What If ...

ROE V. WADE WERE OVERTURNED?

BACKGROUND

[illegible] the ultimate protections of civil liberties [illegible] do these rights work in practice? How do we determine what our rights are in any given situation? One way is through judicial review [illegible] courts to declare laws and other acts of government unconstitutional. Supreme Court cases are often hotly contested, and the [illegible] *Roe v. Wade* [illegible] today. In the *Roe v. Wade* case, the Court declared that a woman's constitutionally protected right to privacy includes the right to have an abortion. The Court concluded that the states cannot restrict a woman's right to an abortion during the first three months of pregnancy. Forty years later, however, the debate over the legality of abortion still rages in the United States.

WHAT IF *ROE V. WADE* WERE OVERTURNED?

If the Supreme Court overturned *Roe v. Wade*, the authority to regulate abortion would fall again to the states. Before the *Roe v. Wade* case, each state decided whether abortion would be legal within its borders. State legislatures made the laws that covered abortion. Some critics of the constitutional merits of *Roe v. Wade* have argued that allowing the Supreme Court to decide the legality of abortion nationwide is undemocratic because the justices are not elected officials. In contrast, if state legislatures regained the power to create abortion policy, the resulting laws would reflect the majority opinion of each state's voters. Legislators would have to respect popular sentiment on the issue or risk losing their reelection bids.

THE POSSIBILITY OF STATE BANS ON ABORTION

Simply overturning *Roe v. Wade* would not make abortion in the United States illegal overnight. In many states, abortion rights are very popular, and the legislatures in those states would not consider measures to ban abortion or to further restrict access to abortion. Some states have laws that would protect abortion rights even if *Roe v. Wade* were overturned. Access to abortions would likely continue in the West Coast states and in much of the Northeast. In much of the South and the Midwest, however, abortion could be [illegible] restricted or even banned. Some states have "trigger" laws that would immediately outlaw abortion if *Roe v. Wade* were overturned.

Women living in conservative states such as the Dakotas, Kentucky, and Mississippi already face serious difficulties in obtaining an abortion. In each of these states, [illegible] percent of the counties do not have an abortion clinic. Many women desiring the procedure already have to travel long distances. If abortion were banned, these women could still cross state lines to obtain an abortion. If [illegible] of the most conservative states banned abortion, only 170 clinics would be affected—less than 10 percent of the national total.

STATE CHALLENGES TO *ROE V. WADE*

Undoubtedly feeling optimistic because of President George W. Bush's conservative Supreme Court appointments (John Roberts and Samuel Alito), South Dakota's legislature passed a law in February 2006 banning abortion. However, the law was overturned in a statewide referendum. Another ballot effort to ban abortions was also defeated by South Dakota voters in 2008. In 2008, "right-to-life" activists in a number of other states placed anti-abortion measures on the ballot. In Colorado, for example, citizens voted on whether the state constitution should declare a fertilized egg a "person" who enjoys "inalienable rights, equality of justice, and due process of law." The measure was voted down by a three-to-one margin.

With the election of Barack Obama as president, the future of *Roe v. Wade* brightened. His first Supreme Court appointment, Sonya Sotomayor, was likely to become a supporter of the decision, and in 2010, the president nominated Elena Kagan to replace Justice Stevens, likely shoring up the coalition in support of *Roe v. Wade*.

FOR CRITICAL ANALYSIS

1. *Why do you think that abortion remains a contentious topic 40 years after the Roe v. Wade decision? Should that decision be revisited? Why or why not?*
2. *How significant a role should the courts play in deciding constitutional questions about abortion? Do you feel that individual states should have a say in the legality of abortion within their own borders? Why or why not?*

"THE LAND OF THE FREE." When asked what makes the United States distinctive, Americans commonly say that it is a free country. Americans have long believed that limits on the power of government are an essential part of what makes this country free. The first 10 amendments to the U.S. Constitution—the Bill of Rights—place such limits on the national government. Of these amendments, none is more famous than the First Amendment, which guarantees freedom of religion, speech, the press, and other rights.

Civil Liberties
Those personal freedoms that are protected for all individuals. Civil liberties typically involve restraining the government's actions against individuals.

Most other democratic nations have laws to protect these and other **civil liberties**, but none of those laws is quite like the First Amendment, which states, "Congress shall make no law ... abridging the freedom of speech, or of the press." Think about the issue of "hate speech." What if someone makes statements that stir up hatred toward a particular race or other group of people? In Germany, where memories of Nazi anti-Semitism remain alive, such speech is unquestionably illegal. In the United States, such speech may well be constitutionally protected, depending on the circumstances under which it occurred. In this chapter, we describe the civil liberties provided by the Bill of Rights and some of the controversies that surround them. We look at the First Amendment liberties, including freedom of religion, speech, press, and assembly, and then discuss the right to privacy and the rights of the accused.

■ **Learning Outcome 1:**
Explain the origin of the Bill of Rights, and discuss how these rights were applied to the states.

The Bill of Rights

As you read through this chapter, bear in mind that the Bill of Rights, like the rest of the Constitution, is relatively brief. The framers set forth broad guidelines, leaving it up to the courts to interpret these constitutional mandates and apply them to specific situations. Thus, judicial interpretations shape the true nature of the civil liberties and rights that we possess. Because judicial interpretations change over time, so do our rights. On the next several pages, you will read about several conflicts over the meaning of such simple phrases as *freedom of religion* and *freedom of the press*. To understand what freedoms we actually have, we need to examine how the courts—and particularly the United States Supreme Court—have resolved some of those conflicts. One important conflict was over the issue of whether the Bill of Rights in the federal Constitution limited the powers of state governments as well as those of the national government.

did you know?
One of the proposed initial constitutional amendments—"No State shall infringe the equal rights of conscience, nor the freedom of speech, nor of the press, nor of the right of trial by jury in criminal cases"—was never sent to the states for approval because the states' rights advocates in the first Congress defeated it.

Extending the Bill of Rights to State Governments

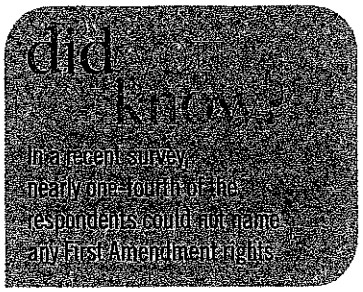
Many citizens do not realize that, as originally intended, the Bill of Rights limited only the powers of the national government. At the time the Bill of Rights was ratified, the potential of state governments to curb civil liberties caused little concern. For one thing, state governments were closer to home and easier to control. For another, most state constitutions already had bills of rights. Rather, the fear was of the potential tyranny of the national government. The Bill of Rights begins with the words, "Congress shall make no law..." It says nothing about *states* making laws that might abridge citizens' civil liberties.

In 1833, in *Barron v. Baltimore*,[1] the United States Supreme Court held that the Bill of Rights did not apply to state laws. The issue in the case was whether a property owner could sue the city of Baltimore for recovery of his losses under the Fifth Amendment to the Constitution. Chief Justice Marshall spoke for a united court, declaring that the Supreme Court could not hear the case because the amendments were meant only to limit the national government.

1. 7 Peters 243 (1833).

We mentioned that most states had bills of rights. These bills of rights were similar to the national one, with some differences. Furthermore, each state's judicial system interpreted the rights differently. Citizens in different states, therefore, effectively had different sets of civil rights. Remember that the Thirteenth, Fourteenth, and Fifteenth Amendments were passed after the Civil War to guarantee equal rights to the former slaves and free black Americans, regardless of the states in which they lived. It was not until after the Fourteenth Amendment was ratified in 1868 that civil liberties guaranteed by the national Constitution began to be applied to the states. Section 1 of that amendment provides, in part, as follows:

> *No State shall . . . deprive any person of life, liberty, or property, without due process of law.*



Incorporation of the Fourteenth Amendment

There was no question that the Fourteenth Amendment applied to state governments. For decades, however, the courts were reluctant to define the liberties spelled out in the national Bill of Rights as constituting "due process of law," which was protected under the Fourteenth Amendment. Not until 1925, in *Gitlow v. New York*,[2] did the United States Supreme Court hold that the Fourteenth Amendment applied one of the protections of the First Amendment, freedom of speech, to the states.

Only gradually, and never completely, did the Supreme Court accept the **incorporation theory**—the view that most of the protections of the Bill of Rights are incorporated into the Fourteenth Amendment's protection against state government actions. Table 4–1 shows the rights that the Court has incorporated into

Incorporation Theory
The view that most of the protections of the Bill of Rights apply to state governments through the Fourteenth Amendment's due process clause.

TABLE 4–1 ▶ Incorporating the Bill of Rights into the Fourteenth Amendment

YEAR	ISSUE	AMENDMENT INVOLVED	COURT CASE
1925	Freedom of speech	I	*Gitlow v. New York*, 268 U.S. 652
1931	Freedom of the press	I	*Near v. Minnesota*, 283 U.S. 697
1932	Right to a lawyer in capital punishment cases	VI	*Powell v. Alabama*, 287 U.S. 45
1937	Freedom of assembly and right to petition	I	*De Jonge v. Oregon*, 299 U.S. 353
1940	Freedom of religion	I	*Cantwell v. Connecticut*, 310 U.S. 296
1947	Separation of church and state	I	*Everson v. Board of Education*, 330 U.S. 1
1948	Right to a public trial	VI	*In re Oliver*, 333 U.S. 257
1949	No unreasonable searches and seizures	IV	*Wolf v. Colorado*, 338 U.S. 25
1961	Exclusionary rule	IV	*Mapp v. Ohio*, 367 U.S. 643
1962	No cruel and unusual punishment	VIII	*Robinson v. California*, 370 U.S. 660
1963	Right to a lawyer in all criminal felony cases	VI	*Gideon v. Wainwright*, 372 U.S. 335
1964	No compulsory self-incrimination	V	*Malloy v. Hogan*, 378 U.S. 1
1965	Right to privacy	I, III, IV, V, IX	*Griswold v. Connecticut*, 381 U.S. 479
1966	Right to an impartial jury	VI	*Parker v. Gladden*, 385 U.S. 363
1967	Right to a speedy trial	VI	*Klopfer v. North Carolina*, 386 U.S. 213
1969	No double jeopardy	V	*Benton v. Maryland*, 395 U.S. 784

2. 68 U.S. 652 (1925).

the Fourteenth Amendment and the case in which it first applied each protection. As you can see in that table, in the 15 years following the *Gitlow* decision, the Supreme Court incorporated into the Fourteenth Amendment the other basic freedoms (of the press, assembly, the right to petition, and religion) guaranteed by the First Amendment. These and the later Supreme Court decisions listed in Table 4–1 have bound the 50 states to accept for their citizens most of the rights and freedoms that are set forth in the U.S. Bill of Rights. We now look at some of those rights and freedoms, beginning with the freedom of religion.

■ **Learning Outcome 2: Explain how the Bill of Rights protects freedom of religion while maintaining a separation between the state and religion.**

Establishment Clause
The part of the First Amendment prohibiting the establishment of a church officially supported by the national government. It is applied to questions of state and local government aid to religious organizations and schools; the legality of allowing or requiring school prayers, and the teaching of evolution versus intelligent design.

Freedom of Religion

In the United States, freedom of religion consists of two main principles as they are presented in the First Amendment. The **establishment clause** prohibits the establishment of a church that is officially supported by the national government, thus guaranteeing a division between church and state. The *free exercise clause* constrains the national government from prohibiting individuals from practicing the religion of their choice. These two precepts can inherently be in tension with one another, however. Public universities are constrained to allow religious groups to form on campus under the free exercise clause but may decide not to fund such student groups because of the Supreme Court's prohibition of supporting religion under the establishment clause. You will read about several difficult freedom of religion issues in the following discussion.

The Separation of Church and State—The Establishment Clause

The First Amendment to the Constitution states, in part, that "Congress shall make no law respecting an establishment of religion." In the words of Thomas Jefferson, the establishment clause was designed to create a "wall of separation of Church and State."[3]

Perhaps Jefferson was thinking about the religious intolerance that characterized the first colonies. Many of the American colonies were founded by groups that were pursuing religious freedom for their own particular denomination. Nonetheless, the early colonists were quite intolerant of religious beliefs that did not conform to those held by the majority of citizens within their own communities. Jefferson undoubtedly was also aware that established churches, meaning state-protected denominations, existed within 9 of the original 13 colonies.

As interpreted by the United States Supreme Court, the establishment clause in the First Amendment means at least the following:

> *Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.*[4]

3. "Jefferson's Letter to the Danbury Baptists, The Final Letter, as Sent," January 1, 1802, The Library of Congress, Washington, D.C.
4. *Everson v. Board of Education*, 330 U.S. 1 (1947).

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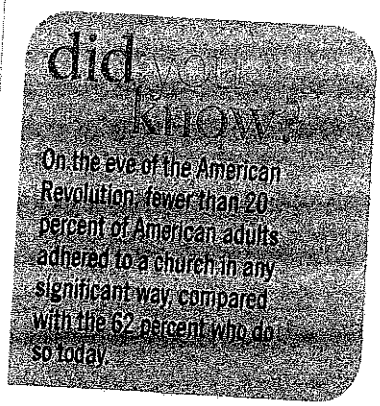
U.S. Representative Keith Ellison (D-Minn) places his hand on an English translation of the Koran once owned by Thomas Jefferson and held by his wife Kim as he is sworn in as the first Muslim member of Congress by then U.S. Speaker of the House Nancy Pelosi. His children watch the ceremony. Should members of Congress be required to be sworn in on a sacred text?

The establishment clause is applied to all conflicts about such matters as the legality of state and local government aid to religious organizations and schools, the allowing or requiring of school prayers, the teaching of evolution versus intelligent design, the posting of the Ten Commandments in schools or public places, and discrimination against religious groups in publicly operated institutions. The establishment clause's mandate that government can neither promote nor discriminate against religious beliefs raises particularly complex questions at times.

Aid to Church-Related Schools. Throughout the United States, all property owners except religious, educational, fraternal, literary, scientific, and similar nonprofit institutions must pay property taxes. A large part of the proceeds of such taxes goes to support public schools. But not all children attend public schools. Fully 12 percent of school-aged children attend private schools, of which 85 percent have religious affiliations. Many cases have reached the United States Supreme Court; the Court has tried to draw a fine line between permissible public aid to students in church-related schools and impermissible public aid to religion. These issues have arisen most often at the elementary and secondary levels.

In 1971, in *Lemon v. Kurtzman*,[5] the Court ruled that direct state aid could not be used to subsidize religious instruction. The Court in the *Lemon* case gave its most general statement on the constitutionality of government aid to religious schools, stating that the aid had to be secular (nonreligious) in aim, that it could not have the primary effect of advancing or inhibiting religion, and that the government must avoid "an excessive government entanglement with religion." The three phrases above became known as the "three-part *Lemon* test" which has been applied in most of the cases under the establishment clause since 1971. The interpretation of the test, however, has varied over the years.



5. 403 U.S. 602 (1971).

In several cases, the Supreme Court has held that state programs helping church-related schools are unconstitutional. The Court also has denied state reimbursements to religious schools for field trips and for developing achievement tests. In a series of other cases, however, the Supreme Court has allowed states to use tax funds for lunches, textbooks, diagnostic services for speech and hearing problems, state-required standardized tests, computers, and transportation for students attending church-operated elementary and secondary schools. In some cases, the Court argued that state aid was intended to directly assist the individual child, and in other cases, such as bus transportation, the Court acknowledged the state's goals for public safety.

A Change in the Court's Position. Generally, today's Supreme Court has shown a greater willingness to allow the use of public funds for programs in religious schools than was true at times in the past. Consider that in 1985, in *Aguilar v. Felton*,[6] the Supreme Court ruled that state programs providing special educational services for disadvantaged students attending religious schools violated the establishment clause. In 1997, however, when the Supreme Court revisited this decision, the Court reversed its position. In *Agostini v. Felton*,[7] the Court held that *Aguilar* was "no longer good law." What had happened between 1985 and 1997 to cause the Court to change its mind? Justice Sandra Day O'Connor answered this question in the *Agostini* opinion: What had changed since *Aguilar*, she stated, was "our understanding" of the establishment clause. Between 1985 and 1997, the Court's makeup had changed significantly. In fact, six of the nine justices who participated in the 1997 decision were appointed after the 1985 *Aguilar* decision.

School Vouchers. Questions about the use of public funds for church-related schools are likely to continue as state legislators search for new ways to improve the educational system in this country. An issue that has come to the forefront in recent years is school vouchers. In a voucher system, educational vouchers (state-issued credits) can be used to "purchase" education at any school, public or private.

School districts in Florida, Ohio, and Wisconsin have all been experimenting with voucher systems. In 2000, the courts reviewed a case involving Ohio's voucher program. Under that program, some $10 million in public funds is spent annually to send 4,300 Cleveland students to 51 private schools, all but five of which are Catholic schools. The case presented a straightforward constitutional question: Is it a violation of the principle of separation of church and state for public tax money to be used to pay for religious education?

In 2002, the Supreme Court held that the Cleveland voucher program was constitutional.[8] The Court concluded, by a 5-4 vote, that Cleveland's use of taxpayer-paid school vouchers to send children to private schools was constitutional, even though more than 95 percent of the students use the vouchers to attend Catholic or other religious schools. The Court's majority reasoned that the program did not unconstitutionally entangle church and state, because families theoretically could use the vouchers for their children to attend religious schools, secular private academies, suburban public schools, or charter schools, even though few public schools had agreed to accept vouchers. The Court's decision raised a further question that will need to be decided—whether religious and

6. 473 U.S. 402 (1985).
7. 521 U.S. 203 (1997).
8. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

private schools that accept government vouchers must comply with disability and civil rights laws, as public schools are required to do.

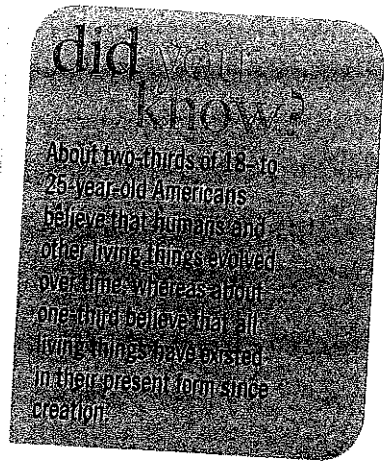
Despite the United States Supreme Court's decision upholding the Cleveland voucher program, in 2006 the Florida Supreme Court declared Florida's voucher program unconstitutional. The Florida court held that the Florida state constitution bars public funding from being diverted to private schools that are not subject to the uniformity requirements of the state's public school system. The state of Arizona has taken an entirely different approach, passing legislation to allow parents to reduce their state taxes by the amount of tuition paid to a private school. In 2011, the Supreme Court ruled that, because the money was paid directly from the individual to the school and the government did not support the private school, the law could not be challenged by other taxpayers.[9] In 2012, school voucher programs in eight states and the District of Columbia served about 80,000 children; however, many of these programs were still being legally contested in state courts.

The Issue of School Prayer—Engel v. Vitale. Do the states have the right to promote religion in general, without making any attempt to establish a particular religion? That is the question raised by school prayer and was the precise issue in 1962 in *Engel v. Vitale*,[10] the so-called Regents' Prayer case in New York. The State Board of Regents of New York had suggested that a prayer be spoken aloud in the public schools at the beginning of each day. The recommended prayer was as follows:

> *Almighty God, we acknowledge our dependence upon Thee, And we beg Thy blessings upon us, our parents, our teachers, and our Country.*

Such a prayer was implemented in many New York public schools. The parents of several students challenged the action of the regents, maintaining that it violated the establishment clause of the First Amendment. At trial, the parents lost. The Supreme Court, however, ruled that the regents' action was unconstitutional because "the constitutional prohibition against laws respecting an establishment of a religion must mean at least that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by any government." The Court's conclusion was based in part on the "historical fact that governmentally established religions and religious persecutions go hand in hand." In *Abington School District v. Schempp*,[11] the Supreme Court outlawed officially sponsored daily readings of the Bible and recitation of the Lord's Prayer in public schools.

The Debate over School Prayer Continues. Although the Supreme Court has ruled repeatedly against officially sponsored prayer and Bible-reading sessions in public schools, other means for bringing some form of religious expression into public education have been attempted. In 1983, the Tennessee legislature passed a bill requiring public school classes to begin each day with a minute of silence. Alabama had a similar law. In 1985, in *Wallace v. Jaffree*,[12] the Supreme Court struck down as unconstitutional the Alabama law authorizing one minute of silence for prayer or meditation in all public schools. Applying the three-part *Lemon* test, the Court concluded that



9. *Arizona School Tuition Organization v. Winn*, 09-987 (2011)
10. 370 U.S. 421 (1962).
11. 374 U.S. 203 (1963).
12. 472 U.S. 38 (1985).

the law violated the establishment clause because it was "an endorsement of religion lacking any clearly secular purpose."

Since then, the lower courts have interpreted the Supreme Court's decision to mean that states can require a moment of silence in the schools as long as they make it clear that the purpose of the law is secular, not religious.

Prayer outside the Classroom. The courts have also dealt with cases involving prayer in public schools outside the classroom, particularly prayer during graduation ceremonies. In 1992, in *Lee v. Weisman*,[13] the United States Supreme Court held that it was unconstitutional for a school to invite a rabbi to deliver a nonsectarian prayer at graduation. The Court said nothing about *students* organizing and leading prayers at graduation ceremonies and other school events, however, and these issues continue to come before the courts. A particularly contentious question in the last few years has been the constitutionality of student-initiated prayers before sporting events, such as football games. In 2000, the Supreme Court held that while school prayer at graduation did not violate the establishment clause, students could not use a school's public-address system to lead prayers at sporting events.[14]

Despite the Court's ruling, students at several schools in Texas continue to pray over public-address systems at sporting events. In other areas, the Court's ruling is skirted by avoiding the use of the public-address system. For example, in a school in North Carolina, a pregame prayer was broadcast over a local radio station and heard by fans who took radios to the game for that purpose.

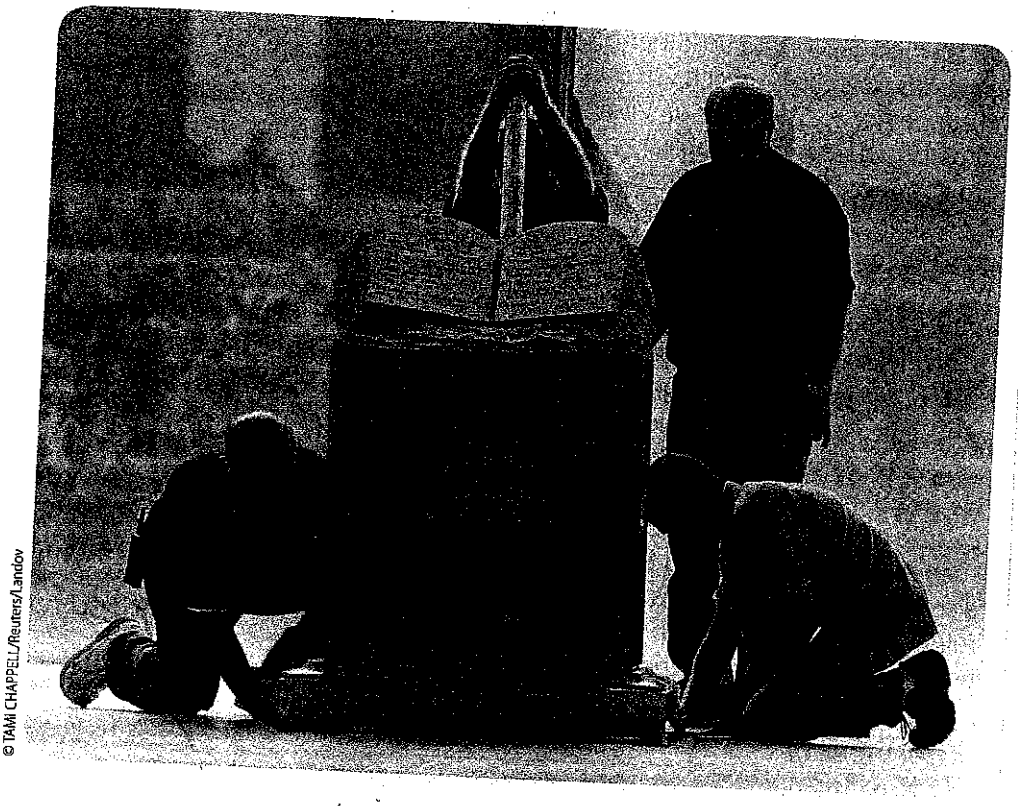
The Ten Commandments. A related church–state issue is whether the Ten Commandments may be displayed in public schools—or on any public property. Supporters of the movement to display the Ten Commandments argue that they embody American values and that they constitute a part of the official and permanent history of American government.

Opponents of such laws claim that they are an unconstitutional government entanglement with the religious life of citizens. Still, various Ten Commandments installations have been found to be constitutional. For example, the Supreme Court ruled in 2005 that a granite monument on the grounds of the Texas state capitol that contained the commandments was constitutional because the monument as a whole was secular in nature.[15] In another 2005 ruling, however, the Court ordered that displays of the Ten Commandments in front of two Kentucky county courthouses had to be removed because they were overtly religious.[16]

The Ten Commandments controversy took an odd twist in 2003 when, in the middle of the night, former Alabama chief justice Roy Moore installed a two-and-a-half-ton granite monument featuring the commandments in the rotunda of the state courthouse. When Moore refused to obey a federal judge's order to remove the monument, the Alabama Court of the Judiciary was forced to expel him from the judicial bench.

Forbidding the Teaching of Evolution. For many decades, certain religious groups, particularly in southern states, have opposed the teaching of evolution in the schools. To these groups, evolutionary theory directly counters their religious belief that human beings did not evolve but were created fully formed, as described in the biblical story of creation. State and local attempts to forbid the

13. 505 U.S. 577 (1992).
14. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).
15. *VanOrden v. Perry*, 125 S. Ct. 2854 (2005).
16. *McCreary County v. American Civil Liberties Union*, 125 S. Ct. 2722 (2005).



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Workers work to remove a monument of the Ten Commandments from the rotunda area of the Alabama Judicial Building where Superior Court Justice Roy Moore had refused to take it down, on August 27, 2003, in Montgomery, Alabama. Judge Moore was expelled from his seat on the bench for his refusal.

teaching of evolution, however, have not passed constitutional muster in the eyes of the United States Supreme Court. For example, in 1968, the Supreme Court held in *Epperson v. Arkansas*[17] that an Arkansas law prohibiting the teaching of evolution violated the establishment clause because it imposed religious beliefs on students. The Louisiana legislature passed a law requiring the teaching of the biblical story of the creation alongside the teaching of evolution. In 1987, in *Edwards v. Aguillard*,[18] the Supreme Court declared that this law was unconstitutional, in part because it had as its primary purpose the promotion of a particular religious belief.

Nonetheless, state and local groups around the country, particularly in the so-called Bible Belt, continue their efforts against the teaching of evolution. The Cobb County school system in Georgia attempted to include a disclaimer in its biology textbooks that proclaims, "Evolution is a theory, not a fact, regarding the origin of living things." A federal judge later ruled that the disclaimer stickers must be removed. Other school districts have considered teaching "intelligent design" as an alternative explanation of the origin of life. Proponents of intelligent design contend that evolutionary theory has gaps that can be explained only by the existence of an intelligent creative force (God). They suggest that teaching intelligent design in the schools is simply teaching another kind of scientific theory, so it would not breach the separation of church and state. Critics of intelligent design have pointed out that many of its proponents have a religious agenda. The same religious groups also once backed creationism, a set of quasi-scientific theories that support the creation narrative. Intelligent design, at its essence, proposes an original Creator, which is a religious belief and cannot be taught in the schools.

17. 393 U.S. 97 (1968).
18. 482 U.S. 578 (1987).

Religious Speech. Another controversy in the area of church-state relations concerns religious speech in public schools or universities. For example, in *Rosenberger v. University of Virginia*,[19] the issue was whether the University of Virginia violated the establishment clause when it refused to fund a Christian group's newsletter but granted funds to more than 100 other student organizations. The Supreme Court ruled that the university's policy unconstitutionally discriminated against religious speech. The Court pointed out that the funds came from student fees, not general taxes, and were used for the "neutral" payment of bills for student groups.

Later, the Supreme Court reviewed a case involving a similar claim of discrimination against a religious group, the Good News Club. The club offers religious instruction to young schoolchildren. The club sued the school board of a public school in Milford, New York, when the board refused to allow the club to meet on school property after the school day ended. The club argued that the school board's refusal to allow the club to meet on school property, when other groups—such as the Girl Scouts and the 4-H Club—were permitted to do so, amounted to discrimination on the basis of religion. Ultimately, the Supreme Court agreed, ruling in *Good News Club v. Milford Central School*[20] that the Milford school board's decision violated the establishment clause.

The Free Exercise Clause

Free Exercise Clause
The provision of the First Amendment guaranteeing the free exercise of religion.

The First Amendment constrains Congress from prohibiting the free exercise of religion. Does this **free exercise clause** mean that no type of religious practice can be prohibited or restricted by government? Certainly, a person can hold any religious belief that he or she wants, or have no religious beliefs. When, however, religious *practices* work against public policy and the public welfare, the government can act. For example, regardless of a child's or parent's religious beliefs, the government can require certain types of vaccinations. The sale and use of marijuana for religious purposes has been held illegal, because a religion cannot make legal what would otherwise be illegal.

The extent to which government can regulate religious practices has always been a subject of controversy. For example, in 1990 in *Oregon v. Smith*,[21] the United States Supreme Court ruled that the state of Oregon could deny unemployment benefits to two drug counselors who had been fired for using peyote, an illegal drug, in their religious services. The counselors had argued that using peyote was part of the practice of a Native American religion. Many criticized the decision as going too far in the direction of regulating religious practices.

The Religious Freedom Restoration Act. In 1993, Congress responded to the public's criticism by passing the Religious Freedom Restoration Act (RFRA). One of the specific purposes of the act was to overturn the Supreme Court's decision in *Oregon v. Smith*. The act required national, state, and local governments to "accommodate religious conduct" unless the government could show a *compelling* reason not to do so. Moreover, if the government did regulate a religious practice, it had to use the least restrictive means possible.

Some people believed that the RFRA went too far in the other direction—it accommodated practices that were contrary to the public policies of state governments. Proponents of states' rights complained that the act intruded into an area

19. 515 U.S. 819 (1995).
20. 533 U.S. 98 (2001).
21. 494 U.S. 872 (1990)

traditionally governed by state laws, not by the national government. In 1997, in *City of Boerne v. Flores*,[22] the Supreme Court agreed and held that Congress had exceeded its constitutional authority when it passed the RFRA. According to the Court, the act's "sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."

Free Exercise in the Public Schools. The courts have repeatedly held that U.S. governments at all levels must remain neutral on issues of religion. In the *Good News Club* decision discussed previously, the Supreme Court ruled that "state power is no more to be used to handicap religions than it is to favor them." Nevertheless, by overturning the RFRA, the Court cleared the way for public schools to set regulations that, while ostensibly neutral, effectively limited religious expression by students. An example is a rule banning hats, which has been instituted by many schools as a way of discouraging the display of gang insignia. This rule has also been interpreted as barring yarmulkes, the small caps worn by strictly observant Jewish boys and men.

Freedom of Expression

■ **Learning Outcome 3: Define freedom of expression, explain where it is found in the Bill of Rights, and show why it is important in a democracy.**

Perhaps the most frequently invoked freedom that Americans have is the right to free speech and a free press without government interference. Each of us has the right to have our say, and all of us have the right to hear what others say. For the most part, Americans can criticize public officials and their actions without fear of reprisal by any branch of government.

No Prior Restraint

Restraining an activity before that activity has actually occurred is called **prior restraint**. When expression is involved, prior restraint means censorship, as opposed to subsequent punishment. Prior restraint of expression would require, for example, that a permit be obtained before a speech could be made, a newspaper published, or a movie or TV show exhibited. Most, if not all, Supreme Court justices have been very critical of any governmental action that imposes prior restraint on expression. The Court clearly displayed this attitude in *Nebraska Press Association v. Stuart*,[23] a case decided in 1976:

> *A prior restraint on expression comes to this Court with a "heavy presumption" against its constitutionality. . . . The government thus carries a heavy burden of showing justification for the enforcement of such a restraint.*

Prior Restraint
Restraining an action before the activity has actually occurred. When expression is involved, this means censorship.

One of the most famous cases concerning prior restraint was *New York Times v. United States*[24] in 1971, the so-called Pentagon Papers case. The *Times* and *The Washington Post* were about to publish the Pentagon Papers, an elaborate secret history of the U.S. government's involvement in the Vietnam War (1964–1975). The secret documents had been obtained illegally by a disillusioned former Pentagon official. The government wanted a court order to bar publication of the documents, arguing that national security was threatened and that the documents had been stolen. The newspapers argued that the public had a right to know the information contained in the papers and that the press had

22. 521 U.S. 507 (1997).
23. 427 U.S. 539 (1976). See also *Near v. Minnesota*, 283 U.S. 697 (1931).
24. 403 U.S. 713 (1971).

the right to inform the public. The Supreme Court ruled 6-3 in favor of the newspapers' right to publish the information. This case affirmed the no-prior-restraint doctrine.

WikiLeaks

In recent years, an organization known as WikiLeaks, led by an Australian named Julian Assange, has made available on the Internet huge sets of documents that were held by governments around the world. Most of these documents had been "classified" by the respective governments as too sensitive to be made public. Assange, who has been indicted on other unrelated crimes, continues to live in Great Britain and direct the operation. The United States government charged the member of the U.S. military who allowed WikiLeaks to gain access to the documents with a crime, but no other action seems to be possible. The Internet has, in this case, made freedom of expression a worldwide issue.

The Protection of Symbolic Speech

Symbolic Speech
Nonverbal expression of beliefs, which is given substantial protection by the courts.

Not all expression is in words or in writing. Articles of clothing, gestures, movements, and other forms of expressive conduct are considered **symbolic speech**. Such speech is given substantial protection today by our courts. For example, in a landmark decision issued in 1969, *Tinker v. Des Moines School District*,[25] the United States Supreme Court held that the wearing of black armbands by students in protest against the Vietnam War was a form of speech protected by the First Amendment. The case arose after a school administrator in Des Moines, Iowa, issued a regulation prohibiting students in the Des Moines School District from wearing the armbands. The Supreme Court reasoned that the school district was unable to show that the wearing of the armbands had disrupted normal school activities. Furthermore, the school district's policy was discriminatory, as it banned only certain forms of symbolic speech (the black armbands) and not others (such as lapel crosses and fraternity rings).

© HIROKO MASUIKE/AFP/Getty Images

Demonstrators burn U.S. flags in front of the World Bank headquarters in 2002, protesting the international meetings there. Why is it legal to burn the flag in protest?

25. 393 U.S. 503 (1969).

In 1989, in *Texas v. Johnson*,[26] the Supreme Court ruled that state laws that prohibited the burning of the American flag as part of a peaceful protest also violated the freedom of expression protected by the First Amendment. Congress responded by passing the Flag Protection Act of 1989, which was ruled unconstitutional by the Supreme Court in June 1990.[27] Congress and President George H. W. Bush immediately pledged to work for a constitutional amendment to "protect our flag"—an effort that has yet to be successful.

In 2003, however, the Supreme Court held that a Virginia statute prohibiting the burning of a cross with "an intent to intimidate" did not violate the First Amendment. The Court concluded that a burning cross is an instrument of racial terror so threatening that it overshadows free speech concerns.[28]

The Protection of Commercial Speech

Commercial speech usually is defined as advertising statements. Can advertisers use their First Amendment rights to prevent restrictions on the content of commercial advertising? Until the 1970s, the Supreme Court held that such speech was not protected at all by the First Amendment. By the mid-1970s, however, more commercial speech had been brought under First Amendment protection. According to Justice Harry A. Blackmun, "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product for what reason and at what price."[29] Nevertheless, the Supreme Court will consider a restriction on commercial speech valid as long as it (1) seeks to implement a substantial government interest, (2) directly advances that interest, and (3) goes no further than necessary to accomplish its objective. What this means is that an advertisement that makes totally false claims can be restricted.

Commercial Speech
Advertising statements, which increasingly have been given First Amendment protection.

The issue of political campaign advertising is one that crosses the boundaries between individual free speech and commercial speech. For many years, federal law has prohibited businesses, labor unions, and other organizations from engaging directly in political advertising. As you will learn later in this book, corporations and other groups were allowed to create political action committees to engage in regulated activities. In recent years, new organizational forms were created to campaign for issues. However, nonprofit organizations were strictly prohibited from directly campaigning for candidates. In 2009, the Supreme Court overturned decades of law on this issue, declaring in *Citizens United vs. FEC* that corporations and other associations were "persons" in terms of the law and had free speech rights. According to the majority decision, Citizens United, an incorporated nonprofit group, was unfairly denied the right to pay for broadcasting a movie about Senator Hillary Clinton, a film which was intended to harm her campaign for president. President Obama reacted by asking the Congress to rewrite the campaign finance laws to restrict such forms of political advertising.[30]

Permitted Restrictions on Expression

At various times, restrictions on expression have been permitted. As we have seen after the terrorist attacks of September 11, 2001, periods of perceived foreign threats to the government sometimes lead to more repression of speech

26. 488 U.S. 884 (1989).
27. *United States v. Eichman*, 496 U.S. 310 (1990).
28. *Virginia v. Black*, 538 U.S. 343 (2003).
29. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).
30. *Citizens United v. Federal Election Commission*, 558 U.S. (2010).

that is thought to be dangerous to the nation. It is interesting to note that the Supreme Court changes its view of what might be dangerous speech depending on the times.

Clear and Present Danger. When a person's remarks create a clear and present danger to the peace or public order, they can be curtailed constitutionally. Justice Oliver Wendell Holmes used this reasoning in 1919 when examining the case of a socialist who had been convicted for violating the Espionage Act by distributing a leaflet that opposed the military draft. Holmes stated:

> *The question in every case is whether the words are used in such circumstances and are of such a nature as to create a* ***clear and present danger*** *that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.*[31] *[Emphasis added.]*

Clear and Present Danger Test
The test proposed by Justice Oliver Wendell Holmes for determining when government may restrict free speech. Restrictions are permissible, he argued, only when speech creates a *clear and present danger* to the public order.

According to the **clear and present danger test**, then, expression may be restricted if evidence exists that such expression would cause a condition, actual or imminent, that Congress has the power to prevent. Commenting on this test, Justice Louis D. Brandeis in 1920 said, "Correctly applied, it will reserve the right of free speech ... from suppression by tyrannists, well-meaning majorities, and from abuse by irresponsible, fanatical minorities."[32]

Modifications to the Clear and Present Danger Rule. Since the clear and present danger rule was first enunciated, the United States Supreme Court has modified it. In 1925, during a period when many Americans feared the increasing power of communist and other left-wing parties in Europe, the Supreme Court heard the case *Gitlow v. New York*.[33] In its opinion, the Court introduced the *bad-tendency rule*. According to this rule, speech or other First

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In 2002, a student who held this banner outside his school in Alaska was suspended for supporting drug use with his "speech." The Supreme Court upheld the principal's decision in the 2007 case *Morse v. Frederick*, saying that public schools are able to regulate what students say about promoting illegal drug use. Do you think banning such speech is a violation of students' free speech rights? Should colleges be able to implement such a ban as well?

31. *Schenck v. United States*, 249 U.S. 47(1919).
32. *Schaefer v. United States*, 251 U.S. 466 (1920).
33. 268 U.S. 652 (1925).

Amendment freedoms may be curtailed if a possibility exists that such expression might lead to some "evil." In the *Gitlow* case, a member of a left-wing group was convicted of violating New York State's criminal anarchy statute when he published and distributed a pamphlet urging the violent overthrow of the U.S. government. In its majority opinion, the Supreme Court held that although the First Amendment afforded protection against state incursions on freedom of expression, Gitlow could be punished legally in this particular instance because his expression would tend to bring about evils that the state had a right to prevent.

The Supreme Court again modified the clear and present danger test in a 1951 case, *Dennis v. United States.*[34] During the early years of the Cold War, Americans were anxious about the activities of communists and the Soviet Union within the United States. Congress passed several laws that essentially outlawed the Communist Party of the United States and made its activities illegal. Twelve members of the American Communist Party were convicted of violating a statute that made it a crime to conspire to teach, advocate, or organize the violent overthrow of any government in the United States. The Supreme Court affirmed the convictions, significantly modifying the clear and present danger test in the process. The Court applied a *grave and probable danger rule*. Under this rule, "the gravity of the 'evil' discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger." This rule gave much less protection to free speech than did the clear and present danger test.

Six years after the *Dennis* case, the Supreme Court heard another case in which members of the Communist Party in California were accused of teaching and advocating the overthrow of the government of the United States. The ruling of the Court in this case greatly reduced the scope of the law passed by Congress. In *Yates v. United States,*[35] the Court held that there was a difference between "advocacy and teaching of forcible overthrow as an abstract principle" and actually proposing concrete action. The Court overturned the convictions of the party leaders because they were essentially engaging in speech rather than action. This was the beginning of a series of cases that eventually found the original congressional legislation to be unconstitutional because it violated the First and Fourth Amendments.

Some claim that the United States did not achieve true freedom of political speech until 1969. In that year, in *Brandenburg v. Ohio,*[36] the Supreme Court overturned the conviction of a Ku Klux Klan leader for violating a state statute. The statute prohibited anyone from advocating "the duty, necessity, or propriety of sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." The Court held that the guarantee of free speech does not permit a state "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless actions and is likely to incite or produce such action." The incitement test enunciated by the Court in this case is a difficult one for prosecutors to meet. As a result, the Court's decision significantly broadened the protection given to advocacy speech.

Unprotected Speech: Obscenity

Many state and federal statutes make it a crime to disseminate obscene materials. Generally, the courts have not been willing to extend constitutional protections of free speech to what they consider to be obscene materials. But what is obscenity?

34. 341 U.S. 494 (1951).
35. 354 U.S. 298 (1957).
36. 395 U.S. 444 (1969).

Justice Potter Stewart once stated, in *Jacobellis v. Ohio*,[37] a 1964 case, that even though he could not define *obscenity*, "I know it when I see it." The problem is that even if it were agreed on, the definition of *obscenity* changes with the times. Victorians deeply disapproved of the "loose" morals of the Elizabethan Age. The works of Mark Twain and Edgar Rice Burroughs at times have been considered obscene (after all, Tarzan and Jane were not legally wedded).

Definitional Problems. The Supreme Court has grappled from time to time with the difficulty of specifying an operationally effective definition of *obscenity*. In 1973, in *Miller v. California*,[38] Chief Justice Warren Burger created a formal list of requirements that must be met for material to be considered legally obscene. Material is obscene if (1) the average person finds that it violates contemporary community standards; (2) the work taken as a whole appeals to a prurient interest in sex; (3) the work shows patently offensive sexual conduct; and (4) the work lacks serious redeeming literary, artistic, political, or scientific merit. The problem is that one person's prurient interest is another person's medical interest or artistic pleasure. The Court went on to state that the definition of *prurient interest* would be determined by the community's standards. The Court avoided presenting a definition of *obscenity,* leaving this determination to local and state authorities. Consequently, the *Miller* case has been applied in a widely inconsistent manner.

Protecting Children. The Supreme Court has upheld state laws making it illegal to sell materials showing sexual performances by minors. In 1990, in *Osborne v. Ohio*,[39] the Court ruled that states can outlaw the possession of child pornography in the home. The Court reasoned that the ban on private possession is justified because owning the material perpetuates commercial demand for it and for the exploitation of the children involved. At the federal level, the Child Protection Act of 1984 made it a crime to receive knowingly through the mails sexually explicit depictions of children.

Pornography on the Internet. A significant problem facing Americans and lawmakers today is how to control obscenity and child pornography disseminated via the Internet. In 1996, Congress first attempted to protect minors from pornographic materials on the Internet by passing the Communications Decency Act (CDA). The act made it a crime to make available to minors online any "obscene or indecent" message that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." The act was immediately challenged in court as an unconstitutional infringement on free speech. The Supreme Court held that the act imposed unconstitutional restraints on free speech and was therefore invalid.[40] In the eyes of the Court, the terms *indecent* and *patently offensive* covered large amounts of nonpornographic material with serious educational or other value. Later attempts by Congress to curb pornography on the Internet also encountered stumbling blocks. For example, the Child Online Protection Act (COPA) of 1998 banned the distribution of material "harmful to minors" without an age-verification system to separate adult and minor users. In 2002, the Supreme Court upheld a lower court injunction suspending the COPA, and in 2004, the Court again upheld the

37. 378 U.S. 184 (1964).
38. 413 U.S. 5 (1973).
39. 495 U.S. 103 (1990).
40. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

suspension of the law on the ground that it was probably unconstitutional.[41] In 2000, Congress enacted the Children's Internet Protection Act (CIPA), which requires public schools and libraries to install filtering software to prevent children from viewing Web sites with "adult" content.

Should "Virtual" Pornography Be Deemed a Crime? In 2001, the Supreme Court agreed to review a case challenging the constitutionality of another federal act attempting to protect minors in the online environment—the Child Pornography Prevention Act (CPPA) of 1996. This act made it illegal to distribute or possess computer-generated images that appear to depict minors engaging in lewd and lascivious behavior. At issue was whether digital child pornography should be considered a crime even though it uses only digitally rendered images and no actual children are involved.

The Supreme Court, noting that virtual child pornography is not the same as child pornography, held that the CPPA's ban on virtual child pornography restrained a substantial amount of lawful speech.[42] The Court stated, "The statute proscribes the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages." The Court concluded that the act was overbroad and thus unconstitutional.

Unprotected Speech: Slander

Can you say anything you want about someone else? Not really. Individuals are protected from **defamation of character**, which is defined as wrongfully hurting a person's good reputation. The law imposes a general duty on all persons to refrain from making false, defamatory statements about others. Breaching this duty orally is the wrongdoing called *slander*. Breaching it in writing is the wrongdoing called *libel*, which we discuss later. The government does not bring charges of slander or libel. Rather, the defamed person may bring a civil suit for damages.

Defamation of Character
Wrongfully hurting a person's good reputation. The law imposes a general duty on all persons to refrain from making false, defamatory statements about others.

Legally, **slander** is the public uttering of a false statement that harms the good reputation of another. Slanderous public uttering means that the defamatory statements are made to, or within the hearing of, persons other than the defamed party. If one person calls another dishonest, manipulative, and incompetent to his or her face when no one else is around, that does not constitute slander. The message is not communicated to a third party. If, however, a third party accidentally overhears defamatory statements, the courts have generally held that this constitutes a public uttering and therefore slander, which is prohibited.

Slander
The public uttering of a false statement that harms the good reputation of another. The statement must be made to, or within the hearing of, persons other than the defamed party.

Campus Speech

In recent years, students have been facing free-speech challenges on campuses. One issue has to do with whether a student should have to subsidize, through student activity fees, organizations that promote causes that the student finds objectionable.

Student Activity Fees. In 2000, this question came before the United States Supreme Court in a case brought by several University of Wisconsin students. The students argued that their mandatory student activity fees—which

41. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004).
42. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

helped to fund liberal causes with which they disagreed, including gay rights—violated their First Amendment rights of free speech, free association, and free exercise of religion. They contended that they should have the right to choose whether to fund organizations that promoted political and ideological views that were offensive to their personal beliefs. To the surprise of many, the Supreme Court rejected the students' claim and ruled in favor of the university. The Court stated that "the university may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular life. If the university reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends."[43]

Campus Speech and Behavior Codes. Another free speech issue is the legitimacy of campus speech and behavior codes. Some state universities have established codes that challenge the boundaries of the protection of free speech provided by the First Amendment. These codes are designed to prohibit so-called hate speech—abusive speech attacking persons on the basis of their ethnicity, race, or other criteria. For example, a University of Michigan code banned "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap" or Vietnam-veteran status. A federal court found that the code violated students' First Amendment rights.[44]

Although the courts generally have held, as in the University of Michigan case, that campus speech codes are unconstitutional restrictions on the right to free speech, such codes continue to exist. Whether hostile speech should be banned on high school campuses has also become an issue. In view of school shootings and other violent behavior in the schools, school officials have become concerned about speech that consists of veiled threats or that could lead to violence. Some schools have even prohibited students from wearing clothing, such as T-shirts bearing verbal messages (such as sexist or racist comments) or symbolic messages (such as the Confederate flag), that might generate "ill will or hatred." Defenders of campus speech codes argue that they are necessary not only to prevent violence but also to promote equality among different cultural, ethnic, and racial groups on campus and greater sensitivity to the needs and feelings of others.

Hate Speech on the Internet

Extreme hate speech appears on the Internet, including racist materials and denials of the Holocaust (the murder of millions of Jews by the Nazis during World War II). Can the federal government restrict this type of speech? Should it? Content restrictions can be difficult to enforce. Even if Congress succeeded in passing a law prohibiting particular speech on the Internet, an army of "Internet watchers" would be needed to enforce it. Also, what if other countries attempt to impose their laws that restrict speech on U.S. Web sites? This is not a theoretical issue. In 2000, a French court found Yahoo in violation of French laws banning the display of Nazi memorabilia. In 2001, however, a U.S. district court held that this ruling could not be enforced against Yahoo in the United States.[45]

43. *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000).
44. *Doe v. University of Michigan*, 721 F. Supp. 852 (1989).
45. *Yahool, Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

Freedom of the Press

Freedom of the press can be regarded as a special instance of freedom of speech. Of course, at the time of the framing of the Constitution, the press meant only newspapers, magazines, and books. As technology has modified the ways in which we disseminate information, the laws touching on freedom of the press have been modified. What can and cannot be printed still occupies an important place in constitutional law, however.

Defamation in Writing

Libel is defamation in writing (or in pictures, signs, films, or any other communication that has the potentially harmful qualities of written or printed words). As with slander, libel occurs only if the defamatory statements are observed by a third party. If one person writes a private letter to another person wrongfully accusing him or her of embezzling funds, that does not constitute libel. It is interesting that the courts have generally held that dictating a letter to a secretary constitutes communication of the letter's contents to a third party, and therefore, if defamation has occurred, the wrongdoer can be sued.

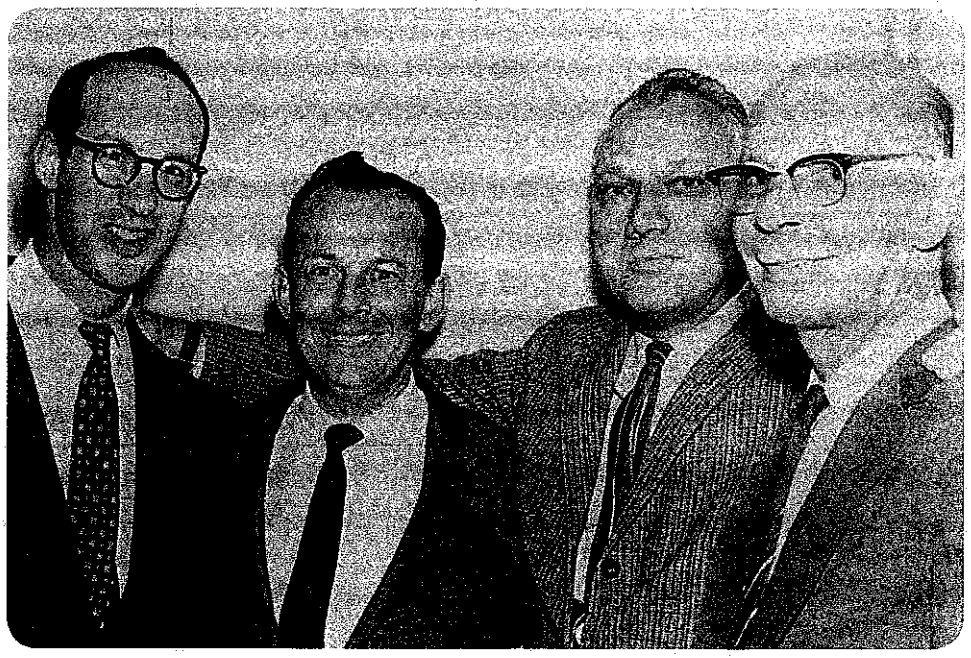
Libel
A written defamation of a person's character, reputation, business, or property rights.

A 1964 case, *New York Times Co. v. Sullivan*,[46] explored an important question regarding libelous statements made about public officials. The Supreme Court held that only when a statement against a public official was made with **actual malice**—that is, with either knowledge of its falsity or a reckless disregard of the truth—could damages be obtained.

Actual Malice
Either knowledge of a defamatory statement's falsity or a reckless disregard for the truth.

The standard set by the Court in the *New York Times* case has since been applied to **public figures** generally. Public figures include not only public officials but also public employees who exercise substantial governmental power and any persons who are generally in the limelight. Statements made about public figures, especially when they are made through a public medium, usually are related to matters of general public interest; they are made about people who substantially

Public Figure
A public official, movie star, or other person known to the public because of his or her position or activities.



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Police Commissioner
L. B. Sullivan (second from right) celebrates his $500,000 libel suit victory in the case *New York Times Co. v. Sullivan*. From left are attorneys J. Roland Nachman, Jr., who directed the plaintiff's suit, Calvin Whitesell, Sullivan, and Sam Rice Baker.

46. 376 U.S. 254 (1964).

affect all of us. Furthermore, public figures generally have some access to a public medium for answering disparaging falsehoods about themselves, whereas private individuals do not. For these reasons, public figures have a greater burden of proof (they must prove that the statements were made with actual malice) in defamation cases than do private individuals.

A Free Press versus a Fair Trial: Gag Orders

Another major issue relating to freedom of the press concerns media coverage of criminal trials. The Sixth Amendment to the Constitution guarantees the right of criminal suspects to a fair trial. In other words, the accused have rights. The First Amendment guarantees freedom of the press. What if the two rights appear to be in conflict? Which one prevails?

Gag Order
An order issued by a judge restricting the publication of news about a trial or a pretrial hearing to protect the accused's right to a fair trial.

Jurors certainly may be influenced by reading news stories about the trial in which they are participating. In the 1970s, judges increasingly issued **gag orders**, which restricted the publication of news about a trial in progress or even a pretrial hearing. In a landmark 1976 case, *Nebraska Press Association v. Stuart*,[47] the Supreme Court unanimously ruled that a Nebraska judge's gag order had violated the First Amendment's guarantee of freedom of the press. Chief Justice Warren Burger indicated that even pervasive adverse pretrial publicity did not necessarily lead to an unfair trial, and that prior restraints on publication were not justified. Some justices even went so far as to suggest that gag orders are never justified.

Despite the *Nebraska Press Association* ruling, the Court has upheld certain types of gag orders. In *Gannett Co. v. De Pasquale*[48] in 1979, for example, the highest court held that if a judge found a reasonable probability that news publicity would harm a defendant's right to a fair trial, the court could impose a gag rule: "Members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials."

Radio "Shock Jock"
Howard Stern offended the sensibilities of the Federal Communications Commission (FCC). That regulatory body fined Stern's radio station owner hundreds of thousands of dollars for Stern's purportedly obscene outbursts on the radio in 1992 and again in 2004. The extent to which the FCC can regulate speech over the air involves the First Amendment. But the current FCC regulation does not apply to pay-for-service satellite radio, pay-for-service cable TV, or satellite TV. To take advantage of this, in December of 2005, Stern took his show to satellite radio, thus, for now, evading FCC regulation. Why is it that what is permissible and acceptable on radio and TV today probably would have been considered obscene three decades ago?

© Getty Images

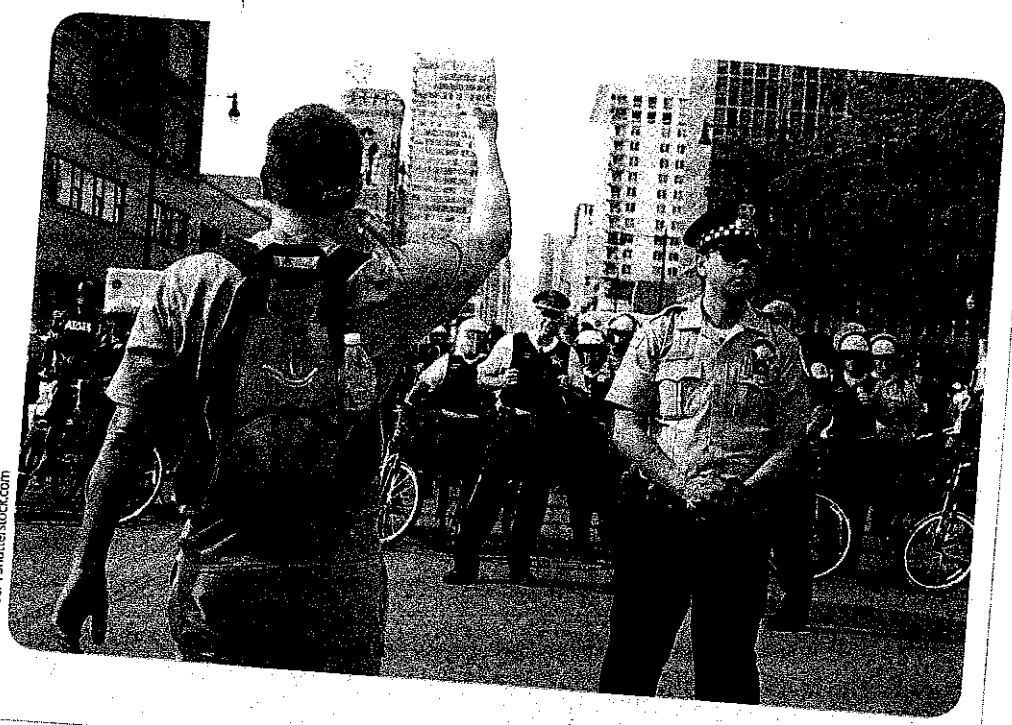
47. 427 U.S. 539 (1976).
48. 443 U.S. 368 (1979).

The *Nebraska* and *Gannett* cases, however, involved pretrial hearings. Could a judge impose a gag order on an entire trial, including pretrial hearings? In 1980, in *Richmond Newspapers, Inc. v. Virginia*,[49] the Court ruled that actual trials must be open to the public except under unusual circumstances.

Films, Radio, and TV

As we have noted, only in a few cases has the Supreme Court upheld prior restraint of published materials. The Court's reluctance to accept prior restraint is less evident with respect to motion pictures. In the first half of the 20th century, films were routinely submitted to local censorship boards. In 1968, the Supreme Court ruled that a film can be banned only under a law that provides for a prompt hearing at which the film is shown to be obscene. Today, few local censorship boards exist. Instead, the film industry regulates itself primarily through the industry's rating system.

Radio and television broadcasting has the least First Amendment protection. In 1934, the national government established the Federal Communications Commission (FCC) to regulate electromagnetic wave frequencies. The government's position has been that the airwaves and all frequencies that travel through the air belong to the people of the United States. Thus, no broadcaster can monopolize these frequencies nor can they be abused. The FCC is the authority that regulates the use of the airwaves and grants licenses to broadcast television, radio, satellite transmission, etc. Based on a case decided by the Supreme Court in 1978,[50] the FCC can impose sanctions on radio or TV stations that broadcast "filthy words," even if the words are not legally obscene. During the George W. Bush administration, the FCC acted more frequently to sanction radio and television broadcasters for the use of words, phrases, and pictures that might be considered in the category of "filthy words."



Theresasc7 /Shutterstock.com

A protestor in Chicago demonstrates against the NATO meeting there in 2012. What kinds of regulations do you think should govern such protests?

49. 448 U.S. 555 (1980).
50. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The phrase "filthy words" refers to a monologue by comedian George Carlin, which became the subject of the court case.

The Right to Assemble and to Petition the Government

The First Amendment prohibits Congress from making any law that abridges "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Inherent in such a right is the ability of private citizens to communicate their ideas on public issues to government officials, as well as to other individuals. Indeed, the amendment also protects the right of individuals to join interest groups and lobby the government. The Supreme Court has often put this freedom on a par with freedom of speech and freedom of the press. Nonetheless, it has allowed municipalities to require permits for parades, sound trucks, and demonstrations so that public officials can control traffic or prevent demonstrations from turning into riots.

The freedom to demonstrate became a major issue in 1977 when the American Nazi Party sought to march through Skokie, Illinois, a largely Jewish suburb where many Holocaust survivors resided. The American Civil Liberties Union defended the Nazis' right to march (despite its opposition to the Nazi philosophy). The Supreme Court let stand a lower court's ruling that the city of Skokie had violated the Nazis' First Amendment guarantees by denying them a permit to march.[51]

One of the most controversial groups organizing protests in the last few years has been the Westboro Baptist Church in Topeka, Kansas, which often demonstrates at the funeral services for members of the military who were killed in enemy action in Afghanistan and Iraq. Westboro members and supporters carry signs and protest the funerals on the grounds that these deaths are the result of the nation's sins in tolerating homosexuality and what they view as other immorality. Many churches, communities, and families have attempted to limit the access of Westboro church members to the site of memorial services, but the church claims freedom of expression as its right. In 2011, the Supreme Court heard the case *Snyder v. Phelps*[52] and overturned a jury verdict against the church, upholding the right of free speech in this case.

Online Assembly

A question for Americans today is whether individuals should have the right to "assemble" online to advocate violence against certain groups (such as physicians who perform abortions) or advocate values that are opposed to our democracy (such as terrorism). While some online advocacy groups promote interests consistent with American political values, other groups aim to destroy those values. Whether First Amendment freedoms should be sacrificed (by the government's monitoring of Internet communications, for example) in the interests of national security is a question that will no doubt be debated for some time to come.

■ Learning Outcome 4: **Discuss the concept of privacy rights, and give examples of how individual privacy is protected under the Constitution.**

More Liberties under Scrutiny: Matters of Privacy

No explicit reference is made anywhere in the Constitution to a person's right to privacy. Until the second half of the 1990s, the courts did not take a very positive approach toward the right to privacy. For example, during Prohibition, suspected

51. *Smith v. Collin*, 439 U.S. 916 (1978).
52. *Snyder v. Phelps*, 08-751 (2011).

bootleggers' telephones were tapped routinely, and the information obtained was used as a legal basis for prosecution. In *Olmstead v. United States*[53] in 1928, the Supreme Court upheld such an invasion of privacy. Justice Louis Brandeis, a champion of personal freedoms, strongly dissented from the majority decision in this case. He argued that the framers of the Constitution gave every citizen the right to be left alone. He called such a right "the most comprehensive of rights and the right most valued by civilized men."

In the 1960s, the highest court began to modify the majority view. In 1965, in *Griswold v. Connecticut*,[54] the Supreme Court overturned a Connecticut law that effectively prohibited the use of contraceptives, holding that the law violated the right to privacy. Justice William O. Douglas formulated a unique way of reading this right into the Bill of Rights. He claimed that the First, Third, Fourth, Fifth, and Ninth Amendments created "penumbras [shadows], formed by emanations [things sent out from] those guarantees that help give them life and substance," and he went on to describe zones of privacy that are guaranteed by these rights. When we read the Ninth Amendment, we can see the foundation for his reasoning: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage [belittle] others retained by the people." In other words, just because the Constitution, including its amendments, does not specifically talk about the right to privacy does not mean that this right is denied to the people.

Some of today's most controversial issues relate to privacy rights. One issue involves the erosion of privacy rights in an information age, as computers make it easier to compile and distribute personal information. Other issues concern abortion and the "right to die." Since the terrorist attacks of September 11, 2001, Americans have faced another crucial question regarding privacy rights: To what extent should Americans sacrifice privacy rights in the interests of national security?

Privacy Rights in an Information Age

An important privacy issue, created in part by new technology, is the amassing of information on individuals by government agencies and private businesses, such as marketing firms, grocery stores, and casinos, to name just a few. Personal information on the average American citizen also is filed away in dozens of agencies—such as the Social Security Administration and the Internal Revenue Service. Because of the threat of indiscriminate use of private information by unauthorized individuals, Congress passed the Privacy Act in 1974. This was the first law regulating the use of federal government information about private individuals. Under the Privacy Act, every citizen has the right to obtain copies of personal records collected by federal agencies and to correct inaccuracies in such records. However, this applies only to government agencies and has no bearing on records collected by private organization or companies.

The ease with which personal information can be obtained by using the Internet for marketing and other purposes has led to unique privacy issues. Some fear that privacy rights in personal information may soon be a thing of the past. However, for today's young adults, the concept of privacy seems to have evolved into something that individuals define for themselves. Portraits on public Web sites such as Facebook, Linked In, or other networking sites are created by the user and can protect personal data or make certain facts *very public*. The

53. 277 U.S. 438 (1928). This decision was overruled later in *Katz v. United States*, 389 U.S. 347 (1967).
54. 381 U.S. 479 (1965).

person who submits the information gets to decide. Whether privacy rights can survive in an information age is a question that Americans and their leaders continue to confront.

Privacy Rights and Abortion

Historically, abortion was not a criminal offense before the "quickening" of the fetus (the first movement of the fetus in the uterus, usually between the 16th and 18th weeks of pregnancy). During the last half of the 19th century, however, state laws became more severe. By 1973, performing an abortion at any time during pregnancy was a criminal offense in a majority of the states.

Roe v. Wade. In 1973, in *Roe v. Wade,*[55] the United States Supreme Court accepted the argument that the laws against abortion violated "Jane Roe's" right to privacy under the Constitution. The Court held that during the first trimester (three months) of pregnancy, abortion was an issue solely between a woman and her physician. The state could not limit abortions except to require that they be performed by licensed physicians. During the second trimester, to protect the health of the mother, the state was allowed to specify the conditions under which an abortion could be performed. During the final trimester, the state could regulate or even outlaw abortions, except when necessary to preserve the life or health of the mother.

After *Roe*, the Supreme Court issued decisions in several cases defining and redefining the boundaries of state regulation of abortion. During the 1980s, the Court twice struck down laws that required a woman who wished to have an abortion to undergo counseling designed to discourage abortions. In the late 1980s and early 1990s, however, the Court took a more conservative approach. For example, in *Webster v. Reproductive Health Services*[56] in 1989, the Court upheld a Missouri statute that, among other things, banned the use of public hospitals or other taxpayer-supported facilities for performing abortions. And, in *Planned Parenthood v. Casey*[57] in 1992, the Court upheld a Pennsylvania law that required preabortion counseling, a waiting period of 24 hours, and, for girls under the age of 18, parental or judicial permission. The *Casey* decision was remarkable for several reasons. The final decision was a 5-4 vote with Sandra Day O'Connor writing the opinion. While the opinion explicitly upheld *Roe*, it changed the grounds on which the states can regulate abortion. The Court found that states could not place an "undue burden" on a woman who sought an abortion. In this case, the Court found that spousal notification was such a burden. Because many other conditions were upheld, abortions continue to be more difficult to obtain in some states than others.

The Controversy Continues. Abortion continues to be a divisive issue. "Right-to-life" forces continue to push for laws banning abortion, to endorse political candidates who support their views, and to organize protests. Because of several episodes of violence attending protests at abortion clinics, in 1994 Congress passed the Freedom of Access to Clinic Entrances Act. The act prohibits protesters from blocking entrances to such clinics. The Supreme Court ruled in 1993 that such protesters can be prosecuted under laws governing racketeering, and in 1998 a federal court in Illinois convicted right-to-life protesters under these

55. 410 U.S. 113 (1973). Jane Roe was not the real name of the woman in this case. It is a common legal pseudonym used to protect a person's privacy.
56. 492 U.S. 490 (1989).
57. 505 U.S. 833 (1992).

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In 2006, on the 33rd anniversary of *Roe v. Wade*, opposing sides on the abortion issue argued with each other in front of the United States Supreme Court building in Washington, D.C. What was the major argument against laws prohibiting abortion that the Court used in the *Roe* case?

laws. In 1997, the Supreme Court upheld the constitutionality of prohibiting protesters from entering a 15-foot "buffer zone" around abortion clinics and from giving unwanted counseling to those entering the clinics.[58] In 2006, however, the Supreme Court unanimously reversed its earlier decision that anti-abortion protesters could be prosecuted under laws governing racketeering.[59]

In a 2000 decision, the Court upheld a Colorado law requiring demonstrators to stay at least eight feet away from people entering and leaving clinics unless people consent to be approached. The Court concluded that the law's restrictions on speech-related conduct did not violate the free speech rights of abortion protesters.[60]

In the same year, the Supreme Court again addressed the abortion issue directly when it reviewed a Nebraska law banning "partial-birth" abortions. Similar laws had been passed by at least 27 states. A partial-birth abortion, which physicians call intact dilation and extraction, is a procedure that can be used during the second trimester of pregnancy. Abortion rights advocates claim that in limited circumstances the procedure is the safest way to perform an abortion, and that the government should never outlaw specific medical procedures. Opponents argue that the procedure has no medical merit and that it ends the life of a fetus that might be able to live outside the womb. The Supreme Court invalidated the Nebraska law on the grounds that, as written, the law could be used to ban other abortion procedures, and it contained no provisions for protecting the health of the pregnant woman.[61] In 2003, legislation similar to the Nebraska statute was passed by the U.S. Congress and signed into law by President George W. Bush. It was immediately challenged in court. In 2007, the Supreme Court heard several challenges to the partial-birth abortion law and upheld the constitutionality of that legislation, saying that the law was specific enough that it did not "impose an undue burden" on women seeking an abortion.[62]

58. *Schenck v. Pro Choice Network*, 519 U.S. 357 (1997).
59. *Scheidler v. National Organization for Women*, 126 S. Ct. 1264 (2006).
60. *Hill v. Colorado*, 530 U.S. 703 (2000).
61. *Stenberg v. Carhart*, 530 U.S. 914 (2000).
62. *Gonzales v. Carhart*, 550 U.S. (2007) and *Gonzales v. Planned Parenthood*, 550 U.S. (2007).

In a move that will likely set off another long legal battle, in 2006 the South Dakota legislature passed a law that banned almost all forms of abortion in the state. The bill's supporters hope that it will eventually force the United States Supreme Court to reconsider *Roe v. Wade*. Opponents of the bill have already filed suit.

Privacy Rights and the "Right to Die"

A 1976 case involving Karen Ann Quinlan was one of the first publicized right-to-die cases.[63] The parents of Quinlan, a young woman who had been in a coma for nearly a year and who had been kept alive during that time by a respirator, wanted her respirator removed. In 1976, the New Jersey Supreme Court ruled that the right to privacy includes the right of a patient to refuse treatment and that patients who are unable to speak can exercise that right through a family member or guardian. In 1990, the Supreme Court took up the issue. In *Cruzan v. Director, Missouri Department of Health*,[64] the Court stated that a patient's life-sustaining treatment can be withdrawn at the request of a family member only if "clear and convincing evidence" exists that the patient did not want such treatment.

What If No Living Will Exists? Since the 1976 *Quinlan* decision, most states have enacted laws permitting people to designate their wishes concerning life-sustaining procedures in "living wills" or durable health care powers of attorney. These laws and the Supreme Court's *Cruzan* decision have resolved the right-to-die controversy for situations in which the patient has drafted a living will. Disputes are still possible if there is no living will.

Physician-Assisted Suicide. In the 1990s, another issue surfaced: Do privacy rights include the right of terminally ill people to end their lives through physician-assisted suicide? Until 1996, the courts consistently upheld state laws that prohibited this practice, either through specific statutes or under their general homicide statutes. In 1996, after two federal appellate courts ruled that state laws banning assisted suicide (in Washington and New York) were unconstitutional, the issue reached the United States Supreme Court. In 1997, in *Washington v. Glucksberg*,[65] the Court stated, clearly and categorically, that the liberty interest protected by the Constitution does not include a right to commit suicide, with or without assistance. In effect, the Supreme Court left the decision in the hands of the states. Since then, assisted suicide has been allowed in only one state—Oregon. In 2006, the Supreme Court upheld Oregon's physician-assisted suicide law against a challenge from the Bush administration.[66]

Privacy Rights versus Security Issues

As former Supreme Court justice Thurgood Marshall once said, "Grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure." Not surprisingly, antiterrorist legislation since the attacks on September 11, 2001, has eroded certain basic rights, in particular the Fourth Amendment protections against unreasonable searches and seizures. Several tools previously used against certain types of criminal suspects (e.g., "roving

63. *In re Quinlan*, 70 N.J. 10 (1976).
64. 497 U.S. 261 (1990).
65. 521 U.S. 702 (1997).
66. *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

wiretaps" and National Security Letters) have been authorized for use against a broader array of terror suspects. Many civil liberties organizations argue that abuses of the Fourth Amendment are ongoing.

While it has been possible for a law enforcement agency to gain court permission to wiretap a telephone virtually since telephones were invented, a roving wiretap allows an agency to tap all forms of communication used by the named person, including cell phones and e-mail, and it applies across legal jurisdictions. Previously, roving wiretaps could only be requested for persons suspected of one of a small number of serious crimes. Now, if persons are suspected of planning a terrorist attack, they can be monitored no matter what form of electronic communication they use. Such roving wiretaps appear to contravene the Supreme Court's interpretation of the Fourth Amendment, which requires a judicial warrant to describe the *place* to be searched, not just the person, although the Court has not banned them to date. One of the goals of the framers was to avoid *general* searches. Further, once a judge approves an application for a roving wiretap, when, how, and where the monitoring occurs will be left to the discretion of law enforcement agents. Supporters of these new procedures say that they allow agents to monitor individuals as they move about the nation. Previously, a warrant issued in one federal district might not be valid in another.

Moreover, President George W. Bush approved a plan by the National Security Agency to eavesdrop on telephone calls between individuals overseas and those in the United States if one party was a terrorist suspect. This plan was carried out without warrants because the administration claimed that speed was more important. Critics called for immediate termination of such eavesdropping. Congress, after criticizing the Bush plan, reauthorized it in law in 2008.

The USA PATRIOT Act. Much of the government's failure to anticipate the attacks of September 11, 2001, has been attributed to a lack of cooperation among government agencies. At that time, barriers prevented information sharing between the law enforcement and intelligence arms of the government. A major objective of the USA PATRIOT Act was to lift those barriers. Lawmakers claimed that the PATRIOT Act would improve lines of communication between agencies such as the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA), thereby allowing the government to better anticipate terrorist plots. With improved communication, various agencies could more effectively coordinate their efforts in combating terrorism.

In addition, the PATRIOT Act eased restrictions on the government's ability to investigate and arrest suspected terrorists. Because of the secretive nature of terrorist groups, supporters of the PATRIOT Act argue that the government must have greater latitude in pursuing leads on potential terrorist activity. After receiving approval of the Foreign Intelligence Surveillance Court (known as FISA), the act authorizes law enforcement officials to secretly search a suspected terrorist's home. It also allows the government to monitor a suspect's Internet activities, phone conversations, financial records, and book purchases. Although a number of these search and surveillance tactics have long been a part of criminal investigations, the PATRIOT Act expanded their scope to include individuals as terrorist suspects even if they are not agents of a foreign government.

Civil Liberties Concerns. Proponents of the PATRIOT Act insist that ordinary, law-abiding citizens have nothing to fear from the government's increased search and surveillance powers. Groups such as the ACLU have objected to the PATRIOT

Act, however, arguing that it poses a grave threat to constitutionally guaranteed rights and liberties. Under the PATRIOT Act, FBI agents are required to certify the need for search warrants to the FISA Court. Rarely are such requests rejected.

In the last few years, the FBI began using another tool that it has had for several years, the National Security Letter (NSL), to avoid the procedures required by the FISA Court. The NSL allows the FBI to get records of telephone calls, subscriber information, and other kinds of transactions, although it does not give the FBI access to the content of the calls. However, as Congress tightened the requirements for warrants under the PATRIOT Act, the FBI evidently began to use the NSLs as a shortcut. While the use of NSLs has been legal for more than 20 years, recent massive use of this technique has led Congress to consider further restrictions on the FBI and its investigations in order to preserve the rights of U.S. citizens.

Opponents of the PATRIOT Act fear that these expanded powers of investigation might be used to silence government critics or to threaten members of interest groups who oppose government polices today or in the future. Congress debated all of these issues in 2005 and then renewed most of the provisions of the act in 2006. It has been renewed again in 2011 over the objections of many civil liberties organizations. One of the most controversial aspects of the PATRIOT Act permits the government to eavesdrop on telephone calls with a warrant from the FISA Court. In 2005, it became known that the Bush administration was eavesdropping on U.S. telephone calls without a warrant if the caller was from outside the United States. After almost three years of controversy, Congress passed the FISA Amendments Act in June 2008, which regulates such calls and gives immunity from prosecution to telecommunications companies.

The incredible growth of modern wireless technology is an opportunity and a challenge for law enforcement officials but carries potential threats to civil liberties. Modern wireless technology makes it possible to track offenders more easily, but is such tracking legal? Most wireless devices that we carry around—smartphones, tablets, netbooks—contain wireless receivers that connect with the Internet, and most include a GPS transmitter. If you lose your telephone, you can call your service provider and be told approximately where it is because it is signaling a nearby tower or satellite. Is the tracking of your device an invasion of your privacy?

Our total dependence on the Internet and its infrastructure for everything from our social network to finding the weather or traffic reports or looking for the best deal on a purchase brings a new set of privacy challenges. Unless the individual puts extensive privacy controls into place, purchase records are sent to advertisers, and Facebook data are sent to friends and to friends of friends and to marketers. Your location is signaled by your wireless device, as is that of your friends as you tweet. All Internet traffic is recorded; much of it is mined as a database for private companies. The government archives all of it but does not search for individuals unless, possibly, Internet and telephone messages suggest a terrorist plot.

■ **Learning Outcome 5: Identify the rights of the accused, and discuss the role of the Supreme Court in expanding those rights.**

The Great Balancing Act: The Rights of the Accused versus the Rights of Society

The United States has one of the highest murder rates in the industrialized world. It is not surprising, therefore, that many citizens have extremely strong opinions about the rights of those accused of violent crimes. When an accused person, especially one who has confessed to some criminal act, is set free because of an

apparent legal technicality, many people believe that the rights of the accused are being given more weight than the rights of society and of potential or actual victims. Why, then, give criminal suspects rights? The answer is partly to avoid convicting innocent people, but mostly because all criminal suspects have the right to due process of law and fair treatment.

The courts and the police must constantly engage in a balancing act of competing rights. At the basis of all discussions about the appropriate balance is the U.S. Bill of Rights. The Fourth, Fifth, Sixth, and Eighth Amendments deal specifically with the rights of criminal defendants. (You will learn about some of your rights under the Fourth Amendment in the You Can Make a Difference feature at the end of this chapter.)

The basic rights of criminal defendants are outlined in Table 4–2. When appropriate, the specific constitutional provision or amendment on which a right is based is also given.

Extending the Rights of the Accused

During the 1960s, the Supreme Court, under Chief Justice Earl Warren, significantly expanded the rights of accused persons. In *Gideon v. Wainwright*,[67] a case decided in 1963, the Court held that if a person is accused of a felony and cannot

TABLE 4–2 ▶ Basic Rights of Criminal Defendants

LIMITS ON THE CONDUCT OF POLICE OFFICERS AND PROSECUTORS
No unreasonable or unwarranted searches and seizures (Amend. IV)
No arrest except on probable cause (Amend. IV)
No coerced confessions or illegal interrogation (Amend. V)
No entrapment
On questioning, a suspect must be informed of her or his rights
DEFENDANT'S PRETRIAL RIGHTS
Writ of *habeas corpus* (Article I, Section 9)
Prompt arraignment (Amend. VI)
Legal counsel (Amend. VI)
Reasonable bail (Amend. VIII)
To be informed of charges (Amend. VI)
To remain silent (Amend. V)
TRIAL RIGHTS
Speedy and public trial before a jury (Amend. VI)
Impartial jury selected from a cross section of the community (Amend. VI)
Trial atmosphere free of prejudice, fear, and outside interference
No compulsory self-incrimination (Amend. V)
Adequate counsel (Amend. VI)
No cruel and unusual punishment (Amend. VIII)
APPEAL OF CONVICTIONS
No double jeopardy (Amend. V)

67. 372 U.S. 335 (1963).

afford an attorney, an attorney must be made available to the accused person at the government's expense. This case was particularly interesting because Gideon, who was arrested for stealing a small amount of money from a vending machine, was not considered a dangerous man, nor was his intellect in any way impaired. As related by Anthony Lewis,[68] Gideon pursued his own appeal to the Supreme Court because he believed that every accused person who might face prison should be represented. Although the Sixth Amendment to the Constitution provides for the right to counsel, the Supreme Court had established a precedent 21 years earlier in *Betts v. Brady*,[69] when it held that only criminal defendants in capital (death penalty) cases automatically had a right to legal counsel.

Miranda v. Arizona. In 1966, the Court issued its decision in *Miranda v. Arizona*.[70] The case involved Ernesto Miranda, who was arrested and charged with the kidnapping and rape of a young woman. After two hours of questioning, Miranda confessed and was later convicted. Miranda's lawyer appealed his conviction, arguing that the police had never informed Miranda that he had a right to remain silent and a right to be represented by counsel. The Court, in ruling in Miranda's favor, enunciated the *Miranda* rights that are now familiar to virtually all Americans:

> *Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed.*

Two years after the Supreme Court's *Miranda* decision, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968. Section 3501 of the act reinstated a rule that had been in effect for 180 years before *Miranda*—that statements by defendants can be used against them if the statements were made voluntarily. The Justice Department immediately disavowed Section 3501 as unconstitutional and has continued to hold this position. As a result, Section 3501, although it was never repealed, has never been enforced. In 2000, in a surprise move, a federal appellate court held that the all-but-forgotten provision was enforceable, but the Supreme Court held that the *Miranda* warnings were constitutionally based and could not be overruled by a legislative act.[71]

did you know?

In 18th-century England, pickpocketing and similar crimes were punishable by the death penalty.

Exceptions to the *Miranda* Rule. As part of a continuing attempt to balance the rights of accused persons against the rights of society, the Supreme Court has made several exceptions to the *Miranda* rule. In 1984, for example, the Court recognized a "public-safety" exception to the rule. The need to protect the public warranted the admissibility of statements made by the defendant (in this case, indicating where he had placed a gun) as evidence in a trial, even though the defendant had not been informed of his *Miranda* rights.

In 1985, the Court further held that a confession need not be excluded even though the police failed to inform a suspect in custody that his attorney had tried to reach him by telephone. In an important 1991 decision, the Court stated that a suspect's conviction will not be automatically overturned if the suspect was coerced into making a confession. If the other evidence admitted at trial is strong enough to justify the conviction without the confession, then the fact that the confession was obtained illegally in effect can be ignored. In yet another case, in

68. Anthony Lewis, *Gideon's Trumpet* (New York: Vintage, 1964).
69. 316 U.S. 455 (1942).
70. 384 U.S. 436 (1966).
71. *Dickerson v. United States*, 530 U.S. 428 (2000).

1994, the Supreme Court ruled that suspects must unequivocally and assertively state their right to counsel in order to stop police questioning. Saying "Maybe I should talk to a lawyer" during an interrogation after being taken into custody is not enough. The Court held that police officers are not required to decipher the suspect's intentions in such situations. Most recently, the *Miranda* protections

Beyond Our Borders

TAKING AMERICAN RIGHTS OVERSEAS

Many thousands of American students study abroad each year, while others go abroad to work for not-for profit organizations in developing countries or as Peace Corps volunteers, or as members of the American military. Inevitably, some young Americans (and older ones as well) come into contact with the law enforcement officials of other nations. The following question will occur to them at that moment: Do I have the same rights here as I have in the United States? The answer is complex: You probably have the same rights on paper, but the interpretation of criminal procedure may be quite different.

The rights of the accused person in the United States are defined by state law, federal law, the Bill of Rights, and the interpretations of the Supreme Court. In the nations that have similar legal systems, such as Great Britain, Canada, and Australia, your rights and the way you are treated as an accused person are quite similar to your treatment in the United States. Many European and South American nations have a different legal system based on their respective legal code. In those nations, the prosecutor and court will begin with a presumption of guilt, and your defense counsel must conclusively prove your innocence. In some countries, it may be very difficult for you to post bond and leave jail to await your trial. Even though most of the nations of the world subscribe to the Universal Declaration of Human Rights and have impressive lists of rights, your treatment will also depend on the level of development of the nation and its political status. In some nations, jails are extremely unhealthy and unsanitary places, and prisoners must arrange for their own food to be brought in. Communication with your family or your lawyer is extremely difficult, and visiting rights may be severely limited.

Consider the advice given by the U.S. State Department on the criminal justice system in Mexico: "For an accused person, the accused is ... considered guilty until proven innocent." The State Department notes that you have the right to see the American consular representative but that this person cannot help with your legal case. You are subject to the Mexican criminal code, which makes some crimes such as possession of drugs much more serious than in the United States.

ATTA KENARE/AFP/Getty Images

Three American hikers who accidentally crossed into Iran, were held in prison for two years, accused as spies.

Matters are further complicated for travelers in nations that have ongoing civil conflicts or do not have a democratic form of government. If you are suspected of being involved with the opposition, you may be arrested, tortured, and detained without notice even though the nation has a written bill of rights. In the case of civil conflicts or outright military action against another nation, you could be detained as an enemy combatant and held as a prisoner of war or, worse yet, a spy.

It is important to be aware of the political and social situation in any country in which you travel or volunteer and to be respectful of the local government and its officials. While you are an American and our embassy will keep in touch with you, it can do little if you are in legal trouble. Before you travel to countries that are experiencing civil unrest or high criminal activity, it is a good idea to read the travel warnings posted by the U.S. State Department. If you are truly interested in the state of human rights abroad, go to the Web site of Human Rights Watch, which issues an annual report on the state of justice in most of the nations of the world, including the United States.

For the U.S. State Department, go to www.state.gov and go to travel advisories. The Web site for Human Rights Watch is www.hrw.org.

were further narrowed when the Court found that a suspect must expressly announce his or her desire to remain silent, not just sit silently during questioning.

Video Recording of Interrogations. In view of the numerous exceptions, there are no guarantees that the *Miranda* rule will survive indefinitely. Increasingly, though, law enforcement personnel are using digital cameras to record interrogations. According to some scholars, the recording of *all* custodial interrogations would satisfy the Fifth Amendment's prohibition against coercion and in the process render the *Miranda* warnings unnecessary. Others argue, however, that recorded interrogations can be misleading.

The Exclusionary Rule

Exclusionary Rule
A policy forbidding the admission at trial of illegally seized evidence.

At least since 1914, judicial policy has prohibited the admission of illegally seized evidence at trials in federal courts. This is the so-called **exclusionary rule**. Improperly obtained evidence, no matter how telling, cannot be used by prosecutors. This includes evidence obtained by police in violation of a suspect's *Miranda* rights or of the Fourth Amendment. The Fourth Amendment protects against unreasonable searches and seizures and provides that a judge may issue a search warrant to a police officer only on *probable cause* (a demonstration of facts that permit a reasonable belief that a crime has been committed). The question that must be determined by the courts is what constitutes an unreasonable search and seizure.

The reasoning behind the exclusionary rule is that it forces police officers to gather evidence properly, in which case their due diligence will be rewarded by a conviction. Nevertheless, the exclusionary rule has always had critics who argue that it permits guilty persons to be freed because of innocent errors.

This rule was first extended to state court proceedings in a 1961 United States Supreme Court decision, *Mapp v. Ohio*.[72] In this case, the Court overturned the conviction of Dollree Mapp for the possession of obscene materials. Police found pornographic books in her apartment after searching it without a search warrant and despite her refusal to let them in.

Over the last several decades, the Supreme Court has diminished the scope of the exclusionary rule by creating some exceptions to its applicability. For example, in 1984, the Court held that illegally obtained evidence could be admitted at trial if law enforcement personnel could prove that they would have obtained the evidence legally anyway. In another case decided in the same year, the Court held that a police officer who used a technically incorrect search warrant form to obtain evidence had acted in good faith and therefore the evidence was admissible at trial. The Court thus created the "good faith" exception to the exclusionary rule.

Dewey Bozella, an aspiring boxer, served twenty-six years in prison for a murder he did not commit. He was exonerated by Project Innocence in 2011. What safeguards can be put in place to reduce the number of wrongful convictions?

Kevin Winter/Getty Images

The Death Penalty

Capital punishment remains one of the most debated aspects of our criminal justice system. Those in favor of the death penalty maintain that it serves as a deterrent to serious crime and satisfies society's need for justice and fair play. Those opposed to the death penalty do not believe it has any deterrent value and hold that it constitutes a barbaric act in an otherwise civilized society.

72. 367 U.S. 643 (1961).

Politics with a Purpose

THE INNOCENCE PROJECT

As long as the United States has imposed capital punishment on convicted felons, there have been claims of innocence by those sentenced to die. Although police officers and judges have always known that sometimes the innocent are falsely accused and convicted, they also believe that most of the individuals were correctly prosecuted and convicted of their crimes. As most Americans know from popular television series such as *CSI* and *Bones*, new scientific techniques make it possible to find biological and chemical evidence that was completely unknown to law enforcement in the past. Most important of these new tools is the use of DNA, or deoxyribonucleic acid. DNA molecules contain all of the information about a person's or an animal's genetic makeup and are almost unique to each individual. The importance of DNA to criminal investigations is that DNA molecules found on a strand of hair or saliva on a handkerchief can be tested many years after they were deposited on that object.

In the early 1990s, law students at the Benjamin N. Cardozo School of Law at Yeshiva University began theorizing that DNA found in old evidence records could be used to establish the innocence of individuals wrongfully convicted of crimes. Led by Barry C. Scheck and Peter J. Neufeld, the students and faculty founded the Innocence Project, which is dedicated to helping exonerate innocent people and improving the legal system to avoid wrongful convictions. To date, more than 291 people have been exonerated through DNA evidence, and 17 of those were serving time on death row. A recent wrongful conviction that was overturned is that of boxer Dewey Bozella, who served 26 years for a murder he did not commit.

Why do wrongful convictions occur? Don't the safeguards of the Constitution (the right to confront witnesses, the right to an attorney, and the right to a speedy trial) protect people from wrongful imprisonment? The Innocence Project identifies a number of reasons why wrongful convictions occur. Witnesses may identify the wrong person as the suspect; individuals who are arrested may feel strongly pressured to make a confession, especially if the prosecution offers a plea bargain for a lesser sentence; forensic science may be faulty in a particular location; the police may have acted out of discriminatory motives or failed to complete an investigation; informants or snitches may have given false information; or the free counsel offered to a defendant may be incompetent.[a] The Innocence Project is a nonprofit organization located at Yeshiva University; however, the work has spread throughout the United States and to some foreign countries. Now, 54 affiliated projects are found mostly at law schools and centers in 45 states. The centers form when students and faculty come together to begin the work in their own state. Law students provide most of the volunteer investigations into possible cases of wrongful conviction, with guidance from their faculty. Students also research the laws governing criminal procedure in their own state and then lobby for changes to reduce the chance of wrongful convictions. In 2010, Governor Strickland of Ohio signed into law a bill that was researched by a student of the Innocence Project at the University of Cincinnati law school. The student was present at the General Assembly when the bill passed. The new legislation requires preservation of DNA evidence forever in serious crimes, strengthens the requirements for police lineups, and gives incentives for the video recording of interrogations in most serious crimes. The legislation is considered groundbreaking for preserving evidence that might prevent wrongful convictions.

If you are interested in taking part in the Innocence Project or finding a center near you, log on to the national Web site, www.innocenceproject.org, and look for the list of state projects. You can learn a great deal about wrongful convictions from the organization's site and explore changes in the law that may prevent the miscarriage of justice.[b]

[a] Barry Scheck, Peter Neufeld, and Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right*, New York: New American Library, 2003.
[b] Saundra Westervelt and John Humphrys, *Wrongly Convicted: Perspectives on Failed Justice*, Piscataway, NJ: Rutgers University Press, 2001.

Cruel and Unusual Punishment?

The Eighth Amendment prohibits cruel and unusual punishment. Throughout history, "cruel and unusual" referred to punishments that were more serious than the crimes—the phrase referred to torture and to executions that prolonged the agony of dying. The Supreme Court never interpreted "cruel and unusual" to prohibit all forms of capital punishment in all circumstances. Indeed, several states

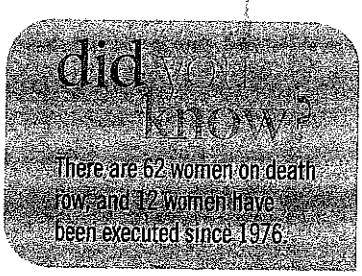
had imposed the death penalty for a variety of crimes and allowed juries to decide when the condemned could be sentenced to death. However, many believed that the imposition of the death penalty was random and arbitrary, and in 1972 the Supreme Court agreed in *Furman v. Georgia*.[73]

The Supreme Court's 1972 decision stated that the death penalty, as then applied, violated the Eighth and Fourteenth Amendments. The Court ruled that capital punishment is not necessarily cruel and unusual if the criminal has killed or attempted to kill someone. In its opinion, the Court invited the states to enact more precise laws so that the death penalty would be applied more consistently. By 1976, 25 states had adopted a two-stage, or *bifurcated*, procedure for capital cases. In the first stage, a jury determines the guilt or innocence of the defendant for a crime that has been determined by statute to be punishable by death. If the defendant is found guilty, the jury reconvenes in the second stage and considers all relevant evidence to decide whether the death sentence is, in fact, warranted.

In *Gregg v. Georgia*,[74] the Supreme Court ruled in favor of Georgia's bifurcated process, holding that the state's legislative guidelines had removed the ability of a jury to "wantonly and freakishly impose the death penalty." The Court upheld similar procedures in Texas and Florida, establishing a procedure for all states to follow that would ensure them protection from lawsuits based on Eighth Amendment grounds. On January 17, 1977, Gary Mark Gilmore became the first American to be executed (by Utah) under the new laws.

The Death Penalty Today

Today, 33 states (see Figure 4–1) and the federal government have capital punishment laws based on the guidelines established by the *Gregg* case. State governments are responsible for almost all executions in this country. The executions of Timothy McVeigh and Juan Raul Garza in 2001 marked the first death sentences carried out by the federal government since 1963. At this time, about 3,200 prisoners are on death row across the nation.



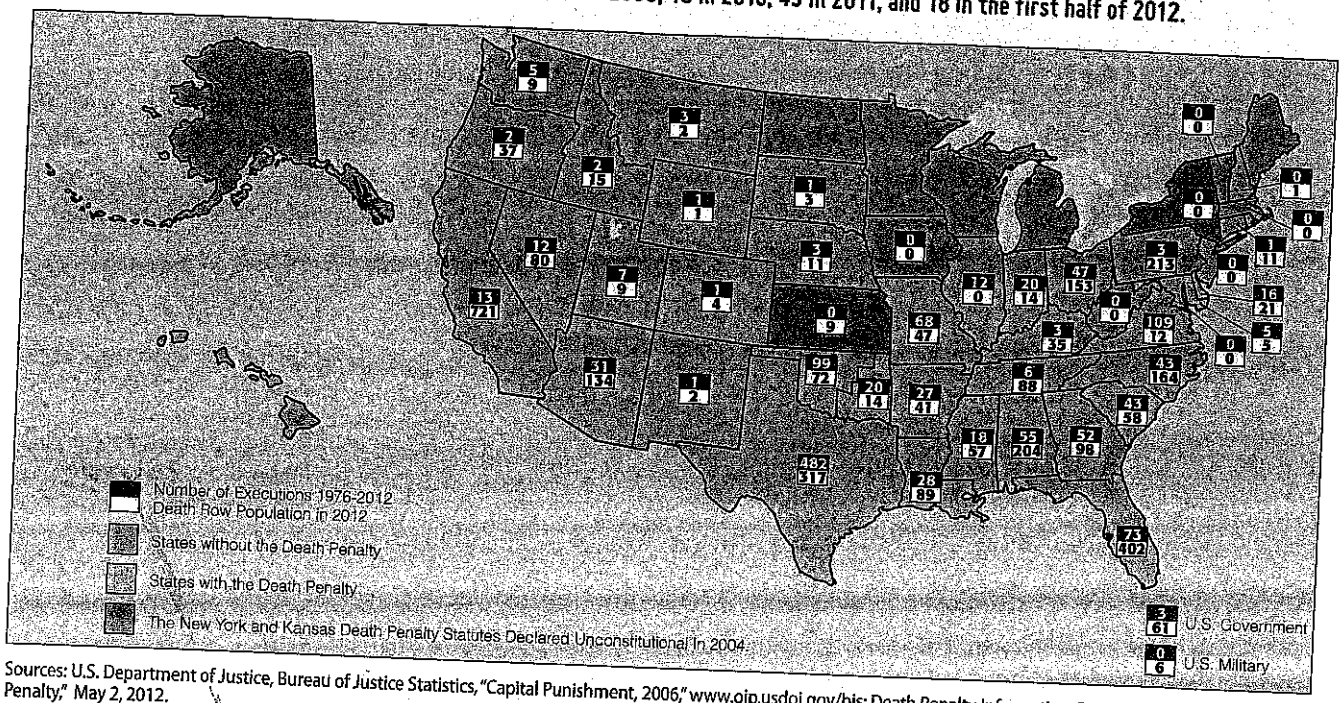
The most recent controversy over the death penalty concerns the method by which the punishment is carried out. The 33 states that have the death penalty use a lethal injection to cause the convicted person's death. Most use a combination of three different drugs injected in an intravenous manner. Several cases have been appealed to the Supreme Court on the basis that this method can cause extreme pain and thus violates the Constitution's ban on cruel and unusual punishment. The Court has upheld the three-drug method, most recently in April 2008, although the justices wrote seven opinions in the case, indicating a lack of consensus among them.[75]

The number of executions per year reached a high of 98 in 1998, and then began to fall. Some believe that the declining number of executions reflects the waning support among Americans for the imposition of the death penalty. In 1994, polls indicated that 80 percent of Americans supported the death penalty. Recent polls, however, suggest that this number has dropped to between 50 and 60 percent, depending on the poll, possibly because of public doubt about the justice of the system. Recently, DNA testing has shown that some innocent people may have been convicted unjustly of murder. Since 1973, more than 130 prisoners have been freed from death row after new evidence suggested that

73. 408 U.S. 238 (1972).
74. 428 U.S. 153 (1976).
75. *Baze v. Rees*, 553 U.S. 35 (2008).

Figure 4–1 ▶ The States and the Death Penalty: Executions 1976–2012 and the Death Row Population

Today, as shown in this figure, 33 states and the federal government and military have laws permitting capital punishment. Since 1976, there have been 1,295 executions in the United States, 52 in 2009, 46 in 2010, 43 in 2011, and 18 in the first half of 2012.



Sources: U.S. Department of Justice, Bureau of Justice Statistics, "Capital Punishment, 2006," www.ojp.usdoj.gov/bjs; Death Penalty Information Center, "Facts about the Death Penalty," May 2, 2012.

they were wrongfully convicted. It is the goal of the Innocence Project, discussed in Politics with a Purpose, to continue to investigate wrongful convictions in every state.

The number of executions may decline even further due to the Supreme Court's 2002 ruling in *Ring v. Arizona*.[76] The Court held that only juries, not judges, could impose the death penalty, thus invalidating the laws of five states that allowed judges to make this decision. The ruling meant that the death sentences of 168 death row inmates would have to be reconsidered by the relevant courts. The sentences of many of these inmates have been commuted to life in prison.

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act. The law limits access to the federal courts for all defendants convicted in state courts. It also imposes a severe time limit on death row appeals. The law requires federal judges to hear these appeals and issue their opinions within a specified time period. Many are concerned that the shortened appeals process increases the possibility that innocent persons may be put to death before evidence that might free them can be discovered. On average, it takes about seven years to exonerate someone on death row; however, the time between conviction and execution has been shortened from an average of 10 to 12 years to an average of six to eight years.

76. 536 U.S. 548 (2002).

Key Terms

actual malice 113
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Chapter Summary

1. Originally, the Bill of Rights limited only the power of the national government, not that of the states. Gradually and selectively, however, the Supreme Court accepted the incorporation theory, under which no state can violate most provisions of the Bill of Rights.

2. The First Amendment's protection of speech, press, religion, and the right to assemble and petition government is meant to protect the fundamental rights of citizens in a democracy. If a government can suppress speech, the press, religious beliefs, or the right to join a group, it can make democratic debates and elections impossible.

3. The First Amendment protects against government interference with freedom of religion by requiring a separation of church and state (under the establishment clause) and by guaranteeing the free exercise of religion. Controversial issues that arise under the establishment clause include aid to church-related schools, school prayer, the teaching of evolution versus intelligent design, school vouchers, the posting of the Ten Commandments in public places, and discrimination against religious speech. The government can interfere with the free exercise of religion only when religious practices work against public policy or the public welfare; however, the government cannot sponsor or support religion in general or any specific religious belief.

4. The First Amendment protects against government interference with freedom of speech, which includes symbolic speech (expressive conduct). The Supreme Court has been especially critical of government actions that impose prior restraint on expression. Commercial speech (advertising) by businesses has received limited First Amendment protection. Restrictions on expression are permitted when the expression creates a clear and present danger to the peace or public order. Speech that has not received First Amendment protection includes expression that is judged to be obscene or slanderous.

5. The First Amendment protects against government interference with the freedom of the press, which can be regarded as a special instance of freedom of speech. Speech by the press that does not receive protection includes libelous statements. Publication of news about a criminal trial may be restricted by a gag order in some circumstances.

6. The First Amendment protects the right to assemble peaceably and to petition the government. Permits may be required for parades, sound trucks, and demonstrations to maintain the public order, and a permit may be denied to protect the public safety.

7. Under the Ninth Amendment, rights not specifically mentioned in the Constitution are not necessarily denied to the people. Among these unspecified rights protected by the courts is a right to privacy, which has been inferred from the First, Third, Fourth, Fifth, and Ninth Amendments. A major privacy issue today is how best to protect privacy rights in cyberspace. Whether an individual's privacy rights include a right to an abortion or a "right to die" continues to provoke controversy. Another major challenge concerns the extent to which Americans must forfeit privacy rights to control terrorism.

8. The Constitution includes protections for the rights of persons accused of crimes. Under the Fourth Amendment, no one may be subject to an unreasonable search or seizure or be arrested except on probable cause. Under the Fifth Amendment, an accused person has the right to remain silent. Under the Sixth Amendment, an accused person must be informed of the reason for his or her arrest. The accused also has the right to adequate counsel, even if he or she cannot afford an attorney, and the right to a prompt arraignment and a speedy and public trial before an impartial jury selected from a cross section of the community.

9. In *Miranda v. Arizona* (1966), the Supreme Court held that criminal suspects, before interrogation by law enforcement personnel, must be informed of certain constitutional rights, including the right to remain silent and the right to be represented by counsel.