

15.1 Civil Liberties: What does the *Constitution* protect?



Image 15.1 Interned U.S. Citizens of Japanese Descent Work on a Farm

Japanese-American camp, war emergency evacuation at Tule Lake Relocation Center in Newell, California about 1942-1943.
(Credit: Library of Congress)

Learning Objectives

- Define civil liberties.
- Explain the difference between civil liberties and civil rights.
- Identify the key positions on civil liberties taken at the Constitutional Convention.
- Explain the concern that states should respect civil liberties.

Chart 15.1 Learning Objectives on Civil Liberties and Civil Rights

The framers of the *Constitution* wanted a government that would respect rather than infringe upon individual **liberties** and individual **rights**. Actions by Britain's government previously caused them to declare independence of that government's rule, which they felt did not respect citizen's liberties or rights. Within its opening paragraphs, the *Declaration of Independence* proclaimed that it was "self-evident" that individuals were "endowed by their Creator with certain Unalienable Rights," which included "liberty" and that the protection and security of these rights and liberties was one of the purposes of government.

In everyday conversation, we often treat freedoms, liberties, and rights as effectively the same thing, when in fact they are distinct concepts. Political scientists and legal experts distinguish between civil liberties and civil rights, even though the *Constitution*, including our Bill of Rights, has been interpreted to protect both. **Civil liberties** are often seen as limitations on government power, intended to protect

freedoms from illegal government intrusion. Previously, it was noted that **civil rights** guarantee that government officials will treat people equally and base decisions on the law rather than race, ethnicity, gender, or other personal characteristics.

How do I determine the difference between a liberty and a right?	
Liberties	Rights
basic individual freedoms restricted/immune from government action	individual freedoms protected by government/protection obligated by law
freedoms all human beings intrinsically possess unalienable—unable to separate	freedoms protected equally by law for every person
arising from humanity, right reason, or a higher power per personal belief; also possessing procedural freedoms (if accused; presumption of innocence; etc.)	individuals treated in a correct, just, and honorable way without respect to any other factor outside that of human status non-discriminatory
individual freedoms opportunity to engage in “pursuit of happiness” in life goals; acting as one pleases	government protection of individual exercise of liberties restricted only in relation to maintaining the equal protection of others’ liberties while respecting the liberties of others

Chart 15.2 Illustrating the Differences Between Liberties and Rights

The *U.S. Constitution* and especially the first ten amendments, known as the Bill of Rights, guarantee protection for the freedoms or civil liberties of individuals in the United States. These civil liberties’ guarantees essentially define a private sphere of personal liberty free of governmental restrictions including freedom of expression (speech and press), religious liberty, and the right to join groups or political parties as well as including prohibitions against unreasonable searches and guarantees of due process of law.

Only a limited protection of civil liberties was contained in the original constitutional document. *Article I* guaranteed three specific civil liberties by limiting the power of Congress when prohibiting:

1. **bills of attainder**—laws that declare a person guilty of a crime without trial; or allowing a single act of the legislature to both accuse a person as well as impose a punishment, and all without benefit of a trial
2. **ex post facto laws**—laws making criminal an act that was legal when the act was committed; retroactive punishment
3. **habeas corpus** limitations—requiring legal grounds be shown for detaining a person; protection against illegal incarceration.

Therefore, civil liberties derive from our humanity and specific protections of civil liberties derive from the Bill of Rights. During debate over ratification of the *Constitution*, the absence of a more extensive protection of individual liberties was a major concern raised by those opposed to the proposed constitution.

Although initially opposed to adding a Bill of Rights, supporters of the proposed constitution—including James Madison—agreed to add these protections in the first Congress once the *Constitution* was ratified. These additions took the form of amendments, which were ratified by the states in 1791.

During the congressional debate over these amendments, James Madison unsuccessfully proposed that freedom of press and speech provisions be applicable to both Congress and the States; however, the final form of the amendments limited the Bill of Rights' impact solely to the national level of government. Application of the Bill of Rights to state and local government action would not occur until the 20th century.

A BILL OF RIGHTS AND THE CONCEPT OF NATURAL LAW

The philosophical argument on behalf of a bill of rights is closely related to the concept of **natural law**. The term “**natural law**,” especially as used in legal philosophy, refers to a set of universal principles and rules properly governing human conduct. Unlike a statute, natural law is not created by human beings in any social compact.

Rather, natural law is thought to be preexisting law, which human beings can discover through their capacity for rational analysis or which some human beings understand arises from a higher power.^[1]

Natural law acknowledges **unalienable liberties** existing outside the laws of the government. Individuals retain the liberty/freedom to maintain their own life and obtain property by attaching their labor to the acquisition, and they do not receive or obtain such rights from the state. If individuals recognize the government as the grantor of rights, the government may remove rights at the will of those in power. If citizens acknowledge the government gives rights, they must also acknowledge the government has the power to remove these rights.

Laws of the government, those formed through legislative action or agreement between parties, are **positive laws**.^[2] Generally the term **positive law** connotes statutes, i.e., law enacted by a duly authorized legislature. As used in this sense, **positive law** is distinguishable from **natural law**.

If citizens believe they consent to some restrictions on their unalienable/inseparable liberties/freedoms (possessed by them because they are human beings), they consent only to government restrictions on these liberties in order to obtain a benefit. Usually a portion of these liberties are surrendered to the **positive laws** enforced by government toward safety and security for the remaining liberties.

For example, freedom to self-determine driving destinations, times, speeds and methods are surrendered to positive laws established to protect the health and safety of all drivers and pedestrians. Individuals

who apply for a driver's license and operate a motor vehicle give up their individual freedom to drive at any speed they choose and in any manner they deem appropriate. This freedom is surrendered in order to protect the safety of other members of the public.

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*.^[2] In this case, which dealt with Fifth Amendment property rights, the Supreme Court unanimously decided that the Bill of Rights applied only to federal government actions.

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."



(a)



(b)

Image 15.2 John Bingham and Abraham Lincoln Photographs

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. (Credit: National Archives and Records Administration)

The prevailing view on the limited application of the Bill of Rights to the states changed in the wake of the Civil War. Soon after the Thirteenth Amendment abolished slavery, Democrat controlled state governments—particularly those in the former Confederacy—began to pass “black codes” restricting the rights of former slaves and effectively relegating them to second-class citizenship under their state laws and constitutions.

Angered by these actions, members of the Radical Republican faction in Congress demanded 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.

Long-term they proposed two constitutional amendments to guarantee the rights of freed slaves on an equal standing with whites; these rights became the Fourteenth Amendment, dealing with civil liberties and rights in general, and the Fifteenth Amendment protecting the right to vote. But, the right to vote did not yet apply to women or to Native Americans.

Civil liberties were significantly clarified by the **Fourteenth Amendment** in 1868. First, it states that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” – a provision echoing 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. (For example, 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 and immunities clause over the years; some have argued 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.^[3]

More recently, Justice Clarence Thomas argued in the 2010 *McDonald v. Chicago* ruling that this clause applied the individual right to bear arms to the states.^[4]

The **due process clause** is the second provision of the Fourteenth Amendment applying the Bill of Rights to the states. It says, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” As in the Fifth Amendment this provision 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 provision’s text does not mention rights specifically, the courts have held in a series of cases that it indicates 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.^[5]

Beginning in 1897, the Supreme Court established that various Bill of Rights protections 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 state practices; in other words, the *Constitution* effectively inserts parts of the Bill of Rights into state laws and constitutions, even though it does not do so explicitly.

When cases arise to clarify particular issues and procedures, the United States Supreme Court decides whether state laws violate the Bill of Rights and are therefore unconstitutional.

In *Gitlow v. New York* (1925), the Court ruled, for the first time, that the Fourteenth Amendment incorporated the First Amendment’s right to free speech into a protection applicable to the state governments as well as the national government.^[6]

The court reasoned that protection of fundamental liberties at the state and local level existed under the Fourteenth Amendment's due process clause, which forbade a state from depriving "any person of life, liberty or property" without due process of law (reasonable and fair procedures to protect someone's freedoms).

During the 1930s most of the First Amendment requirements were incorporated and applied to the states following *Palko v. Connecticut* (1937).

In this case, the Court reasoned that some of the Bill of Rights, such as freedom of speech, were "fundamental rights and liberties" in that "neither liberty nor justice would exist if they were sacrificed."^[7] Expansion of due process protection, especially in the area of the rights of criminal defendants, continued during the 1960s.

On the other hand, 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 confirming it is reasonable to try the person for that crime. (A **grand jury** is a group of citizens charged with deciding if there is enough evidence of a crime to prosecute someone.) The Supreme Court has ruled however that states are not required to use grand juries if 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 then decide it was a fundamental liberty the states must also uphold.

It was only in the *McDonald v. Chicago* case two years later that the Supreme Court incorporated the Second Amendment into state law. The Supreme Court also gradually moved to extend the Bill of Rights to the states regarding 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.^[8]

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.

Most of the Bill of Rights' protections of civil liberties have been expanded to cover actions by state governments since the Civil War, through the Fourteenth Amendment, a series of Supreme Court decisions and 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.



Image 15.3 American Citizen of Japanese Descent Places Sign in Front of Business

This sign appeared outside a store in Oakland, California, owned by a Japanese American after the bombing of Pearl Harbor in 1941. After the president's executive order, the store was closed and the owner evacuated to an internment camp for the duration of the war.
(Credit: Library of Congress)

As previously noted, the *Constitution*—in particular, the first ten amendments forming the Bill of Rights—protects the liberties of individuals. It does not limit this protection to citizens or adults; in most cases the *Constitution* simply refers to “persons;” which, over time, has grown to mean—through court interpretation—that even children, visitors from other countries, and immigrants—permanent or temporary, legal or undocumented—enjoy the same freedoms as adult citizens within the United States or its territories.

Neither tourists visiting Disney World nor visitors exceeding the limit of days allowed on their visas, sacrifice those liberties.

Civil Liberties & Civil Rights Infringed in the Name of Safety & Security

Individuals in the U.S. possess an unalienable liberty of movement and freedom of action, and they also retain the right to expect the government will not take this liberty away without reason and without some sort of process or procedure that applies equally to all individuals regardless of any personal characteristic, socio-economic status, etc.

The writ of **habeas corpus** (one personal liberty) demands that a neutral judge decide whether someone has been lawfully detained by government authority. Particularly in times of war, or in response to threats against national security, the government has held suspected enemy agents without access to civilian courts.

This incarceration is frequently without access to lawyers or a defense with the government seeking instead to try them before military tribunals or detain them indefinitely without trial. The question is one of priorities—individual liberty versus national security.

For example, 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*.^[9]

Following the attacks at Pearl Harbor in 1941, many in the United States feared that Japanese Americans on the West Coast might form a fifth column (a hostile group working from the inside) to aid a Japanese invasion. These fears mingled with existing anti-Japanese sentiment across the country and created paranoia over the West Coast. To calm fears and prevent any real fifth-column actions, President Franklin

D. Roosevelt signed *Executive Order 9066*, authorizing the removal of people to military areas as necessary. When the military dubbed the entire West Coast a military area, it effectively allowed for the removal of more than 110,000 Japanese Americans from their homes. For two and a half years, these people, many of them U.S. citizens, were moved to relocation or internment camps in the nation's interior.^[10]

The overwhelming majority of Japanese Americans felt shamed by the actions of the Japanese empire and willingly went along with the policy to demonstrate their loyalty to the United States. But at least one Japanese American refused. His name was Fred Korematsu, and he went into hiding in California rather than be taken to the internment camp with his family. He was soon discovered, turned over to the military, and sent to the internment camp in Utah that held his family. His challenge to the internment system and the president's executive order continued. In 1944, Korematsu's case was heard by the Supreme Court. In a 6–3 decision, the Court ruled against him, arguing that the administration had the constitutional power to sign the order because of the need to protect U.S. interests against the threat of espionage.^[11] Forty-four years after this decision, President Reagan issued an official apology for the internment and provided some compensation to the survivors. In 2011, the Justice Department went a step further by filing a notice officially recognizing that the solicitor general of the United States (the official who argues cases for the U.S. government before the Supreme Court) acted in error by arguing to uphold the executive order.^[12]

Consider the Original

United States Commission on Civil Rights; The Decision to Prosecute Drug Offenses and Homicides in Marion County, Indiana; Chapter 2; Public Commentary;

Monica Foster, Attorney—Hammerle, Foster, Allen & Long-Sharp

"My practice focuses exclusively on representing persons charged with serious crimes or convicted of serious crimes on appeal. A large portion of my practice over the last 15 or 16 years has been devoted to representing persons charged with or sentenced to the death penalty. Those cases I accept on a public defender appointment basis because virtually none of the individuals who are charged with the death penalty throughout the state of Indiana have the funds to hire private counsel. There is a perception in [the minority] community that race has played a role in the death penalty charging decision for quite some time. So, one of the things that our firm did as part of its representation of [a particular person] was to look at the charging practices by this particular prosecutor to determine if, in fact, our perceptions were accurate."

"So we tracked cases [involving the death penalty] to see what the plea posture was. In other words, did the prosecutor at any point in time offer a plea bargain for something less than death? . . . There were six white defendants and eight African American defendants . . . Of the six white defendants charged with the death penalty, Prosecutor Newman offered a plea for life in five of those cases, . . . which computes out to 83.3 percent. Of the cases where an African American was the defendant, the statistics completely flip flop. There were eight African American defendants charged with the death penalty. Prosecutor Newman offered a plea for something less than death in only one of those cases. And in seven of the cases, the African American defendants have been required to go to trial with the death penalty hanging over their head. Only 12 percent of the African American defendants are offered life pleas" (Credit: United States Commission on Civil Rights).

Chart 15.3 Comments on Due Process by Attorney Monica Foster

Liberties & Rights of Accused Individuals

In many life situations, civil liberties and civil rights are both affected. The criminal justice system is one such situation. Accused individuals need protection of their civil liberties when their life (threat of death penalty) or liberty (threat of extended incarceration) is at risk.

Accused individuals need protection of their civil rights in that all accused individuals deserve to be treated equally by authorities as they move through the process of the justice system. Unfortunately, corrupt individuals within the system often abuse the civil liberties of individuals accused of a crime. For example, many examples exist of an accused individual being denied both liberties and rights when they receive assistance from a **public defender** (a licensed attorney/lawyer the

government has employed to represent defendants that are unable to afford to hire their own counsel) who is overworked and can offer no individual attention to their case.

In the situation described by Attorney Monica Foster (above), inequitable application of the practice of **plea bargaining** (when a prosecutor offers a defendant an expectation of leniency in charges or sentencing if the defendant relinquishes constitutionally protected liberties in order to gain this benefit) infringes on the equal rights of defendants based on race.^[13]

Consider the Original

An earlier use of this quote, “Eternal vigilance is the price of liberty,” is from a speech made by the American Abolitionist and liberal activist **Wendell Phillips** on **January 28, 1852**.

Speaking to members of the Massachusetts Anti-Slavery Society that day, Phillips said:

Eternal vigilance is the price of liberty; power is ever stealing from the many to the few. The manna of popular liberty must be gathered each day or it is rotten. The living sap of today outgrows the dead rind of yesterday. The hand entrusted with power becomes, either from human depravity or esprit de corps, the necessary enemy of the people. Only by continued oversight can the democrat in office be prevented from hardening into a despot; only by unintermitted agitation can a people be sufficiently awake to principle not to let liberty be smothered in material prosperity.” (Credit: Library of Congress)

Chart 15.4 Quote on Anti-Slavery Position

In many discussions of the *Constitution*, the Bill of Rights is acknowledged to be designed to protect the freedoms of individuals from interference by over-reaching government as well as to provide equal protection to all individuals. There is still debate about how protection of individual liberty should be balanced against the interests of others and of society. Laws, constitutions and other “parchment barriers” (written documents) alone have not protected freedoms over the years; instead, citizens have learned the

truth of the old saying “Eternal vigilance is the price of liberty” (often attributed to Thomas Jefferson but actually said by Irish politician John Philpot Curran). Ordinary citizens’ actions are at the core of a vigilant effort to protect constitutional liberties.

Civil Liberties: Questions to Consider

1. What freedoms require vigilant protection?
2. How do we balance the protection of liberties while ensuring appropriate levels of safety and security?
3. Briefly explain the difference between civil liberties and civil rights.
4. Why is habeas corpus an important protection?

1. all personal freedoms or liberties require protection
2. balancing protection of individual liberties while providing adequate safety and security of life and property is a difficult process for government
3. liberties are personal freedoms maintained by every individual and rights are guarantees the government will not treat individuals unequally with respect to protection of liberties
4. habeas corpus prevents government from denying due process; it prevents government incarceration without benefit of trial

Civil Liberties: Terms to Remember

bill of attainder—trial by legislature rather than court system

civil liberties—limitations on the power of government, designed to ensure personal freedoms; basic freedoms possessed by all human beings; right to life, liberty, and property (pursuit of happiness); unalienable rights

civil rights—guarantees of equal treatment by government authorities; how much freedom ruling authority protects or denies individuals and whether that authority is exercised equitably

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

ex post facto law—after the fact; laws enacting retroactive punishment

habeas corpus—present the body; government may not suspend due process protections; government may not hold an individual indefinitely without acknowledging charges against the individual

natural law—a set of universal principles and rules that properly govern moral human conduct; the preexisting law of nature, which human beings can *discover* through their capacity for rational analysis

positive law—human made rules and regulations; human agreed upon contracts and constitutions

public defender—a licensed attorney/lawyer the government has employed to represent defendants that are unable to afford to hire their own counsel

selective incorporation—the process through which civil liberties granted in the Bill of Rights were applied to the states on a case-by-case basis by the Supreme Court through application of the due process clause of the 14th Amendment

unalienable rights—basic freedoms possessed by all human beings; right to life, liberty, and property (pursuit of happiness); inseparable

Works Consulted

1. See multiple discussions of natural and positive law within the National Archives selection of original documents including but not limited to a letter from Thomas Jefferson to Henry Lee, 8 May 1827 at <http://founders.archives.gov/documents/jefferson/98-01-02-5212>.
2. Office of the Law Revision Counsel, United States Code, THE TERM "POSITIVE LAW" at http://uscode.house.gov/codification/term_positive_law.htm.
3. *Barron v. Baltimore*, 32 U.S. 243 (1883)
4. *Saenz v. Roe*, 526 U.S. 489 (1999)
5. *McDonald v. Chicago*, 561 U.S. 742 (2010)
6. *Sherbert v. Verner*, 374 U.S. 398 (1963)
7. *Gitlow v. New York* 268 U.S. 652 (1925)
8. *Near v. Minnesota*, 283 U.S. 697 (1931)
9. *Ex parte Quirin*, 317 U.S. 1 (1942); See William H. Rehnquist. 1998. *All the Laws but One: Civil Liberties in Wartime*. New York: William Morrow
10. Julie des Jardins, "From Citizen to Enemy: The Tragedy of Japanese Internment," <http://www.gilderlehrman.org/history-by-era/world-war-ii/essays/from-citizen-enemy-tragedy-japanese-internment> (May 1, 2016).
11. *Korematsu v. United States*, 323 U.S. 214 (1944)
12. Ilya Somin, "Justice Scalia on Kelo and Korematsu," *Washington Post*, 8 February 2014, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/08/justice-scalia-on-ke-lo-and-korematsu/>.
13. United States Commission on Civil Rights, <http://www.usccr.gov/pubs>; "Homicides in Marion County, Indiana," Chapter 2, Public Commentary, Monica Foster, Attorney with Hammerle, Foster, Allen and Long-Sharp.

LICENSES AND ATTRIBUTIONS

CC LICENSED CONTENT, SHARED PREVIOUSLY

American Government. **Authored by:** OpenStax. **Provided by:** OpenStax; Rice University. **Located**

at: <https://cnx.org/contents/W8wOWXNF@12.1:Y1CfqFju@5/Preface>. **License:** [CC BY: Attribution](#). **License Terms:** Download for free at <http://cnx.org/contents/9e28f580-0d1b-4d72-8795-c48329947ac2@1>.

Share icon. **Authored by:** Quan Do. **Provided by:** The Noun Project. **Located at:** <https://thenounproject.com/term/share/7671/>. **License:** [CC BY: Attribution](#)
Adaption and Remix, and Original Content. **Authored by:** Deborah Smith Hoag. **Provided by:** Austin Community College. **Located at:** <http://austincc.edu>. **Project:** Achieving the Dream Grant. **License:** [CC BY: Attribution](#)

15.2 Civil Liberties: Securing Basic Freedoms



Image 15.4 Students Wearing Black Armbands in Protest

Students wear black armbands as a form of non-verbal protest. (Credit: USCourts.gov at <http://www.uscourts.gov/about-federal-courts/educational-resources/supreme-court-landmarks/tinker-v-des-moines-podcast>)

Learning Objectives

- Identify the liberties & rights guaranteed by the first 4 amendments to the *Constitution*.
- Explain why these liberties & rights are limited in actual practice & government process.
- Explain why interpreting an amendment is often controversial.

Chart 15.5 Learning Objectives on Controversial Interpretations of Amendments over Rights

The case *Tinker v. Des Moines* (1969), depicted above, involved a public school in Des Moines, Iowa, where students organized a silent protest against the Vietnam War.^[1] Students planned to wear black armbands to school to protest the fighting, but the principal found out and told the students they would be suspended if they wore the armbands. Despite the warning, students wore the armbands and were suspended. During their suspension the students' parents sued the school for violating their children's right to free speech. A U.S. district court sided with the school, ruling that wearing armbands could disrupt learning. The students appealed the ruling to a U.S. Court of Appeals but lost and took their case to the United States Supreme Court. In 1969 the United States Supreme Court ruled in a 7-2 decision in favor of the students.^[2] The high court agreed that students' free rights should be protected and said, "Students don't shed their constitutional rights at the school house gates."^[3]

The Bill of Rights' provisions can be broadly divided 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; 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 national government.

Categories of Rights and Protections

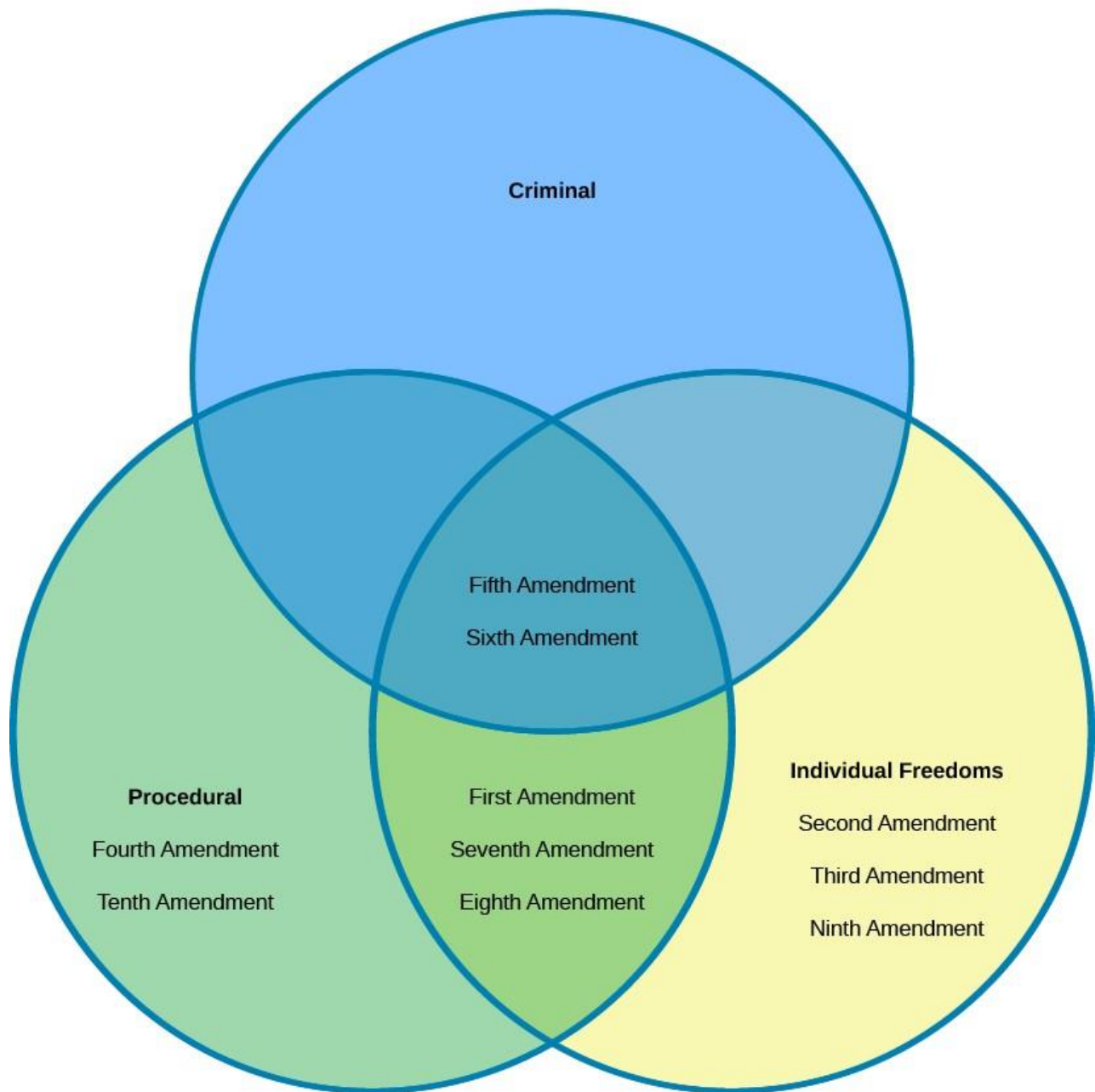


Chart 15.6 Illustration of Overlapping Constitutional Protection of Rights

Individual Freedoms

The First Amendment protects five different liberties retained by the people... religion, speech, press, assembly and petition.

Consider the Original: The 1st Amendment

The First Amendment 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.”

Chart 15.7 Quote of the First Amendment

Given the broad scope of this amendment, it is helpful to break it into its two major parts. The first part, referenced in the text of the amendment, protects two related aspects of religious freedom, and the remaining second part contains freedoms that can be grouped under the concept of free expression. It is this concept of freedom of expression that creates the critical environment for citizen participation in a representative republic.



Image 15.5 Copy of Newspaper with Story of Lusitania

Credit: Library of Congress; World War I American Experience, Images; ww10002-standard

Freedom of Expression

Although the remainder of the First Amendment protects four distinct rights—free speech, press, assembly, and petition—today we view them as encompassing a right to freedom of expression, particularly as technological advances blur the lines between oral and written communication (i.e., speech and press).

Controversies over freedom of expression were rare until the 1900s, even amidst common government censorship.

Censorship reached its height during World War I. The United States was swept up in two waves of hysteria. Germany's actions leading up to United States involvement, including the sinking of the RMS *Lusitania* and the Zimmerman Telegram (an effort to ally with Mexico against the United States) provoked significant anti-German feelings.

Further, the Bolshevik revolution of 1917 overthrowing the Russian government called for communist revolutionaries to overthrow the capitalist, democratic governments in Western Europe and North America.

Americans vocally supporting the communist cause or opposing 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; arguing that recommending 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.^[4]

However, in the 1960s 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 ruled 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.^[5]

The Supreme Court also ruled 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.



Image 15.6 Women Protesters Burning the Flag

A group of women carrying signs against America’s support of the English against the Irish, burning a flag on the sidewalk, June 3, 1920. (Credit: Library of Congress)

Perhaps no act of symbolic speech has been as controversial in U.S. history as the burning of the flag.

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 desecration—defacing, damaging, or otherwise treating it with disrespect. Perhaps in part because of these laws, people wanting to publicize opposition to U.S. government policies have used desecrating the flag a useful way to gain public and press attention to their cause.



Image 15.7 Burning the American Flag in Protest

On the eve of the 2008 election, a U.S. flag was burned in protest in New Hampshire.

(Credit: OpenStax; modification of work by Jennifer Parr)

Note the case of Gregory Lee Johnson, a member of various pro-communist and antiwar groups. As part of a protest near the Republican National Convention in Dallas, Texas in 1984 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. 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.^[6] This court decision was strongly criticized, and Congress responded with a new federal law, the Flag Protection Act, intended to overrule it; this Act was also struck down as unconstitutional in 1990.^[7]

Commercial speech does not retain the same protections as individual free speech and expression. Commercial speech or advertising is subject to more scrutiny by the government because it involves companies or individuals seeking to make a profit.^[8] The government protects consumers from business or individuals who would lie to customers in order to make a profit.

Freedom of the press is another important component of the right to free expression. In *Near v. Minnesota*, a 1931 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 prohibit someone from publishing something in advance without a very compelling reason.^[9] This standard, reinforced in 1971 by the Pentagon Papers case, saw the Supreme Court rule the government could not permit publishing of materials compiled by the military regarding information concealed from the American public regarding political and military involvement in the Vietnam War. 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 a good example. Snowden himself, rather than those involved in promoting the information that he shared, became the object of criminal prosecution.

The courts have further 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 must demonstrate not only the falsehood of a negative press statement about them, but also that the statement was conveyed with either malicious intent or “reckless disregard” for the truth.^[10] This ruling made it much harder for politicians to silence potential critics or to bankrupt their political opponents through the courts. The liberty of **free expression** is not absolute; several key restrictions limit our ability to speak or publish opinions under certain circumstances. We have seen that the *Constitution*

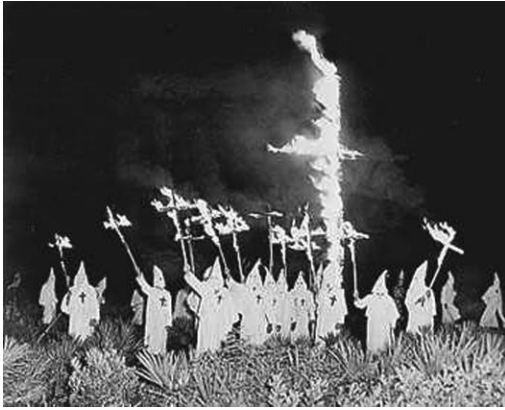


Image 15.8 Ku Klux Klan Burning a Cross

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. (Credit: OpenStax included image)

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 cannot 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.¹¹¹ Finally, defamation of character—whether in written form (**libel**) or spoken form (**slander**)—is not protected by the First Amendment. People subject to false accusations can sue to recover damages although criminal prosecutions of libel and slander are rare.

Obscenity is another exception to the right to freedom of expression. These are acts or statements considered extremely offensive under the *current* societal standards. The courts are understandably challenged to define obscenity; Supreme Court Justice Potter Stewart famously said of obscenity, having watched pornography in the Supreme Court building, “I know it when I see it.” Today it is rare for the courts to uphold obscenity charges for written material alone.

In 1973, the Supreme Court established the Miller test (*Miller v. California*, 413 U.S. 15 (1973)) 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.”¹¹²

Applying this standard has often been problematic. The concept of “contemporary community standards” asserts that obscenity can vary geographically; many people in New York or San Francisco might be unconcerned with something that offends people in Memphis or Salt Lake City. The one form of obscenity that has been banned almost without challenge is child pornography, although the courts have found exceptions even here.

Efforts to protect children from pornography on the internet have largely been struck down as unconstitutional. This demonstrates that technology has created new avenues for disseminate obscene material. 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 material deemed harmful to minors.

The courts have also allowed laws forbidding or compelling certain forms of expression by businesses. Examples are laws requiring nutritional information disclosure on food and beverage containers and warning labels on tobacco products. The federal government requires that prices advertised for airline tickets include all taxes and fees. Many states regulate advertising by lawyers. False or misleading statements made in connection with a commercial transaction can be illegal if they constitute fraud.

The courts have also 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 create “substantial interference with school discipline or the rights of others”^[13] or is “reasonably related to legitimate pedagogical concerns.”^[14]

For example, the content of school-sponsored activities like school newspapers and speeches delivered by students can be controlled, either for student instruction in proper adult behavior or to deter student conflict.

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.

Examples are American Nazis and the activist Westboro Baptist Church, whose members are known for protesting at the funerals of U.S. soldiers who have died fighting in the war on terror.^[15]

The Supreme Court in *National Association for the Advancement of Colored People (NAACP) v. Alabama* (1958) considered the rights of organizations of freely assembled persons to keep membership records confidential. In 1956, Alabama ordered the review of the organization’s documents, including membership lists. The NAACP refused to disclose its members. In a unanimous decision, the Supreme Court sided with the NAACP and formally recognized a constitutional right to freedom of association. The forced disclosure of membership lists violated NAACP members’ right ‘to pursue their lawful private interests privately and to associate freely with others.’

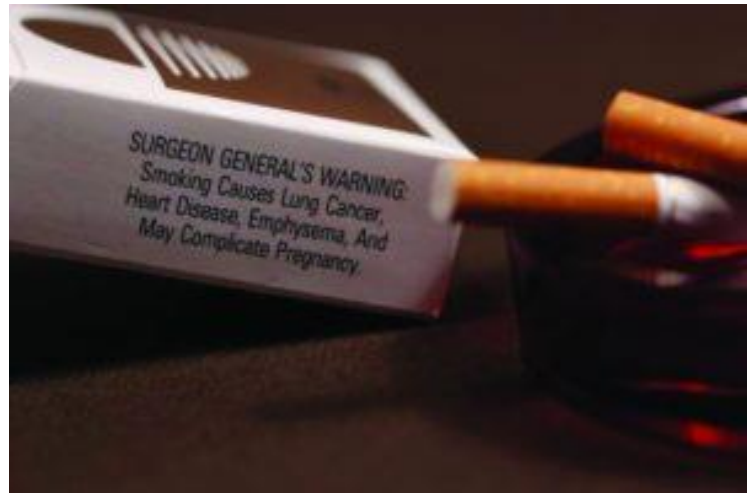


Image 15.9 Pack of Cigarettes

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)



Image 15.10 Boy Scouts in Uniform at Irving, Texas Headquarters

Two eagle scouts at the Scouting National Headquarters and museum in Irving, Texas.
(Credit: 290 Photo)

By recognizing the importance of confidential membership data, especially among unpopular groups, the *NAACP v. Alabama* decision furthered informational privacy rights.”^[16]

Relying on precedent, the court considered arguments in 2006 involving the Boy Scouts of America. In *Boy Scouts of America et al. v. Dale* (2000), the court examined competing rights—the rights of an openly gay leader in the BSA, James Dale, who was removed from his position as a scoutmaster (discrimination based on sexual orientation in public accommodation) and the rights of the BSA (1st Amendment protected freedom of assembly), where the Court held: Applying New Jersey’s public accommodations law to require the Boy Scouts to readmit Dale violates the Boy Scouts’ First Amendment right of expressive association. Government actions that unconstitutionally burden that right may take many forms, one of which is intrusion into a group’s internal affairs by forcing it to accept a member it does not desire.^[17] 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.



Image 15.11 Black Protesters March in St. Louis

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.

“At the break of summer 1917, racial tension simmered across the nation. In East St. Louis, [...] dozens of black residents were killed and thousands more were left homeless after their neighborhood was burned to ashes. The NAACP wasted no time [...] and soon issued a call for a Silent Protest Parade. On July 28, nearly 10,000 black men, women, and children wordlessly paraded down New York’s Fifth Avenue. Silently marching to the beat of a drum, the throngs of protesters clutched picket signs declaring their purpose and demanding justice. ‘Make America safe for democracy.’ ‘We march because we deem it a crime to be silent in the face of such barbaric acts.’ ‘We march because we want our children to live in a better land.’ Their tactic was silence, but their message resounded: anti-black violence is unjust and un-American.” In July 2017, at their 108th Annual Convention in Baltimore, the NAACP marked the Silent Parade’s centennial. (Credit: NAACP at <http://www.naacp.org/silent-protest-parade-centennial/>)

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.

RELIGIOUS LIBERTY

The first liberty protected by the First Amendment involves two related aspects of religious freedom:

1. it prevents the government from imposing a specific religion on the people
2. it prevents the government from restricting the people from recognition and exercise of their own specific religious belief, with exceptions only for the safety and security of other individuals should any religious practice infringe on another's unalienable liberties.

The Establishment Clause

The **establishment clause** is the first of these parts. Congress cannot create or promote a state-sponsored religion. When the United States was founded, most countries' governments had an established church or religion, an officially sponsored set of religious beliefs and values. Direct alliances between a state and church leaders frequently led to religiously aligned wars and state sponsored tyranny against anyone with religious beliefs outside of the official church.

The **establishment clause** today is interpreted more broadly; it forbids the creation of a "Church of the United States" or "Church of Ohio" and forbids the government from favoring one set of religious beliefs over others.

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.^[18]

The Lemon Test

- 1) an action or a law must not lead to excessive government entanglement/involvement with religion (monitoring this boundary should not require extensive effort)
- 2) an action or a law cannot either inhibit (restrict) or advance (promote) a particular religious practice (it should be neutral when there is an affect on religion)
- 3) an action or a law must have a secular (non-religious) purpose or justification for the action or law

Chart 15.8 Lemon Test Information

The Lemon Test has three criteria that must be satisfied for such a law or action to be found constitutional and remain in effect.

(Credit: Image at <http://www.lemon-buy-back.com/>)

A school cannot prohibit students from voluntary, non-disruptive prayer because that would impair the free exercise of religion. The general statement that prayer in schools is illegal or unconstitutional is incorrect. In *Kennedy v. Bremerton School District*, the high court ruled 6-3 that a school district in the state of Washington violated the First Amendment rights of high school football coach by disciplining g him for kneeling at midfield after games, where he prayed. The majority advised schools not to treat everything teachers and coaches say in the workplace as governmental speech subject to government limitation. While not directly overturning the *Lemon* decision, the majority opinion by Justice Neil Gorsuch called the Lemon test too “abstract” to be of practical use.”^[19]

The line between what is promoted by school authorities and what is student instigated activity is, at times, disputed. For example, *Matthews v. Kountze ISD* involved cheerleaders being banned for painting scripture verses on cheer banners for football games.^[20]

Wisconsin-based Freedom from Religion

Foundation complained about the banners, the case was reviewed by the Texas Supreme Court as “private religious expression protected under Texas law, and not government speech, subject to the school district’s censorship.”^[21] An “8-0 decision” favoring the cheerleaders was handed down in 2016.^[22]

Disputes often arise over how much the government can acknowledge widespread religious belief. The courts have allowed for an acknowledgement of God or a creator. For example, the national motto “In God We Trust,” appearing on our coins and paper money, is seen as more of an acknowledgment that most citizens believe in God than of any effort by government officials to promote religious belief and practice. This reasoning applies to the inclusion of the phrase “under God” in the Pledge of Allegiance—a change originating during the early years of the Cold War.

The courts have also 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, 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 on an equal footing.



(a)



(b)

Image 15.12 Photo of "IN GOD WE TRUST" on a Coin and a Granite Tablet with the 10 Commandments

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 to OpenStax included image; modification of work by Kevin Dooley)

The Free Exercise Clause

The **free exercise clause** limits the government’s ability to control or restrict specific group or individual religious practices. It does not regulate the government’s promotion of religion, but rather government suppression of religious belief and practice. Jehovah’s Witness cases demonstrate the difficulty of striking the right balance. Their church teaches that they should refuse to participate in displays of patriotism, including saluting the flag and reciting the Pledge of Allegiance. They also regularly recruit converts through door-to-door evangelism. Members attempting to evangelize were arrested for violating laws prohibiting door-to-door solicitation.



Image 15.13 Amish School

Amish parents can homeschool their children without harassment from local school authorities as a result of the decision in *Wisconsin v. Yoder* (1972). (Credit: Amish Country Byway—One Room Schoolhouse, National Archives 7716961, Department of Transportation, Federal Highway Administration, Office of Planning, Environment, and Realty, Office of Natural and Human Environment, National Scenic Byways Program, 1991.)

In early legal challenges, the Supreme Court was reluctant to overturn state and local laws that burdened their religious beliefs.^[23]

In later cases, the court upheld the rights of Jehovah’s Witnesses to proselytize and refuse to salute the flag or recite the Pledge.^[24]

The rights of conscientious objectors—individuals who refuse to perform military service on the grounds of freedom of thought, conscience, or religion—have also been controversial. 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.^[25]

The Supreme Court is sometimes challenged to establish a framework for deciding if religious belief may override laws and policies. In the 1960s and 1970s, the court established a general test for deciding similar cases. In *Sherbert v. Verner* (dealing with unemployment compensation) and *Wisconsin v. Yoder* (dealing 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.^[26] It must demonstrate both a “**compelling interest**” in limiting that practice and that restriction must be “narrowly tailored.” In other words, it must show a very good reason for that law and demonstrate that the law was the only feasible way of achieving that goal.



Image 15.14 Woman Wearing a Headscarf

Samantha Elauf won her case before the US Supreme Court in *EEOC v. Abercrombie* (Credit: Gordon Donovan, Yahoo News, and Equal Employment Opportunity Commission at <https://www.eeoc.gov/eeoc/faces/elauf.cfm>).

Precedent now allowed more government regulation of religious practices and followers of other religions grew concerned that state and local laws, even ones neutral on their face, might be used to curtail their own religious practices.

Congress responded to this decision in 1993 with a law known as the **Religious Freedom Restoration Act (RFRA)**, followed in 2000 by the **Religious Land Use and Institutionalized Persons Act** after part of the RFRA was struck down by the Supreme Court. According to the Department of Justice, RFRA mandates **strict scrutiny** before government may violate religious freedoms/free exercise of religious beliefs.

RLUIPA designates the *government may not impose a “substantial burden” on individual exercise of beliefs or religious freedoms and government must use “the least restrictive means” of carrying out policy while furthering “a compelling interest” on the part of the government.*^[27]

Land zoning issues, eminent domain, and the rights of prisoners exercising their religious beliefs drove the perceived need for this legislation.^[28]

In *EEOC v. Abercrombie & Fitch Stores, Inc.* (2015), the Equal Employment Opportunity Commission on behalf of Samantha Elauf, argued before the Supreme Court against discrimination because of the

religious practice of wearing a headscarf, which conflicted with the company's dress policy. ^[29] The claim was based on "disparate-treatment" and the need for an "accommodation," with the Court ruling, "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions under Title VII of the Civil Rights Act of 1964."^[30]

Conversely, 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*.^[31] The Hobby Lobby chain sells arts and crafts merchandise at hundreds of stores; its founder David Green is a devout Christian whose beliefs include opposition to abortion. Consistent with these beliefs, he objected 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 protected First Amendment right to exercise his religious beliefs.

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 RFRA laws became controversial when individuals and businesses providing wedding services (e.g., catering and photography) were compelled to provide services for same-sex weddings in states where the practice had been newly legalized.

Proponents of state RFRA laws argued that people and businesses should not be compelled to endorse practices counter to their religious beliefs and feared clergy might be compelled to officiate same-sex marriages against their religion's specific 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 rights of gays and lesbians.^[32]

Despite ongoing controversy, 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.

RIGHT TO BEAR ARMS

Consider the Original: The 2nd Amendment

For such a highly charged political issue, the text of the Second Amendment is among the shortest:

“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.”

Chart 15.9 Text of 2nd Amendment

The text’s relative simplicity has not spared it from controversy; arguably, the Second Amendment has become controversial *because* of its text. Does it merely protect 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” to individually bear arms?



Image 15.15 Art Installation Supporting Gun Buy Back

“Gun Totem” by artist, Boris Bally, in Providence, Rhode Island, constructed from guns obtained in a government buy-back program in 2001 called “Guns for Goods.” (Credit: Library of Congress, 7-27-18 by Carol M. Highsmith, photographer)

States gradually began to introduce laws to regulate gun ownership. Federal gun control laws were introduced in the 1930s in response to organized crime, and stricter laws regulating most gun commerce stemming from the street protests of the 1960s. Laws requiring background checks for prospective gun buyers were passed in the early 1980s following an assassination attempt on President Ronald Reagan. 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 because such weapons did not support the goal of promoting a “well regulated militia.”^[33] This ruling was interpreted to support the view that the Second Amendment protected the right of the states to organize a militia, rather than an individual right. Consequently, the lower courts ruled most firearm regulations—including some city and state laws virtually outlawing private ownership of firearms—to be constitutional.

In 2008, in a narrow 5–4 decision on *District of Columbia v. Heller*, the Supreme Court ruled 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.”^[34] Because the District of Columbia is not a state, this decision immediately confirmed the right only to the federal government and territorial governments. Two years later, in *McDonald v. Chicago*, the Supreme Court ruled 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. This suggested that—as in the case of rights protected by the First Amendment—the courts will not treat gun rights as absolute.^[35]



Image 15.16 Photo of Playground with No Firearms Sign

A “No Firearms” sign is posted at Binghamton Park in Memphis, Tennessee, demonstrating that the right to possess a gun is not absolute. (Credit: OpenStax; modification of work by Thomas R Machnitzki)

Consider the Original: The 3rd Amendment

“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.”

Chart 15.10 Text of 3rd Amendment

Many consider this *Constitutional* provision obsolete and unimportant. However, it is worthwhile to note its relevance in the context of the time: colonial citizens were routinely required to quarter soldiers during training maneuvers, redeployments and occupations, even in peacetime and irrespective of their circumstances. They viewed the British laws requiring them to house these soldiers as particularly offensive and disrespectful, so much so 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.

Consider the Original: The 4th Amendment

“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.”

Chart 15.11 Text of 4th Amendment

The Fourth Amendment sits at the boundary between general individual freedoms and the rights of those suspected of crimes. It may reflect James Madison’s broader concern to establish an expectation of privacy from government intrusion at home. The Fourth Amendment protects us from overzealous law enforcement by ensuring investigating authorities have good reason to intrude on people’s privacy and property. The amendment places limits on both *searches* and *seizures*. Searches are efforts to locate evidence and contraband. Seizures are the taking of these items by the government for investigations and as evidence in a criminal prosecution (or, in the case of a person, the detention or taking of the person into custody).

It confirms that officials must 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 lacks 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, or to search people entering the United States from another country.^[36]

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 required for a criminal conviction.



Image 15.17 Photo of Police Traffic Stop

A state police officer conducting a traffic stop near Walla Walla, Washington. (Credit: OpenStax; modification of work by Richard Bauer)

What happens when police conduct an illegal search or seizure without a warrant and still find evidence of a crime? In the 1961 Supreme Court case *Mapp v. Ohio*, the court ruled that evidence obtained without a warrant and not under one of the above exceptions could not be used as evidence in a state criminal trial, leading to the broad application of the **exclusionary rule** established in 1914 on a federal level in *Weeks v. United States*.^[37]

The exclusionary rule does not 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 evidence of some other unexpected crime (e.g., blackmail, drugs, or prostitution), they cannot use the bank statements as evidence of criminal activity—nor can they prosecute you for other evidence discovered during that 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.^[38] However, like the requirement for a **search warrant**, the **exclusionary rule** does have exceptions. The courts have allowed evidence 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. However, most states allow arrests of a suspected felon without a warrant when probable cause exists, and police can arrest people for minor crimes or misdemeanors they have witnessed themselves.

The first four amendments of the Bill of Rights protect citizens’ key freedoms from governmental intrusion. The First Amendment restricts the government from imposing a specific religion on the people or limiting 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, while the Third Amendment prevents the military occupation of civilians’ homes except under extraordinary

circumstances. Finally, the Fourth Amendment protects our persons and property from unreasonable searches and seizures and protects people from unlawful arrests. However, all these provisions are subject to limitations, often to protect the interests of public order and the good of society.

Civil Liberties: Questions to Consider	
1. Explain the difference between the <i>establishment clause</i> and the <i>free exercise clause</i> ? 2. What is commercial speech? 3. What is the difference between slander and libel? 4. Why is a search warrant important in preserving personal liberty?	
1. with one the government is not allowed to establish a state sponsored religion or to show preference for one religious view versus another; free exercise involves individual rights not being curtailed by the government without a compelling interest to do so 2. truth in advertising; free speech is not unlimited with the public safety at possible risk 3. slander is spoken false/untrue information about another person in order to defame their character/with the intent to cause them harm; libel is written false information used to harm another person's character 4. search warrants preserve the privacy of individuals in their homes and vehicles against random searches or seizures of private property or person/s without proof of probable cause based upon evidence presented to a judge	

Civil Liberties: Terms to Remember
commercial speech —does not receive the same level of free speech protection because companies or individuals are seeking to make a profit; in order to accomplish this goal, they may not mislead the public or make untrue claims about their product(s) common-law right —a right of the people rooted in legal tradition and past court rulings, rather than the <i>Constitution</i> compelling interest —before a right may be curtailed by law the government must provide a compelling interest or very good reason for doing so 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 <i>Mapp v. Ohio</i> , 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 libel —written defamation of character; written false information with intent to harm another person 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 search warrant —a legal document, signed by a judge, allowing police to search and/or seize persons or property slander —spoken defamation of character; spoken false information with an intention to harm another individual 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)

Works Consulted

1. USCourts.gov at <http://www.uscourts.gov/about-federal-courts/educational-resources/supreme-court-landmarks/tinker-v-des-moines-podcast> [↗](#)
2. Ibid.
3. Ibid.
4. *Schenck v. United States*, 249 U.S. 47 (1919). [↗](#)
5. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). [↗](#)
6. *Texas v. Johnson*, 491 U.S. 397 (1989). [↗](#)
7. *United States v. Eichman*, 496 U.S. 310 (1990). [↗](#)
8. Food and Drug Administration, "Keeping Drug Advertising Honest and Balanced" at <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm355270.htm> [↗](#)
9. *Near v. Minnesota*, 283 U.S. 697 (1931). [↗](#)
10. *New York Times v. Sullivan*, 376 U.S. 254 (1964). [↗](#)
11. See, for example, *Virginia v. Black*, 538 U.S. 343 (2003). [↗](#)
12. *Miller v. California*, 413 U.S. 15 (1973). [↗](#)
13. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). [↗](#)
14. *Hazelwood School District et al. v. Kuhlmeier et al.*, 484 U.S. 260 (1988). [↗](#)
15. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977); *Snyder v. Phelps*, 562 U.S. 443 (2011). [↗](#)
16. ASSOCIATIONAL PRIVACY 1958 National Archives, David M. Rubenstein Gallery, Records of Rights at <https://search.archives.gov/search?utf8=%E2%9C%93&affiliate=national-archives&query=NAACP+v+Alabama> and <http://recordsofrights.org/events/28/associational-privacy> [↗](#)
17. *Boy Scouts of America et al. v. Dale* certiorari to the supreme court of new jersey No. 99–699. Argued April 26, 2000—Decided June 28, 2000 Petitioners are the Boy Scouts of America and its Monmouth Council (collectively, Boy Scouts). The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people. It asserts that homosexual conduct is inconsistent with those values. Respondent Dale is an adult whose position as assistant scoutmaster of a New Jersey troop was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. <https://www.supremecourt.gov/opinions/boundvolumes/530bv.pdf> [↗](#)
18. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). [↗](#)
19. *Kennedy v. Bremerton School District*, 597 U.S. (2022)
20. *Matthews v. Kountze ISD*, First Liberty at <https://firstliberty.org/cases/kountze/>. 2019 Liberty Institute, First Liberty Institute.
21. Ibid.
22. Ibid.
23. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). [↗](#)
24. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Watchtower Society v. Village of Stratton*, 536 U.S. 150 (2002). [↗](#)
25. *Gillette v. United States*, 401 U.S. 437 (1971). [↗](#)
26. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). [↗](#)
27. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). [↗](#)
28. <https://www.gpo.gov/fdsys/pkg/STATUTE-107/pdf/STATUTE-107-Pg1488.pdf> RELIGIOUS FREEDOM RESTORATION ACT OF 1993 (P.L. 103-141) at <https://www.justice.gov/imd/religious-freedom-restoration-act-1993-pl-103-141> and CHAPTER 21C--PROTECTION OF RELIGIOUS EXERCISE IN LAND USE AND BY INSTITUTIONALIZED PERSONS at <https://www.justice.gov/crt/title-42-public-health-and-welfare> [↗](#)
29. *29 Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*; No. 14—86. Argued February 25, 2015—Decided June 1, 2015, October Term, 2014, Supreme Court of the United States, Syllabus, at https://www.supremecourt.gov/opinions/14pdf/14-86_p68b.pdf.
30. Juliet Eilperin, "31 states have heightened religious freedom protections," *Washington Post*, 1 March 2014. <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/>. Three more states passed state RFRAs in the past year. [↗](#)
31. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. __ (2014). [↗](#)
32. *Obergefell v. Hodges*, 576 U.S. __ (2015). [↗](#)
33. *United States v. Miller*, 307 U.S. 174 (1939). [↗](#)
34. *District of Columbia et al. v. Heller*, 554 US 570 (2008), p. 3. [↗](#)
35. Richard Gonzales, "Supreme Court Rejects NRA Challenge to San Francisco Gun Rules," *National Public Radio*, 8 June 2015. <http://www.npr.org/sections/thetwo-way/2015/06/08/412917394/supreme-court-rejects-nra-challenge-to-s-f-gun-rules> (March 4, 2016). [↗](#)
36. See, for example, *Arizona v. Gant*, 556 U.S. 332 (2009). [↗](#)
37. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914). [↗](#)
38. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). [↗](#)

LICENSES AND ATTRIBUTIONS

CC LICENSED CONTENT, SHARED PREVIOUSLY

American Government. **Authored by:** OpenStax. **Provided by:** OpenStax; Rice University. **Located**

at: <https://cnx.org/contents/W8wOWXNF@12.1:Y1CfqFiu@5/Preface>. **License:** [CC BY: Attribution](#). **License Terms:** Download for free at <http://cnx.org/contents/9e28f580-0d1b-4d72-8795-c48329947ac2@1>.

Share icon. **Authored by:** Quan Do. **Provided by:** The Noun Project. **Located at:** <https://thenounproject.com/term/share/7671/>. **License:** [CC BY: Attribution](#)
Adaption and Remix, and Original Content. **Authored by:** Deborah Smith Hoag. **Provided by:** Austin Community College. **Located at:** <http://austincc.edu>. **Project:** Achieving the Dream Grant. **License:** [CC BY: Attribution](#)
Two Eagle Scouts at the BSA National Headquarters and Museum in Irving, Texas.. **Authored by:** Deborah Hoag. **Provided by:** Austin Community College. **Project:** Achieving the Dream Grant. **License:** [CC BY: Attribution](#)

15.3 Civil Liberties: Protecting the Rights of Accused Persons

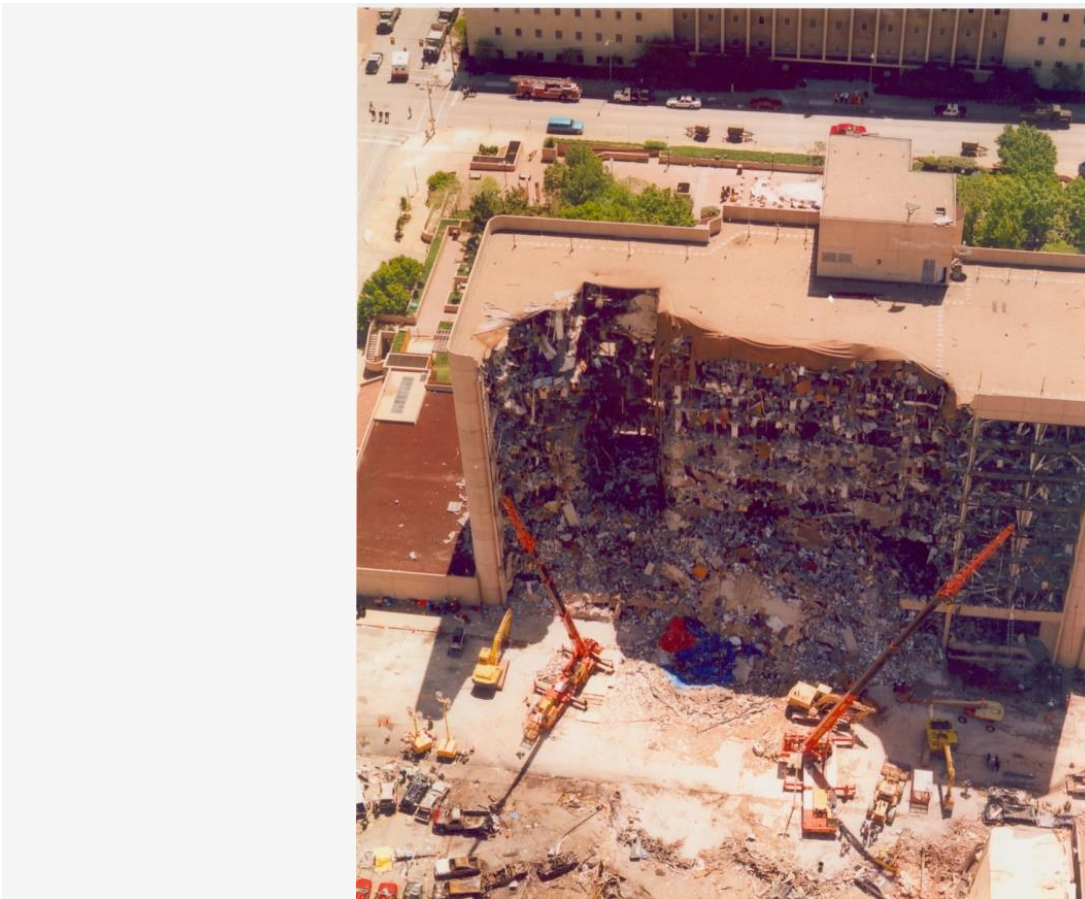


Image 15.18 Photo of Destruction Following Oklahoma City Bombing

On the morning of April 19, 1995, Timothy McVeigh parked a rented Ryder truck in front of the Alfred P. Murrah Federal Building in downtown Oklahoma City. He was about to commit mass murder. The bombing was quickly solved, but the investigation turned out to be one of the most exhaustive in FBI history. In the end, the government that McVeigh hated and hoped to topple swiftly captured him and convincingly convicted both him and his co-conspirators by following the procedural rules for accused individuals and acknowledging the protections of **due process**.
(Credit: Federal Bureau of Investigation at <https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing>).

Learning Objectives

- 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.

Chart 15.12 Learning Objectives on Rights of Accused Persons

In addition to protecting the personal freedoms of individuals, the Bill of Rights protects those suspected or accused of crimes from unfair or unjust treatment by government entities.

In addition to the protections outlined in the Fourth Amendment (pertaining to investigations prior to criminal charges), the next four amendments pertain to those suspected, accused, or convicted of crimes, and people engaged in other legal disputes. At every stage of the legal process, the Bill of Rights incorporates protections for the people.

Consider the Original: The 5th Amendment

The Fifth Amendment includes many of the provisions dealing with the rights of the accused; 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.”

Chart 15.13 Text of 5th Amendment

The first clause requires that serious crimes be prosecuted only after a **grand jury** issues an **indictment**. The courts require this only for felonies; less serious crimes can be tried without a grand jury. This provision does *not* apply to the states because it has not been incorporated; many states alternatively require a preliminary hearing where a judge decides if there is enough evidence to hold a full trial. Active armed forces members accused of crimes are not entitled to a grand jury. This protection is crucial because it inserts “the people” into a “government” process, as an added assurance that an accused person will have other input beyond any official government position or evidence.

The Fifth Amendment also protects individuals against **double jeopardy**, which is prosecuting a person twice for the same criminal charges. No one who has been **acquitted** (found not guilty) of a crime can be prosecuted again for that same crime. The prohibition against double jeopardy has its own exceptions. 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 charges. 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 acquitted of criminal charges.

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 are not forced 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 silence 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.^[1]

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 the suspect is 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 and fair procedures to decide when to limit people's freedoms; 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 is applied to the legal prosecution of crimes.

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 results from the use of the power of **eminent domain** to take property for redevelopment. Traditionally eminent domain was primarily used to obtain property for transportation corridors like railroads, highways, canals and reservoirs, and pipelines, which require specific geographic routes. As any single property owner could effectively block a route or extract an unfair price for land if it was the last piece needed for a route, there are reasonable arguments for using eminent domain as a last resort. This is particularly true for projects that convey substantial benefits to the public at large. Increasingly though, eminent domain has been used to enable economic development for both government and private interests. Beneficiaries range from politically connected big businesses such as car manufacturers building new factories to highly profitable sports teams seeking ever-more-luxurious stadiums.

While we traditionally think of property owners as well-off people whose rights are inherently more secure, 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 another private entity seeking to develop the property for an alternate private purpose.^[2] The case led to a public backlash against eminent domain and subsequent 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.

Some disputes over economic liberty have gone beyond the idea of eminent domain. Recently 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.

Consider the Original: The 6th Amendment

Once someone has been charged with a crime and indicted, the next stage in a criminal case is the trial. The Sixth Amendment governs these 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].”

Chart 15.14 Text of 6th Amendment

The first guarantee is the right to a speedy, public trial by an impartial jury. Although the time allowed between an indictment and the trial is not specified, the Supreme Court notes that excessively lengthy delays must be justified and balanced against the potential harm to the defendant.^[3] In effect, the **speedy trial** requirement prevents the government from detaining people indefinitely. 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. Prosecutors can request closed proceedings only in certain, narrow circumstances (i.e., to protect witnesses from retaliation or to guard classified information). The prosecution must also be made in the “state and district” where the crime was committed; however, if the accused believe pre-trial publicity or other factors compromise their right to a *fair* trial where the crime occurred, they may ask for a **change of venue** (location) for that trial.



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](#) website along with full information about each case.

Most accused persons decline this right to a jury trial. A **plea bargain** is an agreement with the prosecutor in which the defendant pleads guilty to the charge(s) in question or to less serious charges in

exchange for more lenient punishment, placing an unconstitutional condition on this individual—they are required to surrender protection of individual liberties in order to gain this benefit.

There are a number of motivations for this. The evidence against the accused may be so overwhelming that conviction is a near-certainty and avoiding the more serious penalty (perhaps even the death penalty) is better than taking the small chance of acquittal. Someone accused of being part of a larger criminal organization might agree to testify against others in exchange for lighter punishment. Prosecutors facing a difficult trial can seek quick closure and a win by securing convictions for offenses they know they can prove, while avoiding a lengthy trial on other charges they might lose. In general, they use **prosecutorial discretion** to manage cases and use plea bargaining to bring efficiency and streamlining to the process.

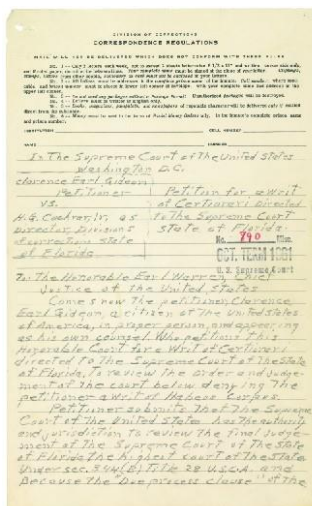
The promise of an impartial jury is a critical component. The prosecution and the defense can reject potential jurors they believe cannot fairly decide that case without prejudice. The courts have also ruled that the composition of the jury as a whole may itself be prejudicial; potential jurors may not be excluded simply because of their race or sex, for example.^[4]

The accused also have the right 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. 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.

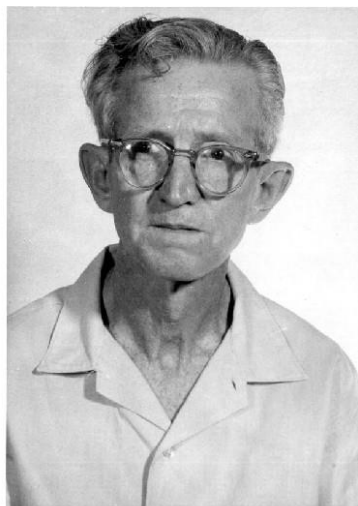
Although both sides in a trial can examine and cross-examine witnesses, the judge may exclude testimony deemed irrelevant or prejudicial.

Finally, the Sixth Amendment guarantees the right of the accused to the assistance of an attorney in their defense. Historically, for most crimes many states did not provide attorneys to the accused when could not afford one themselves; even when provided, their assistance was often inadequate. This situation changed as a result of the Supreme Court’s decision in *Gideon v. Wainwright* (1963).^[5]

A poor drifter named Clarence Gideon 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, convicted and sentenced to a five-year prison term. While in prison—still without legal assistance—he drafted a handwritten appeal and sent it to the Supreme Court, which agreed to hear his case. 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)

Image 15.19 Clarence Gideon Photo

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. (Credit: OpenStax included images)

The Supreme Court later extended the *Gideon v. Wainwright* ruling to apply to any case in which the accused 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 increased the demand for professional public defenders, paid by the government to represent those who cannot afford an attorney themselves. Alternatively, some states require practicing lawyers to represent poor defendants on a pro bono basis (essentially, donating their time and energy to the case).



The [National Association for Public Defense](#) represents public defenders, lobbying for better funding for public defense and improvements in the justice system in general.

Normally a person charged with a serious crime will have a brief hearing before a judge to be informed of the charges against him/her/they, 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, the next stage is jury selection (**voir dire**). 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 alternate jurors. All hear the evidence in the trial; unless an alternate must serve, the original twelve decide whether the evidence determines guilt or innocence beyond a **reasonable doubt**. In the trial itself, the lawyers for the prosecution and defense make opening arguments, followed by testimony of witnesses for the prosecution (and any cross-examination), and then testimony of 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**.



Image 15.20 Photo of Courtroom (Credit: US Courts)

The jurors pick a foreperson 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 (**hung jury**) may be declared, which effectively requires the prosecution to try the case all over again with a new jury.

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 apply 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.

Consider the Original: The 7th Amendment

The Seventh Amendment deals with the rights of those engaged in civil disputes. These are disagreements between individuals or businesses typically seeking compensation for some harm. For example, in an automobile accident, the person responsible is compelled to compensate any others (either directly or through their insurance company). Much of the legal system's work 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."

Chart 15.20 Text of 7th Amendment

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 (a **bench trial**).

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.

Consider the Original: The 8th Amendment

The Eighth Amendment says, in full:

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

Chart 15.21 Text of 8th Amendment

Bail is a payment of money allowing the accused 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 cannot afford bail directly, they may get a *bail bond*, which allows them to pay a fee (typically 10 percent) to a bond seller, who in turn pays the full bail amount to the court. (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, the court may identify the accused as a flight risk or a risk to the community if freed before trial and may deny bail and hold the accused in jail while awaiting trial. Bail amounts are sometimes challenged as excessive, but such challenges are rarely successful. 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.”^[6] In practice the courts have rarely struck down fines as excessive either.

The ban on “cruel and unusual punishments” is the most controversial Eighth Amendment provision.

Various torturous forms of execution common in the past—drawing and quartering, burning people alive, and the like—are prohibited.^[7] Recent controversies over lethal injections and firing squads suggest the topic is still salient. While the Supreme Court has never established a definitive test to define a cruel and unusual punishment, it has generally allowed most penalties short of death for adults, even when some outside observers may reasonably see that punishment as disproportionate or excessive.^[8]

In recent years the Supreme Court has issued a series of rulings substantially

Death Penalty Statistics for 2018*		
Country	Confirmed Executions 2018	Confirmed Death Sentences 2018
North Korea	unknown	unknown
Syria	unconfirmed	unconfirmed
China	1,000 “termed state secret”	1,000s “termed state secret”
Iran	253+	unknown
Saudi Arabia	149	4+
Vietnam	85+	122+
Iraq	52+	271+
Egypt	43+	717+
United States	25	45
Japan	15	4
Pakistan	14	250+
Belarus	4+	2+
Somalia	13	15+
Yemen	4+	13+
South Sudan	7+	8+
Botswana	2	5
Bangladesh	0	229+
India	0	162
Malaysia	0	190

*Amnesty International Global Report: Death Sentences and Executions 2018, April 2019, Index: ACT 50/9870/2019, Amnesty International opposes the

Chart 15.16 2018 Death Penalty Statistics

narrowing death penalty application. As a result, defendants with mental disabilities may not be executed.^[9] Defendants under eighteen years of age when they committed an offense otherwise subject to the death penalty may not be executed.^[10] The court has generally rejected the use of the death penalty for crimes that did not result in the death of another human being, most notably in the case of rape.^[11]

The United States is among ten countries with the most executions worldwide.

The reexamination of past cases through DNA evidence has revealed dozens in which people were wrongfully executed.^[12] 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.^[13] 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.^[14] It remains to be seen whether this gradual state trend to eliminate the death penalty 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.

Civil Liberties: Questions to Consider

- 1. Explain why someone accused of a crime might negotiate a plea bargain rather than exercising the right to a trial by jury.
- 2. Explain the difference between a criminal case and a civil case.

1. if they understand the strength of the evidence against them; on advice of counsel; personal choice
2. criminal cases involve non-compliance with codes of behavior; civil cases involve contractual and personal disputes

Civil Liberties: Terms to Remember

bail—a payment of money allowing the accused to be freed pending trial

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

due process—legal procedures followed equitably for all accused individuals before they are deprived of life, liberty or property

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

indictment—official charges against an accused individual

grand jury—group of citizens who must decide if there is a link between evidence and a particular individual; issuing either true bill (indictment) or no bill (free to go); deciding whether to proceed with a trial or not

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

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

prosecutorial discretion—the government may prosecute but chooses not to for various reasons

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

Civil Liberties: Works Consulted

1. *Miranda v. Arizona*, 384 U.S. 436 (1966). [\[1\]](#)
2. *Kelo et al. v. City of New London et al.*, 545 U.S. 469 (2005). [\[2\]](#)
3. See, for example, *Barker v. Wingo*, 407 U.S. 514 (1972). [\[3\]](#)
4. See, for example, *Batson v. Kentucky*, 476 U.S. 79 (1986); *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994). [\[4\]](#)
5. *Gideon v. Wainwright*, 372 U.S. 335 (1963). [\[5\]](#)
6. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909); *United States v. Bajakajian*, 524 U.S. 321 (1998). [\[6\]](#)
7. See, for example, the discussion in *Wilkerson v. Utah*, 99 U.S. 130 (1879). [\[7\]](#)
8. Perhaps the most notorious example, *Harmelin v. Michigan*, 501 U.S. 957 (1991), upheld a life sentence where the defendant was convicted of possessing just over one pound of cocaine (and no other crime). [\[8\]](#)
9. *Atkins v. Virginia*, 536 U.S. 304 (2002). [\[9\]](#)
10. *Roper v. Simmons*, 543 U.S. 551 (2005). [\[10\]](#)
11. *Kennedy v. Louisiana*, 554 U.S. 407 (2008). [\[11\]](#)
12. Elizabeth Lopatto, "How Many Innocent People Are Sentenced To Death?," *Forbes*, 29 April 2014. <http://www.forbes.com/sites/elizabethlopatto/2014/04/29/how-many-innocent-people-are-sentenced-to-death/#6e9ae5175cc1> (March 1, 2016). [\[12\]](#)
13. Dave Mann, "DNA Tests Undermine Evidence in Texas Execution: New Results Show Claude Jones was Put to Death on Flawed Evidence," *Texas Observer*, 11 November 2010. <http://www.texasobserver.org/texas-observer-exclusive-dna-tests-undermine-evidence-in-texas-execution/> (March 4, 2016). [\[13\]](#)
14. See, for example, "States With and Without the Death Penalty," Death Penalty Information Center, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (March 4, 2016). [\[14\]](#)

LICENSES AND ATTRIBUTIONS

CC LICENSED CONTENT, SHARED PREVIOUSLY

American Government. **Authored by:** OpenStax. **Provided by:** OpenStax; Rice University. **Located at:** <https://cnx.org/contents/W8wOWXNF@12.1:Y1CfqFju@5/Preface>. **License:** [CC BY: Attribution](#). **License Terms:** Download for free at <http://cnx.org/contents/9e28f580-0d1b-4d72-8795-c48329947ac2@1>.

Share icon. **Authored by:** Quan Do. **Provided by:** The Noun Project. **Located at:** <https://thenounproject.com/term/share/7671/>. **License:** [CC BY: Attribution](#)

Adaption and Remix, and Original Content. **Authored by:** Deborah Smith Hoag. **Provided by:** Austin Community College. **Located at:** <http://austinctc.edu>. **Project:** Achieving the Dream Grant. **License:** [CC BY: Attribution](#)

15.4 Civil Liberties: Protecting Privacy of Person and Property

9th Amendment

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

Image 15.22 9th Amendment of the U.S. Constitution, Bill of Rights

Learning Objectives

- Describe how the Ninth Amendment reflects 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.

Chart 15.17 Learning Objectives on Privacy

The protections in the Bill of Rights have been interpreted and reinterpreted repeatedly over the past two centuries. Previous discussion centered on enumerated/written guarantees of personal liberty; however, the courts have determined that implied protections may also be guaranteed. Privacy rights, an area the Bill of Rights does not address directly demonstrates how the Ninth Amendment has been interpreted to expand the scope of liberties protected by the *Constitution*.

Consider the Original: The 9th Amendment

We noted previously that James Madison and other framers were aware they might endanger some rights if they listed some in the *Constitution* and omitted others. To ensure that constitutional interpreters 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.”

Chart 15.18 Text of 9th Amendment

These rights “retained by the people” include the common-law and natural liberties inherited from laws, traditions, and past court decisions. To this day, we regularly exercise and take for granted rights that are not written down, like the right to marry, the right to seek opportunities for employment and education, and the right to have children and raise a family, etc. Supreme Court justices over the years have interpreted the Ninth Amendment differently; some have argued it was intended to extend the liberties protected by the *Constitution* to those natural and common-law rights, while others have argued 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 assert 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 constitutional amendments (the Fifteenth and Nineteenth) even though publicly controversial. However, supporters of a broad interpretation assert the rights of the people—particularly of political or demographic minorities—should not be subject to the whims of popular majorities (as would be the case with a direct democracy and majority rule). A general right to privacy is one the courts have said may be at least partially based on the Ninth Amendment.

The Right to Privacy

Although the specific 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 they understood it: a freedom from government intrusion into personal lives, particularly at home. For example, we could view the Second Amendment as reinforcing the common-law right to self-defense in the home; the Third Amendment confirming that soldiers should not be housed in anyone’s home; the Fourth Amendment as constraining the state’s ability 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 when it acknowledged the existence of basic natural liberties not listed in the Bill of Rights or the body of the *Constitution* itself.^[1]

Although several state constitutions do list the right to privacy as a protected right, the explicit constitutional recognition by the Supreme Court emerged in 1965 when 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.^[2] 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.^[3]

Although neither decision was without controversy, the “sexual revolution” at the time may have contributed to a sense that anti-contraception laws were at the very least dated, if not in violation of people’s rights. In *Griswold*, the Court’s majority based its concept of the right of privacy on several

provisions of the Bill of Rights stating that these “[...] various guarantees create zones of privacy.” The Court reasoned that the right to marital privacy was “older than the Bill of Rights” and ended the opinion with an impassioned appeal to the sanctity of marriage in the common law tradition. In a concurring opinion with the majority, the 9th Amendment was directly mentioned as lending “[...] strong support to the view that the “liberty” protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned [...].” By contrast, the dissenting opinion in this case stated the 9th Amendment was not intended to “broaden the powers of the Court.” The reasoning in the dissent we see echoed in other cases, such as abortion or single-sex marriages.^[4]

The Right to Privacy and Abortion

The Supreme Court’s application of the right to privacy doctrine to abortion rights was legally and politically problematic. 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;” and, abortions were completely illegal in Pennsylvania and heavily restricted in the remaining states.^[5]

A fundamental question concerning abortion is the proper balance between the individual’s unalienable right to life as stated in the *Declaration of Independence* as “[...] life, Liberty and the pursuit of happiness” and the right to privacy as expressed in *Griswold*, where the exercise of the right of privacy impacts the unalienable right to life. Another central question in this debate hinges on the proper role of government in determining which individuals may live and when unalienable rights are conveyed to the individual. The *Dobbs* (24 June 2022) decision overturning *Roe* (22 January 1973) centers on the question regarding which level (national v. state) of government will be involved in the limitations on rights if any.

Some questions, in the public arena, relating to abortion are...

- Does one life take precedence over another?
- Does the age of an individual matter when it comes to government’s protection of life?
- When does a human being begin to possess unalienable liberties?
- Does abortion for rape and incest hold an innocent human being accountable for the crime of another?
- Does life begin and end legally with a heartbeat?
- Is abortion government sanctioned murder?

The government had traditionally erred on the side of life prior to *Roe v. Wade*. The legal landscape changed dramatically as a result of the 1973 ruling in *Roe v. Wade*, when the Supreme Court decided under certain situations, the “[...] right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action , as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether to terminate her pregnancy.”^[6]

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 to decide 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.^[17]

The dissenting opinion in *Roe* stated that the Supreme Court had announced “a new constitutional right” that was not supported by the “[...] language or history of the Constitution” and described it as an unjustified “exercise of raw judicial power [...]”.^[18]

Starting in the 1980s, Supreme Court justices began to readjust and modify 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.^[19] Rather than relying on the 9th Amendment, this decision based the abortion right entirely on the 14th Amendment’s due process clause.

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 abortion health consequences. Other restrictions such as a requirement that a married woman notify her spouse in advance were struck down as an undue burden. Since the *Casey* decision, many states have passed other restrictions, banning certain procedures, requiring women to have and view an ultrasound before an abortion, and implementing more stringent licensing and inspection requirements for facilities where abortions are performed, and late-term abortions in the third trimester.



Image 15.23 Pro-Life and Pro-Choice Protesters

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 to OpenStax; a: modification of work by Brian Stansberry; Credit b: modification of work by Samuel Henderson)

In 2023 in *Dobbs v. Jackson Women's Health Organization*, which overturned both *Roe* and *Casey*, the majority opinion ruled against any constitutional right to an abortion whether based upon the 9th or the 14th Amendments' due process clause or equal protection clauses. The dissent reaffirmed the concept of a right to privacy and cautioned that the majority opinion could threaten other accepted privacy rights.^[10]

For example, beyond the issue 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. That decision was overturned in 2003 in *Lawrence v. Texas*, which invalidated state laws that criminalized sodomy.^[11]

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. 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 in a Society Under Surveillance

Another example of heightened modern era privacy concerns is the recognition that society is under pervasive surveillance. 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.

The pervasive use of GPS (Global Positioning System) raises similar issues.



Image 15.24 Electronic Surveillance via Tollway Passes

Even pedestrians and cyclists are relatively easy to track today. Cameras pointed at sidewalks and roadways can employ facial recognition software to identify people. Most 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. 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.

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: OpenStax; modification of work by Kerry Czeszyk)

These are not 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 reveal much to governments and businesses. Even when information is collected anonymously it can often be traced back to individuals, since people travel and communicate in largely predictable patterns.

Drones (small preprogrammed or remotely piloted aircraft) are becoming the next frontier of privacy issues. Drones can fly virtually undetected and monitor events from overhead. They can peek into fenced backyards and monitor activity inside houses and other buildings using infrared cameras.

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 Fourth Amendment protections today, when seeing into someone's house can be as easy as viewing a remote computer screen, is no longer simple.

In the United States, many civil liberties advocates 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 argue that the Patriot Act has largely been used to prosecute ordinary criminals, mainly drug dealers, rather than the intended terrorists.



Several groups lobby the government, such as [The Electronic Frontier Foundation](#) and [The Electronic Privacy Information Center](#), 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 employed by today's governments had been available to the East German Stasi and the Romanian Securitate, would those repressive regimes have fallen? How much privacy and freedom should citizens sacrifice in order to feel safe?

The courts continue to define the interrelationship of constitutional amendments over time. Because it was not explicitly laid out in the *Constitution*, privacy rights required clarification through public laws and court precedents.

Important cases addressing the right to privacy relate to abortion, sexual behavior, internet activity, and the privacy of personal texts and cell phone calls. Where we draw the line between privacy and public safety is an ongoing discussion and the courts are a significant player.

Civil Liberties: Questions to Consider

1. Which rights and freedoms for citizens do you think our government does a good job of protecting? Why?
2. Which rights and freedoms could it better protect, and how?
3. In which areas do you think people's rights and liberties are at risk of government intrusion? Why? Which solutions would you propose?
1. There is an old saying that it is better for 100 guilty people to go free than for an innocent person to be unjustly punished. Do you agree? Why or why not? What do you think is the right balance for our society to strike?

1. this question is open for debate
2. this question is open to personal opinion and debate
3. this question is open to personal opinion and debate
4. this question is open to personal opinion and debate

Civil Liberties: Terms to Remember

right to privacy—the right to be free of government intrusion

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

Works Consulted

1. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). This discussion parallels the debate among the members of the Supreme Court in the *Griswold* case. [\[1\]](#)
2. *Griswold v. Connecticut*, 381 U.S. 479 (1965) [\[2\]](#)
3. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). [\[3\]](#)
4. *Griswold v. Connecticut*, 381 U.S. 479 (1965)
5. See Rachel Benson Gold. March 2003. "Lessons from Before Roe: Will Past be Prologue?" *The Guttmacher Report on Public Policy* 6, No. 1. <https://www.guttmacher.org/pubs/tgr/06/1/gr060108.html> (March 4, 2016). [\[4\]](#)
6. *Roe v. Wade*, 410 U.S. 113 (1973). [\[5\]](#)
7. *Ibid.*
8. *Ibid.*
9. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). [\[6\]](#)
10. *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. __ (2022)
11. *Lawrence v. Texas*, 539 U.S. 558 (2003). [\[7\]](#)

LICENSES AND ATTRIBUTIONS

CC LICENSED CONTENT, SHARED PREVIOUSLY

American Government. **Authored by:** OpenStax. **Provided by:** OpenStax; Rice University. **Located**

at: <https://cnx.org/contents/W8w0WXNF@12.1:Y1CfqFju@5/Preface>. **License:** [CC BY: Attribution](#). **License Terms:** Download for free at <http://cnx.org/contents/9e28f580-0d1b-4d72-8795-c48329947ac2@1>.

Share icon. **Authored by:** Quan Do. **Provided by:** The Noun Project. **Located at:** <https://thenounproject.com/term/share/7671/>. **License:** [CC BY: Attribution](#)

Adaptation and Remix, and Original Content. **Authored by:** Deborah Smith Hoag. **Provided by:** Austin Community College. **Located at:** <http://austinctc.edu>. **Project:** Achieving the Dream Grant. **License:** [CC BY: Attribution](#)