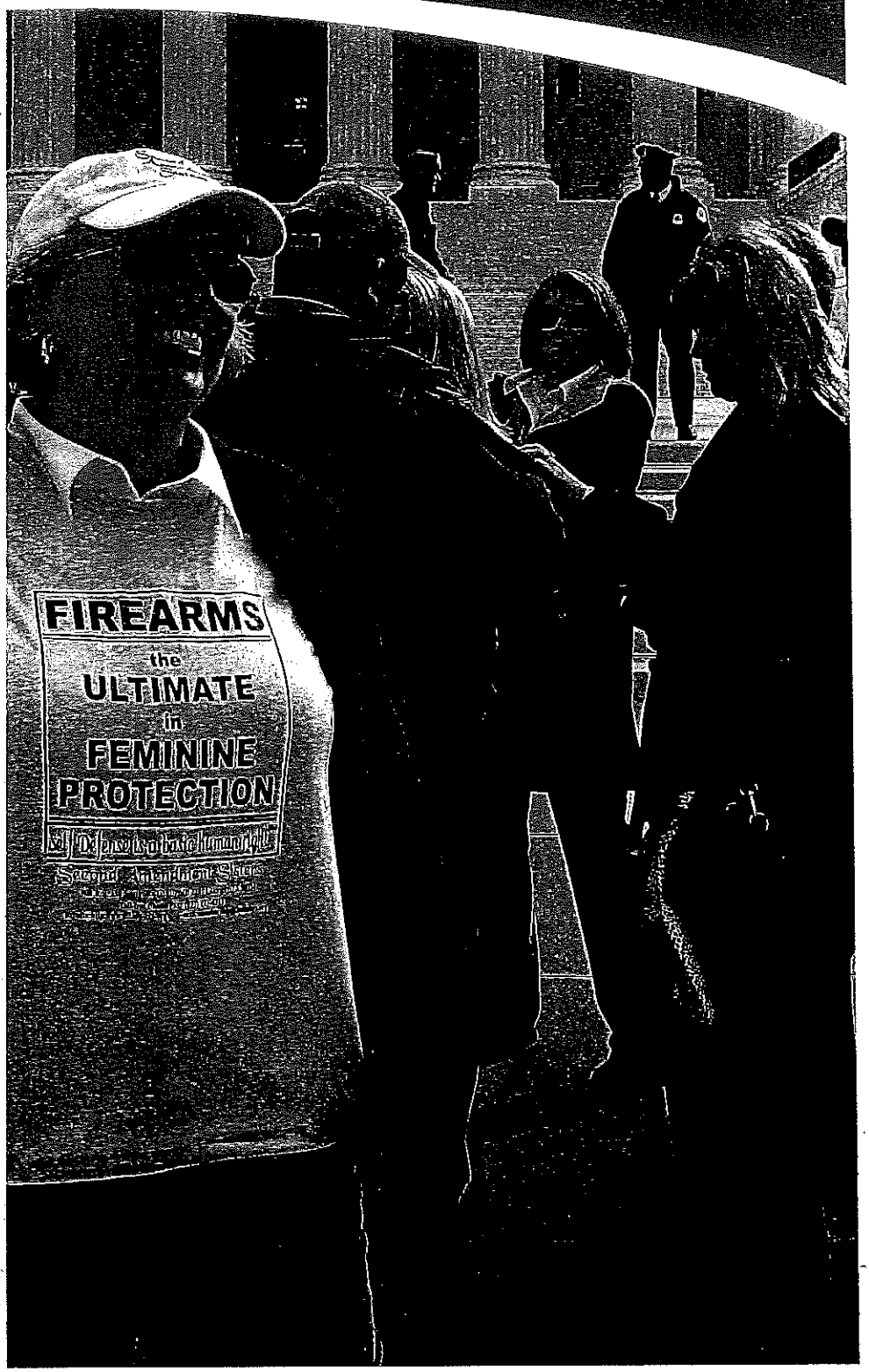
CHAPTER

15 Order and Civil Liberties

CHAPTER TOPICS



NICHOLAS KAMM/AFP/Newscom

CourseMate
Visit www.cengagebrain.com/shop/ISBN/0495906182 for flashcards, web quizzes, videos and more!

In public school classrooms around the country, students stand each day, salute the flag, and recite the Pledge of Allegiance. The Pledge has been part of classroom culture since 1892, when President Benjamin Harrison issued a proclamation celebrating the 400th anniversary of Christopher Columbus's discovery of America. In January 2010, a student at Roberto Clemente Middle School in Germantown, Maryland, did not stand, salute, and pledge. She refused her teacher's command to stand and was escorted from the classroom by a school security guard and sent to a counselor's office, where she was threatened with detention. She returned to school the next day and again refused to participate and was again escorted from the classroom to a counselor's office. Her mother objected, demanding an apology from the teacher. He refused. The assistant principal countered, suggesting that the student apologize to the teacher. As a last straw, the mother contacted the local chapter of the American Civil Liberties Union (ACLU).[1]

The ACLU intervened, explaining that the law has been crystal clear since 1943, when the U.S. Supreme Court ruled that students with religious objections are not required to recite the Pledge or salute the flag.[2] Subsequent decisions have clarified further that a student's rights to free expression—as well as freedom from forced expression—are protected by the Constitution, regardless of the source of a student's beliefs.[3] This student exercised her freedom of expression, though to be more exact, it was her freedom not to speak or participate that was at issue. But the price of her exercise was steep: she was humiliated and embarrassed repeatedly by her Pledge-reciting classmates.[4]

Can school officials ever require student expression? May those officials suppress student expression? More generally, how well do the courts respond to clashes that pit freedom against order or freedom against equality? Is freedom, order, or equality ever unconditional? In this chapter, we explore some value conflicts that the judiciary has resolved. You will be able to judge from the decisions in these cases whether American government has met the challenge of democracy by finding the appropriate balance between freedom and order and between freedom and equality.

To Pledge or Not to Pledge, That Is the Question

Every day, students across the United States stand, place their right hands over their hearts, and recite the Pledge of Allegiance while facing the American flag. The pledge exercise began in 1892, when Francis Bellamy proposed the right-hand-extended gesture to accompany the Pledge of Allegiance, which he authored. President Franklin D. Roosevelt instituted the hand-over-heart gesture in 1943 to avoid confusion with the Roman salute (right hand extended) used by the Italian fascists and quickly copied by the German Nazis. The picture on the left shows March 1943 grade school students saluting the flag. The picture on the right shows contemporary grade school students saluting the flag.

Some students hold religious beliefs that conflict with saluting the flag or reciting the pledge. Though the Supreme Court has long recognized the freedom to decline the pledge recitation and salute, that ruling was forgotten or ignored in Germantown, Maryland in 2010.

(*left*: Library of Congress; *right*: Michael Newman/PhotoEdit)

The value conflicts described in this chapter revolve around claims or entitlements that rest on law. Although we concentrate on conflicts over constitutional issues, the Constitution is not the only source of people's rights. Government at all levels creates rights through laws written by legislatures and regulations issued by bureaucracies.

We begin this chapter with the Bill of Rights and the freedoms it protects. Then we take a closer look at the role of the First Amendment in the original conflict between freedom and order. Next, we turn to the Fourteenth Amendment and the limits it places on the states. Then we examine the Ninth Amendment and its relationship to issues of personal autonomy. In Chapter 16, we will look at the Fourteenth Amendment's promise of equal protection, which sets the stage for the modern dilemma of government: the struggle between freedom and equality.

The Bill of Rights

You may remember from Chapter 3 that, at first, the framers of the Constitution did not include a list of individual liberties—a bill of rights—in the national charter. They believed that a bill of rights was not necessary because the Constitution spelled out the extent of the national government's power. But during the ratification debates, it became clear that the omission of a bill

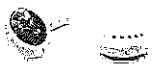
of rights was the most important obstacle to the adoption of the Constitution by the states. Eventually, the First Congress approved twelve amendments and sent them to the states for ratification. In 1791, the states ratified ten of the twelve amendments, and the nation had a bill of rights.

The Bill of Rights imposed limits on the national government but not on the state governments.* During the next seventy-seven years, litigants pressed the Supreme Court to extend the amendments' restraints to the states, but the Court refused until well after the adoption of the Fourteenth Amendment in 1868. Before then, protection from repressive state government had to come from state bills of rights.

The U.S. Constitution guarantees Americans numerous liberties and rights. In this chapter we explore a number of them. We will define and distinguish civil liberties and civil rights. (On some occasions, we use the terms interchangeably.) Civil liberties, sometimes referred to as "negative rights," are freedoms that are guaranteed to the individual. The guarantees take the form of restraints on government. For example, the First Amendment declares that "Congress shall make no law ... abridging the freedom of speech." Civil liberties declare what the government cannot do. The opening example of this chapter illustrates the civil liberties claim that government (in the form of the public school) cannot require students to salute and recite the Pledge.

In contrast, civil rights, sometimes called "positive rights," declare what the government must do or provide. Civil rights are powers and privileges that are guaranteed to the individual and protected against arbitrary removal at the hands of the government or other individuals. The right to vote and the right to a jury trial in criminal cases are civil rights embedded in the Constitution. Today, civil rights also embrace laws that further certain values. The Civil Rights Act of 1964, for example, furthered the value of equality by establishing the right to nondiscrimination in public accommodations and the right to equal employment opportunity. (See the feature "Examples of Positive and Negative Rights: Constitutional Rights and Human Rights" for examples in U.S. and U.N. contexts.) Civil liberties are the subject of this chapter; we discuss civil rights and their ramifications in Chapter 16.

The Bill of Rights lists both civil liberties and civil rights. When we refer to the rights and liberties of the Constitution, we mean the protections that are enshrined in the Bill of Rights and the first section of the Fourteenth Amendment.[5] The list includes freedom of religion, freedom of speech and of the press, the rights to assemble peaceably and to petition the government, the right to bear arms, the rights of the criminally accused, the requirement of due process, and the equal protection of the laws. The idea of a written enumeration of rights seems entirely natural to Americans today. Lacking a written constitution, Great Britain has started to provide written guarantees for human rights (see "Compared with What? Britain's Bill of Rights").



IN OUR OWN WORDS

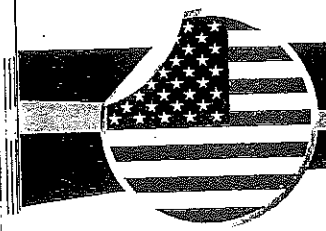
Listen to Jerry Goldman discuss the main points and themes of this chapter.

www.cengagebrain.com/shop/ISBN/0495906182

civil liberties
Freedoms guaranteed to individuals taking the form of restraint on government.

civil rights
Powers or privileges guaranteed to individuals and protected from arbitrary removal at the hands of government or individuals.

*Congress considered more than one hundred amendments in its first session. One that was not approved would have limited power of the states to infringe on the rights of conscience, speech, press, and jury trial in criminal cases. James Madison thought this amendment was the "most valuable" of the list, but it failed to muster a two-thirds vote in the Senate.



Feature Story

Examples of Positive and Negative Rights: Constitutional Rights and Human Rights

	U.S. Constitution	United Nations Universal Declaration of Human Rights
Civil liberties, or "negative rights"	"Congress shall make no *law ... abridging the* freedom of speech, or of the press." (First Amendment) "Excessive bail *shall not be* required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (Eighth Amendment)	"*No one shall be* held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms." (Article 4) "*No one shall be* subjected to arbitrary arrest, detention or exile." (Article 9)
Civil rights, or "positive rights"	"In all criminal prosecutions, the accused shall enjoy *the right to* a speedy and public trial, ... and to have the assistance of counsel for his defense." (Sixth Amendment)	"Everyone has *the right to* a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widow-hood, old age or other lack of livelihood in circumstances beyond his control." (Article 25.1) "Everyone has *the right to* work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment." (Article 23.1)

Some additional distinctions will prove useful in this and subsequent chapters. Persons possess *rights*, and governments possess *powers*. If governments may lawfully regulate a person's behavior (for example, requiring that you possess a valid license to drive a car), then that behavior is a privilege. Thus, you do not have a right to drive, but merely a privilege subject to reasonable restrictions by government. Although some rights may be spelled out in absolute language, generally no right is absolute. However, government limitations on rights are exceptional: they require a higher burden of proof and must be minimal in scope.[6]

Freedom of Religion

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

Religious freedom was important to the colonies and later to the states. That importance is reflected in its position among the ratified amendments that we

know as the Bill of Rights: first, in the very first amendment. The First Amendment guarantees freedom of religion in two clauses: the establishment clause, which prohibits laws establishing religion, and the free-exercise clause, which prevents the government from interfering with the exercise of religion. Together, they ensure that the government can neither promote nor inhibit religious beliefs or practices.

At the time of the Constitutional Convention, many Americans, especially in New England, maintained that government could and should foster religion, specifically Protestantism. However, many more Americans agreed that this was an issue for state governments, that the national government had no authority to meddle in religious affairs. The religion clauses were drafted in this spirit.[7]

The Supreme Court has refused to interpret the religion clauses definitively. The result is an amalgam of rulings, the cumulative effect of which is that freedom to believe is unlimited, but freedom to practice a belief can be limited. Religion cannot benefit directly from government actions (for example, government cannot make contributions to churches or synagogues), but it can benefit indirectly from those actions (for example, government can supply books on secular subjects for use in all schools—public, private, and parochial).

Religion is much more important to Americans than to citizens of other advanced nations.[8] Most Americans identify with a particular religious faith, and 40 percent attend church in a typical week. The vast majority believe in God or a supreme being, in far greater proportion than people in France, Britain, or Italy. (See Figure 15.1.)

Majoritarians might argue, then, that government should support religion. They would agree that the establishment clause bars government support of a single faith, but they might maintain that government should support all faiths. Such support would be consistent with what the majority wants and true to the language of the Constitution. In its decisions, the Supreme Court has rejected this interpretation of the establishment clause, leaving itself open to charges of undermining democracy. Those charges may be true with regard to majoritarian democracy, but the Court can justify its protection in terms of the basic values of democratic government.

The Establishment Clause

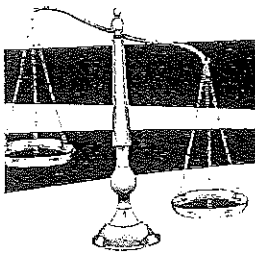
The provision that "Congress shall make no law respecting an establishment of religion" bars government sponsorship or support of religious activity. The Supreme Court has consistently held that the establishment clause requires government to maintain a position of neutrality toward religions and to maintain that position in cases that involve choices between religion and nonreligion. However, the Court has never interpreted the clause as barring all assistance that incidentally aids religious institutions.

establishment clause
The first clause in the First Amendment, which forbids government establishment of religion.

free-exercise clause
The second clause in the First Amendment, which prevents the government from interfering with the exercise of religion.

Government Support of Religion.

In 1879, the Supreme Court contended, quoting Thomas Jefferson, that the establishment clause erected "a wall of separation between church and State."[9] That wall was breached somewhat



Compared with What?

Britain's Bill of Rights

Unlike the United States, Britain has no single document or law known as "the constitution." Instead, it has an "unwritten constitution"—a combination of important documents and laws passed by Parliament (the British legislature), court decisions, customs, and conventions. Britain's "constitution" has no existence apart from ordinary law. In contrast to the American system of government, Britain's Parliament may change, amend, or abolish its fundamental laws and conventions at will. No special procedures or barriers must be overcome to enact such changes.

According to government leaders, Britain has done very well without a written constitution, or at least that was the position of Prime Minister Margaret Thatcher when she was presented with a proposal for a written constitution in 1989. Thatcher observed that despite Britain's lack of a bill of rights and an independent judiciary, "our present constitutional arrangements continue to serve us well.... Furthermore, the government does not feel that a written constitution in itself changes or guarantees anything."

In 1995, a nationwide poll revealed that the British people held a different view. Three-fourths of British adults thought that it was time for a written constitution, and even more maintained that the country needed a written bill of rights. These high levels of public support and the election of a new government in 1997 helped build momentum for important changes in Britain's long history of rule by unwritten law. In October 2000, England formally began enforcing the Human Rights Act, a key component of the government's political program, which incorporated into British law sixteen guarantees of the European Convention on Human Rights. Thus, the nation that

in 1947, when the justices upheld a local government program that provided free transportation to parochial school students.[10] The breach seemed to widen in 1968, when the Court held constitutional a government program in which parochial school students borrowed state-purchased textbooks.[11] The objective of the program, reasoned the majority, was to further educational opportunity. The students, not the schools, borrowed the books, and the parents, not the church, realized the benefits.

But in 1971, in *Lemon* v. *Kurtzman*, the Court struck down a state program that would have helped pay the salaries of teachers hired by parochial schools to give instruction in secular subjects.[12] The justices proposed a three-pronged test for determining the constitutionality of government programs and laws under the establishment clause:

- They must have a secular purpose (such as lending books to parochial school students).
- Their primary effect must not be to advance or inhibit religion.
- They must not entangle the government excessively with religion.

been the source of some of the world's most significant ideas concerning liberty individual freedom finally put into writing guarantees to ensure these fundamental s for its own citizens. Legal experts hailed the edict as the largest change to Britaw in three centuries.

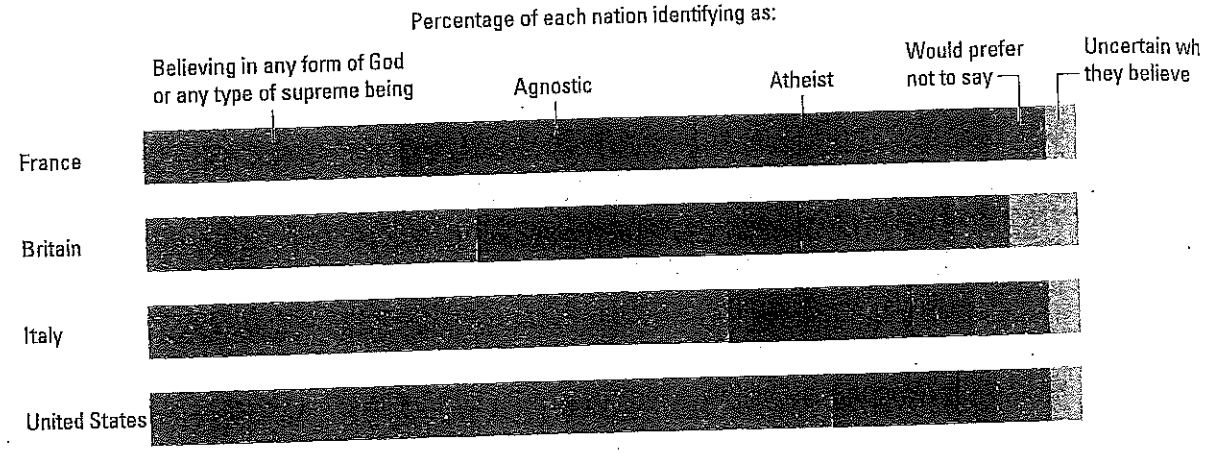
The Charter of Fundamental Rights, a text that is in harmony with the provisions ulated in the European Convention on Human Rights, was to achieve legally bindstatus assuming that all European Union countries ratified the current Reform ity. The United Kingdom and Poland, skittish about the imposition of European val. in their courts, opted out from the Charter provisions. Questions remain whether opt-out language is sufficient to achieve the desired objective. So it is uncertain ether the Human Rights Act will, in the words of one former minister in the atcher government, "rob us of freedoms we have had for centuries" or, as British man rights lawyer Geoffrey Robertson sees it, "help produce a better culture of erty." A 2008 report by a joint committee of Parliament endorsed the idea of a nsensus-based U.K. Bill of Rights and Freedoms emphasizing civil liberties rather an civil rights. But in doing so, the committee firmly rejected the idea that such a Bill f Rights would empower courts to strike down legislation, as in the power of judicial view. "We consider this to be fundamentally at odds with this country's tradition of arliamentary democracy," concluded the committee.

Sources: Andrew Marr, *Ruling Britannia: The Failure and Future of British Democracy* (London: Michael Joseph, 1995); Will Hutton, *The State We're In* (London: Cape, 1995); Fred Barbash, "The Movement to Rule Britannia Differently," *Washington Post*, 23 September 1995, p. A27; "Bringing Rights Home," *Economist*, 26 August 2000, pp. 45–46; Sarah Lyall, "209 Years Later, the English Get American-Style Bill of Rights," *New York Times*, 2 October 2000, p. A3; Suzanne Kapner, "Britain's Legal Barriers Start to Fall," *New York Times*, 4 October 2000, p. W1; Joint Committee on Human Rights, *A Bill of Rights for the UK? Twenty-ninth Report of Session 2007–08* (London: Stationery Office, Ltd., 10 August 2008), http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf.

The program in *Lemon* did not satisfy the last prong. The government would have had to monitor the program constantly, thus ensuring an excessive entanglement with religion. The *Lemon* test, as it became known, governed the Supreme Court's interpretation of such cases for twenty-five years. Then in 1997, the Court dramatically loosened its application of the test in a case reminiscent of the one that gave rise to it. The future of the test now seems uncertain.

Agostini v. *Felton* involved the use of public school teachers to teach congressionally mandated remedial courses to disadvantaged students in New York parochial schools. This time, the Court emphasized that only government *neutrality* toward religion was required by the First Amendment. Moreover, only *excessive* entanglements will be deemed to violate the establishment clause. By a vote of 5–4, it held that religion was neither hindered nor helped by parochial schools' using public school teachers at taxpayers' expense to teach secular subjects.[13] Although the opinion was narrowly written, the Court appears to have lowered the wall separating church and state.

FIGURE 15.1 Religious Self-Identity in Selected Countries



Most Americans believe in God or a supreme being compared to people in Italy, Britain, or France. France and Britain each hav proportionally more atheists than people in Italy or the United States.

Source: *New York Times*, 5 September 2007.

The Court provided additional support in 2002 for its tolerant positi regarding the establishment clause when it upheld a state school-vouch program in which secular or sectarian schools could participate. In *Zelm* v. *Simmons-Harris*, the justices, dividing 5–4, maintained that the progra did not favor religious schools over nonreligious ones when the aid went the student or parent who then chose the school.[14]

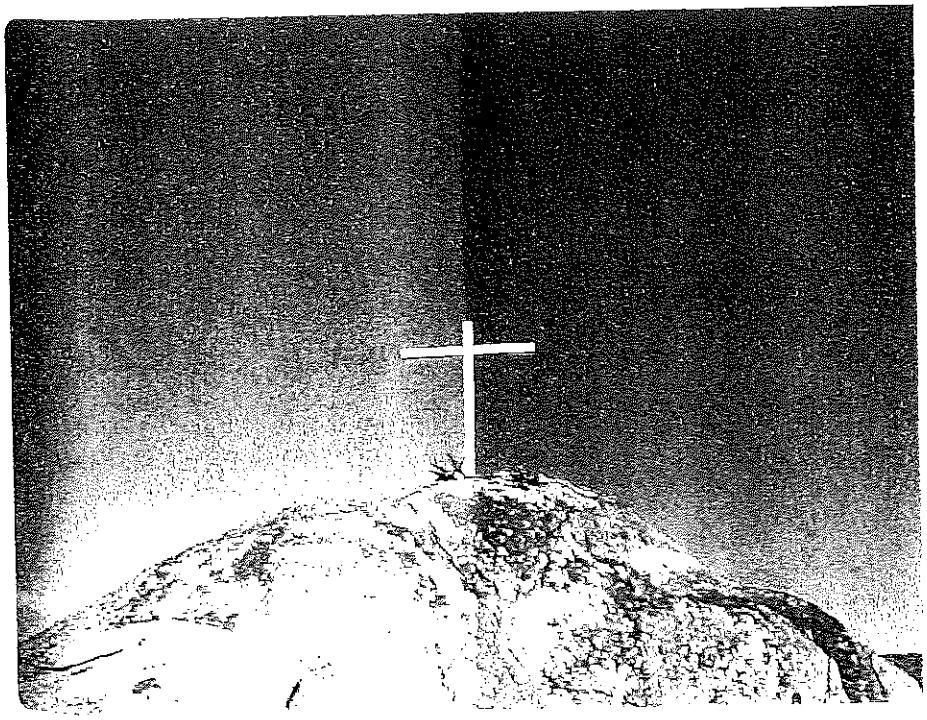
Consider another thorny issue. Does the display of religious artifacts public property violate the establishment clause? In *Lynch* v. *Donnelly* (198 the court said no, by a vote of 5–4.[15] At issue was a publicly funded nativi scene on public property, surrounded by commercial symbols of the Christm season such as Santa and his sleigh. Although he conceded that a crèche h religious significance, Chief Justice Warren E. Burger, writing for the majorit maintained that the display had a legitimate secular purpose: the celebratic of a national holiday. Second, the display did not have the primary effect benefiting religion; the religious benefits were "indirect, remote and incider tal." And third, the display led to no excessive entanglement of religion an government. The justices hinted at a relaxation of their interpretation of th establishment clause by asserting an "unwillingness to be confined to an single test or criterion in this sensitive area." The upshot of *Lynch* was a acknowledgment of the religious heritage of the majority of American although the Christmas holiday is a vivid reminder to religious minorities an the nonreligious of their separateness from the dominant Christian culture.

The *Lynch* decision led to a proliferation of closely decided cases testin the limits of government-sponsored religious displays. The latest ones i 2005 involved a forty-year-old monument displaying the Ten Command ments on the Texas state capitol and a display of the Ten Commandments i two Kentucky county courthouses. In separate 5–4 rulings, the justice upheld the Texas display because of the monument's "secular purpose,"[1]

but on the same day, the Court struck down the Kentucky courthouse displays because they were not integrated into a secular presentation and so had a primarily religious purpose.[17]

The Court continued to struggle with the limits of government entanglement with religious symbols. In 2010, a badly splintered 5–4 ruling that generated six separate opinions held that a five-by-eight-foot cross—originally made of wood but more recently made of four-inch metal pipe—erected by the Veterans of Foreign Wars on federal land to honor World War I veterans did not violate the establishment clause.[18] The federal government faced a dilemma: leaving the cross in place would violate the establishment clause, but removing the cross would show "disrespect for those the cross was seen as honoring," wrote Justice Anthony M. Kennedy for the majority. The solution at issue in the case was a land swap in which the government traded the public land for private property, enabling the cross to remain. But the land trade could be viewed as promoting religion, argued Justice John Paul Stevens in dissent. Such cases are sure to continue as the Court's membership, and perhaps the majority coalition, changes.

School Prayer. The Supreme Court has consistently equated prayer in public schools with government support of religion. In 1962, it struck down the daily reading of this twenty-two-word nondenominational prayer in New York's public schools: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." Justice Hugo L. Black, writing for a 6–1 majority, held that official state approval of prayer was an unconstitutional attempt on the part of the state to establish a religion. This decision, in *Engel* v. *Vitale*, drew a storm of protest that has yet to subside.[19]



The Crux of the Matter

A crucifix on national park land honored World War I veterans. The government swapped the small plot for private land to avoid a possible violation of the First Amendment's Establishment Clause. A splintered Supreme Court ruling in 2010 allowed the trade. A few weeks later, thieves stole the eight-foot-high cross.

(Eric Nystrom)

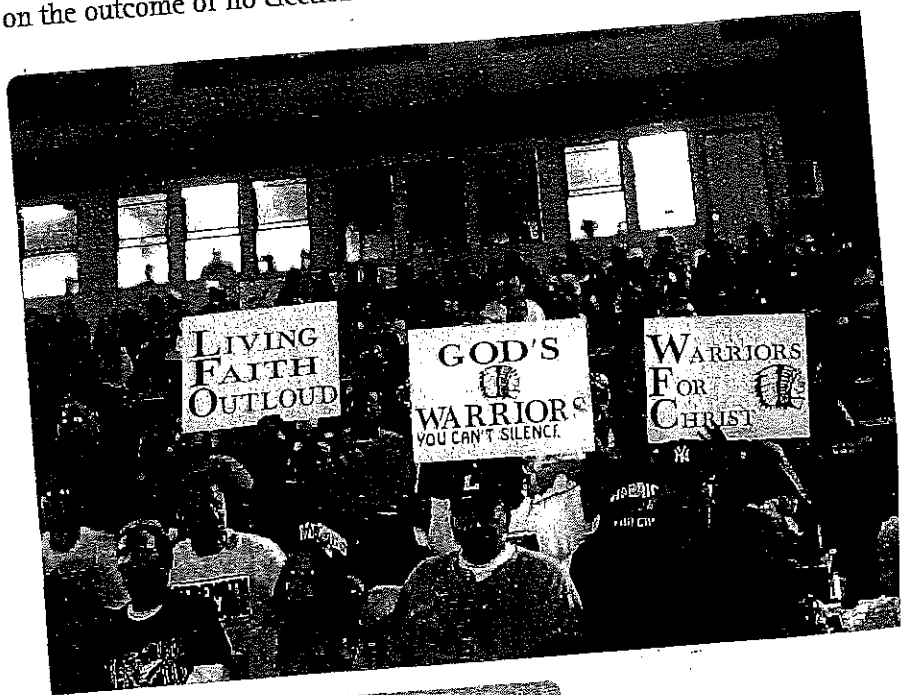
IDEALOG.ORG

Should prayer in school be required? Take IDEAlog's self-test.

The following year, the Court struck down a state law calling for daily reading and recitation of the Lord's Prayer in Pennsylvania's public scho The school district defended the reading and recitation on the grounds that taught literature, perpetuated traditional institutions, and inculcated mora tues. But the Court held that the state's involvement violated the governm constitutionally imposed neutrality in matters of religion.

In 1992, the Court struck down the offering of nonsectarian praye official public school graduations. In a 5–4 decision, the Court held government involvement creates "a state-sponsored and state-directed gious exercise in a public school."[21] The justices said that the establishi clause means that government may not conduct a religious exercise ir context of a school event. Yet school prayer persists.

In 2000, the football gridiron was the latest battlefield in the conflic a 6–3 vote, the Supreme Court struck down the practice of organ student-led prayer at public high school football games. The majority m tained that "the delivery of a pregame prayer had the improper effe coercing those present to participate in an act of religious worship." It i firmed that "fundamental rights may not be submitted to vote; they dep on the outcome of no elections."[22]



Team Religion Moves from Field to Stands

Friday night football is a big deal for high school students and their families. Following 9/11, cheerleaders at a Fort Oglethorpe, Georgia, high school wanted to embrace the Bible as pa Friday night football. For eight seasons, players charged on to the field with banners declari "Commit for Christ." But recognizing that it was deep in a constitutional hole, the school bc banned the practice in 2009. Parents and cheerleaders responded by moving their banner the stands, where they now cheer on their team and fans with inspirations from scripture. T freedom of expression seems secure, as long as it is not exercised on the playing field.

(The New York Times/Redux Picture)

Religious training during public school is out-of-bounds, but religious training after school now passes constitutional muster. In 2001, the Supreme Court ruled that public schools must open their doors to after-school religious activities on the same basis as other after-school programs such as the debate club. To do otherwise would constitute viewpoint discrimination in violation of the free speech clause of the First Amendment.

The issue of school prayer remains. In 2008, the Indian River school district in Sussex County, Delaware, agreed to revise its policies that had tolerated Christian prayer at school functions in clear violation of prior Supreme Court rulings. The settlement, which arose from a lawsuit by two Jewish families, created enormous ill will. One family was forced to move after facing threats and harassment when Christian community members viewed the lawsuit as an effort to limit their free exercise of religion.[23]

The establishment clause creates a problem for government. Support for all religions at the expense of nonreligion seems to pose the least risk to social order. Tolerance of the dominant religion at the expense of other religions risks minority discontent, but support for no religion (neutrality between religion and nonreligion) risks majority discontent.

The Free-Exercise Clause

The free-exercise clause of the First Amendment states that "Congress shall make no law ... prohibiting the free exercise [of religion]." The Supreme Court has struggled to avoid absolute interpretations of this restriction and thus avoid its complement, the establishment clause. An example: suppose Congress grants exemptions from military service to individuals who have religious scruples against war. These exemptions could be construed as a

Let Us Pray

Although school prayer and religious activity in the Indian River school district in Sussex County, Delaware, may have been resolved as a matter of policy, the invocation of a prayer at the start of school board meetings continues. Here, board member Nina Lou Bunting bows her head in prayer at a 2005 meeting. A Delaware federal court rebuffed an establishment clause challenge to the practice in 2010.

(News Journal File/Scott Nathan)

violation of the establishment clause because they favor some religious groups over others. But if Congress forced conscientious objectors to fight—to violate their religious beliefs—the government would run afoul of the free-exercise clause. In fact, Congress has granted military draftees such exemptions. But the Supreme Court has avoided a conflict between the establishment and free-exercise clauses by equating religious objection to war with any deeply held humanistic opposition to it. This solution leaves unanswered a central question: Does the free-exercise clause require government to grant exemptions from legal duties that conflict with religious obligations, or does it guarantee only that the law will be applicable to religious believers without discrimination or preference?[24]

In the free-exercise cases, the justices have distinguished religious beliefs from actions based on those beliefs. Beliefs are inviolate, beyond the reach of government control. But the First Amendment does not protect antisocial actions. Consider conflicting values about working on the Sabbath.

Working on the Sabbath. The modern era of free-exercise thinking began with *Sherbert* v. *Verner* (1963). Adeil Sherbert, a Seventh-Day Adventist, lost her mill job because she refused to work on Saturday, her Sabbath. She filed for unemployment compensation and was referred to another job, which she declined because it also required Saturday work. Because she declined the job, the state disqualified her from receiving unemployment benefits. In a 7–2 decision, the Supreme Court ruled that the disqualification imposed an impermissible burden on Sherbert's free exercise of religion. The First Amendment, declared the majority, protects observance as well as belief. A neutral law that burdens the free exercise of religion is subject to strict scrutiny. This means that the law may be upheld only if the government can demonstrate that (1) the law is justified by a "compelling governmental interest," (2) the law is narrowly tailored to achieve a legitimate goal, and (3) the law in question is the least restrictive means for achieving that interest.[25] Scholars had long maintained that strict scrutiny was "strict in theory but fatal in fact." A recent empirical study debunked this claim, finding that in all strict scrutiny cases from 1990 to 2003, the federal courts upheld nearly one-third of the challenged laws.[26] The strict scrutiny standard sets a high bar but not an insurmountable one.

The *Sherbert* decision prompted religious groups and individual believers to challenge laws that conflict with their faith. We have seen how conflicts arise from the imposition of penalties for refusing to engage in religiously prohibited conduct. But conflicts may also arise from laws that impose penalties for engaging in religiously motivated conduct.[27]

strict scrutiny
A standard used by the Supreme Court in deciding whether a law or policy is to be adjudged constitutional. To pass strict scrutiny, the law or policy must be justified by a "compelling governmental interest," must be narrowly tailored, and must be the least restrictive means for achieving that interest.

Freedom of Expression

> Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

mes Madison introduced the original versions of the speech clause
ıe press clause of the First Amendment in the House of Representatives
ıe 1789. One early proposal provided that "the people shall not be
ed of their right to speak, to write, or to publish their sentiments, and
eedom of the press, as one of the great bulwarks of liberty, shall be
able." That version was rewritten several times, then merged with the
ɔn and peaceable assembly clauses to yield the First Amendment.
ıe spare language of the First Amendment seems perfectly clear: "Con-
shall make no law ... abridging the freedom of speech, or of the press."
majority of the Supreme Court has never agreed that this "most majes-
ıarantee" is absolutely inviolable.[28] Historians have long debated the
ers' intentions regarding these free-expression clauses, the press and
h clauses of the First Amendment. The dominant view is that the
es confer a right to unrestricted discussion of public affairs.[29] Other
ars, examining much the same evidence, conclude that few, if any, of
amers clearly understood the clause; moreover, they insist that the First
ıdment does not rule out prosecution for seditious statements (state-
s inciting insurrection).[30]

The license to speak freely does not move multitudes of Americans to
c out on controversial issues. Americans have woven subtle restrictions
the fabric of our society: the risk of criticism or ostracism by family,
s, or employers tends to reduce the number of people who test the
s of free speech to individuals ready to bear the burdens. The middle
ol student who sat through the Pledge of Allegiance in 2010 bore that
en. As Mark Twain once remarked, "It is by the goodness of God that
ur country we have three unspeakably precious things: freedom of
ch, freedom of conscience, and the prudence never to practice either
ıem."[31]

Today, the clauses are deemed to bar most forms of prior restraint—
ɔorship before publication as well as after-the-fact prosecution for politi-
ınd other discourse. The Supreme Court has evolved two approaches to
resolution of claims based on the free-expression clauses. First, govern-
t can regulate or punish the advocacy of ideas, but only if it can prove
ıtent to promote lawless action and demonstrate that a high probability
ts that such action will occur.[32] Second, government may impose rea-
ıble restrictions on the means for communicating ideas, restrictions that
incidentally discourage free expression. Hence, people have the right to
est but not if their physical presence would block the entrance to an
ıpied public building.

Suppose, for example, that a political party advocates nonpayment of
onal income taxes. Government cannot regulate or punish that party for
ɔcating tax nonpayment because the standards of proof—that the act be
cted at inciting or producing imminent lawless action and that the act be
y to produce such action—do not apply. But government can impose
ictions on the way the party's candidates communicate what they are
ɔcating. Government can bar them from blaring messages from loud-
kers in residential neighborhoods at 3:00 A.M.

free-expression clauses The press and speech clauses of the First Amendment.

prior restraint Censorship before publication.

Freedom of Speech

The starting point for any modern analysis of free speech is the clear and present danger test, formulated by Justice Oliver Wendell Holmes in the Supreme Court's unanimous decision in *Schenck* v. *United States* (1919). Charles T. Schenck and his fellow defendants were convicted under a federal criminal statute for attempting to disrupt World War I military recruitment by distributing leaflets claiming that conscription was unconstitutional. The government believed this behavior threatened the public order. At the core of the Court's opinion, Holmes wrote, was the view that

> the character of every act depends upon the circumstances in which it is done.... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic.... The question in every case is whether the words used 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. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right [emphasis added].[33]

Because the actions of the defendants in *Schenck* were deemed to create a clear and present danger to the United States at that time, the Supreme Court upheld the defendants' convictions. The clear and present danger test helps to distinguish the advocacy of ideas, which is protected, from incitement, which is not. However, Holmes later frequently disagreed with a majority of his colleagues in applying the test.

In an often quoted dissent in *Abrams* v. *United States* (1919), Holmes revealed his deeply rooted resistance to the suppression of ideas. The majority had upheld Jacob Abrams's criminal conviction for distributing leaflets that denounced the war and U.S. opposition to the Russian Revolution. Holmes wrote:

> When men have realized that time has upset many fighting faiths, they may come to believe ... that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[34]

clear and present danger test
A means by which the Supreme Court has distinguished between speech as the advocacy of ideas, which is protected by the First Amendment, and speech as incitement, which is not protected.

In 1925, the Court issued a landmark decision in *Gitlow* v. *New York*.[35] Benjamin Gitlow was arrested for distributing copies of a "left-wing manifesto" that called for the establishment of socialism through strikes and working-class uprisings of any form. Gitlow was convicted under a state criminal anarchy law; Schenck and Abrams had been convicted under a federal law. For the first time, the Court assumed that the First Amendment speech and press provisions applied to the states through the due process clause of the Fourteenth Amendment. Still, a majority of the justices affirmed Gitlow's conviction. Justices

Holmes and Louis D. Brandeis argued in dissent that Gitlow's ideas did not pose a clear and present danger. "Eloquence may set fire to reason," conceded the dissenters. "But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration."

The protection of advocacy faced yet another challenge in 1948, when eleven members of the Communist Party were charged with violating the Smith Act, a federal law making the advocacy of force or violence against the United States a criminal offense. The leaders were convicted, although the government introduced no evidence that they had actually urged people to commit specific violent acts. The Supreme Court mustered a majority for its decision to uphold the convictions under the act, but it could not get a majority to agree on the reasons in support of that decision. The biggest bloc, of four justices, announced the plurality opinion in 1951, arguing that the government's interest was substantial enough to warrant criminal penalties.[36] The justices interpreted the threat to the government to be the gravity of the advocated action, "discounted by its improbability." In other words, a single soap-box orator advocating revolution stands little chance of success. But a well-organized, highly disciplined political movement advocating revolution in the tinderbox of unstable political conditions stands a greater chance of success. In broadening the "clear and present danger" test to the "grave and probable danger" test, the Court held that the government was justified in acting preventively rather than waiting until revolution was about to occur.

By 1969, the pendulum had swung back in the other direction: the justices began to put more emphasis on freedom. That year, in *Brandenburg* v. *Ohio*, a unanimous decision extended the freedom of speech to new limits.[37] Clarence Brandenburg, the leader of the Ohio Ku Klux Klan, had been convicted under a state law for advocating racial strife at a Klan rally. His comments, which had been filmed by a television crew, included threats against government officials.

The Court reversed Brandenburg's conviction because the government had failed to prove that the danger was real. The Court went even further and declared that threatening speech is protected by the First Amendment unless the government can prove that such advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The ruling offered wider latitude for the expression of political ideas than ever before in the nation's history.

The United States stands alone when it comes to protection for hateful speech. Several democratic nations—including Canada, England, France, Germany, the Netherlands, South Africa, Australia, and India—have laws or have signed international conventions banning such speech. Nazi swastikas and flags are forbidden for sale in Israel and France but not in the United States. Anyone who denies the Holocaust in Canada, Germany, and France is subject to criminal prosecution but not in the United States. Some scholars have begun to urge a relaxation of our stringent speech protections because we now live "in an age when words have inspired acts of mass murder and terrorism."[38]

Symbolic Expression. Symbolic expression, or nonverbal communica generally receives less protection than pure speech. But the courts upheld certain types of symbolic expression. *Tinker* v. *Des Moines Ind dent County School District* (1969) involved three public school stu who wore black armbands to school to protest the Vietnam War. Princ in their school district had prohibited the wearing of armbands or grounds that such conduct would provoke a disturbance; the district pended the students. The Supreme Court overturned the suspensions. Ju Abe Fortas declared for the majority that the principals had failed to s that the forbidden conduct would substantially interfere with approp school discipline:

> Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views o another person may start an argument or cause a disturbance. Bu our Constitution says we must take this risk.[39]

Order Versus Free Speech: Fighting Words and Threatening Express Fighting words are a notable exception to the protection of free speech *Chaplinsky* v. *New Hampshire* (1942), Walter Chaplinsky, a Jehov Witness, convicted under a state statute for calling a city marshal a "C damned racketeer" and "a damned fascist" in a public place, appealed to Supreme Court.[40] The Supreme Court upheld Chaplinsky's conviction on theory that fighting words—words that "inflict injury or tend to in an immediate breach of the peace"—do not convey ideas and thus are subject to First Amendment protection.

The Court sharply narrowed the definition of *fighting words* just se years later. Arthur Terminiello, a suspended Catholic priest from Alab and a vicious anti-Semite, addressed the Christian Veterans of Americ right-wing extremist group, in a Chicago hall. Terminiello called the jee crowd of fifteen hundred angry protesters outside the hall "slimy scum" ranted on about the "communistic, Zionistic" Jews of America, evoking c of "kill the Jews" and "dirty kikes" from his listeners. The crowd outside hall heaved bottles, bricks, and rocks, while the police attempted to pro Terminiello and his listeners inside. Finally, the police arrested Termini for disturbing the peace.

Terminiello's speech was far more incendiary than Walter Chaplinsk Yet the Supreme Court struck down Terminiello's conviction on the grou that provocative speech, even speech that stirs people to anger, is protec by the First Amendment. "Freedom of speech," wrote Justice William Douglas in the majority opinion, "though not absolute ... is nevertheless p tected against censorship or punishment, unless shown likely to produc clear ... and present danger of a serious substantive evil that rises far ab public inconvenience, annoyance, or unrest."

fighting words
Speech that is not protected by the First Amendment because it inflicts injury or tends to incite an immediate disturbance of the peace.

This broad view of protection brought a stiff rebuke in Justice Robert Jackson's dissenting opinion:

> The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.[41]

The times seem to have caught up with the idealism that Jackson criticized in his colleagues. In *Cohen* v. *California* (1971), a nineteen-year-old department store worker expressed his opposition to the Vietnam War by wearing a jacket in the hallway of a Los Angeles county courthouse emblazoned with the words "FUCK THE DRAFT. STOP THE WAR." The young man, Paul Cohen, was charged in 1968 under a California statute that prohibits "maliciously and willfully disturb[ing] the peace and quiet of any neighborhood or person [by] offensive conduct." He was found guilty and sentenced to thirty days in jail. On appeal, the U.S. Supreme Court reversed Cohen's conviction.

The Court reasoned that the expletive he used, while provocative, was not directed at anyone in particular; besides, the state presented no evidence that the words on Cohen's jacket would provoke people in "substantial numbers" to take some kind of physical action. In recognizing that "one man's vulgarity is another's lyric," the Supreme Court protected two elements of speech: the emotive (the expression of emotion) and the cognitive (the expression of ideas).[42]

The Supreme Court will confront these kinds of questions again as challenges to intimidating speech on the World Wide Web make their way through the nation's legal system. In 1996, Congress passed the Communications Decency Act, which made it a crime for a person knowingly to circulate "patently offensive" sexual material to Internet sites accessible to those under eighteen years old. Is this an acceptable way to protect children from offensive material, or is it a muzzle on free speech? A federal court quickly declared the act unconstitutional. In an opinion of over two hundred pages, the Court observed that "just as the strength of the Internet is chaos, so the strength of our liberty depends on the chaos and cacophony of the unfettered speech the First Amendment protects."[43]

The Supreme Court upheld the lower court's ruling in June 1997 in *Reno* v. *ACLU*.[44] Its nearly unanimous opinion was a broad affirmation of free speech rights in cyberspace, arguing that the Internet was more analogous to print media than to television, and thus even indecent material on the Internet was entitled to First Amendment protection.

How far does free expression extend? Very far, so far. The justices in 2010 struck down on free expression grounds a federal law that banned depictions of animal cruelty.[45] The Court also agreed to decide whether California's ban on the sale of violent video games to minors is an unconstitutional limitation on freedom of speech.[46]

Shock Jock Rocks

To his legions of loyal fans, radio personality Howard Stern is a superstar. But Stern's provocative language on FM stations made him an outcast. So he abandoned his longtime FM home for satellite, hosting his brand of talk radio in 2006 on Sirius Satellite Radio. Government can impose speech restrictions on the limited AM and FM frequencies, but free speech is virtually unfettered when it comes to satellite transmission.

(Getty Images)

Freedom of the Press

The First Amendment guarantees that government "shall make no law abridging the freedom ... of the press." Although the free press guaran was originally adopted as a restriction on the national government, Supreme Court has held since 1931 that it applies to state and local gove ments as well.

The ability to collect and report information without government interf ence was (and still is) thought to be essential to a free society. The print me continue to use and defend the freedom conferred on them by the frame However, the electronic media have had to accept some government regu tion stemming from the scarcity of broadcast frequencies (see Chapter 6).

Defamation of Character. Libel is the written defamation of character.* person who believes his or her name and character have been harmed false statements in a publication can institute a lawsuit against the public tion and seek monetary compensation for the damage. Such a lawsuit c impose limits on freedom of expression; at the same time, false statemer impinge on the rights of individuals. In a landmark decision in *New Yo Times* v. *Sullivan* (1964), the Supreme Court declared that freedom of t press takes precedence—at least when the defamed individual is a pub official.[47] The Court unanimously agreed that the First Amendment prote the publication of all statements—even false ones—about the conduct

*Slander is the oral defamation of character. The durability of the written word usually means t libel is a more serious accusation than slander.

public officials, except statements made with actual malice (with knowledge that they are false or in reckless disregard for their truth or falsity).

Three years later, the Court extended this protection to apply to suits brought by any public figure, whether a government official or not. Public figures are people who assume roles of prominence in society or thrust themselves to the forefront of public controversies, including officials, actors, writers, and television personalities. These people must show actual malice on the part of the publication that printed false statements about them. Because the burden of proof is so great, few plaintiffs prevail. And freedom of the press is the beneficiary.

What if the damage inflicted is not to one's reputation but to one's emotional state? Government seeks to maintain the prevailing social order, which prescribes proper modes of behavior. Does the First Amendment restrict the government in protecting citizens from behavior that intentionally inflicts emotional distress? This issue arose in a parody of a public figure in *Hustler* magazine. The target was the Reverend Jerry Falwell, a televangelist who founded the Moral Majority. The parody had Falwell—in an interview—discussing a drunken, incestuous rendezvous with his mother in an outhouse, saying, "I always get sloshed before I go out to the pulpit." Falwell won a $200,000 award for 'emotional distress." The magazine appealed, and the Supreme Court confronted the issue of social order versus free speech in 1988.[48]

In a unanimous decision, the Court overturned the award. In his sweeping opinion for the Court, Chief Justice William H. Rehnquist gave wide latitude to the First Amendment's protection of free speech. He observed that 'graphic depictions and satirical cartoons have played a prominent role in public and political debate" throughout the nation's history and that the First Amendment protects even "vehement, caustic, and sometimes unpleasantly sharp attacks." Free speech protects criticism of public figures, even if the criticism is outrageous and offensive.

rior Restraint and the Press. As discussed above, in the United States, reedom of the press has primarily meant protection from prior restraint, or ensorship. The Supreme Court's first encounter with a law imposing prior estraint on a newspaper was in *Near* v. *Minnesota* (1931).[49] In Minneapolis, ay Near published a scandal sheet in which he attacked local officials, charging that they were in league with gangsters.[50] Minnesota officials obtained an injunction to prevent Near from publishing his newspaper, under a state law hat allowed such action against periodicals deemed "malicious, scandalous, nd defamatory."

The Supreme Court struck down the law, declaring that prior restraint aces an unacceptable burden on a free press. Chief Justice Charles Evans ughes forcefully articulated the need for a vigilant, unrestrained press: he fact that the liberty of the press may be abused by miscreant purveyors scandal does not make any the less necessary the immunity of the press om previous restraint in dealing with official misconduct." Although the ourt acknowledged that prior restraint may be permissible in exceptional ircumstances, it did not specify those circumstances, nor has it yet done so.

public figures
People who assume roles of prominence in society or thrust themselves to the forefront of public controversy.

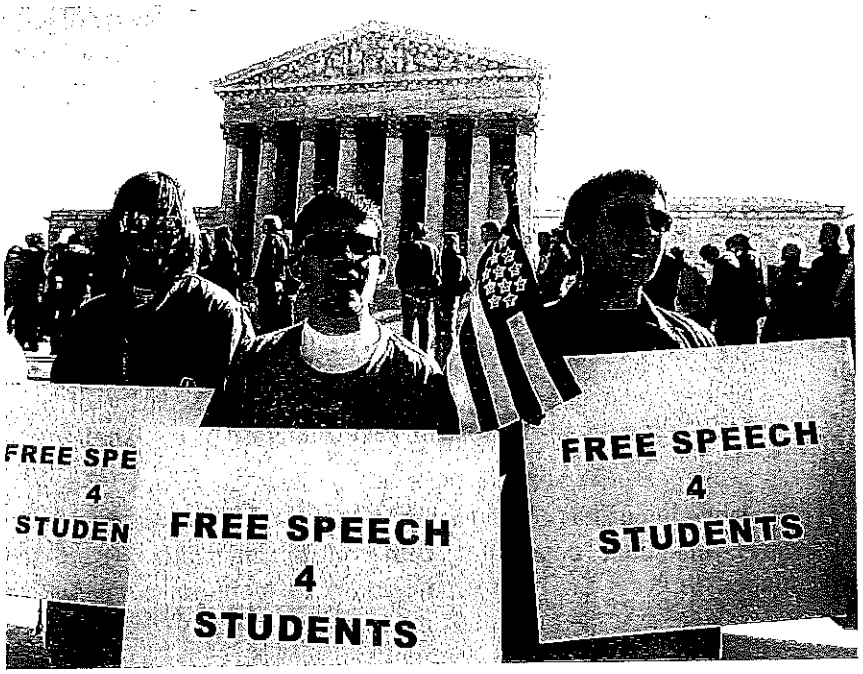
Consider another case, which occurred during a war, a time when the tension between government-imposed order and individual freedom is often at a peak. In 1971, Daniel Ellsberg, a special assistant in the Pentagon's Office of International Security Affairs, delivered portions of a classified U.S. Department of Defense study to the *New York Times* and the *Washington Post*. By making the documents public, he hoped to discredit the Vietnam War and thereby end it. The U.S. Department of Justice sought to restrain the *Times* and the *Post* from publishing the documents, which became known as the Pentagon Papers, contending that their publication would prolong the war and embarrass the government. The case was quickly brought before the Supreme Court, which delayed its summer adjournment to hear oral arguments.

Three days later, in a 6–3 decision in *New York Times* v. *United States* (1971), the Court concluded that the government had not met the heavy burden of proving that immediate, inevitable, and irreparable harm would follow publication of the documents.[51] The majority expressed its view in a brief, unsigned opinion; individual and collective concurring and dissenting views added nine additional opinions to the decision. Two justices maintained that the First Amendment offers absolute protection against government censorship, no matter what the situation. But the other justices left the door ajar for the imposition of prior restraint in the most extreme and compelling of circumstances. The result was hardly a ringing endorsement of freedom of the press or a full affirmation of the public's right to all the information that is vital to the debate of public issues.

Freedom of Expression Versus Maintaining Order. The courts have consistently held that freedom of the press does not override the requirements of law enforcement. A grand jury called on a Louisville, Kentucky, reporter who had researched and written an article about drug-related activities to identify people he had seen in possession of marijuana or in the act of processing it. The reporter refused to testify, maintaining that freedom of the press shielded him from this inquiry. In a closely divided decision, the Supreme Court in 1972 rejected this position.[52] The Court declared that no exception, even a limited one, is permissible to the rule that all citizens have a duty to give their government whatever testimony they are capable of giving.

Consider the 1988 case of a St. Louis high school principal who deleted articles on divorce and teenage pregnancy from the school's newspaper on the grounds that the articles invaded the privacy of students and families who were the focus of the stories. Three student editors filed suit in federal court, claiming that the principal had violated their First Amendment rights. They argued that the principal's censorship interfered with the newspaper's function as a public forum, a role protected by the First Amendment. The principal maintained that the newspaper was just an extension of classroom instruction and thus was not protected by the First Amendment.

In a 5–3 decision, the Supreme Court upheld the principal's actions in sweeping terms. Educators may limit speech within the confines of the school curriculum, including speech that might seem to bear the approval of



Hey Dudes, Let's Protest

Students rally on the steps of the U.S. Supreme Court to demonstrate their support for Joseph Frederick, who was suspended from high school when he held up a banner declaring "Bong Hits 4 Jesus" at a school outing in Juneau, Alaska. Frederick lost. Party on.

(AP Photo/Evan Vucci)

:hool, provided their actions serve any "valid educational purpose." nt expression beyond school property took a hit in 2007 when an ısingly conservative Supreme Court upheld the suspension of a high l student in Juneau, Alaska, who had displayed a banner ("Bong Hits ıs") at an outside school event. School officials may prohibit speech, Chief Justice John G. Roberts, Jr., if it could be interpreted as promot- egal drug use.[53]

: Rights to Assemble Peaceably l to Petition the Government

nal clause of the First Amendment states that "Congress shall make no .. abridging ... the right of the people peaceably to assemble, and to ɔn the Government for a redress of grievances." The roots of the right ition can be traced to the Magna Carta, the charter of English political ivil liberties granted by King John at Runnymede in 1215. The right of :able assembly arose much later. The framers meant that the people the right to assemble peaceably *in order to* petition the government. /, however, the right to assemble peaceably is equated with the right to peech and a free press, independent of whether the government is peti- l. Precedent has merged these rights and made them indivisible.[54] Gov- ent cannot prohibit peaceful political meetings and cannot brand as nals those who organize, lead, and attend such meetings.[55]

he clash of interests in cases involving these rights illustrates the con- ıg nature of the effort to define and apply fundamental principles. The for order and stability has tempered the concept of freedom. And when

freedom and order conflict, the justices of the Supreme Court, whc sponsible only to their consciences, strike the balance. Such clashes tain to occur again and again. Freedom and order conflict whe libraries become targets of community censors, when religious interferes with military service, and when individuals and groups views or hold beliefs at odds with majority sentiment.

The Right to Bear Arms

The Second Amendment declares:

> A well-regulated militia, being necessary to the security of a State, the right of the people to keep and bear arms, shall no infringed.

This amendment has created a hornet's nest of problems for gun advocates and their opponents. Gun-control advocates assert t amendment protects the right of the states to maintain *collective* Gun-use advocates assert that the amendment protects the right of *in als* to own and use guns. There are good arguments on both sides.

Federal firearms regulations did not come into being until Prol so the Supreme Court had little to say on the matter before then. I however, a unanimous Court upheld a 1934 federal law requiring th tion and registration of machine guns and sawed-off shotguns. Th held that the Second Amendment protects a citizen's right to own c militia weapons; sawed-off shotguns did not qualify for protection.[56]

In 2008, the Court squarely considered whether the Second Ame protects an individual's right to gun ownership or is simply a right service in a militia. *District of Columbia* v. *Heller* was a challenge strictest gun-control statute in the country. It barred private posses handguns and required the disassembly or use of trigger locks on ril shotguns. In a landmark decision, the Court ruled 5–4 that there is sonal constitutional right to keep a loaded handgun at home f defense. Justice Antonin Scalia, writing for the conservative m acknowledged the problem of handgun violence. "But the enshrine constitutional rights," declared Scalia, "necessarily takes certain choices off the table.... It is not the role of this court to pronou Second Amendment extinct."[57]

The ruling overturned the ban, but it left a host of issues unan Here are three:

1. The Court expressly left open whether the individual right to keep a arms in the Second Amendment should be brought into or incor into the Fourteenth Amendment to apply against the states. (The Di Columbia is a creation of the federal government; it is not a state.)
2. The justices suggested that personal handgun possession did not to unusual weapons like submachine guns or assault rifles, but th was not squarely before them.

3. The opinion did not set out the standard that would be used to evaluate future challenges to gun regulations that stop short of prohibition.

The Court addressed only the first of these issues in *McDonald* v. *Chicago* (2010), leaving the matter of gun regulation for another day.[58] In five separate opinions covering more than 200 pages, the justices held, 5–4, that an individual's right to bear arms is fundamental and cannot be prohibited by state or local government. The majority could not agree on the exact Fourteenth Amendment clause that enabled this application. Four justices—Chief Justice John G. Roberts, Jr., and Associate Justices Antonin Scalia, Anthony M. Kennedy, and Samuel A. Alito, Jr.—argued that the due process clause served this function. Justice Clarence Thomas maintained that the quiescent privileges and immunities clause should carry the freight.

How much regulation will the Court tolerate when it comes to the right to bear arms? New cases now in the legal pipeline will test the waters on what is permissible and what is not.

Rallying for a Right

Second Amendment activists gathered around the country on April 19, 2010, also known as Patriots Day, to demonstrate the right to bear arms. The date commemorates the battles of Lexington and Concord during the Revolutionary War. One protester wore his holstered unloaded pistol while attending such a rally in Sacramento, California. He and others objected to a proposed state law that would ban gun owners from openly carrying unloaded guns in public. In June 2010, the U.S. Supreme Court held that state and local governments may not forbid individual gun ownership. The Court has yet to decide how far government may go in regulating gun ownership.

(AP Photo/Rich Pedroncelli)

Applying the Bill of Rights to the States

The major purpose of the Constitution was to structure the division of power between the national government and the state governments. Even before it was amended, the Constitution set some limits on both the nation and the states with regard to citizens' rights. It barred both governments from passing **bills of attainder**, laws that make an individual guilty of a crime without a trial. It also prohibited them from enacting **ex post facto laws**, which declare an action a crime after it has been performed. And it barred both nation and states from impairing the **obligation of contracts**, the obligation of the parties in a contract to carry out its terms.

Although initially the Bill of Rights seemed to apply only to the national government, various litigants pressed the claim that its guarantees also applied to the states. In response to one such claim, Chief Justice John Marshall affirmed what seemed plain from the Constitution's language and "the history of the day" (the events surrounding the Constitutional Convention): the provisions of the Bill of Rights served only to limit national authority. "Had the framers of these amendments intended them to be limitations on the powers of the state governments," wrote Marshall, "they would have ... expressed that intention."[59]

Change came with the Fourteenth Amendment, which was adopted in 1868. The due process clause of that amendment is the linchpin that holds the states to the provisions of the Bill of Rights.

The Fourteenth Amendment: Due Process of Law

> *Section 1*.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

Most freedoms protected in the Bill of Rights today function as limitations on the states. And many of the standards that limit the national government serve equally to limit state governments. The changes have been achieved through the Supreme Court's interpretation of the due process clause of the Fourteenth Amendment: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The clause has two central meanings. First, it requires the government to adhere to appropriate procedures. For example, in a criminal trial, the government must establish the defendant's guilt beyond a reasonable doubt. Second, it forbids unreasonable government action. For example, at the turn of the twentieth century, the Supreme Court struck down a state law that forbade bakers from working more than sixty hours a week. The justices found the law unreasonable under the due process clause.[60]

bills of attainder
A law that pronounces an individual guilty of a crime without a trial.

ex post facto laws
Laws that declare an action to be criminal after it has been performed.

obligation of contracts
The obligation of the parties to a contract to carry out its terms.

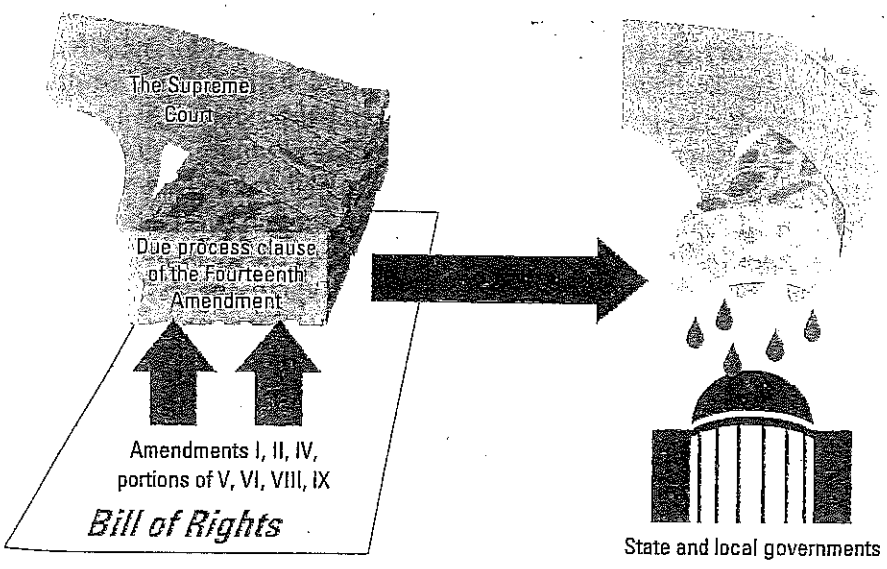
The Supreme Court has used the first meaning of the due process clause as a sponge, absorbing or incorporating the procedural specifics of the Bill of Rights and spreading or applying them to the states. The history of due process cases reveals that unlikely litigants often champion constitutional guarantees and that freedom is not always the victor.

The Fundamental Freedoms

In 1897, the Supreme Court declared that the states are subject to the Fifth Amendment's prohibition against taking private property without providing just compensation.[61] The Court reached that decision by absorbing the prohibition into the due process clause of the Fourteenth Amendment, which explicitly applies to the states. Thus, one Bill of Rights protection—but only that one—applied to both the states and the national government, as illustrated in Figure 15.2. In 1925, the Court assumed that the due process clause protected the First Amendment speech and press liberties from impairment by the states.[62]

The inclusion of other Bill of Rights guarantees within the due process clause faced a critical test in *Palko* v. *Connecticut* (1937).[63] Frank Palko had been charged with homicide in the first degree. He was convicted of second-degree murder, however, and sentenced to life imprisonment. The state of Connecticut appealed and won a new trial; this time, Palko was found guilty of first-degree murder and sentenced to death. Palko appealed the second conviction on the grounds that it violated the protection against double jeopardy guaranteed to him by the Fifth Amendment. This protection applied to the states, he contended, because of the Fourteenth Amendment's due process clause.

FIGURE 15.2 The Selective Incorporation of the Bill of Rights



The Supreme Court has used the due process clause of the Fourteenth Amendment as a sponge, absorbing most of the provisions in the Bill of Rights and applying them to state and local governments. All provisions in the Bill of Rights apply to the national government.

The Supreme Court upheld Palko's second conviction. In his opinion f the majority, Justice Benjamin N. Cardozo formulated principles that were guide the Court's actions for the next three decades. He reasoned that son Bill of Rights guarantees, such as freedom of thought and speech, are fund mental and that these fundamental rights are absorbed by the Fourteen Amendment's due process clause and are therefore applicable to the stat These rights are essential, argued Cardozo, because "neither liberty nor ju tice would exist if they were sacrificed." Trial by jury and other righ although valuable and important, are not essential to liberty and justice a therefore are not absorbed by the due process clause. "Few would be so na row or provincial," Cardozo claimed, "as to maintain that a fair and enligh ened system of justice would be impossible" without these other rights. other words, only certain provisions of the Bill of Rights—the "fundament provisions—were absorbed selectively into the due process clause and ma applicable to the states. Because protection against double jeopardy was r one of them, Palko died in Connecticut's gas chamber in 1938.

The next thirty years saw slow but perceptible change in the standa for determining whether a Bill of Rights guarantee was fundamental. T reference point changed from the idealized "fair and enlightened system justice" in *Palko* to the more realistic "American scheme of justice" thi years later.[64] Case after case tested various guarantees that the Court fou to be fundamental. By 1969, when *Palko* was finally overturned, the Co had found most of the Bill of Rights applicable to the states. (Recall that t Court made the Second Amendment's "right to keep and bear arms" fu applicable to the states in 2010.)

Criminal Procedure: The Meaning of Constitutional Guarantees

"The history of liberty," remarked Justice Felix Frankfurter, "has larg been the history of observance of procedural safeguards."[65] The safegua embodied in the Fourth through Eighth Amendments to the Constitut specify how government must behave in criminal proceedings. Their ap cation to the states has reshaped American criminal justice in the past thi years in two stages. The first stage was the judgment that a guaran asserted in the Bill of Rights also applied to the states. The second st required that the judiciary give specific meaning to the guarantee. The co could not allow the states to define guarantees themselves without risk different definitions from state to state—and thus differences among citize rights. If rights are fundamental, their meaning cannot vary. But life is quite so simple under the U.S. Constitution. The concept of federalism sewn into the constitutional fabric, and the Supreme Court has recogni that there may be more than one way to prosecute the accused while he ing his or her fundamental rights.

Consider, for example, the right to a jury trial in criminal cases, whic guaranteed by the Sixth Amendment. This right was made obligatory for

states in *Duncan* v. *Louisiana* (1968). The Supreme Court later held that the right applied to all nonpetty criminal cases—those in which the penalty for conviction was more than six months' imprisonment.[66] But the Court did not require that state juries have twelve members, the number required for federal criminal proceedings. The Court permits jury size to vary from state to state, although it has set the minimum number at six. Furthermore, it has not imposed on the states the federal requirement of a unanimous jury verdict. As a result, even today, many states do not require unanimous verdicts for criminal convictions. Some observers question whether criminal defendants in these states enjoy the same rights as defendants in unanimous-verdict states.

In contrast, the Court left no room for variation in its definition of the fundamental right to an attorney, also guaranteed by the Sixth Amendment. Clarence Earl Gideon was a penniless vagrant accused of breaking into and robbing a pool hall. Because Gideon could not afford a lawyer, he asked the state to provide him with legal counsel for his trial. The state refused and subsequently convicted Gideon and sentenced him to five years in the Florida State Penitentiary. From his cell, Gideon appealed to the U.S. Supreme Court, claiming that his conviction should be struck down because the state had denied him his Sixth Amendment right to counsel.[67]

In its landmark decision in *Gideon* v. *Wainwright* (1963), the Court set aside Gideon's conviction and extended to defendants in state courts the Sixth Amendment right to counsel.[68] The state retried Gideon, who this time had the assistance of a lawyer, and the court found him not guilty.

In subsequent rulings that stretched over more than a decade, the Court specified at which points in the course of criminal proceedings a defendant is entitled to a lawyer (from arrest to trial, appeal, and beyond). These pronouncements are binding on all states. In state as well as federal proceedings, the government must furnish legal assistance to those who do not have the means to hire their own attorney. During this period, the Court also came to grips with another procedural issue: informing suspects of their constitutional rights. Without this knowledge, procedural safeguards are meaningless. Ernesto Miranda was arrested in Arizona in connection with the kidnapping and rape of an eighteen-year-old woman. After the police questioned him for two hours and the woman identified him, Miranda confessed to the crime. An Arizona court convicted him based on that confession—although he was never told that he had the right to counsel and the right not to incriminate himself. Miranda appealed his conviction, which was overturned by the Supreme Court in 1966.[69]

The Court based its decision in *Miranda* v. *Arizona* on the Fifth Amendment privilege against self-incrimination. According to the Court, the police had forced Miranda to confess during in-custody questioning, not with physical force but with the coercion inherent in custodial interrogation without counsel. The Court said that warnings are necessary to dispel that coercion. The Court does not require warnings if a person is only held in custody without being questioned or is only questioned without being arrested. But in *Miranda,* the Court found the combination of custody and

interrogation sufficiently intimidating to require warnings before questioning. These statements are known today as the *Miranda* warnings:

- You have the right to remain silent.
- Anything you say can be used against you in court.
- You have the right to talk to a lawyer of your own choice before questioning.
- If you cannot afford to hire a lawyer, a lawyer will be provided without charge.

In each area of criminal procedure, the justices have had to grapple with two steps in the application of constitutional guarantees to criminal defendants: the extension of a right to the states and the definition of that right. In *Duncan,* the issue was the right to jury trial, and the Court allowed variation in all states. In *Gideon,* the Court applied the right to counsel uniformly in all states. Finally, in *Miranda,* the Court declared that all governments—national, state, and local—have a duty to inform suspects of the full measure of their constitutional rights. In one of its most important cases in 2000, the Court reaffirmed this protection in a 7–2 decision, holding that *Miranda* had "announced a constitutional rule" that Congress could not undermine through legislation.[70]

The problems in balancing freedom and order can be formidable. A primary function of government is to maintain order. What happens when the government infringes on individuals' freedom for the sake of order? Consider the guarantee in the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Court made this right applicable to the states in *Wolf* v. *Colorado* (1949).[71] Following the reasoning in *Palko,* the Court found that the core of the amendment—security against arbitrary police intrusion—is a fundamental right and that citizens must be protected from illegal searches by state and local governments. But how? The federal courts had long followed the **exclusionary rule,** which holds that evidence obtained from an illegal search and seizure cannot be used in a trial. If that evidence is critical to the prosecution, the case dissolves. But the Court refused to apply the exclusionary rule to the state courts. Instead, it allowed the states to decide on their own how to handle the fruits of an illegal search. The decision in *Wolf* stated that obtaining evidence by illegal means violated the Constitution and that states could fashion their own rules of evidence to give effect to this constitutional decree. The states were not bound by the exclusionary rule.

Miranda warnings
Statements concerning rights that police are required to make to a person before he or she is subjected to in-custody questioning.

exclusionary rule
The judicial rule that states that evidence obtained in an illegal search and seizure cannot be used in trial.

The justices considered the exclusionary rule again twelve years later, in *Mapp* v. *Ohio.*[72] An Ohio court had found Dolree Mapp guilty of possessing obscene materials after an admittedly illegal search of her home for a fugitive. The Ohio Supreme Court affirmed her conviction, and she appealed to the U.S. Supreme Court. Mapp's attorneys argued for a reversal based primarily on freedom of expression, contending that the First Amendment protected the confiscated materials. However, the Court elected to use the decision in *Mapp* to give meaning to the constitutional guarantee against unreasonable search and seizure. In a 6–3 decision, the justices declared that

"all evidence obtained by searches and seizures in violation of the Constitution is, by [the Fourth Amendment], inadmissible in a state court." Ohio had convicted Mapp illegally; the evidence should have been excluded.

The decision was historic. It placed the exclusionary rule under the umbrella of the Fourth Amendment and required all levels of government to operate according to the provisions of that amendment. Failure to do so could result in the dismissal of criminal charges against guilty defendants.

Mapp launched a divided Supreme Court on a troubled course of determining how and when to apply the exclusionary rule. For example, the Court has continued to struggle with police use of sophisticated electronic eavesdropping devices and searches of movable vehicles. In each case, the justices have confronted a rule that appears to handicap the police and to offer freedom to people whose guilt has been established by the illegal evidence. In the Court's most recent pronouncements, order has triumphed over freedom.

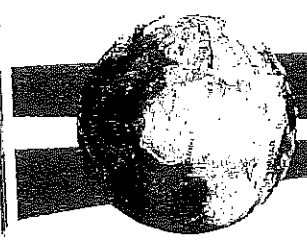
The struggle over the exclusionary rule took a new turn in 1984, when the Court reviewed *United States* v. *Leon*.[73] In this case, the police obtained a search warrant from a judge on the basis of a tip from an informant of unproved reliability. The judge issued a warrant without firmly establishing probable cause to believe the tip. The police, relying on the warrant, found large quantities of illegal drugs. The Court, by a vote of 6–3, established the good faith exception to the exclusionary rule. The justices held that the state could introduce at trial evidence seized on the basis of a mistakenly issued search warrant. The exclusionary rule, argued the majority, is not a right but a remedy against illegal police conduct. The rule is costly to society. It excludes pertinent valid evidence, allowing guilty people to go unpunished and generating disrespect for the law. These costs are justifiable only if the exclusionary rule deters police misconduct. Such a deterrent effect was not a factor in *Leon:* the police acted in good faith. Hence, the Court decided, there is a need for an exception to the rule.

The Court recognized another exception in 2006. When police search a home with a warrant, they have been required to "knock and announce" before entering. But the Supreme Court held that when the police admittedly fail to "knock and announce," the evidence obtained from such a search may still be admitted into evidence, thus creating a new exception to the exclusionary rule. The case was a close one: decided 5–4 with Justice Scalia writing the majority opinion and implying that the exclusionary rule should not be applied in other illegal search circumstances.[74]

As a more conservative coalition has taken shape, the exclusionary rule has come under close scrutiny as the preference for order outweighs the value in freedom. In yet another exception, the Supreme Court held in 2009 that evidence obtained through police negligence would not bar the introduction of that evidence at trial.[75]

The Internet and information technology have had enormous, positive impacts on American life. But they come at a price. For example, personal privacy is surely compromised when e-mail and text messages can be retrieved and shared. But Internet-based telephone conversations may overprotect privacy. (See "Politics of Global Change: Wiretapping in the Digital Age.")

good faith exception An exception to the Supreme Court exclusionary rule, holding that evidence seized on the basis of a mistakenly issued search warrant can be introduced at trial if the mistake was made in good faith, that is, if all the parties involved had reason at the time to believe that the warrant was proper.



Politics of Global Change

Wiretapping in the Digital Age

In the pre-Internet world, telephone calls followed a continuous path between two parties. Armed with a search warrant from a state or federal court, investigators could select a point somewhere along the line to tap the call. But with the advent of the Internet, calls can be placed online. The emergence of VoIP (voice over Internet protocol) has dropped the cost of long-distance and international telephone calls to all-time lows. Some services like Skype provide such services for free. Lawbreakers have reason to rejoice.

The Communications Assistance for Law Enforcement Act (CALEA) governs wiretap requests in the United States. It imposes requirements on telecom companies to cooperate with lawful intercepts. Congress enacted the law in 1994, at the dawn of the Internet. The growth of VoIP telephony left the FBI, the Drug Enforcement Administration, and the Department of Justice powerless. The agencies successfully lobbied the Federal Communications Commission (the agency that oversees implementation of CALEA) to extend the rules to cover VoIP telecoms.

Civil libertarians cried foul, claiming that CALEA targeted only traditional telephone wiretaps. But the fight against terrorism trumped these objections. Today, all broadband-Internet and VoIP providers must comply with the new rules. These firms are required to intercept calls such that suspects cannot tell that they are under surveillance. That's no easy task for at least three reasons.

First, complying with CALEA is complicated because the device at the end of the line today is a computer, not a telephone. A reasonably sophisticated caller can tell if her calls are intercepted by simply measuring the "latency" of the connection, that is, the time taken for a single packet of data to travel from a local machine to a computer elsewhere on the Internet. Inserting a bugging device into the chain increases the

The USA-PATRIOT Act

More than fifty years ago, Justice Robert H. Jackson warned that exceptional protections for civil liberties might convert the Bill of Rights into a suicide pact. The national government decided, after the September 11 terrorist attacks, to forgo some liberties in order to secure greater order, through bipartisan passage of the USA-PATRIOT Act. This landmark law greatly expanded the ability of law enforcement and intelligence agencies to tap phones, monitor Internet traffic, and conduct other forms of surveillance in pursuit of terrorists. In 2006, Congress extended with a few minor changes sixteen expiring provisions of the act.

Shortly after the bill became law, then Attorney General John Ashcroft declared: "Let the terrorists among us be warned: If you overstay your visas, even by one day, we will arrest you. If you violate a local law, we will hope that you will, and work to make sure that you are put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America."[76]

latency, signaling a possible tap. To address this problem, Internet companies, siding with regulators, now leave lawful-intercept equipment permanently in place to be activated as required. In effect, there is now a back door into everyone's connection.

Second, another issue created by VoIP telephony is the enormous volume of data passing along the Internet. Traditional telephone taps required an agent to switch on a recorder to collect evidence. Today's digital eavesdropping requires the collection of hundreds upon hundreds of gigabytes of data and then making sense of the material. Standards for formatting and delivering data to investigators still need resolution to work across national borders.

Third, perhaps the biggest issue remains encryption. Not all VoIP calls are encrypted. But even those who do encrypt their calls must provide law enforcement agencies with the appropriate decryption keys. The one exception is Skype, the most popular VoIP service, with over 520 million users. Skype is a "peer-to-peer" system, routing calls entirely over the public Internet. Skype cannot provide investigators with access to a suspect's calls because Skype does not handle any of the traffic itself. Even if investigators could intercept a Skype call, they would still face the task of unraveling the strong encryption used for those calls. Only the chief spy agency, the National Security Agency, has the computing power to unravel Skype packets. NSA's resources focus on intelligence gathering, not law enforcement. Skype, based in Luxembourg but partially owned by the American company eBay, "cooperates fully with all lawful requests," but it remains to be seen whether CALEA requests are "lawful" from the perspective of a European-based company.

One way around the problem of strong encryption is to grab decryption keys directly from a suspect's computer. A German court has ruled this approach would be inadmissible, prompting German legislators to draft a change in the law.

In a world made ever smaller by technology, eavesdropping on criminals today will require governments to be nimble in lawmaking and persuasive in their efforts to secure cooperation from other nations. This probably means that governments will lag behind in their efforts to eavesdrop as part of law enforcement. Telephony technology may prove a bulwark for personal privacy, but at what cost to the need for order?

Source: "Bugging the Cloud," *Economist Technology Quarterly*, 8 March 2008, pp. 28–30.

In this shift toward order, civil libertarians worry. "These new and unchecked powers could be used against American citizens who are not under criminal investigation," said Gregory T. Nojeim, associate director of the American Civil Liberties Union's Washington office.[77]

The USA-PATRIOT Act runs over three hundred pages. Some parts engender strong opposition; others are benign. More than 150 communities have passed resolutions denouncing the act as an assault on civil liberties. Consider one of the key provisions: Section 215, dealing with rules for searching private records such as you might find in the library, video store, or doctor's office. Prior to the act, the government needed, at minimum, a warrant issued by a judge and probable cause to access such records. (Foreign intelligence information could justify a warrantless search, but judges still reviewed the exception.) Now, under the USA-PATRIOT Act, the government need only certify without substantiation that its search protects against terrorism, which turns judicial oversight into a rubber stamp. With the bar lowered, more warrantless searches are likely to follow. In 2005, the FBI conducted more than thirty-five hundred such searches of U.S. citizens and legal residents, a significant jump from previous years.[78]

IDEALOG.ORG

Do you believe that the USA-PATRIOT Act is needed to protect the country from terrorism? Take IDEAlog's self-test.

To complicate matters, a gag order bars the person turning over the records from disclosing the search to anyone. You may never know that your records were searched. In a fig leaf to civil libertarians, the renewed provision allows those served with such gag orders to challenge them in court after a year's wait. But in order to prevail, they must prove that the government acted in "bad faith."[79]

Detainees and the War on Terrorism

In 2004, the Supreme Court addressed some of the difficult issues in the war on terrorism in two cases in which war detainees had been designated "enemy combatants." President Bush, relying on a series of World War II–era opinions, maintained that the detainees were not entitled to basic legal requirements such as attorneys or hearings and that his actions could not be reviewed in the courts.[80] The Supreme Court rejected his position. Regardless of the location of their detention—hundreds of foreign detainees are being held at a naval base in Guantánamo Bay, Cuba—the Court said in the first case that they are entitled to challenge their designation as "enemy combatants" before a federal judge or other neutral decision maker.[81]

In the second case, a Saudi Arabian resident, who was born in the United States and thus a citizen, was picked up on an Afghan battlefield and detained as an enemy combatant. In an 8–1 vote, the Court declared that he is entitled by the due process clause of the Fifth Amendment to a "meaningful opportunity" to contest the basis for his detention. In blunt language, Justice Sandra Day O'Connor, speaking for herself and three other justices, rebuffed the president's claim: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[82]

In 2006, the Court rejected by a vote of 5–3 the president's claim of unbounded authority in the creation and use of military commissions for enemy combatants imprisoned at Guantánamo Bay, Cuba. In *Hamdan* v. *Rumsfeld,* the justices held that the commissions were unauthorized by Congress and that they violated a provision of international law. The opinion rebuking presidential authority also established minimum procedures for any future commissions.[83] Shortly after, the Bush administration complied with the decision by announcing that terror suspects held by the United States would have a right to basic legal and human protections under international law.

In 2008, the Court issued yet another rebuke to the Bush administration when it ruled 5–4 in *Boumediene* v. *Bush* that prisoners at Guantánamo have a right to challenge their detentions in the federal courts.[84] The president continued to claim he could do as he wished with prisoners he designated as "enemy combatants," expecting the justices to side with him during armed conflicts. But the Court's repeated rejection of presidential authority is likely the result of an unusually aggressive position on executive power. Rather than narrowing its claims after its losses, the administration continued to assert that the 1940s precedents gave it a free hand. That was the wrong lesson.

The Ninth Amendment and Personal Autonomy

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

The working and history of the Ninth Amendment remain an enigma; the evidence supports two different views: the amendment may protect rights that are not enumerated, or it may simply protect state governments against the assumption of power by the national government.[85] The meaning of the amendment was not an issue until 1965, when the Supreme Court used it to protect privacy, a right that is not enumerated in the Constitution.

Controversy: From Privacy to Abortion

In *Griswold* v. *Connecticut* (1965), the Court struck down, by a vote of 7–2, a seldom-enforced Connecticut statute that made the use of birth control devices a crime.[86] Justice Douglas, writing for the majority, asserted that the "specific guarantees in the Bill of Rights have penumbras [partially illuminated regions surrounding fully lit areas]" that give "life and substance" to broad, unspecified protections in the Bill of Rights. Several specific guarantees in the First, Third, Fourth, and Fifth amendments create a zone of privacy, Douglas argued, and this zone is protected by the Ninth Amendment and is applicable to the states by the due process clause of the Fourteenth Amendment.

Three justices gave further emphasis to the relevance of the Ninth Amendment, which, they contended, protects fundamental rights derived from those specifically enumerated in the first eight amendments. This view contrasted sharply with the position expressed by the two dissenters, Justices Black and Stewart. In the absence of some specific prohibition, they argued, the Bill of Rights and the Fourteenth Amendment do not allow judicial annulment of state legislative policies, even if those policies are abhorrent to a judge or justice.

Griswold established the principle that the Bill of Rights as a whole creates a right to make certain intimate, personal choices, including the right of married people to engage in sexual intercourse for reproduction or pleasure. This zone of personal autonomy, protected by the Constitution, was the basis of a 1973 case that sought to invalidate state antiabortion laws. But rights are not absolute, and in weighing the interests of the individual against the interests of the government, the Supreme Court found itself caught up in a flood of controversy that has yet to subside.

In *Roe* v. *Wade* (1973), the Court, in a 7–2 decision, declared unconstitutional a Texas law making it a crime to obtain an abortion except for the purpose of saving the woman's life.[87]

Justice Harry A. Blackmun, who wrote the majority opinion, could not point to a specific constitutional guarantee to justify the Court's ruling. Instead, he based the decision on the right to privacy protected by the due process clause of the Fourteenth Amendment. In effect, state abortion laws were unreasonable and hence unconstitutional. The Court declared that in the first three months of pregnancy, the abortion decision must be left to the

woman and her physician. In the interest of protecting the woman's health, states may restrict but not prohibit abortions in the second three months of pregnancy. Finally, in the last three months of pregnancy, states may regulate or even prohibit abortions to protect the life of the fetus, except when medical judgment determines that an abortion is necessary to save the woman's life. In all, the Court's ruling affected the laws of forty-six states.

The dissenters—Justices Byron R. White and Rehnquist—were quick to assert what critics have frequently repeated since the decision: the Court's judgment was directed by its own dislikes, not by any constitutional compass. In the absence of guiding principles, they asserted, the majority justices simply substituted their views for the views of the state legislatures whose abortion regulations they invalidated.[88] In a 1993 television interview, Blackmun insisted that "*Roe* versus *Wade* was decided ... on constitutional grounds."[89] It was as if Blackmun were trying, by sheer force of will, to turn back twenty years' worth of stinging objections to the opinion he had crafted.

The composition of the Court shifted under President Ronald Reagan. His elevation of Rehnquist to chief justice in 1986 and his appointment of Scalia in 1986 and Kennedy in 1988 raised new hope among abortion foes and old fears among advocates of choice.

A perceptible shift away from abortion rights materialized in *Webster* v. *Reproductive Health Services* (1989). The case was a blockbuster, attracting voluminous media coverage. In *Webster,* the Supreme Court upheld the constitutionality of a Missouri law that denied the use of public employees or publicly funded facilities in the performance of an abortion unless the woman's life was in danger.[90] Furthermore, the law required doctors to perform tests to determine whether fetuses twenty weeks and older could survive outside the womb. This was the first time that the Court upheld significant government restrictions on abortion.

The justices issued five opinions, but no single opinion captured a majority. Four justices (Blackmun, Brennan, Thurgood Marshall, and John Paul Stevens) voted to strike down the Missouri law and hold fast to *Roe.* Four justices (Kennedy, Rehnquist, Scalia, and White) wanted to overturn *Roe* and return to the states the power to regulate abortion. The remaining justice, Sandra Day O'Connor, avoided both camps. Her position was that state abortion restrictions are permissible provided they are not "unduly burdensome." She voted with the conservative plurality to uphold the restrictive Missouri statute on the grounds that it did not place an undue burden on women's rights. But she declined to reconsider (and overturn) *Roe.*

The Court has since moved cautiously down the road toward greater government control of abortion. In 1990, the justices split on two state parental notification laws. The Court struck down a state requirement that compelled unwed minors to notify both parents before having an abortion. In another case, however, the Court upheld a state requirement that a physician notify one parent of a pregnant minor of her intent to have an abortion. In both cases, the justices voiced widely divergent opinions, revealing a continuing division over abortion.[91]

The abortion issue pits freedom against order. The decision to bear or beget children should be free from government control. Yet government has a

legitimate interest in protecting and preserving life, including fetal life, as part of its responsibility to maintain an orderly society. Rather than choose between freedom and order, the majority on the Court has loosened constitutional protections of abortion rights and cast the politically divisive issue into the state legislatures, where elected representatives can thrash out the conflict.

Many groups defending or opposing abortion have now turned to state legislative politics to advance their policies. This approach will force candidates for state office to debate the abortion issue and then translate electoral outcomes into legislation that restricts or protects abortion. If the abortion issue is deeply felt by Americans, pluralist theory would predict that the strongest voices for or against abortion will mobilize the greatest support in the political arena.

With a clear conservative majority, the Court seemed poised to reverse *Roe* in 1992. But a new coalition—forged by Reagan and Bush appointees O'Connor, Souter, and Kennedy—reaffirmed *Roe* yet tolerated additional restrictions on abortions. In *Planned Parenthood* v. *Casey,* a bitterly divided bench opted for the O'Connor "undue burden" test. Eight years later, in 2000, O'Connor sided with a coalition of liberal and moderate justices in a 5–4 decision striking down a Nebraska law that had banned so-called partial-birth abortion, illustrating the Court's continuing and deep division on the abortion issue.[92]

Let's view the abortion controversy through our lens of value conflicts. Presidents try to appoint justices whose values coincide with their own. Justices appointed by conservative presidents Reagan and George H. W. Bush weakened abortion as a constitutional right, putting more weight on order. President Clinton's appointees (Ruth Bader Ginsburg and Stephen G. Breyer) fulfilled his liberal campaign promise to protect women's access to abortion from further assault, putting more weight on freedom. President George W. Bush's conservative appointees—John G. Roberts, Jr., and Samuel A. Alito, Jr.—have tipped the balance toward order. In 2007, the Court by a 5–4 vote upheld a federal law banning partial-birth abortion.[93] The law was nearly identical to the one struck down by the Court years before. Today, order trumps freedom. An ideological shift in the White House may be insufficient to produce a different result unless conservative justices leave the Court. And none have expressed the intention to do so.

Personal Autonomy and Sexual Orientation

The right-to-privacy cases may have opened a Pandora's box of divisive social issues. Does the right to privacy embrace private homosexual acts between consenting adults? Consider the case of Michael Hardwick, who was arrested in 1982 in his Atlanta bedroom while having sex with another man. In a standard approach to prosecuting homosexuals, Georgia charged him under a state criminal statute with the crime of sodomy, which means oral or anal intercourse. The police said that they had gone to his home to arrest him for failing to pay a fine for drinking in public. Although the prosecutor dropped the charges, Hardwick sued to challenge the law's constitutionality. He won in the lower courts, but the state pursued the case.

The conflict between freedom and order lies at the core of the case. "Our legal history and our social traditions have condemned this conduct uniformly for hundreds and hundreds of years," argued Georgia's attorney.

Constitutional law, he continued, "must not become an instrument change in the social order." Hardwick's attorney, a noted constitut scholar, said that government must have a more important reason "majority morality to justify regulation of sexual intimacies in the pri of the home." He maintained that the case involved two precious freed the right to engage in private sexual relations and the right to be free government intrusion in one's home.[94]

More than half the states have eliminated criminal penalties for pr homosexual acts between consenting adults. The rest still outlaw homc ual sodomy, and many outlaw heterosexual sodomy as well. As a r homosexual rights groups and some civil liberties groups followed H wick's case closely. Fundamentalist Christian groups and defender traditional morality expressed deep interest in the outcome too.

In a bitterly divided ruling in 1986, the Court held in *Bowers* v. *Hard* that the Constitution does not protect homosexual relations between con ing adults, even in the privacy of their own homes.[95] The logic of the finc in the privacy cases involving contraception and abortion would seem to compelled a finding of a right to personal autonomy—a right to make pers choices unconstrained by government—in this case as well. But the majority maintained that only heterosexual choices—whether and whoı marry, whether to conceive a child, whether to have an abortion—fall w the zone of privacy established by the Court in its earlier rulings. "The Ju ary necessarily takes to itself further authority to govern the country wit express constitutional authority" when it expands the list of fundam rights not rooted in the language or design of the Constitution, wrote Ju White, the author of the majority opinion.

The arguments on both sides of the privacy issue are compelling. makes the choice between freedom and order excruciating for ordinary zens and Supreme Court justices alike. At the conference to decide the m of the *Bowers* case, Justice Lewis Powell cast his vote to extend pri rights to homosexual conduct. Later, he joined with his conserva colleagues, fashioning a new majority. Four years after the *Bowers* deci Powell revealed another change of mind: "I probably made a mistake, declared, speaking of his decision to vote with the conservative majority.

Justice White's majority opinion was reconsidered in 2003 when the C considered a challenge to a Texas law that criminalized homosexual but heterosexual sodomy. This time, in *Lawrence and Garner* v. *Texas,* a new lition of six justices viewed the issue in a different light. May a majority the power of government to enforce its views on the whole society thrc the criminal law? Speaking through Justice Kennedy, the Court observed emerging awareness that liberty gives substantial protection to adult per in deciding how to conduct their private lives in matters pertaining to s Since the Texas law furthered no legitimate state interest but intruded intc intimate personal choices of individuals, the law was void. Kennedy al with four other justices then took the unusual step of reaching back in tim declare that the *Bowers* decision was wrong and should be overruled.[97]

Justice Antonin Scalia, joined by Chief Justice Rehnquist and Jus ... dissent. Scalia charged the majority v

"signing on to the homosexual agenda" aimed at eliminating the moral opprobrium traditionally attached to homosexual conduct. The consequence is that the Court would be departing from its role of ensuring that the democratic rules of engagement are observed. He continued:

> What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," ... and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.[98]

The challenge of democracy calls for the democratic process to sort out value conflicts whenever possible. And, according to Scalia, the majority has moved from its traditional responsibility of umpiring the system to favoring one side over another in the struggle between freedom and order.

Issues around sexual orientation have shifted toward the states. In anticipation of state-approved same-sex unions, Congress moved affirmatively in 1996 to bar the effects of homosexual marriage through passage of the Defense of Marriage Act. President Clinton signed the bill into law. The law defines marriage as a union between people of opposite sexes and declares that states are not obliged to recognize gay marriages performed elsewhere. The law does not ban such unions; it only protects states from having to recognize same-sex marriage sanctioned by other states. President Obama favors repeal of the act. In July 2010, a federal trial court struck down the marriage-defining section of the Act on the ground that it violated the concept of equality inherent in the Fifth Amendment.[99]

Some states have been innovators in legitimizing homosexuality. Same-sex couples may now marry in fives states (Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont) plus the District of Columbia. Additional states have recognized same-sex "unions" but not same-sex marriages. The difference between a union and a marriage may prove to be a distinction without a difference.

Same-sex marriage still remains a flashpoint for political conflict. In 2009, Maine voters relying on a public referendum became the thirty-first state to ban such marriages. About the same time, the New York State legislature failed to adopt a same-sex marriage law despite a concerted campaign to assure passage.

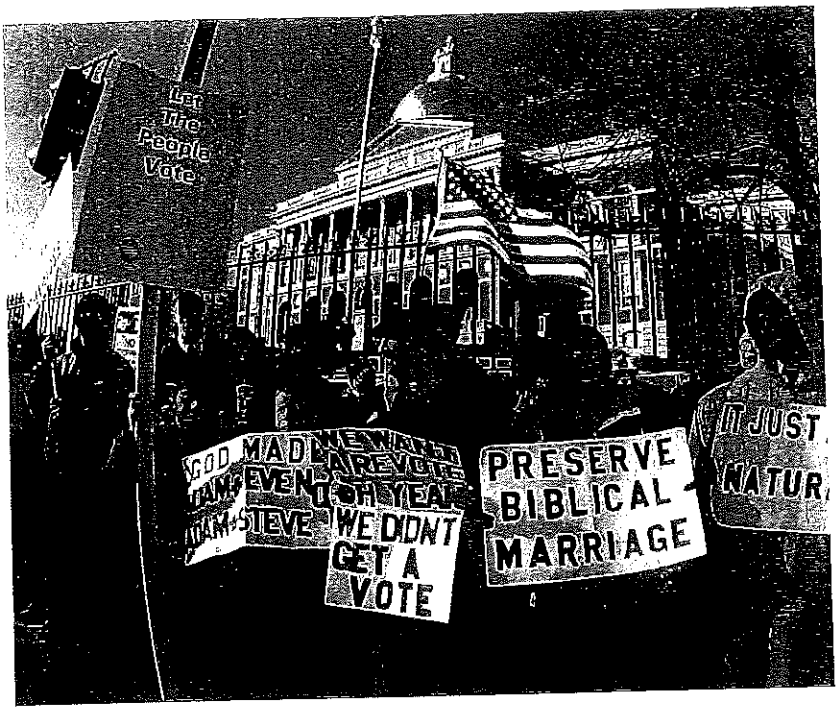
In 2008, the California Supreme Court, relying on state constitutional provisions, opened the door to same-sex marriage by striking down legislation limiting marriage to opposite-sex couples (see Chapter 16). But opponents struck back with an initiative—known as Proposition 8—asking voters to ban same-sex marriage. It passed with 52 percent of the vote that same year. In the interim, 18,000 couples married and their marriages are duly recognized by the state.

In 2010, federal judge Vaughn Walker struck down the initiative as a violation of the due process and equal protection clauses of the Fourteenth

Adam and Eve or Adam and Steve?

Protesters against same-sex marriage rallied outside the Massachusetts State House in Boston as state legislators contemplated amending the state constitution in 2004 to ban such unions. The state's highest court had ruled that only full, equal marriage rights for same-sex couples satisfied the state constitution. The amendment effort failed.

(Rick Friedman/Corbis)



Amendment, rather than follow the ambiguous line of privacy-relat sions.[100] Anticipating that the decision will be appealed eventuall Supreme Court, Judge Walker crafted his analysis to model the reasc Supreme Court Justice Anthony M. Kennedy, the critical fifth vote favorable to gay rights decided in the last decade. Walker conclud California lacked a rational basis to deny gays and lesbians marriage li

Today, twenty-four states have constitutional amendments barr recognition of same-sex marriage and confining civil marriage to th of a man and a woman. The pluralist model provides one solution for dissatisfied with rulings from the nation's courts. State courts ar legislatures have demonstrated their receptivity to positions that ar ably untenable in the federal courts. Pluralist mechanisms like the ir and referendum offer counterweights to judicial intervention. H state-by-state decisions offer little comfort to Americans who beli U.S. Constitution protects them in their most intimate decisions and regardless of where they reside.

IDEALOG.ORG

Do you support a constitutional amendment that would bar marriages between gay and lesbian couples? Take IDEAlog's self-test.

Summary

When they established the new government of the United States, the states and the people compelled the framers, through the Bill of Rights, to protect their freedoms. In interpreting these ten amendments, the courts, especially the Supreme Court, have taken on the balancing freedom and order.

The First Amendment protects several fre freedom of religion, freedom of speech and

ess, and the freedom to assemble peaceably and to etition the government. The establishment clause emands government neutrality toward religions and etween the religious and the nonreligious. According judicial interpretations of the free-exercise clause, re- gious beliefs are inviolable, but the Constitution does ot protect antisocial actions in the name of religion. xtreme interpretations of the religion clauses could ring the clauses into conflict with each other.

Freedom of expression encompasses freedom of peech, freedom of the press, and the right to assemble eaceably and to petition the government. Freedom of peech and freedom of the press have never been held be absolute, but the courts have ruled that the Bill of ights gives the people far greater protection than other reedoms. Exceptions to free speech protections include ome forms of symbolic expression, fighting words, and bscenity. Press freedom has enjoyed broad constitu- ional protection because a free society depends on the bility to collect and report information without govern- nent interference. The rights to assemble peaceably and o petition the government stem from the guarantees of reedom of speech and of the press. Each freedom is equally fundamental, but the right to exercise them is not absolute.

After nearly seventy years of silence, the Supreme Court declared that the right to bear arms protects an individual right to own a gun for personal use. New legal challenges will determine the standard that should apply when judging the appropriateness of gun regula- tions. For now, however, government may not prohibit individual gun ownership. The adoption of the Four- teenth Amendment in 1868 extended the guarantees of the Bill of Rights to the states. The due process clause became the vehicle for applying specific provisions of the Bill of Rights—one at a time, case after case—to the states. The designation of a right as fundamental also called for a definition of that right. The Supreme Court has tolerated some variation from state to state in the meaning of certain constitutional rights. It has also imposed a duty on governments to inform citizens of their rights so that they are equipped to exercise them.

As it has fashioned new fundamental rights from the Constitution, the Supreme Court has become embroiled in controversy. The right to privacy served as he basis for the right of women to terminate a preg- nancy, which in turn suggested a right to personal autonomy. The abortion controversy is still raging, and the justices, relying in part on the abortion cases, have extended protections against state criminal prosecution of private consensual sexual behavior for homosexuals.

These are controversial judicial decisions, and they raise a basic issue. By offering constitutional protection to certain public policies, the courts may be threatening the democratic process, the process that gives the peo- ple a voice in government through their elected repre- sentatives. And should elected representatives fail to heed the public, the public may act on its own through mechanisms such as the referendum or initiative. One thing is certain: the challenge of democracy requires the constant balancing of freedom and order.

KEY CASES

Lemon v. *Kurtzman* (religious establishment)
Sherbert v. *Verner* (religious free exercise)
Brandenburg v. *Ohio* (free speech)
Tinker v. *Des Moines Independent County School District* (symbolic speech)
Morse v. *Frederick* (limit on student expression)
Cohen v. *California* (free expression)
Reno v. *ACLU* (obscenity)
New York Times v. *Sullivan* (free press)
New York Times v. *United States* (prior restraint)
District of Columbia v. *Heller* and *McDonald* v. *Chicago* (right to bear arms)
Palko v. *Connecticut* (Bill of Rights)
Gideon v. *Wainwright* (assistance of counsel)
Griswold v. *Connecticut* (privacy)
Miranda v. *Arizona* (self-incrimination)
Roe v. *Wade* (abortion)
Gonzales v. *Carhart* (abortion restrictions)
Lawrence and Garner v. *Texas* (gay rights)
Hamdan v. *Rumsfeld* (presidential authority; procedural protections at trial)
Boumediene v. *Bush* (constitutional right to challenge detention)