally and that decisions will be made on the basis of merit rather than race, gender, or other personal characteristics. Because of the Constitution's civil rights guarantee, it is unlawful for a school or university run by a state government to treat students differently based on their race, ethnicity, age, sex, or national origin. In the 1960s and 1970s, many states had separate schools where only students of a certain race or gender were able to study. However, the courts decided that these policies violated the civil rights of students who could not be admitted because of those rules.[1]

The idea that Americans—indeed, people in general—have fundamental rights and liberties was at the core of the arguments in favor of their independence. In writing the **Declaration of Independence** in 1776, Thomas Jefferson drew on the ideas of John Locke to express the colonists' belief that they had

certain inalienable or natural rights that no ruler had the power or authority to deny to his or her subjects. It was a scathing legal indictment of King George III for violating the colonists' liberties. Although the Declaration of Independence does not guarantee specific freedoms, its language was instrumental in inspiring many of the states to adopt protections for civil liberties and rights in their own constitutions, and in expressing principles of the founding era that have resonated in the United States since its independence. In particular, Jefferson's words "all men are created equal" became the centerpiece of struggles for the rights of women and minorities (**Figure 4.2**).

Figure 4.2 Actors and civil rights activists Sidney Poitier (left), Harry Belafonte (center), and Charlton Heston (right) on the steps of the Lincoln Memorial on August 28, 1963, during the March on Washington.

Link to Learning

Founded in 1920, the **American Civil Liberties Union (ACLU) (https://www.openstaxcollege.org/l/29aclu)** is one of the oldest interest groups in the United States. The mission of this non-partisan, not-for-profit organization is "to defend and preserve the individual rights and liberties guaranteed to every person in this country by the Constitution and laws of the United States." Many of the Supreme Court cases in this chapter were litigated by, or with the support of, the ACLU. The ACLU offers a **listing of state and local chapters (https://www.openstaxcollege.org/l/29acluaffiliate)** on their website.

CIVIL LIBERTIES AND THE CONSTITUTION

The Constitution as written in 1787 did not include a Bill of Rights, although the idea of including one was proposed and, after brief discussion, dismissed in the final week of the Constitutional Convention. The framers of the Constitution believed they faced much more pressing concerns than the protection of civil rights and liberties, most notably keeping the fragile union together in the light of internal unrest and external threats.

Moreover, the framers thought that they had adequately covered rights issues in the main body of the

document. Indeed, the Federalists did include in the Constitution some protections against legislative acts that might restrict the liberties of citizens, based on the history of real and perceived abuses by both British kings and parliaments as well as royal governors. In Article I, Section 9, the Constitution limits the power of Congress in three ways: prohibiting the passage of bills of attainder, prohibiting ex post facto laws, and limiting the ability of Congress to suspend the writ of habeas corpus.

A bill of attainder is a law that convicts or punishes someone for a crime without a trial, a tactic used fairly frequently in England against the king's enemies. Prohibition of such laws means that the U.S. Congress cannot simply punish people who are unpopular or seem to be guilty of crimes. An ex post facto law has a retroactive effect: it can be used to punish crimes that were not crimes at the time they were committed, or it can be used to increase the severity of punishment after the fact.

Finally, the writ of habeas corpus is used in our common-law legal system to demand that a neutral judge decide whether someone has been lawfully detained. Particularly in times of war, or even in response to threats against national security, the government has held suspected enemy agents without access to civilian courts, often without access to lawyers or a defense, seeking instead to try them before military tribunals or detain them indefinitely without trial. For example, during the Civil War, President Abraham Lincoln detained suspected Confederate saboteurs and sympathizers in Union-controlled states and attempted to have them tried in military courts, leading the Supreme Court to rule in *Ex parte Milligan* that the government could not bypass the civilian court system in states where it was operating.[2]

During World War II, the Roosevelt administration interned Japanese Americans and had other suspected enemy agents—including U.S. citizens—tried by military courts rather than by the civilian justice system, a choice the Supreme Court upheld in *Ex parte Quirin* (**Figure 4.3**).[3] More recently, in the wake of the 9/11 attacks on the World Trade Center and the Pentagon, the Bush and Obama administrations detained suspected terrorists captured both within and outside the United States and sought, with mixed results, to avoid trials in civilian courts. Hence, there have been times in our history when national security issues trumped individual liberties.

Figure 4.3 Richard Quirin and seven other trained German saboteurs had once lived in the United States and had secretly returned in June 1942. Upon their capture, a military commission (shown here) convicted the men—six of them received death sentences. *Ex parte Quirin* set a precedent for the trial by military commission of any unlawful combatant against the United States. (credit: Library of Congress)

Debate has always swirled over these issues. The Federalists reasoned that the limited set of enumerated powers of Congress, along with the limitations on those powers in Article I, Section 9, would suffice, and no separate bill of rights was needed. Alexander Hamilton, writing as Publius in *Federalist* No. 84, argued that the Constitution was "merely intended to regulate the general political interests of the nation," rather than to concern itself with "the regulation of every species of personal and private concerns."

Hamilton went on to argue that listing some rights might actually be dangerous, because it would provide a pretext for people to claim that rights *not* included in such a list were not protected. Later, James Madison, in his speech introducing the proposed amendments that would become the Bill of Rights, acknowledged another Federalist argument: "It has been said, that a bill of rights is not necessary, because the establishment of this government has not repealed those declarations of rights which are added to the several state constitutions."[4] For that matter, the Articles of Confederation had not included a specific listing of rights either.

However, the Anti-Federalists argued that the Federalists' position was incorrect and perhaps even insincere. The Anti-Federalists believed provisions such as the elastic clause in Article I, Section 8, of the Constitution would allow Congress to legislate on matters well beyond the limited ones foreseen by the Constitution's authors; thus, they held that a bill of rights was necessary. One of the Anti-Federalists, Brutus, whom most scholars believe to be Robert Yates, wrote: "The powers, rights, and authority, granted to the general government by this Constitution, are as complete, with respect to every object to which they extend, as that of any state government—It reaches to every thing which concerns human happiness—Life, liberty, and property, are under its controul [sic]. There is the same reason, therefore, that the exercise of power, in this case, should be restrained within proper limits, as in that of the state governments."[5] The experience of the past two centuries has suggested that the Anti-Federalists may have been correct in this regard; while the states retain a great deal of importance, the scope and powers of the national government are much broader today than in 1787—likely beyond even the imaginings of the Federalists themselves.

The struggle to have rights clearly delineated and the decision of the framers to omit a bill of rights nearly derailed the ratification process. While some of the states were willing to ratify without any further guarantees, in some of the larger states—New York and Virginia in particular—the Constitution's lack of specified rights became a serious point of contention. The Constitution could go into effect with the support of only nine states, but the Federalists knew it could not be effective without the participation of the largest states. To secure majorities in favor of ratification in New York and Virginia, as well as Massachusetts, they agreed to consider incorporating provisions suggested by the ratifying states as amendments to the Constitution.

Ultimately, James Madison delivered on this promise by proposing a package of amendments in the First Congress, drawing from the Declaration of Rights in the Virginia state constitution, suggestions from the ratification conventions, and other sources, which were extensively debated in both houses of Congress and ultimately proposed as twelve separate amendments for ratification by the states. Ten of the amendments were successfully ratified by the requisite 75 percent of the states and became known as the Bill of Rights (**Table 4.1**).

Rights and Liberties Protected by the First Ten Amendments

First Amendment	Right to freedoms of religion and speech; right to assemble and to petition the government for redress of grievances
Second Amendment	Right to keep and bear arms to maintain a well-regulated militia
Third Amendment	Right to not house soldiers during time of war
Fourth Amendment	Right to be secure from unreasonable search and seizure
Fifth Amendment	Rights in criminal cases, including due process and indictment by grand jury for capital crimes, as well as the right not to testify against oneself

Table 4.1

Rights and Liberties Protected by the First Ten Amendments

Sixth Amendment	Right to a speedy trial by an impartial jury
Seventh Amendment	Right to a jury trial in civil cases
Eighth Amendment	Right to not face excessive bail, excessive fines, or cruel and unusual punishment
Ninth Amendment	Rights retained by the people, even if they are not specifically enumerated by the Constitution
Tenth Amendment	States' rights to powers not specifically delegated to the federal government

Table 4.1

Finding a Middle Ground

Debating the Need for a Bill of Rights

One of the most serious debates between the Federalists and the Anti-Federalists was over the necessity of limiting the power of the new federal government with a Bill of Rights. As we saw in this section, the Federalists believed a Bill of Rights was unnecessary—and perhaps even dangerous to liberty, because it might invite violations of rights that weren't included in it—while the Anti-Federalists thought the national government would prove adept at expanding its powers and influence and that citizens couldn't depend on the good judgment of Congress alone to protect their rights.

As George Washington's call for a bill of rights in his first inaugural address suggested, while the Federalists ultimately had to add the Bill of Rights to the Constitution in order to win ratification, and the Anti-Federalists would soon be proved right that the national government might intrude on civil liberties. In 1798, at the behest of President John Adams during the Quasi-War with France, Congress passed a series of four laws collectively known as the Alien and Sedition Acts. These were drafted to allow the president to imprison or deport foreign citizens he believed were "dangerous to the peace and safety of the United States" and to restrict speech and newspaper articles that were critical of the federal government or its officials; the laws were primarily used against members and supporters of the opposition Democratic-Republican Party.

State laws and constitutions protecting free speech and freedom of the press proved ineffective in limiting this new federal power. Although the courts did not decide on the constitutionality of these laws at the time, most scholars believe the Sedition Act, in particular, would be unconstitutional if it had remained in effect. Three of the four laws were repealed in the Jefferson administration, but one—the Alien Enemies Act—remains on the books today. Two centuries later, the issue of free speech and freedom of the press during times of international conflict remains a subject of public debate.

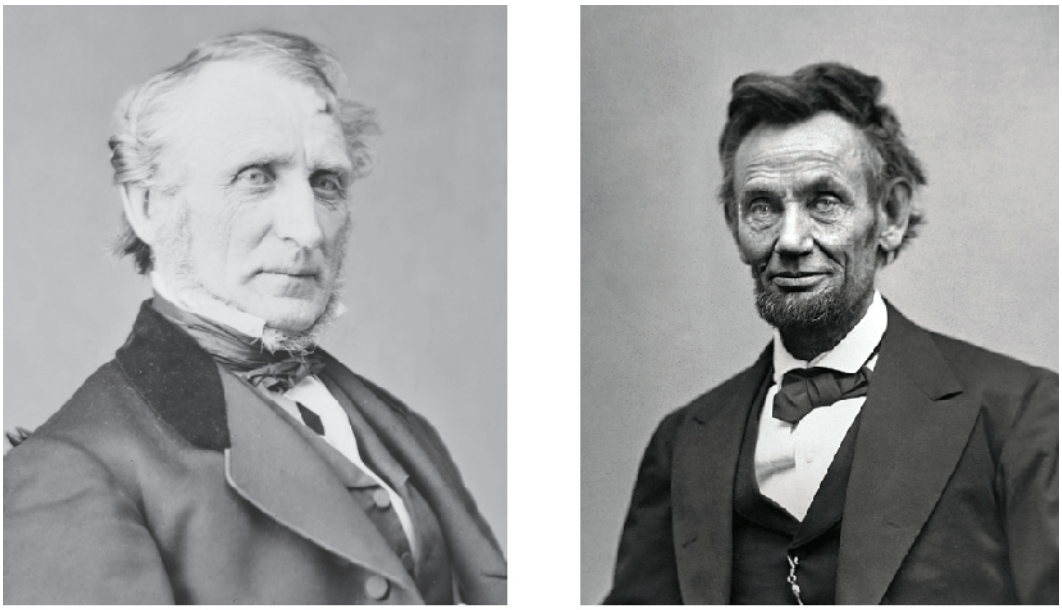
Should the government be able to restrict or censor unpatriotic, disloyal, or critical speech in times of international conflict? How much freedom should journalists have to report on stories from the perspective of enemies or to repeat propaganda from opposing forces?

EXTENDING THE BILL OF RIGHTS TO THE STATES

In the decades following the Constitution's ratification, the Supreme Court declined to expand the Bill of Rights to curb the power of the states, most notably in the 1833 case of *Barron v. Baltimore*.[6] In this case, which dealt with property rights under the Fifth Amendment, the Supreme Court unanimously decided that the Bill of Rights applied only to actions by the federal government. Explaining the court's

ruling, Chief Justice John Marshall wrote that it was incorrect to argue that "the Constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their [Federal] government."

In the wake of the Civil War, however, the prevailing thinking about the application of the Bill of Rights to the states changed. Soon after slavery was abolished by the Thirteenth Amendment, state governments—particularly those in the former Confederacy—began to pass "black codes" that restricted the rights of former slaves and effectively relegated them to second-class citizenship under their state laws and constitutions. Angered by these actions, members of the Radical Republican faction in Congress demanded that the laws be overturned. In the short term, they advocated suspending civilian government in most of the southern states and replacing politicians who had enacted the black codes. Their long-term solution was to propose two amendments to the Constitution to guarantee the rights of freed slaves on an equal standing with whites; these rights became the Fourteenth Amendment, which dealt with civil liberties and rights in general, and the Fifteenth Amendment, which protected the right to vote in particular (**Figure 4.4**). But, the right to vote did not yet apply to women or to Native Americans.



(a) (b)

Figure 4.4 Representative John Bingham (R-OH) (a) is considered the author of the Fourteenth Amendment, adopted on July 9, 1868. Influenced by his mentor, Salmon P. Chase, Bingham was a strong supporter of the antislavery cause; after Chase lost the Republican presidential nomination to Abraham Lincoln (b), Bingham became one of the president's most ardent supporters.

With the ratification of the Fourteenth Amendment in 1868, civil liberties gained more clarification. First, the amendment says, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," which is a provision that echoes the privileges and immunities clause in Article IV, Section 2, of the original Constitution ensuring that states treat citizens of other states the same as their own citizens. (To use an example from today, the punishment for speeding by an out-of-state driver cannot be more severe than the punishment for an in-state driver). Legal scholars and the courts have extensively debated the meaning of this privileges or immunities clause over the years; some have argued that it was supposed to extend the entire Bill of Rights (or at least the first eight amendments) to the states, while others have argued that only some rights are extended. In 1999, Justice John Paul Stevens, writing for a majority of the Supreme Court, argued in *Saenz v. Roe* that the clause protects the right to travel from one state to another.[7] More recently, Justice Clarence Thomas argued in the 2010 *McDonald v. Chicago* ruling that the individual right to bear arms applied to the states because of this

clause.[8]

The second provision of the Fourteenth Amendment that pertains to applying the Bill of Rights to the states is the **due process clause**, which says, "nor shall any State deprive any person of life, liberty, or property, without due process of law." This provision is similar to the Fifth Amendment in that it also refers to "due process," a term that generally means people must be treated fairly and impartially by government officials (or with what is commonly referred to as substantive due process). Although the text of the provision does not mention rights specifically, the courts have held in a series of cases that it indicates there are certain fundamental liberties that cannot be denied by the states. For example, in *Sherbert v. Verner* (1963), the Supreme Court ruled that states could not deny unemployment benefits to an individual who turned down a job because it required working on the Sabbath.[9]

Beginning in 1897, the Supreme Court has found that various provisions of the Bill of Rights protecting these fundamental liberties must be upheld by the states, even if their state constitutions and laws do not protect them as fully as the Bill of Rights does—or at all. This means there has been a process of **selective incorporation** of the Bill of Rights into the practices of the states; in other words, the Constitution effectively inserts parts of the Bill of Rights into state laws and constitutions, even though it doesn't do so explicitly. When cases arise to clarify particular issues and procedures, the Supreme Court decides whether state laws violate the Bill of Rights and are therefore unconstitutional.

For example, under the Fifth Amendment a person can be tried in federal court for a felony—a serious crime—only after a grand jury issues an indictment indicating that it is reasonable to try the person for the crime in question. (A grand jury is a group of citizens charged with deciding whether there is enough evidence of a crime to prosecute someone.) But the Supreme Court has ruled that states don't have to use grand juries as long as they ensure people accused of crimes are indicted using an equally fair process.

Selective incorporation is an ongoing process. When the Supreme Court initially decided in 2008 that the Second Amendment protects an individual's right to keep and bear arms, it did not decide then that it was a fundamental liberty the states must uphold as well. It was only in the *McDonald v. Chicago* case two years later that the Supreme Court incorporated the Second Amendment into state law. Another area in which the Supreme Court gradually moved to incorporate the Bill of Rights regards censorship and the Fourteenth Amendment. In *Near v. Minnesota* (1931), the Court disagreed with state courts regarding censorship and ruled it unconstitutional except in rare cases.[10]

4.2 Securing Basic Freedoms

Learning Objectives

By the end of this section, you will be able to:

- Identify the liberties and rights guaranteed by the first four amendments to the Constitution
- Explain why in practice these rights and liberties are limited
- Explain why interpreting some amendments has been controversial

We can broadly divide the provisions of the Bill of Rights into three categories. The First, Second, Third, and Fourth Amendments protect basic individual freedoms; the Fourth (partly), Fifth, Sixth, Seventh, and Eighth protect people suspected or accused of criminal activity; and the Ninth and Tenth, are consistent with the framers' view that the Bill of Rights is not necessarily an exhaustive list of all the rights people have and guarantees a role for state as well as federal government (**Figure 4.5**).

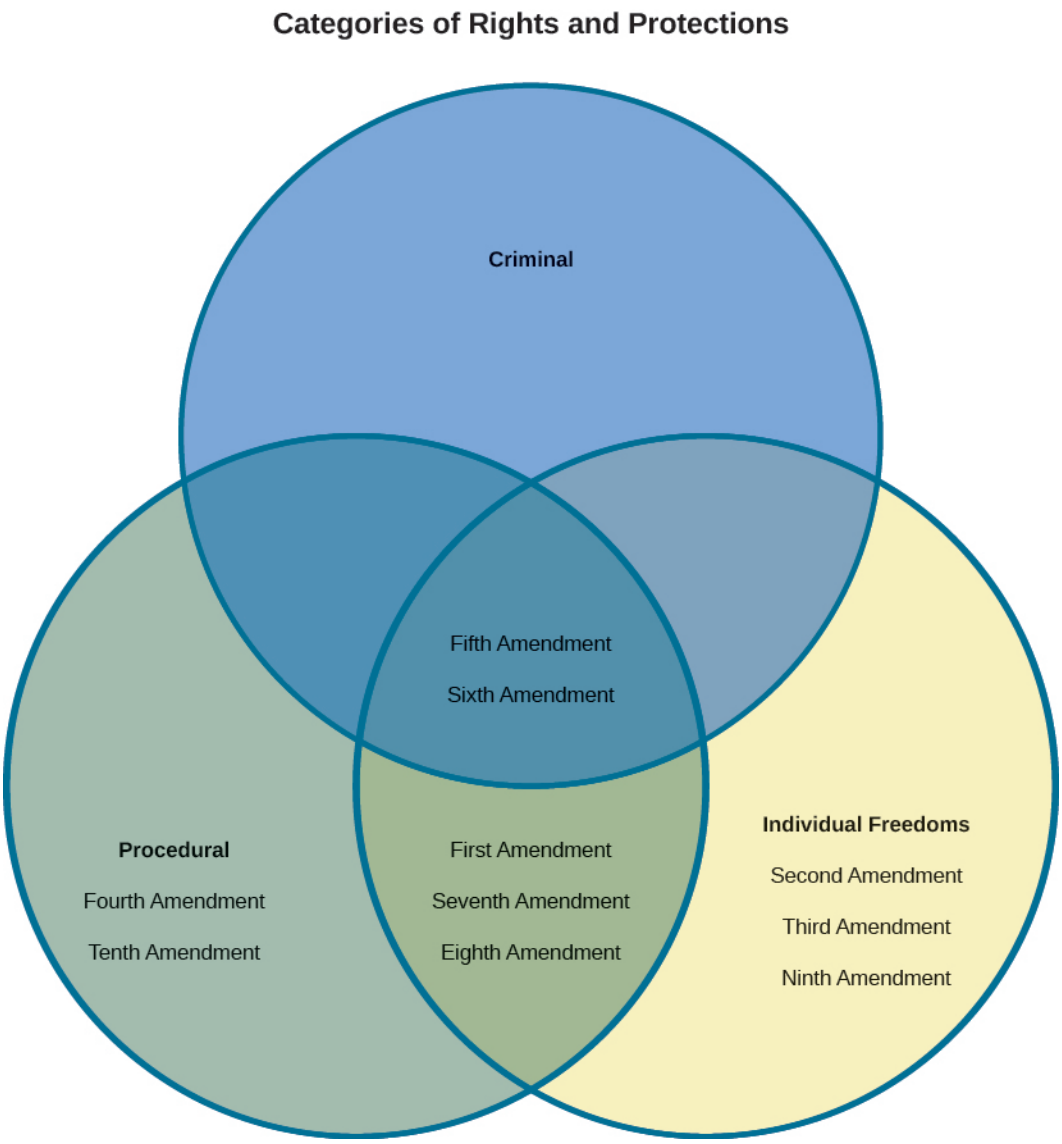


Figure 4.5

The First Amendment protects the right to freedom of religious conscience and practice and the right to free expression, particularly of political and social beliefs. The Second Amendment—perhaps the most controversial today—protects the right to defend yourself in your home or other property, as well as the collective right to protect the community as part of the militia. The Third Amendment prohibits the government from commandeering people's homes to house soldiers, particularly in peacetime. Finally, the Fourth Amendment prevents the government from searching our persons or property or taking evidence without a warrant issued by a judge, with certain exceptions.

THE FIRST AMENDMENT

The First Amendment is perhaps the most famous provision of the Bill of Rights; it is arguably also the most extensive, because it guarantees both religious freedoms and the right to express your views in public. Specifically, the First Amendment says:

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

Given the broad scope of this amendment, it is helpful to break it into its two major parts.

The first portion deals with religious freedom. However, it actually protects two related sorts of freedom: first, it protects people from having a set of religious beliefs imposed on them by the government, and second, it protects people from having their own religious beliefs restricted by government authorities.

The Establishment Clause

The first of these two freedoms is known as the **establishment clause**. Congress is prohibited from creating or promoting a state-sponsored religion (this now includes the states too). When the United States was founded, most countries around the world had an established church or religion, an officially sponsored set of religious beliefs and values. In Europe, bitter wars were fought between and within states, often because the established church of one territory was in conflict with that of another; wars and civil strife were common, particularly between states with Protestant and Catholic churches that had differing interpretations of Christianity. Even today, the legacy of these wars remains, most notably in Ireland, which has been divided between a mostly Catholic south and a largely Protestant north for nearly a century.

Many settlers in the United States found themselves on this continent as refugees from such wars; others came to find a place where they could follow their own religion with like-minded people in relative peace. So as a practical matter, even if the early United States had wanted to establish a single national religion, the diversity of religious beliefs would already have prevented it. Nonetheless the differences were small; most people were of European origin and professed some form of Christianity (although in private some of the founders, most notably Thomas Jefferson, Thomas Paine, and Benjamin Franklin, held what today would be seen as Unitarian and/or deistic views). So for much of U.S. history, the establishment clause was not particularly important—the vast majority of citizens were Protestant Christians of some form, and since the federal government was relatively uninvolved in the day-to-day lives of the people, there was little opportunity for conflict. That said, there were some citizenship and office-holding restrictions on Jews within some of the states.

Worry about state sponsorship of religion in the United States began to reemerge in the latter part of the nineteenth century. An influx of immigrants from Ireland and eastern and southern Europe brought large numbers of Catholics, and states—fearing the new immigrants and their children would not assimilate—passed laws forbidding government aid to religious schools. New religious organizations, such as The Church of Jesus Christ of Latter-day Saints (the Mormon Church), Seventh-day Adventists, Jehovah's Witnesses, and many others, also emerged, blending aspects of Protestant beliefs with other ideas and teachings at odds with the more traditional Protestant churches of the era. At the same time, public schooling was beginning to take root on a wide scale. Since most states had traditional Protestant majorities and most state officials were Protestants themselves, the public school curriculum incorporated many Protestant features; at times, these features would come into conflict with the beliefs of children from other Christian sects or from other religious traditions.

The establishment clause today tends to be interpreted a bit more broadly than in the past; it not only forbids the creation of a "Church of the United States" or "Church of Ohio" it also forbids the government from favoring one set of religious beliefs over others or favoring religion (of any variety) over non-religion. Thus, the government cannot promote, say, Islamic beliefs over Sikh beliefs or belief in God over atheism or agnosticism (**Figure 4.6**).

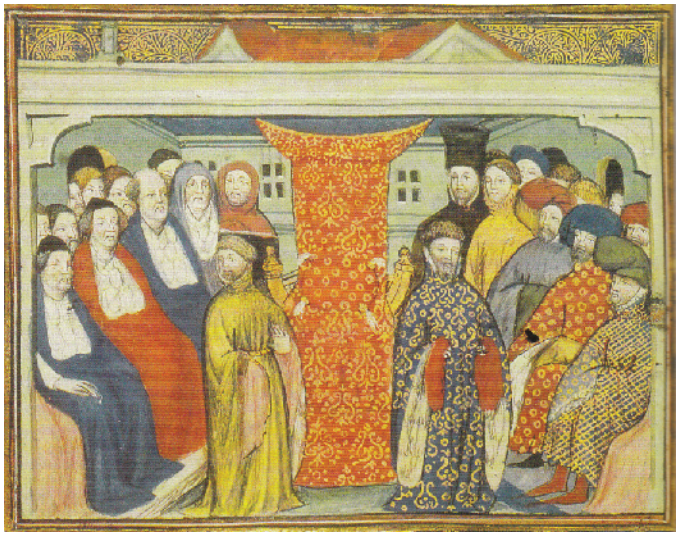


Figure 4.6 In this illustration from a contemporary manuscript, Henry Bolingbroke (i.e., Henry IV) claims the throne in 1399 surrounded by the Lords Spiritual and Temporal (secular). While the Lords Spiritual have been a minority in the House of Lords since the time of Henry VIII, and religion does not generally play a large role in British politics today, the Church of England nevertheless remains represented in Parliament by twenty-six bishops.

The key question that faces the courts is whether the establishment clause should be understood as imposing, in Thomas Jefferson's words, "a wall of separation between church and state." In a 1971 case known as *Lemon v. Kurtzman*, the Supreme Court established the Lemon test for deciding whether a law or other government action that might promote a particular religious practice should be allowed to stand.[11] The Lemon test has three criteria that must be satisfied for such a law or action to be found constitutional and remain in effect:

1. The action or law must not lead to *excessive government entanglement* with religion; in other words, policing the boundary between government and religion should be relatively straightforward and not require extensive effort by the government.
2. The action or law cannot either *inhibit* or *advance* religious practice; it should be neutral in its effects on religion.
3. The action or law must have some *secular purpose*; there must be some non-religious justification for the law.

For example, imagine your state decides to fund a school voucher program that allows children to attend private and parochial schools at public expense; the vouchers can be used to pay for school books and transportation to and from school. Would this voucher program be constitutional?

Let's start with the secular-purpose prong of the test. Educating children is a clear, non-religious purpose, so the law has a secular purpose. The law would neither inhibit nor advance religious practice, so that prong would be satisfied. The remaining question—and usually the one on which court decisions turn—is whether the law leads to excessive government entanglement with religious practice. Given that transportation and school books generally have no religious purpose, there is little risk that paying for them would lead the state to much entanglement with religion. The decision would become more difficult if the funding were unrestricted in use or helped to pay for facilities or teacher salaries; if that were the case, it might indeed be used for a religious purpose, and it would be harder for the government to ensure that it wasn't without audits or other investigations that could lead to too much government entanglement with religion.

The use of education as an example is not an accident; in fact, many of the court's cases dealing with the establishment clause have involved education, particularly public education, because school-age children are considered a special and vulnerable population. Perhaps no subject affected by the First Amendment

has been more controversial than the issue of prayer in public schools. Discussion about school prayer has been particularly fraught because in many ways it appears to bring the two religious liberty clauses into conflict with each other. The free exercise clause, discussed below, guarantees the right of individuals to practice their religion without government interference—and while the rights of children are not as extensive in all areas as those of adults, the courts have consistently ruled that the free exercise clause's guarantee of religious freedom applies to children as well.

At the same time, however, government actions that require or encourage particular religious practices might infringe upon children's rights to follow their own religious beliefs and thus, in effect, be unconstitutional establishments of religion. For example, a teacher, an athletic coach, or even a student reciting a prayer in front of a class or leading students in prayer as part of the organized school activities constitutes an illegal establishment of religion.[12] Yet a school cannot prohibit voluntary, non-disruptive prayer by its students, because that would impair the free exercise of religion. So although the blanket statement that "prayer in schools is illegal" or unconstitutional is incorrect, the establishment clause does limit official endorsement of religion, including prayers organized or otherwise facilitated by school authorities, even as part of off-campus or extracurricular activities.[13]

But some laws that may appear to establish certain religious practices are allowed. For example, the courts have permitted religiously inspired **blue laws** that limit working hours or even shutter businesses on Sunday, the Christian day of rest, because by allowing people to practice their (Christian) faith, such rules may help ensure the "health, safety, recreation, and general well-being" of citizens. They have allowed restrictions on the sale of alcohol and sometimes other goods on Sunday for similar reasons.

The meaning of the establishment clause has been controversial at times because, as a matter of course, government officials acknowledge that we live in a society with vigorous religious practice where most people believe in God—even if we disagree on what God is. Disputes often arise over how much the government can acknowledge this widespread religious belief. The courts have generally allowed for a certain tolerance of what is described as ceremonial deism, an acknowledgement of God or a creator that generally lacks any substantive religious content. For example, the national motto "In God We Trust," which appears on our coins and paper money (**Figure 4.7**), is seen as more an acknowledgment that most citizens believe in God than any serious effort by government officials to promote religious belief and practice. This reasoning has also been used to permit the inclusion of the phrase "under God" in the Pledge of Allegiance—a change that came about during the early years of the Cold War as a means of contrasting the United States with the "godless" Soviet Union.

In addition, the courts have allowed some religiously motivated actions by government agencies, such as clergy delivering prayers to open city council meetings and legislative sessions, on the presumption that—unlike school children—adult participants can distinguish between the government's allowing someone to speak and endorsing that person's speech. Yet, while some displays of religious codes (e.g., Ten Commandments) are permitted in the context of showing the evolution of law over the centuries (**Figure 4.7**), in other cases, these displays have been removed after state supreme court rulings. In Oklahoma, the courts ordered the removal of a Ten Commandments sculpture at the state capitol when other groups, including Satanists and the Church of the Flying Spaghetti Monster, attempted to get their own sculptures allowed there.

(a) (b)

Figure 4.7 The motto "In God We Trust" has appeared intermittently on U.S. coins since the 1860s (a), yet it was not mandated on paper currency until 1957. The Ten Commandments are prominently displayed on the grounds of the Texas State Capitol in Austin (b), though a similar sculpture was ordered to be removed in Oklahoma. (credit a: modification of work by Kevin Dooley)

The Free Exercise Clause

The **free exercise clause**, on the other hand, limits the ability of the government to control or restrict religious practices. This portion of the First Amendment regulates not the government's promotion of religion, but rather government *suppression* of religious beliefs and practices. Much of the controversy surrounding the free exercise clause reflects the way laws or rules that apply to everyone might apply to people with particular religious beliefs. For example, can a Jewish police officer whose religious belief, if followed strictly, requires her to observe Shabbat be compelled to work on a Friday night or during the day on Saturday? Or must the government accommodate this religious practice, even if it means the general law or rule in question is not applied equally to everyone?

In the 1930s and 1940s, cases involving Jehovah's Witnesses demonstrated the difficulty of striking the right balance. In addition to following their church's teaching that they should not participate in military combat, members refuse to participate in displays of patriotism, including saluting the flag and reciting the Pledge of Allegiance, and they regularly engage in door-to-door evangelism to recruit converts. These activities have led to frequent conflict with local authorities. Jehovah's Witness children were punished in public schools for failing to salute the flag or recite the Pledge of Allegiance, and members attempting to evangelize were arrested for violating laws against door-to-door solicitation of customers. In early legal challenges brought by Jehovah's Witnesses, the Supreme Court was reluctant to overturn state and local laws that burdened their religious beliefs.[14] However, in later cases, the court was willing to uphold the rights of Jehovah's Witnesses to proselytize and refuse to salute the flag or recite the Pledge.[15]

The rights of **conscientious objectors**—individuals who claim the right to refuse to perform military service on the grounds of freedom of thought, conscience, or religion—have also been controversial, although many conscientious objectors have contributed service as non-combatant medics during wartime. To avoid serving in the Vietnam War, many people claimed to have a conscientious objection to military service on the basis that they believed this particular war was unwise or unjust. However, the Supreme Court ruled in *Gillette v. United States* that to claim to be a conscientious objector, a person must be opposed to serving in *any* war, not just some wars.[16]

Establishing a general framework for deciding whether a religious belief can trump general laws and policies has been a challenge for the Supreme Court. In the 1960s and 1970s, the court decided two cases in which it laid out a general test for deciding similar cases in the future. In both *Sherbert v. Verner*, a case dealing with unemployment compensation, and *Wisconsin v. Yoder*, which dealt with the right of Amish parents to homeschool their children, the court said that for a law to be allowed to limit or burden a religious practice, the government must meet two criteria.[17] It must demonstrate both that it

had a "compelling governmental interest" in limiting that practice and that the restriction was "narrowly tailored." In other words, it must show there was a very good reason for the law in question and that the law was the only feasible way of achieving that goal. This standard became known as the **Sherbert test**. Since the burden of proof in these cases was on the government, the Supreme Court made it very difficult for the federal and state governments to enforce laws against individuals that would infringe upon their religious beliefs.

In 1990, the Supreme Court made a controversial decision substantially narrowing the Sherbert test in *Employment Division v. Smith*, more popularly known as "the peyote case."[18] This case involved two men who were members of the Native American Church, a religious organization that uses the hallucinogenic peyote plant as part of its sacraments. After being arrested for possession of peyote, the two men were fired from their jobs as counselors at a private drug rehabilitation clinic. When they applied for unemployment benefits, the state refused to pay on the basis that they had been dismissed for work-related reasons. The men appealed the denial of benefits and were initially successful, since the state courts applied the Sherbert test and found that the denial of unemployment benefits burdened their religious beliefs. However, the Supreme Court ruled in a 6–3 decision that the "compelling governmental interest" standard should not apply; instead, so long as the law was not designed to target a person's religious beliefs in particular, it was not up to the courts to decide that those beliefs were more important than the law in question.

On the surface, a case involving the Native American Church seems unlikely to arouse much controversy. But because it replaced the Sherbert test with one that allowed more government regulation of religious practices, followers of other religious traditions grew concerned that state and local laws, even ones neutral on their face, might be used to curtail their religious practices. In 1993, in response to this decision, Congress passed a law known as the Religious Freedom Restoration Act (RFRA), which was followed in 2000 by the Religious Land Use and Institutionalized Persons Act after part of the RFRA was struck down by the Supreme Court. In addition, since 1990, twenty-one states have passed state RFRAs that include the Sherbert test in state law, and state court decisions in eleven states have enshrined the Sherbert test's compelling governmental interest interpretation of the free exercise clause into state law.[19]

However, the RFRA itself has not been without its critics. While it has been relatively uncontroversial as applied to the rights of individuals, debate has emerged about whether businesses and other groups can be said to have religious liberty. In explicitly religious organizations, such as a fundamentalist congregation (fundamentalists adhere very strictly to biblical absolutes) or the Roman Catholic Church, it is fairly obvious members have a meaningful, shared religious belief. But the application of the RFRA has become more problematic in businesses and non-profit organizations whose owners or organizers may share a religious belief while the organization has some secular, non-religious purpose.

Such a conflict emerged in the 2014 Supreme Court case known as *Burwell v. Hobby Lobby*.[20] The Hobby Lobby chain of stores sells arts and crafts merchandise at hundreds of stores; its founder, David Green, is a devout fundamentalist Christian whose beliefs include opposition to abortion and contraception. Consistent with these beliefs, he used his business to object to a provision of the Patient Protection and Affordable Care Act (ACA or Obamacare) requiring employer-backed insurance plans to include no-charge access to the morning-after pill, a form of emergency contraception, arguing that this requirement infringed on his conscience. Based in part on the federal RFRA, the Supreme Court agreed 5–4 with Green and Hobby Lobby's position and said that Hobby Lobby and other closely held businesses did not have to provide employees free access to emergency contraception or other birth control if doing so would violate the religious beliefs of the business' owners, because there were other less restrictive ways the government could ensure access to these services for Hobby Lobby's employees (e.g., paying for them directly).

In 2015, state RFRAs became controversial when individuals and businesses that provided wedding services (e.g., catering and photography) were compelled to provide these for same-sex weddings in states where the practice had been newly legalized (**Figure 4.8**). Proponents of state RFRA laws argued that people and businesses ought not be compelled to endorse practices their religious beliefs held to be immoral or indecent and feared clergy might be compelled to officiate same-sex marriages against their

religion's teachings. Opponents of RFRA laws argued that individuals and businesses should be required, per *Obergefell v. Hodges*, to serve same-sex marriages on an equal basis as a matter of ensuring the civil rights of gays and lesbians, just as they would be obliged to cater or photograph an interracial marriage.[21]

Figure 4.8 One of the most recent notorious cases related to the free exercise clause involved an Oregon bakery whose owners refused to bake a wedding cake for a lesbian couple in January 2013, citing the owners' religious beliefs. The couple was eventually awarded $135,000 in damages as a result of the ongoing dispute. (credit: modification of work by Bev Sykes)

Despite ongoing controversy, however, the courts have consistently found some public interests sufficiently compelling to override the free exercise clause. For example, since the late nineteenth century, the courts have consistently held that people's religious beliefs do not exempt them from the general laws against polygamy. Other potential acts in the name of religion that are also out of the question are drug use and human sacrifice.

Freedom of Expression

Although the remainder of the First Amendment protects four distinct rights—free speech, press, assembly, and petition—we generally think of these rights today as encompassing a right to freedom of expression, particularly since the world's technological evolution has blurred the lines between oral and written communication (i.e., speech and press) in the centuries since the First Amendment was written and adopted.

Controversies over freedom of expression were rare until the 1900s, even though government censorship was quite common. For example, during the Civil War, the Union post office refused to deliver newspapers that opposed the war or sympathized with the Confederacy, while allowing pro-war newspapers to be mailed. The emergence of photography and movies, in particular, led to new public concerns about morality, causing both state and federal politicians to censor lewd and otherwise improper content. At the same time, writers became more ambitious in their subject matter by including explicit references to sex and using obscene language, leading to government censorship of books and magazines.

Censorship reached its height during World War I. The United States was swept up in two waves of hysteria. Anti-German feeling was provoked by the actions of Germany and its allies leading up to the war, including the sinking of the RMS *Lusitania* and the Zimmerman Telegram, an effort by the Germans to conclude an alliance with Mexico against the United States. This concern was compounded in 1917 by the Bolshevik revolution against the more moderate interim government of Russia; the leaders of the Bolsheviks, most notably Vladimir Lenin, Leon Trotsky, and Joseph Stalin, withdrew from the war against Germany and called for communist revolutionaries to overthrow the capitalist, democratic governments in western Europe and North America.

Americans who vocally supported the communist cause or opposed the war often found themselves in jail. In *Schenck v. United States*, the Supreme Court ruled that people encouraging young men to dodge the draft could be imprisoned for doing so, arguing that recommending that people disobey the law was tantamount to "falsely shouting fire in a theatre and causing a panic" and thus presented a "clear and present danger" to public order.[22] Similarly, communists and other revolutionary anarchists and socialists during the Red Scare after the war were prosecuted under various state and federal laws for supporting the forceful or violent overthrow of government. This general approach to political speech remained in place for the next fifty years.

In the 1960s, however, the Supreme Court's rulings on free expression became more liberal, in response to the Vietnam War and the growing antiwar movement. In a 1969 case involving the Ku Klux Klan, *Brandenburg v. Ohio*, the Supreme Court found that only speech or writing that constituted a direct call or plan to imminent lawless action, an illegal act in the immediate future, could be suppressed; the mere advocacy of a hypothetical revolution was not enough.[23] The Supreme Court also found that various forms of **symbolic speech**—wearing clothing like an armband that carried a political symbol or raising a fist in the air, for example—were subject to the same protections as written and spoken communication.

Milestone

Burning the U.S. Flag

Perhaps no act of symbolic speech has been as controversial in U.S. history as the burning of the flag (**Figure 4.9**). Citizens tend to revere the flag as a unifying symbol of the country in much the same way most people in Britain would treat the reigning queen (or king). States and the federal government have long had laws protecting the flag from being desecrated—defaced, damaged, or otherwise treated with disrespect. Perhaps in part because of these laws, people who have wanted to drive home a point in opposition to U.S. government policies have found desecrating the flag a useful way to gain public and press attention to their cause.

Figure 4.9 On the eve of the 2008 election, a U.S. flag was burned in protest in New Hampshire. (credit: modification of work by Jennifer Parr)

One such person was Gregory Lee Johnson, a member of various pro-communist and antiwar groups. In 1984, as part of a protest near the Republican National Convention in Dallas, Texas, Johnson set fire to a U.S. flag that another protestor had torn from a flagpole. He was arrested, charged with "desecration of a venerated object" (among other offenses), and eventually convicted of that offense. However, in 1989, the Supreme Court decided in *Texas v. Johnson* that burning the flag was a form of symbolic speech protected by the First Amendment and found the law, as applied to flag desecration, to be unconstitutional.[24]

This court decision was strongly criticized, and Congress responded by passing a federal law, the Flag Protection Act, intended to overrule it; the act, too, was struck down as unconstitutional in 1990.[25] Since then, Congress has attempted on several occasions to propose constitutional amendments allowing the states and federal government to re-criminalize flag desecration—to no avail.

Should we amend the Constitution to allow Congress or the states to pass laws protecting the U.S. flag from desecration? Should we protect other symbols as well? Why or why not?

Freedom of the press is an important component of the right to free expression as well. In *Near v. Minnesota*, an early case regarding press freedoms, the Supreme Court ruled that the government generally could not engage in **prior restraint**; that is, states and the federal government could not in advance prohibit someone from publishing something without a very compelling reason.[26] This standard was reinforced in 1971 in

the Pentagon Papers case, in which the Supreme Court found that the government could not prohibit the *New York Times* and *Washington Post* newspapers from publishing the Pentagon Papers.[27] These papers included materials from a secret history of the Vietnam War that had been compiled by the military. More specifically, the papers were compiled at the request of Secretary of Defense Robert McNamara and provided a study of U.S. political and military involvement in Vietnam from 1945 to 1967. Daniel Ellsberg famously released passages of the Papers to the press to show that the United States had secretly enlarged the scope of the war by bombing Cambodia and Laos among other deeds while lying to the American public about doing so.

Although people who leak secret information to the media can still be prosecuted and punished, this does not generally extend to reporters and news outlets that pass that information on to the public. The Edward Snowden case is another good case in point. Snowden himself, rather than those involved in promoting the information that he shared, is the object of criminal prosecution.

Furthermore, the courts have recognized that government officials and other public figures might try to silence press criticism and avoid unfavorable news coverage by threatening a lawsuit for defamation of character. In the 1964 *New York Times v. Sullivan* case, the Supreme Court decided that public figures needed to demonstrate not only that a negative press statement about them was untrue but also that the statement was published or made with either malicious intent or "reckless disregard" for the truth.[28] This ruling made it much harder for politicians to silence potential critics or to bankrupt their political opponents through the courts.

The right to freedom of expression is not absolute; several key restrictions limit our ability to speak or publish opinions under certain circumstances. We have seen that the Constitution protects most forms of offensive and unpopular expression, particularly political speech; however, *incitement* of a criminal act, "fighting words," and genuine threats are not protected. So, for example, you can't point at someone in front of an angry crowd and shout, "Let's beat up that guy!" And the Supreme Court has allowed laws that ban threatening symbolic speech, such as burning a cross on the lawn of an African American family's home (**Figure 4.10**).[29] Finally, as we've just seen, defamation of character—whether in written form (libel) or spoken form (slander)—is not protected by the First Amendment, so people who are subject to false accusations can sue to recover damages, although criminal prosecutions of libel and slander are uncommon.

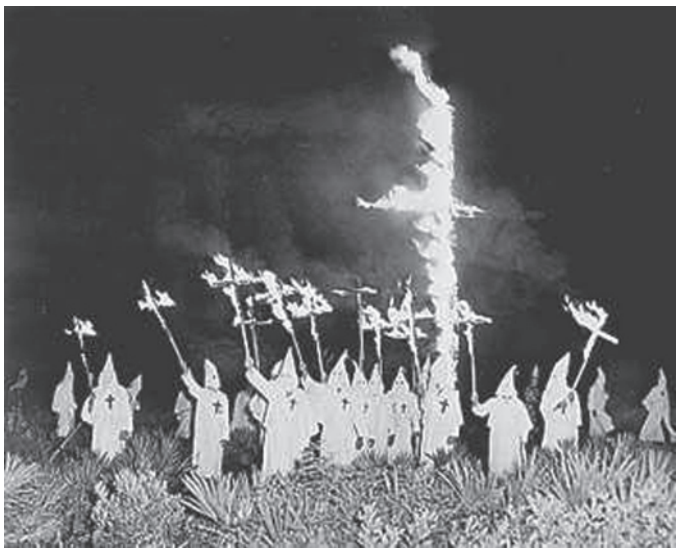


Figure 4.10 The Supreme Court has allowed laws that ban threatening symbolic speech, such as burning crosses on the lawns of African American families, an intimidation tactic used by the Ku Klux Klan, pictured here at a meeting in Gainesville, Florida, on December 31, 1922.

Another key exception to the right to freedom of expression is **obscenity**, acts or statements that are

extremely offensive under current societal standards. Defining obscenity has been something of a challenge for the courts; Supreme Court Justice Potter Stewart famously said of obscenity, having watched pornography in the Supreme Court building, "I know it when I see it." Into the early twentieth century, written work was frequently banned as being obscene, including works by noted authors such as James Joyce and Henry Miller, although today it is rare for the courts to uphold obscenity charges for written material alone. In 1973, the Supreme Court established the Miller test for deciding whether something is obscene: "(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[30] However, the application of this standard has at times been problematic. In particular, the concept of "contemporary community standards" raises the possibility that obscenity varies from place to place; many people in New York or San Francisco might not bat an eye at something people in Memphis or Salt Lake City would consider offensive. The one form of obscenity that has been banned almost without challenge is child pornography, although even in this area the courts have found exceptions.

The courts have allowed censorship of less-than-obscene content when it is broadcast over the airwaves, particularly when it is available for anyone to receive. In general, these restrictions on indecency—a quality of acts or statements that offend societal norms or may be harmful to minors—apply only to radio and television programming broadcast when children might be in the audience, although most cable and satellite channels follow similar standards for commercial reasons. An infamous case of televised indecency occurred during the halftime show of the 2004 Super Bowl, during a performance by singer Janet Jackson in which a part of her clothing was removed by fellow performer Justin Timberlake, revealing her right breast. The network responsible for the broadcast, CBS, was ultimately presented with a fine of $550,000 by the Federal Communications Commission, the government agency that regulates television broadcasting. However, CBS was not ultimately required to pay.

On the other hand, in 1997, the NBC network showed a broadcast of *Schindler's List*, a film depicting events during the Holocaust in Nazi Germany, without any editing, so it included graphic nudity and depictions of violence. NBC was not fined or otherwise punished, suggesting there is no uniform standard for indecency. Similarly, in the 1990s Congress compelled television broadcasters to implement a television ratings system, enforced by a "V-Chip" in televisions and cable boxes, so parents could better control the television programming their children might watch. However, similar efforts to regulate indecent content on the Internet to protect children from pornography have largely been struck down as unconstitutional. This outcome suggests that technology has created new avenues for obscene material to be disseminated. The Children's Internet Protection Act, however, requires K–12 schools and public libraries receiving Internet access using special E-rate discounts to filter or block access to obscene material and other material deemed harmful to minors, with certain exceptions.

The courts have also allowed laws that forbid or compel certain forms of expression by businesses, such as laws that require the disclosure of nutritional information on food and beverage containers and warning labels on tobacco products (**Figure 4.11**). The federal government requires the prices advertised for airline tickets to include all taxes and fees. Many states regulate advertising by lawyers. And, in general, false or misleading statements made in connection with a commercial transaction can be illegal if they constitute fraud.

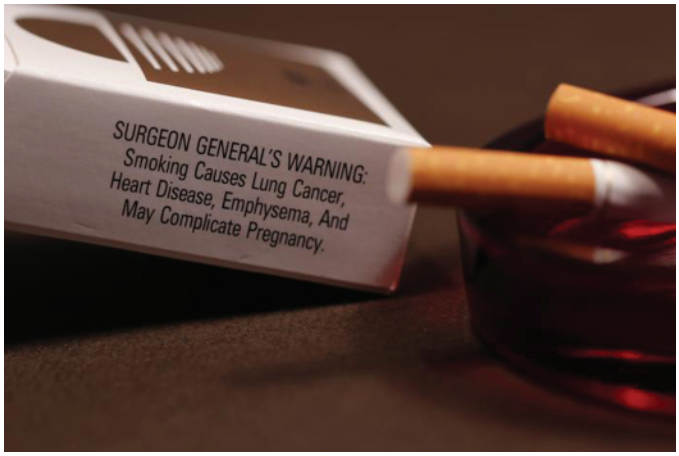


Figure 4.11 The surgeon general's warning label on a box of cigarettes is mandated by the Food and Drug Administration. The United States was the first nation to require a health warning on cigarette packages. (credit: Debora Cartagena, Centers for Disease Control and Prevention)

Furthermore, the courts have ruled that, although public school officials are government actors, the First Amendment freedom of expression rights of children attending public schools are somewhat limited. In particular, in *Tinker v. Des Moines* (1969) and *Hazelwood v. Kuhlmeier* (1988), the Supreme Court has upheld restrictions on speech that creates "substantial interference with school discipline or the rights of others"[31] or is "reasonably related to legitimate pedagogical concerns."[32] For example, the content of school-sponsored activities like school newspapers and speeches delivered by students can be controlled, either for the purposes of instructing students in proper adult behavior or to deter conflict between students.

Free expression includes the right to assemble peaceably and the right to petition government officials. This right even extends to members of groups whose views most people find abhorrent, such as American Nazis and the vehemently anti-gay Westboro Baptist Church, whose members have become known for their protests at the funerals of U.S. soldiers who have died fighting in the war on terror (**Figure 4.12**).[33] Free expression—although a broad right—is subject to certain constraints to balance it against the interests of public order. In particular, the nature, place, and timing of protests—but not their substantive content—are subject to reasonable limits. The courts have ruled that while people may peaceably assemble in a place that is a public forum, not all public property is a public forum. For example, the inside of a government office building or a college classroom—particularly while someone is teaching—is not generally considered a public forum.

Figure 4.12 Protesters from Westboro Baptist Church picket outside the U.S. Supreme Court in July 2014 prior to the decision ruling that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. (credit: Jordan Uhl)

Rallies and protests on land that has other dedicated uses, such as roads and highways, can be limited to groups that have secured a permit in advance, and those organizing large gatherings may be required to give sufficient notice so government authorities can ensure there is enough security available. However, any such regulation must be viewpoint-neutral; the government may not treat one group differently than another because of its opinions or beliefs. For example, the government can't permit a rally by a group that favors a government policy but forbid opponents from staging a similar rally. Finally, there have been controversial situations in which government agencies have established free-speech zones for protesters during political conventions, presidential visits, and international meetings in areas that are arguably selected to minimize their public audience or to ensure that the subjects of the protests do not have to encounter the protesters.

Link to Learning

Since 2011, as part of the White House website, the Obama administration has included a dedicated system, **"We the People: Your Voice in our Government," (https://www.openstaxcollege.org/l/29whitehousepet)** for people to make petitions that will be reviewed by administration officials.

THE SECOND AMENDMENT

There has been increased conflict over the Second Amendment in recent years due to school shootings and gun violence. As a result, gun rights have become a highly charged political issue. The text of the Second Amendment is among the shortest of those included in the Constitution:

> "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."

But the relative simplicity of its text has not kept it from controversy; arguably, the Second Amendment has become controversial in large part because of its text. Is this amendment merely a protection of the right of the states to organize and arm a "well regulated militia" for civil defense, or is it a protection of a "right of the people" as a whole to individually bear arms?

Before the Civil War, this would have been a nearly meaningless distinction. In most states at that time, white males of military age were considered part of the militia, liable to be called for service to put down rebellions or invasions, and the right "to keep and bear Arms" was considered a **common-law right**

inherited from English law that predated the federal and state constitutions. The Constitution was not seen as a limitation on state power, and since the states expected all able-bodied free men to keep arms as a matter of course, what gun control there was mostly revolved around ensuring slaves (and their abolitionist allies) didn't have guns.

With the beginning of selective incorporation after the Civil War, debates over the Second Amendment were reinvigorated. In the meantime, as part of their black codes designed to reintroduce most of the trappings of slavery, several southern states adopted laws that restricted the carrying and ownership of weapons by former slaves. Despite acknowledging a common-law individual right to keep and bear arms, in 1876 the Supreme Court declined, in *United States v. Cruickshank*, to intervene to ensure the states would respect it.[34]

In the following decades, states gradually began to introduce laws to regulate gun ownership. Federal gun control laws began to be introduced in the 1930s in response to organized crime, with stricter laws that regulated most commerce and trade in guns coming into force in the wake of the street protests of the 1960s. In the early 1980s, following an assassination attempt on President Ronald Reagan, laws requiring background checks for prospective gun buyers were passed. During this period, the Supreme Court's decisions regarding the meaning of the Second Amendment were ambiguous at best. In *United States v. Miller*, the Supreme Court upheld the 1934 National Firearms Act's prohibition of sawed-off shotguns, largely on the basis that possession of such a gun was not related to the goal of promoting a "well regulated militia."[35] This finding was generally interpreted as meaning that the Second Amendment protected the right of the states to organize a militia, rather than an individual right, and thus lower courts generally found most firearm regulations—including some city and state laws that virtually outlawed the private ownership of firearms—to be constitutional.

However, in 2008, in a narrow 5–4 decision on *District of Columbia v. Heller*, the Supreme Court found that at least some gun control laws *did* violate the Second Amendment and that this amendment does protect an individual's right to keep and bear arms, at least in some circumstances—in particular, "for traditionally lawful purposes, such as self-defense within the home."[36] Because the District of Columbia is not a state, this decision immediately applied the right only to the federal government and territorial governments. Two years later, in *McDonald v. Chicago*, the Supreme Court overturned the *Cruickshank* decision (5–4) and again found that the right to bear arms was a fundamental right incorporated against the states, meaning that state regulation of firearms might, in some circumstances, be unconstitutional. In 2015, however, the Supreme Court allowed several of San Francisco's strict gun control laws to remain in place, suggesting that—as in the case of rights protected by the First Amendment—the courts will not treat gun rights as absolute (**Figure 4.13**).[37]

Figure 4.13 A "No Firearms" sign is posted at Binghamton Park in Memphis, Tennessee, demonstrating that the right to possess a gun is not absolute. (credit: modification of work by Thomas R Machnitzki)

THE THIRD AMENDMENT

The Third Amendment says in full:

> "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."

Most people consider this provision of the Constitution obsolete and unimportant. However, it is worthwhile to note its relevance in the context of the time: citizens remembered having their cities and towns occupied by British soldiers and mercenaries during the Revolutionary War, and they viewed the British laws that required the colonists to house soldiers particularly offensive, to the point that it had been among the grievances listed in the Declaration of Independence.

Today it seems unlikely the federal government would need to house military forces in civilian lodgings against the will of property owners or tenants; however, perhaps in the same way we consider the Second and Fourth amendments, we can think of the Third Amendment as reflecting a broader idea that our homes lie within a "zone of privacy" that government officials should not violate unless absolutely necessary.

THE FOURTH AMENDMENT

The Fourth Amendment sits at the boundary between general individual freedoms and the rights of those suspected of crimes. We saw earlier that perhaps it reflects James Madison's broader concern about establishing an expectation of privacy from government intrusion at home. Another way to think of the Fourth Amendment is that it protects us from overzealous efforts by law enforcement to root out crime by ensuring that police have good reason before they intrude on people's lives with criminal investigations.

The text of the Fourth Amendment is as follows:

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

The amendment places limits on both *searches* and *seizures*: Searches are efforts to locate documents and contraband. Seizures are the taking of these items by the government for use as evidence in a criminal prosecution (or, in the case of a person, the detention or taking of the person into custody).

In either case, the amendment indicates that government officials are required to apply for and receive a **search warrant** prior to a search or seizure; this warrant is a legal document, signed by a judge, allowing police to search and/or seize persons or property. Since the 1960s, however, the Supreme Court has issued a series of rulings limiting the warrant requirement in situations where a person can be said to lack a "reasonable expectation of privacy" outside the home. Police can also search and/or seize people or property without a warrant if the owner or renter consents to the search, if there is a reasonable expectation that evidence may be destroyed or tampered with before a warrant can be issued (i.e., exigent circumstances), or if the items in question are in plain view of government officials.

Furthermore, the courts have found that police do not generally need a warrant to search the passenger compartment of a car (**Figure 4.14**), or to search people entering the United States from another country.[38] When a warrant is needed, law enforcement officers do not need enough evidence to secure a conviction, but they must demonstrate to a judge that there is probable cause to believe a crime has been committed or evidence will be found. **Probable cause** is the legal standard for determining whether a search or seizure is constitutional or a crime has been committed; it is a lower threshold than the standard of proof at a criminal trial.

Critics have argued that this requirement is not very meaningful because law enforcement officers are almost always able to get a search warrant when they request one; on the other hand, since we wouldn't expect the police to waste their time or a judge's time trying to get search warrants that are unlikely to be granted, perhaps the high rate at which they get them should not be so surprising.

Figure 4.14 A state police officer conducting a traffic stop near Walla Walla, Washington. (credit: modification of work by Richard Bauer)

What happens if the police conduct an illegal search or seizure without a warrant and find evidence of a crime? In the 1961 Supreme Court case *Mapp v. Ohio*, the court decided that evidence obtained without a warrant that didn't fall under one of the exceptions mentioned above could not be used as evidence in a state criminal trial, giving rise to the broad application of what is known as the **exclusionary rule**, which was first established in 1914 on a federal level in *Weeks v. United States*.[39] The exclusionary rule doesn't just apply to evidence found or to items or people seized without a warrant (or falling under an exception noted above); it also applies to any evidence developed or discovered as a result of the illegal search or

seizure.

For example, if police search your home without a warrant, find bank statements showing large cash deposits on a regular basis, and discover you are engaged in some other crime in which they were previously unaware (e.g., blackmail, drugs, or prostitution), not only can they not use the bank statements as evidence of criminal activity—they also can't prosecute you for the crimes they discovered during the illegal search. This extension of the exclusionary rule is sometimes called the "fruit of the poisonous tree," because just as the metaphorical tree (i.e., the original search or seizure) is poisoned, so is anything that grows out of it.[40]

However, like the requirement for a search warrant, the exclusionary rule does have exceptions. The courts have allowed evidence to be used that was obtained without the necessary legal procedures in circumstances where police executed warrants they believed were correctly granted but in fact were not ("good faith" exception), and when the evidence would have been found anyway had they followed the law ("inevitable discovery").

The requirement of probable cause also applies to arrest warrants. A person cannot generally be detained by police or taken into custody without a warrant, although most states allow police to arrest someone suspected of a felony crime without a warrant so long as probable cause exists, and police can arrest people for minor crimes or misdemeanors they have witnessed themselves.

4.3 The Rights of Suspects

Learning Objectives

By the end of this section, you will be able to:

- Identify the rights of those suspected or accused of criminal activity
- Explain how Supreme Court decisions transformed the rights of the accused
- Explain why the Eighth Amendment is controversial regarding capital punishment

In addition to protecting the personal freedoms of individuals, the Bill of Rights protects those suspected or accused of crimes from various forms of unfair or unjust treatment. The prominence of these protections in the Bill of Rights may seem surprising. Given the colonists' experience of what they believed to be unjust rule by British authorities, however, and the use of the legal system to punish rebels and their sympathizers for political offenses, the impetus to ensure fair, just, and impartial treatment to everyone accused of a crime—no matter how unpopular—is perhaps more understandable. What is more, the revolutionaries, and the eventual framers of the Constitution, wanted to keep the best features of English law as well.

In addition to the protections outlined in the Fourth Amendment, which largely pertain to investigations conducted before someone has been charged with a crime, the next four amendments pertain to those suspected, accused, or convicted of crimes, as well as people engaged in other legal disputes. At every stage of the legal process, the Bill of Rights incorporates protections for these people.

THE FIFTH AMENDMENT

Many of the provisions dealing with the rights of the accused are included in the Fifth Amendment; accordingly, it is one of the longest in the Bill of Rights. The Fifth Amendment states in full:

> "No person shall be held to answer for 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 offence 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."

The first clause requires that serious crimes be prosecuted only after an indictment has been issued by a grand jury. However, several exceptions are permitted as a result of the evolving interpretation and understanding of this amendment by the courts, given the Constitution is a living document. First, the courts have generally found this requirement to apply only to felonies; less serious crimes can be tried without a grand jury proceeding. Second, this provision of the Bill of Rights does *not* apply to the states because it has not been incorporated; many states instead require a judge to hold a preliminary hearing to decide whether there is enough evidence to hold a full trial. Finally, members of the armed forces who are accused of crimes are not entitled to a grand jury proceeding.

The Fifth Amendment also protects individuals against **double jeopardy**, a process that subjects a suspect to prosecution twice for the same criminal act. No one who has been acquitted (found not guilty) of a crime can be prosecuted again for that crime. But the prohibition against double jeopardy has its own exceptions. The most notable is that it prohibits a second prosecution only at the same level of government (federal or state) as the first; the federal government can try you for violating federal law, even if a state or local court finds you not guilty of the same action. For example, in the early 1990s, several Los Angeles police officers accused of brutally beating motorist Rodney King during his arrest were acquitted of various charges in a state court, but some were later convicted in a federal court of violating King's civil rights.

The double jeopardy rule does not prevent someone from recovering damages in a civil case—a legal dispute between individuals over a contract or compensation for an injury—that results from a criminal act, even if the person accused of that act is found not guilty. One famous case from the 1990s involved former football star and television personality O. J. Simpson. Simpson, although acquitted of the murders of his ex-wife Nicole Brown and her friend Ron Goldman in a criminal court, was later found to be responsible for their deaths in a subsequent civil case and as a result was forced to forfeit most of his wealth to pay damages to their families.

Perhaps the most famous provision of the Fifth Amendment is its protection against **self-incrimination**, or the right to remain silent. This provision is so well known that we have a phrase for it: "taking the Fifth." People have the right not to give evidence in court or to law enforcement officers that might constitute an admission of guilt or responsibility for a crime. Moreover, in a criminal trial, if someone does not testify in his or her own defense, the prosecution cannot use that failure to testify as evidence of guilt or imply that an innocent person would testify. This provision became embedded in the public consciousness following the Supreme Court's 1966 ruling in *Miranda v. Arizona*, whereby suspects were required to be informed of their most important rights, including the right against self-incrimination, before being interrogated in police custody.[41] However, contrary to some media depictions of the **Miranda warning**, law enforcement officials do not necessarily have to inform suspects of their rights before they are questioned in situations where they are free to leave.

Like the Fourteenth Amendment's due process clause, the Fifth Amendment prohibits the federal government from depriving people of their "life, liberty, or property, without due process of law." Recall that due process is a guarantee that people will be treated fairly and impartially by government officials when the government seeks to fine or imprison them or take their personal property away from them. The courts have interpreted this provision to mean that government officials must establish consistent, fair procedures to decide when people's freedoms are limited; in other words, citizens cannot be detained, their freedom limited, or their property taken arbitrarily or on a whim by police or other government officials. As a result, an entire body of procedural safeguards comes into play for the legal prosecution of crimes. However, the Patriot Act, passed into law after the 9/11 terrorist attacks, somewhat altered this notion.

The final provision of the Fifth Amendment has little to do with crime at all. The *takings clause* says that "private property [cannot] be taken for public use, without just compensation." This provision, along

with the due process clause's provisions limiting the taking of property, can be viewed as a protection of individuals' **economic liberty**: their right to obtain, use, and trade tangible and intangible property for their own benefit. For example, you have the right to trade your knowledge, skills, and labor for money through work or the use of your property, or trade money or goods for other things of value, such as clothing, housing, education, or food.

The greatest recent controversy over economic liberty has been sparked by cities' and states' use of the power of **eminent domain** to take property for redevelopment. Traditionally, the main use of eminent domain was to obtain property for transportation corridors like railroads, highways, canals and reservoirs, and pipelines, which require fairly straight routes to be efficient. Because any single property owner could effectively block a particular route or extract an unfair price for land if it was the last piece needed to assemble a route, there are reasonable arguments for using eminent domain as a last resort in these circumstances, particularly for projects that convey substantial benefits to the public at large.

However, increasingly eminent domain has been used to allow economic development, with beneficiaries ranging from politically connected big businesses such as car manufacturers building new factories to highly profitable sports teams seeking ever-more-luxurious stadiums (**Figure 4.15**). And, while we traditionally think of property owners as relatively well-off people whose rights don't necessarily need protecting since they can fend for themselves in the political system, frequently these cases pit lower- and middle-class homeowners against multinational corporations or multimillionaires with the ear of city and state officials. In a notorious 2005 case, *Kelo v. City of New London*, the Supreme Court sided with municipal officials taking homes in a middle-class neighborhood to obtain land for a large pharmaceutical company's corporate campus.[42] The case led to a public backlash against the use of eminent domain and legal changes in many states, making it harder for cities to take property from one private party and give it to another for economic redevelopment purposes.

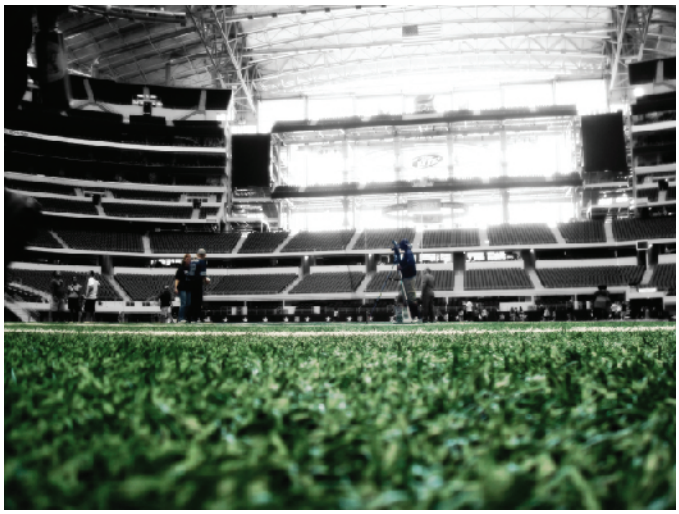


Figure 4.15 AT&T Stadium in Arlington, Texas, sits on land taken by eminent domain. (credit: John Purget)

Some disputes over economic liberty have gone beyond the idea of eminent domain. In the past few years, the emergence of on-demand ride-sharing services like Lyft and Uber, direct sales by electric car manufacturer Tesla Motors, and short-term property rentals through companies like Airbnb have led to conflicts between people seeking to offer profitable services online, states and cities trying to regulate these businesses, and the incumbent service providers that compete with these new business models. In the absence of new public policies to clarify rights, the path forward is often determined through norms established in practice, by governments, or by court cases.

THE SIXTH AMENDMENT

Once someone has been charged with a crime and indicted, the next stage in a criminal case is typically the trial itself, unless a plea bargain is reached. The Sixth Amendment contains the provisions that govern criminal trials; in full, it states:

> "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 [sic]."

The first of these guarantees is the right to have a speedy, public trial by an impartial jury. Although there is no absolute limit on the length of time that may pass between an indictment and a trial, the Supreme Court has said that excessively lengthy delays must be justified and balanced against the potential harm to the defendant.[43] In effect, the speedy trial requirement protects people from being detained indefinitely by the government. Yet the courts have ruled that there are exceptions to the public trial requirement; if a public trial would undermine the defendant's right to a fair trial, it can be held behind closed doors, while prosecutors can request closed proceedings only in certain, narrow circumstances (generally, to protect witnesses from retaliation or to guard classified information). In general, a prosecution must also be made in the "state and district" where the crime was committed; however, people accused of crimes may ask for a change of venue for their trial if they believe pre-trial publicity or other factors make it difficult or impossible for them to receive a fair trial where the crime occurred.

Link to Learning

Although the Supreme Court's proceedings are not televised and there is no video of the courtroom, audio recordings of the oral arguments and decisions announced in cases have been made since 1955. A complete collection of these recordings can be found at the **Oyez Project (https://www.openstaxcollege.org/l/29oyezproject)** website along with full information about each case.

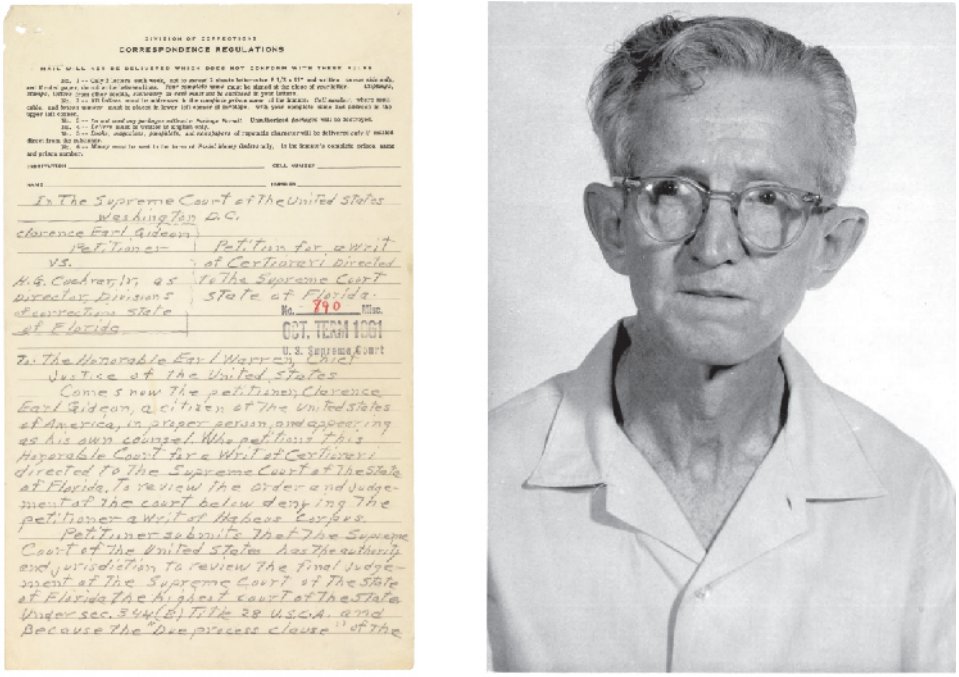
Most people accused of crimes decline their right to a jury trial. This choice is typically the result of a **plea bargain**, an agreement between the defendant and the prosecutor in which the defendant pleads guilty to the charge(s) in question, or perhaps to less serious charges, in exchange for more lenient punishment than he or she might receive if convicted after a full trial. There are a number of reasons why this might happen. The evidence against the accused may be so overwhelming that conviction is a near-certainty, so he or she might decide that avoiding the more serious penalty (perhaps even the death penalty) is better than taking the small chance of being acquitted after a trial. Someone accused of being part of a larger crime or criminal organization might agree to testify against others in exchange for lighter punishment. At the same time, prosecutors might want to ensure a win in a case that might not hold up in court by securing convictions for offenses they know they can prove, while avoiding a lengthy trial on other charges they might lose.

The requirement that a jury be impartial is a critical requirement of the Sixth Amendment. Both the prosecution and the defense are permitted to reject potential jurors who they believe are unable to fairly decide the case without prejudice. However, the courts have also said that the composition of the jury as a whole may in itself be prejudicial; potential jurors may not be excluded simply because of their race or sex, for example.[44]

The Sixth Amendment guarantees the right of those accused of crimes to present witnesses in their own defense (if necessary, compelling them to testify) and to confront and cross-examine witnesses presented

by the prosecution. In general, the only testimony acceptable in a criminal trial must be given in a courtroom and be subject to cross-examination; hearsay, or testimony by one person about what another person has said, is generally inadmissible, although hearsay may be presented as evidence when it is an admission of guilt by the defendant or a "dying declaration" by a person who has passed away. Although both sides in a trial have the opportunity to examine and cross-examine witnesses, the judge may exclude testimony deemed irrelevant or prejudicial.

Finally, the Sixth Amendment guarantees the right of those accused of crimes to have the assistance of an attorney in their defense. Historically, many states did not provide attorneys to those accused of most crimes who could not afford one themselves; even when an attorney was provided, his or her assistance was often inadequate at best. This situation changed as a result of the Supreme Court's decision in *Gideon v. Wainwright* (1963).[45] Clarence Gideon, a poor drifter, was accused of breaking into and stealing money and other items from a pool hall in Panama City, Florida. Denied a lawyer, Gideon was tried and convicted and sentenced to a five-year prison term. While in prison—still without assistance of a lawyer—he drafted a handwritten appeal and sent it to the Supreme Court, which agreed to hear his case (**Figure 4.16**). The justices unanimously ruled that Gideon, and anyone else accused of a serious crime, was entitled to the assistance of a lawyer, even if they could not afford one, as part of the general due process right to a fair trial.



(a) (b)

Figure 4.16 The handwritten petition for appeal (a) sent to the Supreme Court by Clarence Gideon, shown here circa 1961 (b), the year of his Florida arrest for breaking and entering.

The Supreme Court later extended the *Gideon v. Wainwright* ruling to apply to any case in which an accused person faced the possibility of "loss of liberty," even for one day. The courts have also overturned convictions in which people had incompetent or ineffective lawyers through no fault of their own. The *Gideon* ruling has led to an increased need for professional public defenders, lawyers who are paid by the government to represent those who cannot afford an attorney themselves, although some states instead require practicing lawyers to represent poor defendants on a pro bono basis (essentially, donating their time and energy to the case).

Link to Learning

The **National Association for Public Defense (https://www.openstaxcollege.org/l/29publicdefend)** represents public defenders, lobbying for better funding for public defense and improvements in the justice system in general.

Insider Perspective

Criminal Justice: Theory Meets Practice

Typically a person charged with a serious crime will have a brief hearing before a judge to be informed of the charges against him or her, to be made aware of the right to counsel, and to enter a plea. Other hearings may be held to decide on the admissibility of evidence seized or otherwise obtained by prosecutors.

If the two sides cannot agree on a plea bargain during this period, the next stage is the selection of a jury. A pool of potential jurors is summoned to the court and screened for impartiality, with the goal of seating twelve (in most states) and one or two alternates. All hear the evidence in the trial; unless an alternate must serve, the original twelve decide whether the evidence overwhelmingly points toward guilt or innocence beyond a reasonable doubt.

In the trial itself, the lawyers for the prosecution and defense make opening arguments, followed by testimony by witnesses for the prosecution (and any cross-examination), and then testimony by witnesses for the defense, including the defendant if he or she chooses. Additional prosecution witnesses may be called to rebut testimony by the defense. Finally, both sides make closing arguments. The judge then issues instructions to the jury, including an admonition not to discuss the case with anyone outside the jury room. The jury members leave the courtroom to enter the jury room and begin their deliberations (**Figure 4.17**).

Figure 4.17 A typical courtroom in the United States. The jury sits along one side, between the judge/witness stand and the tables for the defense and prosecution.

The jurors pick a foreman or forewoman to coordinate their deliberations. They may ask to review evidence or to hear transcripts of testimony. They deliberate in secret and their decision must be unanimous; if they are unable to agree on a verdict after extensive deliberation, a mistrial may be declared, which in effect requires the prosecution to try the case all over again.

A defendant found not guilty of all charges will be immediately released unless other charges are pending (e.g., the defendant is wanted for a crime in another jurisdiction). If the defendant is found guilty of one or more offenses, the judge will choose an appropriate sentence based on the law and the circumstances; in the federal system, this sentence will typically be based on guidelines that assign point values to various offenses and facts in the case. If the prosecution is pursuing the death penalty, the jury will decide whether the defendant should be subject to capital punishment or life imprisonment.

The reality of court procedure is much less dramatic and exciting than what is typically portrayed in television shows and movies. Nonetheless, most Americans will participate in the legal system at least once in their lives as a witness, juror, or defendant.

Have you or any member of your family served on a jury? If so, was the experience a positive one? Did the trial proceed as expected? If you haven't served on a jury, is it something you look forward to? Why or why not?

THE SEVENTH AMENDMENT

The Seventh Amendment deals with the rights of those engaged in civil disputes; as noted earlier, these are disagreements between individuals or businesses in which people are typically seeking compensation for some harm caused. For example, in an automobile accident, the person responsible is compelled to compensate any others (either directly or through his or her insurance company). Much of the work of the legal system consists of efforts to resolve civil disputes. The Seventh Amendment, in full, reads:

> "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."

Because of this provision, all trials in civil cases must take place before a jury unless both sides waive their right to a jury trial. However, this right is not always incorporated; in many states, civil disputes—particularly those involving small sums of money, which may be heard by a dedicated small claims court—need not be tried in front of a jury and may instead be decided by a judge working alone.

The Seventh Amendment limits the ability of judges to reconsider questions of fact, rather than of law, that were originally decided by a jury. For example, if a jury decides a person was responsible for an action and the case is appealed, the appeals judge cannot decide someone else was responsible. This preserves the traditional common-law distinction that judges are responsible for deciding questions of law while jurors are responsible for determining the facts of a particular case.

THE EIGHTH AMENDMENT

The Eighth Amendment says, in full:

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

Bail is a payment of money that allows a person accused of a crime to be freed pending trial; if you "make bail" in a case and do not show up for your trial, you will forfeit the money you paid. Since many people cannot afford to pay bail directly, they may instead get a *bail bond*, which allows them to pay a fraction of the money (typically 10 percent) to a person who sells bonds and who pays the full bail amount. (In most states, the bond seller makes money because the defendant does not get back the money for the bond, and most people show up for their trials.) However, people believed likely to flee or who represent a risk to the community while free may be denied bail and held in jail until their trial takes place.

It is rare for bail to be successfully challenged for being excessive. The Supreme Court has defined an excessive fine as one "so grossly excessive as to amount to deprivation of property without due process of law" or "grossly disproportional to the gravity of a defendant's offense."[46] In practice the courts have rarely struck down fines as excessive either.

The most controversial provision of the Eighth Amendment is the ban on "cruel and unusual punishments." Various torturous forms of execution common in the past—drawing and quartering, burning people alive, and the like—are prohibited by this provision.[47] Recent controversies over lethal injections and firing squads to administer the death penalty suggest the topic is still salient. While the Supreme Court has never established a definitive test for what constitutes a cruel and unusual punishment, it has generally allowed most penalties short of death for adults, even when to outside observers the punishment might be reasonably seen as disproportionate or excessive.[48]

In recent years the Supreme Court has issued a series of rulings substantially narrowing the application of the death penalty. As a result, defendants who have mental disabilities may not be executed.[49] Also, defendants who were under eighteen when they committed an offense that is otherwise subject to the death penalty may not be executed.[50] The court has generally rejected the application of the death penalty to crimes that did not result in the death of another human being, most notably in the case of rape.[51] And, while permitting the death penalty to be applied to murder in some cases, the Supreme Court has

generally struck down laws that require the application of the death penalty in certain circumstances. Still, the United States is among ten countries with the most executions worldwide (**Figure 4.18**).

Figure 4.18 The United States has the ninth highest per capita rate of execution in the world.

At the same time, however, it appears that the public mood may have shifted somewhat against the death penalty, perhaps due in part to an overall decline in violent crime. The reexamination of past cases through DNA evidence has revealed dozens in which people were wrongfully executed.[52] For example, Claude Jones was executed for murder based on 1990-era DNA testing of a single hair that was determined at that time to be his; however, with better DNA testing technology, it was later found to be that of the victim.[53] Perhaps as a result of this and other cases, seven additional states have abolished capital punishment since 2007. As of 2015, nineteen states and the District of Columbia no longer apply the death penalty in new cases, and several other states do not carry out executions despite sentencing people to death.[54] It remains to be seen whether this gradual trend toward the elimination of the death penalty by the states will continue, or whether the Supreme Court will eventually decide to follow former Justice Harry Blackmun's decision to "no longer… tinker with the machinery of death" and abolish it completely.

4.4 Interpreting the Bill of Rights

Learning Objectives

By the end of this section, you will be able to:

- Describe how the Ninth and Tenth Amendments reflect on our other rights
- Identify the two senses of "right to privacy" embodied in the Constitution
- Explain the controversy over privacy when applied to abortion and same-sex relationships

As this chapter has suggested, the provisions of the Bill of Rights have been interpreted and reinterpreted repeatedly over the past two centuries. However, the first eight amendments are largely silent on the status of traditional common law, which was the legal basis for many of the natural rights claimed by the framers in the Declaration of Independence. These amendments largely reflect the worldview of the time in which they were written; new technology and an evolving society and economy have presented us with novel situations that do not fit neatly into the framework established in the late eighteenth century.

In this section, we consider the final two amendments of the Bill of Rights and the way they affect our understanding of the Constitution as a whole. Rather than protecting specific rights and liberties, the Ninth and Tenth Amendments indicate how the Constitution and the Bill of Rights should be interpreted, and they lay out the residual powers of the state governments. We will also examine privacy rights, an area the Bill of Rights does not address directly; instead, the emergence of defined privacy rights demonstrates how the Ninth and Tenth Amendments have been applied to expand the scope of rights protected by the Constitution.

THE NINTH AMENDMENT

We saw above that James Madison and the other framers were aware they might endanger some rights if they listed a few in the Constitution and omitted others. To ensure that those interpreting the Constitution would recognize that the listing of freedoms and rights in the Bill of Rights was not exhaustive, the Ninth Amendment states:

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

These rights "retained by the people" include the common-law and natural rights inherited from the laws, traditions, and past court decisions of England. To this day, we regularly exercise and take for granted rights that aren't written down in the federal constitution, like the right to marry, the right to seek opportunities for employment and education, and the right to have children and raise a family. Supreme Court justices over the years have interpreted the Ninth Amendment in different ways; some have argued that it was intended to extend the rights protected by the Constitution to those natural and common-law rights, while others have argued that it does not prohibit states from changing their constitutions and laws to modify or limit those rights as they see fit.

Critics of a broad interpretation of the Ninth Amendment point out that the Constitution provides ways to protect newly formalized rights through the amendment process. For example, in the nineteenth and twentieth centuries, the right to vote was gradually expanded by a series of constitutional amendments (the Fifteenth and Nineteenth), even though at times this expansion was the subject of great public controversy. However, supporters of a broad interpretation of the Ninth Amendment point out that the rights of the people—particularly people belonging to political or demographic minorities—should not be subject to the whims of popular majorities. One right the courts have said may be at least partially based on the Ninth Amendment is a general right to privacy, discussed later in the chapter.

THE TENTH AMENDMENT

The Tenth Amendment is as follows:

> "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."

Unlike the other provisions of the Bill of Rights, this amendment focuses on *power* rather than rights. The courts have generally read the Tenth Amendment as merely stating, as Chief Justice Harlan Stone put it, a "truism that all is retained which has not been surrendered."[55] In other words, rather than limiting the power of the federal government in any meaningful way, it simply restates what is made obvious elsewhere in the Constitution: the federal government has both enumerated and implied powers, but where the federal government does not (or chooses not to) exercise power, the states may do so.

At times, politicians and state governments have argued that the Tenth Amendment means states can engage in *interposition* or *nullification* by blocking federal government laws and actions they deem to exceed the constitutional powers of the national government. But the courts have rarely been sympathetic to these arguments, except when the federal government appears to be directly requiring state and local officials to do something. For example, in 1997 the Supreme Court struck down part of a federal law that required state and local law enforcement to participate in conducting background checks for prospective gun purchasers, while in 2012 the court ruled that the government could not compel states to participate in expanding the joint state-federal Medicaid program by taking away all their existing Medicaid funding if they refused to do so.[56]

However, the Tenth Amendment also allows states to guarantee rights and liberties more fully or extensively than the federal government does, or to include additional rights. For example, many state constitutions guarantee the right to a free public education, several states give victims of crimes certain rights, and eighteen states include the right to hunt game and/or fish.[57] A number of state constitutions explicitly guarantee equal rights for men and women. Some permitted women to vote before that right was expanded to all women with the Nineteenth Amendment in 1920, and people aged 18–20 could vote in a few states before the Twenty-Sixth Amendment came into force in 1971. As we will see below, several states also explicitly recognize a right to privacy. State courts at times have interpreted state constitutional provisions to include broader protections for basic liberties than their federal counterparts. For example, although in general people do not have the right to free speech and assembly on private property owned by others without their permission, California's constitutional protection of freedom of expression was extended to portions of some privately owned shopping centers by the state's supreme court (**Figure 4.19**).[58]

Figure 4.19 This sign outside a California branch of the Trader Joe's supermarket chain is one of many anti-solicitation signs that sprang up in the wake of a court case involving the Pruneyard Shopping Center, which resulted in the protection of free expression in some privately owned shopping centers. (credit: modification of work by "IvyMike"/Flickr)

These state protections do not extend the other way, however. If the federal government passes a law or adopts a constitutional amendment that restricts rights or liberties, or a Supreme Court decision interprets the Constitution in a way that narrows these rights, the state's protection no longer applies. For example, if Congress decided to outlaw hunting and fishing and the Supreme Court decided this law was a valid exercise of federal power, the state constitutional provisions that protect the right to hunt and fish would effectively be meaningless. More concretely, federal laws that control weapons and drugs override state laws and constitutional provisions that otherwise permit them. While federal marijuana policies are not strictly enforced, state-level marijuana policies in Colorado and Washington provide a prominent exception to that clarity.

Get Connected!

Student-Led Constitutional Change

Although the United States has not had a national constitutional convention since 1787, the states have generally been much more willing to revise their constitutions. In 1998, two politicians in Texas decided to do something a little bit different: they enlisted the help of college students at Angelo State University to draft a completely new constitution for the state of Texas, which was then formally proposed to the state legislature.[59] Although the proposal failed, it was certainly a valuable learning experience for the students who took part.

Each state has a different process for changing its constitution. In some, like California and Mississippi, voters can propose amendments to their state constitution directly, bypassing the state legislature. In others, such as Tennessee and Texas, the state legislature controls the process of initiation. The process can affect the sorts of amendments likely to be considered; it shouldn't be surprising, for example, that amendments limiting the number of terms legislators can serve in office have been much more common in states where the legislators themselves have no say in whether such provisions are adopted.

What rights or liberties do you think ought to be protected by your state constitution that aren't already? Or would you get rid of some of these protections instead? Find a copy of your current state constitution, read through it, and decide. Then find out what steps would be needed to amend your state's constitution to make the changes you would like to see.

THE RIGHT TO PRIVACY

Although the term *privacy* does not appear in the Constitution or Bill of Rights, scholars have interpreted several Bill of Rights provisions as an indication that James Madison and Congress sought to protect a common-law **right to privacy** as it would have been understood in the late eighteenth century: a right to be free of government intrusion into our personal life, particularly within the bounds of the home. For example, we could perhaps see the Second Amendment as standing for the common-law right to self-defense in the home; the Third Amendment as a statement that government soldiers should not be housed in anyone's home; the Fourth Amendment as setting a high legal standard for allowing agents of the state to intrude on someone's home; and the due process and takings clauses of the Fifth Amendment as applying an equally high legal standard to the government's taking a home or property (reinforced after the Civil War by the Fourteenth Amendment). Alternatively, we could argue that the Ninth Amendment anticipated the existence of a common-law right to privacy, among other rights, when it acknowledged the existence of basic, natural rights not listed in the Bill of Rights or the body of the Constitution itself.[60] Lawyers Samuel D. Warren and Louis Brandeis (the latter a future Supreme Court justice) famously developed the concept of privacy rights in a law review article published in 1890.[61]

Although several state constitutions do list the right to privacy as a protected right, the explicit recognition by the Supreme Court of a right to privacy in the U.S. Constitution emerged only in the middle of the twentieth century. In 1965, the court spelled out the right to privacy for the first time in *Griswold v. Connecticut*, a case that struck down a state law forbidding even married individuals to use any form of contraception.[62] Although many subsequent cases before the Supreme Court also dealt with privacy in the course of intimate, sexual conduct, the issue of privacy matters as well in the context of surveillance and monitoring by government and private parties of our activities, movements, and communications. Both these senses of privacy are examined below.

Sexual Privacy

Although the *Griswold* case originally pertained only to married couples, in 1972 it was extended to apply the right to obtain contraception to unmarried people as well.[63] Although neither decision was entirely without controversy, the "sexual revolution" taking place at the time may well have contributed to a sense that anti-contraception laws were at the very least dated, if not in violation of people's rights. The

contraceptive coverage controversy surrounding the Hobby Lobby case shows that this topic remains relevant.

The Supreme Court's application of the right to privacy doctrine to abortion rights proved far more problematic, legally and politically. In 1972, four states permitted abortions without restrictions, while thirteen allowed abortions "if the pregnant woman's life or physical or mental health were endangered, if the fetus would be born with a severe physical or mental defect, or if the pregnancy had resulted from rape or incest"; abortions were completely illegal in Pennsylvania and heavily restricted in the remaining states.[64] On average, several hundred American women a year died as a result of "back alley abortions" in the 1960s.

The legal landscape changed dramatically as a result of the 1973 ruling in *Roe v. Wade*,[65] in which the Supreme Court decided the right to privacy encompassed a right for women to terminate a pregnancy, at least under certain scenarios. The justices ruled that while the government did have an interest in protecting the "potentiality of human life," nonetheless this had to be balanced against the interests of both women's health and women's right to decide whether to have an abortion. Accordingly, the court established a framework for deciding whether abortions could be regulated based on the fetus's viability (i.e., potential to survive outside the womb) and the stage of pregnancy, with no restrictions permissible during the first three months of pregnancy (i.e., the first trimester), during which abortions were deemed safer for women than childbirth itself.

Starting in the 1980s, Supreme Court justices appointed by Republican presidents began to roll back the *Roe* decision. A key turning point was the court's ruling in *Planned Parenthood v. Casey* in 1992, in which a plurality of the court rejected *Roe's* framework based on trimesters of pregnancy and replaced it with the **undue burden test**, which allows restrictions prior to viability that are not "substantial obstacle[s]" (undue burdens) to women seeking an abortion.[66] Thus, the court upheld some state restrictions, including a required waiting period between arranging and having an abortion, parental consent (or, if not possible for some reason such as incest, authorization of a judge) for minors, and the requirement that women be informed of the health consequences of having an abortion. Other restrictions such as a requirement that a married woman notify her spouse prior to an abortion were struck down as an undue burden. Since the *Casey* decision, many states have passed other restrictions on abortions, such as banning certain procedures, requiring women to have and view an ultrasound before having an abortion, and implementing more stringent licensing and inspection requirements for facilities where abortions are performed. Although no majority of Supreme Court justices has ever moved to overrule *Roe*, the restrictions on abortion the Court has upheld in the last few decades have made access to abortions more difficult in many areas of the country, particularly in rural states and communities along the U.S.–Mexico border (**Figure 4.20**). However, in *Whole Woman's Health v. Hellerstedt* (2016), the Court reinforced Roe 5–3 by disallowing two Texas state regulations regarding the delivery of abortion services.[67]

(a) (b)

Figure 4.20 A "March for Life" in Knoxville, Tennessee, on January 20, 2013 (a), marks the anniversary of the *Roe v. Wade* decision. On November 15, 2014, protestors in Chicago demonstrate against a crisis pregnancy center (b), a type of organization that counsels against abortion. (credit a: modification of work by Brian Stansberry; credit b: modification of work by Samuel Henderson)

Beyond the issues of contraception and abortion, the right to privacy has been interpreted to encompass a more general right for adults to have noncommercial, consensual sexual relationships in private. However, this legal development is relatively new; as recently as 1986, the Supreme Court ruled that states could still criminalize sex acts between two people of the same sex.[68] That decision was overturned in 2003 in *Lawrence v. Texas*, which invalidated state laws that criminalized sodomy.[69]

The state and national governments still have leeway to regulate sexual morality to some degree; "anything goes" is not the law of the land, even for actions that are consensual. The Supreme Court has declined to strike down laws in a few states that outlaw the sale of vibrators and other sex toys. Prostitution remains illegal in every state except in certain rural counties in Nevada; both polygamy (marriage to more than one other person) and bestiality (sex with animals) are illegal everywhere. And, as we saw earlier, the states may regulate obscene materials and, in certain situations, material that may be harmful to minors or otherwise indecent; to this end, states and localities have sought to ban or regulate the production, distribution, and sale of pornography.

Privacy of Communications and Property

Another example of heightened concerns about privacy in the modern era is the reality that society is under pervasive surveillance. In the past, monitoring the public was difficult at best. During the Cold War, regimes in the Soviet bloc employed millions of people as domestic spies and informants in an effort to suppress internal dissent through constant monitoring of the general public. Not only was this effort extremely expensive in terms of the human and monetary capital it required, but it also proved remarkably ineffective. Groups like the East German Stasi and the Romanian Securitate were unable to suppress the popular uprisings that undermined communist one-party rule in most of those countries in the late 1980s.

Technology has now made it much easier to track and monitor people. Police cars and roadways are equipped with cameras that can photograph the license plate of every passing car or truck and record it in a database; while allowing police to recover stolen vehicles and catch fleeing suspects, this data can also be used to track the movements of law-abiding citizens. But law enforcement officials don't even have to go to this much work; millions of car and truck drivers pay tolls electronically without stopping at toll booths thanks to transponders attached to their vehicles, which can be read by scanners well away from any toll road or bridge to monitor traffic flow or any other purpose (**Figure 4.21**). The pervasive use of GPS (Global Positioning System) raises similar issues.

Figure 4.21 One form of technology that has made it easier to potentially monitor people's movements is electronic toll collection, such as the E-ZPass system in the Midwest and Northeast, FasTrak in California, and I-Pass in Illinois. (credit: modification of work by Kerry Ceszyk)

Even pedestrians and cyclists are relatively easy to track today. Cameras pointed at sidewalks and roadways can employ facial recognition software to identify people as they walk or bike around a city. Many people carry smartphones that constantly report their location to the nearest cell phone tower and broadcast a beacon signal to nearby wireless hotspots and Bluetooth devices. Police can set up a small device called a Stingray that identifies and tracks all cell phones that attempt to connect to it within a radius of several thousand feet. With the right software, law enforcement and criminals can remotely activate a phone's microphone and camera, effectively planting a bug in someone's pocket without the person even knowing it.

These aren't just gimmicks in a bad science fiction movie; businesses and governments have openly admitted they are using these methods. Research shows that even metadata—information about the messages we send and the calls we make and receive, such as time, location, sender, and recipient but excluding their content—can tell governments and businesses a lot about what someone is doing. Even when this information is collected in an anonymous way, it is often still possible to trace it back to specific individuals, since people travel and communicate in largely predictable patterns.

The next frontier of privacy issues may well be the increased use of drones, small preprogrammed or remotely piloted aircraft. Drones can fly virtually undetected and monitor events from overhead. They can peek into backyards surrounded by fences, and using infrared cameras they can monitor activity inside houses and other buildings. The Fourth Amendment was written in an era when finding out what was going on in someone's home meant either going inside or peeking through a window; applying its protections today, when seeing into someone's house can be as easy as looking at a computer screen miles away, is no longer simple.

In the United States, many advocates of civil liberties are concerned that laws such as the USA **PATRIOT Act** (i.e., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act), passed weeks after the 9/11 attacks in 2001, have given the federal government too much power by making it easy for officials to seek and obtain search warrants or, in some cases, to bypass warrant requirements altogether. Critics have argued that the Patriot Act has largely been used to prosecute ordinary criminals, in particular drug dealers, rather than terrorists as intended. Most European countries, at least on paper, have opted for laws that protect against such government surveillance, perhaps mindful of past experience with communist and fascist regimes. European countries also tend to have stricter laws limiting the collection, retention, and use of private data by companies, which makes it harder for governments to obtain and use that data. Most recently, the battle between Apple Inc. and the National Security Agency (NSA) over whether Apple should allow the government access to key information that is encrypted has made the discussion of this tradeoff salient once again.

Link to Learning

Several groups lobby the government, such as **The Electronic Frontier Foundation (https://www.openstaxcollege.org/l/29elecfronfoun)** and **The Electronic Privacy Information Center (https://www.openstaxcollege.org/l/29elecprivinf)** , on issues related to privacy in the information age, particularly on the Internet.

All this is not to say that technological surveillance tools do not have value or are inherently bad. They can be used for many purposes that would benefit society and, perhaps, even enhance our freedoms. Spending less time stuck in traffic because we know there's been an accident—detected automatically because the cell phones that normally whiz by at the speed limit are now crawling along—gives us time to spend on more valuable activities. Capturing criminals and terrorists by recognizing them or their vehicles before they can continue their agendas will protect the life, liberty, and property of the public at large. At the same time, however, the emergence of these technologies means calls for vigilance and limits on what businesses and governments can do with the information they collect and the length of time they may retain it. We might also be concerned about how this technology could be used by more oppressive regimes. If the technological resources that are at the disposal of today's governments had been available to the East Germany Stasi and the Romanian Securitate, would those repressive regimes have fallen? How much privacy and freedom should citizens sacrifice in order to feel safe?

Key Terms

blue law a law originally created to uphold a religious or moral standard, such as a prohibition against selling alcohol on Sundays

civil liberties limitations on the power of government, designed to ensure personal freedoms

civil rights guarantees of equal treatment by government authorities

common-law right a right of the people rooted in legal tradition and past court rulings, rather than the Constitution

conscientious objector a person who claims the right to refuse to perform military service on the grounds of freedom of thought, conscience, or religion

double jeopardy a prosecution pursued twice at the same level of government for the same criminal action

due process clause provisions of the Fifth and Fourteenth Amendments that limit government power to deny people "life, liberty, or property" on an unfair basis

economic liberty the right of individuals to obtain, use, and trade things of value for their own benefit

eminent domain the power of government to take or use property for a public purpose after compensating its owner; also known as the takings clause of the Fifth Amendment

establishment clause the provision of the First Amendment that prohibits the government from endorsing a state-sponsored religion; interpreted as preventing government from favoring some religious beliefs over others or religion over non-religion

exclusionary rule a requirement, from Supreme Court case *Mapp v. Ohio*, that evidence obtained as a result of an illegal search or seizure cannot be used to try someone for a crime

free exercise clause the provision of the First Amendment that prohibits the government from regulating religious beliefs and practices

Miranda warning a statement by law enforcement officers informing a person arrested or subject to interrogation of his or her rights

obscenity acts or statements that are extremely offensive by contemporary standards

Patriot Act a law passed by Congress in the wake of the 9/11 attacks that broadened federal powers to monitor electronic communications; the full name is the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act)

plea bargain an agreement between the defendant and the prosecutor in which the defendant pleads guilty to the charge(s) in question or perhaps to less serious charges, in exchange for more lenient punishment than if convicted after a full trial

prior restraint a government action that stops someone from doing something before they are able to do it (e.g., forbidding someone to publish a book he or she plans to release)

probable cause legal standard for determining whether a search or seizure is constitutional or a crime has been committed; a lower threshold than the standard of proof needed at a criminal trial

right to privacy the right to be free of government intrusion

search warrant a legal document, signed by a judge, allowing police to search and/or seize persons or property

selective incorporation the gradual process of making some guarantees of the Bill of Rights (so far) apply to state governments and the national government

self-incrimination an action or statement that admits guilt or responsibility for a crime

Sherbert test a standard for deciding whether a law violates the free exercise clause; a law will be struck down unless there is a "compelling governmental interest" at stake and it accomplishes its goal by the "least restrictive means" possible

symbolic speech a form of expression that does not use writing or speech but nonetheless communicates an idea (e.g., wearing an article of clothing to show solidarity with a group)

undue burden test a means of deciding whether a law that makes it harder for women to seek abortions is constitutional

Summary

4.1 What Are Civil Liberties?

The Bill of Rights is designed to protect the freedoms of individuals from interference by government officials. Originally these protections were applied only to actions by the national government; different sets of rights and liberties were protected by state constitutions and laws, and even when the rights themselves were the same, the level of protection for them often differed by definition across the states. Since the Civil War, as a result of the passage and ratification of the Fourteenth Amendment and a series of Supreme Court decisions, most of the Bill of Rights' protections of civil liberties have been expanded to cover actions by state governments as well through a process of selective incorporation. Nonetheless there is still vigorous debate about what these rights entail and how they should be balanced against the interests of others and of society as a whole.

4.2 Securing Basic Freedoms

The first four amendments of the Bill of Rights protect citizens' key freedoms from governmental intrusion. The First Amendment limits the government's ability to impose certain religious beliefs on the people, or to limit the practice of one's own religion. The First Amendment also protects freedom of expression by the public, the media, and organized groups via rallies, protests, and the petition of grievances. The Second Amendment today protects an individual's right to keep and bear arms for personal defense in the home, while the Third Amendment limits the ability of the government to allow the military to occupy civilians' homes except under extraordinary circumstances. Finally, the Fourth Amendment protects our persons, homes, and property from unreasonable searches and seizures, and it protects the people from unlawful arrests. However, all these provisions are subject to limitations, often to protect the interests of public order, the good of society as a whole, or to balance the rights of some citizens against those of others.

4.3 The Rights of Suspects

The rights of those suspected, accused, and convicted of crimes, along with rights in civil cases and economic liberties, are protected by the second major grouping of amendments within the Bill of Rights. The Fifth Amendment secures various procedural safeguards, protects suspects' right to remain silent, forbids trying someone twice at the same level of government for the same criminal act, and limits the taking of property for public uses. The Sixth Amendment ensures fairness in criminal trials, including through a fair and speedy trial by an impartial jury, the right to assistance of counsel, and the right to examine and compel testimony from witnesses. The Seventh Amendment ensures the right to jury trials in most civil cases (but only at the federal level). Finally, the Eighth Amendment prohibits excessive fines and bails, as well as "cruel and unusual punishments," although the scope of what is cruel and unusual is