The Encyclopedia of Civil Liberties in America

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The Encyclopedia of Civil Liberties in America

Volume One

Editors
David Schultz and John R. Vile

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Preface

ORGANIZATION OF THIS BOOK

This book is organized in an accessible A-Z format with hundreds of entries discussing civil liberties in the United States that should be useful to high school students and teachers, college students and professors, and members of the general public. Professors David Bradley of the College of William and Mary, Williamsburg, Virginia, and Shelley Fisher Fishkin of the University of Texas at Austin previously compiled *The Encyclopedia of Civil Rights in America* in 1998, and this work is designed to complement that set.

Scholars of the subject know that attempts to distinguish civil rights from civil liberties are illusory objectives at best. We take a largely functional approach. Typically, civil rights issues center chiefly on rights related to the Equal Protection Clause of the Fourteenth Amendment and its application to issues of race, gender, and related classifications, whereas civil liberties issues center on rights found within the Bill of Rights (the first ten amendments to the Constitution) and elsewhere in the Constitution. Recognizing that some overlap would be necessary, we followed this basic division in compiling this book. We have thus omitted many civil rights issues, not because they are unimportant but because they are covered fully in *The Encyclopedia of Civil Rights in America*. Similarly, these volumes focus chiefly on the American experience and some of its English roots, simply because one set of volumes can address only so much.

ENTRIES

This book contains essays on terms, historical documents and events, constitutional provisions, individuals and associations that have been important in the struggle for civil liberties, legal terms and procedures, U.S. Supreme Court decisions, contemporary issues, and the like. Each entry contains one or more references for further research or reading, and all three volumes are indexed.

We have been humbled by the efforts of scores of practitioners and scholars in a variety of disciplines and occupations who have so generously contributed to these volumes. Although we originally developed a headword list for this project, this encyclopedia is vastly enriched by the ideas of many contributors who suggested numerous additional terms and essays. Many are friends, but many others are simply scholars who have seen our requests for help on the Internet and elsewhere and who have, by responding, demonstrated their interest in the subject of these volumes. We thank all the contributors, apologizing in advance for often having to impose word limits that gave many of them far less space than they would have wanted or even than they might have thought was necessary. In a few instances, we inadvertently assigned the same topic to more than one individual. In such cases, we combined them, crediting both authors, again with apologies to each.

We also thank our editors at M.E. Sharpe for formulating the idea of this work, for contacting us about it, for helping us to publicize it, and for seeing the project to completion. We especially want to thank Todd Hallman, Cathy Prisco, and Wendy Muto, who have all had a part in this project.

We recognize that no list of entries can be complete. Each year brings new events, new judicial decisions, and new legislative and executive actions. Although the protection of civil liberties may, as Thomas Jefferson asserted in the Declaration of Independence, involve the application of universal principles, or "inalienable rights," human understandings and application of these rights must be tailored to unique times and circumstances.

The editors of these volumes approach the subject from somewhat different perspectives, but both of us are strongly committed to the perpetuation of civil liberties in America. We fervently hope that these volumes will serve as useful reference material to enhance both knowledge and appreciation of America's unique heritage. We further hope that the United States will continue to serve its historical role as a beacon of liberty throughout the world.

When asked what kind of government the framers

of the nation had created, Benjamin Franklin was reputed to have responded, "A republic, if you can keep it." The editors of these volumes believe that civil liberties continue to be a vital part of republican government. Defense and preservation of civil liberties are less threatening to the nation's security than is the abandonment of these goals. In keeping with America's founding fathers, we continue to believe that American liberties are ultimately American "blessings."

Introduction

Alexis de Tocqueville wrote of the United States in his famous *Democracy in America* (1835) that the character of America could be understood, in part, by the spirit of liberty that pervaded its institutions and people. From the vantage point of the early twenty-first century, the history of the United States, from its founding to the present, can be described more appropriately as a continuing battle between efforts by groups and individuals demanding civil liberties and freedoms for themselves and others, on the one hand, versus the unfortunate reality that these liberties often have been suppressed and denied, on the other. Our goal in *The Encyclopedia of Civil Liberties in America* is to tell these stories, providing comprehensive documentation and discussion of the major people, groups, institutions, events, cases, and issues that have defined the battle for individual liberty in the United States.

When the delegates to the U.S. Constitutional Convention of 1787 composed a preamble to summarize why they wrote the Constitution, they stated they hoped to "secure the blessings of liberty for ourselves and our posterity." We are proud to be editing these volumes because we believe this is still a worthy objective. We further realize that such security is never final but demands recurring commitment from each generation of Americans, and that widespread civic knowledge of the blessings of liberty is essential to the perpetuation of freedom.

ROOTS OF CIVIL LIBERTIES

The idea of personal liberty was not born on the North American continent. Ancient philosophers of the Greek city-states had passed the torch of liberty to statesmen who defended the Roman republic, to early Christians who asserted the right to follow their conscience, to English barons who refused to be bullied by a tyrannical king, to Protestant leaders of the Reformation, and to Englishmen who ousted kings and established the Parliament and other representative institutions. These wellsprings of liberty in turn fed the streams of freedom in the New World.

Great Britain was the primary source of settlers in America, and the nation continues to be indebted to England for many of its ideas of freedom. Although Britain had a monarch, this monarch was limited and subject to law. The Magna Carta and the English Bill of Rights were among the documents to proclaim that individuals were entitled to certain liberties, and that government was restrained. In developing the common law, English courts in turn cobbled out basic freedoms, such as the individual's right to be free from unwarranted governmental intrusions at home and the right to jury trials. These were, in turn, transplanted to the New World.

LIBERTIES IN THE NEW WORLD SETTING

If ever a place was destined for liberty, it was the New World. Although the motives of settlers were mixed, many came to America specifically because they thought they would be able to exercise their freedoms here. This was particularly true of America's favorite founding fathers, the Pilgrims, who drafted a compact of self-government even before they disembarked from their ships. However, it was also true for Quakers who settled in Pennsylvania, for Catholics who settled in Maryland, and for settlers everywhere who were hoping for greater opportunities that would be available in a society lacking deeply entrenched institutions or a hereditary aristocracy. In truth, settlers who came to America to exercise their own freedom were not always anxious to extend it to others; thus the Pilgrims tried to establish a theocracy excluding those individuals they believed to be heretical. Moreover, as richly told by Arthur Miller in *The Crucible* (one of many books once banned by schools or libraries in America), fear and prejudice took their toll upon many people during the Salem witch-hunts, when over twenty individuals were hanged or crushed to death because they were different from the rest. Such events, however, often were illumined by vocal dissenters, as when John Peter Zenger in 1735 dared to publish writings critical of British rule over the American colonies, and over time Americans began to connect the idea of exercising personal freedom with the parallel notion of extending it to others.

An ocean removed from would-be European masters, American settlers quickly found they had to be resourceful simply to survive on the vast continent. Distance precluded taking everyday matters to a foreign king, and the colonists quickly set up legislative

assemblies to take care of most such business themselves. Occasionally, a royal governor or king would disapprove a measure that the legislature enacted. But especially up to the end of the French and Indian War in 1763, after which the English thought they should recoup some of their expenditures in defending the colonists, the English exercised a policy of "salutary neglect" over the colonies that allowed them to gain experience and self-confidence in self-government—all of which served them well when they declared their complete independence from Great Britain.

THE AMERICAN REVOLUTION AND THE DECLARATION OF INDEPENDENCE

The period from 1763 through the end of the Revolutionary War is often considered to be the "seed time" of civil liberties in America; certainly, the rhetoric of liberty blossomed during this time. Significantly, the colonists did not profess to be inventing new rights. Rather, most asserted they were simply claiming their rights as Englishmen. As they dumped tea into Boston Harbor, the colonists gave symbolic meaning to the cherished right of "no taxation without representation," but, as the Declaration of Independence would later delineate, the colonists claimed other freedoms as well. They objected to general warrants whereby British agents descended on American ports and ransacked personal belongings. They objected to holding trials of American citizens abroad where they would not receive a trial by their peers. They objected when governors dismissed the colonists' representative assemblies. In fact, the Declaration of Independence reveals not only a political philosophy about personal liberties but also a bill of particulars against King George III and the abuses the colonists had endured from him.

Initially, the colonists limited their resistance chiefly to claims of parliamentary sovereignty and appealed to the English king, who had issued the charters the colonists so valued, to come to their aid. After the king rebuffed petition after petition, the colonists recognized that, on this issue, the king was going to side with Parliament rather than fight it. Drawing from a vast well of opposition Whig literature in England, such as was evident in John Trenchard and Thomas Gordon's *Cato's Letters* and John Locke's *Two Treatises on Government,* the colonists eventually disclaimed the authority of both king and Parliament in America.

After fighting broke out at Lexington and Concord and the colonists abandoned the idea of reconciliation with the mother country, Thomas Jefferson took the lead on a five-man committee and drafted the Declaration of Independence, which the Second Continental Congress subsequently revised and approved in July 1776. If Americans were to declare their independence from Britain, they realized they could no longer base their claims simply on the rights of Englishmen. Drawing chiefly from the natural-rights and social-contract theories of his day, Jefferson thus proclaimed that "all men are created equal" and were endowed by their Creator with certain "inalienable rights," among which he listed "life, liberty, and the pursuit of happiness." He further asserted that the people had the right to overthrow a government that did not secure such rights and replace it with one that would.

Such rhetoric inspired Americans to wage and ultimately win a long and arduous contest for liberty against what was then the world's greatest military power. As if to put feet to their rhetoric, states began the process of replacing their royal charters with their own more democratic constitutions. During the drafting of the Virginia Constitution, George Mason wrote a historic declaration of rights that was subsequently copied in many other states.

Unfortunately, the rhetoric of freedom did not always match reality. The most glaring mismatch was that of slavery. It was hypocritical for Americans to be fighting for their liberties even as they were subjugating other individuals, but the institution existed. The treatment of Native Americans also did little to recognize their equality, and they and slaves were relegated to be "other persons," counted in the Constitution as merely three-fifths of white males. Despite Abigail Adams's pleas to her husband, John, to "remember the ladies" as the framers declared their independence in 1776, women gained faint recognition when the Constitution was written in 1787. Finally, the property of Tories was not always respected, more evidence that those who disagreed about the need for revolution did not always win favor for their views.

As jarring as the disconnect between the language of freedom and equality and the reality often was, words once spoken and written sometimes acquired their own momentum. Some states freed their slaves as they began to apply the doctrines of liberty they had proclaimed, and states widened voting rights and other constitutional protections.

THE ARTICLES OF CONFEDERATION, THE CONSTITUTION, AND THE BILL OF RIGHTS

The end of the Revolutionary War ushered in a new stage in American history, and the initial road was rocky. Prizing the colonies' histories as thirteen separate entities, the creators of the Articles of Confederation (1781–1789) emphasized the freedom and independence of the states over those rights of individuals. They withheld vital powers from Congress, and the resulting weakness eventually threatened American security both at home and abroad.

By 1787, key leaders recognized that the powers of the national government needed to be strengthened. They realized the people would not be comfortable with entrusting such powers to the national government unless those powers could be restricted. The delegates to the Constitutional Convention that met May-September 1787 did all they could to create a democratic republican government that would protect civil rights and liberties. They divided the new government into three branches that would mutually check one another. They split Congress into two branches, an upper and a lower house. They continued to parcel out powers between state and national authorities. They relied on representatives with varied terms of office to refine the public view. They also relied on the idea, best explained and defended by James Madison in *Federalist No.10,* that extending republican government over a large land area like that of the United States would encompass such a diversity of factions, or interests, that no one of them would be likely to dominate.

Believing that the entire Constitution thus served to protect individual rights and liberties, its framers were stung by critiques of the Antifederalist opponents of the Constitution that the document was inadequate because it failed to include a bill of rights. In events that are spelled out in greater detail in the introduction to *The Encyclopedia of Civil Rights in America* that these volumes complement, Federalist supporters of the Constitution countered with a number of arguments: that the new government would be exercising limited powers; that the text of the Constitution already contained some guarantees for liberties—guarantees, for example, against ex post facto laws and bills of attainder; that lists of liberties could prove dangerous by becoming the basis for the argument that all rights not reserved had been entrusted to the government; and that those in power sometimes ignored guarantees that were listed in bills of rights.

As Thomas Jefferson pointed out in letters to his friend James Madison, however, these arguments were not persuasive. The fact that the Constitution already contained some such guarantees indicated that guarantees were not in and of themselves harmful. A list of guarantees would help educate the public by keeping essential liberties in the public view. In prophetic words that Madison later repeated in the first Congress, Jefferson further argued that specific constitutional prohibitions would grant courts a basis to invalidate unconstitutional legislation that trammeled on such liberties.

In time, Federalists agreed to support a bill of rights once the Constitution was adopted. True to this pledge, James Madison, who had done so much to write and secure the adoption of the Constitution, successfully led the battle for such a bill in the first Congress.

The eventual result was the first ten amendments to the U.S. Constitution—the Bill of Rights—in which the framers articulated more than twenty-five rights. The requisite number of states ratified these amendments in December 1791. These amendments continue to serve both as an enduring symbol of American ideals and as protections that individuals can evoke in court when their liberties have been suppressed. This volume contains many entries related to these amendments, but a brief summary is appropriate here.

PROVISIONS OF THE BILL OF RIGHTS

The First Amendment contains one of the most cherished lists of rights (five in all) within the Constitution. Two provisions relate to religious freedom—one guaranteeing "free exercise" of religion, the other pre-

venting the "establishment" of religion. The amendment also protects freedom of speech and press, of petition, and of peaceable assembly. Each clause has provided a fertile field for application and dispute.

The Second and Third Amendments have not to date proved as ripe for judicial decision-making, but each continues to be debated and discussed. The central Second Amendment debate swirls around whether the amendment is designed chiefly to protect a personal right to bear arms or is tied more directly to the maintenance of a militia. The Third Amendment, which grew out of specific British abuses of the colonies, prohibits the billeting of troops in a private home without the owner's consent or without the guidance of law.

The colonists used the Fourth Amendment to secure themselves against the abuses of general warrants that the British had inflicted upon them. As a means of securing "persons, houses, papers, and effects against unreasonable searches and seizures," the amendment provides that warrants cannot be issued except "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment contains a laundry list of guarantees, most related to protections for individuals who are accused of crimes. It provides for indictments by grand juries, prohibits double jeopardy, forbids extortion of confessions, and prohibits the deprivation of "life, liberty, or property, without due process of law." In a separate provision indicating the founders' belief that property rights were also important—a notion that has received increased attention in recent years—the Fifth Amendment also prohibits government from taking private property for public use without providing the owner "just" compensation.

The primary focus of the Sixth Amendment is on the rights of individuals who are on trial for criminal offenses. It provides the following guarantees: Criminal trials shall be both speedy and public; they shall be conducted before an impartial jury from the district; individuals shall be informed of the charges against them; defendants shall have the subpoena power of government to obtain witnesses; and defendants shall be entitled to be represented by attorneys. The Seventh Amendment further extends the guarantee of jury trials to civil cases.

The Eighth Amendment prohibits excessive bail and excessive fines. With a view toward the cruelty that was often common in the criminal justice system of its day, this amendment also prohibits "cruel and unusual punishments."

The Ninth and Tenth Amendments are somewhat more elusive. The Ninth, designed to respond to earlier Federalist arguments that an unintentionally incomplete list of rights might be interpreted as excluding others, refers to other rights "retained by the people." The Tenth Amendment further reminds readers that powers not delegated to the United States remain with the states and their people.

RIGHTS IN THE EARLY REPUBLIC

Although the national government was strong, it exercised relatively few powers over individual liberties in America's early years under the Constitution, and courts rarely adjudicated issues involving the Bill of Rights during this period. In one of the few such cases, *Barron v. City of Baltimore,* 32 U.S. 243 (1833), the U.S. Supreme Court ruled that the Bill of Rights did not apply to the states. Not until the end of the nineteenth century would the Court argue that states must respect the Bill of Rights guarantees—at first in terms of property rights—and it was not until the twentieth century that the Bill of Rights would be selectively incorporated through the Due Process Clause of the Fourteenth Amendment to limit the power of states to infringe upon individual liberties.

In the early days of the republic, courts were much more concerned with adjudicating disputes among the branches of the national government and between the national government and the states, and establishing the power, known as "judicial review," to invalidate legislation that judges considered to be unconstitutional.

The one liberty to receive the Court's attention in the early republic was the right of property. Under Chief Justice John Marshall, the Court invalidated numerous state acts that were thought to interfere with the Contracts Clause in Article I, Section 10 of the Constitution, which prohibits states from passing any laws "impairing the obligation of contracts." Marshall combined such protections with strong assertions of

national authority, as in his decision in *McCulloch v. Maryland,* 17 U.S. 316 (1819), upholding the constitutionality of the national bank.

Then as now, it was often difficult to honor rights and liberties when the nation faced crises, and the early republic was awash in them. America was torn by conflict between individuals (usually associated with the Federalist Party) who were more closely attached to Great Britain and those (usually associated with the Democratic-Republican Party) who were more closely aligned with France and its revolution. At times, war threatened. On one of these occasions, the Federalists used their position of congressional dominance to pass the Alien and Sedition Acts (1798) making it more difficult for foreigners to be naturalized and making it a punishable offense to criticize the president of the United States. Because Federalists controlled the judiciary, Democratic-Republican leaders James Madison and Thomas Jefferson attempted to protest chiefly by asserting state authority in the Virginia and Kentucky resolutions, and thus in part resurrecting the theory of government on which the Articles of Confederation had rested. Jeffersonian Republicans, in turn, arguably threatened liberty when they later came to power and pursued prosecution of Aaron Burr and sought to undermine judicial independence through use of the impeachment process.

Of all the issues in early American history, however, none was to become more important than the future of slavery. Northerners became increasingly convinced that this institution was incompatible with American ideals. Southerners began to replace earlier protestations that slavery was a necessary evil with new claims, based on assumptions of African American inferiority, that slavery was actually a positive good. As citizens and politicians debated whether slavery should extend into the American West, the Whig Party (successor to the Federalist Party) disintegrated, and the Democratic Party split into Northern and Southern wings. In this milieu, the Republican Party was born, with Abraham Lincoln at its helm, in opposition to the further expansion of slavery. Lincoln forcefully questioned the Supreme Court's holding in *Scott v. Sandford,* 60 U.S. 393 (1857), that blacks were not and could not be citizens of the United States and that the national government had no right to exclude slavery from the western territories.

THE CIVIL WAR

Compromise after compromise proved unavailing, and the nation ultimately divided with Lincoln's election to the presidency in 1860. The new president refused to allow the Southern states to secede without a fight. Initially determined to preserve the Union at any price, sometimes including restrictions of individual rights during wartime (such rights were even less respected in the South), Lincoln realized as the bloody war progressed that its sacrifices demanded a nobler goal. He thus used his war powers to issue the Emancipation Proclamation (1863) freeing slaves behind enemy lines. He subsequently pressed for the Thirteenth Amendment, which ended slavery. Lincoln anticipated that the war could serve as the crucible for "a new birth of freedom."

Lincoln was assassinated before the Thirteenth Amendment was adopted, but its ratification in 1865 seemed to bring an end to America's most obvious departure from its ideals. As Southern states attempted to replace legal bondage with other, subtler forms of discrimination, such as were embodied in the so-called Black Codes (Jim Crow laws), however, Congress realized that it would need to extend other rights to the newly freed slaves. It proposed, and the states subsequently ratified, the Fourteenth and Fifteenth Amendments.

The Fourteenth Amendment, adopted in 1868, is most notable for its recognition of citizenship for all persons born or naturalized in the United States and for its extension of privileges and immunities, right to due process, and right of equal protection to all such citizens. The Fifteenth Amendment (1870), the first of a number of amendments that would be adopted expanding voting rights, prohibited discrimination in suffrage on the basis of race. These amendments were initially enforced during the Reconstruction period (1865–1877) by federal troops. Although the amendments were aimed chiefly at protecting former slaves, they were worded broadly and subsequently were used by women and other individuals to secure their rights. Due to twentieth-century Supreme Court decisions, over time, the Due Process Clause of the Fourteenth Amendment became the means, in a process generally called "incorporation," by which these guarantees that

once applied only to the national government were also applied to the states.

Many women had been stalwart supporters of emancipation. As early as 1848, delegates to the Seneca Falls (New York) Convention to promote women's rights had rewritten the Declaration of Independence to assert that all men and women were created equal and to claim the right of suffrage for women. The postwar amendments did not move in this direction, however, and cases such as *Bradwell v. Illinois,* 83 U.S. 130 (1873), and *Minor v. Happersett,* 88 U.S. 162 (1875), in which the Court denied women the right to practice law and to vote, suggested that whatever further movement there was toward respecting the rights and liberties of former slaves would not be extended to women. Not until 1920, with the adoption of the Nineteenth Amendment, were governments prohibited from discriminating by denying voting rights to women.

POST-RECONSTRUCTION

When federal troops were withdrawn from the South at the end of Reconstruction, many Americans wanted to put memories of the Civil War behind them, and the rights of African Americans suffered as a consequence. The Supreme Court interpreted the Privileges or Immunities Clause narrowly; confined the application of the Equal Protection Clause to cases of state (and not private) discriminatory action; used the Due Process Clause chiefly to protect the rights of emerging corporations; and eventually even sanctioned racial segregation in *Plessy v. Ferguson,* 163 U.S. 537 (1896). Procedures at the state level were often woefully inadequate in protecting individual rights.

Liberties were trampled in particular with the rise of organized labor and labor unions. Even as the Supreme Court began to fashion and then apply in cases such as *Lochner v. New York,* 198 U.S. 45 (1905), legal doctrines such as substantive due process and liberty of contract to protect economic liberties and place limits on the ability of the state and federal government to regulate businesses, workers and unions organized protests to redress and respond to the growing power of trusts and corporations in America. For example, on May 4, 1886, several striking workers were killed in their protests against the McCormick Reaper Works Company, and several more were indicted. In addition, Eugene Debs, a Socialist and union organizer critical of capitalism, eventually was jailed for his views. Along with Debs, others were also jailed for speaking up for labor, and the government increasingly used injunctions to break strikes and the rights of unions to organize and speak freely. Not until Congress in the 1930s passed the National Labor Relations Act, better known as the Wagner Act, did unions begin to have their liberties respected.

World Wars I and II put added pressure on rights, as did the fear of communism. Sedition acts tested the limits of freedom of speech. Fears over German influences during World War I and over possible Japanese invasion during World War II resulted in repressive policies. A "red scare" followed World War I, and World War II had barely ended before the Cold War between democracy and communism put further pressures on civil liberties and pushed individuals toward conformity.

Despite such setbacks, this period brought the beginning of the process of "incorporation" by which the Supreme Court used the Due Process Clause of the Fourteenth Amendment to apply provisions of the Bill of Rights—initially those protecting property and First Amendment rights—to the states. Although rarely setting forth absolute rules, the Court began to look at individual cases involving criminal justice—as, for example, in the famous mid-1930s "Scottsboro boys" cases (young Alabama black men charged with rape of white women) in which it invalidated both discriminatory juries and the failure to appoint counsel—to require state governments to deal fairly with their citizens.

POST-1937 DEVELOPMENTS

Franklin D. Roosevelt was elected to the U.S. presidency in 1932 during the Great Depression on his New Deal promise of increasing the powers of the national government to deal with the economy. Through the early New Deal, the Supreme Court regarded itself as a protector of "liberty of contract" and other doctrines that it had developed over the preceding decades to protect laissez-faire individualism and property rights. After President Roosevelt threatened to pack the Court in 1937, however, the justices took

a turn—sometimes called "the switch in time that saved nine"—toward giving far more deference to governmental economic controls, most exercised under the authority of the interstate Commerce Clause.

The following year, in the justly famous footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), Justice Harlan Fiske Stone indicated that the Court henceforth would be less deferential in three areas: enforcement of specific provisions of the Bill of Rights and of the post–Civil War amendments; protection for democratic processes, as in the case of voting rights; and protection of racial, religious, and other minorities that could not protect themselves simply through force of numbers. Although the process of incorporation already had begun, the Court subsequently turned increasing attention to the Bill of Rights. In a striking decision, the Court overturned an earlier decision to declare in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), that compulsory saluting of the American flag in school was unconstitutional.

THE WARREN COURT

The years during which Chief Justice Earl Warren sat on the U.S. Supreme Court (1953–1969) proved to be among the most active in its history. This era was epitomized by the Court's decision in *Brown v. Board of Education,* 347 U.S. 483 (1954), to reverse the *Plessy* precedent (1896) and declare that racial segregation would no longer be tolerated. Within ten years, the Supreme Court had also declared in *Baker v. Carr,* 369 U.S. 186 (1962), that it would no longer regard matters of state legislative apportionment to be "political questions" immune from judicial review. The Court went on in dozens of cases to strike down malapportioned state legislative and congressional districts.

The Court increasingly took on matters of church and state, as in its decision in *Engel v. Vitale,* 370 U.S. 421 (1962), outlawing public prayer in public schools, and in *Abington School District v. Schempp,* 374 U.S. 203 (1963), outlawing Bible-reading in the same venue. It turned greater attention to protections for freedom of speech, widening this freedom to include materials previously regulated as pornographic, and ultimately providing greater safeguards against the abuse of libel suits. The Court further ruled in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), that provocative political speech could be suppressed only when it posed an imminent threat of lawless action and not, as held in previous Court decisions, when it was thought to have a "bad tendency" or to pose "a clear and present danger."

The Warren Court also became increasingly concerned about state administration of criminal justice. It applied provisions to state police that had once applied only to the national government. In *Gideon v. Wainwright,* 372 U.S. 335 (1963), the Court extended the right to counsel to indigents in felony cases; in *Mapp v. Ohio,* 367 U.S. 643 (1961), it applied the exclusionary rule to prohibit the state's use of illegally gathered evidence at trial; and in *Miranda v. Arizona,* 384 U.S. 436 (1966), it provided that police officers must warn suspects of their rights before beginning custodial interrogation. Over time, there were few provisions in the Bill of Rights that the Court had not applied to both state and national governments. Often these rights were significantly widened. By the end of Chief Justice Warren's tenure, the Court was venturing into new areas, as in *Griswold v. Connecticut,* 381 U.S. 479 (1965), in which the Court either created, or recognized, depending on one's viewpoint, a right to privacy in striking down state laws restricting the use of contraception.

On the flip side, the Warren Court years were accompanied by the Cold War, McCarthyism, and the Communist witch-hunts of the 1950s. Rooted in fears and prejudices not much different from those that animated the Salem witch trials of the seventeenth century, Senator Joseph McCarthy (R-WI), Senator Richard Nixon (R-CA), and the House Un-American Activities Committee investigated scores of individuals suspected of being Communists or subversives, and these inquiries led to the dismissal or blacklisting of many individuals based simply upon their political views. Later in the 1960s, J. Edgar Hoover, head of the Federal Bureau of Investigation, aided those efforts by spying on individuals suspected as being Communists, such as Martin Luther King Jr. The Department of Justice, through its Attorney General's List of Subversive Organizations, also kept tabs on civil rights and eventually Vietnam War protesters. Yet in cases such as *Watkins v. United States,* 354 U.S. 178 (1957),

Barenblatt v. United States, 360 U.S. 109 (1959), and *Brandenburg v. Ohio,* 395 U.S. 444 (1969), the Warren Court engaged in a checkered but eventually successful battle to protect free speech rights of dissidents and demonstrators.

THE BURGER AND REHNQUIST YEARS

President Richard M. Nixon's appointment of Warren E. Burger as chief justice in 1969 was supposed to signal a retreat from many of the Warren Court's more controversial decisions, but neither Burger's tenure (until 1986) nor the service of his successor, Chief Justice William H. Rehnquist (1986–present) put an end to judicial activism. Generally, the Court took only baby steps backward—for example, recognizing the "inevitable-discovery" exception to the exclusionary rule and the "plain-view" exception to the warrant requirement—rather than sounding a full retreat.

Moreover, in some areas the Court appeared to be carried by the momentum of previous years. The Court asserted its power and arguably struck a blow for liberty when it invalidated President Nixon's assertion of executive privilege in *United States v. Nixon,* 418 U.S. 683 (1974). In *Roe v. Wade,* 410 U.S. 113 (1973), the Court extended the right to privacy to cover most abortions, especially those in the first two trimesters. In 2003 in *Lawrence v. Texas*, 539 U.S. 558, the Court further ruled that this privacy right covered private consensual homosexual conduct.

Similarly, the Court increasingly accepted arguments that the Equal Protection Clause should apply not only to racial minorities but also to women, aliens, and other minorities. Beginning with its decision in *Furman v. Georgia,* 408 U.S. 238 (1972), the Court actively applied the Eighth Amendment provision prohibiting cruel and unusual punishments to cases involving capital punishment.

The Court issued increasingly liberal decisions related to freedom of speech, striking down a government injunction in *New York Times Co. v. United States,* 403 U.S. 713 (1971), against publication of the *Pentagon Papers,* and gradually widening protections for symbolic and commercial speech. The Court continued to qualify but did not abandon earlier landmarks in Fourth and Fifth Amendment law.

Another important trend during the Burger years was a movement in which state courts became increasingly more aggressive toward using their own constitutions to protect individual rights. Spurred on by Justice William J. Brennan Jr. in a 1975 article urging state courts to protect civil liberties, state courts in New Jersey, New York, California, and elsewhere articulated important decisions in the areas of free speech, privacy, and abortion rights.

THE TWENTY-FIRST CENTURY

As the nation entered a new century, Americans continued to express pride in their form of government and in the liberties that it guarantees. The threat of terrorism supplanted the threat of communism, especially after the attacks on Washington, D.C., and New York City on September 11, 2001, after which the national government asked for increased powers to detain and try those who have attacked, or are thought to pose threats to, the United States. Today, this is the central focus of the Patriot Act, which President George W. Bush and his first attorney general, John Ashcroft, had advanced as a means of combating the terrorist threat. The federal courts initially seemed to be unsympathetic to efforts to curtail criminal due process rights, and librarians around the country became heroes to many readers in declining to disclose to the government who has been reading what books, a requirement in the Patriot Act. Whatever the ultimate judgment on the constitutionality of this law, it will not be the last law that poses questions about the relationship between liberty and national security.

The American people must continue to recognize that balance needs to be maintained between government power and personal liberty. Justice Robert H. Jackson once observed that those who attempt to eliminate dissent may end up with the "unanimity of the graveyard." As long as the Constitution, the Bill of Rights, and subsequent amendments are honored and enforced, the United States will avoid such enforced unanimity.

David Schultz and John R. Vile

A

ABA

See American Bar Association

Abington School District v. Schempp (1963)

Abington School District v. Schempp, 374 U.S. 203 (1963), represented the U.S. Supreme Court's attempt to clarify its past First Amendment rulings dealing with religion and to establish guidelines as to permissible and impermissible practices in the public schools. Although not the first major case dealing with Establishment Clause doctrine, *Abington* also sought to resolve the tension between the two constitutional components of religious freedom contained in the First Amendment, which mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (thus termed the Establishment Clause and the Free Exercise Clause). This prohibition extends to state legislatures through incorporation into the Due Process Clause of the Fourteenth Amendment. In *Abington*, the justices struggled with the claim that an absolute insistence on government "neutrality" toward religion might, in fact, promote what Justice Arthur J. Goldberg termed a "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." In short, a too rigorous application of the Establishment Clause might well result in a violation of the Free Exercise Clause.

In *Abington*, the Court assessed the constitutionality of Pennsylvania and Maryland statutes requiring public schools to engage in a Bible reading and the recitation of the Lord's Prayer at the beginning of each day. The Edward Lewis Schempp family, Unitarians in Pennsylvania, and Madalyn Murray, an atheist whose son (then also an atheist) attended public school in Baltimore, challenged the statutes. The Court heard the cases together because the two statutes were nearly identical in their requirements and impact. In the Pennsylvania case, the lower courts struck down the statute, holding that the morning exercises impermissibly promoted religion. In the Maryland case, the lower courts held that the exercises did not violate the Establishment Clause and were permissible. The Supreme Court's task was to resolve the contradiction among the lower federal courts and to provide guidance to them in interpreting the Establishment Clause.

Justice Tom C. Clark, who wrote the Court's opinion, reviewed prior rulings related to the Establishment Clause and suggested a test: The Court should inquire as to the purpose of the statute and to its primary effect. If either the statute's purpose or effect advanced or inhibited religion, then the statute violated the Establishment Clause. This test was the precursor to the three-pronged test that later would be developed in *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

Both states claimed that the statutes advanced the *secular* (versus *religious*) purpose of promoting moral values. Furthermore, the exercises were strictly voluntary—parents could excuse their children from the exercises by submitting a written request. Because the exercises were voluntary, the states contended, they could not be said to promote religion. Justice Clark, along with all of his fellow justices except Justice Potter Stewart, was unconvinced by the states' claim. The use of the Holy Bible (with the King James version preferred), combined with the recitation of the Lord's Prayer, gave a specifically Christian, even Protestant, cast to the exercises. The states' purpose in promoting moral values could be accomplished without incorporating Christian theology and prayers. Justice William O. Douglas, in a concurring opinion, identified a second Establishment Clause violation: The statutes required the schools to use their facilities and funds to support the exercises, thus devoting resources to activities with religious content. Douglas considered this violation as serious as the one emphasized by the majority. The opinion by Justice Clark and the

concurrences by Justices Douglas, Goldberg, and William J. Brennan Jr. all recognized the tension between limiting the state's ability to encourage religion and yet allowing individuals who wished to participate an opportunity to exercise their beliefs at the beginning of the day. However, eight of the nine justices agreed that the statutes in question involved the state so directly in sectarian activities so as effectively to represent an "establishment" of religion.

Justice Stewart was the sole dissenter in the case. He expressed discomfort with the newly articulated test of "purpose and primary effect," arguing that mechanistic definitions would be insensitive to the vital role religion plays in the lives of many Americans. He was not willing to declare the statutes in question constitutional but rather wanted the cases remanded to the lower courts so that further evidence could be taken. Stewart's primary concern was that the Court's ruling, by forbidding religious exercises in the public schools, might place religion at a disadvantage. To prohibit religious practice would also violate the Constitution by restricting the "free exercise thereof."

Abington v. Schempp provided a much-needed clarification of Establishment Clause doctrine. Although all but one justice concurred with the result, the number of separate opinions filed served as evidence of the conflict among the justices over the proper relationship between the state and religious practice.

Sara Zeigler

See also: Establishment Clause; First Amendment; Free Exercise Clause; Incorporation Doctrine; *Lemon v. Kurtzman;* Separation of Church and State.

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Abood v. Detroit Board of Education (1977)

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the U.S. Supreme Court considered whether the Detroit Board of Education could require teachers to pay a union fee as a condition of employment. The Court held that the mandatory fee was constitutional to the extent it funded union activities relating to collective bargaining, but that the fee system violated the teachers' First and Fourteenth Amendment rights to freedom of expression and association to the extent it forced nonunion teachers to fund the union's political and ideological activities.

At issue in *Abood* was an "agency shop" clause contained in the 1971 collective bargaining agreement between the Detroit Board of Education and the Detroit Federation of Teachers, the union that represented teachers employed by Detroit. The agency-shop clause required teachers either to join the union and pay union dues, or if the teachers did not become union members, to pay the union a service charge equal to the normal union dues. Several teachers sued the board of education and the union in state court, claiming that requiring them to pay the union a service fee violated their First and Fourteenth Amendment rights to freedom of expression and association. The state trial and appellate courts held that the agency-shop clause was not per se unconstitutional. The plaintiffs appealed to the U.S. Supreme Court.

The Court in *Abood* initially recognized that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." However, relying on precedent, the Court concluded that the government's strong interest in supporting labor relations permitted some interference with the teachers' freedom of association caused by the agency-shop agreement; thus, the board could force teachers to pay a fee for union expenses related to collective bargaining, contract administration, and the handling of grievances. However, the Court concluded that the union's use of fees to pay for political or ideological speech or activities unrelated to union representation violated the teachers' First and Fourteenth Amendment rights to freedom of expression and association. The plain-

tiffs were entitled to an appropriate remedy, the Court concluded, such as a refund of the portion of fees used for political expenditures and a reduction in the future fees charged, based on the amount of funds the union used for political and ideological activities.

Abood made clear that forcing nonunion members to fund a union's ideological and political activities violates the dissenting employees' rights to freedom of expression and association. Still, in cases since *Abood,* the courts have struggled to draw the line between those impermissible activities and other activities legitimately related to collective bargaining and contract negotiations.

Margot O'Brien

See also: First Amendment; Fourteenth Amendment; Labor Union Rights.

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Abortion

See Birth Control and Contraception; *Roe v. Wade*

Abrams v. United States (1919)

Abrams v. United States, 250 U.S. 616 (1919), is one of a number of cases in which the U.S. Supreme Court upheld the conviction of individuals who criticized the U.S. government and its policies during World War I against challenges that these convictions violated the freedom of speech and press protected by the First Amendment to the Constitution. Jacob Abrams and fellow defendants were anarchists and/or socialists who had immigrated to the United States from Russia. After printing and distributing materials that were especially critical of U.S. military intervention in Russia, they were convicted in a U.S. district court of violating an amended provision of the Espionage Act of 1917 that punished conspiracy to print abusive language about the form of the U.S. government, to bring it into scorn or contempt, or to interfere with its recruiting service.

Justice John H. Clarke wrote the seven–two opinion upholding the convictions. He relied on *Schenck v. United States,* 249 U.S. 47 (1919), and other Court rulings holding that Congress could suppress speech that presented a "clear and present danger." Such threats were especially likely to be posed during times of war.

The dissenting opinion by Oliver Wendell Holmes Jr. has received far more attention. Although Holmes authored the *Schenck* decision, he dissented from *Abrams,* indicating a shift to an even more libertarian approach to the subject. He did not believe Abrams and other defendants had specifically targeted the government of the United States or its recruiting services, but more important, he did not think the defendants' criticisms had posed an "imminent danger" to the nation. Fearing that the defendants were being prosecuted for holding to a "creed of ignorance and immaturity" rather than for specific actions, Justice Holmes argued that "fighting faiths" should be protected. In his view, the best way to ensure progress was through "free trade in ideas," and "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Holmes portrayed democracy, like life, as an "experiment" and contended that the First Amendment prohibited prosecutions, permitted in England at the time of the American founding, for seditious libel. Justice Louis D. Brandeis joined Justice Holmes's dissent.

Holmes's more liberal view of speech was reflected in the Supreme Court's later opinion in *Brandenburg v. Ohio,* 395 U.S. 444 (1969): In overturning a conviction for a speech calling for "revengence" [*sic*] delivered at a Ku Klux Klan rally, the Court declared that Clarence Brandenburg's speech did not pose the threat of "imminent lawless action."

John R. Vile

See also: Brandenburg v. Ohio; Clear and Present Danger; Espionage Act of 1917; First Amendment; Holmes, Oliver Wendell, Jr.; *Schenck v. United States.*

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Academic Freedom

Academic freedom is commonly perceived as the right of college and university professors to teach and to engage in research and publication without undue restrictions placed on these activities. Yet academic freedom is more far-reaching: It protects not only professors but also teachers in elementary and secondary schools and students at all educational levels, in both public and private educational settings. The modern concept of academic freedom derives from the principles of *Lehrfreiheit* (freedom to teach) and *Lernfreiheit* (freedom to learn), which were formulated and practiced by the University of Berlin in the early nineteenth century. According to the German philosopher Johann Gottlieb Fichte, a university can achieve its intellectual goals only if it is free from outside pressures. Nevertheless, academic freedom has been threatened by social constraints, advances in scientific knowledge, government regulation, and religious, social, and political movements.

In the United States, academic freedom is associated with the First Amendment's protection of freedom of expression. Although the amendment does not protect academic freedom per se, it protects the expression of ideas within public colleges and universities from government regulation. Some courts have recognized a relationship between academic freedom and First Amendment rights, but the U.S. Supreme Court did not associate the two until relatively recently, and it has yet to define the scope of those rights. In the 1950s and 1960s, academic-freedom cases involved protecting faculty and educational institutions from external pressures, such as might be involved in overly intrusive governmental investigations. Since the 1970s, court cases have focused mainly on the conflict between the academic-freedom rights of faculty versus institutional freedom.

The roots of academic freedom can be traced to ancient Greece, when Socrates defended himself against charges of corrupting the youth of Athens by his teachings. The seeds of the modern concept of academic freedom were sown in the twelfth century with the establishment of the first universities in Europe. They were founded by the Catholic Church, and the scope of their curricula was narrowly tailored to meet the demands of both religious and governmental authority. Teachers and students had limited academic freedom and were expected to affirm essential Christian doctrines. The sixteenth-century Protestant Reformation resulted in even greater restrictions on the scope of academic freedom.

The principle of academic freedom grew and developed during the Enlightenment. In the eighteenth and nineteenth centuries, scholars working outside of universities, such as philosophers Thomas Hobbes, John Locke, Jeremy Bentham, and Herbert Spencer, biologist Thomas Huxley, economist David Ricardo, writer François Voltaire, and naturalist Charles Darwin, developed the scientific method. Their ideas filtered into the universities and helped to secularize them, but not without controversy. For example, Charles Darwin's *Origin of Species* (1859), which articulated his theory of evolution, led to the harassment and dismissal of some professors who attempted to teach it in the classroom.

In colonial America, the first universities also were established by religious groups and were dedicated to training ministers. Harvard College was founded in 1636 as an institution for teaching the faith to its members and for training ministers. Most other early American colleges had similar missions. These institutions were headed by boards of trustees and presidents who exerted a heavy measure of control over what was taught. Yet despite their religious origins, these colleges provided the young men of the day with a liberal education and instilled the notion of serving the public. Faculty members sometimes also offered public lectures. When former U.S. president Thomas Jefferson founded the University of Virginia in 1819, he pledged that it would be based "upon the illimit-

Academic freedom protects college and university professors, teachers in elementary and secondary schools, and students at all educational levels, in both public and private educational settings. *(© Nita Winter/The Image Works)*

able freedom of the human mind to explore and expose every subject susceptible of its contemplation."

Religiously affiliated colleges dominated American higher education until the Civil War. Their teachers suffered serious challenges to their freedom to teach from a variety of sources, including advances in science and technology and the issue of slavery. After the Civil War, the environment of higher education changed, as scholars and professors began to teach and research more secular subjects. Yet their activities were still subject to severe scrutiny. In 1894, Richard T. Ely, a proponent of the Social Gospel movement, was dismissed from his position at the University of Wisconsin, allegedly for teaching socialism. He was later vindicated, but his ordeal led to the founding of the American Association of University Professors

(AAUP) by philosophers John Dewey and Arthur Lovejoy in 1915. The AAUP codified the concept of academic freedom around the premises that freedom was a necessary condition for a university's existence and that tenure for faculty would ensure job security.

Threats to academic freedom continued throughout the twentieth century. During World War I, some university professors were accused of holding pro-German sentiments. Toward the end of World War II, the Servicemen's Readjustment Act of 1944 (the GI Bill) provided financial assistance to enable war veterans to earn college degrees. The role of the university in society and government expanded, but with this expansion came further threats to academic freedom. The Cold War and the "red scare" of the late 1940s and 1950s led to congressional investigations of citizens' loyalty to the United States. Loyalty oaths were required of federal employees, and many states enacted similar laws for state employees, including teachers. During this time, the courts began to define the parameters of academic freedom.

In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the Court ruled that government inquiry into the content of a University of New Hampshire professor's lecture invaded the professor's liberties "in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread." In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Court upheld faculty members' First Amendment rights against a state law requiring them to sign loyalty oaths. The Court declared that "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

The 1960s saw waves of student and faculty protests over U.S. intervention in Vietnam. The civil rights movement transformed the complexion of colleges and universities and led to demands for social justice on the part of many students and professors. Congress passed the Civil Rights Act of 1964 prohibiting, among other things, discrimination in education and employment. This and other federal legislation of the 1960s through the 1990s mandating equality were accompanied by a plethora of government regulations that applied to public schools and public institutions of higher learning. They exacerbated the conflicts over faculty hiring and promotion, course development and content, and student admissions, on the one hand, and academic freedom of faculty and educational institutions, on the other. Charges of sexual harassment and sexual and racial discrimination sometimes pitted freedom of expression against equal rights under the Fourteenth Amendment. Some of these controversies found their way into the courts. Compliance with federally mandated affirmative action programs led to charges of reverse discrimination on some campuses and mandatory sexual harassment and sensitivity training sessions for faculty and staff. Debates about political correctness on campus, disputes over campus speech codes, hate speech, and the development of gay and lesbian studies, black studies, and women's studies programs led to friction and factionalism within some universities. In addition, a new movement across the country to initiate post-tenure review of tenured faculty threatened further to undermine academic freedom.

The new millennium ushered in yet more risks. The ubiquitous presence and utility of the Internet as a means of communication and learning, including distance education, e-mail as a form of communication, and the creation of faculty and student Web pages, pose several threats to academic freedom. Congressional attempts to prevent children from accessing pornography and indecent material on the Internet involve serious First Amendment issues and could negatively affect academic freedom by restricting access to material over the Internet.

International and domestic terrorism, particularly the intentional crashing of airplanes into the World Trade Center in New York City and the Pentagon in Washington, D.C., on September 11, 2001, and additional terrorist actions against U.S. interests at home and abroad led to more restrictive federal laws to protect national security. In particular, the USA Patriot Act passed in 2001 grants federal law enforcement agencies increased authority over surveillance, including electronic surveillance of university computer facilities, e-mail, and library resources. These new threats pose both a challenge and an opportunity for educational institutions and those who work and learn in them. The challenge is to maintain free and open

discourse in educational institutions; the opportunity is to instill in new generations a healthy respect for freedom of inquiry and freedom of expression.

Judith Haydel and Henry B. Sirgo

See also: Congressional Investigations; First Amendment; Loyalty Oaths; McCarthy, Joseph; Patriot Act; Red Scare.

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ACLU

See American Civil Liberties Union

Actual Malice

The term “actual malice” is a technical concept. It derives from case law dealing with defamation (libel and slander) of an individual in the “public eye,” also called a “public figure,” who claims damage to reputation from false, published material. To prove actual malice, a public figure must meet a tough test devised by the U.S. Supreme Court. The test requires an individual claiming injury from publication to show that the statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”

The First Amendment to the U.S. Constitution guarantees that persons may speak and write freely and without fear of reprisal. This freedom is not without limitation. The law of libel imposes certain duties on a speaker not knowingly or carelessly to speak or write falsehoods that damage reputation. In the case of an ordinary citizen, the words do not necessarily have to cause economic or emotional harm. The requirements generally are that the speaker or writer has (1) published a (2) false statement of fact accusing (3) an identifiable plaintiff (the complaining party) of (4) a crime, professional or business ineptness, lack of chastity, or contagion with a loathsome disease, publishing (5) with the requisite level of fault and (6) unprotected by any privilege.

The level of fault differs for public figures versus ordinary private citizens. A public official is subject to the higher standard of “actual malice” because the courts wish to encourage “uninhibited, robust and wide-open debate” on the actions of the holders of public office. This is typically accomplished in published media accounts about such actions.

The standard for a legal action against a public figure is embodied in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which was decided by the U.S. Supreme Court during the turmoil of the civil rights struggles. The case arose out of an advertisement placed in the *New York Times* in March 1960 by an

advocacy group named Committee to Defend Martin Luther King and the Struggle for Freedom in the South. The advertisement was titled "Heed Their Rising Voices" and was signed by committee officers and by prominent people who were well known for their support of the civil rights movement. The broadside solicited funds for legal fees and expenses to defend Dr. Martin Luther King Jr. from a variety of charges in Montgomery, Alabama.

The *New York Times* had distributed 394 copies of the newspaper containing the offending statements in the state of Alabama, thirty-five of which were distributed in Montgomery County. The publication recited facts, protested various state actions and repression, and sought funds. No individual was named in the ad, but it used exaggeration and contained a number of factual errors in regard to police conduct. Thirteen individuals filed libel suits against the newspaper. All of the plaintiffs in the various suits were city and county officials in Montgomery. One of the county commissioners, L.B. Sullivan, obtained the first judgment, which was for $500,000. By the time the case reached the U.S. Supreme Court, after having been upheld by the Alabama Supreme Court, a second libel judgment in the same amount had been awarded to another of the complaining officials.

The U.S. Supreme Court reversed the state court on the basis that it had inadequately protected First Amendment rights, and it established the actual-malice standard to govern future cases involving public figures. Justice Hugo L. Black said he wanted to maintain "an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials." The Court did not think the advertisement should go unprotected simply because it had been paid for, and thus opened up protections for commercial speech.

The *News Reporter's Handbook on Law and Courts* provides this guidance for reporting on public officials and public figures: "Persons who become involved in public controversies or thrust themselves into the forefront of public issues, even if only for brief periods, may be considered 'public figures' for purposes of news reports regarding those controversies or issues." This publication further states, "The burden is on the public official or public figure to show that the media printed the allegedly libelous statement with actual malice."

Thus, public figures who would have solid cases where advocacy or negligence has tarred a reputation through falsehoods have a difficult burden of proof, and the courts are more concerned about intent than about truth or falsity. Because of *Sullivan,* the courts try to discern the mind of the author or broadcaster. This problem became reality when the Court decided *Herbert v. Lando,* 441 U.S. 153 (1979), in which it upheld the right of a plaintiff alleging libel to inquire into the editorial processes that had gone into the production of a television documentary. Although the Court claimed its decision rested on common law, wherein malice was always actionable, the practical effect merely intensified the search for notes, memoranda, and other indications of the author's thought process.

The consequences of the rules become especially troubling when the party claiming injury is not necessarily a public figure. An example might be when the parents of a murdered child are alleged to be the murderers by a sensation-seeking tabloid. They are not in the public eye willingly but instead find themselves hurled into the limelight. Which standard is to apply, negligence or actual malice? If they are not public figures, they merely have to prove that the tabloid did little or no investigation. If they must prove actual malice, the tabloid has reason to destroy notes and internal memoranda as a regular office practice, making the process of vindication doubly difficult.

The consequence in either situation is that citizens may be discouraged from entering public life because of the problem of protecting a good name. As Shakespeare wrote in the third act of *Othello:* "But he that filches from me my good name; Robs me of that which not enriches him; And makes me poor indeed."

The problem was revisited in later cases, such as *Coughlin v. Westinghouse Broadcasting and Cable, Inc.,* 476 U.S. 1187 (1986), in which the Court majority refused to review lower-court decisions dismissing a police officer's libel suit. Dissenting from this denial of certiorari, Justice William H. Rehnquist and Chief Justice Warren Burger called for a reexamination of *Sullivan.* Absent such a reappraisal, the actual-malice test will continue to serve as the standard in cases involving alleged libel of public figures. The test does

not make it easy for public figures who are seeking to prove damages, but its difficulty stems from the Court's desire that the standard will preserve robust debate.

Stanley Morris

See also: Commercial Speech; First Amendment; *Hustler Magazine, Inc. v. Falwell;* Libel; *New York Times Co. v. Sullivan;* Slander.

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ADA

See Americans for Democratic Action

Adamson v. California (1947)

In *Adamson v. California,* 332 U.S. 46 (1947), the U.S. Supreme Court upheld a murder conviction despite claims by the defendant that the prosecutor's comments about his refusal to testify at trial violated his due process rights. The defendant, Admiral Dewey Adamson, was accused of breaking into the Los Angeles home of a sixty-four-year-old widow and subsequently murdering her. During the trial, Adamson refused to testify in his own defense, and the prosecutor suggested that the jury could take the defendant's silence as evidence of guilt. The underlying issue in the case was the degree to which the right against self-incrimination provided in the Fifth Amendment was to be applied, if at all, to the states via the Due Process Clause of the Fourteenth Amendment under the doctrine of incorporation.

Adamson had refused to testify in his own behalf because of a prior criminal history. He believed his testimony would open the door for the prosecution to impeach his credibility based on that prior record and thus would violate his right against self-incrimination.

California law at the time did not permit the prosecution to force Adamson to testify, but, unlike federal law at the time, the state did allow the prosecution to comment on his refusal to do so. At the trial, the prosecutor told the jury that Adamson's refusal to testify had stripped him of his presumption of innocence. In his closing argument, the prosecutor urged the jurors to consider the defendant's silence as evidence in reaching their decision: "Counsel [for the defense] asked you to find the defendant not guilty. But does the defendant get on the stand and say under oath, 'I am not guilty'? Not one word from him. . . . I leave the case in your hands."

After a short deliberation, the jury convicted Adamson of burglary and murder. Sentenced as a habitual criminal, he was given life in prison for the burglary and was sentenced to death in the gas chamber for the murder. Adamson's attorney appealed unsuccessfully to the state supreme court and then to the U.S. Supreme Court.

Adamson asked the Court to strike down the California law that permitted prosecutorial comment on a defendant's decision not to testify. He argued that the law violated his Fifth Amendment protections that had been made applicable against state power through the Fourteenth Amendment's Privileges or Immunities Clause or its Due Process Clause.

By a narrow five–four majority, the Court upheld Adamson's conviction. The majority opinion, written by Justice Stanley F. Reed, ignored almost entirely the privileges and immunities claim and focused on the defendant's due process arguments. The majority reasoned, based on the decision in *Palko v. Connecticut,* 302 U.S. 319 (1937), that the California law did not result in an unfair trial. The majority did not regard the right against self-incrimination as a fundamental right that the writers of the Fourteenth Amendment had intended to apply to the states.

Although Justice Hugo L. Black was in the minority, the dissent he wrote, in which Justice William O. Douglas joined, proved an important harbinger of change to come. In *Adamson,* Justice Black lost the

immediate fight for his position that the Fourteenth Amendment incorporated all of the first eight amendments as applicable to the states—a view designated as "total incorporation"—but his dissent in the case eventually helped to win the war. It was not until 1964 in *Malloy v. Hogan,* 378 U.S. 1 (1964), that the Court adopted his reasoning on the right against self-incrimination, but that holding had significant ramifications. The shift required the Court to define when the right against self-incrimination had been violated. This line of reasoning built to its climax in the now famous case of *Miranda v. Arizona,* 384 U.S. 436 (1966).

David A. May

See also: Fifth Amendment and Self-Incrimination; Incorporation Doctrine; *Miranda v. Arizona*.

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Adderley v. Florida (1966)

In *Adderley v. Florida,* 385 U.S. 39 (1966), a five-justice majority of the U.S. Supreme Court articulated limitations on the First Amendment rights of freedom of speech, assembly, and petition, as applied to the states under the Fourteenth Amendment, when the activity is conducted on publicly owned property such as a jail facility. In upholding a Florida criminal trespass conviction, the Court held that the state has the same right as private landowners to preserve its property for the use to which it is dedicated. Though the opinion favored the state of Florida, the Court, as in previous cases such as *Brown v. Louisiana,* 383 U.S. 131 (1966), continued to be sharply divided over the constitutional protections afforded protesters on publicly owned property.

The case arose when the petitioners, Harriett Louise Adderley and thirty-one other students from Florida A&M University in Tallahassee, began a demonstration on a nonpublic jail driveway and on the adjacent county jail premises to protest the arrest the previous day of their fellow classmates who had been demonstrating. The protest was lively and included singing, dancing, and clapping and may have been organized in part to protest state policies of racial segregation. The sheriff's department ordered the protesters to leave the site and subsequently arrested 107 of the approximately 200 protesters when they refused to depart. The petitioners were charged and convicted by a jury under Florida law for trespass with a malicious or mischievous intent (821.18 of the Florida statutes). Florida's lower appellate courts affirmed the convictions.

The U.S. Supreme Court was split over the case. Justice Hugo L. Black, writing for the majority (Justices Byron R. White, Tom C. Clark, John M. Harlan, and Potter Stewart), argued that previous decisions favoring protesters were not applicable to the instant case because those individuals were not protesting on property open to the public. Black noted that the sheriff, as custodian of the jail, had the power to direct the protesters to leave the property The majority dismissed additional arguments concerning the breadth and scope of the trespass statute. Black wrote that the Florida law was not unconstitutionally broad, and that the trespass statute was narrowly tailored and aimed at conduct of a limited kind. This allowed Black to distinguish previous Supreme Court decisions in *Edwards v. South Carolina,* 372 U.S. 229 (1963), and *Cox v. Louisiana,* 379 U.S. 536 (1965).

Justice William O. Douglas, joined by Chief Justice Earl Warren and Justices William J. Brennan Jr. and Abe Fortas, authored a dissenting opinion. Douglas argued that a jail was a public forum that constituted a seat of government and was therefore a legitimate target of protests. Douglas noted that the protest was peaceful and did not prevent the normal operation of the jail. He further contended that in previous cases the Court had restricted the applicability of state statutes in public-forum cases. Douglas also made a more pragmatic contention when he pointed out that the restriction of these types of protests would lead to frustration from the aggrieved. He concluded that a trespass law should not be used to thwart citizens attempting to protest to the government.

The *Adderley* decision constituted a limited reversal in free speech jurisprudence. The limitations on the scope and locations of protests would be litigated again later with a more successful outcome for the protesters, as in *Grayned v. City of Rockford,* 408 U.S. 104 (1972), and *Carey v. Brown,* 447 U.S. 455 (1980). Nonetheless, *Adderley* continues to be an important precedent for the limitation of free speech rights on publicly owned property, as seen in *Geer v. Spock,* 424 U.S. 828 (1976), and *United States v. Grace,* 457 U.S. 393 (1983).

Kevin M. Wagner

See also: First Amendment; Public Forum; Right to Petition.

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Administrative Searches

Most people imagine the protection against unreasonable searches and seizures provided by the Fourth Amendment to the Constitution as being applicable in the context of criminal investigations, but the Fourth Amendment also comes into play when administrative agencies seek to conduct health and safety inspections. The U.S. Supreme Court, however, initially treated these and other administrative searches as outside the purview of the Fourth Amendment.

The Court first explicitly considered the constitutionality of warrantless administrative searches in *Frank v. Maryland,* 359 U.S. 360 (1959). In this case, a health inspector for Baltimore, Maryland, as part of an inspection of area houses in response to a complaint regarding a rat infestation, sought permission from the appellant to inspect the basement of his house after an external inspection uncovered large quantities of rodent feces at the rear of the house. The appellant declined to grant permission, and the health inspector returned the next day, again seeking permission to inspect the basement but this time in the company of two police officers. The appellant refused entry again, whereupon the health inspector swore out a warrant for his arrest in accordance with city health codes that required compliance with requests for entry when a public nuisance was suspected. In a five–four decision, the Court affirmed the appellant's conviction, holding that such searches did not constitute a violation of due process nor did they encroach in any meaningful way on an individual's right to privacy. In arriving at this decision, the Court focused on the fact that the purpose of the inspection was not to seek out evidence of criminal wrongdoing but rather only to ensure compliance with community health standards.

The Court signaled a reversal of sorts eight years later in its ruling in *Camara v. Municipal Court,* 387 U.S. 523 (1967). At issue was a tenant's use of the rear portion of commercial space he leased as residential quarters in violation of the housing code of the city of San Francisco. After refusing entrance to inspectors three times, the tenant was arrested despite his argument that the housing code authorizing such an inspection in the absence of a warrant was a violation of the Fourth Amendment. In ruling in the tenant's favor, the Court asserted that no matter how carefully a statutory scheme was drawn to ensure safeguards against Fourth Amendment violations, probable cause was an element that must be determined by a neutral magistrate in the issuance of a search warrant rather than by an agency or inspector.

In *See v. City of Seattle,* 387 U.S. 541 (1967), decided the same day as *Camara*, the Court likewise found the warrant requirement to apply to the inspection of commercial premises. In *See,* fire inspectors had sought to search a locked commercial warehouse. In its decision, the Court said, "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from

unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." The only two exceptions to the warrant requirement recognized by the Court were inspections with permission of the occupant and inspections of areas open to the public.

The Court's subsequent decisions affirmed the applicability of the Fourth Amendment's warrant requirement to administrative searches but simultaneously carved out permissible exceptions, the most notable being the licensing exception, which the Court first addressed in *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970). An employee of the Bureau of Alcohol, Tobacco, and Firearms (BATF), the agency responsible for federal regulation of the liquor industry, attended a party (as a guest) held on Colonnade's property and observed what appeared to be a violation of federal excise tax law. When BATF agents arrived later, however, they were denied access to a locked storeroom because, according to the defendant, they did not have a search warrant. The agents subsequently broke into the locked storeroom and seized the bottles of liquor at the heart of the controversy. In rendering its decision, the Court found in favor of the catering company, relying on the statutory language, which authorized fines but did not specifically authorize forced entry in the event that permission to enter was not granted. Despite finding in favor of the catering company, the Court emphasized that Congress did indeed have broad regulatory authority, including the authority to authorize administrative searches, for certain industries with a history of governmental regulation.

In subsequent cases, the Court extended this exception to cover firearms dealers in *United States v. Biswell,* 406 U.S. 311 (1972). The Court made clear that the exception applied only to industries that historically were pervasively regulated, as it reaffirmed in *Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978), in limiting a warrantless search of an electrical and plumbing supply business, or to industries with established histories of unsafe working conditions such as mines, as was the case in *Donovan v. Dewey,* 452 U.S. 594 (1981).

The Court distinguished between criminal searches pursuant to penal law versus administrative inspections pursuant to regulatory statutes on the basis of their consequences. In *Wyman v. James,* 400 U.S. 309 (1971), a recipient of Aid to Families with Dependent Children (AFDC) declined to grant permission to a social worker for a home visit; accordingly, her AFDC benefits were terminated. Five justices led by Harry A. Blackmun declined to find the social worker's visit akin to a search that would fall under the Fourth Amendment. In a concurring opinion, Justice Byron R. White disagreed with that finding but nonetheless found the visit constitutionally permissible, since it served a valid administrative purpose without constituting an invasive violation of personal privacy. The justices in the majority highlighted the fact that the refusal to allow a home visit did not and would not result in a criminal prosecution of any sort, merely the termination of AFDC benefits. However, as the Court asserted in *New York v. Burger,* 482 U.S. 691 (1987), even if a search undertaken as an administrative inspection did uncover evidence of criminal activity and prosecution ensued, that search would remain constitutionally valid.

Wendy L. Martinek

See also: Search; Search Warrants.

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Adversarial Versus Inquisitorial Legal Systems

Modern democratic states use one of two forms of trial procedure. Countries that follow the common law, including the United States, England, and most former British colonies, use adversarial procedures in which the prosecution and defense gather evidence and then question witnesses in front of a lay jury. To make sure the jury reaches a proper verdict, most adversarial systems rely on complex evidentiary rules that restrict the information the jury can hear; an example is the rule against hearsay, which generally prohibits a witness from repeating at trial utterances another person made to that witness in an out-of-court setting—utterances that thus would not be subject to cross-examination. The judge's primary role is to enforce these evidentiary rules.

By contrast, the civil law world, which comprises continental Europe and Latin America, uses inquisitorial procedures, in which the trial judge determines the evidence to present, questions witnesses, and (sometimes with lay jurors) reaches a verdict, which is often in writing. The prosecution and defense are limited to making closing speeches. Inquisitorial legal systems also have fewer restrictive evidentiary rules.

The adversarial system traces its origins to the early Middle Ages, a time when legal questions were settled by judicial combats and ordeals, events whose validity rested on the idea that the results reflected God's will. The impetus for the inquisitorial system came later, with the rise of canon law in the eleventh century. Canon lawyers replaced the combat and ordeal with testimony of witnesses and the accused. At the center of the new system stood the inquisitor, who sought truth by interviewing witnesses (including the accused) and applying rigid standards of proof that restricted the use of circumstantial evidence. But the very rigidity of these rules posed a problem—it was often impossible to establish guilt without a confession. The solution was the widespread use of torture, especially upon unpopular defendants such as accused heretics and witches.

These abuses tainted inquisitorial methods in the eyes of Enlightenment thinkers. The result was a widespread abandonment of judicial torture, the loosening of rules of proof, and the rise of the prison as an alternative sanction. These changes helped the inquisitorial system survive the reforms brought about by the French Revolution of 1789. Although the rules of evidence were relaxed, judges continued to play a central role in presenting evidence, questioning witnesses, and rendering the verdict.

Supporters of inquisitorial justice, some from the United States, charge the adversarial system with favoring fairness to the accused over the search for truth. They also question the reliance on juries and the rigid evidentiary rules juries require. Defenders of the adversarial system argue that conflict between the parties is best designed to bring out the truth, and they point out the dangers posed by the concentration of power in the hands of the judge, a state official. They see juries and evidentiary rules as safeguards against unjust verdicts.

Greater global interdependence has increased the confrontation between the two legal systems. This tension was evident at the post–World War II Nuremberg trials of war criminals, during which the accused complained about the power of prosecutors to cross-examine witnesses. Such conflicts will continue to grow with time. War crimes trials, the creation of the International Criminal Court, and proposals for a uniform European code of criminal procedure will force legal drafters to develop a set of common trial procedures to facilitate legal participation by parties accustomed to both systems.

Robert A. Kahn

See also: Civil Law System; Common Law; Trial by Jury.

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Aggravating and Mitigating Factors in Death Penalty Cases

Aggravating and mitigating factors are elements in addition to facts of the crime to be considered when a jury decides whether a defendant receives the death penalty or a lesser sentence of life imprisonment. For a defendant to be eligible for the death penalty, the jury must find at least one aggravating factor—some circumstance that calls for heightened punishment. Similarly, the consideration of mitigating evidence (circumstances justifying lesser punishment) by the judge or jury sentencing a person to death is required by the Eighth and Fourteenth Amendments of the U.S. Constitution.

Mitigating factors are information about a defendant or the circumstances of a crime that might tend to lessen the sentence or the crime with which a person is charged. A statute cannot automatically mandate the death penalty for a defendant convicted of a specific crime. In *Buchanan v. Angelone,* 522 U.S. 269 (1998), the Supreme Court ruled there was a "need for a broad inquiry into all relevant mitigating evidence to allow for individualized determination." The judge or jury must consider the offender's character and record and the circumstances of the offense.

Further, a state cannot prohibit the presentation of mitigating evidence or limit it so severely that it cannot be part of the sentencing decision. But states can guide the sentencer's consideration of the mitigating evidence. A federal statute (*U.S. Code,* Vol. 21, §848(M)) provides that "in determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider mitigating factors." Enumerated factors under section 848(M) (1) through (9) address impaired capacity, substantial duress, minor participation, reasonable foreseeability, relative youth, prior criminal record, mental disturbance, codefendant sentences, and victim consent. The statutory mitigating factors are consistent with constitutional requirements as interpreted and applied by the Supreme Court. Section 848(M) is not intended as an exclusive list of mitigating factors; section (M)(10) requires consideration of any "other factors in the defendant's background or character that mitigate against imposition of the death sentence."

For a convicted defendant to be qualified for the death penalty, the jury must find one aggravating factor. Aggravating factors that are essential to any death penalty scheme must "genuinely narrow the class of death eligible persons" in a way that reasonably "justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder," the Court explained in *Zant v. Stephens,* 462 U.S. 862 (1983). The Constitution requires that the class of defendants eligible for the death penalty be narrowed by means of statutory aggravating factors that furnish principled guidance for the choice between death and a lesser penalty. These factors can be in the definition of the crime, in separate sentencing elements, or in both. Most states follow the *Model Penal Code,* adopted by the American Law Institute in 1962, and define murder broadly. This system requires the sentencer to consider aggravating factors and mitigating evidence at the sentencing phase. However, Oregon, Texas, Utah, and Washington do not use aggravating factors at sentencing. Washington's statutory scheme, for instance, involves the consideration of aggravating factors at the guilt-determination phase, whereas Georgia follows the *Model Penal Code* in requiring consideration of aggravating factors at the sentencing phase.

In *Jurek v. Texas,* 428 U.S. 262 (1976), the Supreme Court ruled that death penalty statutes must be tailored narrowly, thus ostensibly reducing the class of people eligible for the death penalty. This was accomplished by (1) narrowing the definition of capital offenses by including a list of specific aggravating circumstances as elements of the crime that makes a person eligible for the death penalty or (2) defining capital offenses broadly and requiring the sentencing judge or jury to consider during the sentencing phase whether specified aggravating circumstances exist. In *Ring v. Arizona,* 536 U.S. 584 (2002), the U.S. Supreme Court held that the U.S. Constitution guarantees a jury trial and that juries, not judges, must decide if aggravating circumstances exist in the crime to merit the death penalty.

Since 1976 the Court has in dicta (comments in written court opinions that are not necessary to case decisions) and holdings spoken of the belief that "Respect for human dignity underlying the Eighth Amendment requires consideration of aspects of the

character of the individual offender and the circumstances of that particular offense as a constitutionally indispensable part of the process of imposing the ultimate punishment of death," as Justice Potter Stewart stated in *Woodson v. North Carolina,* 428 U.S. 280 (1976). The statutory requirement of considering aggravating and mitigating factors in the determination of death is one step in this process.

Gladys-Louise Tyler

See also: Capital Punishment; Death Penalty for the Mentally Retarded; Effective Death Penalty Act of 1996; Federal Death Penalty Act; Juvenile Death Penalty.

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Agostini v. Felton (1997)

Title I of the Elementary and Secondary Education Act of 1965 was intended to provide remedial instruction to academically "at risk" students. Congress directed that students eligible under Title I could be enrolled in either public or nonpublic schools. The legislation raised a First Amendment issue involving the Establishment Clause, which prohibits the state from engaging in the establishment of religion. The Supreme Court ruled in *Aguilar v. Felton,* 473 U.S. 402 (1985), and *School District of Grand Rapids v. Ball,* 473 U.S. 373 (1985), that services funded under Title I could not be provided to students on religious school premises. A permanent injunction barred the Board of Education of New York City from sending public school teachers into parochial schools to provide Title I instruction.

The board subsequently provided Title I services by transporting some eligible parochial school students to public schools, while others received services at leased sites or in vans parked near the parochial schools. In the seven years following the *Aguilar* and *Ball* decisions, the New York City school district spent more than $100 million to transport Title I students or provide the vans. The school district and parents of parochial school students eligible for Title I sought release from the injunction by pointing to the unreasonable expense of compliance. They further contended that Establishment Clause rulings since 1985 had largely abandoned the *Aguilar* and *Ball* decisions. The Rehnquist Court (so named for Chief Justice William H. Rehnquist) agreed in a five–four decision in *Agostini v. Felton,* 521 U.S. 203 (1997).

In *Aguilar,* the Court had concluded that church and state were excessively entangled because Title I required "pervasive monitoring" to ensure that school employees did not inculcate religion; necessitated ongoing administrative cooperation between the public school district and nonpublic schools; and increased the danger of "political divisiveness." Twelve years later, Justice Sandra Day O'Connor wrote in *Agostini* that the Court's rulings following *Aguilar* modified the approach the Court used to assess "indoctrination." She suggested the Court had "abandoned the presumption" that the placement of public school employees on parochial school grounds "invariably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." Further, she said the Court had departed from the rule relied on in *Aguilar* that "all government aid that directly aids the educational function of religious schools is invalid."

O'Connor concluded that from the Court's post-*Aguilar* perspective, New York City's Title I program would "not be deemed to have the effect of advancing religion through indoctrination." Rather, the city's program was religion-neutral and did not "run afoul" of any of the criteria used to evaluate whether government aid has the effect of advancing religion. It did not result in "governmental indoctrination," define its recipients "by reference to religion," or "create an excessive entanglement" of church and state. This conclusion was incompatible with *Aguilar* and *Ball,* which resulted in both cases being overruled because they were "no longer good law."

The dissenters (Justices Stephen G. Breyer, Ruth Bader Ginsburg, David H. Souter, and John Paul Stevens) contended that *Aguilar* was a "correct and sensible decision." Under the Establishment Clause of the

First Amendment, the state cannot subsidize religion and is "forbidden to act in any way that could reasonably be viewed as religious endorsement." Justice Souter said that no line could be drawn between "instruction paid for at taxpayers' expense and the instruction in any subject that is not identified as formally religious."

The Court's ruling in *Agostini* permitted New York to resume its on-premises Title I program and allowed other school districts greater latitude in delivering Title I and other educational services to nonpublic school students. Implicit in *Agostini* is the view that the three-prong standard formulated in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), to assess violations of the Establishment Clause may no longer be viable. Although O'Connor's opinion in *Agostini* was narrowly written, her reasoning provided foundation for the Court's later decision in *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), which upheld school vouchers.

Peter G. Renstrom

See also: Establishment Clause; First Amendment; *Lemon v. Kurtzman;* Separation of Church and State; *Zelman v. Simmons-Harris*.

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Aguilar v. Texas (1964)

In *Aguilar v. Texas,* 378 U.S. 108 (1964), the U.S. Supreme Court set forth a standard to assist magistrate judges responsible for issuing search warrants in determining whether "probable cause" exists as required by the Fourth Amendment. A warrant is obtained by filing a sworn statement (affidavit) stating sufficient information that gives reasonable ground for suspicion that specified evidence is likely to be found at a designated place. In *Aguilar,* the Court held that the affidavit accompanying the application for the warrant must contain information to enable the magistrate not only to understand the facts and circumstances that form the basis of the informant's knowledge, but also to make a determination as to the informant's credibility or reliability. The *Aguilar* case set the probable-cause standard until 1983.

Nick Aguilar was charged with heroin possession after police executing a search warrant at his apartment found him attempting to dispose of a package of drugs. The police officer's affidavit supporting the issuance of the warrant merely stated the officer's belief that illegal narcotics were kept at Aguilar's apartment. According to the affidavit, this belief was based on " 'reliable information from a credible person.' " At trial, Aguilar objected to the introduction of the evidence seized in the execution of the warrant, arguing that there had not been sufficient probable cause to support issuance of the warrant. The trial court overruled Aguilar's objection and sentenced him to twenty years in prison.

The Supreme Court reversed Aguilar's conviction. A finding of probable cause, the Court argued, must be based on " 'the informed and deliberate determination of [judges] empowered to issue warrants,' " quoting from *United States v. Lefkowitz,* 282 U.S. 452 (1932). In order to perform this function, the Court reasoned, police must give judges enough facts so that they can make an informed and independent decision as to the existence of probable cause. Thus, the Court held, the affidavit accompanying the application for the warrant must contain information to enable the magistrate both to understand the facts and circumstances that form the basis of the informant's knowledge and to make a determination as to the informant's credibility or reliability.

In *Spinelli v. United States,* 393 U.S. 410 (1969), the Court developed more fully the standard announced in *Aguilar*. The *Aguilar-Spinelli* test, as the probable-cause standard was then called, was the standard for probable-cause determinations until the early 1980s. In the 1983 case of *Illinois v. Gates*, 462 U.S. 213, the Court rejected the *Aguilar-Spinelli* test in favor of a "totality-of-the-circumstances" approach to probable-cause determinations.

Scott A. Hendrickson

See also: Arrest; *Illinois v. Gates;* Totality-of-Circumstances Test.

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Aid to Parochial Schools

Controversy over aid to religiously affiliated schools has a long, complicated history, riddled as it is with issues dealing with the Establishment Clause of the First Amendment. The pertinent clause, as now applied to the states via the Due Process Clause of the Fourteenth Amendment, is often summed up in the phrase "separation of church and state." It prohibits government from engaging in action that would constitute establishment of religion.

Tension began when states raised taxes to fund and build public school systems in the 1840s. In addition to teaching reading, writing, and arithmetic, a major goal of public education was to provide citizenship training for the waves of immigrants arriving in the United States. Most schools used books saturated with Protestant ideas and examples. Passages from the King James Bible were read daily. Prayers began and ended the day.

Catholics became alarmed, with good reason, that the public schools were being used to convert their children to Protestantism. Requests to end the proselytizing were met with refusal, and Catholics reacted by building their own schools. When school attendance became mandatory, Catholics requested that their schools be funded along with public schools. That too was refused.

The stubbornness of public school officials is understandable. Most immigrants who arrived between the Civil War and World War I came from Catholic countries such as Ireland, Italy, and Poland. Most were poor and spoke no English. They had no experience with democracy. Indeed, they belonged to a hierarchical church that at the time viewed democracy with suspicion. Many public school advocates believed that democratic government and Catholicism were incompatible. In their view, immersion in the Protestant culture, if not outright conversion, was essential for a healthy republic.

The Court first addressed the question of aid to parochial schools in the 1947 case of *Everson v. Board of Education,* 330 U.S. 1 (1947). Ewing Township, New Jersey, had no public school but did pay to transport its children to schools in surrounding towns. These schools included both public and parochial institutions. A taxpayer sued, arguing that it was unconstitutional to use tax money to fund Catholic education. The Court issued a controversial decision: It gave a definition of the Establishment Clause that forbade any tax money being given to any religious organization for any reason, but then upheld the constitutionality of the Ewing Township program. Justice Hugo L. Black, writing for a five–four majority, reasoned that the aid went to the children being bused and aided religious schools only indirectly. This "child-benefit theory" set the stage for more than fifty years of constitutional litigation to determine what is or is not allowable aid. A few examples show the complexity of this issue.

In *Board of Education v. Allen,* 392 U.S. 236 (1968), a six–three majority of the Court upheld as constitutional the "loan" of secular textbooks by public schools to students in parochial schools on the grounds that the loans promoted secular, not religious, education. In *Lemon v. Kurtzman,* 403 U.S. 602 (1971), and *Early v. DiCenso*, 411 U.S. 192 (1971), the Court, by eight–zero and eight–one majorities, struck down programs that reimbursed religious schools for the purchase of textbooks and other instructional materials and provided salary supplements to teachers of secular subjects. However, on the same day in *Tilton v. Richardson,* 403 U.S. 672 (1971), the Court upheld a program to construct new buildings to be used to teach secular subjects at religious universities and colleges. In *Wolman v. Walter,* 433 U.S. 229 (1977), a six–three Court upheld government funding of diagnostic, health, therapeutic, and testing services, but struck down purchase of instructional materials, such as maps, classroom equipment, and field trips. In *Mueller v. Allen,* 463 U.S. 388 (1983), a five–four Court majority upheld a state

Children leaving a parochial school in Norwich, Connecticut, 1947. In recent years the U.S. Supreme Court has held many forms of support for religious schools to be constitutional. *(Library of Congress)*

law that allowed tax deductions for tuition, textbooks, and transportation to all schools, including religious ones.

Apparently a heightened consciousness of the needs of handicapped students has had a major impact on the Court's thinking. In *Witters v. Washington Department of Services for the Blind,* 474 U.S. 481 (1986), a unanimous Court agreed that handicapped students at a Christian college could not be denied state vocational rehabilitation funding. In *Zobrest v. Catalina Foothills School District,* 509 U.S. 1 (1983), a five–four majority ruled that a disabled student at a Catholic high school could receive the services of a state-paid sign-language interpreter. Then in *Agostini v. Felton,* 521 U.S. 203 (1997), a five–four majority upheld a program that funded special education classes taught in parochial schools. In this case the Court overruled several previous decisions that had declared a variety of aids unconstitutional.

The pattern of approving state-funded support continued in *Mitchell v. Helms,* 530 U.S. 793 (2000), in which a six–three majority upheld provision of library services and the purchase of computer hardware and software for religious schools. Finally, setting a very important precedent in *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), a sharply divided Court voted five–four to uphold a voucher plan for the Cleveland, Ohio, school district. The majority argued that vouchers were given to the parents of school-age children from poor families who then chose to have their children attend either public or religious schools. Since parents also had to pay additional tuition for

their children to attend the religious schools, there was no incentive to choose the religious over the public schools. Therefore, because of the elements of parental choice and nonpreferential treatment, vouchers were held constitutional.

In recent years the Court has held many forms of support for religious schools to be constitutional. However, the future of aid to parochial schools remains uncertain for several reasons. First, many Court decisions supporting aid have been by five–four margins, an indication of deep division among the justices; the retirement and replacement of one or two justices on the court could reverse that trend. Second, Protestant Christian schools are the fastest-growing segment of private schooling, a factor that blunts much of the early sectarian criticism of Catholic schools. Third, Catholics have proved to be loyal citizens, and the virulent anti-Catholicism of the nineteenth century has largely disappeared from American culture. Fourth, many state legislators have realized that giving small amounts of aid to children attending religious schools is far less expensive than educating the children in public schools if the religious schools are forced to close. Finally, there is a belief among a number of politicians and educators, disputed by other experts, that religious schools do a better job of educating poor children than do public schools and therefore should be encouraged.

Paul J. Weber

See also: Child-Benefit Theory; Establishment Clause; *Everson v. Board of Education;* First Amendment; *Lemon v. Kurtzman;* Separation of Church and State.

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Airport Searches

The right to travel is a liberty long preserved to Americans and was specifically identified as a fundamental right by the U.S. Supreme Court in 1958 in *Kent v. Dulles,* 357 U.S. 116. Although it is fundamental to liberty, the right to travel is not without restraints, particularly when national security interests are at issue. Predictably, air travel often raises such issues, and Americans' right to travel is limited by security precautions taken by commercial airlines. Their security measures include searches of passengers and their baggage, a procedure governed by the requirements of the Fourth Amendment.

The Fourth Amendment guarantees the people the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Generally, a search requires a warrant that will be issued only upon a showing of probable cause that a crime has occurred, but this rule has exceptions.

One such exception is the administrative search. In *United States v. Davis,* 482 F.2d 893 (9th Cir. 1973), the Ninth Circuit Court of Appeals held that a search conducted in furtherance of a narrow and compelling administrative purpose could be permissible without warrant or probable cause, provided the search was limited to only what is necessary to achieve that purpose. Accordingly, the *Davis* court concluded that a preboarding screening of all passengers and the items they carry is reasonable as long as it is limited in scope to only what is necessary to detect weapons and explosives and if a person is able to avoid the search by electing not to board an aircraft. This means that only weapons, explosives, or other items related to passenger safety are relevant in a preboarding screening. Evidence of any other kind of crime, such as drugs, cannot be used against the passenger.

These searches are permissible as part of a regulatory scheme because their primary purpose is not to find evidence of a crime but rather to deter passengers from carrying weapons and explosives aboard and to protect air travelers. Although administrative searches can take place absent probable cause, they still must be reasonable under the Fourth Amendment. This requires balancing the need to search against the privacy

A state trooper and his Chesapeake Bay retriever conduct a bomb search at Logan Airport in Boston, Massachusetts. Since the terrorist attacks on September 11, 2001, airport security has increased, but some critics contend that personal liberties are being sacrificed.
(© Dorothy Littell Greco/The Image Works)

interest of the individual. In *United States v. Edwards,* 498 F.2d 496 2d Cir. (1974), the Second Circuit Court of Appeals held that airport searches were valid under this balancing test because the risk of danger to persons and property justifies the search so long as the search is actually made in good faith to prevent hijacking or similar incidents. The search must also be limited in scope to what is reasonable to search for weapons and explosives, and the passenger must be able to avoid the search by choosing not to fly.

In 2001 a passenger flying from Miami to Paris boarded the plane with explosives hidden in his sneakers. As a result, it is now policy for most airlines to ask passengers to remove their shoes if they cause a metal detector to sound. Before the incident in Miami, courts and passengers alike would likely have considered it unreasonable to remove their shoes for security purposes. However, because the risk is real and proven, this is now a commonplace part of airport screening. As terrorists become more innovative, Americans may find that more and more procedures for airport searches emerge and are held to be reasonable by courts.

Another issue with regard to airport searches is whether a physical frisk by a security officer is permissible. In *Terry v. Ohio,* 392 U.S. 1 (1968), the U.S. Supreme Court allowed a limited frisk for weapons without requiring a search warrant if a police officer reasonably and objectively believes criminal activity has occurred or is about to take place. This "stop-and-frisk" is limited to the outer clothing of the individual and is valid only as a search for weapons. Can *Terry v. Ohio* be used as the basis for frisking airline passengers if a metal detector or magnetometer indicates that a passenger is carrying a metal object? In *United States v. Albarado,* 495 F.2d 799 (2d Cir. 1974), the Second Circuit Court of Appeals concluded that a frisk is appropriate only when there is no lesser available means (such as a hand-held metal detector) of determining what metal object a person may be carrying. In other words, security officers should use a *Terry* frisk only as a last resort.

The consent exception has also helped airport screening officials to escape the Fourth Amendment requirements of warrant and probable cause. To satisfy the requirements of the consent exception, an individual must both knowingly and voluntarily give consent to the search. The doctrine of implied consent, which had developed over the years in other contexts, such as police requests to search vehicles, was adopted for airport searches by the *Edwards* court. The nature of airport searches makes this a logical step for the courts to take: It is reasonable to assume that airline passengers traveling in the United States know through common knowledge or signs posted in the airport that their person and baggage are subject to search, and that they can avoid this search by leaving the airport instead of boarding a flight. Therefore, the passenger who remains in the line to be searched has given implied consent to the search, knowingly and voluntarily submitting to it.

As new technology emerges, new issues arise as to what constitutes a reasonable search. With each new security procedure, if and when it is challenged, courts will have to ask if the measure constituted a search and, if so, if the search was reasonable. The CTX-5000 bomb and explosive detector that has recently been introduced into airports, for instance, can be likened to x-ray and hand searches of carry-on luggage in terms of how much the device compromises the privacy interest of the passenger. The BodySearch, which is x-ray technology that reveals what is under a person's clothing, and biometric face-recognition technology, two emerging technologies that will soon be introduced in many airports, likely will be challenged as being more intrusive than existing procedures.

For existing as well as potential procedures, airport security measures that include searching passengers and their baggage without a warrant are constitutionally justified under the Fourth Amendment by exceptions for administrative searches and searches to which an individual consents. Even under these exceptions, however, security measures must be reasonable under the Fourth Amendment when balanced against the harm they are designed to prevent.

Brandi Snow Bozarth

See also: Fourth Amendment; Stop-and-Frisk; *Terry v. Ohio.*

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Alabama v. Shelton (2002)

In *Alabama* v. *Shelton,* 535 U.S. 654 (2002), a divided U.S. Supreme Court significantly expanded the Sixth Amendment right to counsel. In the five–four decision, the Court ruled that suspended sentences cannot be imposed upon a defendant if the state did not provide the defendant with counsel at trial.

The Sixth Amendment to the U.S. Constitution states that "in all criminal prosecutions, the accused shall enjoy the right to have . . . the assistance of counsel for his defense." In *Johnson* v. *Zerbst,* 304 U.S. 458 (1938), the U.S. Supreme Court reaffirmed a defendant's right to counsel in federal proceedings. The landmark decision of *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), extended that right to state proceedings, holding that indigent defendants accused of felonies were entitled to state-appointed counsel. The ruling in *Shelton* was a further attempt by the Court to define the parameters of the Sixth Amendment right to counsel.

LeReed Shelton represented himself in an Alabama criminal trial. The court warned Shelton several times about the difficulties associated with self-representation, but at no time did the court offer Shelton state-appointed counsel. Shelton was convicted of a misdemeanor and sentenced to thirty days in jail. The sentence was subsequently suspended, and Shelton was placed on two years' probation. Justice Ruth Bader Ginsburg delivered the Court's opinion in which Justices John Paul Stevens, Sandra Day O'Connor, David H. Souter, and Stephen G. Breyer joined. The Court found that a suspended sentence that may ultimately result in imprisonment cannot be imposed upon a defendant if the state did not provide the defendant with counsel at trial.

The *Shelton* ruling significantly expanded the Court's previous decisions. The Court relied heavily on *Argersinger v. Hamilton,* 407 U.S. 25 (1972), and *Scott v. Illinois,* 440 U.S. 367 (1979). In *Argersinger,* the Court found that the right to counsel extended to all proceedings, misdemeanor and felony, that could lead to imprisonment. In *Scott,* the Court ruled that counsel is not required when a defendant's punishment is only a fine but is required when the defendant's sentence is imprisonment. Accordingly, the Court held in *Shelton* that the Sixth Amendment does not allow the later activation of a suspended sentence when the defendant was not provided counsel at the trial where the sentence was imposed. If the suspended sentence were activated (for example, for a defendant's violation of the terms of probation), the defendant would ultimately be incarcerated for the original offense notwithstanding lack of a lawyer at trial.

The dissenting justices believed the Court's ruling placed an undue burden on the states. Writing for the dissent, Justice Antonin Scalia did not think that the threat of imprisonment should entitle a defendant to counsel. Several states were affected by the Court's ruling in *Shelton*. At the time of the decision, sixteen states did not provide counsel for a defendant facing the threat of imprisonment.

Carrie A. Schneider

See also: Right to Counsel; Sixth Amendment.

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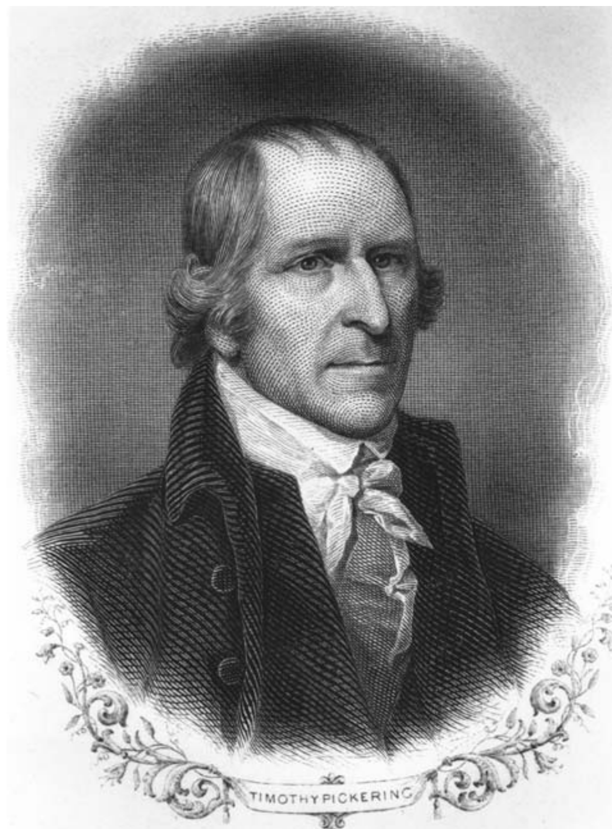
Alien and Sedition Acts (1798)

During an undeclared war with France over violations against American shipping, the Federalists passed four laws in 1798 to weaken and silence the Republican opposition party. Had the first governing party of the United States been successful in using these Alien and Sedition Acts against its opponents, the experiment of self-government in the United States, so eloquently advocated by Thomas Jefferson, might have disintegrated into tyranny by a minority.

In the late 1790s, the Federalists regarded the Jeffersonian Republicans as a subversive faction, likely to betray the republic to the French. At the time, Europe was under French hegemony, with Britain in danger of defeat. A wave of paranoia regarding possible subversives spread through America, centering particularly on immigrants, who gravitated to the Republicans. At the same time, some Federalists calculated that they could use the hysteria to eradicate their political enemies.

Secretary of State Timothy Pickering and President John Adams were among the leading champions of the proposed legislation, although Adams never advocated the use of the laws for partisan purposes. The Federalists did not distinguish between liberal democrats and subversive radicals; some Federalists even advocated burning the seditious writings of Tom Paine.

The fledgling Congress passed these four acts: (1) The Naturalization Act extended to fourteen years (from five) the period of residence required before an individual could obtain citizenship; it was repealed in 1802. (2) The Alien Enemies Act was never in effect, since Congress did not declare war against France. However, some apprehensive aliens left the United States or declined to immigrate to it. (3) The Alien Friends Act was a temporary peacetime act (in effect two years, it expired at the end of Adams's presidency) that capitalized on the fear of Jacobins (radicals who supported the 1789 French Revolution), spies, foreign agents, vagabonds, stereotypical and hated "wild Irish," and so on. The chief executive could order the deportation of any foreigner whom he judged was dangerous to the peace and safety of the United States. (4) The Sedition Act ("An Act for the Punishment of Certain Crimes") was aimed at "domestic traitors" and "internal enemies" and mandated fines or imprisonment for anyone who slandered the government, the Congress, or the president. Its more outrageous provisions, however, were struck out; deleted, for example, was a provision that any American citizen convicted of giving aid and comfort to the enemy would incur the penalty of death. (After the 1800 election, the lame-duck Federalists tried unsuccessfully to reenact it.)



Secretary of State Timothy Pickering and President John Adams were among the leading champions of the proposed legislation that became the Alien and Sedition Acts of 1798. *(Library of Congress)*

Jeffersonian Senator Albert Gallatin of Pennsylvania asked: "What is a false, scandalous, and malicious libel?" In none of the sedition trials was truth suc-

President John Adams was accused of supporting the Alien and Sedition Acts in order to silence his political opponents. *(Library of Congress)*

cessfully presented as a defense. Jefferson, the country's vice president, and James Madison, cofounder of the Republican Party but not at the time in public office, ghostwrote the Kentucky and Virginia Resolutions declaring the four laws unconstitutional and urging states to "interpose" themselves against them.

Selective prosecution on the basis of party and ideology was the norm. In Philadelphia, for example, the Republican *Aurora* was investigated but not the Federalist *Gazette of the United States*, which had also abused its political enemies. Adams protected scientist Joseph Priestley from deportation by his zealous secretary of state, Pickering, but Adams was willing to crack down on another scientist, Pierre Dupont de Nemours. The law was used to punish attacks on the president's reputation but not to punish verbal and written abuse of Vice President Jefferson. When the Hamiltonian Federalists attacked President Adams in 1800, they were committing the very offense they had prohibited, and they did so with at least as much vindictiveness as had resulted in prosecution of Republicans. (Hamilton complained about Adams's "disgusting egotism," "distempered jealousy," and "ungovernable indiscretion.")

About twenty-five persons were indicted under the Sedition Act, and of these about a dozen were brought to trial (including journalists William Duane, Thomas Cooper, and James T. Callender). Benjamin Franklin Bache, publisher of the *Aurora,* was accused of being a hireling and in correspondence with the despots of France. He had printed embarrassing documents and defamed Federalists, but yellow fever took his life before he could be prosecuted for sedition. His assistant, William Duane, continued the *Aurora* and was charged.

One of the first victims of the Sedition Act was congressman Matthew Lyon of Vermont. His imprisonment made him a martyr of freedom of the press. Lyon had attacked the Federalists as Tories and aristocrats, but he had not attacked the president, either house of Congress, or the government. Some of his alleged libels had occurred before the passage of the Sedition Act. Lyon was prosecuted during his reelection campaign. In fact, he conducted his campaign from a federal prison after being convicted.

In Dedham, Massachusetts, men were charged with erecting a "liberty pole" (a flagstaff, often topped with a liberty cap) in protest against government actions thought to be tyrannical. Crackpots and drunkards were among those charged with sedition.

U.S. Supreme Court Justice Samuel Chase displayed highly partisan conduct in impaneling juries, in interfering with defense attorneys, and in his charges to the juries in several cases, including those involving Thomas Cooper, the Massachusetts liberty pole, and James Callender.

There resulted what some in the late twentieth century termed "blowback": The attempt to suppress seditious criticism of the authorities instead served to facilitate its spread. As propagandists, the Federalists were no match for the Republicans. (One reason for the unpopularity of the Alien Act in the South was a strange belief that the president had been given authority to deport slaves.)

Hamilton was prescient. He feared that the sedition legislation threatened to strengthen, rather than weaken, the Republican "faction." John Marshall, who was elected to the House of Representatives in 1798

(and thus did not begin service until after the laws were adopted), also announced that he would have opposed as unwise the Alien and Sedition Acts had he been in Congress. (For this act of party disloyalty, he was censured by the New England extremists.)

Martin Gruberg

See also: First Amendment; Immigration; Seditious Libel.

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Alien Tort Claims Act (1789)

Passed by the first U.S. Congress in 1789, the Alien Tort Claims Act (ATCA) fell quietly into disuse for almost 200 years. Today it is the basis for some of the most important international human rights litigation in the United States, allowing aliens to file lawsuits for violations such as genocide, disappearance, and torture, regardless of where the acts were committed.

The ATCA reads, "The [federal] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Its original purpose was to give aliens access to federal rather than state courts as they sought compensation for violations of international law.

The ATCA went mostly unnoticed until 1978, when the Filártiga family discovered that a Paraguayan officer who had tortured and unlawfully killed Joelito Filártiga in Asunción was living in eastern New York. The family filed an unprecedented civil suit under the ATCA and in 1980 won damages of over $10 million, which was upheld in *Filártiga v. Peña-Irala,* 630 F.2d 876 (2d Cir. 1980).

The *Filártiga* victory spawned an entire line of international human rights litigation in domestic courts, with federal judges regularly hearing cases that spanned the globe in reach. As critic M.O. Chibundu put it, surveys of such lawsuits resemble "a current affairs topics primer of the trouble-spots of the non-Western world." From Latin America alone, cases have been brought against former officers of repressive regimes in Argentina, Bolivia, Chile, Guatemala, Haiti, Nicaragua, Paraguay, and El Salvador. Cases have addressed the Rwandan genocide, the Bosnian genocide, and mass killings in East Timor, and defendants served have included Jean-Bertrand Aristide, president of Haiti; Li Peng, former Chinese premier; Ferdinand Marcos, former dictator of the Philippines; and Robert Mugabe, president of Zimbabwe. The cases have reached back in time as well, with recent suits filed for slave-labor practices in Japan and Germany during World War II. Defendants are not always individuals: Plaintiffs have sued multinational companies, such as Unocal, Exxon Mobil, and Rio Tinto, for alleged human rights violations committed abroad.

A 1984 judgment temporarily slowed the *Filártiga* momentum. In *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 744 (D.C. Cir. 1984), a court dismissed a case brought by Israeli citizens against defendants that included the Palestinian Liberation Organization (PLO). But the judges could not reach a consensus; the case was dismissed by three contradictory concurring opinions, and the judges called both for the Supreme Court to take the case and for Congress to pronounce its will. The U.S. Supreme Court declined the case, but Congress passed the Torture Victims Protection Act (TVPA) in 1992, which provides in part: "An individual who, under actual or apparent authority or under color of law of a foreign nation, subjects another individual to torture or extrajudicial killing shall be liable for damages in a civil action to that individual.

The TVPA complements the ATCA in several ways. First, it seems to voice congressional political approval of the *Filártiga* line of cases. Second, it expands "standing" (the right to bring a lawsuit) to encompass aliens. However, its reach is less broad: Suits under the TVPA can be brought only for torture and extrajudicial killing, and it limits the category of defendants to individuals acting under color of law.

ATCA-based litigation has been subject to a great

deal of critical examination and debate. Critics argue that the cases encroach on executive prerogative in the realm of foreign policy, and that such suits risk overcrowding the dockets of U.S. courts with claims rooted in foreign political conflicts. Indeed, the State and Justice Departments of the Bush administration have interceded on behalf of several ATCA corporate defendants; the Justice Department's brief in *Doe v. Unocal,* 2002 U.S. App. Lexis 19263 (9th Cir. 2000), went so far as to call for an end to ATCA-based human rights litigation. Scholarly debate also has turned on the issues of whether the actions arise from international customary law, U.S. law, or foreign domestic law and whether it is proper for U.S. courts single-handedly to fashion international customary law. Another controversial aspect of these suits is that victorious plaintiffs rarely collect damages. Defendants often default, neither defending themselves in court nor paying out judgments.

Human rights activists argue that ATCA-based litigation prevents the United States from becoming a safe haven for individuals who commit human rights abuses abroad and then avoid justice in their own countries by immigrating. Further, the ATCA provides a forum through which victims can gain compensation and a sense of vindication. Without ATCA, many plaintiffs would have no legal recourse, as foreign courts are often reluctant to try such crimes, and U.S. courts are reluctant to claim universal jurisdiction under international law. Finally, the threat of litigation has made some multinational corporations more amenable to working with human rights groups to modify their practices.

In a sense, ATCA-based litigation has filled the same gap in human rights law that the International Criminal Court (ICC) aims to fill: It has provided access to justice for victims of heinous human rights abuses who cannot gain redress in their own countries. However, the ICC will not make ATCA-based litigation redundant, as its jurisdiction is limited to war crimes and crimes against humanity, and its focus is criminal rather than civil liability.

Alexandra Huneeus

See also: Rights of Aliens.

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Allgeyer v. Louisiana (1897)

In *Allgeyer v. Louisiana,* 165 U.S. 578 (1897), a unanimous U.S. Supreme Court established the doctrine of "liberty of contract." Like most constitutional doctrines, liberty of contract—or the *Allgeyer* doctrine, as it became known—had a lineage predating its formal articulation. And like all landmark rulings, *Allgeyer* continued to echo in subsequent constitutional rulings.

Around the middle of the nineteenth century, American judges amplified the concept of due process beyond only procedural matters to include a substantive limitation against arbitrary government action. In addition to limiting government by requiring that acts of power conformed to established rules of law—a conception of due process dating back beyond Magna Carta (1215) to a pre-Norman (1066) understanding that even the sovereign must obey a higher law—the principle of substantive due process held that certain governmental deprivations of life, liberty, and property were inherently arbitrary. The U.S. antecedents of a substantive reading of due process appeared as early as 1798, in *Calder v. Bull,* 3 U.S. 386, in which Justice Samuel Chase wrote: "There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority." Over the next half century,

the specific sources of such substantive limitations remained vague, with U.S. courts referring variously to the character of legislatures, to natural-law principles, or to the common law, primarily to insulate the private ordering of economic relations—contracts and property rights—from government regulation.

In 1856 the New York Court of Appeals overturned a statute prohibiting alcohol as being a substantive deprivation of property in violation of the New York constitution's due process clause. The Court reasoned in *Wynehamer v. People,* 13 N.Y. 378 (1856), that if "the legislature [can] make the mere existence of the rights secured the occasion of depriving a person of any of them . . . by the forms which belong to 'due process of law[,]' [then] . . . the legislative power is absolute." One year later, in *Scott v. Sandford,* 60 U.S. 393 (1857), the U.S. Supreme Court overturned the Missouri Compromise (which prohibited slavery in certain new U.S. territories), holding that the Due Process Clause of the Fifth Amendment gave substantive protection for a slaveholder's right to take such "property" (slaves) into the territories. After 1868 the focal point of substantive due process jurisprudence in the economic realm became the newly adopted Fourteenth Amendment.

Two dissenting opinions by Justice Stephen J. Field were immediate precursors to Justice Rufus Peckham's *Allgeyer* opinion. In the *Slaughterhouse Cases,* 83 U.S. 36 (1873), and *Munn v. Illinois,* 94 U.S. 113 (1877), Justice Field articulated the core notion of economic substantive due process. As he put it in *Munn,* "[L]iberty . . . means . . . freedom [of the individual] . . . to pursue such callings and avocations as may be most suitable to develop his capacities, and to give them their highest enjoyment." Twenty years later, Justice Peckham couched Field's view in terms of contracts, this time for the unanimous *Allgeyer* majority: " '[L]iberty' . . . is . . . the right . . . to be free in the enjoyment of all [a citizen's] faculties . . . and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

Justice Peckham deployed the *Allgeyer* doctrine notably—in some circles, infamously—in *Lochner v. New York,* 198 U.S. 45 (1905), to overturn a statute requiring that bakers work no longer "than sixty hours in any one week, or more than ten hours in any one day on the last day of the week." *Allgeyer* also figured in the Court's voiding of the federal Erdman Act prohibiting discrimination against union members in *Adair v. United States,* 208 U.S. 161 (1908). The specific liberty-of-contract doctrine articulated in the *Allgeyer-Lochner-Adair* decisions ultimately was rejected by the Supreme Court in 1937. Nevertheless, the underlying notion that due process imposed substantive as well as formal limitations on government remained viable. A line of cases stretching from *Meyer v. Nebraska,* 262 U.S. 390 (1923), to *Roe v. Wade,* 410 U.S. 113 (1973), and beyond were grounded in "liberty" understood as personal autonomy, government deprivations of which the Court deemed arbitrary.

James C. Foster

See also: Contract, Freedom of; Due Process of Law; Property Rights; *Slaughterhouse Cases;* Substantive Due Process.

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American Bar Association

The American Bar Association (ABA) is a voluntary membership association of attorneys. With over 400,000 members, the ABA is the largest professional association of its type in the world.

The ABA was founded August 21, 1878, by a group of 100 lawyers, judges, and law teachers out of a concern for the existing state of the profession. The populist movement of the time displayed a significant distrust toward groups such as lawyers, because they were perceived to wield class power and enjoy special privileges. This distrust resulted in minimal standards for admittance to the legal profession, with only nine states having any educational requirements at all. Bar examinations were considered meaningless. The pro-

fession had no national code of ethics. There was no national organization to serve as a forum for debate about the challenges to the profession and as a resource for information about the increasingly complex nature of legal practice.

At the initial organizational meeting in Saratoga Springs, New York, these 100 representatives of twenty-one states adopted a constitution and identified these goals: "To advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the nation, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar." Today the ABA's recommended role is to be "the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence, and respect for the law."

The ABA House of Delegates, composed of over 500 elected representatives from every state, is the policy-making organ of the ABA. The House of Delegates meets annually and has numerous committees. Between annual meetings a thirty-seven-member Board of Governors, elected by the House of Delegates, has the authority to act and speak for the ABA.

ABA activities include providing continuing legal education for attorneys, disseminating information about law and the legal system, and sponsoring initiatives to improve the legal system. For example, the U.S. Department of Education authorizes the ABA to accredit American law schools; it is the only organization that performs this task. A number of states condition admission to the bar on graduation from an ABA-accredited law school. In addition, for almost a century the ABA has adopted suggested standards of

President Herbert Hoover receiving applause before the opening session of the American Bar Association in Washington, D.C., 1932. *(Library of Congress)*

professional conduct, or codes of ethics, that serve as models for the regulatory law governing the legal profession. The current version of these standards is the *Model Rules of Professional Conduct* (2002); more than two-thirds of the states have adopted professional conduct codes based on these model rules.

One of the ABA's controversial activities has been the evaluation of the professional qualifications of persons nominated for appointment to the U.S. Supreme Court and other federal judicial positions, a task performed by the ABA's Standing Committee on Federal Judiciary. For over fifty years every U.S. president, Democrat or Republican, had consulted the committee about potential judicial nominees prior to their nomination. On March 22, 2001, the White House announced that it would no longer submit names to the committee in advance of a nomination. Nevertheless, the committee continues to evaluate judicial candidates after their names are public and provides its conclusions to the Senate Judiciary Committee, the Office of the Attorney General, and the White House.

John H. Matheson

See also: Lawyer Advertising.

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American Bar Association. http://www.abanet.org.

American Booksellers Association, Inc. v. Hudnut (1985)

In *American Booksellers Association, Inc. v. Hudnut,* 771 F.2d 323 (7th Cir. 1985), a federal appeals court invalidated an Indianapolis antipornography ordinance. The U.S. Supreme Court has ruled that obscenity is a category of expression not protected by the First Amendment. To determine if a pornographic work is obscene, courts have used guidelines articulated by the Supreme Court in *Miller v. California,* 413 U.S. 15 (1973): (1) whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a pornographic work is not obscene, it is protected speech.

Some feminists, notably Andrea Dworkin and Catharine MacKinnon, have argued that pornography should be banned because it violates women's civil rights. It degrades women by depicting them as sexual objects. It increases the tendency of men who view it to develop unacceptable attitudes toward women, to discriminate against women in the workplace, and to engage in acts of violence against women. In 1983 Dworkin and MacKinnon drafted an antipornography ordinance based on this argument.

In 1984 the Indianapolis–Marion County City-County Council passed an ordinance that outlawed pornography based on the Dworkin-MacKinnon definition, as the graphic, sexually explicit subordination of women, presenting women as sex objects or as enjoying pain, humiliation, or servility. The ordinance did not outlaw pornography that depicted women in sexual encounters premised on equality. This ordinance was far removed from the standards articulated in the *Miller* test.

The American Booksellers Association and other book, magazine, and film distributors and readers challenged the ordinance in U.S. District Court for the Southern District of Indiana on the basis that it violated their First Amendment rights. Indianapolis justified the ordinance on the theory that pornography affects men's thoughts and harms women.

The district court declared the ordinance unconstitutional because it regulated the content of speech. Such regulation can be justified only by demonstrating a compelling state interest in reducing sex discrimination, and Indianapolis did not demonstrate such a compelling interest. In 1985 the U.S. Court of Appeals for the Seventh Circuit upheld the decision of the district court. Writing for the court, Judge Frank Easterbrook called the ordinance "thought control," because it established an "approved" view of women, of how they may react to sexual encounters, and of how the sexes may relate to each other. Only those who espouse the so-called approved view may use sexual images. The appellate court said the ordinance discriminated on the basis of the content of the speech. Speech treating women in the approved way is lawful

under the ordinance, no matter how sexually explicit the work. Speech treating women in the unapproved way is illegal no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state (including local government) may not declare one perspective correct and all others invalid. In 1986 the U.S. Supreme Court declined to accept the case for review, and the standards in *Miller v. California* continue to govern in this area.

Judith Haydel

See also: Miller v. California; Obscenity; Pornography.

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American Civil Liberties Union

The American Civil Liberties Union (ACLU) is a private, nonpartisan organization that litigates cases and lobbies for the defense of civil liberties throughout the United States. As either an amicus curiae (friend of the court) or in its capacity as directly representing litigants, the ACLU has been one of the most successful and influential groups in America defending First Amendment, criminal due process, and equal protection rights.

Founded in 1920 by Roger Baldwin, Crystal Eastman, Albert DeSilver, and others to protest against the government's crackdown on dissenters during World War I, the ACLU defines itself as the guardian of American liberty and individual rights. In its eighty-plus years of existence, the ACLU has sought to defend the Constitution and the Bill of Rights (the first ten amendments to the Constitution) primarily through litigation, but it has also employed lobbying at the state and federal level and used educational programs to further its mission.

Throughout its history, the ACLU has been involved in some of the politically and constitutionally most important cases in America. In 1925 it employed attorney Clarence Darrow to defend a Tennessee high school teacher who defied state law and taught the theory of evolution. In what became known as the "Scopes monkey trial," Darrow and the ACLU squared off against famous orator-lawyer William Jennings Bryan in one of the most dramatic trials in history. Although losing at the trial level, eventually the defendant John Scopes was acquitted of violating the law.

In the 1940s, the ACLU challenged the government's relocation and internment of Japanese Americans in *Korematsu v. United States*, 323 U.S. 214 (1944); in 1954 it joined the challenge to school desegregation that led to the decision in *Brown v. Board of Education*, 347 U.S. 484 (1954) declaring that type of segregation unconstitutional; and in the 1950s it litigated on behalf of the political rights of individuals, challenging efforts to persecute Communists. Over time, the ACLU has been involved in defending abortion rights, as in *Roe v. Wade,* 410 U.S. 113 (1973); privacy and gay rights, as in *Romer v. Evans,* 517 U.S. 620 (1996); and free speech rights, as in *Texas v. Johnson,* 491 U.S. 397 (1989) (the right to burn a flag). Finally, the ACLU has brought many cases defending criminal due process rights while also opposing the death penalty.

Currently, the ACLU has over 300,000 members, with 150 affiliates in all fifty states, as well as national offices in Washington, D.C., and New York City. The organization handles more than 6,000 cases per year.

David Schultz

See also: Ashcroft v. American Civil Liberties Union; First Amendment; *Texas v. Johnson; West Virginia Board of Education v. Barnette.*

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American Nazi Party

The American Nazi Party (ANP) was significant both historically and politically. It was best known in the late 1950s and into the 1960s for arguing against extending civil rights and liberties to nonwhites and Jewish persons in the United States. Although most Americans view the acts committed under Nazi Germany's regime as among the most reprehensible ever recorded, many are unaware of activities that supported Nazi objectives in the United States.

The ANP existed from 1958 to 1967, but its roots were evident as early as the 1920s, and its progeny, groups identified as neo-Nazi, are still very active today. The ANP contended that Jews seek world domination and the social, economic, political, and biological destruction of white persons. Consequently, whites must take drastic measures to defeat the Jewish threat. A brief review of the earlier Bund movement provides background for understanding the development, growth, and demise of the ANP.

From 1924 to 1941, the Bund movement became the initial Nazi movement in the United States and disseminated Adolf Hitler's National Socialist ideology to America. The movement received financial support from Germany once Hitler (pictured) was named chancellor in 1933.
(Library of Congress)

THE EARLY NAZI MOVEMENT IN AMERICA

The United States received nearly 430,000 German immigrants between 1919 and 1932, according to Sander Diamond, and during the 1920s, many of them formed organizations in their new country that supported the views and political objectives of an ascendant Adolf Hitler in Germany. In 1920, Hitler founded the National Socialist German Workers Party, which became known as the Nazi Party.

After World War I, Germany faced significant economic pressures in part due to the reparations demanded by the Treaty of Versailles. Hitler argued that conspiring Jews and Communists caused Germany's problems, and he attracted supporters because of the chaotic and uncertain conditions that prevailed. As a result of Hitler's effort to gain control of the German government in 1923, however, the Nazi Party was banned; Hitler was subsequently convicted of treason and incarcerated briefly, before being released in 1924.

Some Germans who came to America during this period were Nazi sympathizers. They formed pro-Nazi organizations—for example, the Teutonia Association, the Friends of the New Germany, or the American German Bund—known collectively as the Bund movement (a federation or union). The Bund movement subsequently received financial support from Germany once Hitler was named chancellor in 1933. From 1924 to 1941, it became the initial Nazi movement in the United States and disseminated Hitler's National Socialist ideology to America. With some modifications in ideology, the Bund movement was able to exploit America's racial problems. Its tenets included (1) Aryan persons (Caucasians of "pure" blood) are superior to non-Caucasians; (2) world Jewry is the archenemy of Aryan peoples; (3) Jews are inherently evil and seek to install communism globally; (4) Jews will destroy all other groups to ensure their political objectives and world domination; (5) Jews use blacks and other racial minorities to decimate America—particularly Aryan society; thus (6) Jews and racial minorities are responsible for all of the social and economic problems in America.

The Bund movement failed because it never drew significant numbers of native-born Americans; participants reportedly never exceeded 25,000. It fell under suspicion and was identified as an un-American organization as interwar relations between the United

States and Nazi Germany became increasingly strained.

THE AMERICAN NAZI PARTY

As the Bund movement languished, Nazism fell dormant until U.S.-born George Lincoln Rockwell reintroduced it. In an ironic twist, Rockwell fought against Germany in World War II, then subsequently established the first postwar neo-Nazi organization in America in 1958.

Rockwell's childhood included early exposure to anti-Semitic and other intolerant attitudes. After his discharge from military service and several failed attempts at various occupations, Rockwell became more involved in right-wing political causes. He contributed to the formation of the National States Rights Party in Georgia, which propagated an anti-Semitic and racist platform. By 1958 he identified himself as a Nazi and formed the American Nazi Party in Arlington, Virginia. The ANP, not unlike the Bund movement, adhered to Hitler's National Socialist ideology.

National Socialism contends that race determines an individual's natural abilities and that natural law identifies a racial hierarchy. National Socialists thus believe that Aryans have greater abilities than non-Aryans. Also, the well-being of one's racial group must be a greater priority than one's individual aspirations.

Based on this premise, the ANP promoted the following concepts: racialism, white power, anti-Semitism, and the necessity of eliminating Jews, homosexuals, "race-traitors," and nonwhites. This elimination must occur politically—if not physically through genocide—because the Jewish race conspires to subjugate whites worldwide by using nonwhite races. In 1967, Rockwell changed the name of the ANP to the National Socialist White People's Party (NSWPP) in order to "Americanize" its image. Rockwell also introduced the term "white power" in a book posthumously published in 1972.

The Nazi movement in the United States under the banner of the NSWPP best articulated its position regarding civil liberties in its twelve-point program. It included the demand that citizenship and its attendant rights be limited to non-Jewish whites "who prove themselves worthy of it."

Rockwell employed a simple formula to attempt to build the ANP: Agitate a targeted group; provoke an aggressive response; draw media attention; and see some growth in membership. However, as with its predecessor Bund groups, the ANP failed to thrive due to its inability to make its ideology attractive to mainstream American politics. ANP membership never exceeded 200 persons.

Rockwell was eventually assassinated by one of his own lieutenants in August 1967. Nevertheless, the NSWPP continues to be active more than thirty years after Rockwell's death. Nazis sometimes become embroiled in controversies relating to the First Amendment, as when they attempt to march without permits or display Nazi symbols like the swastika in public.

Carolyn Turpin-Petrosino

See also: Smith v. Collin; Symbolic Speech.

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Americans for Democratic Action

The founding of Americans for Democratic Action (ADA) in 1947 nearly coincides with the advent of civil liberties as an issue that can be clearly demarcated with respect to voting in Congress. Aage Clausen, who pioneered the study of issues that have produced cleavages in Congress, pegged 1949 as the first year that such cleavages could be identified.

Among the ADA's founders were Chester Bowles, Eleanor Roosevelt, and Joseph L. Rauh Jr., the famed

civil rights lawyer. Many of the founders were attacked for their so-called liberalism. Bowles, who nonetheless went on to be elected governor of Connecticut, was attacked for allegedly aiding Henry Wallace of the Progressive Party and being soft on Communists. Eleanor Roosevelt's husband, President Franklin D. Roosevelt, had nominated such First Amendment absolutists as William O. Douglas and Hugo Black to the U.S. Supreme Court. She chaired the panel that promulgated the Declaration of Human Rights (1948) for adoption by the United Nations, and she was frequently vilified for her friendship with African Americans and her advocacy of civil rights.

The late 1940s was an inauspicious time for civil liberties in light of the advent of the Cold War. President Harry S Truman had established an Employee Loyalty Program in response to attacks that his administration contained "subversives." Moreover, the successful Republican national campaign in 1952 highlighted fears of communism both at home and abroad. Complaints abounded of injustices in the Employee Loyalty Program with its plethora of security boards passing judgment on the loyalty of federal employees and reinforcing the concept of "guilt by association" in the United States. Joseph L. Rauh Jr., who chaired the executive committee of the ADA, decried that people accused of disloyalty were not allowed to confront their accusers.

Francis Biddle, who had served as one of Franklin D. Roosevelt's attorneys general, sent a memorandum to President Truman stating that an executive order he had issued April 21, 1951, exacerbated the situation by allowing the dismissal of federal employees if there was "reasonable doubt" as to the person's loyalty. Despite President Truman's empathy for the workers, Biddle believed that a "witch-hunt" would likely ensue.

Over the years, the ADA became tantamount to a faction of the Democratic Party, historically the more heterogeneous of the two major parties, that promotes implementation of the party platform. The group develops measures of liberalism for votes in Congress and grades members accordingly. The organization continues to voice concern for the maintenance of civil liberties and to support candidates who favor such freedoms.

Henry B. Sirgo

See also: Democratic Party.

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Americans United for Separation of Church and State

Originally called Protestants and Other Americans United for Separation of Church and State, the organization Americans United for Separation of Church and State was founded in 1947 in response to the decline of Protestant power in the United States as the Catholic Church pushed for greater aid to parochial schools and American ties, formal or informal, to the Vatican. The organization dropped the "Protestant and Other" portion of its original name in 1972, reflecting its expansion into all issues concerning church and state, not just those affecting Protestantism. This group blended a number of distinct religious, fraternal, and educational groups, as well as liberal, conservative, and fundamentalist leaders. Often called simply Americans United (AU), it maintains close ties with various groups to this day and provides a network between important individuals and

groups interested in church-state separation. It has expanded to include local chapters in twenty-nine states.

Its only founding principle, as set forth in its manifesto, is to ensure the maintenance of the constitutional guarantee of the separation of church and state, which the courts have found is mandated by the First Amendment. This separation is considered to be a safeguard of religious liberty to all people and all churches. The group's objective is to ensure that the provision forbidding Congress from making a law "respecting an establishment of religion" remains clear and strictly enforced by the U.S. Supreme Court. Members take a strictly separationist viewpoint, in that they believe that both political and religious institutions function better the less they are entangled with each other. In that belief, they have fought the funding of faith-based initiatives, prayer in public schools, school vouchers, the public display of religious symbols, and the teaching of creationism or "intelligent design" in public schools.

The AU pursues a number of strategies of advancing strict separation. It is a major player in the state and federal courts on the church-state issue as it initiates lawsuits; provides legal counsel and support, including legal briefs; and partners in joint lawsuits. Also, through grassroots local, state, and regional chapters, the group monitors church-state interactions throughout the country. It addition, it advocates its separation philosophy to the public through numerous media outlets, lobbies on the issue in state legislatures and the U.S. Congress, and publishes a monthly journal on the issue called *Church and State*.

The organization may be best known for its participation in major church-state cases such as *Lemon v. Kurtzman,* 403 U.S. 602 (1971), among others, but members also collect information and advocate the constitutional rights of individuals outside of the courtrooms through nonadversarial means. To this end, its legal department identifies potential constitutional violations and engages in letter writing, phone calling, and informal advocacy. Aside from playing an advocacy role in the many court battles that shape church-state law, Americans United also ensures that where a strong constitutional precedent for separation exists, it is respected on the local, state, and national level. This nonadversarial program represents a novel way of ensuring the protection of rights and is but one example of how Americans United fights for the strict separation of church and state on all levels, including courts, legislatures, and public opinion venues.

James F. Van Orden

See also: Establishment Clause; Separation of Church and State.

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Amicus Curiae

Amicus curiae (Latin, meaning "friend of the court") is a term used for written legal arguments (called briefs) filed by persons and organizations not a party to a case before the U.S. Supreme Court but who nonetheless seek to influence the justices' decisions. The dramatic growth in the past several decades of the number of amicus curiae briefs filed with the Court is among the most remarkable historical changes the justices have encountered in the decision-making environment. Although Supreme Court rules place some restrictions on the submission of amicus briefs, these documents are filed in approximately 90 percent of all cases granted plenary (full) review by the justices. Not surprisingly, landmark civil liberties

cases that trigger intense ideological debate—such as *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989), involving abortion restrictions, and *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200 (1995), dealing with minority contracting—also generate disproportionate numbers of amicus filings. Moreover, judicial scholars report that amicus curiae briefs, especially those submitted by the U.S. solicitor general on behalf of the federal government, are an important source of information for the Court and may inform the justices' decision-making practices.

What, then, might a "friend of the court" wish to accomplish in submitting written arguments in a case to which that "friend" is not a party? Persons or organizations submitting amicus curiae briefs hope to impact the business of the Supreme Court in one of two ways. First, a party filing an amicus curiae brief may seek to influence the justices' decisions concerning whether to grant or deny a request for issuance of the writ of certiorari, the document requiring that the record of lower-court actions in a case be sent to the Court for complete review on the merits. In this sense, parties seek to influence which cases the Court ultimately decides. Second, an amicus curiae brief may be filed by a party seeking to shape the justices' final decision in a case and the content of the written opinion(s) the Court issues following that final decision. In short, parties often seek to shape the content of the law by providing the justices not only written legal arguments but also sociological data, technical information, or scientific insight. Legal scholars Joseph Kearney and Thomas Merrill have noted that amicus filings are significant factors shaping the decisions of Supreme Court justices, and parties submitting briefs encounter success in patterned, predictable ways.

Court rules specify the circumstances under which amici (plural "friends") briefs are permitted. Supreme Court Rule 37 provides that amicus curiae briefs may be submitted when all parties to the suit consent. Absent the consent of one or more parties to the suit, an organization wishing to submit an amicus curiae brief may petition the Court for permission to submit despite objections from the litigants. According to political scientists Gregory Caldeira and John Wright, on only rare occasions does the Court deny amicus participation to a petitioning organization.

Rule 37 recognizes the special place of government organizations in the life of the Supreme Court. The rule allows the U.S. solicitor general to submit an amicus brief in any case before the Court even in the absence of the litigants' consent and without going through the process of obtaining the justices' permission. The same principle holds for all federal agencies, each of the fifty states, and all municipalities within the political boundaries of the United States. Frequently, the Court invites amicus participation from the U.S. government. The effect of Rule 37 and the solicitor general's amicus participation is that the federal government's interests are a consistent element of the information available to the justices in selecting cases for review and deciding cases on the merits.

Considering the Court's heavy caseload and the demands of writing opinions, what motivates justices to spend the additional time and effort required to weigh the information presented in amicus briefs? Political scientists Lee Epstein and Jack Knight researched the motivational factor and found that the justices seek to render decisions that will endure the scrutiny of the president, other members of the executive branch, and Congress. Further, the justices know that their decisions, like all instances of policy making, must survive in an interinstitutional environment where officials who oppose a Court decision may attempt, either legislatively or via executive action, to undo the Court's work. Thus, according to Epstein and Knight, the justices act strategically, using the information presented in amicus curiae briefs to effectuate decisions that will endure the rigors of the American system of separation of powers (legislative, executive, judicial). In short, the justices see amicus curiae briefs as a source of information useful in advancing their desired policy outcomes. In this sense, the arguments and information contained in amicus curiae briefs may be important factors shaping the content of substantive policy debate among Supreme Court justices.

Because amicus curiae briefs are so influential, consistently high amicus participation rates reflect that the business of the Court, often regarded as the province of the legal and political elite, is today a policy-making arena markedly open to interest-group participation. The effect of this openness, however, is to generate significant competition among the thousands of organized amicus participants, a system that likely favors groups possessing the most highly

regarded resources for appellate advocacy—expertise and experience.

Questions regarding the influence of amicus curiae briefs on Court behavior are important targets of scholarly activity. Furthermore, the impact of amicus participation on case outcomes is, and will likely remain, a point of contention for Court observers. What is certain, however, is that the sheer volume of amicus filings with the Court is consistent with the view that the justices occupy a principal station in American politics and that amicus curiae briefs comprise a key pathway for interest-group participation in the public policy process.

Bradley J. Best

See also: Solicitor General; Writs of Certiorari.

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Amish

The Amish are an ultraorthodox Protestant religious group that has been involved in several important U.S. Supreme Court cases regarding the religious freedom guaranteed by the First Amendment to the Constitution. The Amish are an agrarian and devoutly religious sect who have sought the Court's protection when their unique religious beliefs have conflicted with majority-imposed laws.

In 1938, in footnote four of the decision in *United States v. Carolene Products Co.,* 304 U.S. 144 (1938), Justice Harlan F. Stone urged a shift in the Court's focus from social and economic policy to, among other things, the special protection of "discrete and insular minorities" against the majority-led political process. The Amish epitomize this notion of a "discrete and insular minority."

The Amish first arrived in America in colonial times, as they fled religious persecution in Europe. They lead an insular lifestyle by attempting to remain separate from society at large and rejecting modern technology, and religion defines all aspects of their way of life. A very close-knit sense of community is another trademark. To become a member of the Amish church, one must choose to be baptized at age eighteen. Before this crucial decision, children are under parental control. Parents inculcate offspring from an early age with the social ways of the Amish to preserve and perpetuate their unique heritage.

A governmental threat to this parental power led to *Wisconsin v. Yoder,* 406 U.S. 205 (1972). Wisconsin enacted a law requiring that children attend school until age sixteen, a provision that clashed with the Amish practice of providing education only up to eighth grade and then enrolling children in apprenticeship programs. The question facing the Supreme

Amish children reading their lesson in a one-room schoolhouse. Amish religious beliefs have caused the group to be involved in several important Supreme Court cases, most notably one involving state-imposed educational laws. *(Mel Horst Photography)*

Court in *Yoder* was whether a minority should be exempted from a law of general applicability when the law violated their religious beliefs. The court sided with the Amish, since the state law was effectively asking them "to perform acts undeniably at odds with the fundamental tenets of their religious beliefs," and so violated the Free Exercise Clause of the First Amendment. The Court seemed to side with the parents on the threats of compulsory school attendance, since it "carries with it a very real threat of undermining the Amish community and religious practice. . . . [T]hey must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region." In short, the Court employed a balancing test, weighing the state interest in compulsory education against the nature of the violation of the Amish faith. The state did not have a compelling argument that compulsory education was necessary, whereas the threat to the Amish religion was large. In short, the Amish, as a "discrete and insular minority," merited the Court's protection of their free exercise of religion.

Later, in *United States v. Lee,* 455 U.S. 252 (1982), the Court indicated that the protections afforded in *Yoder* had limits. Influenced by their deeply felt religious obligation to care for their own elders, Amish individuals refused to pay into the Social Security system or accept its benefits. The Court again employed a balancing test, this time denying the faith-based exemption, noting that such an exemption could lead to other claims of religious exemption to Social Security taxes and thus threaten the entire system. The federal government's overriding interest in maintaining the integrity of the Social Security system likely tipped the scales in its favor. The Court concluded that any hindrance to the free exercise of their religion was a justified hardship for the Amish.

James F. Van Orden

See also: Free Exercise Clause; *Wisconsin v. Yoder*.

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Anonymous Political Speech

The ability to speak anonymously about or on behalf of political issues or candidates is protected by the First Amendment to the U.S. Constitution. Under the First Amendment, Congress cannot make laws that infringe on the exercise of free speech. This right has been extended to include the freedom to express opinions and the freedom of content. The right to speak anonymously does not automatically prevent the subsequent determination of the identity of the speaker or writer. A speaker cannot hide behind the protection of anonymity to commit a fraud, engage in false advertising, violate copyright laws, or libel another person. Anonymity is often motivated by fear of reprisal, such as economic or social retaliation. Whistleblowing is sometimes referred to as political speech and is generally protected by state or federal statute. Anonymous political speech has been supported by the courts since the Constitutional Convention of 1787 and remains an issue today with the advent of communications by most citizens through the Internet.

One of the first examples of anonymous political speech in the United States was *The Federalist Papers,* a series of articles published shortly after the conclusion of the Constitutional Convention of 1787. These eighty-five essays, written by Alexander Hamilton, James Madison, and John Jay under the name "Publius," appeared in newspapers in New York state. Published anonymously, the essays sought to encourage the state's delegates to ratify the Constitution. Since Hamilton and Madison attended the Constitutional Convention, *The Federalist Papers* offered a unique insight into the history of the language of the Constitution.

The Supreme Court of the United States has consistently extended First Amendment protection to anonymous political speech. For example, in *National Association for the Advancement of Colored People* [NAACP] *ex rel. Patterson v. Alabama,* 357 U.S. 449 (1958), the Court struck down a law requiring the

NAACP to make its membership list public. Furthermore, laws cannot prohibit the anonymous distribution of political literature. In *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995), the Court struck down an Ohio law requiring that a name and business address be included on all literature distributed in an electoral context. In this case, the Court upheld the right of an individual to distribute political leaflets anonymously.

Laws or policies cannot constitutionally require advance permission from government for the distribution of political material. Requiring the distributor of political material to register unconstitutionally impedes speech. Likewise unconstitutional are laws that call for the names and addresses of the person preparing and distributing the literature. Courts recognize that fear of punishment may discourage the distribution and this in turn restricts political expression. The Court, without fail, has held unconstitutional the restriction of the freedom of expression through mechanisms such as registration.

In campaign finance matters, however, the Supreme Court has upheld disclosure laws. In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Court upheld laws requiring the disclosure of political contributions and expenditures as necessary to eliminate corruption or its appearance. Similarly, the Bipartisan Campaign Reform Act, signed into law by President George W. Bush in 2002, contained new limitations on the use of unattributed political speech. The legislation regulates the political speech of nonprofit issue-advocacy groups and provides that under certain circumstances, the names of contributors to issue campaigns must be disclosed. Groups that purchase broadcast advertising containing the name of a federal candidate in the media market where the candidate is running must also be disclosed. The disclosure requirements of this law have been upheld.

The government cannot restrict expression because of subject matter or content, a principle that especially protects political text. Protections extend to the Internet, since most people exchange ideas and obtain information online. Computer-generated images are included and thereby are considered protected speech. The content of speech, virtual or written, cannot be suppressed unless laws regulating the limits are narrowly tailored and are the least restrictive means of accomplishing a compelling governmental purpose. Compelling purposes include safety and welfare of citizens.

Whistle-blowing is speech that involves a current or former employee of a company or governmental agency providing information about its wrongdoing, typically to a regulatory agency or congressional oversight committee. These people often provide information about fraudulent acts, abuse, or misdeeds by company or governmental officials. Some states have enacted statutes to protect the reporting individual from retribution, retaliation, or reprisals. Often, these statutes allow for the continued anonymity of the whistle-blower.

Finally, the Patriot Act of 2001 allows the FBI to obtain library and bookstore records and monitor e-mail transactions without the approval of a judge. The increased use of the Internet to express political opinions, participate in polls, and comment online may cause such legislation to collide with the consistent constitutional protection of anonymous political speech.

Darlene Evans McCoy

See also: Buckley v. Valeo; National Association for the Advancement of Colored People v. Alabama ex rel. Patterson.

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ANP

See American Nazi Party

Anti-Dial-a-Porn Measures

The pornography industry relies on the right of free speech that is protected under the First Amendment, but the government has tried to curb this right in the

context of these businesses. During the 1980s several firms began offering, for a fee, sexually oriented, prerecorded telephone messages popularly known as "dial-a-porn." Other firms soon offered interactive sexual discussions with an employee; these were popularly known as "phone sex." When Federal Communications Commission (FCC) regulations failed to curb such activity, in April 1988 Congress amended the Federal Communications Act of 1934, *U.S. Code,* vol. 47, sec. 223(b). The new section 223(b) stated that whoever knowingly used a telephone to make directly or by recording device "obscene or indecent communication for commercial purposes to any person," regardless of who placed the call, could be fined up to $50,000 and imprisoned for not more than six months, or both. After parties filed litigation challenging the amendment, Congress in November 1988 enacted provisions in the Child Protection and Obscenity Enforcement Act that further amended section 223(b). The additional amendment extended the penalties of fines and up to two years' imprisonment to include proprietors and others "in control" of the firm offering the sexual messages as well as the employees responding to calls or involved in making and transmitting the prerecorded messages.

In *Sable Communications of California, Inc. v. Federal Communications Commission,* 492 U.S. 115 (1989), the U.S. Supreme Court, in an opinion by Justice Byron R. White, held that provisions of the amendments that prohibited obscene communication, as defined in *Miller v. California,* 413 U.S. 15 (1973), were constitutional. However, the Court held that the government had not shown a compelling interest sufficient to allow it to penalize all indecent commercial communications. Because the statute was not narrowly tailored to separate constitutionally protected indecent communications with adults from communications with minor children that could be regulated, in this respect the statute was unconstitutional. Dissenting in part, Justices William J. Brennan Jr., Thurgood Marshall, and John Paul Stevens argued that the provision prohibiting obscene communications was also unconstitutional because "obscenity" could not be defined with adequate specificity to prevent erosion of freedom of speech.

Subsequently, Congress again amended section 223(b) in 1989 and 1996 so that whoever knowingly used a telephone to make directly or by recording device "obscene or indecent communication for commercial purposes to any person under 18 years of age or to any other person without that person's consent" could be fined, imprisoned, and subject to civil fines. The effectiveness of this standard as a control on children's access to sexual material remains uncertain.

Richard Brisbin

See also: Federal Communications Commission; *Miller v. California;* Obscenity; Pornography.

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Argersinger v. Hamlin (1972)

In *Argersinger v. Hamlin,* 407 U.S. 25 (1972), the U.S. Supreme Court determined the circumstances in which the Sixth Amendment to the U.S. Constitution required that a court-appointed attorney be provided for a criminal defendant. The case was important for its holding that even a misdemeanor offense, provided it could result in imprisonment, warranted application of the right to counsel.

Jon Argersinger was convicted of carrying a concealed weapon and was sentenced to ninety days in jail. Argersinger was indigent and unrepresented by counsel at his trial. The Florida Supreme Court upheld his conviction, concluding that the right to court-appointed counsel extended only to offenses punishable by more than six months' imprisonment. In a unanimous decision, the U.S. Supreme Court reversed and found that Argersinger was entitled to appointed counsel at his trial.

Argersinger extended the rule in *Gideon v. Wainwright,* 372 U.S. 335 (1963), to apply to indigent misdemeanor defendants, not just those facing felony charges or more than a six-month imprisonment. Justice William O. Douglas, who wrote the Court's majority opinion, stressed that there was no historical

evidence suggesting that Sixth Amendment rights should be "retractable" in petty-offense cases. A defendant's right to be heard would be "of little avail if it did not comprehend the right to be heard by counsel." Douglas suggested that although *Gideon* involved felonies, its rationale "has relevance to any criminal trial, where an accused is deprived of liberty." The Court believed that the legal issues of a case should be the criteria for assessing necessity of counsel, pointing out that misdemeanor cases carrying lesser terms of imprisonment "may not be any less complex than cases in which lengthy sentences may be imposed." The assembly-line character of most misdemeanor proceedings also made assistance of counsel especially valuable. Beyond trial representation, Douglas saw representation for the plea process as "looming large in misdemeanor as well as in felony cases." Counsel was necessary so that the accused would "know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution." Accordingly, the Court concluded that absent a "knowing and intelligent waiver," no defendant may receive jail or prison time unless represented by counsel at trial.

The *Argersinger* Court wished to extend *Gideon* as far as possible, but such expansion raised substantial implementation issues because misdemeanor cases cause the most court congestion and "assembly-line justice" often results. *Argersinger* provided a safety valve, however, by giving trial judges the choice of appointing counsel and keeping sentencing options open or not appointing counsel and forfeiting the possibility of imprisonment. Several justices expressed concerns in concurring opinions about implementing *Argersinger*. Justice Lewis F. Powell Jr. agreed that an indigent defendant's need for counsel did not "mysteriously evaporate" when the charge was an offense punishable by six months or less. Powell would have preferred a flexible rule that did not automatically apply to all misdemeanors, and he feared that the decision could have a "seriously adverse impact upon the day-to-day functioning of the criminal justice system."

Argersinger fundamentally altered the process of justice in misdemeanor courts. Despite the implementation problems, it also prompted policy responses at the local level. Localities now provide legal services for indigent misdemeanor defendants, and many state and local governments decriminalized some traffic and other offenses in order to avoid the consequences of *Argersinger.* The Supreme Court clarified *Argersinger* in *Scott v. Illinois,* 440 U.S. 367 (1979), by ruling that state courts did not have to appoint counsel when imprisonment was authorized for a particular offense but not actually imposed.

Peter G. Renstrom

See also: Gideon v. Wainwright; Public Defenders; Right to Counsel.

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Arizona v. Evans (1995)

In *Arizona v. Evans,* 514 U.S. 1 (1995), the U.S. Supreme Court established a "good faith" exception to the "exclusionary rule," a rule designed to enforce the Fourth Amendment by prohibiting the use in court of evidence obtained by unlawful searches or seizures. This rule is intended to keep police within constitutional boundaries as they conduct their activities. The case began in January 1991 when Isaac Evans was arrested in Phoenix, Arizona, for driving the wrong way down a one-way street in front of a police station. When the arresting officer asked to see his driver's license, Evans explained that it was suspended. A computer check from the officer's car confirmed the suspension and also revealed an outstanding misdemeanor warrant for his arrest. In the process of being handcuffed, Evans dropped a hand-rolled cigarette that the officer determined contained marijuana. A search of Evans's car turned up a bag of the substance. Evans was charged with possession of marijuana.

When Evans was brought to the police station, the Justice Court explained that the misdemeanor warrant had been quashed seventeen days prior, and due to a clerical error, this had not been noted in the police

computer system. Evans argued that the possession charge should be dropped because the evidence was the “fruit” (product) of an unlawful arrest. (This principle is often referred to as the “fruit of the poisonous tree”: If the initial search is illegal [the poisonous tree], any evidence derived as a product [fruit] of the illegal search must be excluded.) The district court agreed but was reversed on appeal on grounds that the exclusionary rule did not apply to errors caused by employees not directly associated with the arresting officers or their police department. The Arizona Supreme Court rejected the distinction, and the case reached the U.S. Supreme Court, which issued its opinion March 1, 1995.

Two questions were before the Court. First, when a state-court decision fairly appears to rest primarily on federal law or to be interwoven with federal law, and when the adequacy and independence of any possible state-law grounds are not clear from the opinion’s face, does the U.S. Supreme Court have jurisdiction to hear the case? Second, does the exclusionary rule require suppression of evidence seized in violation of the Fourth Amendment when the erroneous information resulted from clerical errors of court employees? The Court ruled seven–two that it did have jurisdiction, and that because the purpose of the exclusionary rule would not be furthered by excluding evidence in this instance, the evidence could be used against Evans.

Writing for the majority, Chief Justice William H. Rehnquist explained that the Court accepted cases based on state law when the state courts acted as they did with the understanding that federal law required them to do so. This freed the state courts to act as they thought best, without having constantly to turn to the federal courts for guidance. State courts could act as laboratories for exploring the boundaries of their own constitutions, but they were not free from the final authority of the federal system when dealing with issues of U.S. constitutional interpretation.

Second, the exclusionary rule was intended to deter police officers from acting illegally in their efforts to collect evidence. In this case, the officers were acting in good faith that the information provided to them by the court was correct; excluding the evidence would not have a deterrent effect on them in future activities. Since the employees who made the error were clerical staff of the court system, they also lacked an incentive to make similar errors in the future. Because excluding this evidence would not have a deterrent effect, and the officers had collected the evidence in good faith, the Court determined that it could be used at trial against Evans.

Brian J. Glenn

See also: Exclusionary Rule; Inevitable-Discovery Doctrine; *Mapp v. Ohio;* Open-Fields Exception; Plain-Sight Doctrine.

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Arkansas Educational Television Commission v. Forbes (1998)

In *Arkansas Educational Television Commission v. Forbes,* 523 U.S. 666 (1998), the U.S. Supreme Court held six–three that a public television station did not violate the First Amendment when it decided to exclude a minor-party candidate from a televised debate in a race for the U.S. House of Representatives from Arkansas’s third congressional district. The U.S. District Court had rejected Ralph Forbes’s plea for injunctive relieve, but had been overturned by the U.S. Eighth Circuit Court of Appeals, which had remanded the case. On rehearing, the district court again upheld Forbes’s exclusion, concluding that the debate was a nonpublic forum and that the decision to exclude Forbes had not been influenced by disagreement with his views. Again, the Eighth Circuit remanded, finding that the debate was a public forum and that the assessment of Forbes’s viability as a candidate had not established a sufficiently compelling or narrowly tailored governmental interest that would justify infringing on his right of free speech under the First Amendment. This decision put the Eighth Circuit in conflict with an earlier decision of the Eleventh Circuit Court of Appeals.

In assessing Forbes’s claims, Justice Anthony M. Kennedy rejected the idea that the public-forum doc-

trine—which required that speech in such public settings must be available equally for all—should be mechanically applied to cases involving public television. Broad requirements for access would interfere with journalistic discretion. Congressional debates, Kennedy noted, were not like other forums both because the views expressed were those of the candidates and because debates were "of exceptional significance in the electoral process." This was clearly not a public forum open to all, nor was it a designated public forum. Given the number of minor-party candidates in both congressional and presidential races, requiring that such forums be open to all candidates would be onerous and could influence broadcasters to air no debates rather than to provide a forum for all. Although it was not a public forum, the station did not have "unfettered power to exclude any candidate it wished." Here, however, evidence indicated that the television station had not excluded the speaker on the basis of his views but in the belief that he had not established himself as a candidate with significant public support: "His own objective lack of support, not his platform, was the criterion." In such circumstances, his exclusion was constitutional.

Justice John Paul Stevens's dissent focused on what he considered to be the "ad hoc" and "standardless" character of the decision that the station made to exclude Forbes. Stevens also argued that because the station in question was publicly owned, the majority decision created unacceptable risks of governmental censorship. Stevens likened the powers being exercised by the station to that of a governmental official deciding whether to issue permits. Such discretion should have been curbed by written objective criteria.

The reasoning of this decision also has been applied to presidential debates. Thus, Ross Perot was excluded from the 1996 presidential debates, and Ralph Nader was excluded from the 2000 presidential debates.

John R. Vile

See also: Presidential Debates; Public Forum.

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Arraignment

The first appearance of an accused individual either in court or before a judge is typically in an arraignment, a hearing where the defendant is officially notified of the criminal charges filed by the prosecution. If the accused is arrested and incarcerated, and depending on the circumstances surrounding the case, the individual has the right to be arraigned without unnecessary delay within forty-eight hours after the arrest so that the judge can ascertain if there was probable cause for an arrest, as required by the Fourth Amendment. Whether the person is incarcerated or released on bail, the accused has the right to be arraigned.

At an arraignment, the defendant is advised of his or her constitutional rights and given the opportunity to make some very important choices. The judge may read these rights orally to the defendant or may give the accused a written form that delineates these rights. The most important rights that a defendant must consider and decide upon are the right to an attorney, the right to plead guilty or not guilty, and the right to a speedy trial by jury. If the defendant has insufficient funds to hire an attorney, the court may appoint an attorney for the accused person.

During an arraignment, an indictment is read, and the defendant is asked to plead either guilty or not guilty to the charges. The accused can also plead no contest to the charges, which is legally the same as a guilty plea. If for some reason the accused person is not represented by an attorney, the defendant should enter a plea of not guilty. It is also the right of the accused person to refuse to enter a plea at an arraignment and ask for more time to consult with an attorney. If this is done, the judge will typically enter a not-guilty plea on behalf of the accused. In most cases when defendants waive their right to an attorney and enter a guilty plea at an arraignment, they typically do so without fully knowing their rights and without full knowledge of the consequences of a conviction. If the defendant enters a guilty plea, it is the responsibility of the judge to make certain that the person has done so knowingly and voluntarily. In that case, the judge should also be certain that there is substantial evidence supporting a conviction. When an ar-

"Images Removed Due to Copyright Issues"

raignment is concluded, the judge should set a future court date for the defendant to return for a hearing, trial, or other court proceeding, unless the defendant has expressly waived that right.

For some first-time offenses, such as drug possession in small amounts for personal use, the accused should determine if there are drug diversion programs available to attend before entering a guilty plea at an arraignment. If these programs are available in the area where the legal proceedings take place, the court can order that the accused attend and receive counseling instead of being fined or incarcerated. If a program is completed and the counsel followed, the charges may be dismissed. If the charges are not dropped, the defendant retains the right to a preliminary hearing or a trial by jury.

Alvin K. Benson

See also: Bail, Right to; Hearing; Reply, Right to; Right to Counsel; Speedy Trial, Right to; Trial by Jury.

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Arrest

"Arrest" is the governmental seizure of a person. The legal concept of "arrest" is governed primarily by the Fourth Amendment to the U.S. Constitution, to some extent by the Fifth and Fourteenth Amendments, and by certain decisions of the U.S. Supreme Court. The relevant portion of the Fourth Amendment states: The right of the people to be "secure in their persons, . . . against unreasonable . . . seizures, shall not be violated, and no warrants shall issue, but upon probable cause."

In other words, a person may not be seized or arrested by the government unless the state establishes probable cause that the arrestee committed a crime or offense. For the government to establish probable cause to arrest a suspect, either law enforcement officials must make their case to a judge that the state has probable cause to arrest an individual and get an arrest warrant from the judge, or law enforcement officers can make probable-cause determinations on their own if exigent circumstances are present—such as a crime being committed in an officer's presence. It is always better that law enforcement obtain an arrest warrant if the situation allows, as the warrant amounts to prior judicial approval of the arrest.

"Arrest" may or may not be accompanied by a statement by police that an individual is under arrest. People often associate the action of being placed in handcuffs with the action of arrest; sometimes that is the case but not always. The Supreme Court established a test for determining whether an individual is under "arrest" in *Florida v. Bostick,* 501 U.S. 429 (1991). Terrance Bostick was a passenger on a bus traveling from Miami, Florida, to Atlanta, Georgia. Police officers looking for drug couriers boarded the bus and confronted Bostick, asking to see his ticket and identification. The officers then sought consent

Street arrest for a drinking complaint. Individuals arrested for such crimes have many rights, including a right to an attorney if they cannot afford one. *(National Archives)*

to search his luggage. When officers searched his luggage, they found cocaine. Bostick was then "arrested" and charged with trafficking in cocaine.

But when exactly was Bostick arrested? Was he arrested at an earlier point in the encounter? That is exactly what Bostick argued. He claimed that the police trapped him on the bus and he had no choice but to comply with their demands; hence he was under arrest and the police did not have probable cause for the arrest and custodial interrogation. The Supreme Court announced the test to determine whether a person is under arrest as follows: "[T]he appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." The majority held that under facts like those in Bostick, reasonable individuals could not believe they were under arrest (Bostick could have terminated the encounter but did not) and remanded the case to the Florida courts for them to determine the facts and apply the legal test quoted here.

Both the Fifth and Fourteenth Amendments require "due process" before individuals can be deprived of their life, liberty, or property. The Constitution requires both "substantive" due process and "procedural" due process. This means that the probable-cause determinations and arrests and all hearings and proceedings by the state must be actually and procedurally fair. Individuals can consent to arrest if they do so knowingly, intelligently, and voluntarily.

James E. Headley

See also: Fourth Amendment; Search Incident to Arrest.

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Articles of Confederation

The Articles of Confederation was the first constitution adopted by the United States. The Second Continental Congress drafted the Articles of Confederation over several weeks after the 1776 signing of the Declaration of Independence. The articles served as the de facto constitution until full ratification in 1781. The government formed by the articles was notable for its decentralization—that is, the national government was given limited authority by the states. The states not only chose the representatives and other officials of the national government, but they also had the authority to override decisions made by the national government.

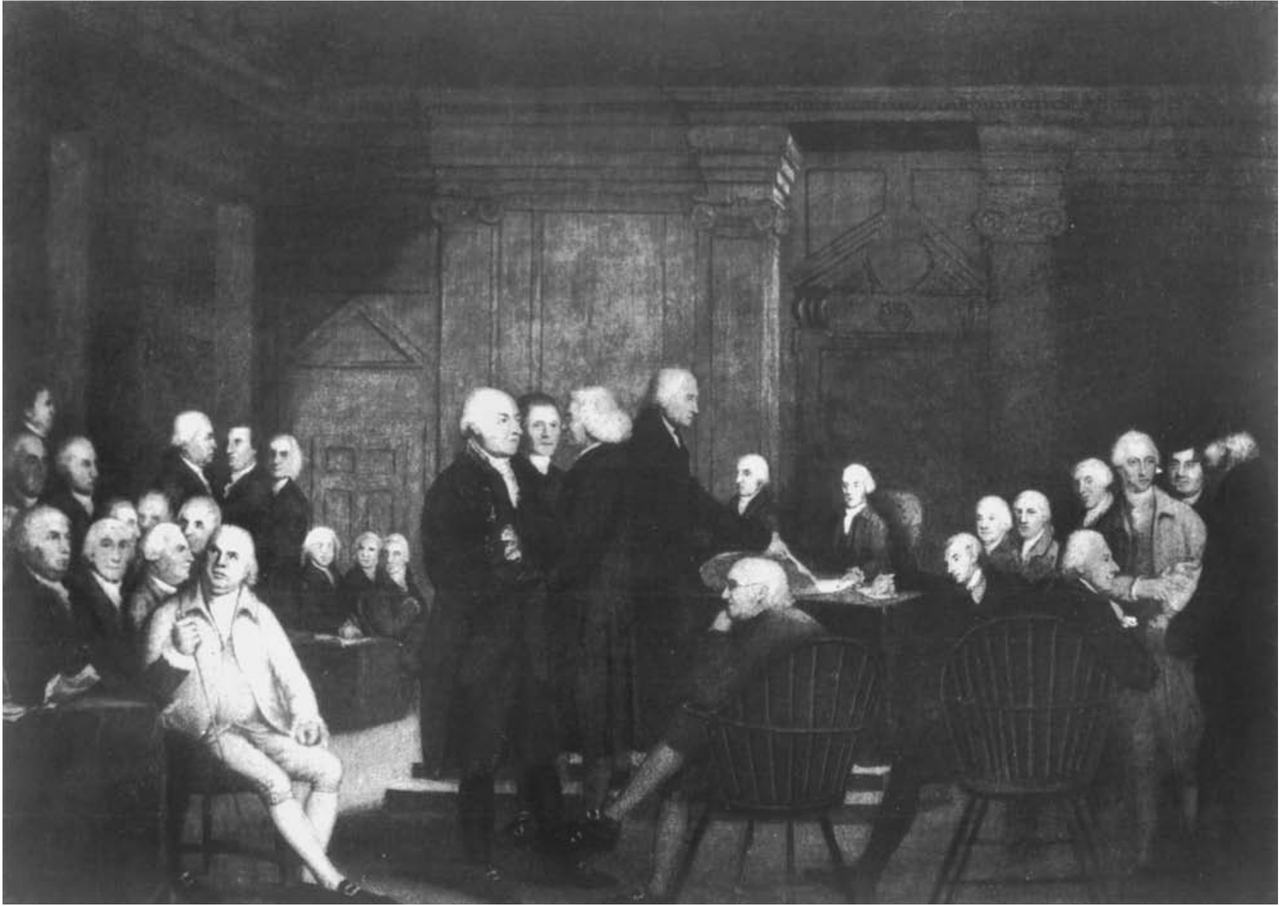
Through the articles, the duties of the revolutionary Continental Congress were transferred to the new and permanent Congress. The new Congress also assumed the form of the Continental Congress. Each state had one vote on any matter before the Congress. To be enacted, any major legislation needed nine of thirteen state delegations to vote for it. Fundamental changes to the form or function of the national government needed unanimous support from the state delegations. For example, the national government had no authority to tax citizens directly. Any change that would have enabled direct taxation could occur only through unanimous support of the delegations. The articles did not provide for either an executive or judicial branch. Rather, committees conducted almost all business of the national government with the occasional appointment of special administrators to carry out some specific tasks.

The long history of colonial home-rule, under which local government rather than the king made most decisions, and a suspicion of strong national authority led the delegates to prefer this decentralized system. As the delegates expected, independence led to war with Great Britain, but they did not expect the difficulties that arose in fighting the war as a result of the form of government they chose. Indeed, the insistence on a weak national government almost cost the new nation its independence.

The Articles of Confederation did not grant the national government authority to raise an army or levy direct taxes. Accordingly, the national government was forced to rely upon the states to recruit and prepare any troops to defend the new country against Great Britain. The military command of the national government was charged with coordinating the war effort and answered to Congress. Congress identified military needs of the country, and the military command sought to fill those needs through the states. Since the national government had no authority to compel state compliance, any state contribution, whether troops or supplies, was provided on a strictly voluntary basis. This resulted in a poorly supplied and understaffed military. Although Congress was empowered to borrow money through bonds, its inability to levy taxes made bonds risky to investors and costly to the national government; because of the uncertainty arising out of the inability to tax, the national government was forced to pay a higher yield to attract investors.

The war effort was thus hampered by two problems arising out of the structure of the Articles of Confederation. First, Congress proved to be an inept manager of the war, and there was no administrative structure in place to address the problem. Second, because the national government could not compel compliance from the states, some states withheld troops and supplies, content to "free ride" on the efforts of the other states. Other states held back full support because of the perception of and concern about this free riding.

Congress had no authority under the articles to respond in any meaningful way to the structural problems of prosecuting the war. Instead, it decentralized even more in an effort to create incentives for each state to do its fair share. Specifically, among other acts, it passed a resolution requiring states to supply and outfit their own troops directly. By summer 1780, the military situation had deteriorated so badly that even many state officials were demanding the national government take a firmer hand in managing the war. Despite the growing chorus in favor of centralization of authority, the structural design of the articles continued to impair the efforts of those who sought a more powerful national government. In 1781 a bill that gave Congress the power to tax was vetoed by Rhode Island, home to fewer than 2 percent of the population. The widespread support for reform of the articles that developed as a result of the wartime problems dissipated once France loaned the United States the hard currency necessary to mount an effective war.



The Second Continental Congress voting on independence. Delegates drafted the Articles of Confederation over several weeks after the signing of the Declaration of Independence. *(National Archives)*

France formally recognized American independence in 1778 but did not fund the war effort until late in 1781. The defeat of the British troops under General Charles Cornwallis meant the United States was indeed independent, but it also marked the abatement of reform sentiments.

As the country entered the post–Revolutionary War period, the Articles of Confederation again presented a structural impediment to development. In particular, Congress assumed a tremendous amount of debt to pay for the war. The national government owed the debt, but only the states could tax. In a manner similar to its efforts during the war, Congress assigned annual assessments to the states for the purpose of paying the war debt. The states' compliance with payment of the tax assessments was similar to their compliance with the provision of the necessities of war. States that did pay generally paid less than was assessed, and many states simply paid nothing, again content to free ride. The unanimity rule again subverted congressional efforts to pass a bill to allow the national government to tax directly when New York vetoed the bill in order to protect its lucrative port revenue.

Moreover, the articles expressly reserved to the states all powers over commerce. This meant that the national government could not negotiate trade agreements with foreign countries without approval from each and every state legislature. The states competed with each other for foreign investment; each had its own currency and could tax any commercial interest passing through its borders. As the economy continued to struggle under these structural constraints, many leaders again began to push for reform. In January 1787, Shays's Rebellion, involving strong protests by Massachusetts farmers against tax collection,

revealed how the weak national government was unable to help Massachusetts keep the peace. These events proved that the Articles of Confederation had to be reformed if the country was to persevere. When the Constitutional Convention was convened in May 1787, all the state legislatures except Rhode Island sent a delegation. The purpose of the convention was nominally to amend the articles and to resolve some commercial disputes between states, but some of the delegates, including James Madison, planned to drop the Articles of Confederation and begin anew. Madison was particularly concerned about injustices that he believed were being perpetuated in the states without adequate national supervision, and he envisioned that government spread out over all thirteen colonies would be less likely to fall prey to such violations of civil liberties. By the end of the convention, the Articles of Confederation had been relegated to the scrap heap of history, and the new Constitution was sent to the states for ratification.

Charles Anthony Smith

See also: Federalism; Federalists; United States Constitution.

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Arts and Humanities Funding

Public funding of the arts raises many constitutional issues regarding whether the government is violating the First Amendment to the U.S. Constitution in its decisions about the type of projects it chooses to fund or not to fund. At the heart of the problem is the artist's right to freedom of expression, which the First Amendment generally protects even though the expression may be offensive to some individuals. Still, critics charge that for government to fund such work inevitably pits free expression against censorship.

In 1989 and 1990, a fierce political battle raged over whether the National Foundation for the Arts and the Humanities Act of 1965 should be amended to prohibit the National Endowment for the Arts (NEA) from providing federal grants for obscene or sacrilegious artwork. The dispute emerged during spring 1989 when the American Family Association and others drew public and congressional attention to the fact that NEA funding had helped support Andres Serrano's work *Piss Christ* and an exhibit of Robert Mapplethorpe's photographs, considered by some to be obscene and homoerotic. In Congress, the chief proponent of restricting funds was Senator Jesse Helms (R-NC); he was joined by others who wanted to restrict the NEA tightly or even abolish it altogether. Defenders of the NEA argued that the vast majority of grants were unquestioned and that artists should be allowed freedom of expression in their work.

In 1989, Helms succeeded in attaching an amendment to the Interior Department's appropriations bill that would prohibit the NEA from funding obscene work. In the conference committee reconciling House and Senate versions of the bill, however, the language was watered down to say that the NEA could not fund work that, "in the judgment" of the endowment, was obscene and, when taken as a whole, did "not have serious literary, artistic, political, or scientific value." Although the bill included the first restrictions of this type on NEA funding, the compromise largely pleased the arts community. In 1990, political debate on the issue became even more intense. Despite Helms's efforts to keep or tighten the ban, the 1990 Interior appropriations bill removed the 1989 restriction and replaced it with language that shifted the burden for determining obscenity to the courts. The NEA could fund works without restriction, but if the works were later judged obscene, the artist had to return the federal grant. The two-year debate forced many people to deal with the issues of when the government should support the arts and when art crossed the line into obscenity.

The NEA was established in 1965 to supplement private support for the arts. By the late 1980s, it had awarded over 80,000 grants. The endowment's annual budget was approximately $170 million. Although not insignificant, NEA funds were less important to the overall arts community than were ticket sales, state and local government grants, and corporate donations. Still, the NEA was seen as important for its support of more controversial and less publicly successful projects and because NEA approval often led artists to receive significantly more state and corporate assistance. The NEA was not without its critics. Some saw it as an example of excessive government power in society. Other critics argued that government support for the arts was an unnecessary and unwise luxury in a time of rising government deficits. These critics became important forces when focus was put on particular controversial NEA grants.

The 1989 controversies began when Reverend Donald Wildmon, executive director of the conservative religious American Family Association, sent letters to congressional offices complaining about Serrano's *Piss Christ*. This work, showing a crucifix submerged in a container of urine, had been funded by a $15,000 grant given to the Southeastern Center for Contemporary Art in Winston-Salem, North Carolina. Soon after, attention shifted to a $30,000 grant given to the Institute for Contemporary Art at the University of Pennsylvania to help underwrite an exhibit of Mapplethorpe's homoerotic photographs. Days after focus shifted to Mapplethorpe, the Corcoran Gallery of Art in Washington, D.C., hoping to avoid controversy, canceled its scheduled showing of his work. This action created the opposite of the intended effect. It put the Corcoran at the center of the controversy and led both sides to become more vehement in their statements. Helms and others sought to capitalize on the public focus to impose restrictions. Defenders of the NEA realized that few in Congress wanted to risk a vote that could later be construed as supporting obscenity, so they tried to find compromise language that would appeal to moderates demanding some restrictions but still give the NEA flexibility.

The ensuing legislative battle was complicated by three factors. First, because the U.S. budget process includes both appropriations bills and authorization bills for the same money, frequently several separate informal groups and congressional committees were working on parallel issues and competing language simultaneously. Second, both the House and Senate ultimately had to support the new legislation but again often worked simultaneously and produced differing language. Third, because conflicts between House and Senate language are resolved in conference committees, supporters of the NEA made compromises or even tactically accepted tougher language to move the bills to the conference stage where they hoped decisions favoring moderate language would be made.

In 1989 the House took the first floor action on the issue. After hours of heated debate, the House rejected an amendment that would have significantly cut NEA funding. They settled on a carefully crafted compromise that cut $45,000, equal to the amount of the Serrano and Mapplethorpe grants, from the NEA's budget. The Senate saw less debate before voting to go further than the House by barring funding for five years to the two local groups that had sponsored the controversial work. Then, with few members in the chamber, Helms offered an amendment to prohibit any NEA funding of obscene work. The amendment was adopted by voice. In conference, Helms's tough language, as expected, was dropped and replaced with language that gave the NEA the responsibility to determine what was obscene and what had artistic merit, especially with respect to depictions of sadomasochism, homoeroticism, exploitation of children, or other sexual acts. The conference language also established a twelve-member commission to study the NEA and review grant procedures. The overall bill, including the NEA compromise, easily passed both houses and was signed by President George H.W. Bush in October 1989.

Almost as soon as the legislation of one year was enacted, debate began on wording for the next year. The controversy was kept in the headlines by public focus on more projects critics saw as offensive and by the NEA's decision to have grant applicants sign a statement that their art would be in line with the 1989 standards. In 1990 supporters of the NEA sought to avoid bruising battles by quietly working

out proposals before the debates and by shifting the burden of decision-making to the courts. Senator Orrin Hatch (R-UT) first formulated the court-centered proposal during committee work on the authorization bill. The Hatch language would have removed the 1989 guidelines and again let the NEA fund most projects. If a work was later found obscene by a court, then the artist would have to repay the grant. Hatch's ideas had some support, but the authorization bill was slow to move forward. The House therefore took the next action. After rejecting efforts to cut all NEA funding or keep tight restrictions, the House included wording similar to Hatch's in the authorization bill, but also added wording that supported artwork had to meet "general standards of decency." The authorization bill was then added to the appropriation bill. In Senate floor action, language that would have continued the 1989 policy was replaced with the Hatch language. As NEA supporters celebrated their victory, Helms again used a voice vote in an almost empty chamber to add a restriction on works that denigrated religion. This amendment was stripped out at conference. Differences between the House and Senate versions were ironed out, and the Hatch language became law on November 5, 1990. Ultimately, the NEA had almost the same discretion as before the controversy, but the two-year battle left major scars at the NEA and in the arts community.

John Dietrich

See also: First Amendment; Obscenity.

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Ashcroft, John D. (b. 1942)

John D. Ashcroft was appointed to serve as attorney general of the United States in the first George W. Bush administration, beginning in 2001. A Republican with close ties to the Christian conservative movement, Ashcroft has played a key role in the expansion of government investigative and prosecutorial powers in the wake of the September 11, 2001, terrorist attacks in New York City and Washington, D.C., and the failed attempt in Pennsylvania.

Ashcroft held numerous elected offices before his appointment as attorney general, including the posts of attorney general of Missouri (1977–1985) and governor of Missouri (1985–1993). He served one term in the U.S. Senate (1995–2001).

Ashcroft's nomination as attorney general proved controversial, with his long-standing opposition to abortion generating particular opposition. As attorney general of Missouri, Ashcroft argued for the constitutionality of Missouri's restrictions on abortion in *Planned Parenthood Association of Kansas City* v. *Ashcroft,* 462 U.S. 476 (1983). The U.S. Supreme Court struck down the state's prohibition against obtaining second-trimester abortions outside of a hospital, but it upheld several other restrictions on abortion care, including a consent requirement for minors. In 1986, Governor Ashcroft signed into law a statute containing a declaration that human life begins at conception; this declaration remains in place in Missouri today. While in the Senate, Ashcroft cosponsored a proposed amendment to the U.S. Constitution containing the same declaration and permitting abortion only when the life of the mother is at stake.

As a senator, Ashcroft also proposed eliminating the National Endowment for the Arts (NEA) and cosponsored a proposed constitutional amendment to prohibit the burning of the American flag. In addition, he served as cosponsor for the 1996 Defense of Marriage Act, which denies all federal recognition of same-sex marriages.

Since the September 11, 2001, attacks, Attorney General Ashcroft has played a key role in developing and implementing the George W. Bush administration's "war on terror." For example, he was a key player in the writing and passage of the USA Patriot

In January 2001, a coalition of civil rights, women's rights, community, and labor groups held a rally outside the JFK Federal Building in Boston to oppose John Ashcroft's nomination for U.S. attorney general. Speakers cited Ashcroft's negative record on women's rights and civil rights.
(© Marilyn Humphries/The Image Works)

Act of 2001, which significantly broadens the government's surveillance authority.

Much of this war on terror has focused on the rights accorded to prisoners, including those who are American citizens. Shortly after the attacks, Ashcroft approved a Department of Justice policy allowing the surveillance of some federal prisoners' discussions with their attorneys. Also under Ashcroft's leadership, the federal government detained at least several hundred individuals in connection with possible terrorist activities, but delayed filing charges against or even releasing the names of many of the individuals in custody. For proponents of civil liberties, these policies raised troubling issues under the Fourth, Fifth, and Sixth Amendments to the Constitution.

As the United States tries to come to grips with terrorism, the attorney general will continue to face strong opposition from civil liberties advocates. Legal challenges to many of the Justice Department's new policies and activities continue to work their way through the federal courts, and the U.S. Supreme Court will certainly be asked to decide several of these pressing issues.

Staci L. Beavers

See also: Ashcroft v. American Civil Liberties Union; Ashcroft v. Free Speech Coalition; Patriot Act.

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Ashcroft v. American Civil Liberties Union (2002)

In *Ashcroft v. American Civil Liberties Union,* 535 U.S. 564 (2002), the U.S. Supreme Court sustained an injunction against enforcement of the Child Online Protection Act of 1998, Congress's second attempt to protect children from exposure to indecent material on the Internet and the World Wide Web. U.S. citizens cherish their First Amendment right of freedom of expression. Government cannot infringe on this right unless the restriction is narrowly tailored to achieve a compelling government interest and is the least restrictive means of securing that compelling interest. This is called the "strict-scrutiny test." Government has an interest in protecting children from pornographic and indecent material, but unless the material is defined as "obscene," adults have a First Amendment right to view it. The emergence of the Internet and the World Wide Web as vehicles for providing information and entertainment makes access to pornographic and indecent material easy and anonymous for adults and children. How can government keep children from accessing pornographic and indecent material over the Internet and the Web while still allowing access by adults?

Congress's first attempt to protect children from exposure to such material online was the Communications Decency Act of 1996. The U.S. Supreme Court struck it down in *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997), and declared that Internet speech is entitled to the same First Amendment protection as are other forms of speech.

The *Ashcroft* case addressed Congress's second attempt, the Child Online Protection Act of 1998 (COPA). This law prohibited communication of "ma-

terial that is harmful to minors," and it applied to commercial material accessible to the public posted on the Web. It drew on the standards set forth in *Miller v. California,* 413 U.S. 15 (1973), to define "material harmful to minors" as determined by contemporary community standards.

The day after COPA was signed into law, the American Civil Liberties Union (ACLU) and fifteen other groups challenged its constitutionality. In February 1999, the U.S. District Court for the Eastern District of Pennsylvania granted the ACLU a preliminary injunction preventing enforcement of COPA until the case could be tried, concluding that the ACLU was likely to win at trial. On appeal, a three-judge panel of the Third Circuit Court of Appeals sustained the injunction and concluded that COPA's use of contemporary community standards rendered it unconstitutionally overbroad, because it restricted access to material adults have a right to view. The government appealed to the U.S. Supreme Court.

The question before the Court was whether COPA's use of "community standards" to identify "material that is harmful to minors" violated the First Amendment. Eight of the nine justices agreed that reliance on "community standards" to define material harmful to minors did not by itself make the law unconstitutional, but that it might be unconstitutional for other reasons. The Court sustained the injunction and remanded the case to the Third Circuit Court of Appeals. The Third Circuit also sustained the injunction, concluding that COPA was likely to be declared unconstitutional at trial because it was overbroad and failed the strict-scrutiny test. It remanded the case to the district court. In an unpublished opinion, the district court granted the injunction. On March 6, 2003, the Third Circuit affirmed the judgment of the district court, and on October 14, 2003, the U.S. Supreme Court once again accepted the case for review.

Judith Haydel

See also: Internet and the World Wide Web; *Miller v. California;* Obscenity; *Reno v. American Civil Liberties Union.*

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Ashcroft v. Free Speech Coalition (2002)

The U.S. Supreme Court upheld the Child Pornography Prevention Act of 1996 in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002). Sexual abuse of children is a serious crime. Some people sexually desire children and molest them to gratify their impulses. Other people do not physically molest children but enjoy looking at and trading child pornography. There is a constitutional distinction between child pornography and adult pornography. Adult pornography can be prohibited only if it is obscene under standards established in *Miller v. California,* 413 U.S. 15 (1973). Child pornography using real children can be prohibited whether or not the images are obscene, because the government has an interest in protecting children from being exploited by the production process and in prosecuting those who promote the sexual exploitation of children. In *New York v. Ferber,* 458 U.S. 747 (1982), the Court defined child pornography as material "that *visually* depict[s] sexual conduct by children below a specified age." In *Ferber,* the Court ruled that the First Amendment does not protect such material even when it is not obscene, because it is intrinsically related to the sexual abuse of children.

In 1996, Congress enacted the Child Pornography Prevention Act (CPPA). It prevented the production or distribution of pornographic material pandered as child pornography. It redefined child pornography to include not only pornographic images made using real children but also "any visual depiction, including any photographic, film, video, picture, or computer or

computer-generated image or picture" that "conveys the impression" that it "is, or appears to be, of a minor engaging in sexually explicit conduct." It banned sexually explicit images, sometimes called "virtual-child pornography," that appeared to depict minors but, by using youthful-looking adults or computer-imaging technology, were not produced using real children. Thus, the CPPA prohibited speech that is not a crime and did not victimize children in its production.

An adult entertainment trade association and others filed suit in U.S. District Court for the Northern District of California alleging that the "appears to be" and "conveys the impression" provisions of the CPPA were overbroad and vague, thus chilling production of works protected by the First Amendment. The district court disagreed and upheld the constitutionality of the CPPA. Plaintiffs appealed to the Ninth Circuit Court of Appeals, which held that the CPPA was unconstitutional because it was overbroad. It banned materials that are neither obscene under *Miller* nor are produced by the exploitation of real children as prohibited by *Ferber*. In similar litigation in other states, four other federal courts of appeals sustained the constitutionality of the CPPA.

On appeal, the U.S. Supreme Court held in a five–four decision written by Justice Anthony M. Kennedy that the parts of the CPPA that cover materials beyond the categories recognized in *Ferber* and *Miller* and the reasons the government offered for limiting freedom of speech could not be justified by the Court's precedents or by First Amendment law. Thus, the *Ferber* and *Miller* tests remain the governing parameters for determining constitutionally protected speech in the context of pornographic and indecent material.

Judith Haydel

See also: Child Pornography; *Miller v. California; New York v. Ferber;* Obscenity; Pornography.

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ATCA

See Alien Tort Claims Act

Atkins v. Virginia (2002)

In *Atkins v. Virginia,* 536 U.S. 304 (2002), the U.S. Supreme Court held that the execution of mentally retarded persons violated the Eighth Amendment's prohibition of cruel and unusual punishment. This provision is made applicable to the states through the Due Process Clause of the Fourteenth Amendment.

A Virginia jury had sentenced Darryl Atkins to death for abduction, armed robbery, and murder after he and codefendant William James robbed Eric Nesbitt at gunpoint and forced him to drive them to an automatic teller machine (ATM). After Nesbitt withdrew money from his account, the defendants took the victim to an isolated spot where he was shot eight times. Cameras at the ATM had recorded the transaction, and the video assisted in identifying the offenders.

At trial, both Jones and Atkins testified that the other had shot Nesbitt. Jones, who made a more coherent and believable witness, was offered a life sentence in exchange for a guilty plea and his testimony against Atkins. The jury then convicted Atkins of capital murder. During the sentencing phase, the defense called upon a forensic psychologist who testified that Atkins was mildly mentally retarded with an IQ of 59. (An IQ below 70 is the usual criterion for retardation.) The state convinced the jurors that on the basis of future dangerousness and the vileness of the crime, Atkins deserved to be put to death. A divided Virginia Supreme Court agreed.

By a six–three majority, the U.S. Supreme Court reversed the sentence. Justice John Paul Stevens wrote the Court's opinion holding that executing the mentally retarded violated contemporary standards of

decency and was therefore cruel and unusual punishment in violation of the Eighth Amendment to the Constitution. Although the Court looked to several sources to determine prevailing standards of decency, it tended to rely heavily on the actions of state legislatures. Since the last time the justices had considered the constitutionality of executing the mentally retarded in 1989, in *Penry v. Lynaugh,* 492 U.S. 302, a total of sixteen states had prohibited such sentences. Adding those plus the two states that had previously enacted such prohibitions and the twelve states that did not have capital punishment, the Court determined that a clear majority of thirty states had laws forbidding the execution of retarded persons. In the Court's view, the direction of the trend was consistent, even though, the justices noted, it ran contrary to the general popularity of anticrime laws with state legislators. They concluded that contemporary society considered retarded criminals less blameworthy than ordinary offenders.

The Court agreed with emerging public opinion that although retarded criminals should be punished, their diminished capacities—to process information, to communicate, to think abstractly, to learn from mistakes, and so on—resulted in diminished culpability. In addition, the Court considered that because retarded persons may unwittingly confess to crimes they did not commit, because they may not be able to assist defense counsel, because they may make poor witnesses, and because their demeanor may lead a jury to conclude that they lack remorse, such individuals are at a greater risk of wrongful conviction.

Having decided that the execution of the mentally retarded was unconstitutional, the Court left it to the states to develop appropriate ways of determining who would fall within that category.

Three justices—William H. Rehnquist, Antonin Scalia, and Clarence Thomas—disagreed with the majority. The dissenters disputed that there was a clear consensus against executing the retarded. They also criticized the majority justices for considering the views of professional organizations, such as the American Psychological Association, and international human rights standards in reaching their opinion.

Mary Atwell

See also: Capital Punishment; Death Penalty for the Mentally Retarded; Eighth Amendment; *Furman v. Georgia.*

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Attainder, Bill of

See Bill of Attainder

Attorney General

The individual who heads the Office of the Attorney General (AG) is the chief lawyer and law enforcement officer of the United States. The AG runs the largest legal office in the world in the service of a single client, the U.S. government. The office was created by act of Congress in 1789 and has grown enormously in power, scope, and prestige ever since.

The AG's office and those who occupy it exist in an awkward place, with overlap into the executive, legislative, and judicial departments of government. As a cabinet-level position, the AG is part of the executive branch of government, serving at the pleasure of the president and subject to removal by the president. As part of the federal bureaucracy and lacking independent constitutional authority, the AG derives basic authority from an act of Congress, and the position is filled only with the advice and consent of the U.S. Senate. To cloud matters even further, the AG is primarily a judicial officer, performing functions that most clearly are part of the judicial function. In short, the Office of the Attorney General has at least three masters in government.

The first attorney general of the United States was Edmund Randolph of Virginia. When he assumed the position in 1789, the office was lacking in prestige, power, and budget. Randolph was responsible for paying for rent, postage, and heat out of his own funds and was not provided any assistants to help with his

Edmund Randolph of Virginia became the first attorney general of the United States in 1789. *(Library of Congress)*

duties, a situation that did not change until 1853. For his relatively meager annual salary of $1,500, at least Randolph was not required to provide any records of his activities, but he had only to be available to offer legal opinions to the government when asked. No records of opinions issued by the AG's office were compiled until 1840, a half century after it began operations.

On June 22, 1870, President Ulysses S. Grant signed a bill creating the Department of Justice (DOJ), an executive agency to be overseen by the AG. This legislation created not only an administrative agency but also unified governmental legal administration under the control of a single individual, the U.S. attorney general. The newly created office was put in control of all governmental litigation and was empowered to argue any case in which the government had an interest in any court of the United States.

From only four officers in 1870, the Department of Justice has grown enormously, as has the power wielded by the AG. The AG now oversees the functioning of more than 80,000 employees. The original simple office with a broad mandate has grown to more than thirty divisions, bureaus, and offices. Its budget has ballooned from nothing when the office was created—most attorneys were paid on a part-time or contract basis through the nineteenth century—to almost $8 billion annually.

The transformation of the AG from a relatively minor bureaucrat charged simply with providing legal advice and litigating in the name of the United States to a major player in the federal bureaucracy mirrors the growth of government more generally. This transformation has its roots in the transition from a national government of limited powers to one that exercises strong positive regulatory functions. As the government has attempted to regulate additional aspects of American life, it has fallen to the DOJ and the AG to enforce those new laws.

The AG oversees some of the most recognizable and important components of the U.S. legal bureaucracy. The Federal Bureau of Investigation (FBI) was added to the DOJ in 1924 and remains one of the largest and most powerful of its subunits, operating largely independently as the country's national investigative service. The Bureau of Prisons, which operates and oversees the entire federal prison system, has been part of the DOJ since 1930. The Immigration and Naturalization Service (INS), responsible for all immigration and naturalization law enforcement, was under DOJ control from 1940 until it was shifted to the newly created Department of Homeland Security in 2003. The Civil Rights Division of the DOJ, created in 1957, is responsible for enforcing the provisions of the 1957, 1960, and 1964 civil rights legislation as well as the Voting Rights Act of 1965 and its subsequent amendments. The Drug Enforcement Administration (DEA) was added to the DOJ in 1973 to enforce narcotics and controlled-substances law.

David A. May

See also: Ashcroft, John; Attorney General's List of Subversive Organizations; Department of Justice; Federal Bureau of Investigation; Solicitor General.

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Attorney General's List of Subversive Organizations

The Office of the Attorney General maintained a document called the "List of Subversive Organizations" for use by federal and state government agencies in determining the loyalty of employees during the late 1940s. At the time, political tensions in the United States were running high amid Communist advances in Eastern Europe and China and accusations that Communist spies and traitors and other left-leaning individuals and organizations were infiltrating the country. As the Cold War deepened, these suspicions increased. Originally created in 1943, the attorney general's list was first made public in 1947, when it became an important part of President Harry S Truman's loyalty program implemented to dismiss federal employees associated with subversive organizations. Attorney General Tom C. Clark later asserted that organizations were contacted and provided the opportunity for a hearing, and that he, as attorney general (AG), personally made the final decision of whether to list each group after considering confidential material not provided to the organizations, including reports from the Federal Bureau of Investigation (FBI).

The U.S. Supreme Court reviewed the AG's list in *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123 (1951), in which the Court was asked to rule on the AG's determination that several Communist-front groups met the criteria of Executive Order No. 9835, issued by President Truman. In that order, Truman empowered the AG to inform a Loyalty Review Board of groups he determined to be "communist or subversive," and the Loyalty Review Board transmitted that same list to other government agencies for their use in determining employee disloyalty. One criterion for making this determination was whether the individuals were members of AG-listed organizations. The three groups that sued to remove their listing faced loss of membership and additional investigations of their business dealings by state agencies because of the publicity the AG's list generated.

The three challenging groups were, in fact, significantly controlled by the American Communist Party. The Joint Anti-Fascist Refugee Committee was composed of Communist activists who supported the defeated Republican forces after General Francisco Franco's victory in Spain, and the National Council of American-Soviet Friendship distributed propaganda friendly to the Soviet Union. The third group, the International Workers Order (IWO), was the largest Communist front in the 1940s; it sold insurance policies, provided cultural programming for broadcast, and financially subsidized activities by other front organizations.

The case was relatively easy for the Court to resolve, because the AG had failed to hold hearings or provide factual determinations to justify his listing of the organizations as "communist." Thus, the listings were, on their face, arbitrary. Despite this, the five justices in the majority wrote five separate opinions. Justice Harold H. Burton, joined by Justice William O. Douglas, focused on the lack of justifications provided by the AG, whereas Justice Felix Frankfurter noted that the Fifth Amendment required some form of hearing to provide due process. Justice Hugo L. Black added the objection that the list constituted an unconstitutional bill of attainder, which specifically punished individuals or groups. Justice Robert H. Jackson focused on how the AG's determination made it virtually impossible for members who were public employees to challenge their dismissals because it created a strong presumption of disloyalty. The dissent, written by Justice Stanley F. Reed and joined by Chief Justice Frederick M. Vinson and Justice Sherman Minton, did not argue the arbitrary nature of the listing, but instead asserted that the list could not be challenged because it had no legal force on its own. Despite the Court's decision that the process used to create the list was arbitrary, the IWO lost its license to sell insurance, although it had received very high ratings from an independent reporting service, and the New York State Insurance Department liquidated the IWO's assets.

The AG's list was also used by many states and private employers as a way of determining employee

Gathering of the Venetia Giulia fraternity, an International Workers Order (IWO) section composed of members of Italian heritage from the southern section of Austria, in New York City, 1943. The largest Communist front in the 1940s, the IWO sold insurance policies, provided cultural programming, and financially subsidized activities by other front organizations. *(Library of Congress)*

loyalty. Among the states, New York developed the most sophisticated program for discharging employees with subversive affiliations. New York afforded full notice and hearing before listing an organization and also provided for judicial review in the state courts. Moreover, although the state's Board of Regents, which controlled the state's public schools, adopted a rule that membership in a listed organization constituted prima facie evidence of disloyalty, employees facing termination were provided with a full hearing, including representation by counsel and judicial review. New York's process was upheld by the Supreme Court in *Adler v. Board of Education,* 342 U.S. 485 (1952).

The federal government resumed its effort to register subversive organizations with the passage of the Internal Security Act (McCarran Act) of 1950. However, the lengthy process required to prove an organization's subversive nature meant that few were ever ordered to register. Even those few who were ordered to do so fought in the courts for so long that the orders became archaic.

Daniel A. Levin

See also: Attorney General; Federal Bureau of Investigation; First Amendment; Loyalty Oaths.

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Atwater v. City of Lago Vista (2001)

In *Atwater v. City of Lago Vista,* 532 U.S. 318 (2001), the U.S. Supreme Court upheld the custodial arrest and jailing of a woman for a seat-belt violation that was punishable with only a $50 fine. Such offenders are normally released with merely a citation, and there was no apparent reason not to do so in this case. The Court's five–four decision has been widely criticized because it gives police complete discretion to make unnecessary and disproportionate arrests. Critics charge that such full discretion is an affront to the requirement of reasonableness guaranteed by the Fourth Amendment. Broad arrest powers also create a grave potential for discriminatory enforcement in light of the breadth of modern traffic laws (almost every driver violates some minor traffic rule); the search powers that accompany an arrest but are not based on reasonable suspicion; the documented tendency for some officers to engage in pretense-based investigations or racial profiling; and the absence of effective legal limits on use of pretense and profiling.

Justice David H. Souter's majority opinion admitted that the seat-belt offender's arrest was "pointless," and critics have found his reasons for upholding her arrest unpersuasive. Two-thirds of Souter's opinion dealt with history, particularly arrest rules at the time the Fourth Amendment was adopted. Scholars have seriously questioned the accuracy of Souter's history as well as its relevance—in 1791 there were no cars, detailed traffic laws, computerized driver records, or organized police departments. Moreover, the Court has not bothered before to consult history when approving major expansions of modern police powers.

In rejecting the "reasonableness balancing" argument (that the intrusiveness of the woman's arrest far outweighed the nonexistent state interests supporting arrest), Souter claimed that police officers need broad arrest powers. Yet as noted in Justice Sandra Day O'Connor's dissent, a workable rule limiting such arrests in minor traffic cases could easily be devised (and already exists in many states). Souter was also worried about civil liability of police officers. This problem, if it exists, was solved in a case decided six weeks later, *Saucier v. Katz,* 533 U.S. 194 (2001), in which the Court dismissed a suit against two military police officers for roughly handling an animal rights protester who appeared at an event where the vice president was speaking. Next, Souter asserted that arrests of the type in *Atwater* are rare. Evidence on this point is hard to find; in any case, such arrests will certainly become more common after *Atwater.*

Finally, Justice Souter implied (and other recent cases clearly demonstrate) that the Court wishes to limit further applications of case-specific "reasonableness balancing," in order to keep the law clear and maintain traditional police powers and citizens' rights. However, given the strong balance in the seat-belt offender's favor, and the serious potential for abuse of unfettered arrest powers, the Court could have ruled in her favor with little or no extension of the scope of balancing analysis. Nor would such a ruling require police and lower courts to engage in complex interest balancing. As it has done in other cases—for example, in *Terry v. Ohio,* 392 U.S. 1 (1968), approving "stop-and-frisk"—the Court could have used balancing to identify the need to reexamine police powers in a particular context, and then could have formulated a simple set of standards to govern the exercise of such powers.

Some scholars and justices have argued that cases should generally be decided narrowly, avoiding rules and principles extending far beyond the facts of the current case. *Atwater* provides a clear example of the virtues of this approach: The facts and case-specific policy arguments were compelling, and the Court's broad grant of arrest power risks many unintended adverse consequences. The Court needed only to hold that for nonjailable traffic violations, the police must show a legitimate need to arrest rather than issue a citation. Such legitimate needs (for example, to verify the driver's identity) are already well defined in model codes and in many state statutes and rules.

The problems of the Court's reasoning in *Atwater*, and the serious potential for abuse of broad arrest powers, may encourage more states to limit minor traffic arrests by statute or by criminal rule. If such limitations are not adopted, courts may be persuaded to recognize them under state constitutions.

Richard S. Frase

See also: Arrest; Automobile Searches; Fourth Amendment; Search; Seizure.

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AU

See Americans United for Separation of Church and State

Austin v. Michigan Chamber of Commerce (1990)

In *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), the U.S. Supreme Court upheld a provision of the Michigan Campaign Finance Act requiring corporations to draw from segregated (as opposed to general treasury) funds for contributions to political candidates. The state argued that such a restriction was necessary to prevent advantages accrued in the economic marketplace from overwhelming the political marketplace. Because it desired to use its general funds to purchase local media advertisements for a state candidate, the Chamber of Commerce alleged a violation of its First Amendment right to free political expression and association.

Departing from the sentiments expressed in *First National Bank v. Bellotti,* 435 U.S. 765 (1978), in which the Court resisted the supervision of corporate speech—and distinguishing the chamber's claims from those considered more recently in *Federal Election Commission v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986), in which a federal expenditure restriction on voluntary political associations was found to be unconstitutional as applied—Justice Thurgood Marshall, writing for the majority, reasoned that the state-conferred advantages bestowed upon corporations, and especially the composition and organization of the chamber's corporate form, justified such restrictions. That is, as opposed to the concerns expressed by the Massachusetts Citizens organization, an entirely voluntary group existing for exclusively political purposes, the chamber, Marshall explained, was not assembled merely to exert political influence; to the contrary, it engaged in a variety of nonpolitical activities, its members were not able to disassociate easily if they disagreed with the organization's allocation of resources, and thus it was more like a traditional business corporation. Moreover, the majority concluded, where vast amounts of money could tend to distort or corrupt the political system, the state had the prerogative to enact such regulations to preserve the integrity of its electoral process.

With customary vitriol, Justices Antonin Scalia and Anthony M. Kennedy, in separate dissents, chastised the majority for its "illiberal" approach to freedom of speech. For one thing, many individuals and groups receive some form of financial support or incentive from the state. What made corporations any different? Of greater concern, however, was the state's (and the Court's) apparent desire to maintain some degree of "fairness" in political debate—implying that too much speech, of a certain kind or from a certain type of speaker, justifies state intervention in the free exchange of ideas. Why or how could the government assume that its proprietary responsibilities extended to such normative determinations? Displaying a laissez-faire attitude toward speech regulations, the dissenters argued that citizens alone were qualified to evaluate the nature, scope, and degree of such speech.

Austin presents a series of interesting questions for understanding concerns about freedom of speech in campaign finance law. Most striking is the majority's rhetorical sleight of hand—resuscitating the concern for "equalization" declared dead in *Buckley v. Valeo,* 424 U.S. 1 (1976) yet justifying it with "anticorruption" rationale. As opposed to the *Bellotti* Court's expressed indifference toward speaker identity, the *Austin* Court fixed on the particular nature of the group involved, determining that the chamber's unregulated expression would overwhelm other "voices" and create a disjunction between the degree or volume

of expressed sentiment and the actual amount of public support for certain candidates and issues. Under such circumstances, then, to prevent domination by certain groups and to preserve the integrity of the process itself, the state had a compelling interest in maintaining such expenditure restrictions.

Brian K. Pinaire

See also: Buckley v. Valeo; First Amendment; *McConnell v. Federal Election Commission.*

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Automobile Searches

Automobile searches do not merit the same level of protection under the Fourth Amendment as do searches of persons, homes, or businesses. The seminal case with regard to automobile searches is *Carroll v. United States,* 267 U.S. 132 (1925), in which the U.S. Supreme Court articulated an exception to the warrant requirement of the Fourth Amendment for automobile searches. In this Prohibition-era case, law enforcement agents stopped the car in which George Carroll and John Kiro were driving based on their belief that the two were transporting liquor in violation of the National Prohibition Act. The agents did find evidence of bootlegging, and that evidence was used to secure their convictions. In dismissing the defendants' arguments that the search of their car ran afoul of the Fourth Amendment, the Court focused on the mobility of automobiles, which makes it easy for evidence to be moved and, accordingly, makes it impractical for law enforcement to secure a warrant. The Court subsequently further justified this automobile exception in *California v. Carney,* 471 U.S. 386 (1985), based on the reduced expectation of privacy individuals enjoy when they or their belongings are in a car.

This automobile exception does not mean, however, that police have carte blanche to conduct warrantless searches simply because the search is of a car or a person in a car. Under most circumstances, there must be probable cause to believe that the automobile in question has been involved in illegal activity, as noted by the Court in *Brinegar v. United States,* 338 U.S. 160 (1949). Accordingly, random traffic stops for license and registration checks are not permissible, the Court held in *Delaware v. Prouse,* 440 U.S. 648 (1979). Sobriety checkpoints, on the other hand, are, as the Court ruled in *Michigan Department of State Police v. Sitz,* 496 U.S. 444 (1990). Under a pilot program initiated by the Michigan state police, temporary checkpoints were set up along certain roadways. When these checkpoints were in operation, all cars passing through them were briefly stopped to ascertain whether the drivers were intoxicated. Those who demonstrated signs of intoxication were detained and given a field sobriety test. In upholding the validity of this program, the Court focused on the strong interest states have in deterring drunk driving and the limited nature of the intrusion. The Court also distinguished this case from *Prouse* by noting that the sobriety checkpoints involved stopping all cars, whereas the practice challenged in *Prouse* involved stops of cars solely at the unrestrained discretion of law enforcement officers.

Although people enjoy greater protections under the Fourth Amendment than automobiles, drivers are subject to search, without a search warrant, when arrested for a traffic offense, as the Court ruled in *United States v. Robinson,* 414 U.S. 218 (1973). Further, drivers may be arrested for even minor traffic offenses, an issue in *Atwater v. City of Lago Vista,* 532 U.S. 318 (2001). Even in the absence of an arrest, however, an officer may ask the driver of a vehicle stopped for a traffic infraction to step out of the car. In its ruling on this issue in *Pennsylvania v. Mimms,*

Police officers in action in south San Antonio, Texas, searching a car for drugs in 2003. Police have broad powers to search cars, so long as the search is incident to a valid stop or arrest. *(© Bob Daemmrich/The Image Works)*

434 U.S. 106 (1977), the Court emphasized that the intrusion entailed in such a case is minimal because the individual has already been lawfully stopped. The Court reiterated the slight nature of the intrusion, especially in comparison with the enhanced safety it affords to the law enforcement officer, and extended the permissibility of the practice to include passengers of cars stopped for traffic offenses in *Rakas v. Illinois,* 439 U.S. 128 (1978).

The Court has likewise enhanced the scope of law enforcement discretion to search containers in automobiles, though the line of precedent on this point has been confusing at times. Initially, the Court curtailed law enforcement's ability to search containers in automobiles. In *United States v. Chadwick,* 433 U.S. 1 (1977), the Court found the search of a locked footlocker discovered in a defendant's car after his lawful arrest to be inconsistent with the Fourth Amendment. In doing so, the Court said it saw no reason that a search warrant could not have been obtained, since the defendant was already under arrest and the footlocker itself was being held by federal officials. In other words, the Court declined to find exigent circumstances for the search of the footlocker that would be consistent with the rationale underlying the automobile exception in the first place. The Court went on to say in *Arkansas v. Sanders,* 442 U.S. 753 (1979), that luggage or other containers found in automobiles cannot be searched without a warrant solely on the basis of the automobile exception to the warrant requirement, and in *Robbins v. California,* 453 U.S. 420 (1981), the Court reiterated the necessity for a search warrant to search closed luggage.

Subsequently, the Court appeared to reverse course, granting law enforcement greater and greater latitude. In the 1982 case of *United States v. Ross,* 456 U.S. 798, police had been tipped off that an individual known as "Bandit," later identified as Albert Ross, was selling drugs in a specific area from a specific car, with additional narcotics in the trunk of the vehicle. After

having spotted the car in the area the informant had said it would be and finding the driver to match the informant's description, officers ordered Ross out of the car and proceeded to search both the passenger compartment and the trunk. In the glove compartment they found a gun, at which point Ross was placed under arrest. The search of the trunk at the scene turned up a closed paper bag that contained narcotics. Writing for the majority, Justice John Paul Stevens asserted that the search was permissible, saying, "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."

This ruling did not explicitly overrule either the *Chambers* or the *Sanders* cases and left the standard for container searches in automobiles unclear. The Court clarified the matter in *California v. Acevedo,* 500 U.S. 565 (1991), holding permissible the search of any containers found in an automobile when law enforcement agents have probable cause to believe contraband or other evidence will be found. Recently, the Court reiterated this position in *Wyoming v. Houghton,* 526 U.S. 295 (1999), making it clear that the permissibility of such a search extends to all containers regardless of whether the owner of such containers is the driver of or merely a passenger in the car.

Wendy L. Martinek

See also: Atwater v. City of Lago Vista; Fourth Amendment; *Pennsylvania v. Mimms.*

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B

Bad-Tendency Test

In the context of the right to free speech guaranteed under the First Amendment to the Constitution, the U.S. Supreme Court used the "bad-tendency test" from the late nineteenth century through the 1930s. This test determined the constitutionality of laws punishing individuals for advocating unpopular political change or publishing obscene material.

The bad-tendency test permitted the government to prohibit speech before it could create a real danger. The rationale was that the natural and reasonable tendency of the words or publication to result in an illegal act justified suppression of speech and publishing. The offender must have intent to bring about the illegal act, but intent could be determined by the common law principle that individuals intend the natural consequences of their actions.

England's highest court adopted a rule in 1868 banning a publication if the tendency of the publication was to deprave and corrupt the mind of the reader. U.S. state and federal courts quickly adopted the same rule.

The bad-tendency test afforded little protection to individuals publicly opposing government policies. The courts would presume the state action to be constitutional unless the state acted in an arbitrary or unreasonable fashion. Even a merely remote or conjectural danger was sufficient to meet the state's burden of proof.

Debs v. United States, 249 U.S. 211 (1919), is the classic example of the bad-tendency test at work. Eugene Debs, the leader of the American Socialist Party, was convicted for allegedly obstructing the drafting of men for service in the U.S. military during World War I. A unanimous Supreme Court ruled that Debs's antiwar speech "was so expressed that its natural and intended effect was to obstruct recruiting." Other individuals were jailed for circulating copies of the Declaration of Independence because their actions could create opposition to the war.

Justice Oliver Wendell Holmes's dissent in *Abrams v. United States,* 250 U.S. 616 (1919), was the first clear challenge to the test. The majority of the Court had upheld Congress's power to make antiwar discussion a felony, relying upon the bad-tendency test. Joined by Justice Louis D. Brandeis, Justice Holmes offered his alternative test of "clear and present danger." The clear-and-present-danger test requires a showing that the danger of speech or writing is clear and may cause damage to the country in the relatively near future.

Despite Justice Holmes's efforts to replace the bad-tendency test in *Abrams* and in the accompanying case of *Schenck v. United States,* 249 U.S. 47 (1919), courts continued to apply the more cautious bad-tendency test in cases such as *Gitlow v. New York,* 268 U.S. 652 (1925). However, the Supreme Court later adopted the clear-and-present-danger test in cases such as *Herndon v. Lowry,* 301 U.S. 242 (1937). The Court rejected the bad-tendency test when dealing with allegedly obscene publication in *Roth v. United States,* 354 U.S. 476 (1957), replacing it with a narrower test that declared a work of art obscene if, "to the average person, applying contemporary community standards, the dominant theme taken as a whole appeals to the prurient interest."

The Supreme Court specifically overruled the bad-tendency test for free speech cases in *Brandenburg v. Ohio,* 395 U.S. 444 (1969). In a per curiam (unsigned) decision, it unanimously overturned the conviction of Clarence Brandenburg for making threats against the president, the Congress, and the Supreme Court at a Ku Klux Klan rally. The *Brandenburg* test of "incitement to imminent lawless action" requires a showing that the speech can and has incited lawless behavior.

Timothy J. O'Neill

See also: Abrams v. United States; Balancing Test; *Brandenburg v. Ohio;* Clear and Present Danger; First Amendment; *Gitlow v. New York; Roth* Test.

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Bail, Right to

The Eighth Amendment to the Constitution states that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The term “bail” refers to the money or bond put up to secure the release of a person who has been charged with a crime and faces pretrial incarceration. For minor crimes, bail is usually set on the basis of a predetermined schedule. For more serious crimes, bail is set by the judge at the defendant’s first court appearance. A judge may also forgo setting bail and release a defendant on his or her own recognizance (akin to an unsecured, personal promise to appear at the next court session). If bail is set, however, the defendant may post the amount in cash, post a property bond, or, in some states, use the services of a bail bondsman. A bail bondsman posts the set amount with the court on behalf of the defendant in exchange for the payment of a nonrefundable fee.

There is no absolute right to bail granted by the U.S. Constitution. The U.S. Supreme Court has ruled that although the Eighth Amendment bars excessive bail, a court may deny bail altogether in cases involving murder or treason or when there is a danger that the defendant will flee or cause harm to others. In

Members of the media snap photos of former Tyco executive Dennis Kozlowski as he leaves federal court in New York City after posting bail, 2002. He was charged with stealing millions from the famous toy maker.
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other words, “no bail” is not the same thing as “excessive bail,” as held in *United States v. Salerno,* 481 U.S. 739 (1987). On the surface, it may seem that bail is used as a form of punishment, but that is definitely not the case. Even when a defendant is convicted, the bail amount is refunded in full provided the individual has appeared for all required court sessions.

The Supreme Court addressed the issue of right to bail in *Harris v. United States,* 404 U.S. 1232 (1971). This case involved a defendant’s application for bail pending appeal from a narcotics conviction. The Court held that although “there is no automatic right to bail after convictions, . . . the [c]ommand of the Eighth Amendment that ‘Excessive bail shall not be required . . . ’ *at the very least* obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons.” The Court cited the Bail Reform Act of 1966, which sets out the only circumstances for denial of bail, including the risk of flight and posing a danger to any other person or to the community. In *Harris,* the Court found that the government did not meet its burden of showing that compelling circumstances existed that required denial of bail. This decision represented an expansive interpretation of defendants’ rights to bail and provided guidelines for courts to follow in making their determination.

The Supreme Court specifically considered the evaluation of a defendant’s risk of fleeing in *Truong Dinh Hung v. United States,* 439 U.S. 1326 (1978). In this case, the defendant was convicted on espionage charges in the federal district court, after which the court revoked his bail because of the seriousness of the crimes and the flight risk of the defendant, who did not maintain permanent residence in the United States. The Supreme Court held that although risk of flight certainly does permit the denial of bail, the risk must be apparent, and in this case, the defendant did not show any inclination that he would flee the country. On the contrary, “applicant faithfully complied with the terms of his pretrial bail and affirmed at sentencing his faith in his eventual vindication and his intention not to flee if released on bail.” The Court once again recognized the fundamental right of defendants to bail and mandated that extreme circumstances, such as flight risk and danger to society, must be supported by evidence and not implication.

The Court further addressed the issue in *Murphy v. Hunt,* 455 U.S. 478 (1982). In this case, an individual charged with several counts of sexual assault was denied bail by the lower state courts, which relied on a provision in the Nebraska constitution that entitled all persons to bail, except those being charged with violent sexual offenses. On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed the lower court, but that decision subsequently was vacated by the U.S. Supreme Court. The Court asserted that the defendant had already been convicted on three charges by the time the Court of Appeals rendered its decision, thereby making the issue of pretrial bail moot (no longer relevant). Although the Court failed to side with the defendant in this case, it is clear from the Court of Appeals decision that the Eighth Amendment imposes stringent guidelines that must be followed in considering bail applications.

Clearly, the Court views the right to bail as a fundamental guarantee that must be protected. That guarantee, however, does not mean that bail must always be set. The decisions about whether bail is set and the amount of bail set are consequential in that defendants subject to pretrial detention may be more likely to face conviction as well as stiffer prison sentences.

Michael R. Reiner

See also: Eighth Amendment.

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Bailey, F. Lee (b. 1933)

Francis Lee Bailey is one of America’s best-known criminal defense attorneys. He was born in Waltham, Massachusetts, and was admitted to the bar in 1960 after attending Harvard College and Boston Univer-

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sity Law School. Within fifteen years he had served as defense counsel in several high-profile cases, including the Torso Murder, the retrial of Dr. Sam Sheppard, the Boston Strangler, the Great Plymouth Mail Robbery, and the trial of Captain Ernest Medina for his part in the My Lai incident in Vietnam. Characteristically, he accepted cases that attracted him by their professional challenge, public notoriety, or fat fee.

As Bailey was finishing law school in spring 1960, Boston newspapers were carrying headlines about a woman's body that had been dismembered and the head never recovered. Her husband was indicted for what became known as the "Torso Murder." Bailey, who was in the process of using the polygraph test to defend an alleged rapist, was invited to cross-examine a witness to demonstrate the unreliability of the test. His line of questioning showed the polygraph examiner had not followed procedures recommended in the machine's manual, such as not testing when the subject was suffering from a hangover and physically tired. Bailey's challenge played a major role in the acquittal.

Bailey successfully argued before the U.S. Supreme Court in *Sheppard v. Maxwell,* 384 U.S. 333 (1966), for a new trial for his client, Dr. Sam Sheppard, who was accused of his wife's murder. (Dr. Sheppard's circumstances were later made famous by the movie and television series *The Fugitive.*) In granting a new trial, the Court gave portions of the Sixth Amendment heightened importance by warning trial judges to take specific measures, such as jury sequestration, when there was a reasonable likelihood that publicity would prevent a fair trial. The original trial judge—who pur-

portedly told a reporter Sheppard was "guilty as hell"—let the media have virtually unfettered access to the jury and attorneys, giving the trial a carnival-like atmosphere. Despite the dangers of prejudicial publicity pointed out in *Sheppard,* the Supreme Court has continued to give great latitude to the press in its reporting.

The following year Bailey appeared before the Supreme Court representing Albert H. DeSalvo, dubbed "the Boston Strangler." Bailey's objective was to convince the jury—using the thirteen murders his client claimed to have committed as substantiation—his client was not guilty by reason of insanity. Experts for both sides agreed DeSalvo was mentally ill, but they differed on whether he could control his impulses. He was convicted on eight counts of a variety of charges—including assault and battery by means of a dangerous weapon and commission of unnatural acts—and sentenced to life in prison.

Three men who were suspects in an August 14, 1962, robbery of $1.5 million from a mail truck traveling from Cape Cod to Boston turned to Bailey in December 1962 to end harassment by federal officials during the investigation. The harassment included searches without warrants of homes as well as legal searches that left the homes in shambles. By the time the case came to trial in 1968, Bailey had successfully influenced public opinion with his usual polygraph tests, press conferences, and leaks to the media. Toward the end of the government's case, Bailey displayed his skill in cross-examination and essentially ended the government's case by discrediting the prosecution's "identification" witnesses. The jury deliberated less than an hour and delivered a not-guilty verdict.

Bailey ventured into the unfamiliar environment of military court-martial when he defended Captain Ernest Medina in 1971 for his role in the slaughter of women and children at My Lai, Vietnam. The polygraph test he ordered, although never introduced in court, offered mixed results. Medina had neither ordered nor implied his men should kill children and women, but he knew random killing was happening and failed to end it. Bailey earned credit for having conducted a stellar defense, which included obtaining the admission from a witness that he had told the prosecution he was willing to lie under oath. Medina was declared not guilty on all counts.

Patty Hearst, granddaughter of newspaper publishing magnate William Randolph Hearst, was kidnapped from her Berkeley, California, apartment in February 1974 by the Symbionese Liberation Army (SLA), a group of young antiestablishment and antiwar radicals suspected in several violent crimes. She participated with the group in a San Francisco bank robbery and was arrested nineteen months later by the Federal Bureau of Investigation (FBI).

With Bailey as her defense counsel, she stood trial in a federal court in 1976 for possession of automatic weapons as well as the robbery. Bailey used a "coercive persuasion" (brainwash) defense, not previously used in a civilian criminal trial. He attempted to convince the jury that the trial was not about bank robbery but, rather, dying and surviving. His inability to rattle and discredit prosecution witnesses hurt his efforts. After twelve hours of deliberation, the jury found Hearst guilty, sentencing her to thirty-five years in prison. The verdict surprised and embarrassed Bailey who, according to news accounts, acted with great arrogance throughout the trial. Twenty-two months into Hearst's prison term, the sentence was commuted by President Jimmy Carter.

Bailey had considerable success defending clients such as those described here as a result of several factors. He undertook careful investigation, prepared extensively, and often pursued a strategy of manipulating the media—a strategy frowned upon by more conservative, established lawyers. His approach, however, at times proved vital to protecting his clients from encroachment on their right to a fair trial (Sam Sheppard, the Torso Murder, Medina) and from unreasonable search and seizure (Great Plymouth Mail Robbery).

Mark Alcorn

See also: Federal Bureau of Investigation; *Sheppard v. Maxwell.*

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Baker v. Carr (1962)

Baker v. Carr, 369 U.S. 186 (1962), represents a landmark on the path to the enforcement of one of the guiding principles in American democracy: the doctrine that people have a right to substantially equal representation in state and local government. In practice, that principle has usually played out in the requirement that single-member political districts have approximately an equal number of people.

As the United States became an urban, industrial society, tension arose between rural interests and the interests of growing urban populations. A coalition of conservative rural lawmakers and the urban upper class conspired to prevent a substantial change of state legislative districts from decade to decade. To protect rural interests, state legislatures simply refused to draw new legislative districts to account for changes in population. Urban areas were growing rapidly, but rural areas were stagnant or losing population. As a result, over time lawmakers in urban areas were representing up to ten times as many people as lawmakers in rural areas.

As a population moves around, representatives in growing areas represent more people than representatives from areas where population is stagnant or decreasing. Under normal circumstances (decadal, or once a decade, redistricting), such disparity is not large enough to be a problem, but if this misrepresentation is not corrected over a number of decades, shifting population patterns can cause a significant bias in a legislature.

At a local level, this was often used as a way to deny representation to minorities, particularly urban blacks. As blacks migrated from the rural South to the urban North, black districts in minority areas swelled with population, whereas during the 1950s urban white populations were beginning a migration to the suburbs. Failure to redistrict often became a de facto means of creating underrepresentation of minorities on local city councils.

Courts were reluctant to become involved in these cases, as they were considered substantially "political" questions. By 1960, however, the U.S. Supreme Court was beginning to take an interest in overturning previous decisions in which it had denied federal jurisdiction, as, for example, in *Colegrove v. Green,* 328 U.S. 549 (1946). In 1960 a Tennessee voter named Charles Baker appealed a lawsuit against the board governing Tennessee state elections and its chair, Joe Carr. He claimed his right to equal representation was substantially violated by the failure of the Tennessee legislature to redistrict as required by the Tennessee constitution. Tennessee had failed to reapportion its legislative districts since 1900, and as a result there were substantial inequalities in the number of persons in each legislative district.

The federal appeals decision had held that Baker's argument was entirely valid, but it was not for the courts to decide political questions. Not surprisingly, the debate that ensued on the Supreme Court took on precisely this issue. Some justices, led by Felix Frankfurter, felt the subject matter was too political and best left to the Congress. Other justices, led by Potter Stewart (a former city councilman), felt that the time was long past for the problem of unequal representation to be addressed. Justice William J. Brennan Jr., backed by Chief Justice Earl Warren, successfully depoliticized the issue by applying statistical tests to the question of whether apportionment laws were constitutional.

Baker established that federal courts could take on questions of representation as they applied to the substantial equality of legislative districts. In conjunction with *Reynolds v. Sims,* 377 U.S. 533 (1964), *Baker* required state legislatures to adopt new legislative districts following the decennial census and to ensure these districts were substantially equal in population. This was applied to civic redistricting as well, forcing city councils to change their election districts to reflect population changes. Ironically, by the time the decision was enforced, the balance of power was already shifting away from the cities to the suburbs.

At the time, *Baker* was viewed by many states' rights advocates as political intervention by an activist Supreme Court. Today, it and follow-up cases are more usually seen as the Court's imposing a classic democratic concept on the political system: one-person, one-vote. To ensure that people have an equal voice in the political arena and that each voter's rights have equal protection, substantially equal legislative districts are required.

The precedent set by *Baker* would lead to a stream

of legislative apportionment cases related to minority representation, including *Thornburg v. Gingles,* 478 U.S. 30 (1986), involving one single-member and six multimember districts in North Carolina that, it was alleged, discriminated against African Americans; and *Davis v. Brandemer,* 478 U.S. 109 (1986), involving partisan gerrymandering in Indiana state legislative districts. Similarly, *Shaw v. Reno,* 509 U.S. 630 (1993), dealt with whether North Carolina's congressional districts were sufficiently compact and contiguous. *Baker* was the Court's first substantial intervention into the matter of legislative redistricting and the political process, ensuring that a key democratic ideal (substantially equal representation in the lower house) was upheld.

Tim Hundsdorfer

See also: Political-Question Doctrine.

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Balancing Test

The balancing test is a doctrine developed by U.S. and state courts to settle conflicts between the First Amendment right to free expression and association, on the one hand, and other constitutional rights and social interests, on the other. Courts have used the Due Process Clause of the Fourteenth Amendment to apply the test to state governments.

Those advocating a balance among competing interests argue that other important individual rights and social interests may outweigh the right to free expression. Protecting national security, preventing the defamation of an individual's reputation, banning the open display of obscene materials, and punishing unfair advertising are among those offsetting interests and values. As Justice Louis D. Brandeis argued in his concurring opinion in *Whitney v. California,* 274 U.S. 357 (1927), "although the rights of free speech and assembly are fundamental, they are not in their nature absolute" and thus may validly be regulated.

The balancing test was developed in the 1950s and 1960s to replace the clear-and-present-danger test. Justice Felix Frankfurter in a concurring opinion in *Dennis v. United States,* 341 U.S. 494 (1951), offered a description of the new test: "The demands of free speech in a democratic society as well as the interest in national security" are best served by the "weighing of the competing interests." The Court should weigh "the interest of government in self-preservation" against "the interest of defendants in advocating action." Justice Frankfurter asserted that the ordinary political process, not the judicial process, best protects free expression. Congress has rejected thousands of proposed bills restricting free expression, but the Supreme Court has ruled only a handful of laws unconstitutional. The Court should overrule Congress only if the balance struck by the legislature is "outside the pale of fair judgment."

Balancing was used in the 1950s to sustain congressional and state investigations into the associations and activities of individuals suspected of subversion and to sustain proceedings against the Communist Party and its members. The Court used the test to uphold speech and associational rights in cases where hostile southern states sought to intimidate civil rights groups by demanding they make their membership lists public. Similarly, balancing was applied in the late 1960s to protect the speech rights of a public employee who had criticized his employers. On the other hand, balancing was not used when the Court struck down restrictions on receiving mail from Communist countries, and it was not used in cases involving picketing, pamphleteering, and demonstrating in public places.

Justices Hugo L. Black and William O. Douglas became the best-known opponents to the balancing test. They championed an "absolutist" position, denying the government any power whatsoever to abridge speech. Absolutists feared that never knowing whether expression was protected until after a court balanced the competing interests would create such uncertainty as to have a "chilling effect" on the political activities of citizens. In the absolutists' view, the Court should create a clear-cut distinction between expression that is constitutionally protected and ex-

pression that is not. Anything labeled protected expression should have an absolute shield from government regulation.

Supporters of the balancing test argue that if courts provide absolute protection for some categories of speech, they will be weakened as political institutions. Federal courts are unelected institutions. They are deliberately insulated from the normal political means of accountability. As such they must walk a fine line: If they resist too often the efforts of electoral majorities for social change or stability, the courts' power—the power of persuasion—will dissipate. Judicial authority is a fragile one, dependent upon an audience open to reason. Should that audience perceive the courts to speak unreasonably, or if judicial solutions fail to meet pressing needs, the audience may turn away.

Balancing continues to be invoked by some Supreme Court justices. Cases such as *Brandenburg v. Ohio,* 395 U.S. 444 (1969), with its test of "incitement to imminent unlawful action," and the flag-salute cases suggest, however, that the Court is willing to place greater weight on individual expressive and associative rights than on the government interest in protecting public order.

Timothy J. O'Neill

See also: Bad-Tendency Test; Black, Hugo L.; *Brandenburg v. Ohio; Dennis v. United States;* First Amendment; Frankfurter, Felix; *Whitney v. California*.

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Baldwin, Roger Nash (1884–1991)

Roger Nash Baldwin, once described by Justice William O. Douglas of the U.S. Supreme Court as "the conscience of America," gave birth to the modern civil liberties movement in the United States. Throughout virtually the entire twentieth century, Baldwin was one of the most persistent and successful advocates for

Mr. and Mrs. Leonard Bernstein, right, present tributes from all around the world to Roger Nash Baldwin, founder of the American Civil Liberties Union, on the occasion of his eightieth birthday at a party in their home in 1964. *(Library of Congress)*

civil liberties, especially freedom of speech and other rights governed by the First Amendment to the Constitution. In the process he helped to rewrite U.S. constitutional law.

Baldwin was born in 1884 and died in 1991. His entire adult life was a testament to social justice, fundamental fairness, egalitarian politics, and an unflagging belief in the inestimable, inherent dignity of each person. An "unhappy optimist" by his own admission, Baldwin was tireless in his efforts at political organizing, as when he helped to create the American Civil Liberties Union (ACLU) in 1920 in the context of World War I. His work reflected a deep faith in American democracy and popular sovereignty, along with an abiding, healthy distrust of the structures of government and "officialdom."

A graduate of Harvard, Baldwin left Boston on the advice of Louis D. Brandeis for Saint Louis, Missouri, where he engaged in social work and liberal reform politics reflective of the progressivism of the late nineteenth and early twentieth centuries. His pacifist con-

victions were put to the test during World War I when he took part in the founding of Americans United Against Militarism (AUAM) and served time in federal prison for refusing to submit to the new selective service system.

Most of all, Roger Baldwin was devoted to American democracy, the Declaration of Independence, and an expansive reading of the Bill of Rights (the first ten amendments to the Constitution), most notably the First Amendment. A reformer with radical impulses, Baldwin played a central role in the development of First Amendment jurisprudence and helped to bring, through his political and legal advocacy, the First Amendment from paper to reality, thereby giving life to James Madison's hope that the Bill of Rights would become more than merely a "parchment barrier" to governmental misdeeds.

Baldwin retired from the ACLU in 1950 and, over the course of the next two decades, sought to expand his civil liberties work internationally by directing the International League for the Rights of Man through the auspices of the United Nations. In 1981 he received the Presidential Medal of Freedom, the nation's highest civilian award, a fitting acknowledgment of and crowning achievement for a life devoted to fulfilling the American promise of participatory democracy and freedom from oppression and exploitation.

Arguably the lone or major low point of Baldwin's career came during World War II, when the national ACLU office chose not to challenge aggressively President Franklin D. Roosevelt's decision to intern Japanese Americans after the December 1941 attack on Pearl Harbor (by Executive Order No. 9066, February 1942). Baldwin both distrusted governmental power and sought to lobby the corridors of power effectively, and like any political operative, he often made compromises in the pursuit of fundamental interests. Nonetheless, this patriarch of the civil liberties movement never wavered in his commitment to the rule of law and the principles enshrined in the Constitution.

Stephen K. Shaw

See also: American Civil Liberties Union.

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Barenblatt v. United States (1959)

Barenblatt v. United States, 360 U.S. 109 (1959), is a leading case involving the balance between the congressional power of investigation and the First Amendment protections of free expression and assembly. After witnessing the horrors effectuated by totalitarian regimes during World War II, America embarked on a crusade to promote democracy and end communism. As America waged the Cold War with the former Soviet Union, it fought the threat of communism on its own soil with the House Un-American Activities Committee (HUAC).

The House of Representatives created HUAC in 1938 to investigate the scope of Communist infiltration in America. Although the power of congressional investigation is not specifically listed in the U.S. Constitution, courts have decided that this authority furthers congressional law-making powers. The committee led numerous investigations into the private affairs of individuals suspected of being Communists, blacklisting many witnesses that it called. In 1954, HUAC subpoenaed two witnesses whose cases shaped U.S. Supreme Court doctrine concerning witness rights during congressional hearings.

John Watkins, a former labor union president, admitted his Communist affiliations when HUAC questioned him, but he refused to answer questions concerning the political affiliations of his past acquaintances. Lloyd Barenblatt, professor of psychology at Vassar College and former graduate student at the University of Michigan, refused to answer the committee's questions concerning his past political associations. Both Watkins and Barenblatt asserted that HUAC had no power to compel answers, and Congress cited both men for contempt. Only Watkins succeeded in his claims.

In *Watkins v. United States,* 354 U.S. 178 (1957), the Court, speaking through Chief Justice Earl War-

ren, limited the committee's power to investigate in favor of Watkins's First Amendment freedoms, his right to privacy, and his right to due process. The Court held that the committee failed to inform Watkins adequately about the subject of inquiry and the pertinence of its questions to that subject. Two years later, after intense public and congressional criticism of the Court's decision, it decided *Barenblatt* on First Amendment grounds. The Court, in a five–four decision written by Justice John Marshall Harlan, chose to uphold Barenblatt's conviction. It narrowly interpreted *Watkins* to determine that HUAC had fully apprised Barenblatt of the subject and pertinence of his questioning. The Court announced a new balancing test for First Amendment claims: The Court would weigh the government's security interests against the individual's rights. In this case, as in most contemporary cases challenging HUAC's investigative powers, the Court's balancing test favored the government.

Justice Hugo L. Black wrote a sharp dissent in *Barenblatt*, joined by Chief Justice Warren and Justice William O. Douglas; Justice William J. Brennan Jr. also wrote a one-paragraph dissent. Focusing on the "chilling effect" of being called before a legislative committee, Black supported Barenblatt's right to make political mistakes. Significantly, Black attacked HUAC at a time when few spoke against it for fear of being labeled Communist. Justice Black accused the government of adopting the very methods of the totalitarian regimes that it sought to combat.

Although the Court has been increasingly willing to recognize First Amendment rights, its balancing test continues to be applied to congressional investigations. Justice Black's opinion, however, stands as a testament to the value of an individual's rights to speak and to associate freely without being publicly shamed and castigated for professing beliefs that others deem unpopular.

Virginia L. Vile

See also: Balancing Test; Congressional Investigations; House Un-American Activities Committee; *Watkins v. United States*.

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Barnes v. Glen Theatre, Inc. (1991)

In *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991), the U.S. Supreme Court was called upon to determine whether Indiana's public indecency statute violated the First Amendment's guarantee of freedom of expression. Two adult entertainment establishments located in South Bend, Indiana, challenged the law. Their proprietors argued that the law ran afoul of the First Amendment because it prohibited them from presenting "totally nude dancing" and required their dancers to wear pasties and G-strings.

By a narrow majority, the Court held that the pasties and G-string restriction on nude dancing did not violate the First Amendment. The five justices in the majority, however, could not agree on a single rationale for the Court's holding. A plurality—Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor and Anthony M. Kennedy—concluded that the Indiana statute should be analyzed and upheld under the four-part test enunciated in *United States v. O'Brien,* 391 U.S. 367 (1968), for evaluating regulations of expressive conduct. In reaching this determination, the plurality noted that (1) the statute was clearly within the constitutional power of Indiana and furthered the state's substantial interest in protecting morals and public order; (2) the state's decision to protect societal order and morality by prohibiting totally nude dancing was "unrelated to the suppression of free expression" because "the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic [and] [t]he perceived evil that Indiana seeks to address is not erotic dancing, but public nudity"; (3) the pasties and G-string restriction was no greater

than essential to the furtherance of the state's interest because the "prohibition is not a means to some greater end, but an end in itself"; and (4) the statute was "narrowly tailored" because "Indiana's requirement that the dancers wear pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose."

Justice Antonin Scalia concurred in the judgment of the Court but wrote separately to emphasize his belief that "the challenged regulation must be upheld not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." Justice David H. Souter concurred as well. He agreed with the plurality that "the appropriate analysis to determine the actual protection required by the First Amendment is the four-part inquiry described in *O'Brien,*" but he rested his concurrence (which, as the most narrow opinion joining the judgment of the Court, is the controlling opinion) "not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments." Justice Byron R. White, joined by Justices Thurgood Marshall, Harry A. Blackmun, and John Paul Stevens, dissented from the holding of the Court. In their opinion, the pasties and G-strings restriction on nude dancing was a content-based regulation of expressive conduct that failed to pass constitutional muster because "even if there were compelling [state] interests [involved], the Indiana statute is not narrowly drawn."

Stephen Louis A. Dillard

See also: Nude Dancing; Obscenity; Symbolic Speech; *United States v. O'Brien.*

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Barron v. City of Baltimore (1833)

In *Barron v. City of Baltimore,* 32 U.S. 243 (1833), the U.S. Supreme Court had to decide if the Bill of Rights (the first ten amendments to the U.S. Constitution), which the federal government was bound to honor, applied to the individual states as well.

The facts in *Barron* involved Baltimore's diversion of streams in the course of road construction that had resulted in the deposit of silt in a private wharf, making it unusable. The wharf owner sued the city under the just-compensation wording of the Takings Clause of the Fifth Amendment, claiming that he should be reimbursed for the city's damage. Although he won a judgment of $4,500 at the trial court, the Maryland State Court of Appeals reversed this decision before it reached the U.S. Supreme Court.

In a unanimous decision, Chief Justice John Marshall also rejected the wharf owner's plea. He argued that the Fifth Amendment and other provisions in the Bill of Rights had been designed to regulate the general government and not those of the individual states. He pointed out that in those relatively few cases where the framers limited the states—for example, Article I, Section 10 prohibited states from exercising powers granted exclusively to the general government—they specifically said so. Not only did the language of the Bill of Rights not address the states, but the purpose of these amendments, which had grown out of the Federalist/Antifederalist debate over the new Constitution, was to limit the powers of the newly formed government. If individuals wanted to incorporate protections against their own states, they could do so by changing these state constitutions rather than by involving the entire nation in the process.

Barron v. Baltimore remains the generally accepted interpretation of the original intention of the Bill of Rights. However, there is evidence that some of the proponents of the Fourteenth Amendment, ratified in 1868, intended not only to eliminate discriminatory state actions but also to overturn the decision in *Bar-*

ron and see that states were bound by the same constitutional guarantees as was the national government. In a development, the beginnings of which are often traced to *Gitlow v. New York,* 268 U.S. 652 (1925), the U.S. Supreme Court began using the Due Process Clause of this amendment to absorb, or incorporate, fundamental provisions of the Bill of Rights and to apply them to the states as well as to the national government. Scholars call this process "selective incorporation." Over the course of the twentieth century, the Court held that almost all provisions of the Bill of Rights were fundamental and thus applied not only to the national government but also to the states.

John R. Vile

See also: Bill of Rights; *Gitlow v. New York;* Incorporation Doctrine; Selective Incorporation.

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Bates v. State Bar of Arizona (1977)

In *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), the U.S. Supreme Court interpreted the First Amendment's free speech and press guarantees to protect commercial speech (advertising) by lawyers, thereby extending the reach of the Court's earlier decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), which had protected the rights of pharmacists to advertise prices and credit terms for prescription drugs.

Bates involved the case of two Arizona lawyers, John Bates and Van O'Steen, who operated a legal clinic in Phoenix providing moderately priced legal services. In order to make their business more visible to the public, they placed an advertisement in the newspaper, an act that violated policies of the State Bar of Arizona prohibiting advertising. In its enforcement of these policies, the bar disciplined the two lawyers with a one-week suspension. Bates and O'Steen argued that their commercial speech was protected by the First Amendment under the precedent the Court had established in *Board of Pharmacy* one year earlier.

Although the state had legitimate interests in protecting the professionalism of the bar, in prohibiting misleading advertisements by lawyers, and in not encouraging additional litigation through such advertisements, the Court, in an opinion by Justice Harry A. Blackmun, held five–four that these interests were not only outweighed by the U.S. Constitution's protection of commercial speech but that they could be achieved in ways less damaging to the First Amendment.

As in *Board of Pharmacy,* the majority in *Bates* noted that the First Amendment's protection of commercial speech was not as extensive as its protection of political speech and that advertisements that were false or misleading or advertised an illegal product or service could be prohibited. In addition, the Court thought it possible that some restrictions regarding attorneys' claims of quality would be permissible. In this case, however, there were no such contested claims, and the Court held that "truthful advertisement concerning the availability and terms of routine legal services" was protected by the First Amendment's free speech and press guarantees.

In cases after *Bates,* the Court has been required to define the boundaries of commercial speech protection in the context of other types of lawyer advertising. In *Ohralik v. Ohio State Bar,* 436 U.S. 447 (1978), the Court held that a state bar may prohibit in-person solicitation of clients, commonly known as "ambulance chasing," because such regulation was economic rather than speech-related. In *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985), the Supreme Court upheld an Ohio State Bar requirement that lawyers advertising their availability on a contingency-fee basis must disclose in their advertisements that clients might be required to pay costs if their lawsuit proved unsuccessful. And in *Florida State Bar v. Went For It,* 515 U.S. 618 (1995), a majority of the Court held that it was permissible under the First Amendment for the state bar to prohibit

lawyers from making written solicitations to victims or their relatives within thirty days of an accident.

Michael W. Bowers

See also: Bigelow v. Virginia; Commercial Speech; First Amendment; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*

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Batson v. Kentucky (1986)

During the "voir dire," the process through which members of petit (trial) juries are chosen, lawyers are typically granted the power to exercise challenges to dismiss prospective jurors. Challenges for cause are based on clear indications of conflicts of interest—for example, family or employment relationships or clear biases. By contrast, peremptory challenges are exercised on the basis of gut feelings about individual jurors. In *Batson v. Kentucky,* 476 U.S. 79 (1986), the U.S. Supreme Court decided that the Sixth Amendment right to a jury, as applied to the states by the Due Process Clause of the Fourteenth Amendment, was further limited by the Equal Protection Clause of that amendment so as to prevent racial bias in seating a jury.

In *Batson,* the African American defendant was tried and convicted for second-degree burglary and receipt of stolen goods. The prosecutor used his peremptory challenges to dismiss all four African Americans in the jury pool, and the Kentucky Supreme Court upheld the action. The defendant appealed to the Supreme Court.

The Court previously had considered the factor of racial exclusion from juries. In *Strauder v. West Virginia,* 100 U.S. 303 (1880), the Court struck down a conviction of a black defendant when African Americans were completely excluded from the jury pool. In *Swain v. Alabama,* 380 U.S. 202 (1965), the Court unanimously decided that defendants could challenge exclusion of members of their race from hearing their case, but defendants had the task of showing that the prosecutor had exhibited a pattern of such exclusions in other cases as well, a threshold that made proof almost impossible.

Batson made such proof easier. Citing its belief that discriminatory jury selection undermined public confidence in the justice system, the Court in a seven-two decision authored by Justice Lewis F. Powell Jr. held that defendants who were members of a cognizable racial group could object on equal protection grounds when all members of their race were excluded from the jury through prosecutorial use of peremptory challenges. To survive equal protection challenge, the prosecutor must then offer a "neutral explanation" for excluding the prospective jurors in question.

In a concurring opinion, Justice Byron R. White sought to limit the retroactive application of the *Batson* decision. Justice Thurgood Marshall advocated eliminating peremptory challenges altogether. Chief Justice Warren E. Burger and Justice William H. Rehnquist authored dissents suggesting that the Court had addressed an issue not raised in the lower courts, distinguishing the exclusion of jurors from the general jury pool and from individual cases, and arguing that requiring justification of peremptory challenges defeated the purpose of this mechanism.

In *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991), the Court subsequently extended the *Batson* precedent to civil cases. *Powers v. Ohio,* 499 U.S. 400 (1991), applied the precedent to cases in which whites were convicted after blacks were excluded from their juries. *Georgia v. McCollum,* 505 U.S. 42 (1992), extended the ban on race-based peremptory challenges to counsel for the defendant as well as to prosecutors, with the ironic result that such actions were regarded as unconstitutional state action. *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127 (1994), further extended a similar ban to use of peremptory challenges to exclude jurors on the basis of gender.

John R. Vile

See also: Trial by Jury; Voir Dire.

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Beauharnais v. Illinois (1952)

In a five–four decision in *Beauharnais v. Illinois,* 343 U.S. 250 (1952), the U.S. Supreme Court upheld a conviction under an Illinois statute criminalizing group libel, despite the defendant's claims that his speech was protected under the First Amendment. The statute made it a crime to sell or distribute material that "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion" when the material may expose that group to "contempt, derision or obloquy or which is productive of breach of the peace or riots." The statute dated from 1917, but a number of states had written similar group-libel statutes in reaction to both the rise of European fascism and organized domestic racism.

Joseph Beauharnais was arrested in 1950 for publishing and distributing a pamphlet calling on white citizens to petition the mayor and city council of Chicago against racial integration. In a significant part of the pamphlet Beauharnais stated: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."

Justice Felix Frankfurter, writing for the Court, defended the law along two doctrinal lines. First, relying upon the two-tiered system of speech announced in *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), he argued that libel was outside the protection of the First Amendment. As a result, the statute had only to pass a minimal-rationality (versus compelling state interest) test. Second, Frankfurter accepted the analogy of group libel to personal libel. Without extensive elaboration, Frankfurter stated that any utterance that the state could hold criminally libelous when directed at an individual could also be prohibited when directed at well-defined groups within society. He pointed to the recent history of racial violence in Illinois and cited studies showing the reputation and social standing of individuals were directly tied to core group identities such as race and ethnicity.

The four dissenting opinions offered nothing resembling a uniform explanation for why the law was unconstitutional. Justice Hugo L. Black made the strongest attack on group-libel laws in general, analogizing them to seditious libel. He complained that the state had improperly extended the criminal-libel standard to groups rather than limiting it to individuals. He also reminded the Court that Beauharnais's defamatory utterance was in the form of a petition for government policy changes. Justice Stanley F. Reed's concern was with what he took to be the unconstitutional vagueness of the language, especially key words like "virtue" and "derision." Justice Robert H. Jackson argued that the trial court did not produce evidence of the dangerous tendency of the words or allow Beauharnais to show either the truth of his statements or good faith. Justice William O. Douglas prophesied that group-libel laws could in turn be used to silence racial minorities protesting discrimination.

The Supreme Court has never formally overturned *Beauharnais,* but it is highly questionable whether the case may be considered good law. Frankfurter's identification of libel as outside First Amendment protection is no longer correct after the 1964 case of *New York Times Co. v. Sullivan,* 376 U.S. 254, in which the Court extended constitutional protection to many forms of libel. In subsequent decisions, the Court also granted extended protection to offensive speech in *Cohen v. California,* 403 U.S. 15 (1971), and created a heightened test for speech that may disrupt the peace in *Brandenburg v. Ohio,* 395 U.S. 444 (1969). The state of Illinois itself removed the criminal group-libel law from its books in 1961, thus making it unavailable for the prosecution of Nazis marching through Skokie in 1977. The Court had an opportunity to clarify the status of *Beauharnais* in the early 1990s when it addressed the problem of hate-speech laws in *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992). In striking down a Minnesota hate-speech ordinance as unconstitutionally content-specific, the Court neither overturned nor reaffirmed *Beauharnais*. Nevertheless, the *R.A.V.* ruling further weakened the constitutional basis for group-libel laws.

Douglas C. Dow

See also: Brandenburg v. Ohio; Cohen v. California; Fighting Words; First Amendment; Group Libel; Hate Speech; Libel; *New York Times Co. v. Sullivan.*

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Berman v. Parker (1954)

In *Berman v. Parker,* 348 U.S. 26 (1954), the U.S. Supreme Court upheld an urban-development statute that authorized the government to condemn privately owned land through the power of eminent domain in order to resell it to new owners interested in redeveloping the property for private use. The issue was whether the Takings Clause of the Fifth Amendment, which prohibits the taking of private property for public use without compensation, permitted such action.

In order to improve poor housing and slum conditions in the nation's capital, Congress passed the District of Columbia Redevelopment Act of 1945. The statute established a land agency that could acquire, through the power of eminent domain, private property in areas targeted for urban renewal. After taking the property, the agency was authorized to sell it to new private owners who agreed to develop the land in accordance with the agency's plan. The owner of a department store in a neighborhood slated for redevelopment claimed the law violated the Takings Clause of the Fifth Amendment because the government did not intend to condemn his property "for public use." He argued that the transfer of his property to another owner for redevelopment would result not in public but rather private use. The store owner also claimed no public use could be found in the plan to take his property, since the statute's stated goal was simply to make the neighborhood more attractive.

In an opinion written by Justice William O. Douglas, the U.S. Supreme Court unanimously upheld the redevelopment statute. The Court found the Takings Clause of the Fifth Amendment allowed the government to condemn property in order to promote a "public purpose" or public goal and did not require the government to develop it for strictly "public use." This interpretation meant the government did not need to retain ownership over condemned property and open it for some kind of use by the public; instead, the government could also sell the property to private owners for private use if the government decided such an action would help advance a public purpose.

In addition, the Court found nothing in the Fifth Amendment that restricted the government from defining the scope of a public purpose. Once the government decided to pursue a public purpose (including, as in this case, the eradication and redevelopment of slums to promote the public's well-being), the Takings Clause became a means to achieve that end. As a result, *Berman* legitimized beautification as a reason to exercise the power of eminent domain. Finally, although the owner had kept his building well-maintained, the Court found the agency's decision to condemn the department store acceptable as part of the agency's comprehensive neighborhood improvement plan.

Jason Stonerook

See also: Fifth Amendment and Self-Incrimination; *Hawaii Housing Authority v. Midkiff;* Takings Clause.

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Bethel School District v. Fraser (1986)

In *Bethel School District v. Fraser,* 478 U.S. 675 (1986), the U.S. Supreme Court held that disciplining a student for making lewd remarks in a speech at a school assembly did not violate that student's right to free speech under the First Amendment. This right

and others have been made applicable to the states through the Due Process Clause of the Fourteenth Amendment.

Matthew Fraser was a student at a public high school and presented a speech in a school assembly nominating a friend for a position in student government. He presented the theme of the speech using "elaborate, graphic, and explicit sexual metaphor." Teachers noted that the reaction of the nearly 600 students in the assembly ranged from "hooting and hollering" to bewilderment. Fraser was suspended for three days and eliminated from the list of potential speakers for his high school graduation. His father brought a lawsuit on his behalf challenging the school's disciplinary action, claiming violation of Fraser's rights to free speech and due process of the law and challenging the school rule as unconstitutionally vague and overbroad. Both the U.S. District Court and the Ninth Circuit Court of Appeals held that Fraser's rights had been violated. The school district then successfully applied to the U.S. Supreme Court for a writ of certiorari (request for full appellate review). The high court reversed the Ninth Circuit's decision, holding that Fraser could be disciplined under the school's disciplinary rule that stated, "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."

As for freedom of speech, the Court distinguished Fraser's case from *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), the landmark case holding that students did not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." In *Tinker,* the students wore black armbands to school in protest of the Vietnam War and U.S. involvement in it (1964–1975). The Court found the armbands in *Tinker* distinguishable from Fraser's speech because the armbands did not concern speech or action that intruded upon the work of the school or the rights of other students. The Court explained the school's responsibility to prepare students for citizenship and civility, noting the importance of acceptance of divergent points of view but making clear that vulgarity or foul or abusive language is not accepted in many settings of public discourse. For example, the early House of Representatives adopted Thomas Jefferson's "Manual of Parliamentary Practice," which prohibits the use of "impertinent" speech during debate. Chief Justice Warren E. Burger wrote in *Fraser,* "[C]an it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?" The Court thought not, and reversed the Ninth Circuit's holding that Fraser's right to free speech had been violated.

In support of this position, the Court noted instances in which minors' rights are not coexistent with those afforded to adults. In *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), the Court held that minors in the public school setting did not enjoy Fourth Amendment protections against search and seizure that were commensurate with those enjoyed by adults. In *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726 (1978), the Court held that a radio station could be cited for broadcasting obscene material during a time of day when children would undoubtedly be in the audience. As for the right of minors to purchase pornographic material, the Court marked the distinction between minors and adults in *Ginsberg v. New York,* 390 U.S. 629 (1968), holding that a New York statute banning the sale of the materials to minors was constitutional.

Fraser asserted that the disciplinary action taken by the school was unconstitutional as a violation of his right to due process, because he did not have notice of potential discipline he could face. The Court held that the school needed the flexibility to discipline in light of the wide range of unanticipated conduct disruptive to the educational process, conduct that school officials face daily. The two-day suspension Fraser served did not, in the Court's view, amount to a "penal" sanction; hence it did not require the procedural due process protections applicable in a criminal proceeding, as outlined in *Goss v. Lopez,* 419 U.S. 565 (1975).

Fraser stands for an important principle that is still fundamental to American jurisprudence in relationship to minors: The state has a compelling interest in protecting minors. The public schools, acting "in loco parentis" (in the place of a parent), have the responsibility to protect minors on a daily basis while children are entrusted to them by parents. This

responsibility is the foundation for the holding in *Fraser*.

Laurie M. Kubicek

See also: First Amendment; *Hazelwood School District v. Kuhlmeier; New Jersey v. T.L.O.; Tinker v. Des Moines Independent Community School District;* Vietnam War.

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Betts v. Brady (1942)

In *Powell v. Alabama,* 287 U.S. 45 (1932), the U.S. Supreme Court held that the Fourteenth Amendment to the U.S. Constitution required state-appointed defense counsel if a defendant in a capital case (a "capital defendant") could not afford a lawyer or could not conduct his own defense. Six years later, the Court ruled in *Johnson v. Zerbst,* 304 U.S. 458 (1938), that the Sixth Amendment entitled indigent federal-felony defendants to appointed counsel. The rulings in *Powell* and *Zerbst* suggested that the Court might require the states to appoint counsel in state-felony cases as well, but in *Betts v. Brady,* 316 U.S. 455 (1942), the Court ruled that states did not need to appoint counsel for defendants in state-felony cases absent such "special circumstances" as mental disability or a capital charge.

The justices deciding *Betts* were deeply divided about whether assistance of counsel was indispensable to fair trials in noncapital cases. Six justices preferred a flexible fundamental-fairness approach, permitting the Court to review questions about legal representation on a case-by-case basis. Their view, shared by most states in 1942, was that state criminal trials were not inherently unfair if defendants were unrepresented. Although states had to allow defense counsel to appear, they were under no constitutional obligation to provide counsel to indigent felony defendants. Justice Owen J. Roberts wrote for the Court in *Betts* that the issue was better resolved by state legislatures but said state judges could appoint defense counsel if they deemed it necessary in the "interest of fairness." He categorically rejected an all-purpose rule requiring states to provide counsel for all felonies, saying the states "should not be straight-jacketed in this respect." Roberts concluded that although the Fourteenth Amendment prohibited convictions in which fundamental ideas of fairness were absent, it did not "embod[y] an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." Betts was "not helpless," Roberts indicated, but was instead a man in his forties, of ordinary intelligence, and had the ability to represent himself at a trial. Nonetheless, the Court recognized exceptions: Counsel must always be supplied in state trials that presented "special circumstances."

Justices Hugo L. Black, William O. Douglas, and Frank Murphy dissented. They viewed assistance of counsel as imperative to fair trials and advocated a categorical rule providing for counsel in all felony cases. Black argued that the constitutional mandate requiring appointment of counsel in federal trials should apply to the states. Absence of counsel created doubt that a defendant's case was adequately presented. Black declared that not providing counsel for indigent defendants "cannot be reconciled with common and fundamental ideas of fairness and right"; the practice "subjects innocent men to increased dangers of conviction merely because of their poverty."

During the twenty years following *Betts,* the Court heard several cases involving "special circumstances" and determined that counsel should have been appointed in virtually all of them. Although the special-circumstances proviso was broadened following *Betts,* the basic holding in *Betts* governed the jurisprudence pertaining to assistance of counsel until the Court under Chief Justice Earl Warren formally overruled it in

Gideon v. Wainwright, 372 U.S. 335 (1963). *Gideon* applied only to felonies. A decade later, the Court expanded the right to misdemeanors as well.

Peter G. Renstrom

See also: Argersinger v. Hamlin; Gideon v. Wainwright; Powell v. Alabama; Right to Counsel.

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Beyond a Reasonable Doubt

The phrase "proof beyond a reasonable doubt" describes the prosecution's high burden of proof in a criminal trial. Proof beyond a reasonable doubt is a far higher standard than the "preponderance of the evidence" standard used in civil proceedings. Each element of the criminal offense charged must be proved "beyond a reasonable doubt" for the jury to return a guilty verdict. If the prosecution fails to meet this burden, the jury must return a not-guilty verdict. "Not guilty" is a legal finding that the prosecution has failed to meet its burden of proof; it is not necessarily a factual description of reality. Furthermore, deciding that the prosecution has failed to meet its burden of proof is not necessarily the same as deciding that the defendant is innocent. That is why the verdict delivered is "not guilty" rather than "innocent."

Every state has a statutory provision requiring the establishment of guilt beyond a reasonable doubt in criminal cases, and the U.S. Supreme Court, in *In re Winship,* 397 U.S. 357 (1970), held that due process requires this high level of proof. There are varying definitions of "proof beyond a reasonable doubt." Most individuals have a general understanding of what the phrase means to them, but studies of juror comprehension of legal terms indicate that jurors are sometimes confused by the various definitions. One study found that half of the jurors who were given an instruction on the presumption of innocence and the burden of proof erroneously believed a defendant was required to prove his innocence.

The requirement that the state meet a high burden of proof in a criminal trial has existed, in some form, since the twelfth century. Exactly how that burden of proof was described changed over time, however. Twelfth- and thirteenth-century writings reveal that courts then used the concept of "moral certainty." The phrase "moral certainty" has been equated with "reasonable doubt" or almost absolute certainty. By the seventeenth century, the standard of persuasion was often referred to as the "satisfied conscience test," meaning that jurors should vote to convict only if in their conscience they were sure the defendant was guilty. A judgment based on conscience was supposedly based on rational decision-making and intellect rather than the will or impulse. The most frequent charge used for the burden of proof during the eighteenth century was that a juror should acquit if "any doubt" existed. The "any doubt" test did not require that the doubt had to be reasonable; jurors could acquit a defendant if they had any doubt whatsoever.

By the early nineteenth century, American courts commonly required proof of guilt "beyond a reasonable doubt" in criminal trials. There were few attempts to define the term precisely. The most famous attempt at defining it came in *Commonwealth v. Webster,* 59 Mass. 295 (1850), in which a Massachusetts court used the phrases "moral certainty" and "abiding conviction" in its definition. Courts since have relied on these phrases and others to define the phrase.

The U.S. Supreme Court has approved a variety of definitions of reasonable doubt. In only one case, *Cage v. Louisiana,* 498 U.S. 39 (1990), has the Court held that a particular definition of reasonable doubt violated due process standards. Justice Sandra Day O'Connor acknowledged in *Victor v. Nebraska,* 511 U.S. 1 (1994), that "[a]lthough this standard is an ancient and honored aspect of our criminal justice system, it defies easy explication." She also noted that the Constitution did not require that any particular definition of reasonable doubt be used.

Most states have case law (appellate-level decisions that become "precedent," or binding on lower courts) that provides some definition of reasonable doubt.

Some states adhere to only one definition; other states accept multiple definitions. Among the commonly used definitions of reasonable doubt are "a doubt that would cause one to hesitate to act" (used in some form in twenty states); "a doubt based on reason" (seventeen states), and "an actual and substantial doubt" (ten states). Other less popular definitions include "a doubt that can be articulated" and "moral certainty."

Not every state requires that reasonable doubt be defined for the jury. Two states forbid any attempt at definition, and ten others suggest the better practice is not to define. Twelve states neither require nor oppose the giving of a definition. Several states permit the giving of a definition only in certain types of cases. Other states leave the decision to the trial court.

Proof beyond a reasonable doubt is a crucial component of the criminal trial. It imposes a difficult burden on the prosecution as a means of ensuring that no innocent person is convicted. Like many legal concepts, however, it is difficult to define precisely and is subject to misunderstanding.

Craig Hemmens

See also: Due Process of Law.

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Bifurcation

Bifurcation of issues in criminal trials, especially in capital cases (cases in which the death penalty may apply), has become an effective procedural device that states use to avoid violating the Eighth Amendment's prohibition against cruel and unusual punishments. Bifurcation divides a criminal trial into two parts: one in which the court or jury determines guilt, the other in which the court or jury sentences a convicted defendant. The rationale for a bifurcated trial is that many issues that are appropriate for determining whether to convict may not be so for sentencing a defendant. For example, although evidence of a defendant's prior convictions as well as potential future behavior may be appropriate for sentencing, courts have generally not permitted these factors to be presented as evidence of guilt. Thus, a proceeding that combines the two phases can deprive sentencing juries of critical information.

Since accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die, a process that does not furnish such information is deemed to be arbitrary and capricious and violative of defendants' rights under the Eighth Amendment's prohibition against cruel and unusual punishments, the U.S. Supreme Court held in *Furman v. Georgia,* 408 U.S. 238 (1972). In later implementing *Furman,* the Court held in *Gregg v. Georgia,* 428 U.S. 153 (1976), that the sentencing authority's need for adequate information can "best [be] met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of a sentence and provided with standards to guide its use of that information." Notwithstanding the intended effect of *Gregg* to curtail arbitrary and capricious death-penalty decisions, some empirical studies indicate that the effort has not been successful.

Bifurcated trials are not limited to criminal cases.

In fact, they are increasingly employed in civil trials, particularly those involving tort cases (noncriminal private injury or wrong not arising from a contract, such as negligence and product liability cases), which may have punitive damages issues in addition to the standard claims for compensatory damages (such as for lost income and pain and suffering). The rationale for use of bifurcated trials in civil trials is essentially the same as in criminal cases. In tort law, the purpose of punitive damages is to punish defendants who are found guilty of gross negligence. To punish such defendants properly and adequately, evidence of their financial condition is relevant, but such evidence if presented alongside evidence of liability may be highly prejudicial to defendants. Cases involving punitive damages often analyze the amount awarded in terms of its ratio to any compensatory damages awarded.

A case in point is *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1 (1991). Although the Court in *Haslip* refused to find Alabama's system of awarding punitive damages invalid, Justice Harry A. Blackmun, writing for the Court, opined that "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." Justice Sandra Day O'Connor's dissent is noteworthy in view of the Court's position requiring bifurcation in capital cases:

> Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category. States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so.

An example of how states sought to implement the procedural implications of Justice Blackmun's concern in *Haslip* and Justice O'Connor's critique is the Texas Supreme Court's decision in *Transportation Insurance Co. v. Moriel,* 879 S.W.2d 10 (1994). In that case, the Texas court opined that the "broad jury discretion that is the hallmark of the common law punitive damages system must be complemented by procedural safeguards that will ensure against excessive or otherwise inappropriate awards." The Texas court joined several other states requiring bifurcated trials in tort cases in which plaintiffs seek punitive damages. Similar procedurally to the bifurcated trial in capital cases, in the two-phase procedure,

> the jury first hears evidence relevant to liability for actual damages, the amount of actual damages, and liability for punitive damages (e.g., gross negligence), and then returns a verdict on these issues. If the jury answers the punitive damage liability question in the plaintiff's favor, the same jury is then presented evidence relevant only to the amount of punitive damages, and determines the proper amount of punitive damages, considering the totality of the evidence presented at both phases of the trial.

In *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996), another Alabama case, the U.S. Supreme Court took a turn from procedural considerations to substantive concerns and held that a state court's punitive damages award—the case involved fraud—of $2 million to a customer who purchased a "new" car for $40,750.88 without knowing that the car had been partially repainted at a cost of $601.37 was grossly excessive and thus violated federal due process. In *Gore*, although Alabama procedural law required a bifurcated trial when plaintiffs sought punitive damages, the Court held as a matter of substantive law that the $2 million punitive damages award was grossly excessive and violated the defendant's right of due process. Thus, the Court has been content to accept bifurcated jury decisions in capital cases on procedural (Eighth Amendment) grounds, but it is equally willing to tackle corporate exposure to large punitive damages suits in state courts on substantive due process grounds.

In *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408 (2003), the Court extended the *Gore* holding in two major respects: First, *State Farm* elevated the amount of punitive damages that state courts may assess to the level of constitutional inquiry. Second, it changed the time-honored practice of using the defendant's wealth as one measure for determining the amount of punitive damages to assess a defendant found to have been grossly negligent. Al-

though the Court in *State Farm*, quoting *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443 (1993), paid homage to previous Court holdings that have "consistently rejected the notion that the constitutional line [for the ratio of compensatory to punitive damages] is marked by a simple mathematical formula," and declaring that it would not "impose a bright-line ratio which a punitive damage award cannot exceed," it did just that. Writing for the majority in *State Farm*, Justice Anthony M. Kennedy stated: "Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Justice Kennedy's statement that "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award" may herald the end of a need for bifurcated hearings in punitive damages cases.

Clyde E. Willis

See also: Capital Punishment; Eighth Amendment; *Gregg v. Georgia*.

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Bigelow v. Virginia (1975)

Bigelow v. Virginia, 421 U.S. 809 (1975), is one in a series of significant U.S. Supreme Court rulings granting limited First Amendment protections to commercial speech. Such speech, which usually involves commercial advertising, has been granted varying degrees of First Amendment protection, ranging from none to somewhat less than 100 percent. In *Bigelow*, the Court, by a seven–two margin, reversed its prevailing tendency to limit protections of commercial speech, ruling that speech is not stripped of protections simply because it is a commercial advertisement. In this case, the language in the ad did not involve obscenity, libel, or incitement and therefore did not fall into other preexisting categories that are also denied First Amendment protections.

The facts in *Bigelow* involved the conviction of Jeffrey C. Bigelow (managing editor of *Virginia Weekly* in Charleston, Virginia) on the charge of publishing an advertisement from a New York–based referral service that provided women with access to abortions. At the time, abortion was illegal in Virginia, and advertising abortion services was a misdemeanor. The Virginia Supreme Court upheld the conviction because Bigelow was engaging in what it viewed as purely commercial speech that the state could regulate.

Earlier cases involving commercial speech aid in understanding and interpreting the significance of *Bigelow*. In *Valentine v. Chrestensen,* 316 U.S. 52 (1942), the Court made a clear distinction between the freedom to express political views and the freedom to do commercial advertising, offering government full regulatory authority over such commercial speech. Several years later, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973), the Court ruled along the same lines; however in this five–four decision, the dissenting opinions made it clear that the *Chrestensen* doctrine was unraveling.

Finally, in *Bigelow,* the Court afforded certain protections to commercial speech. Because the advertisement pertained to a clear "public interest" and because it was completely factual, the Court extended such commercial speech First Amendment protection, though it was not clear on where the balance between public interest and purely commercial speech existed. Indeed, the conclusion in *Bigelow* did not stipulate that all truthful commercial speech was to be protected, but it moved the Court in that direction. The following year in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), the Court took the next step, ruling that truthful commercial speech falls under the protections of the First Amendment. Some limits on commercial speech remain, including time, place, and manner re-

strictions (applicable also to other forms of speech), illegal activities, and false advertising.

Nathan Bigelow

See also: Bates v. State Bar of Arizona; Commercial Speech; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*

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Bill of Attainder

A bill of attainder, which was used in England but is prohibited in the United States, is a legislative act that inflicts punishment on an individual or group without benefit of a judicial trial. If an act inflicted a milder degree of punishment than death, it was called "a bill of pains and penalties." When the punishment is for an offense that was not illegal when it was committed, the law is also ex post facto (literally, "made after the occurrence").

In medieval England, attainder resulted in death and forfeiture of all civil rights and property after condemnation for treason or a felony, and it applied to the heirs of the condemned as well ("attaint or corruption of blood"). During the Wars of the Roses (1455–1485), bills of attainder were used by rival factions to rid themselves of each other's leaders. In the reign of Charles I, an act of Parliament attaindered his chief adviser, the Earl of Strafford.

Article I, Section 9, and Article III, Section 3, of the U.S. Constitution prohibit such means of punishment by the federal government, and Article I, Section 10, outlaws use of attainder by the states.

During the Civil War, there were efforts to punish Confederate sympathizers. Missouri's constitution required oaths for certain professionals (teachers, ministers, lawyers) attesting that they had not in any manner aided the cause of the Confederacy. The U.S. Supreme Court in *Cummings v. Missouri,* 71 U.S. 277 (1867), struck down the requirement as constituting a bill of attainder. In *Ex parte Garland,* 71 U.S. 333 (1867), the Court voided the Test Oath Act of 1862, an act of Congress requiring a similar oath of attorneys. (In 1868, Augustus H. Garland, the subject of *Ex parte Garland,* became attorney general of the United States.)

During World War II, Congress passed a rider to an appropriations bill that forbade payment of salaries to three named federal government employees who had been charged with subversive activities by the House Un-American Activities Committee unless they were renominated by the president and confirmed by the Senate. The Court in *United States v. Lovett,* 328 U.S. 303 (1946), declared the measure unconstitutional as being a bill of attainder.

In *Communist Party v. Subversive Activities Control Board,* 367 U.S. 1 (1961), Justice Hugo L. Black in dissent contended that the Internal Security Act of 1950 was a "classical bill of attainder." His colleagues disagreed. In 1965, however, the Court struck down a portion of the Taft-Hartley Act of 1947 requiring non-Communist affidavits from union leaders, holding in *United States v. Brown,* 381 U.S. 437 (1965), that the requirement was a legislative punishment of members of the Communist Party without affording them a trial.

In *De Veau v. Braisted,* 363 U.S. 144 (1960), the Supreme Court held it was not a bill of attainder for a state to bar ex-convicts from holding office in a union; similarly, in *Flemming v. Nestor,* 363 U.S. 603 (1960), the Court held it was not considered punishment (and a bill of attainder) to deprive a deported alien of his Social Security check. In *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977), the Court rejected former President Richard M. Nixon's claim that the statute placing control of his presidential papers and recordings in the hands of the General Services Administration amounted to a bill of attain-

der. The Court ruled that Congress's purpose was not punitive.

Martin Gruberg

See also: Ex Post Facto Laws.

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Bill of Rights

The first ten amendments to the U.S. Constitution are typically referred to as the Bill of Rights. Their addition to the Constitution in 1791 was a concession to the Antifederalists, who worried that the new American government would not respect individual rights unless specifically bound to do so, and who threatened to block ratification of the new Constitution unless a Bill of Rights was added.

The Federalists objected to a Bill of Rights, but not because they opposed the liberties at issue. Rather, they argued that because the Constitution created a government of delegated, enumerated powers, and no power had been conferred upon the government that would allow it to infringe upon citizens' rights, a Bill of Rights was unnecessary. Furthermore, they shared the concern voiced by Alexander Hamilton, who argued in *The Federalist No. 84* that a detailed Bill of Rights "would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted."

It is true, as the Antifederalists claimed, that the body of the Constitution included structural elements designed to prevent government tyranny: Separation of powers, a bicameral (two-chamber) legislature, federalism, the right of habeas corpus (a writ, or petition, by an individual to require the government to specify a legal basis for confinement of that person or to release the individual), and a variety of other checks and balances were intended to prevent overreaching by the government. Nevertheless, the Antifederalists' arguments prevailed, and a Bill of Rights was subsequently appended to the Constitution. James Madison was the individual most responsible for formulating the provisions of the Bill of Rights and getting Congress to approve the document and send it to the states for ratification.

THE AMENDMENTS

The first eight amendments address substantive rights. The First Amendment, with admirable economy of language (forty-five words), protects freedom of speech, freedom of religion, freedom of the press, and the right of citizens to assemble and petition their government for redress of grievances. The Second Amendment protects a right to bear arms, but this right remains the subject of much academic and political debate: Some claim the language protects a personal right to own weapons, whereas others believe it was intended to protect the right of states to form militias. The Third Amendment, which forbids the government from quartering soldiers in citizens' homes, is cited today primarily as evidence of the founders' concern for a right to privacy and belief that "a man's home is his castle." The Fourth Amendment protects citizens against unreasonable searches and seizures and requires that warrants cannot be issued without "probable cause." These provisions have generated a substantial body of case law regarding what state behaviors should be considered unreasonable and what citizen behaviors are sufficient to meet the requirement of "probable cause."

The Fifth Amendment prescribes certain rights of the accused in criminal cases: indictment by grand jury, the prohibition against double jeopardy, and protection against self-incrimination. It also protects citizens' right to due process of law and concludes with the much-debated Takings Clause, which prohibits the taking of private property by government without payment of just compensation. The Sixth Amendment spells out the elements of a fair trial. Such trials must be speedy and public and have an impartial jury. Those accused of a crime must be informed of the

Female symbol of America holding torch in front of Bill of Rights and standing on "150 years" pedestal, 1941. *(Library of Congress)*

charges against them and must have the right to confront the witnesses against them, the right to assistance of counsel, and the right to subpoena witnesses on their own behalf. The Seventh Amendment extends the right of trial by jury to civil actions and makes the jury the sole trier of fact. That means that appeals from jury verdicts must allege an error of law and cannot be based on the argument that the jury got the facts wrong. The Eighth Amendment forbids cruel and unusual punishments, excessive fines, and excessive bail.

The Ninth and Tenth Amendments were intended as a response to those who, like Alexander Hamilton, had argued that an enumeration of citizens' rights in a Bill of Rights would eventually be interpreted as all-inclusive; that is, if a right were not explicitly listed, it could be argued that it was not protected. The Ninth Amendment addressed this concern directly: "The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Tenth Amendment spoke to powers: If a power was not explicitly delegated to the federal government, or was explicitly forbidden to the states, that power is deemed to be retained by the states or the people.

THE FOURTEENTH AMENDMENT

When the Bill of Rights was ratified, it applied only to the federal government. States remained free to act in ways that the national government could not, and although some state constitutions included safeguards for civil liberties, such protections were anything but uniform. The Thirteenth Amendment, passed in 1865 during the closing months of the Civil War, abolished slavery. Almost immediately thereafter, in 1866, the Fourteenth Amendment was drafted, containing the following language: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio congressman John Bingham, who authored the language, made clear that his intent was to apply the Bill of Rights to the states. Thaddeus Stevens, a senator from Pennsylvania who assisted with the amendment's passage, explained the intent of the language to his colleagues: "[T]he Constitution limits only the action of Congress, and is not a limitation on the States. This Amendment supplies that defect."

Despite such statements from those who drafted and subsequently ratified the Fourteenth Amendment in 1868, the U.S. Supreme Court did not immediately use it to apply the Bill of Rights to state governments. Instead, in the *Slaughterhouse Cases,* 83 U.S. 36 (1873), brought shortly after ratification of the amendment, the Court by a five–four vote held that the Privileges or Immunities Clause should be narrowly interpreted as ensuring only the rights of recently freed slaves. It was not until 1925, in *Gitlow*

v. New York, 268 U.S. 652 (1925), that the Court began the process known as "selective incorporation"—using the Fourteenth Amendment to apply to the states those elements of the first eight amendments determined to be "essential to ordered liberty" and "fundamental." The proper approach to incorporation was the subject of significant disagreement among Court justices, with Hugo L. Black (1886–1971) at one extreme arguing for total incorporation, and Felix Frankfurter (1882–1965) at the other arguing for a case-by-case fundamental-rights approach. The view that emerged fell somewhere between these extremes, and today most, but not all, of the guarantees of the Bill of Rights limit state and local governmental units as well as the federal government.

PHILOSOPHIC UNDERPINNINGS

The drafters of the new American Constitution and Bill of Rights were profoundly influenced by Enlightenment philosophers such as Charles-Louis de Secondat Montesquieu and Thomas Hobbes. These and other Enlightenment theorists held the then-radical notion that the primary role of government was to protect the liberties of its citizens. The Bill of Rights is a clear outgrowth of their belief that rights are *negative;* that is, liberty is the right to be free of state interference. Unlike the Universal Declaration of Human Rights, adopted in 1948 by the United Nations, or the constitutions of many other countries, the U.S. Constitution and Bill of Rights do not encompass positive entitlements to food, housing, medical care, or education. Instead, the Bill of Rights forbids specific government actions. Only government (federal, state, local) can violate the Bill of Rights, because the Bill of Rights constrains only government.

The great debates between the Federalists and Antifederalists were about the proper role of government and the nature of the rights that all citizens should enjoy. Americans have enlarged their notion of citizenship since the Constitutional Convention (women, former slaves, and nonlandowners are now included), but the original framework remains. The overarching issue raised by the Bill of Rights is the proper balance between state power and individual autonomy. Who decides what books may be read, what prayers may be said? Who decides who may marry and procreate? What are the conditions under which the state may deprive someone of liberty? How are the government's right to exercise authority and duty to enforce order balanced against citizens' rights to be secure in their person and free in their conscience? How would the country avoid the "tyranny of the majority" that the founders so feared?

The Bill of Rights is often referred to as "antimajoritarian" because it reflects the high value that its drafters accorded to *individual* liberties. Its provisions were intended as a libertarian brake on the power of the majority, just as the various structures of the Constitution were intended to privilege deliberation and thoughtful debate over hasty action taken in response to the passions of the moment.

Unlike statutes and ordinances, constitutions are statements of principles that must be applied over time to changing circumstances and new technologies. Courts today must decide how the First Amendment principle of free expression applies to motion pictures, radio and television, and the Internet. They must decide whether the Fourth Amendment allows use of technologies that enable police to search a residence without entering it. Because it is a timeless statement of liberal democratic values, the Bill of Rights continues to provide a workable framework within which these and similar questions can be answered.

Sheila Suess Kennedy

See also: Constitutional Amending Process; Constitutional Amendments; Federalists; *Gitlow v. New York;* Incorporation Doctrine; Madison, James; Negative and Positive Liberties; *Slaughterhouse Cases;* Tyranny of the Majority; United States Constitution. *Also see* individual amendments (e.g., First Amendment).

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Billboards

Billboards are outdoor signs that have been used to communicate political, social, and commercial messages throughout American history. Billboards can foster a healthy marketplace, not only of goods and services but also of ideas. Still, the positive aspects of increasing the dissemination of ideas must be weighed against legitimate public interests in safety and physical appearance.

BILLBOARD REGULATION UNDER THE POLICE POWER

Under the police power, reserved to the states under the Tenth Amendment to the Constitution, local governments may pass regulations protecting public health, safety, welfare, and morals. Using this power, local governments have sought to control or even ban billboards due to their adverse effects on public safety and aesthetics. In *Thomas Cusack Co. v. City of Chicago,* 242 U.S. 526 (1917), a local government adopted an ordinance prohibiting the placement of billboards on a residential block without the written consent of a majority of the homeowners. In upholding the ordinance, Justice John H. Clarke explained the justification for the police power with regard to the ill effects of billboards: "[F]ires had been started in the accumulation of combustible material which gathered about such billboards; . . . offensive and [un]sanitary accumulations are habitually found about them; and . . . they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals."

Because this ordinance was not unreasonable and arbitrary, it was a permissible exercise of the police power. Michael Litka might have had Justice Clarke's reasoning in *Cusack* in mind in a 1969 item he wrote discussing aesthetics as an objective of legislation: "The future of any legislation involving the regulation of outdoor advertising depends to a large extent upon the court's view of aesthetics. Most of the health, safety, and morals objections to billboards can be overcome in their manner of construction. They can be elevated so as not to collect rubbish or to provide a lurking place for people with evil intent, fireproof structures can be provided, and traffic distractions can be minimized."

This combination of concern for public safety and aesthetic quality had led Congress to enact, four years earlier, the Highway Beautification Act of 1965. It provides that "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate [Highway] System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." The legislation sought to achieve these goals by providing financial incentives to any state that effectively regulated billboards along its roadways, although lack of funding has largely frustrated these measures. Yet the act stands as a testament to the continuing concern over the aesthetic harm caused by distasteful and misplaced billboards, even as it reemphasized traditional goals for exercise of the police power.

BILLBOARDS AS PROTECTED SPEECH: *METROMEDIA* AND THE MODERN DEBATE

Local and state laws regulating billboards were generally considered to be a valid exercise of the police power until the early 1980s, when the U.S. Supreme Court found that the free speech concerns arising from billboard regulations merited First Amendment analysis. In the case that introduced free speech concerns into the billboard debate, *Metromedia v. San Diego,* 453 U.S. 490 (1981), the Court was unable to agree on a controlling majority opinion, although seven justices ultimately held that a city's "interest in avoiding visual clutter" was sufficient to uphold a ban on commercial billboards. They arrived at this conclusion under different theories on the role of billboards and what the First Amendment required in assessing outdoor signage regulations. A San Diego ordinance forbade off-site commercial and all noncommercial billboard advertising unless the noncommercial advertising fell under one of twelve specific exceptions; on-site commercial advertising was per-

missible. The ordinance sought "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays . . . [and] to preserve and improve the appearance of the City."

The plurality opinion, penned by Justice Byron R. White, differentiated between commercial and noncommercial signage. Although both implicated the free speech guarantees of the First Amendment, the Court would subject prohibitions on noncommercial speech to a stricter constitutional test. The part of the statute that restricted commercial speech to on-site signage was valid, but the noncommercial prohibitions were unconstitutional because they limited protected speech. The plurality argued that by providing specific exceptions for noncommercial speech, San Diego had gone too far in defining the public discourse. Justice William J. Brennan Jr. concurred, arguing that the portion of the statute pertaining to noncommercial speech equated to an outright ban. He believed, though, that it would be permissible if the city could show that it had a substantial governmental interest in enacting such regulation, which it had.

Finally, Chief Justice Warren E. Burger dissented, arguing that the noncommercial regulation was permissible. He called the plurality's action "bizarre" because precedent (on-point cases previously decided by the Court) dictated that laws infringing on protected speech would be valid as long as they "served a significant government interest and . . . [left] ample alternative channels for communication," both of which, in his estimation, San Diego's ordinance accomplished. His conclusion drew on the aesthetic and psychological effects of billboards: "[E]very large billboard adversely affects the environment, for each destroys a unique perspective on the landscape and adds to the visual pollution of the city. Pollution is not limited to the air we breathe and the water we drink; it can equally offend the eye and the ear."

Billboards raise numerous concerns, since they represent a form of protected speech, although there are valid governmental reasons for their control. These two interests (both of which find protection under the Constitution, speech by the First Amendment and control under the police power) are at times opposed, as was the case in *Metromedia*. Courts must weigh these important interests and strike a balance that best follows the Constitution and Supreme Court precedents, regulating the placement and content of billboards for the public good but minimally treading on protected speech. Billboard regulations can range from simple physical standards to total bans of certain forms, provided the government is protecting a substantial interest, including aesthetic quality, and the controls outweigh the infringement of free speech.

James F. Van Orden

See also: First Amendment; Police Power.

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Birth Control and Contraception

Government regulation of birth control has created a tension between the civil liberties of the individual and the power of the state to regulate quality of medical services. The ability of American women to control when and if to reproduce has been the key to their political and economic equality. Without this ability, women are dependent on the financial support of men and the political recognition of their offspring. In the United States, although contraceptive technology has long been available, albeit at variable reliability rates, the right to contraception was not recognized as a constitutional right until 1965.

Congress passed the Act for the Suppression of

Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use in 1873. Known popularly as the Comstock Act, this law made it a criminal offense to send birth control information or contraceptives through the U.S. mail or to engage in the selling of contraceptives through interstate commerce. Although many states also passed their own laws restricting sale or use of birth control devices, courts frequently limited application of these statutes.

Against this legal background, the American birth control movement was born. Women such as Emma Goldman and Margaret Sanger worked to pass state and federal laws that would make birth control legal and protect the civil liberties of citizens. By the 1930s, contraception was frequently used by the middle classes and was generally legal, but its purpose was to prevent the birth of children that families could not afford. Fertility rates declined rapidly, reaching an all-time low in 1932 that would not be seen again until the 1960s.

FORCED AND VOLUNTARY STERILIZATION

The U.S. Supreme Court initially examined reproductive rights in *Buck v. Bell,* 274 U.S. 200 (1927), in which it upheld the constitutionality of the forced sterilization of a woman who had been committed to a mental hospital for "feeblemindedness." This decision allowed states to continue passing and enforcing laws that authorized the nonconsensual sterilization of those deemed mentally impaired, habitually criminal, or poor. Although the Supreme Court has never overturned *Buck v. Bell,* it narrowed the holding in *Skinner v. Oklahoma,* 316 U.S. 535 (1942), when it found the forced sterilization of a petty criminal unconstitutional on the basis of equal protection. The Court found that the deprivation of the right to have children, "one of the basic civil rights of man," was too immense to be justified by minor crimes.

The ethical issues attending "eugenic sterilization"—the use of involuntary sterilization to eliminate mental illness or retardation, poverty, and criminal tendencies in the population—have been debated since the turn of the twentieth century. Primarily as a result of the development of safer, more effective, reversible sterilization procedures, there were efforts in the 1960s and 1970s to legalize voluntary sterilization (such as vasectomies and tubal ligations). All fifty states repealed their bans on contraceptive sterilization by the early 1970s; federal court cases through the next two decades invalidated the majority of stringent limitations on voluntary sterilization. Today, public hospitals cannot refuse to perform sterilization, but in most states hospitals may create their own policies regarding spousal consent, waiting periods, and physician consultations. As sterilization becomes increasingly reversible, these governmental limitations on personal choice are becoming fewer.

Margaret Sanger, president of the National Committee on Federal Legislation for Birth Control. Sanger was arrested in 1916 for opening the nation's first birth control clinic in Brooklyn, New York. *(Library of Congress)*

PRIVACY RIGHTS AND CONTRACEPTION

To many people, the right to privacy has been connected to the issue of abortion; this right, recognized in *Roe v. Wade,* 410 U.S. 113 (1973), is based upon earlier decisions related to contraception and sterilization. In both abortion and contraception, the courts

are asked to balance the right of the individual's access to safe and effective fertility control (or the individual's right not to have children) against the power of the state to limit the individual's access and right to such treatment. Whereas women want a reliable contraceptive that is convenient and affordable, the state has multiple goals, including limiting extramarital sexual involvement, protecting prenatal life, increasing reproduction, protecting the health of its citizens, and preserving the financial interests of pharmaceutical companies and medical professionals. Both contraception and abortion have generated much legislative activity and litigation with the goal of balancing these interests.

In *Tileston v. Ullman,* 318 U.S. 44 (1943), and in *Poe v. Ullman,* 367 U.S. 497 (1961), the Supreme Court rejected challenges to state laws banning contraceptives on the basis that the parties lacked standing or a case did not present a "ripe" issue (one suitable for adjudication). In 1965, however, the Court commenced consideration of the constitutional protections granted to individuals in the area of reproductive rights. In the seminal case of *Griswold v. Connecticut,* 381 U.S. 479 (1965), the Court overturned a Connecticut law that banned the use of contraceptives by married couples, finding that there was a right of privacy inherent within the penumbras, or shadows, of a number of provisions within the Bill of Rights and the Fourteenth Amendment to the Constitution. Privacy extends to the marital relationship, and governmental involvement in forbidding contraception would have a "maximum destructive impact" on that relationship. In the 1972 case of *Eisenstadt v. Baird,* 405 U.S. 438 (1972), a Massachusetts statute outlawing the prescription or distribution of contraceptives to nonmarried persons was also found unconstitutional. The Court argued that the right to make reproductive decisions was an individual right, not limited to the marital state. Justice William J. Brennan Jr. found the Massachusetts statute unconstitutional because "the statute's distinction between married and unmarried people was an unconstitutional denial of equal protection of the laws." The right of privacy is rooted in the individual, not inherent in the marital state (as in *Griswold*). Massachusetts had no legitimate state interest to defend.

The Supreme Court extended the right of privacy to include abortions in its seminal decision in *Roe v. Wade,* 410 U.S. 113 (1973). In effect, this decision allowed for widespread access to abortion, especially during the first two trimesters of pregnancy, prior to fetal "viability" outside the womb. Subsequent Court decisions have approved waiting periods and other measures designed to encourage considered reflection about this choice, but have not eliminated it.

In 1977 the Court further extended this right to privacy when it struck down a New York state ban on the distribution of contraceptives to minors under the age of sixteen. In this case, *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court also found unconstitutional portions of the New York law that banned the advertisement of contraceptives and prohibited anyone other than a doctor from distributing over-the-counter birth control.

Another case involving contraception and the First Amendment soon followed. In *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60 (1983), the Court overturned a federal law against unsolicited mail advertisements for contraceptives. Although the mailings in question were commercial, they also included public health information on venereal disease and family planning, opening up arguments for even higher levels of constitutional protection. Although the Court opted to rule based on the qualified protections afforded commercial speech, a majority still found that the mailings warranted First Amendment protection.

NEW TECHNOLOGY AND NEW LIBERTY CONCERNS

When the birth control pill was approved by the Food and Drug Administration (FDA) in 1960, it became clear that a reliable, convenient form of birth control not only would be used by women but also could be a very successful business investment. Since that time, many forms of birth control have been tested and approved, and with these have come new conflicts for the courts to address. As new technologies are tested and implemented, the potential health complications for women using these contraceptives become more complex. Early concerns about the side effects of the birth control pill, a lack of governmental oversight, and the personal rights of women resulted in televised

congressional hearings and mobilized young women to take a more vocal role in their own health care.

In the 1960s, a birth control device called the IUD, or intrauterine device, became popular. The small device fits inside the uterus of a woman and prevents pregnancy. The Dalkon Shield was introduced in the United States in 1971, and 2.2 million women were using it by 1974. However, side effects quickly manifested: More than 10,000 users had pelvic inflammatory disease (PID), resulting in reproductive problems or sterility for many of these women. The Dalkon device had a pregnancy rate of 5 percent, and many of these women miscarried or had children with birth defects. Lawsuits against the manufacturer of the Dalkon Shield lasted more than a decade and resulted in massive legal settlements. In the late 1990s, similar lawsuits were filed about the Norplant product, a contraceptive device that is implanted in the upper arm under the skin and releases hormones into the woman's body to prevent pregnancy, and the Today sponge. The Norplant and Today products caused less dramatic harm than the Dalkon Shield, but this mass litigation has made pharmaceutical companies less willing to test and provide additional birth control options.

New technology has also resulted in new conflicts involving governmental interests, property interests, and the personal liberty interests of individuals. The invention of Viagra, a medication for impotent men, has raised a different series of lawsuits against insurance companies that provided coverage for men's prescription Viagra but not for women's prescription contraception. As these cases have worked their way through lower courts, the central question has been whether the two prescriptions are comparable or if one is a "medical necessity" and the other is merely "life-enhancing." The courts have come to contradictory conclusions. Norplant technology allowed several states to consider requiring individuals on welfare, with multiple children, to accept the insertion of this device as a prerequisite to receiving government aid. During the late 1980s, several local judges received national press for requiring mothers convicted of minor crimes to choose between serving jail time and having Norplant insertions. This tension continues as many criminal justice and public health professionals argue that this technology is ideal for poor women because it is a long-term, yet reversible form of birth control. Women's advocates, however, claim that this forced decision has a direct coercive effect on poor women and women of color, limits their reproductive choices, and violates the personal right to reproduce.

Finally, as technology evolves, the line between abortion and contraception becomes narrower. The "morning-after pill" is designed to prevent contraception if it is taken within twenty-four hours after unprotected sex; initially challenged by antiabortion activists, by 2003 this medication was legal and widely available in the United States, although only by prescription. Efforts during 2002 and 2003 to make the morning-after pill available over the counter were halted by the FDA as a result of pressure by antiabortion groups.

The RU-486 medication, on the other hand, is still banned by many states. This synthetic hormone, approved for use in Europe in 1988, was finally approved by the U.S. Food and Drug Administration in 1997 but was not available on the market until 1999. This pill causes shedding of the lining of the uterus, inducing menstruation and in pregnant women resulting in abortion. Because this drug is taken only after pregnancy has occurred, it has faced legal barriers that have not accompanied use of the morning-after pill.

In sum, the personal liberty to control reproduction is closely tied to technology. The combination promises to continue generating controversies that ultimately will be resolved by legislatures or litigation.

Michelle Donaldson Deardorff

See also: Buck v. Bell; Comstock Acts; *Eisenstadt v. Baird;* Eugenics; *Griswold v. Connecticut;* Right to Privacy; *Roe v. Wade; Skinner v. Oklahoma.*

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Bivens and Section 1983 Actions

Violation of individual rights by government officials was a concern for the framers of the Constitution, but they did not include in it any direct tool permitting citizens to sue the federal or state governments for damages. Creation of this right was left to Congress and the courts. In 1871, Congress passed a law allowing individuals to sue state governments in federal courts; such lawsuits became known as "section 1983 actions" under the *United States Code.* The right to sue the federal government for damages was created by the U.S. Supreme Court in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971).

After the end of the Civil War, the federal government embarked on what became known as Reconstruction (1865–1877), reconstructing disaffected southern governments that were being granted renewed congressional representation. Part of Reconstruction was congressional passage of the Fourteenth Amendment, which prohibited states from denying their citizens due process of the laws and gave Congress the power to enforce the amendment.

Congress enforced the amendment using the Civil Rights Act of 1871, better known as the Ku Klux Klan Act. Section 1983 of the law prohibited state officials from denying citizens of the state due process of the law. Officials who acted in an unconstitutional manner could be charged in federal court and assessed monetary damages. Because the law was passed after the Civil War and during the reaction against states' rights, section 1983 did not apply to federal officials. Not until a century later did the Supreme Court act to place federal officials under the same constraints as state officials.

In *Bivens,* the Court expanded protections for individuals whose constitutional rights were violated by federal employees. The petitioner in *Bivens* sued six FBI agents who arrested him without a warrant. When the arrest was thrown out of court, he sought damages from the agents. The main obstacle for him was the lack of any federal law allowing him to sue the federal government.

The U.S. Supreme Court ruled for the petitioner. Speaking for six members, Justice William J. Brennan Jr. found that citizens could sue for damages when a federal officer violated their Fourth Amendment rights. Citing a list of cases in which the Court had allowed damage suits against government officials, Brennan extended that right to sue to include Fourth Amendment violations.

The *Bivens* decision opened an opportunity for defendants and convicted prisoners to sue prosecutors, police officers, and prison officials, charging them with violating their due process rights. These suits included complaints about everything from food to living conditions to the method of determining good-behavior credits for early release. Federal judges were soon faced with a backlog of cases that forced them to make minutiae-driven decisions about the operations of prisons and the conduct of prosecutors. William H. Rehnquist's appointment as chief justice in 1986 marked a turn in the Court's treatment of *Bivens.* The case thereafter would no longer be an avenue for creating new rights.

LIMITING *BIVENS* AND 1983

The Court under Chief Justice Rehnquist treated section 1983 actions in much the same way as it did *Bivens* claims. Section 1983 became the main tool for convicted state prisoners to sue prison officials seeking damages either for improper treatment or wrongful imprisonment. In *Monroe v. Pape,* 365 U.S. 167 (1961), the Court had allowed citizens to hold public officials personally liable for violating the Constitution. The *Monroe* decision was followed by a swelling number of claims by prisoners under section 1983. By the 1980s, however, the new Court began constructing obstacles to those suits.

One such obstacle, used in both section 1983 and *Bivens* claims, was the concept of qualified immunity. Under qualified immunity, government officials cannot be sued for violating constitutional rights if they

were not aware that their actions constituted such a violation. In a case involving an illegal search, *Anderson v. Creighton,* 483 U.S. 635 (1987), the Court defined qualified immunity as extending protection from suit to an officer who believed his actions were lawful based on the law at that time. This definition was expanded during the 1990s as qualified immunity became a frequent defense for officials who claimed that although their actions may have been unconstitutional, the officials had acted with the belief that their actions were legal at the time.

In *Wilson v. Layne,* 526 U.S. 603 (1999), the Court considered the constitutionality of allowing members of the media to ride along with police and take pictures during arrests. Federal marshals (sued under a *Bivens* claim) and local police (sued under section 1983) searched Charles Wilson's house. During the search, a local newspaper photographer who had ridden with officers to the scene snapped pictures of the home's interior. Wilson sued, claiming that the presence of the photographer violated his Fourth Amendment rights against unreasonable searches.

The Court unanimously agreed that the ride-alongs violated the Fourth Amendment, but the justices split over whether the federal marshals and local police had qualified immunity from being sued. Five justices ruled that the police could not have known that including the media was a violation of the Fourth Amendment. Because the officers had believed the ride-alongs were permissible, they had not knowingly violated Wilson's rights and could not be sued for damages for that violation.

Yet the Court has not accepted every argument for qualified immunity. In *Hope v. Pelzer,* 536 U.S. 730 (2002), the Court considered the constitutionality of the "hitching post" that the state of Alabama used as a punishment for state prisoners. Larry Hope was such a prisoner, and as a punishment for a rules infraction, he was handcuffed to a hitching post, forced to stand in a sun-exposed position, and given little water and no access to bathroom facilities. He sued under section 1983, claiming the prison guards, as state officials, had violated the Eighth Amendment's ban on cruel and unusual punishment. The prison guards claimed qualified immunity, stating that they were not aware the hitching post could be considered unconstitutional punishment.

The Court denied the claim of immunity and allowed Hope to sue under section 1983. In his opinion, Justice John Paul Stevens stated that the hitching post clearly violated the prohibition against cruel and unusual punishment and that any reasonable state officer would have known not to impose such a punishment on anyone. But *Hope* represented one of the few times the Court refused a claim of qualified immunity. Instead, the Court has focused mainly on reining in abusive lawsuits that have clogged the federal courts.

To limit the number of lawsuits, the Court has refused to extend *Bivens* to new areas. One recent case involved private prisons. These prisons, run by corporations, took in nonviolent offenders when public prisons became overcrowded. In *Correctional Services v. Malesko,* 534 U.S. 61 (2001), the Court considered whether officials in a private prison could be sued under *Bivens.*

John Malesko, a prisoner in a privately run facility, was forced to climb six flights of stairs despite a heart condition. After suffering a heart attack, he sued the company that ran the prison, claiming his rights had been violated. Speaking for a majority of five, Chief Justice Rehnquist rejected Malesko's claim, noting that *Bivens* was intended to prevent unconstitutional actions by federal officials. Suing corporations would have little effect on these officials but would punish the business for the actions of their employees. With its *Malesko* decision, the Court stated plainly that it was unlikely to expand on the number of issues prisoners could use to sue under *Bivens*.

The Court has also limited section 1983 suits using the due process requirement of the law. Under section 1983, state officials can be sued only if they violate rights while denying due process to a citizen. In *Lujan v. G&G Sprinklers,* 532 U.S. 189 (2001), the Court considered whether a company could use section 1983 to sue a state official who refused to pay a bill owed to the company. In *Lujan,* the state refused to pay G&G Sprinklers because the company did not abide by requirements for hiring minorities. G&G sued, claiming its property had been taken by the state without the benefit of due process or a hearing.

In a unanimous decision, the Court ruled that the state had not denied the company due process. Under state law, G&G could have sued the state for breach

of contract and received the payment due it. Because there was an opportunity at the state level for G&G to recover its property, it could not sue in federal court under section 1983.

Lujan represents a major limitation on the right to bring section 1983 actions. Because most states have laws governing breach of contract or allow people to sue in tort law for injuries caused by the state, there will be few opportunities for citizens to claim their rights have been denied under section 1983. In most cases involving disputes between citizens and state governments, those disputes will be settled in state court.

Since the *Bivens* decision in 1971, both it and section 1983 have been limited in their scope. The Supreme Court has created several exceptions to when individuals can sue state officials in federal courts. By doing this, they have heightened the importance of state courts and lessened the workload of federal courts.

Douglas Clouatre

See also: Eighth Amendment; Fourth Amendment; Prisoners' Rights; State Action.

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Black, Hugo L. (1886–1971)

Hugo L. Black served as an associate justice of the U.S. Supreme Court from 1937 to 1971. He became known as one of the greatest "liberals" to serve on the Court during the twentieth century. Black supported civil liberties and political equality in numerous opinions over thirty-four years. He endorsed a "literalist" interpretation of the Constitution in matters regarding the Bill of Rights. Despite many contractions and reversals during his tenure on the Court, Black remains an important figure in American legal history.

Black was born in Clay County, Alabama, on February 22, 1886. Although he never finished an undergraduate degree, he received a law degree in 1906. Black became a well-known plaintiff's attorney in Alabama and became a police court judge in 1911. He was elected prosecutor for Birmingham, Alabama, and fought for penal reform throughout his career. Black's career as a lawyer and prosecutor would have an influence on his career as a Supreme Court justice. During the early 1920s, he briefly joined the Ku Klux Klan.

In 1925 he was elected to the U.S. Senate, where he served until 1937. During his time in the Senate, Black supported the New Deal legislation of President Franklin D. Roosevelt and conducted congressional investigations of the utilities industry and lobbyists. Throughout his time as a senator, Black generally backed the prosegregation policies of other southern politicians. He attacked Supreme Court decisions of the early 1930s that struck down New Deal legislation under the guise of substantive due process.

In 1937, President Roosevelt nominated Black to the Supreme Court. He won Senate confirmation even after the public disclosure of his past Klan membership. Black immediately began to work on reversing the Court's anti–New Deal rulings and voting to support the constitutionality of administration legislation. By the early 1940s, Black began to develop his reputation as a civil libertarian and free speech advocate. After voting with the majority to uphold suppression of unpopular views in *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), and *Minersville School District v. Gobitis,* 310 U.S. 586 (1940), Black switched course to become the Court's leading advocate of absolute protection for First Amendment freedoms. In *Bridges v. California,* 314 U.S. 252 (1941), he laid out a strong free speech argument in the majority opinion.

Black's change of heart in the mid-1940s and his

Hugo L. Black served as associate justice of the Supreme Court from 1937 to 1971. During that time, he supported civil liberties and political equality in numerous opinions. *(Library of Congress)*

defense of the doctrine known as "total incorporation"—that all the provisions of the Bill of Rights should apply equally to the state and national governments, a position he explained in his dissent in *Adamson v. California,* 332 U.S. 46 (1947)—led to intellectual and personal feuds with some of his Supreme Court brethren, especially Justices Felix Frankfurter and Robert H. Jackson. During the 1941–1953 period of conservative, progovernment Court decisions, Black was usually in dissent, often accompanied by Justices William O. Douglas, Frank Murphy, or Wiley B. Rutledge. In 1952 he was able to express himself when he wrote the majority opinion in *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 (1952), overturning President Harry S Truman's seizure of the private steel industry during a time of war. According to Black, "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."

Black was instrumental in the civil rights revolution, supporting all of the major civil rights cases throughout the 1950s and 1960s. As a southerner, he had a particular interest in civil rights and supported the legal aspirations of African Americans. By the late 1960s, Black had lost patience with southern obstructionism and demanded that the Court's desegregation rulings in *Brown v. Board of Education,* 347 U.S. 483 (1954), and subsequent cases be enforced.

Black applied his staunch libertarian doctrines to all aspects of the Constitution. In 1944 he authored a majority opinion in *Korematsu v. United States,* 323 U.S. 214 (1944), that upheld the government's policy of interning Japanese Americans during World War II. Throughout his career, Black was never passionate about the Fourth Amendment and seldom mentioned it in his writings. By the 1960s, Black was frequently critical of Court opinions that he considered to be lenient on crime, yet he wrote the opinion in *Gideon v. Wainwright,* 372 U.S. 335 (1963), the 1963 decision that applied the right to counsel to the states and for all crimes having potential for imprisonment.

During the years of Chief Justice Earl Warren, Black authored majority opinions supporting the rights of minorities, freedom of speech, and the rights of the accused. He was particularly forceful in arguing for an "absolutist" position for First Amendment rights. Dissenting in *Roth v. United States,* 354 U.S. 476 (1957), he stated, "But I believe this nation's security and tranquility can best be served by giving the First Amendment the same broad construction that all Bill of Rights guarantees deserve." In one of his last cases, Black authored the per curiam (by the Court) opinion in the *Pentagon Papers* case, *New York Times Co. v. United States,* 403 U.S. 713 (1971), involving the publication of government documents in the *New York Times.*

During his final years of tenure on the Court, some observers argued that Black moved toward a more conservative position. Black's absolutist position on the First Amendment never wavered, but he occasionally was very limited in what he considered "speech." Black dissented from protecting the vulgar expression on Paul Cohen's jacket in *Cohen v. California,* 403 U.S. 15 (1971). He disagreed with the holding in *Griswold v. Connecticut,* 381 U.S. 479 (1965), which overturned Connecticut's ban on sale of contracep-

tives to married couples, stating in his dissent, "[The] Court talks about a constitutional 'right of privacy' as though there is some constitutional [provision] forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not." Black was relentless during this period as an opponent of the idea that the Constitution protected a general right to privacy.

Black entered his final year on the Supreme Court in declining health. He resigned on September 17, 1971, and died eight days later. Black ranks as one of the most important justices of the twentieth century, and his support for First Amendment rights has been heralded by scholars as the most devoted and articulate of any Supreme Court justice.

Charles C. Howard

See also: First Amendment; Incorporation Doctrine; Symbolic Speech; Warren, Earl.

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Blacklisting

Blacklisting consists of placing an individual's name on a circulated list of persons who are disapproved of or who are to be punished for or prevented from associating with or gaining economic advantage from a particular favored group or gaining access to the privileges bestowed upon individuals holding a perceived favored status. Synonyms for *blacklist* include *ban, ostracize, blackball, exclude, reject, boycott, debar, banish, shun,* and *shut out*. Blacklisting is generally discriminatory and illegal when used to single out a particular individual on the basis of race, religion, gender, national origin, or beliefs.

Some exclusionary practices are legal and permissible, such as when groups seek to affiliate and exclude others on the basis of association with a declared public cause, on the basis of espousing certain religious beliefs, or on the basis of a physical attribute that might otherwise be discriminatory. For example, a private divinity school may insist upon commitment to the teachings and precepts of a specific religion. Gender may create a valid basis for private inclusion versus exclusion. The Ladies Professional Golf Association (LPGA) is open to professional women golfers only, and the Women's Tennis Association (WTA) specifically excludes male tennis athletes. Both organizations sponsor professional competition tours and events open to qualifying women athletes. Even in such cases, however, the excluded group may seek legal action to force inclusion on the basis of constitutional equal protection, such as when public money or state funding supports the group. For example, in *United States v. Virginia,* 518 U.S. 515 (1996), women who were denied entry to the Virginia Military Institute successfully challenged its admissions policy on grounds that they had been denied equal protection of the law, which is guaranteed by the Fourteenth Amendment to the Constitution.

HISTORICAL INCIDENTS OF BLACKLISTING

In 1947 the House Un-American Activities Committee (HUAC) began its investigation of suspected Communists in the film industry. The committee, which included Rep. Richard M. Nixon (R-CA), later to become U.S. president, called various celebrities to testify in Washington, D.C. Senator Joseph McCarthy of Wisconsin led another investigative committee, and the period was dubbed the "McCarthy era." The "witch hunt" against Communists in America in the late 1940s and 1950s wielded two weapons, namely imprisonment and the economic boycott. Ultimately, a list was circulated naming alleged pro-Communist screenwriters and actors. Robert Taylor, Robert Montgomery, Gary Cooper, and future U.S. president Ronald Reagan were among those called to testify. The "Hollywood Ten"—seven screenwriters, two directors, and one producer—challenged the committee's right to probe their personal beliefs as a violation of the Constitution. Despite invoking their Fifth Amendment right against self-incrimination and their First Amendment right of freedom of association, their protest led to one-year federal prison terms.

In 1951 over 100 people were called to testify. A year later more than 300 people were unable to work in the motion picture industry because their names were placed on the blacklist. They were accused of all forms of subversive activities, including conspiracy to build new weapons with Russia. Many blacklisted writers used pseudonyms. Hollywood producers refused to create any films that questioned or highlighted the teachings of communism and instead marketed a bevy of anti-Communist films in order to curry favor with the political leaders of the U.S. government.

The congressional inquiries into Communist affiliations expanded to include academic colleges and educational institutions. In response to government inquiry, the dean of Columbia University in New York City drafted and issued special written policy guidelines for use on campus, emphasizing the importance of academic freedom under the First Amendment to the Constitution.

Today, U.S. government intelligence officials maintain lists of groups and individuals believed to be potential dangerous criminals, ranging from white Aryan neo-Nazi fascist groups to al-Qaeda Muslim terrorist groups. In spite of this intense government scrutiny, the courts have granted neo-Nazi groups permission to exercise First Amendment rights to demonstrate in support of their beliefs and teachings. In October 2002, United Press International reported that U.S. officials were contemplating the dissemination of an expanded blacklist of "countries of particular concern" that restrict religious freedoms.

DEFINING ILLEGAL CONDUCT

Intentional blacklisting violates federal and state statutes in numerous areas of the law. In the labor law field, a union negotiating under a collective bargaining agreement may not use secondary boycotts in order to put undue pressure on the employer to succumb to the union's demands. A "secondary boycott" is one in which a union refuses to deal with a secondary employer with whom the union has no dispute, for the purpose of forcing that employer to stop doing business with the primary employer, with whom the union has a labor dispute.

Many states have enacted laws to encourage employees to report employer wrongdoing such as fraud. The federal Whistleblower Protection Act of 1989 shields federal employees who report employer illegal activity. Under the federal False Claims Reform Act of 1986, employees may be entitled to monetary awards for undertaking the risk of blacklisting, retaliatory employment termination, and other loss of compensation and benefits. Federal and state statutes empower officials to prosecute such employment-related blacklisting and retaliatory conduct.

Horizontal restraints in antitrust law are any agreements that in some way restrain competition between rival firms competing in the same market. The refusal to deal with a particular person or firm by a group of competitors is prohibited by the Sherman Antitrust Act, first adopted in 1890. This conduct is called a "group boycott."

In *Summit Health, Ltd. v. Pinhas,* 500 U.S. 322 (1991), an ophthalmologist claimed that he was blacklisted for refusing to employ an unnecessarily costly surgical procedure by a group of conspiring Los Angeles medical service departments. His hospital privileges were terminated, and a false peer-review report was compiled in contemplation of his civil action under section one of the Sherman Act. The evidence demonstrated that the doctor's rate of speed for performing eye surgery was six times that of his competitors, which greatly benefited the patients whose risk of incurring damaged eye tissue was greatly reduced. The Supreme Court ruled that he was entitled to relief under the Sherman Act.

ILLUSTRATIONS OF PERMISSIBLE BOYCOTTS

Some boycotts orchestrated by consumer groups or public interest groups may be permissible under the First Amendment right to freedom of expression. For example, consumer groups may publicly organize consumers to boycott or refrain from buying goods from companies doing business with political regimes that promote racism, such as the case of South Africa before it banned apartheid as a formal governmental policy. Other public interest groups have boycotted companies and their products based upon poor do-

mestic compliance with regulations passed by the Occupational Safety and Health Administration (OSHA); the mistreatment of laboratory animals in experimental studies; and abuse and exploitation of labor in poor countries, such as in Southeast Asia.

The Department of Defense has adopted a federal acquisition regulation that clarifies the criteria for blacklisting of contractors and companies that have an unsatisfactory record of integrity and business ethics. As a means of government regulation, blacklisting prohibits the award of federal procurement contracts to companies that are listed for unsatisfactory compliance with labor, antitrust, environmental, tax, and consumer protection laws.

A lawsuit by Michael Italie against Goodwill Industries of South Florida in 2001 further clarifies the debate over proper versus improper blacklisting. Goodwill terminated Italie's employment because of his affiliation with the Socialist Workers Party (SWP) and his communistic rejection of the principles, foundations, and market mechanisms associated with capitalism. Italie ran for mayor in South Florida as the SWP candidate and declared his support for the Cuban Revolution. His leftist supporters argued that Goodwill's decision to discharge him from employment violated his civil liberties as guaranteed under the First Amendment. A court disagreed, holding that in a free democratic society even corporate employers are tax-paying citizens of the state and have a legitimate protected right to refuse to employ those with whom they disagree politically.

J. David Golub

See also: Boycott; Fifth Amendment and Self-Incrimination; First Amendment.

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Blackmun, Harry A. (1908–1999)

Born in Nashville, Illinois, in 1908, Harry A. Blackmun was raised in Saint Paul, Minnesota, and subsequently earned his bachelor's and law degrees from Harvard University. He returned to Minnesota where he engaged in private practice and served as resident counsel at the Mayo Clinic before President Dwight D. Eisenhower appointed him to the U.S. Court of Appeals for the Eighth Circuit in 1959. President Richard M. Nixon nominated Blackmun to the U.S. Supreme Court in 1980, and he served on the high court until 1995.

Blackmun is best known for writing the Court's decision in *Roe v. Wade,* 410 U.S. 113 (1973), in which he articulated women's constitutional right to abortion. Balancing the constitutional right to privacy, including the privacy of the child-bearing decision, with the interest of the state in a woman's health, he said in *Roe* that the right to abortion varied with the stages of pregnancy. The state could impose tighter restrictions on the right in the later stages, when the dangers to a woman from abortion became greater. In subsequent abortion-rights cases, he voted to strike down spousal or parental consent requirements and waiting periods as well as limits on government funding of abortions.

He was not always that consistent throughout all his opinions, however; his judicial philosophy was a work in progress. He abhorred capital punishment but voted to uphold it as within the powers of the state, and he declared only as he was about to leave the Court that it was unconstitutional in *Callins v. Collins,* 510 U.S. 1141 (1994). He had a mixed record in speech and press cases, voting in *New York Times Co. v. United States,* 403 U.S. 713 (1971), to prevent the *New York Times* from publishing the *Pentagon Papers,* and in *Smith v. Goguen,* 415 U.S. 566 (1974), to penalize the asserted speech rights of a young man who wore the flag "affixed to the seat of his pants." In contrast, he joined the Court in striking down a flag desecration law in *Texas v. Johnson,* 491 U.S. 397 (1989), and a "hate-speech" law in *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992). He was a key figure in the development of the law of commercial speech, giving constitutional protection to advertisers in the

Associate Justice Harry A. Blackmun is best known for writing the Supreme Court's decision in *Roe v. Wade* (1973), in which he enunciated the constitutional right to abortion. *(Library of Congress)*

name of providing consumers with all relevant information, as the Court held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), and thereby putting commercial speech more on a par with political speech.

Although Blackmun tended to be dismissive of the rights of accused criminals, he was generally supportive of the rights of people he considered disadvantaged. He wrote opinions upholding school desegregation in *Columbus v. Penick,* 443 U.S. 499 (1979), and statutory employment preferences for Native Americans in the Bureau of Indian Affairs in *Morton v. Mancari,* 417 U.S. 535 (1974), and he dissented from decisions that limited affirmative action plans, as in *Ward's Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989). He was particularly protective of aliens, announcing in *Graham v. Richardson,* 403 U.S. 365 (1971), that the Court would view classifications based on alienage with suspicion, and arguing that states could not prohibit aliens from employment in the civil service, an issue in *Sugarman v. Dougall,* 413 U.S. 634 (1973), or in public schools, as in *Ambach v. Norwick,* 441 U.S. 68 (1979). Further, states could not exclude children of illegal aliens from public schools, he wrote in *Plyler v. Doe,* 457 U.S. 202 (1982), and he dissented angrily in *Sale v. Haitian Centers Council,* 509 U.S. 155 (1993), when the Court held that the United States could intercept Haitian refugees at sea and return them to Haiti.

For the most part, Blackmun's record reflected his promise, made when he was nominated to the Court, that he would "show . . . in the treatment of little people . . . a sensitivity to their problems."

Philippa Strum

See also: Roe v. Wade.

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Blackstone, William (1723–1780)

William Blackstone was the most influential British legal scholar of the eighteenth century, and his consolidation of English common law had a profound influence upon American legal thought. He was born in 1723, four months after his father's death, and an uncle provided for him after his mother died when he was twelve. Educated at Oxford, he occupied the Vinerian Chair of English Law there and was the first professor at an English university to lecture on the indigenous unwritten, or common, law (*lex non scripta*), as opposed to Roman or canon law. From these lectures emerged his monumental four-volume treatise, *Commentaries on the Laws of England* (1765–1769), in which he gave shape and structure to the

complex developments of judicial precedents, legislative acts, and legal traditions. Blackstone's greatest skills lay in writing clearly and with organizational coherence on legal subjects that were often turgid, technical, and dry. Nevertheless, Blackstone was no innovator, and the *Commentaries* often resemble a grab-bag of different contemporary schools of law, including natural law, ancient constitutionalism, and social-contract theory.

The work exerted a great and immediate influence on both sides of the Atlantic. Blackstone aimed to educate law students, but his intended audience also included the British landed gentry who he believed needed to understand their duty to sustain and protect the system of civil liberty enshrined in the common law heritage. Blackstone therefore designed the *Commentaries* to be appreciated without previous legal knowledge. As a result, in Britain, and especially in the United States, his *Commentaries* became a cornerstone of legal education, both as a ubiquitous reference guide and as the first (and often only) book aspiring lawyers would read before practicing law. The volumes were often updated to keep abreast of legal changes, and in 1803 an American lawyer and scholar named St. George Tucker (1752–1828) came out with the first U.S. annotation of the *Commentaries.*

Despite its popularity, his treatise proved an ambivalent authority for many members of America's founding generation. The trouble was in the framework of the *Commentaries.* On the one hand, Blackstone conceptualized English common law in the idiom of natural law, arguing that human beings were free agents and the law existed to assist all individuals in the realization of their natural freedom. On the other hand, Blackstone believed that the English system of common law had reached a state of near perfection with the Glorious Revolution of 1688, which had ousted James II and brought William and Mary to power. This historical satisfaction generated a deep conservatism in his thought, and rarely did he take the opportunity to use natural law as a tool for critiquing the state of law in his own time.

For example, despite his natural law foundations, Blackstone was at pains to deny the right of revolution. He argued that John Locke's defense of revolution might be justifiable in theory, but in practice it remained impossible. To suggest revolution or even to challenge the absolute power of Parliament—known as parliamentary sovereignty—would be to risk the absolute collapse of all governing authority, including the ancient protections of the common law itself, upon which, Blackstone asserted, freedom was dependent. Indeed, at the heart of the *Commentaries* was a strong defense of the principle that the Parliament, not the people themselves, was the supreme sovereign. Neither persons nor particular causes could be allowed to diminish or limit the absolute jurisdiction of the legislature.

As a result, Blackstone not surprisingly was unsympathetic to the cause of the American Revolution. Some of its leaders, such as major constitutional draftsman James Wilson of Pennsylvania, explicitly challenged Blackstone's principle of legislative supremacy; others, including Alexander Hamilton, focused upon the support in the *Commentaries* for natural rights and ignored the more controversial issues. Despite his antirevolutionary character, Black-

Sir William Blackstone's *Commentaries* strongly influenced the framers of the Constitution and the Bill of Rights. *(Library of Congress)*

stone presented an overall conservative message, and he supported private property and separation of powers; for these reasons, his thinking was well received, especially after the Revolution. He was one of the authorities most often cited during the writing and ratification of the Constitution.

In the context of U.S. constitutional doctrine, Blackstone's most enduring influence concerned the interpretation of the First Amendment's protection of free speech and freedom of the press. Blackstone famously argued that English freedom of the press prohibited restraint prior to publication but permitted punishments after publication for offenses such as libel, sedition, or blasphemy. This standard of freedom was quite inadequate, since the writer could be severely punished after publication. Much of the controversy in America in the wake of both the Sedition Act of 1798 and the Espionage Act during World War I concerned whether the First Amendment was meant to incorporate or broaden Blackstone's doctrine.

Blackstone entered Parliament in 1761, became the Queen's solicitor general in 1763, and was appointed as a judge of the King's Bench in 1770. Later that year he moved to the Court of Common Pleas, where he served until his death in 1780.

Douglas C. Dow

See also: Common Law; English Roots of Civil Liberties; First Amendment.

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Blue Laws, or Sunday-Closing Laws

Sunday-closing laws, perhaps better known as "blue laws," which generally prohibit labor, business, and other commercial activities on Sunday, have been prevalent throughout American history. In fact, they have been part of Anglo-Saxon tradition since 1237, when Henry III prohibited his subjects from going to markets on Sunday. The British statute in effect when the American colonies gained independence provided in part:

> For the better observation and keeping holy the Lord's day, commonly called Sunday: be it enacted . . . that no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor or business or work of their ordinary callings upon the Lord's day, or any part thereof (works of necessity and charity only excepted); . . . and that no person or persons whatsoever shall publicly cry, show forth, or expose for sale any wares, merchandise, fruit, herbs, goods, or chattels, whatsoever, upon the Lord's day.

Blue laws appeared in the American colonies as early as 1650 when Plymouth Colony restricted Sunday work and traveling. In fact, each colony enacted similar laws restraining Sunday activities. A typical example is the preface to a 1695 New York blue law, cited in *McGowan v. Maryland,* 366 U.S. 420 (1961), stating that

> the true and sincere worship of God according to his holy will and commandments, is often profaned and neglected by many of the inhabitants and in this province, who do not keep holy the Lord's day, but in a disorderly manner accustom themselves to travel, laboring, working, shooting, fishing, sporting, playing, horse-racing, frequenting of tippling houses and the using many other unlawful exercises and pastimes, upon the Lord's day, to the great scandal of the holy Christian faith, be it enacted . . .

It might appear on the surface that blue laws would have difficulty passing constitutional examination on grounds not only of equal protection (they apply unevenly to different businesses and activities) but also of establishment of religion (prohibited by the Establishment Clause of the First Amendment). Yet these constitutional provisions aside, the validity and continued existence of blue laws are generally secure. A few state courts invalidated such laws for a variety of reasons in the late twentieth century, but during the nineteenth century, only one court, in *Ex parte New-*

A Reginald Marsh cartoon showing a crowd of angry clergymen gathered at the base of the Statue of Liberty, exclaiming "Hey, take your arm down. Don't you know this is Sunday?" Marsh's cartoon, which appeared in the left-wing journal *Good Morning* in 1921, possibly was meant to satirize "blue" laws that prohibited all labor and business activities on the Christian Sabbath. *(Library of Congress)*

man, 9 Cal. 502 (1858), found a blue law unconstitutional, and that decision was overruled three years later in *Ex parte Andrews,* 18 Cal. 678 (1861).

On the federal level, the U.S. Supreme Court in *McGowan v. Maryland,* 366 U.S. 420 (1961), upheld a Maryland blue law against a claim that it violated the Establishment Clause on the ground that the purpose and effect of the statutes were not to aid religion but to set aside Sunday as a day of rest and recreation. The *McGowan* court also refused to invalidate the statute on equal protection grounds even though it had many exceptions, such as permitting retail sale of certain products, including tobacco, food, and gasoline. On the issue of equal protection, Chief Justice Earl Warren, writing for the Court, stated that

> a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day—that a family which takes a Sunday ride into the country will need gasoline for the automobile and may find pleasant a soft drink or fresh fruit; that those who go to the beach may wish ice cream or some other item normally sold there; that some people will prefer alcoholic beverages or games of chance to add to their relaxation; that newspapers and drug products should always be available to the public.

At least two reasons can be offered to explain the safe position of blue laws under the Constitution. One is that constitutional challenges on libertarian grounds were uncommon in the nineteenth and early twentieth centuries, as witnessed by the fact that the judiciary did not apply the Establishment Clause of the First Amendment to the states, through the Fourteenth Amendment, until 1947 with *Everson v. Board of Education,* 330 U.S. 1 (1947). The other and more important reason is that over time the justification for blue laws changed from sectarian to secular grounds. As Justice Stephen J. Field stated in *Soon Hing v. Crowley,* 113 U.S. 703 (1885):

> Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States.

The evolution of attitudes toward blue laws began long before the twentieth century. Sir William Blackstone wrote in the middle of the eighteenth century: "The keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sor-

did ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness." A corollary of the attitudinal change was the widespread habit of ignoring blue laws. As nineteenth-century commentators like A.H. Lewis were pointing out, "these laws are 'dead letter.' Whoever wishes to disobey them, does so. Many of them which seem to be stringent, are open enough to 'drive a coach and four horses through without touching.' "

Approximately one-half of the states currently have some form of statutory restriction on Sunday activities. Many state governments permit counties and municipalities to enact restrictions as well. Contemporary blue laws span a wide spectrum, ranging from one in Alabama providing that "Any person who opens, or causes to be opened, for the purpose of selling or trading, any public market or place on Sunday, or opens, or causes to be opened, any stall or shop therein, or connected therewith, or brings anything for sale or barter to such market or place, or offers the same for sale therein on that day, or buys or sells therein on that day, including livestock or cattle, shall, on conviction, be punished . . ." (Ala. Code § 13A-12–2 [2002]), to one in Louisiana providing that "No store or business that is opposed to being open on Sunday shall be required to open on Sunday unless it is agreed to in the lease agreement" (La. R.S. § 51:192 [2003]).

Although the U.S. Supreme Court appears to have insulated blue laws from a successful First Amendment challenge, it is a different story in state courts where decisions are based on state law. Blue laws have been invalidated by state tribunals on a variety of grounds, including the lack of a rational basis to support the law, as in *Pacesetter Homes, Inc. v. Village of South Holland,* 18 Ill. 2d 247, 163 N.E.2d 464 (1958); the failure to apply the law uniformly throughout the state, as in *People v. Abrahams,* 40 N.Y.2d 277, 353 N.E.2d 574 (1976); and the failure to achieve legislative purpose by including so many exceptions, as in *Spartan's Industries, Inc. v. Oklahoma City,* 498 P.2d 399 (Okla.1972).

Clyde E. Willis

See also: First Amendment.

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Board of Education v. Earls (2002)

In *Board of Education v. Earls,* 536 U.S. 822 (2002), the U.S. Supreme Court upheld a policy of requiring drug tests for middle and high school students engaged in any extracurricular activity. The general legal principle under the Fourth Amendment is that search and seizure require a warrant, but there are several exceptions, one of which is called the "administrative search." The five–four decision in *Earls* represented a significant extension of the "special needs" exception for administrative searches and expanded the scope of warrantless, suspicionless, random drug testing in public schools beyond the factually narrow holding in *Vernonia School District v. Acton,* 515 U.S. 646 (1995).

In 1998, the Tecumseh, Oklahoma, public school district adopted a policy mandating random, suspicionless drug testing of high school students participating in extracurricular activities such as band and choir, the Future Farmers of America and Future Homemakers of America, and athletic and academic teams. Students who refused to submit to testing were banned from extracurricular activities.

Lindsay Earls, a member of the show choir, marching band, and academic team, challenged the drug testing in federal court. The district court ruled for the school, but the Tenth Circuit Court of Appeals reversed, and, relying on *Vernonia,* held that the school would have to show a "special need" for such testing. Unlike the school in *Vernonia,* the schools in the small town of Tecumseh had little evidence of a drug problem. Furthermore, in contrast to the sports teams at issue in *Vernonia,* no special risk of physical harm was posed by drug use by Tecumseh students in the nonathletic activities, and there was no parallel

to the reduced expectation of privacy student athletes have, given the need for physical examinations and use of common showers and locker rooms. The Tenth Circuit decision conflicted with decisions by the Seventh and Eighth Circuits upholding broad testing of students, setting up a "circuit split" that invited Supreme Court review.

Writing for a five-justice majority upholding the school's policy, Justice Clarence Thomas concluded that random drug testing of all those who participated in extracurricular activities was reasonable in light of the school's interest in detecting and preventing drug use and furthering schools' "custodial and tutelary responsibility for children."

The Court noted that the drug tests were administered without an undue invasion of students' privacy, and that the results were confidential and were not turned over to law enforcement, thus ameliorating any lessening of students' privacy interests. The majority also pointed out the seriousness of student drug use as a national problem and noted there was some evidence in the record suggesting the possibility of some drug use at or near the Tecumseh school.

Writing for the four dissenters, Justice Ruth Bader Ginsburg labeled the policy "capricious, even perverse." The dissent noted that the health risks cited by the majority were present for all students, not just those involved in extracurricular activities, and that the students in the activities at issue shared the same privacy expectations of students in general. The dissenters also pointed out that the evidence of a drug problem was so thin that any school in the country would be able to make out a similar claim. They also agreed with Earls that participation in extracurricular activities, though nominally voluntary, was actually essential for students seeking admission to competitive colleges, and that students involved in such programs were less likely to be involved in drug use and thus less in need of testing. As such, the dissenters complained, the Court was opening the door to testing of all public school students.

Ronald Steiner

See also: Fourth Amendment; *New Jersey v. T.L.O.;* Random Drug Testing; Search; Seizure; *Vernonia School District v. Acton.*

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Board of Education v. Grumet (1994)

In *Board of Education v. Grumet,* 512 U.S. 687 (1994), the U.S. Supreme Court enunciated the neutrality principle the government must apply when dealing with religious groups: It cannot prefer one religion to another. The government violates the Establishment Clause of the First Amendment to the U.S. Constitution when it discriminates among religious groups. Such discrimination is permissible only if it meets the Court's highest level of scrutiny, called "strict scrutiny."

The village of Kiryas Joel was created by a group of Satmar Hasidic Jews (Satmars), practitioners of a particularly strict form of Orthodox Judaism, who drew the village lines carefully to exclude all but Satmars. With few exceptions, the Satmar children attended the local religious schools; the exceptions consisted of those who, because of physical, mental, or emotional handicaps, required special education under the Individuals with Disabilities Education Act, which the parochial school could not provide. Originally, the Monroe Woodbury School District provided special education services in an annex to one of the parochial schools, but following several court decisions disfavoring the provision of public services in religious institutions, the district discontinued the practice and required Satmar children in need of special education to attend pubic schools outside the community. After some litigation in state courts over whether the district was barred from providing separate schools in Kiryas Joel (with the state courts ruling that it was permissible if the complaint were framed as one of religious incompatibility rather than emotional trauma, as al-

leged by the Satmar parents), all but one child were removed from the district schools.

In 1989, in what Governor Mario Cuomo described as a "good faith effort to solve this unique problem," the New York Assembly passed a law constituting Kiryas Joel as a separate school district and created a local board to preside over the new district. The Kiryas Joel district ran only a special education program for the village's handicapped children, as the other Satmar children continued to attend their parochial schools. Suit was brought to invalidate the school district by two officials of the New York State School Boards Association.

The New York Appellate Division found that the law had the primary effect of advancing religion in violation of both state and federal constitutions. The New York Court of Appeals affirmed on the federal question, stating that the law "created a symbolic union of church and state." The U.S. Supreme Court granted certiorari.

In a six–three decision, the Court held that the law creating the Kiryas Joel Village School District violated the Establishment Clause of the First Amendment because the district followed the village boundary line, which excluded all but practitioners of one religion. Although states have considerable latitude in drawing school district lines to achieve various public policies, the state may not "deliberately delegate discretionary power to an individual, institution, or community on the ground of religious identity," even though religious persons cannot per se be excluded from political office.

Even though the form of the delegation in this matter was to a village regularly constituted under the laws of New York and not expressly identified with a religious community, the Court did not stop at an analysis of the mere form but viewed the delegation along with the attendant circumstances. In this case, the village was specifically created and the boundaries carefully drawn to create a religious enclave for the members of one specific sect. The act creating the school district resulted in a "fusion of governmental and religious functions" that was the result of impermissible employment of a religious criterion for the delegation of political power. The Court also noted that the extraordinary nature of the enabling act made it very unlikely that similar remedies would be available to other religious bodies, another factor that compromised government neutrality in religious matters.

John C. Knechtle

See also: Establishment Clause; Separation of Church and State; Strict Scrutiny.

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Board of Education v. Pico (1982)

In *Board of Education v. Pico,* 457 U.S. 853 (1982), the U.S. Supreme Court invalidated the removal of books from a school library. The principal issue underlying the case involved the rights of free speech, including the right to receive information, as set forth in the First Amendment to the Constitution.

The dispute arose from a September 1975 meeting in which three members of the Board of Education of the Island Trees Union Free School District No. 26 in Long Island, New York, attended a conference sponsored by a politically conservative parents organization. After being provided with a list of books that were allegedly unfit for school students to read, board members later discovered that nine of the books were in their high school library, and one was in the junior high library. Labeling the books "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy," the board appointed a committee to evaluate them and recommend whether they should be removed. The committee could not agree on whether the books—which included Kurt Vonnegut Jr.'s *Slaughterhouse Five,* Desmond Morris's *The Naked Ape,* and Richard Wright's *Black Boy*—should remain on the shelves. Nevertheless, the board demanded that they be removed.

Steven Pico and three other students filed suit, claiming that the board's actions denied them their rights under the First Amendment. The U.S. District Court for the Eastern District of New York rejected their claim, but they won on appeal to the Second Circuit Court of Appeals, which concluded that the school board must demonstrate a reasonable basis for interfering with the students' First Amendment rights. The school board appealed to the U.S. Supreme Court. The question before the Court was whether the First Amendment imposed limitations on the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries.

By a five–four majority, the Court ruled that under the First Amendment school boards cannot remove books from school libraries in order to deny access to ideas with which it disagrees for political reasons. Local school boards have broad discretion in the management of school affairs, but the First Amendment limits its exercise of that discretion. Students' rights under the First Amendment include a right to receive information and ideas. They should have wide access to information and ideas to prepare them for active and effective participation in society. A school board cannot remove books from high school and junior high libraries because of the books' content.

Five of the justices agreed that the school board did not have the power to remove the books, but they differed as to why. Justice William J. Brennan Jr. wrote the opinion of the Court, joined by Justices Thurgood Marshall and John Paul Stevens. Justices Harry A. Blackmun and Byron R. White wrote concurring opinions. Chief Justice Warren E. Burger and Justices Lewis F. Powell Jr., William H. Rehnquist, and Sandra Day O'Connor wrote dissenting opinions. The dissenters rejected the argument that the First Amendment includes a right of school children to receive information and ideas. They thought the proper role of education was to inculcate the community's values, a function into which the federal courts should rarely intrude. Justice Powell's dissent is notable for its appendix containing excerpts of questionable material from the nine books.

The case was settled in 1983, and the school board voted to keep the books on the library shelves. The students involved in the lawsuit graduated. Steven Pico became a lobbyist who fought against censorship.

Judith Haydel

See also: Book Banning; Right of School Boards to Ban Books; Student Rights; *Tinker v. Des Moines Independent Community School District.*

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Board of Regents v. Southworth (2000)

In *Wisconsin Board of Regents v. Southworth,* 520 U.S. 217 (2000), the U.S. Supreme Court refined its First Amendment jurisprudence about governmentally subsidized expression, one of the most nettlesome subsets of the Court's work on the intersection of money and speech. Previously, in *Rosenberger v. University of Virginia,* 515 U.S. 819 (1995), the Court had ruled that a student publication providing "a Christian perspective" could not be excluded from receiving its share of student activities fees because of its explicitly religious content. Five years later, the Court again confronted this issue but from the opposite direction.

The University of Wisconsin likewise had a generally assessed student activities fee that was used to fund extracurricular groups and activities. The objection lodged by Scott Southworth and several of his fellow law students at the university was that the school was requiring them to pay a student activity fee to support a cause they did not support. For Southworth, this was problematic because he found the agendas of some of the groups that received money from the fee to be personally distasteful. A self-described born-again Christian, Southworth specifically objected to the funding of programs on abortion and gay rights and contended that his mandatory con-

tribution to the general student activities fund was tantamount to compelled speech. The case was one in a series of lawsuits filed by conservative groups in the late 1990s in an effort to "defund the left" on college campuses nationwide.

Southworth's complaint was not without merit. Ever since its leading campaign finance decision, *Buckley v. Valeo,* 424 U.S. 1 (1976), the Court had regarded money spent on speech as a form of pure speech itself and thus subject to the free speech rights protected by the First Amendment to the Constitution. Extracting money from someone to support expression was thus functionally identical to commanding someone to make the actual utterances.

Nevertheless, the Court unanimously ruled against Southworth. Justice Anthony M. Kennedy's opinion reaffirmed the rule laid out in *Rosenberger* that a university must adopt a posture of "viewpoint neutrality" with respect to funding student expression. In *Rosenberger,* this principle was violated by the blanket exclusion of religious speech from receiving student activities fees (an action the University of Virginia had deemed necessary to avoid violating the Establishment Clause of the First Amendment, which prohibits government from engaging in activity that would constitute "establishment of religion"). In *Southworth,* by contrast, viewpoint neutrality was preserved by placing all mandatory contributions into a general fund. As long as a student's contribution was not earmarked for a specific group, there was no basis for conclusively suggesting that an individual student was supporting an agenda with which the student disagreed. Although this may have been true in a general sense, the Court felt that the problem was outweighed by a university's mission. Kennedy's opinion tepidly referenced this balance, but Justice David H. Souter's concurrence provided a thumping reaffirmation of academic freedom: "[T]he weakness of Southworth's claim is underscored by its setting within a university, whose students are inevitably required to support the expression of personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach."

The Court struck down one minor feature of the Wisconsin system: A method of awarding or stripping a group's financing through a student referendum was an alternative that threatened viewpoint neutrality, because a vote could be colored by support or hostility to a group's agenda.

Steven B. Lichtman

See also: Buckley v. Valeo; Rosenberger v. University of Virginia.

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Book Banning

Book banning has a long history, both in the United States and elsewhere, and is usually motivated by the conviction that public access to certain materials might be harmful to the public's common interest and morals. Of course, the mere attempt to ban information immediately raises issues involving the right to free speech found in the First Amendment to the Constitution. That right and other fundamental rights have been applied to the states through the Due Process Clause of the Fourteenth Amendment.

The most obvious form of politically motivated book banning involves the prohibition of works that undermine respect for the established government or for powerful religious authorities. For example, Thomas Paine's writings supporting American independence and his works defending the French Revolution were branded as treasonous and banned in eighteenth-century England. In the United States, the Supreme Court upheld bans on the distribution of antidraft publications because of the dangers such subversive writings posed in the context of World War I; one case addressing the issue was *Schenck v. United States,* 249 U.S. 47 (1919). During that same period, the

Ryan Honda, age eleven, reads to his seven-year-old brother Gavin from *Harry Potter and the Goblet of Fire,* on the back porch of their parents' home. *(© Norbert von der Groeben/The Image Works)*

War Department ordered that pacifist (antiwar) writings be removed from U.S. libraries, lest they undermine the war effort. During the "red scare" of the 1950s, classic works on communism by Karl Marx and V.I. Lenin came under fire.

Attempts to ban materials because of sexual content have been even more common—and more successful—than efforts to limit works deemed subversive. In the late nineteenth and early twentieth centuries, laws under the Comstock Act of 1873 effectively halted interstate distribution of "lewd" and "indecent" books such as *The Arabian Nights* and *The Canterbury Tales*. The same legislation also banned Margaret Sanger's *Family Limitation,* which provided clear and explicit instructions on using contraception. Under current laws, materials deemed "obscene" under the standards established in *Miller v. California,* 413 U.S. 15 (1973), are not considered protected speech and may be restricted. In some instances, courts have even permitted prior restraint (banning even before publication or distribution) of materials that a community considered obscene, as in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1957). Although the First Amendment right to free speech, including the written word, has been deemed fundamental, the courts have recognized limitations on that right if the limitations serve "compelling governmental interests."

Between 1990 and 2000, most challenges seeking the removal of books from libraries involved school districts. Parents instigated the majority of these challenges. The most frequently cited justification for a challenge was that the book contained sexually explicit material. In second place was the objection that the book used offensive language. The "offensive language" category encompasses both sexually explicit and racially charged language. The advent of R.L.

Stine's *Scary Stories* and J.K. Rowling's *Harry Potter* series has produced increases in challenges based on the contention that the work includes occult themes or promotes Satanism. Parents and community leaders also make frequent objections to books with homosexual themes, such as Leslea Newman's *Heather Has Two Mommies* and Michael Willhoite's *Daddy's Roommate*. Opponents of such books argue that their use in the classroom and presence in the library promote homosexuality and undermine the moral values parents seek to teach their children—objections similar to those waged against works with sexual themes. At times, school boards have sought to ban books over the objections of school administrators, faculty, and parents and to purge objectionable materials from both the curricula and the libraries. Parents have responded by lawsuit, contending that the school boards' bans promote their political agendas rather than educational interests. The Court has acknowledged, in many cases, the school's broad discretion over activities in the school ranging from curricula to activities to student attire. However, the Court ruled that the discretion enjoyed by officials does not permit them to ban books simply because they object to the political message the books contain. The decision to remove books from school libraries or from curricula must be grounded in educational concerns. Although educational considerations may be sufficient to justify restricting student access to controversial materials, the preferences of the school board do not outweigh the students' First Amendment rights, as the Court ruled in *Board of Education v. Pico,* 457 U.S. 853 (1982).

Parents have also pursued challenges against some classic works that confront difficult themes of racism and slavery. Mark Twain's celebrated work, *The Adventures of Huckleberry Finn,* is fifth on the American Library Association's list of frequently challenged books. Although Twain's message may not be racist, his portrayal of subservient African Americans and his characters' use of racist language can offend. An African American parent in Tempe, Arizona, launched a challenge to the inclusion of *Huckleberry Finn* on her daughter's freshman English reading list, arguing that it violated the girl's equal protection right to a nondiscriminatory education. In *Monteiro v. Tempe Union High School District,* 158 F.3d 1022 (1998), the Third Circuit Court of Appeals acknowledged that Twain's work contained racially sensitive themes and even suggested that if the instruction were insufficiently sensitive to those themes, a discrimination claim might exist. However, the court reiterated its position in favor of access to books and in favor of supporting school officials when their decisions were motivated by a desire to advance the school's educational mission.

Under current law, those who would ban books must offer compelling justifications to support the ban. In most instances, the courts favor access over prohibition and will not tolerate curtailment of First Amendment rights simply because community leaders, parents, or government authorities wish to promote a political, religious, or moral agenda through book banning. There are exceptions, of course, and Supreme Court opinions on book banning do recognize the community's right to create and enforce minimal standards of decency. Some bans have been and will be upheld. That said, most book banning probably occurs in subtle ways rather than through legislation and policy. A lawsuit creates unfavorable publicity and consumes the time, energy, and resources of school districts, even if the districts ultimately win. It is likely that books are banned behind the scenes, that officials and faculty choosing between a controversial work and an inoffensive one may be tempted to select the inoffensive work when both books meet curricular needs. The simple desire to focus on teaching rather than on defending curricular decisions to parents may lead to book banning in effect, if not in name.

Sara Zeigler

See also: Board of Education v. Pico; First Amendment; *Miller v. California*.

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Border Searches

The authority of the executive branch to conduct searches at the international borders of the United States has its roots in the very beginnings of the nation. Two months before the first Congress proposed the Bill of Rights—which included the Fourth Amendment with its famous protections against unreasonable search and seizure and its requirements for a search warrant—to the states for ratification, it enacted a statute that permitted searches of vessels arriving from international waters for the purpose of collecting import duties (Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29).

In part because the first Congress thus appeared to distinguish border searches from more limited domestic searches, routine border searches have always been exempt from certain Fourth Amendment protections, as the U.S. Supreme Court acknowledged in *United States v. Ramsey,* 431 U.S. 606 (1977). The Fourth Amendment gives people the right to be secure against unreasonable searches and seizures and ensures that no warrants will be issued without probable cause. However, the preratification statute authorizing the collection of revenue on dutiable goods permitted searches of incoming ships and vessels for contraband based upon only a "reason to suspect." At the same time, the statute required a warrant based upon probable cause for subsequent searches of any dwellings, stores, or buildings. Thus, searches of persons or packages at an international border rest on considerations and rules of constitutional law quite different from those that apply to other domestic regulations. As a result, routine searches occurring at an international border are considered reasonable and therefore outside of the protections of the Fourth Amendment, simply because the searches occur at the border.

The de facto reasonableness of a border search has also been justified by the power of a sovereign to protect its territory and to defend itself from outside threats. In addition, courts have also cited practical considerations involving the difficulty of controlling smuggling into the country, specifically noting the ease of concealment of drugs, as a secondary consideration justifying the exception to the Fourth Amendment's probable-cause and warrant requirements.

Since the first customs law was enacted, the border-search exception to the Fourth Amendment has been expanded significantly. The exception, as it is currently understood, applies to searches designed to enforce both customs laws, which apply to goods, and immigration laws, which apply to people. Under the exception, customs officials may conduct a routine search of any person, vehicle, or container entering the country on only the suspicion that dutiable merchandise is being concealed or that contraband is being shipped. Similarly, first-class mail from foreign destinations may be opened without a warrant on less than probable cause. Automotive travelers may be stopped at fixed checkpoints near the border without individualized reasonable suspicion, even if the stop is based partly on the ethnicity of the traveler, the Court held in *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976). And boats on inland waters with ready access to the sea may be hailed and boarded with no suspicion whatever.

However, not all searches that occur at a border are "routine." Routine border searches are those types of inspections that do not embarrass the average traveler or otherwise pose substantial breaches of privacy. Routine border searches usually subject a person to only a minimal amount of intrusion or indignity. For example, searches of a border entrant's personal effects, including suitcases, purses, and wallets, are deemed routine. Similarly, detentions of individuals while their effects are searched, as well as x-ray examination of items, have been upheld as routine.

If a search or detention of a traveler at the border goes beyond a routine customs stop, it becomes "nonroutine" and requires that the customs official have at least a "reasonable suspicion" of smuggling or other illegal activity. The reasonable-suspicion standard requires the agent to have "a particularized and objective basis for suspecting the particular person" of smuggling contraband. A strip search, for example, must be supported by reasonable suspicion. These types of searches have become much more commonplace due to the significant, but largely undetected, flow of narcotics across the borders. Indeed, because of the frequency of cases of drug smugglers transporting narcotics inside their bodies, very intrusive searches, including x-rays and body-cavity searches, are becoming more commonplace. However, courts require cus-

toms officials to have an articulable suspicion, reasonable under the circumstances, that a person may be carrying drugs internally before such a search may be conducted. Courts will continually have to revisit this issue in the future due to the changing technology available to border agents. For example, international airline passengers may soon become subject to a new sensory-enhancing imaging device known as Body Scan Imaging Technology that permits a viewer to see through people's clothes. Even though this type of search is not as physically invasive as a body-cavity search or even a pat-down search, it is significantly revealing and intrusive and may require reasonable suspicion before it is used at a border.

Routine border searches may also be conducted at areas deemed to be the "functional equivalent" of an international border. Given the impossibility of conducting searches at the true physical border, the place where an international flight lands, such as O'Hare International Airport in Chicago, is consistently considered the "functional equivalent" of the international border. As such, routine searches conducted upon the arrival of an international flight are justified on mere suspicion alone.

The border-search exception has even been extended to apply to international travelers who have already crossed the border into the country but who have yet to reassimilate into the mainstream of domestic activities. These searches, which frequently occur near an international border, are deemed nonroutine border searches but are constitutionally permissible if reasonable under the Fourth Amendment. To determine whether an extended-border search is reasonable, courts consider whether (1) there is a reasonable certainty that a border crossing has occurred; (2) there is a reasonable certainty that no change in condition of the luggage has occurred since the border crossing; and (3) there is a reasonable suspicion that criminal activity has occurred. These three factors were articulated in *United States v. Espinoza-Seanez,* 862 F.2d 526 (5th Cir. 1988). The constitutional concern of extending the border in this manner is that it potentially permits searches, with less than probable cause, at significant distances from U.S. national borders. For example, in *United States v. Caicedo-Guarnizo,* 723 F.2d 1420 (9th Cir. 1984), a suspect was searched in Los Angeles after he had passed through customs without being searched in New Orleans and changed flights en route in Houston. The court allowed a no-probable-cause search under the extended-border doctrine, despite the fact that several hours and over a thousand miles had passed since his border crossing.

Customs officials have also justified searches of exports under the border-search doctrine, citing the need to protect national security given the possibility of the export of sensitive technology. This type of expansion of the doctrine has been widely called for, especially in light of the scale of the terrorist attacks on September 11, 2001, in New York City and Washington, D.C., and the ease with which the terrorists entered and remained in the United States. In light of those factors, there has been broad-based support for a reexamination of the country's immigration laws and border-security measures in order to increase citizens' safety without treading too severely on their liberties.

Andrew Braniff

See also: Fourth Amendment.

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Bowers v. Hardwick (1986)

In *Bowers v. Hardwick,* 478 U.S. 186 (1986), the U.S. Supreme Court held that there was no fundamental right to engage in homosexual sodomy, a decision that therefore limited the right to privacy. The case deeply divided the justices, who had widely divergent notions of the constitutional privacy right, the extent to which it should be broadened, and the contexts in which

such a right existed. The five–four holding eventually was overturned in 2003.

Michael Hardwick was charged with violating the Georgia statute criminalizing sodomy by engaging in oral sex with another man in the bedroom of his home. The police were in his home to serve a summons for failing to appear at a hearing for violating an open-container (liquor) ordinance and were directed by another houseguest to Hardwick's bedroom. Because the bedroom door was open, the police were able to view Hardwick's activities. The district attorney decided not to bring charges, but Hardwick sued Georgia's attorney general, Michael Bowers, challenging the constitutionality of the statute.

Hardwick alleged that the law violated his fundamental right to privacy comparable to a heterosexual couple's desire to use birth control or a woman's right to terminate an early pregnancy. His legal brief described the right to privacy as protecting "values of intimate association" and "individual autonomy" and characterized his activity as "the consensual intimacies of private adult life."

Justice Byron R. White authored the majority opinion, joined by Chief Justice Warren E. Burger and Justices Lewis F. Powell Jr., William H. Rehnquist, and Sandra Day O'Connor. The majority considered whether there was "a fundamental right [of] homosexuals to engage in acts of consensual sodomy" but held that the right to privacy was limited to areas of family, marriage, and procreation. The Court also emphasized the need to resist expanding the substantive reach of the Due Process Clause of the Fourteenth Amendment to the Constitution and concluded that the constitutional right to privacy did not extend to homosexual sexuality.

The majority opinion cited historical evidence to indicate that bans against homosexuality had "ancient roots." Chief Justice Burger in his concurring opinion concluded, "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." Because there was no fundamental right involved, the Court looked for a rational basis for the statute and found it in the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."

Writing for the four dissenters (Justices Harry A. Blackmun, William J. Brennan Jr., Thurgood Marshall, and John Paul Stevens), Justice Blackmun argued that Hardwick's sexual activity was within that private sphere of individual liberty kept largely beyond the reach of the state. In rejecting the majority's framing of the issue as a right to homosexual sodomy, Blackmun said the case involved "the fundamental interest all individuals have in controlling the nature of their intimate associations with others" and more generally the "right to be let alone," quoting *Olmstead v. United States,* 277 U.S. 438 (1928). The language of the Georgia statute made gender and marital status irrelevant, thus requiring unconstitutional selective enforcement absent at least a rational state interest. Justice Blackmun scolded, "Only the most willful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human experience, central to family life, community welfare, and the development of human personality." Sexual intimacy, in his view, was as central a part of an individual's life as the activities already protected by the constitutional right to privacy. He argued that although the right to privacy perhaps was not sufficiently clarified, "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to be at the heart of the Constitution's protection of privacy."

Justice Stevens objected to the selective application of the statute against homosexuals only, since the law applied to all couples, married and unmarried, heterosexual and homosexual. When the Georgia attorney general conceded that the law would be unconstitutional if married couples were prosecuted, Justice Stevens concluded that the state's asserted interest amounted to nothing more than "habitual dislike for, or ignorance about, the disfavored group." He countered the majority's reliance on history and tradition by stating that such rationale had not saved laws prohibiting miscegenation or other types of behavior condemned in earlier times.

Bowers was considered a landmark for its ramifications on the right to privacy. The case indicated that the Court was not receptive to expanding substantive due process protections such as the right to privacy. Supporters of the decision applauded the Court's affirmation of traditional family values and community standards of morality. Critics suggested that the ma-

jority's negative view of homosexuality was an important factor affecting the outcome of the case. After retiring from the bench, Justice Powell stated that he probably had made a mistake in his analysis. Since the decision was five–four, a switch in his vote would have led to the opposite result. In fact, the Court overturned *Bowers* seventeen years later in *Lawrence v. Texas,* 539 U.S. 558 (2003).

Martin Dupuis

See also: Griswold v. Connecticut; Lawrence v. Texas; Right to Privacy; *Romer v. Evans.*

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Boy Scouts of America v. Dale (2000)

Boy Scouts of America v. Dale, 530 U.S. 640 (2000), raised issues of how the Constitution's First Amendment, protecting freedom of association, could be balanced against a state's effort to legislate nondiscrimination. The U.S. Supreme Court agreed, five–four, that Boy Scouts of America (BSA) had a First Amendment right to exclude from its organization an openly gay scoutmaster. In doing so, it reversed the New Jersey Supreme Court and its application of a statute covering sexual orientation that required nondiscrimination in public accommodations (N.J. Stat. Ann., section 10: 5–4). Chief Justice William H. Rehnquist, who wrote the Court's majority opinion, cited *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), a unanimous decision, as its controlling legal authority (precedent). Justice John Paul Stevens wrote an independent opinion, in part dissenting from the application of *Hurley* on the facts, and in part asserting that the controlling precedent was *Roberts v. U.S. Jaycees,* 468 U.S. 609 (1984).

According to the majority opinion in *Dale,* New Jersey erred by failing to properly balance a private association's First Amendment free speech right to condemn homosexuality among its members as inconsistent with BSA's creed that a Boy Scout must be "morally straight" and "clean." The evidence that BSA's creed had an antihomosexual meaning, accepted by the Court majority, was the executive board's sincere word to that effect and BSA's litigation policy since the 1980s.

In *Hurley,* a unanimous Court held that the Allied Veterans of Boston, private organizers of a Saint Patrick's Day street parade, had a First Amendment right to exclude individual homosexual and bisexual members who wanted to participate in the march by carrying a banner announcing their sexuality. In so doing, it reversed the highest court of Massachusetts, which had denied this right by applying a public-accommodations statute similar to the one in New Jersey.

Justice Stevens distinguished the facts in *Dale* from *Hurley.* James Dale did not ask BSA to include him by letting him announce his gay identity as part of its message. His sexuality became a public matter when a newspaper article covered a college gay organization that included Dale as a student member. Justice Stevens asked if BSA must approve all of its members' non-Scouting activities. He argued that being a Scout was not symbolic speech. In addition, because BSA had no explicit teaching against homosexuality, and because liberal theology allowed tolerance for homosexuality, BSA's exclusion of homosexuality and commitment to God connoted a fundamentalist theology, contrary to its professed religious neutrality. Furthermore, Justice Stevens noted that since the Court first rendered a landmark antigay opinion, in *Bowers v. Hardwick,* 478 U.S. 186 (1986), and despite continuing discrimination, society had evolved to moderate public bias against gays. Nothing prevented BSA

from lobbying to amend the state's law against discrimination.

Justice Stevens found *U.S. Jaycees* relevant because in it the Court held that Minnesota's human rights policy prohibiting sex discrimination was applicable against a private association that excluded women from full membership and that alleged infringement of its First Amendment rights if it were required to include them. In his view, the Court should affirm New Jersey's effort to control discrimination with its public-accommodations statute.

From a political science perspective, *Dale* illustrates that relevant precedents can exist for both sides of a case. Further, an element of subjectivity exists in how each justice reads the facts and constitutional-law principles in a set of cases, even when the Court's composition has not changed. From the viewpoint of critical legal scholars, the Court's doctrinal analysis perhaps stressed the wrong legal points. One critic of *Dale* wrote that the Court's jurisprudence should have focused more on the state's purpose in prohibiting discrimination rather than elevating the private organization's interest in discriminating as a First Amendment right. Another wrote that antidiscrimination policies should permit an exemption for organizations who request it, thus giving notice to potential members who might prefer to boycott that organization.

Sharon G. Whitney

See also: Bowers v. Hardwick; Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.

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Boycott

A boycott is the systematic refusal to purchase goods from, use the services of, or otherwise deal with a merchant company or public accommodation in order to force the party to change its policies or practices. Boycotts are usually planned and concerted actions to isolate their objects—such as persons, companies, or products—socially or economically. The purpose of the boycott is to force its object to succumb to the desires of the boycotters. The term takes its name from Charles Boycott, an Irish estate manager in the early 1880s, whose rent collection tactics so outraged tenants that they refused to work for him. The development of the boycott actually occurred prior to its naming. American farmers frequently refused to use certain railroads in the early 1800s unless prices were lowered. By the late 1800s, there were close to 200 recognized boycotts by American labor groups. The boycott is also a commonly used practice in international affairs. In an embargo, a government prohibits the departure of commercial ships from its ports.

In the United States, boycotts are primarily used either in labor disputes or in cases of perceived social injustices. In labor and social disputes, a boycott does not exist alone but is usually combined with other activities. For instance, a sit-in or a strike, which are called *primary boycotts,* may be combined with picketing or a campaign informing the public that products are made by strikebreakers. Moreover, a primary boycott also can be combined with the *secondary boycott,* which involves the refusal to deal with or patronize anyone who deals with the first employer with whom there is a dispute. The Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959 have outlawed secondary boycotts. A section of the Taft-Hartley Act as amended by the Landrum-Griffin Act forbade anybody from inducing or encouraging a person to engage in a strike, to refuse to handle or work on any goods, or to refuse to perform any services, if the purpose of the strike was to force any person to cease doing business with any other person.

Primary boycotts are lawful but often ineffective, especially for unions. People may continue to cross a picket line to patronize a strikebound store and, in the case of large industrial plants, suppliers may continue to sell to the plant and dealers may continue to sell its products. Labor usually prefers the secondary boycott, which enables it to bring pressure upon others whose continued dealing with the strikebound plant hinders the successful conclusion of the strike.

Citizens of Woodstock, New York, demonstrate in September 2002 against a CVS drug store, urging a boycott. The site had been the home of Woodstock's only supermarket. When the Grand Union Supermarket went bankrupt earlier in 2002, CVS opportunistically took over the building before another supermarket could open there. This left Woodstock with two drug stores and only limited grocery facilities. *(© ANA/The Image Works)*

The most commonly used boycott by American labor began in the late nineteenth century and is referred to as the *product boycott.* Typically, the union attempts to discourage other union members and the public at large from purchasing the employer's product by making them aware of the employer's position in the dispute.

Labor unions have not been the only organizations to use boycotts. During the modern civil rights movement in the United States, the boycotting of segregated buses was one of the most successful tactics used to combat Jim Crow segregation and the system of apartheid in the American South. On December 1, 1955, Rosa Parks, a black seamstress, was arrested for refusing to obey a Montgomery, Alabama, bus driver's order to give up her seat for a boarding white passenger, as required by law. Outrage in Montgomery's black community over the arrest of Parks sparked a boycott against the city's bus line, led by twenty-six-year-old Rev. Martin Luther King Jr., that lasted 381 days. The boycott successfully ended with the U.S. Supreme Court's ruling in *Gayle v. Browder,* 352 U.S. 903 (1956), that Montgomery's segregated bus system was unconstitutional. This boycott has been considered the beginning of the modern era of the civil rights movement. Boycotts challenging segregation subsequently began in other cities throughout the South.

Dewey Clayton

See also: Blacklisting; Labor Union Rights.

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Brady Rule

In *Brady v. Maryland,* 373 U.S. 83 (1963), the U.S. Supreme Court set forth the government's duty to disclose exculpatory evidence to a criminal defendant, a holding that thus became known as the *Brady* rule. In *Brady,* the defendant had been convicted of complicity in a murder, which had occurred during the course of a robbery, and was sentenced to death. During trial, the defendant conceded his involvement in the robbery, but he maintained he had not participated in the actual killing and asked the jury to return a guilty verdict "without capital punishment." Unbeknown to the defendant, his codefendant had confessed to the killing. Because the prosecutor had withheld this information, the Court found that the petitioner was entitled to a new trial on the issue of punishment. It held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

In the years following *Brady,* the Supreme Court clarified the parameters of the disclosure rule. Specifically, in *Giglio v. United States,* 405 U.S. 150 (1972), the Court expanded the definition of "favorable evidence" to include evidence that could be used to attack the credibility of a witness against the accused (impeachment evidence). Later, in *United States v. Bagley,* 473 U.S. 667 (1985), the Court explained that undisclosed evidence was "material" only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Finally, in *Kyles v. Whitley,* 514 U.S. 419 (1995), the Court held that materiality should be determined by the cumulative effect of the nondisclosure rather than by an item-by-item examination of the evidence and the potential significance of each piece to the trial's outcome. The Court further held that the prosecutor had a duty to disclose all favorable evidence known to any person working on the government's behalf.

Although noting the importance that exculpatory and impeachment evidence plays in a defendant's constitutional right to a fair trial, several lower courts have found that the disclosure of evidence favorable to an accused *during trial* is sufficient to meet the government's duty under *Brady.* Accordingly, to comply fully with the *Brady* rule, the prosecution often need only disclose available impeachment evidence immediately prior to the testimony of the relevant witness, and need only provide exculpatory evidence in time for the defendant to make some beneficial use of it at trial.

In addition to disclosure at trial, a few lower courts have found that so-called *Brady* evidence must be divulged prior to a defendant's entry of a guilty plea. In this context, however, a defendant may withdraw his guilty plea only if he is able to show, by a reasonable probability, that, but for the *Brady* violation, he would not have chosen to plead guilty but would have instead demanded a trial. The application of *Brady* to the context of plea negations is significantly unsettled, and the U.S. Supreme Court has yet to address the issue.

Stephan J. Schlegelmilch

See also: Exclusionary Rule; Fourth Amendment.

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Brandeis, Louis Dembitz (1856–1941)

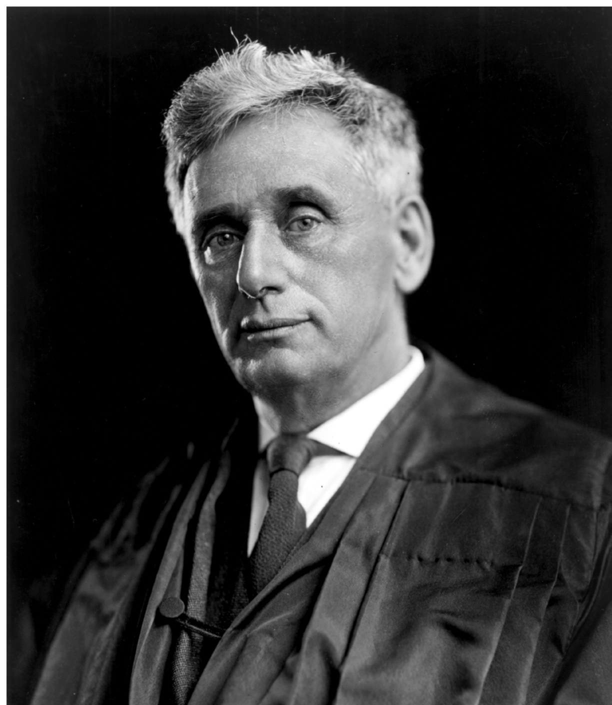
Louis D. Brandeis was an innovator in the law who articulated the basis for the U.S. Constitution's protection of privacy and speech.

Born in Louisville, Kentucky, Brandeis enrolled at Harvard Law School at age eighteen. Shortly after graduating from Harvard in 1878, he and classmate Samuel D. Warren Jr. opened a law partnership in Boston. Responding to his new role as an attorney for small businessmen, Brandeis developed an original conception of the role of both the lawyer and the law.

He quickly recognized that to assess his clients' needs he had to understand not only their immediate problems but also the economic context in which they arose—to familiarize himself with legal precepts as well as the fact situations to which such rules would be applied. That realization illuminated his emerging legal philosophy, which assumed that law had to be consistent with societal needs and that societal needs could be assessed only through an accumulation of facts. Law, he decided, was and should be based on history rather than abstract logic.

When Brandeis was asked to defend Oregon's maximum-hours law for women before a skeptical U.S. Supreme Court, he submitted a brief that contained only two pages of legal precedents but more than 100 pages of factual support for his argument that society would benefit from that kind of protection for women workers. His strategy worked; the Court upheld the law in *Muller v. Oregon,* 208 U.S. 412 (1908). The fact-filled "Brandeis brief" became the model for American constitutional litigation. It would prove particularly important in leading civil liberties and civil rights cases such as *Brown v. Board of Education,* 347 U.S. 483 (1954), in which fact-based briefs about the impact of segregated education on young children helped persuade the Supreme Court to strike down the "separate but equal" standard.

Brandeis also believed that law must be moral in order to be valid, and that attorneys had an obligation to work on behalf of the people rather than only as employees for wealthy corporations. This conviction led him to involve himself in public causes, beginning with a ten-year fight against Boston Elevated Railway's attempt to acquire a monopoly over Boston's transportation system. He redesigned Massachusetts' utilities laws; invented Savings Bank Life Insurance so that workers could provide for their families; designed much of President Woodrow Wilson's antitrust policy; advised President Franklin D. Roosevelt to enact unemployment insurance; and advocated legalization of unions, minimum-wage and maximum-hours laws, public ownership of Alaska's natural resources, and public works projects during the depression of the 1930s. His decision not to accept fees for his efforts on behalf of the public helped create the American pro bono ("for the public good") tradition in the law and led to the media's dubbing him the "people's attorney."



Louis Dembitz Brandeis was an innovator in the law who articulated the basis for the Supreme Court's strong protection of privacy and speech. *(Library of Congress)*

In the early days of their partnership, Brandeis and Warren had been incensed at the way journalists violated socialite Warren's privacy. In reaction, they wrote an article arguing that the law had to protect individual privacy and the right "to be let alone." Their article is generally credited with being one of the most influential law review articles ever published, and it is still cited today in cases involving issues from abortion and gay rights to wiretapping and the right against unreasonable searches and seizures.

Brandeis carried his fact-based jurisprudence to the U.S. Supreme Court when Woodrow Wilson appointed him to that tribunal in 1916. There he repeatedly voted against "bigness" in government, for

example in *Myers v. United States,* 272 U.S. 52 (1927), and *Louisville v. Radford,* 295 U.S. 590 (1935); and in business, for example in *Bedford Cut Stone Co. v. Journeymen Stone Cutters Association,* 274 U.S. 37 (1927), and *Quaker City Cab v. Pennsylvania,* 277 U.S. 389 (1928). Yet he maintained in *Liggett Co. v. Lee,* 288 U.S. 517 (1933), that state governments needed the freedom to experiment with solutions to contemporary societal problems. He favored judicial restraint and, in *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 (1936), established tightly self-limiting criteria for Supreme Court involvement in constitutional litigation.

Brandeis also continued to emphasize privacy. When the Court upheld what it saw as the government's constitutional power to wiretap at will, he dissented, writing in *Olmstead v. United States,* 277 U.S. 438 (1928), that the founding fathers had included the "right to be let alone" in the Constitution even though the word privacy was not mentioned in that document. The right to privacy, he insisted, had to be interpreted broadly. "Beliefs, thoughts, emotions and sensations" had to be protected from government intrusion because the free flow of ideas was crucial to a democratic nation.

His approach to privacy reflected Brandeis's democratic ideal. One colleague described him as an "implacable democrat"; another commented that to Brandeis, "democracy is not a political program. It is a religion." His formulation of democracy emphasized the rights of the individual, particularly as they affected human dignity and the ability to participate in the democratic process. Convinced that free speech was an absolute necessity if citizens were to have access to ideas and be able to make intelligent choices among them, he dissented in a number of 1920 cases and argued that unpopular and even potentially dangerous views had to be permitted in order to preserve democracy; examples of these cases include *Schaefer v. United States,* 251 U.S. 466 (1920); *Pierce v. United States,* 252 U.S. 239 (1920); and *Gilbert v. Minnesota,* 254 U.S. 325 (1920). The culmination of his writing about speech came in his opinion in *Whitney v. California,* 274 U.S. 357 (1927), in which he eloquently asserted that the expression of obnoxious ideas did not constitute a "clear and present danger" to society unless it included a call to immediate illegal action. The Court did not adopt his reasoning until 1969, in *Brandenburg v. Ohio,* 395 U.S. 444, but the Brandeis approach then became the philosophical basis for today's uniquely permissive American speech jurisprudence.

When Brandeis resigned from the Court in 1939, he left behind a tradition of lawyers contributing their efforts to public service; a jurisprudence based on interpreting the Constitution in light of societal facts; views of privacy and free speech that gradually became the law of the land; an emphasis on individual dignity; and a certainty that given the efforts of active democrats, liberty would indeed prevail.

Philippa Strum

See also: Right to Privacy; *Whitney v. California*.

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Brandenburg v. Ohio (1969)

Brandenburg v. Ohio, 395 U.S. 444 (1969), established the current judicial standard for assessing whether specific speech constitutes a societal danger so as to lose its protection under the First Amendment to the Constitution.

"If our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken," Clarence Brandenburg declared at a Ku Klux Klan rally held on an Ohio farm. "We are marching on Congress July the Fourth." The twelve other hooded figures at the demonstration, some of them armed, proceeded to burn a large wooden cross. "Bury the niggers," someone called out. "Send the Jews back to Israel." Brandenburg was subsequently convicted by Ohio for advocating violent or otherwise unlawful means of accomplishing political or economic reform.

The question before the U.S. Supreme Court, when Brandenburg appealed his conviction, was whether the law violated the right to free speech provided by the Constitution's First Amendment. Under that provision, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble," and the Supreme Court had held in *Gitlow v. New York,* 268 U.S. 652 (1925), that its prohibitions were applicable via the Fourteenth Amendment to the states as well as to the federal government. Six years earlier, Justice Oliver Wendell Holmes had written for the Court in *Schenck v. United States,* 249 U.S. 47 (1919), that words could be punished if they were "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." He did not, however, define how "clear" or how "present" the danger had to be. In 1927, in *Whitney v. California,* 274 U.S. 357, the Court stated that the First Amendment did not prohibit the states from punishing those whose utterances were "inimical to the public welfare" or "tending to incite to crime" or to overthrow of the government, and it upheld a California law similar to the one in Ohio.

In using the words "tending to incite to crime," the majority in *Whitney* emphasized the tendency that speech might have to encourage impermissible acts, thereby maximizing the power of the government to limit speech. In a concurring opinion that read much like a dissent, Justice Louis D. Brandeis argued that speech had to be permitted unless it "would produce, or is intended to produce, a clear and imminent danger of some substantive evil." He in effect changed the "present" of the "clear and present danger" test to "imminent," substituting an emphasis on the immediacy of the danger of criminal or subversive activity for a possible tendency to create a danger at some time in the future. By the time of *Whitney*, Justice Holmes had rethought his approach to speech articulated in *Schenck,* and he joined Brandeis's opinion. It was nonetheless the majority's opinion in *Whitney* and the "bad-tendency" test that Ohio argued should control when *Brandenburg* reached the Supreme Court.

In *Brandenburg,* however, the Court endorsed Justice Brandeis's view and overruled *Whitney*. The First Amendment does not permit a state to criminalize advocacy "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," the Court wrote. It pointed out that films of the rally, made by a local television station at the invitation of the demonstrators, showed that the only people present were the Klansmen themselves and the journalists; no one else was there to be influenced. No immediate action was discussed, so it could not be successfully argued that the speech constituted an incitement to immediate criminal activity. Assembling with others for the purpose merely of advocating political and economic change, the Court said, did not meet the test of imminent danger.

The Court's opinion was handed down per curiam (for the entire Court), which is a procedure the justices normally use only for noncontentious holdings. They thereby signaled their belief that *Whitney* and the bad-tendency test had been, in the Court's words, "thoroughly discredited" although not specifically overruled in the preceding years. There had been good reason for Brandenburg to believe that the justices would overturn his conviction, in spite of *Whitney*. The Court had upheld severe limitations on speech in the early years of the Cold War, but by the late 1950s and 1960s, it had begun striking such restrictions down, for example in *Yates v. United States,* 354 U.S. 298 (1957); *Noto v. United States,* 367 U.S. 290 (1961); *Aptheker v. Secretary of State,* 378 U.S. 500 (1964); and *Keyishian v. Board of Regents,* 385 U.S. 589 (1967). The Court had come to believe that democracy was best served by the free flow of ideas, however obnoxious, and that the electorate possessed the ability to sort out the good ones from the bad.

Since *Brandenburg,* the Court has adhered to the imminent-danger test as the criterion to be used when allegedly dangerous speech is at issue.

Philippa Strum

See also: Bad-Tendency Test; Clear and Present Danger; *Gitlow v. New York; Schenck v. United States; Whitney v. California*.

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Branzburg v. Hayes (1972)

Branzburg v. Hayes, 408 U.S. 665 (1972), combined three similar controversies that pitted state interests in the enforcement of criminal law against First Amendment protections extended to the press. In all three cases, reporters were summoned to testify in grand jury proceedings and to disclose information obtained while gathering information for stories. Paul Branzburg, a reporter for the *Louisville Courier-Journal,* had witnessed other individuals using marijuana and making hashish from marijuana. Paul Pappas, a television reporter assigned to cover civil disturbances in New Bedford, Massachusetts, gained access to a meeting of the Black Panthers, a political party that seeks to fight oppression and discrimination, particularly oppression based upon race. A *New York Times* reporter, Earl Caldwell, had also gained access to meetings of the Black Panthers.

During the 1960s and 1970s, many considered the Black Panthers to be militant and viewed the party as a potential instigator of civil disturbance and rioting. Some chapters of the Black Panthers were suspected of targeting high-level political officials, including the president. In all three cases dealt with in *Branzburg,* state authorities believed the reporters possessed information that could assist in criminal investigation, thus forwarding the public interest.

In its five–four decision, the Court held that news reporters enjoy no constitutional immunity from being compelled to testify in criminal proceedings, unless the state legislatures choose to afford them such immunity by statute. In short, if the state has no law protecting reporters and their sources, they may not look to the Constitution to avoid testifying.

Justice Byron R. White authored the opinion of the Court, which was joined by Chief Justice Warren E. Burger and Justices Harry A. Blackmun, Lewis F. Powell Jr., and William H. Rehnquist. Justice White noted that when the state limits speech or curtails freedom of the press, the fundamental right of the individual or the press must be balanced against the state's interest that requires the restriction. There were two questions to be answered. First, was the state actually limiting the freedom of the press? Second, was the state's interest in doing so sufficiently compelling to justify a restriction?

The majority opinion held that requiring reporters to respond to grand jury subpoenas did reach the level of endangering the ability of the press to gather news, inform the public, and criticize government officials. After reviewing prior decisions regarding freedom of the press, Justice White concluded that no precedent suggested that reporters should be immune from the general laws, which would compel any other citizen to appear in like circumstances. The state imposed no direct burden upon news reporting, and, if it did, the state's interests in curtailing drug use, preventing civil disturbance, and protecting public safety were too important to yield to a vague claim that informant disclosures might be chilled by the reporters' appearance. In fact, Justice White contended, to employ a "balancing" test weighing the state's interests against the burden imposed on the press would be to usurp the rightful power of the legislature. The legislature, the branch charged with making the laws, made no distinction among criminal laws and did not deem some less significant than others. For the Court, whose role is to interpret the law, to weigh the importance of a particular law would be an impermissible intrusion into the jurisdiction of the legislature. All three reporters would be required to respond to the subpoenas and appear before the grand jury.

Four justices—William O. Douglas, Potter Stewart, Thurgood Marshall, and William J. Brennan Jr.—dissented, with Justices Douglas and Stewart authoring opinions. Justice Douglas noted that the First Amendment was presented in the most absolute of terms and should not be "balanced" against mere interests. Because of the preferred position of the press in the Constitution, the Court should protect it against government actions that could limit its ability to inform the public and criticize the government.

Justice Stewart's opinion, joined by Justices Marshall and Brennan, attacked the majority position on similar grounds, accusing the Court of insensitivity to the critical role of the press. A number of states agreed with the dissenters, enacting shield laws that provided journalists with statutory protection against being subpoenaed to testify.

The *Branzburg* holding, with its articulated deference to the legislature, reflects the beginning of a shift from the decisions of the Court in the 1960s. Prior Court holdings had preferred the rights of the individual over law enforcement needs, regardless of whether the individual in question was the accused or a reporter with information. This Court deferred to the legislative judgment and considered the needs of law enforcement to be a public interest that could not yield to speculative claims regarding the ruling's potential effect on the news-gathering function of the press.

Sara Zeigler

See also: Chilling Effect; First Amendment.

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Bray v. Alexandria Women's Health Clinic (1993)

In *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263 (1993), the U.S. Supreme Court ruled that antiabortion protesters could not have their activities enjoined as illegal conspiracies to deny the civil rights of women seeking abortions. Two main civil liberty issues underlie *Bray*. The first is the concern for women's ability to access the right to abortion first guaranteed by the Court in *Roe v. Wade,* 410 U.S. 113 (1973). Second is the concern for the First Amendment rights to free speech for antiabortion protesters.

The National Organization for Women (NOW) and various abortion clinics in the Washington, D.C., area originally brought *Bray* to enjoin the antiabortion organization Operation Rescue (OR) and six of its members from blocking the entrances to abortion clinics. Operation Rescue appealed the injunction on the grounds that the federal Civil Rights Act of 1871, commonly referred to as the Ku Klux Klan Act (Klan Act), under which the injunction was granted was improperly applied to their activities. In addition, OR claimed that any regulation of their activities should be conducted under state law, not federal law.

The Klan Act prohibits private parties from conspiring to deprive any persons or class of people of their civil rights. NOW argued that the clinic blockades performed by OR were similar to conspiracies and acts of intimidation used by the Ku Klux Klan to deprive blacks of their civil rights. In addition, NOW argued that state law was insufficient to protect the rights of the abortion clinics' potential clients, and that states needed the help of the federal government in handling the large-scale disruptions caused by OR protests.

Obtaining injunctions was part of the abortion-rights movement's efforts to defend against the increasingly aggressive tactics of antiabortion protest groups such as OR. If the injunction in *Bray* were overturned due to the inapplicability of the Klan Act, the abortion-rights movement would lose a weapon against antiabortion protest groups in its fight to protect the right to abortion. Conversely, if the injunction were upheld, OR, which was already experiencing internal organizational conflict, and other antiabortion groups would be faced with increasing legal and financial barriers to continuing their protests against abortion.

The Supreme Court first heard oral argument for *Bray* in October 1991 but announced in June 1992 that it would rehear the case in the next term. This unusual step prompted some to speculate that the conservative Court was protecting the George H.W. Bush administration from the impact of the decision until after the 1992 presidential election. It is more likely that since only eight of the usual nine justices heard the argument, due to Justice Thurgood Mar-

shall's October 1991 retirement, the Court was evenly split after the first round of arguments and wanted to rehear the case with a full panel of justices.

In its majority opinion decided January 13, 1993, the Court announced that the Klan Act was inapplicable to OR. First, the Court determined that neither women seeking abortions, nor women in general, qualified as a protected class of people in the terms intended by the Klan Act. Second, even if one assumed that women seeking abortions, or women in general, qualified as a protected class, the Court declared that OR was not conspiring to deny them of civil rights intended to be protected against interference by private citizens.

Operation Rescue heralded the victory as forwarding its cause, but the celebration was short-lived. In 1994, Congress passed the Freedom of Access to Clinic Entrances Act, which limited *Bray*'s impact by creating federal regulations for protests at abortion clinics.

Joshua C. Wilson

See also: First Amendment; *Roe v. Wade*.

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Brennan, William J., Jr. (1906–1997)

William J. Brennan Jr. was appointed to the U.S. Supreme Court in 1956 by President Dwight D. Eisenhower and served until 1990. Justice Brennan is considered to be one of the most influential and liberal justices ever to sit on the Court. He was author of numerous opinions that brought major transformation to American law in the second half of the twentieth century.

Born to Irish Catholic immigrants in Newark, New Jersey, William Brennan attended a parochial grammar school and graduated from a public high school. His upbringing in a family of modest means would leave a mark upon the future Court justice in two ways. First, he developed the discipline of having to work and hold jobs while attending school. Second, the lessons of working-class struggles shaped his view on the law, leading him to emphasize that it and legal institutions needed to protect the rights and liberties of people.

Upon graduation from high school, Brennan attended the Wharton School of Business at the University of Pennsylvania. After graduation, he married Marjorie Leonard and then attended Harvard Law School on a scholarship in 1930. Although a good student—graduating in the top 10 percent of his class—he was not the star of his class, and one of his professors, Felix Frankfurter, also a future Supreme Court justice, initially was skeptical when Brennan joined the Court.

After graduation Brennan practiced labor law with a New Jersey firm until World War II. During the war he assisted Secretary of War Robert Patterson with procurement and labor matters, and he was eventually discharged as a colonel. When the war ended he rejoined his firm and became involved with efforts to reform the New Jersey court system. This work gained him notice by the governor, who appointed him to be a state superior court judge in 1949. In 1950 he was elevated to the appellate division and then in 1952 made a justice on the New Jersey Supreme Court.

Brennan's elevation to the U.S. Supreme Court is an often-told story of how President Eisenhower, facing a possible tough reelection to a second term in 1956, stated that he wanted to get a Catholic from the Northeast on the Court to shore up political support among key constituencies. Senate approval was nearly unanimous, except for Senator Joseph McCarthy (of House Un-American Activities Committee fame), and Brennan replaced retiring Justice Sherman Minton. Little of the record Brennan made on the New Jersey Supreme Court portended that he would become one of the most liberal justices on the Court during the 1950s and 1960s when Earl Warren was chief justice. Indeed, "the Warren Court" became a battle cry for conservatives who were trying to stem the tide of so-called liberal causes, such as civil rights, due process, and equal protection. Years later when Eisenhower was asked if he had made any mistakes as

president, he replied two, and both of them (Brennan and Warren) were on the Supreme Court.

During Justice Brennan's thirty-four years on the Court, he articulated a judicial philosophy that placed respect for human freedom and dignity at the center of his jurisprudence. Brennan felt that interpretation of the Constitution must respect the concept of dignity and freedom that individual liberties and rights were meant to protect, and his opinions demonstrate that commitment.

Over the course of his career, Justice Brennan participated in nearly 1,400 opinions. He wrote 425 majority opinions for the Court, as well as 220 concurring, and 492 partial or full dissents. His greatest skill resided not so much in his intellectual brilliance (which was nonetheless still significant) but in his ability to forge coalitions and convince other justices to go along with him. Reputedly, every year he would welcome his new law clerks with a talk during which he held up five fingers—telling them that the rule of five (a majority vote of the nine justices) was what it took to get things done on the Court. His skills at majority building were so good that many analysts consider him the real leader of the Warren Court in terms of forging the coalitions that articulated many of its most famous decisions. Further, many credit Brennan's skills in preventing the Court under Chief Justice Warren E. Burger from reversing these opinions as the Court became more conservative. Even late in his tenure as justice when the Court under Chief Justice William H. Rehnquist had become decidedly more conservative, Brennan managed to forge liberal rulings in cases such as *Texas v. Johnson,* 491 U.S. 397 (1989) (striking down on First Amendment grounds a state law that made it illegal to burn flags as a form of political protest), and *Metro Broadcasting Co. v. Federal Communications Commission,* 497 U.S. 547 (1990) (upholding a federal policy to favor minority ownership of broadcast licenses).

Justice Brennan's majority opinions read like a greatest-hits collection of recent Supreme Court rulings. In *Baker v. Carr,* 369 U.S. 186 (1962), he led the Supreme Court to reverse precedent and rule that legislative redistricting and reapportionment were justiciable matters that the Court could hear. In *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), he wrote for the Court in placing First Amendment limits on libel, making it easier for newspapers and the media to print news and criticize public officials.

Other significant majority opinions Justice Brennan wrote include *Katzenbach v. Morgan,* 384 U.S. 641 (1966) (upholding the 1965 Voting Rights Act); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978) (upholding historic preservation laws); *Goldberg v. Kelly,* 397 U.S. 254 (1970) (mandating due process procedures for persons being denied government welfare payments); *Shapiro v. Thompson,* 394 U.S. 618 (1969) (upholding the right of interstate travel and striking down state durational residency requirements for welfare); and *Eisenstadt v. Baird,* 405 U.S. 438 (1972) (striking down state laws that made it illegal to sell birth control devices to unmarried couples, as being a violation of their privacy rights). Justice Brennan, joined by his long-term colleague Justice Thurgood Marshall, also frequently dissented against the death penalty, stating in both *Furman v. Georgia,* 408 U.S. 238 (1972), and *Gregg v. Georgia,* 428 U.S. 153 (1976), that capital punishment was cruel and unusual punishment and therefore unconstitutional.

Beyond the influence Justice Brennan had on the Court, he was also instrumental, by way of a 1976 law review article, in urging state courts to use their constitutions to preserve the legacy of protection for individual rights that the Court started during the tenure of Chief Justice Warren but that began slipping under Chief Justice Burger. Brennan also was the focal point of many conservatives who attacked the Supreme Court as being too activist. During the 1980s, Justice Brennan and Ed Meese, U.S. attorney general in President Ronald Reagan's administration, were embroiled in battles over how to interpret the Constitution, with Meese seeking to place limits on what the Court could do and how it should read rights in a very limited fashion. Needless to say, Brennan did not yield to Meese or other conservative critics, fighting for his views until he left the Court in 1990.

Overall, Justice Brennan's legacy on the Court and law is immense. He helped redefine the law in areas such as privacy, defendants' rights, procedural due process, land use, and many others. Even now, many years after his Court service, his opinions form the basis of much of contemporary constitutional law. On most lists, Justice Brennan is included as one of the

ten best individuals ever to sit on the U.S. Supreme Court.

David Schultz

See also: Baker v. Carr; Marshall, Thurgood; *Shapiro v. Thompson; Texas v. Johnson;* Warren, Earl.

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Breyer, Stephen G. (b. 1938)

On August 3, 1994, Stephen Breyer became the 108th justice to sit on the U.S. Supreme Court. Born August 15, 1938, the California native earned bachelor's degrees at Stanford University and Oxford University and his law degree at Harvard Law School, where he also later taught. Before he joined the Court, Breyer was chief counsel for the Senate Judiciary Committee, served on the U.S. Sentencing Commission, and sat on the U.S. Court of Appeals for the First Circuit. Justice Breyer has written books focusing on administrative law and regulatory policy.

Justice Breyer's holdings on civil liberties reflect pragmatic centrism. His support of civil liberties is driven by his desire for balance and proportionality. In two recent Fourth Amendment cases, Justice Breyer authored opinions rejecting civil libertarian arguments. Regarding the privacy of public school students, *Board of Education v. Earls,* 536 U.S. 822 (2002), the Supreme Court upheld mandatory drug testing of students participating in extracurricular activities. Justice Breyer concurred, observing that the policy represented a reasonable effort by the school to respond to the drug epidemic among teens.

Bond v. United States, 529 U.S. 334 (2000), presented a search and seizure question involving police conduct. The Court held that police officers were prohibited from manipulating bus passengers' soft-sided carry-on luggage to determine its contents. Justice Breyer dissented, arguing that such activity was permissible because a public transportation passenger could not reasonably expect that he could store such luggage physically undisturbed in a shared compartment.

Justice Breyer was more sympathetic to civil libertarians on issues involving the Sixth Amendment's Confrontation Clause, which protects the right of defendants to confront their accusers. In *Gray v. Maryland,* 523 U.S. 185 (1998), he wrote for a majority holding that merely substituting blank spaces for the names of criminal codefendants renders an otherwise unimpeachable confession inadmissible unless the confessor is subject to cross-examination. He deemed the blank spaces directly accusatory, just as incriminating as pointing to the defendant in open court. Therefore, the implicated codefendant had the constitutional right to confront his accuser.

Justice Breyer spoke for a Court majority in *Easley v. Cromartie,* 532 U.S. 234 (2001), a recent case involving voting rights and race-conscious political redistricting. The Court concluded that although race may serve as a consideration in drawing district lines to create a majority-minority district, it cannot function as the preponderant consideration. However, because the relationship between race and party identification is strong, challengers of districting plans must satisfy a demanding burden in order to demonstrate that race was an impermissibly persuasive factor.

The Bill of Rights preserves individual liberties by imposing specific restrictions on governmental action. Justice Breyer recognizes that courts do not adjudicate in a vacuum; consequently, he strives to balance those restrictions against societal interests. In Justice Breyer's view, complex societal questions are appropriately resolved by citizen participation in the democratic process rather than by having governmental institutions impose solutions on society. Premature intrusion by courts risks preemption of the democratic process; judicial restraint promotes democratic principles.

Melanie K. Morris

See also: Fourth Amendment; Sixth Amendment.

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Bryan, William Jennings (1860–1925)

The leader of the Democratic Party for a generation in the late nineteenth and early twentieth centuries, William Jennings Bryan ran for president three times and served as secretary of state in the administration of President Woodrow Wilson (1913–1921). Bryan was a champion of the rights of ordinary Americans and was a vocal conservative Christian. His public life spanned the era from the populist movement of the 1890s to the *Scopes* monkey trial of 1925 in Tennessee. His admirers saw him as a true "man of the people."

Bryan was born in Illinois and became an attorney in the early 1880s. Soon thereafter, he moved to Lincoln, Nebraska, where he won election to the U.S. House of Representatives in 1890 and 1892. After his congressional tenure ended, Bryan published a newspaper and continued to speak out on issues of importance to his readers in the Great Plains region. Meanwhile, hard economic times led western farmers to create the Populist (or People's) Party in the early 1890s as an alternative to the Democrats and Republicans. The Populists wanted the U.S. government to

William Jennings Bryan is most noted for his participation in the "monkey trial" of John Scopes, in which Bryan defended a Tennessee law that made the teaching of evolution illegal. *(Library of Congress)*

address economic issues affecting the American West, which they thought was being hindered by adherence to a gold standard. They believed that this valuation standard made it difficult for farmers to obtain credit from banks.

Bryan thought the Democratic Party should adopt policies supported by the Populists. The majority of Democrats, however, lived in the eastern United States and ignored—as did Republicans—the "political prairie fire" that populism was spawning. Leaders of both parties argued that western farmers had received all the help they deserved from the U.S. government, including free land and railroads. In 1896, however, delegates to the Democratic National Convention defied their party's leaders; they adopted a platform supporting many aspects of the Populist agenda, and after Bryan delivered his famous Cross of Gold speech advocating the coining of silver (an inflationary measure), they nominated him as the party's presidential candidate. The Populists decided to join forces with the Democrats by nominating Bryan as well.

Bryan lost the 1896 election, in part because many eastern Democrats refused to support him. His campaign, however, along with those of 1900 and 1908 (when he was also the Democratic nominee) helped convert the Democratic Party into the reform organization it continued to be throughout the twentieth century. Bryan supported the 1912 presidential nomination of New Jersey governor Woodrow Wilson; once elected, Wilson rewarded Bryan, who had opposed U.S. imperialism in the Spanish-American War, by appointing him secretary of state. Bryan resigned his cabinet position in 1915 in a dispute with Wilson over how to respond to Germany's sinking of the *Lusitania,* a British ship on which many American vacationers were passengers.

Bryan's final appearance on the stage of U.S. history occurred in 1925 when he went to Tennessee to help prosecute John Thomas Scopes for violating a law prohibiting the teaching of evolution in that state's public schools. A conservative Protestant, Bryan believed in the literal, fundamentalist interpretation of the Bible. Many observers believed that the man who had been such an eloquent spokesman for western farmers was trampling on Scopes's right to free speech and academic freedom. The national media representatives covering the trial universally ridiculed Bryan. Perhaps exhausted from the pressures of the case, which had featured a grueling cross-examination of Bryan by attorney Clarence Darrow, Bryan died in Knoxville, Tennessee, five days after the trial ended.

Roger D. Hardaway

See also: Democratic Party; Political Parties; *Scopes v. State of Tennessee*.

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Buchanan v. Warley (1917)

The U.S. Supreme Court's decision in *Buchanan v. Warley,* 245 U.S. 60 (1917), marked one of the first successful attacks on segregationist policies in the United States. Its outcome, however, was based on libertarian respect for property rights rather than on a desire to ensure that all citizens received the equal protection of the laws, a right protected by the Equal Protection Clause of the Fourteenth Amendment to the Constitution. That line of thinking ultimately would become the basis for most of the later successful attacks on segregation.

William Warley, the president of the Louisville, Kentucky, chapter of the National Association for the Advancement of Colored People (NAACP), contracted with Charles Buchanan, a white real estate agent, to buy a residential lot. The block on which the lot was located contained residences of eight white families and two black families. The city of Louisville, however, refused to grant the deed under a city ordinance preventing blacks from moving into neigh-

borhoods in which whites owned a majority of the residences (and vice versa). Warley claimed the contract was thus invalid, and Buchanan then sued for breach of contract. The Kentucky Court of Appeals upheld the ordinance and ruled the contract unenforceable, but the U.S. Supreme Court struck it down as the deprivation of a property right without due process of law as required by the Fourteenth Amendment.

The city attempted to justify the ordinance as a valid exercise of the government's police power in order to prevent racial strife, which might occur if blacks and whites lived together in the same neighborhoods. It also argued that the "separate but equal" holding of *Plessy v. Ferguson,* 163 U.S. 537 (1896), controlled the disposition of the case. A unanimous Supreme Court, however, rejected both arguments and declared that racial zoning was unconstitutional. First, Justice William R. Day rejected the argument that the decision in *Plessy* was controlling by noting that *Plessy* had dealt only with the reasonable accommodation of separating races and not with the outright denial of a right, especially a property right, which was at issue in this case. Then, Justice Day stated that the police power rationale could not serve to deny fundamental property rights protected by the Constitution, namely the right to alienate (transfer) property freely. Although he noted in the opinion that promoting the public peace by preventing potential racial conflicts was a desirable goal, he ultimately concluded that such a goal could not be accomplished by infringing upon rights guaranteed by the Constitution. Moreover, he openly called into question the validity of the ordinance's rationale by pointing out an exception in the ordinance allowing black servants to live in white homes and by noting that the ordinance did not prohibit nearby residences owned by different races as long as they were on different blocks.

In the wake of the *Buchanan* decision, the NAACP successfully used the Supreme Court's libertarian "defense of property rights" argument to overturn similar segregationist housing ordinances in other cities, though some cities continued to pass racial zoning ordinances until the 1940s. The *Buchanan* decision did not end legal residential segregation, however, because it did not apply to private racially restrictive covenants in land sales, which were not ruled illegal until 1953. By that time, the Supreme Court had also relaxed its scrutiny of limitations on property rights and was becoming more concerned with the protection of civil rights and the overall assurance of equal protection under the laws. Nonetheless, the Court's *Buchanan*-era view of property rights as fundamental and substantively protected by due process allowed the NAACP and other groups to help end government-mandated residential segregation in the United States.

James McHenry

See also: Due Process of Law; Fourteenth Amendment; Police Power.

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Buck v. Bell (1927)

In 1924, Virginia passed a law that legalized the practice of sterilizing persons in mental institutions, and three years later, in *Buck v. Bell,* 272 U.S. 200 (1927), the U.S. Supreme Court upheld the law. Its opinion promoted views closely akin to social Darwinism, the extension of Charles Darwin's theory of natural selection, or "survival of the fittest," to the social arena. The state's legislative intent was to prevent the mentally disadvantaged from reproducing and passing their mental disabilities to future generations.

Under the law, mental institutions followed specific procedures for the sterilization of patients. The superintendent recommended sterilization of a patient to the board of directors and then informed the patient and the patient's guardian of the decision. The patient had an opportunity to be heard by the board of directors. If the board concluded that the patient should be sterilized, the patient had thirty days to appeal the decision to the state courts. If the patient was sterilized, the institution released the patient, since that individual no longer posed a genetic threat to society.

The year Virginia passed the law, an eighteen-year-old institutionalized woman brought her case to the Virginia Circuit Court, challenging its constitutionality. Carrie Buck's guardians had placed her in the Virginia State Colony for Epileptics and Feeble-Minded after she was raped. Carrie gave birth to a daughter while living in the institution, where her mother also resided. Although recent information suggests that Carrie was not mentally deficient, doctors characterized both women as having the mental capabilities of a young child. The superintendent, Dr. Albert Priddy, replaced by John H. Bell in 1925, determined that Carrie Buck's child would be mentally impaired, so he asked the board to approve Carrie's sterilization.

Irving Whitehead, a retired board member, represented Carrie. Whitehead argued that forced sterilization could never be constitutional and that the law violated equal protection since it did not forcibly sterilize mentally unstable persons not confined to institutions. The Supreme Court dismissed Whitehead's arguments, choosing to focus on procedural due process.

The Court, in an eight–one opinion written by Justice Oliver Wendell Holmes Jr., affirmed the law. The Court held that Carrie Buck had been afforded due process and reasoned that society's future benefit from Carrie's sterilization outweighed her right to bear children. Holmes's decision promoted genetic selection, and approximately twenty-five states enacted similar laws for the sterilization of persons in mental institutions within the next three years. Carrie Buck was one of 60,000 people sterilized in the United States after the Court's decision. Nazi Germany also relied on the Court's decision in forming and defending its genetic laws designed to produce a master race. Although the practice was continued in America until the 1970s, the eugenics movement largely lost its appeal after World War II.

The Court has never officially overturned this infamous case; however, the 1942 decision of *Skinner v. Oklahoma,* 316 U.S. 535, that declared forced sterilization of repeat criminal offenders unconstitutional has been subsequently applied to other forced sterilizations. In *Skinner*, the Court accepted the equal protection argument that it had previously rejected and declared the right to bear children fundamental, subject to strict scrutiny by the courts. Today, *Buck* remains at odds with the development toward privacy rights and personal liberties not only in *Skinner* but also in cases involving birth control and abortion.

Virginia L. Vile

See also: Eugenics; Right to Privacy; *Skinner v. Oklahoma*.

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Buckley v. Valeo (1976)

In *Buckley v. Valeo,* 424 U.S. 1 (1976), the U.S. Supreme Court, with varying votes on a range of issues, upheld provisions of the Federal Election Campaign Act (FECA) of 1971 as amended in 1974 but invalidated several other provisions. The case posed important questions under the First Amendment to the Constitution, particularly that amendment's protections for freedom of speech and freedom of association.

As a result of the Watergate affair (the bungled 1972 burglary of Democratic National Committee headquarters in the Washington, D.C., Watergate apartment complex by individuals who had ties to President Richard M. Nixon, plus the subsequent attempted cover-up of White House involvement, all of which led to Nixon's resignation in 1973), and in an attempt to rid political campaigns of corruption by restricting financial contributions to candidates, Congress amended FECA in 1974 and passed the Presidential Election Campaign Fund Act (PECFA). PECFA set limits on the amount of money an individual could contribute to a single campaign, and it required the reporting of contributions above a certain

amount. In addition, the Federal Election Commission (FEC) was established to enforce the statute.

In January 1975, Senator James L. Buckley (R-NY) filed suit in U.S. District Court for the District of Columbia charging that FECA and PECFA were unconstitutional on several grounds. The defendants included Francis R. Valeo, who as secretary of the U.S. Senate was an FEC member, and the newly created FEC itself.

The district court, in accordance with FECA provisions, certified the constitutional questions in the case to the U.S. Court of Appeals for the D.C. Circuit. In August 1975 that court ruled to uphold the great majority of FECA's substantive provisions with respect to contributions, expenditures, and disclosure. On appeal to the U.S. Supreme Court, among the questions presented was whether limits placed on electoral expenditures by the FECA violated the rights to freedom of speech and freedom of association as provided under the First Amendment.

The Court upheld the constitutionality of provisions setting limitations on contributions by individuals to candidates for federal office, the disclosure and recordkeeping requirements, and the public financing of presidential elections. The Court struck down provisions setting limits on expenditures by candidates and their committees, except for presidential candidates who accepted matching public funds.

With respect to the contribution limits, the Court held they constituted one of the law's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions. In contrast to the ruling on contribution limits, the Court found that the FECA expenditure limit imposed substantial restraints on political speech and therefore was a violation of First Amendment protections.

The appellants had claimed the reporting and disclosure requirements constituted a violation of their rights to free association under the First Amendment. The Court recognized that disclosure could seriously infringe on freedom of association, but concluded the government had a compelling interest in helping voters evaluate candidates by informing them of the sources and uses of campaign funds as well as deterring corruption or the appearance of corruption by making public the names of significant donors.

In upholding the public financing of presidential campaigns through the voluntary checkoff system, the Court ruled that it was constitutionally valid to require that a presidential candidate agree to an expenditure limit as a condition for receiving public funding.

The holdings of the Court with respect to contributions and expenditures were controversial for the next quarter century, and debate culminated in the Bipartisan Campaign Reform Act of 2002, a challenge to which also reached the Supreme Court in *McConnell v. Federal Election Commission,* 124 S. Ct. 619 (2003). This decision upheld most parts of the new law, including restrictions on "soft money" expenditures made by individuals not officially associated with political candidates.

Mark Alcorn

See also: Federal Election Campaign Act of 1971; *McConnell v. Federal Election Commission;* Political Parties.

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Burger, Warren Earl (1907–1995)

President Richard M. Nixon replaced Earl Warren with Warren E. Burger as chief justice in 1969. Burger was born in Saint Paul, Minnesota, September 17, 1907, and he worked his way through the University of Minnesota and Saint Paul College of Law, graduating magna cum laude from law school in 1931. He joined a firm in Saint Paul, where he maintained a general private practice until 1953. He was extensively involved in Republican politics, managing the presidential bids of Minnesota Governor Harold Stassen in 1948 and 1952. At the 1948 Republican nominating convention, he met Herbert Brownell, then

campaign manager for New York Governor Thomas Dewey. In 1952, Burger was instrumental in securing the presidential nomination for Gen. Dwight D. Eisenhower when Stassen's candidacy was no longer viable. Brownell became Eisenhower's attorney general and named Burger to head of the Civil Division of the Justice Department. In 1955, Eisenhower nominated Burger to a seat on the U.S. Court of Appeals for the District of Columbia, where he served until his elevation to the Supreme Court.

An articulated priority of Richard M. Nixon was to neutralize the Warren Court's (1953–1969) expansion of rights afforded criminal defendants. He wanted Warren Burger to lead the Court to decisions different from those in the Warren era. Burger performed as expected on criminal rights issues, supporting capital punishment, criticizing the exclusionary rule (disallowing evidence obtained through police misconduct), and seeking to limit the scope of the *Miranda* doctrine (requiring defendants to be informed of their constitutional rights). He also had substantial impact on First Amendment issues, leading his Court to an accommodationist position in cases dealing with establishment of religion. Burger fashioned the three-prong *Lemon* test pertaining to establishment of religion in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), which still remains in effect. He also wrote the Court's opinion in the case that permitted the Amish exemption from a state compulsory education law in *Wisconsin v. Yoder,* 406 U.S. 205 (1972). Burger crafted new definitional standards for obscenity in *Miller v. California,* 413 U.S. 15 (1973), encouraging more aggressive state and local regulation of obscenity. His record on a free press was somewhat mixed; he dissented in the *Pentagon Papers* case, *New York Times Co. v. United States,* 403 U.S. 713 (1971), but struck down a court order restricting coverage of a criminal trial in *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976). He supported press access to criminal trials in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), while rejecting a claimed privilege of source confidentiality in *Branzburg v. Hayes,* 408 U.S. 665 (1972).

Burger's record on equal protection is often presumed to be unsympathetic. In *Alexander v. Holmes County Board of Education,* 396 U.S. 19 (1969), however, he was part of a unanimous Court that ordered immediate desegregation of a number of Mississippi school districts, thus closing the open-ended "all deliberate speed" language of *Brown v. Board of Education,* 347 U.S. 483 (1954). He authored the first important busing opinion in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), upholding the authority of lower federal courts to remedy constitutional violations in public education. Although generally opposed to affirmative action programs, Burger acknowledged broad congressional authority to remedy discrimination in his majority opinion in *Fullilove v. Klutznick,* 448 U.S. 448 (1980). Burger resisted extension of the Equal Protection Clause to classifications other than race. Although he occasionally supported claims of impermissible gender discrimination, as in *Reed v. Reed,* 404 U.S. 71 (1971), he rejected the view that gender is a "suspect" classification that should be subjected to more demanding standards than other legislative enactments. Finally, it was the Burger Court that handed down the historic decision in *Roe v. Wade,* 410 U.S. 113 (1973), which established constitutional protection for abortion rights.

Burger was a highly visible chief justice. He tended to assign to himself the task of writing the majority opinion in major cases, such as the decision on executive privilege in *United States v. Nixon,* 418 U.S. 683 (1974). He also had a distinguished record in the area of judicial management and court reform. He retired from the Court in July 1986 and served as chairman of the Commission on the Bicentennial of the United States Constitution. Burger died June 25, 1995.

Peter G. Renstrom

See also: Nixon, Richard M.; Warren, Earl.

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Burson v. Freeman (1992)

In *Burson v. Freeman,* 504 U.S. 191 (1992), the U.S. Supreme Court upheld a provision of Tennessee's Electoral Code prohibiting the solicitation of votes and the distribution or display of campaign materials within a 100-foot radius from the door of the polling place on election day. "Campaign-free zones" such as this—in effect in forty-seven states and varying in distance from twenty-five feet (Missouri) to 1,000 feet (Hawaii)—ostensibly deter fraud and intimidation by insulating individuals from encounters with campaign workers. And yet, as longtime political activist and campaign worker Mary Rebecca Freeman contended, they also prevent advocates from interacting with and persuading undecided voters as they proceed into the polling place. They raise issues of First Amendment freedoms such as the right of free speech.

American elections, originally conducted in public, were altered dramatically by the widespread adoption of the Australian ballot, a system designed to offer voters the increased secrecy of a standard, official ballot and the privacy of individual polling booths. During a period of national electoral reform at the end of the nineteenth century, and in an effort to preserve the "purity" of its elections, Tennessee switched to the Australian system and, in 1972, enacted a comprehensive code to regulate the conduct of elections—the code that included the statute in question.

Inspired by rumors that the state was going to begin *entirely* prohibiting campaign workers from the grounds of the polling place, Freeman and her attorney challenged the statute as facially unconstitutional—an example of pure content discrimination—singling out political speech, purportedly the most protected form of speech, for restriction in this environment. Furthermore, Freeman explained, the point where she could legally interact with voters at her local polling place (the 101st foot) was in the middle of the street. Still, the state alleged, such zones were necessary to prevent the harassment and intimidation of voters—problems perhaps most pronounced in the American South.

In one of the rare instances when a statute satisfied the requirements of "strict scrutiny" review, Justice Harry A. Blackmun, writing for the Court, reasoned that restrictions on speech and advocacy of this sort were constitutional because they were enacted and enforced to preserve voting rights. Significantly, Justice Blackmun's reasoning traced the history of electoral reform efforts in the United States (and abroad) and concentrated on the intimidation and fraud that have plagued elections in the past.

Yet, this emphasis on historical evidence is what troubled the dissenters. Past practice, Justice John Paul Stevens argued, does not imply present necessity. Certainly "reforms" of this sort were a wise idea at some point, but the state already had laws on the books prohibiting voter fraud and intimidation. Further, by singling out political speech—and prohibiting it within the 30,000 square feet around each polling place—the state, ironically, disfavored the form of expression it was *most* obliged to preserve. *Burson* presents, then, the difficult balancing of competing rights and concerns often seen in cases about freedom of speech. In a literal and figurative sense, where should the line be drawn that preserves both the right to vote and the right to engage in political discourse?

Brian K. Pinaire

See also: First Amendment.

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Burton, Harold H. (1888–1964)

As mayor of Cleveland, U.S. senator, and an associate justice of the U.S. Supreme Court, Harold H. Burton

made a number of important contributions in the area of civil rights and liberties. He was born in Jamaica Plain, Massachusetts, where his father was a civil engineering professor and dean of the faculty at the Massachusetts Institute of Technology. Burton graduated summa cum laude from Bowdoin College in Brunswick, Maine, in 1909 and from Harvard Law School in 1912. He married his childhood friend Selma Florence Smith and moved to Cleveland, Ohio, to begin practicing law.

In Cleveland, Burton set his sights on a career in politics. He began working with his wife's uncle, not only in Cleveland but also in Salt Lake City, Utah, and Boise, Idaho, where he became a successful attorney for power companies. Burton volunteered for the infantry during World War I and entered the conflict in 1917 as an army lieutenant. The following year he rose in rank to captain and received the Purple Heart and Belgium's Croix de Guerre. After the war, he returned to his corporate law practice in Cleveland, taught at Western Reserve University Law School from 1923 to 1925, and ultimately set up his own law firm, Cull, Burton, and Laughlin.

Burton was elected to the Board of Education of East Cleveland in 1927. He served in the Ohio House of Representatives the following year and as Cleveland's director of law from 1929 to 1932. After returning to private practice for three years, Burton ran for mayor. Not only did he win, but he was reelected twice and remained in that position until his election to the U.S. Senate in 1940. As mayor, Burton helped restore economic prosperity to the city by combating organized crime and developing employment programs. In the Senate, he was generally liberal on international affairs and conservative in the domestic realm. He pressed for U.S. participation in the United Nations after World War II.

In 1945, President Harry S Truman appointed Burton to the U.S. Supreme Court. Truman had served with Burton on the Senate Special Committee to Investigate the National Defense and remembered his former colleague when it was suggested that he nominate a Republican. Burton's moderate conservatism made him an ideal choice, and the Senate easily confirmed him. On the Court, Burton took a methodical approach to his work. He labored for long hours, often staying at his desk until well after midnight. Burton's opinions were generally consistent with his moderate conservative philosophy. In the controversial area of racial discrimination, however, Burton was a liberal. He joined the Court's opinion in *Shelley v. Kraemer,* 344 U.S. 1 (1948), striking down racially restrictive covenants in housing. He called it a "privilege" to join the unanimous Court in striking down racial segregation in public schools in *Brown v. Board of Education,* 347 U.S. 483 (1954).

Still, in the Cold War era, he often voted to uphold government authority over individual rights. For example, in *Bute v. Illinois,* 333 U.S. 640 (1948), he wrote the majority opinion holding that the Due Process Clause of the Fourteenth Amendment did not require states to provide counsel for defendants. *Gideon v. Wainwright,* 372 U.S. 335 (1963), later overturned this decision. In 1957, Burton was diagnosed with Parkinson's disease, and he retired the following year. He then served in "senior status" for four years on the D.C. Circuit Court of Appeals until his death on October 28, 1964.

Artemus Ward

See also: Gideon v. Wainwright; Vinson, Frederick Moore; Warren, Earl.

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Bus Searches

Bus searches have become a common tactic employed by law enforcement officials in their efforts to combat drug trafficking. These searches, or sweeps, are typically of intercity buses traveling on known drug routes and are conducted at normally scheduled bus stops. Such searches require the courts to balance law

enforcement's interests in effective drug interdiction with bus passengers' expectations of privacy. Central to the determination of whether these searches are permissible under the Fourth Amendment is an evaluation of the consensual nature of the police-passenger encounter and the voluntariness of a passenger's consent.

The Court explicitly considered whether bus sweeps are by their nature nonconsensual in *Florida v. Bostick,* 501 U.S. 429 (1991). Terrance Bostick sought to suppress as evidence in his trial cocaine that was found in his luggage when law enforcement officers searched it during a bus trip from Miami, Florida, to Atlanta, Georgia. The officers had boarded the bus during a layover in Fort Lauderdale, Florida, and approached Bostick, asking to see his identification and his ticket and subsequently asking to search his luggage, after advising him that they were narcotics officers searching for drugs. The Florida Supreme Court ruled in Bostick's favor, and the state of Florida appealed to the U.S. Supreme Court. In issuing its ruling, the Court acknowledged that there was no reasonable suspicion for the search of Bostick's person or luggage. It went on to assert, however, that an encounter like that between the police and Bostick did not necessarily rise to the occasion of being a seizure as understood under the Fourth Amendment. The majority further stated that although the conditions of a cramped bus should be taken into account in ascertaining whether a reasonable person would feel free to terminate the encounter with the police, the fact that the encounter occurs on a bus is not by itself enough to invoke the Fourth Amendment.

Whereas law enforcement agents are free to pose questions to individuals such as bus passengers in the absence of reasonable suspicion, absence of it obligates law enforcement to abide by the Supreme Court's rulings with regard to permission to conduct a search. The Court recognized consent as an exception to the Fourth Amendment's warrant requirement—consent by the party to be searched or by the owner of the items to be searched—in *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). The key to a consent search is the voluntary nature of that consent. If consent has been coerced, then the exception to the warrant requirement based on consent does not apply, and any evidence obtained cannot be used against the accused. In the *Bostick* case, the officers who boarded the bus advised Bostick that he had the right to refuse to consent to the search of his luggage. Further, though it was clear to the passengers on the bus that at least one of the officers was armed, there was no evidence that the officer used the presence of his gun to coerce Bostick into providing consent. These two factors led the Court to conclude that consent was voluntary on Bostick's part.

It is clear that overt threats, whether through the use of a gun or otherwise, would render consent involuntary, but the ruling in *Bostick* was unclear as to how important it was for the officers to have advised Bostick of his right to decline to give consent. The Court addressed this issue squarely in its 2002 ruling in *United States v. Drayton,* 536 U.S. 194. Christopher Drayton and Clifton Brown Jr. were passengers on a bus traveling from Fort Lauderdale, Florida, to Detroit, Michigan. During a layover in Tallahassee, Florida, three police officers boarded the bus. While one kneeled in the driver's seat, facing the passenger compartment, the other two officers made their way to the rear of the bus. One of them then made his way forward up the aisle, stopping to ask passengers about their travel plans and to match passengers with their luggage in the overhead rack.

When the officer came to Drayton and Brown, they gave him permission to search their joint bag in the luggage rack, which did not contain any contraband. The officer, noting their baggy clothing despite the hot weather, first asked Brown if he could search his person. Brown agreed, whereupon the officer found suspicious packages in his groin area. After Brown's arrest, the officer asked Drayton for permission to search him as well. That search also uncovered drug packages. Drayton and Brown sought to have those drugs excluded at trial, based in part on the fact that the officer had not advised them of their right to refuse to consent to the search. The Court was unpersuaded and declined to find that such notification was mandatory to ensure that consent for a search was voluntary: "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent."

In Otay Mesa, California, a border patrol officer searches a Greyhound bus bound for Los Angeles from Mexico. The officer is looking for a man who slipped under a fence into the United States, then entered the bus. Individuals have a right to refuse to consent to such searches or police questioning. *(© S. Rubin/The Image Works)*

In *Bond v. United States,* 529 U.S. 334 (2000), the Court considered the expectation of privacy that bus passengers reasonably enjoy with regard to their luggage. Steven Dewayne Bond was a passenger on a bus traveling from California to Arkansas. The route the bus took required it to stop at a border patrol station located at Sierra Blanca, Texas. At the station, a border patrol agent boarded the bus to ascertain the immigration status of its passengers. He did so as he made his way from the front to the back of the bus and then back toward the front of the bus, feeling and squeezing any soft luggage in the overheard rack. Feeling a hard object in a bricklike shape such as that commonly used for smuggling drugs, the agent asked Bond for permission to open the bag, which Bond gave. Bond sought to have the discovered brick of methamphetamine excluded at his trial. Unsuccessful in the lower courts, Bond appealed to the Supreme Court, which ruled in his favor. The Court acknowledged that bus passengers have at least some expectation that their luggage will be handled by others. The kind of manipulation in this case, however, which was intended specifically to identify drugs or other illegal paraphernalia, far exceeded what a passenger would normally expect. On this basis, the Court found the search to be unconstitutional, thereby invalidating what some legal scholars have referred to as a "plain feel" exception to the warrant requirement analogous to the "plain view" principle (permitting admission of evidence that is in plain sight of police as they are engaged in legitimate investigative activities).

Wendy L. Martinek

See also: Fourth Amendment; Search; Seizure.

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Bush, George H.W. (b. 1924)

Promising "a kinder, gentler nation" during his inaugural address in 1989, George H.W. Bush (U.S. president, 1989–1993) initially appeared to offer a more moderate agenda than had Ronald Reagan. However, those expecting a significant departure from the Reagan era were to be disappointed. Bush had not received a mandate for change from Reagan's policies in the 1988 election. He received 53.3 percent of the vote, and both houses of Congress were controlled by the Democrats. In addition, much of Bush's background before he was elected vice president and then president was in foreign affairs. He had served as ambassador to the United Nations, special envoy to China, and Central Intelligence Agency director. Under such circumstances, it was no surprise that the Bush administration increasingly turned to foreign policy issues over domestic issues as a way to make its political mark. The culmination of the administration's foreign policy actions was, of course, the 1990–1991 Gulf War to repel Iraq's invasion of Kuwait. Still, the question remains: Was the promise of a "kinder and gentler nation" kept during the administration of George Bush?

Much of Bush's activity in the area of civil rights dealt with employment. He vetoed the 1990 civil rights bill intended to reverse a series of Supreme Court decisions that had made it more difficult to prove job discrimination. It was the first defeat of major civil rights legislation in a quarter century. A somewhat modified version of the vetoed bill was passed in 1991 and signed by President Bush. Its passage was partly a response to political fallout from the congressional hearings for the nomination of Clarence Thomas to the U.S. Supreme Court.

Those hearings were among the most memorable events in the Bush years. Nominated by President Bush to replace retiring Justice Thurgood Marshall, Thomas was young, Republican, very conservative, and African American, with a compelling story of personal success under difficult circumstances. However, charges were brought that Thomas had sexually harassed a female employee. In a circuslike atmosphere, the hearings were conducted before an all-male Senate Judiciary Committee. The hearings and the vote on Thomas's nomination proved a major polarizing event. Thomas was confirmed by the Senate in a close vote in a process that ultimately involved partisanship, ideology, race, and sex. And, to little surprise, Thomas quickly proved a consistently conservative vote on the Supreme Court. By contrast, President Bush's first nominee, David H. Souter, developed a moderate-to-liberal voting record.

Although the Bush administration was far from supportive of traditional civil rights legislation, in one area it made a major impact. The administration supported, and President Bush signed, the Americans with Disabilities Act of 1990, the most important federal law protecting the rights of the disabled.

With the exception of the disabled, Bush's promise of "a kinder, gentler nation" was not met. His administration was generally unsympathetic to civil rights and civil liberties policies. Economic downturn coupled with an increase in taxes that was contrary to his "no new taxes" pledge led to his political downfall. Even though he had in the previous year seemed unbeatable in the aftermath of his success in the Gulf War, the 1992 election left George H.W. Bush a one-term president.

Anthony Champagne

See also: Central Intelligence Agency; Disability Rights.

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Calder v. Bull (1798)

During the first decade of the U.S. Supreme Court (1790–1800), the justices decided few cases. One decision, however, *Calder v. Bull,* 3 U.S. 386 (1798), had a long-term effect in one critical legal area, the prohibition against ex post facto laws, or "after the fact" laws. The first clause of Article 1, Section 10 of the Constitution, the Ex Post Facto Clause, forbids states from passing laws making previously legal acts illegal and punishing individuals for them. This ensures that citizens cannot be punished retroactively for an act that was legal when they did it but that later was made illegal.

Calder began when the Connecticut state probate court rejected the will of Normand Morrison in 1793. The beneficiaries of that will, the Caleb Bull family, did not appeal and let a Morrison grandson inherit the estate. In 1795 the Connecticut legislature passed a law overturning the probate court's ruling and allowing Morrison's original will to be enforced and the Bulls to inherit. The grandson challenged the Connecticut law as a violation of the Ex Post Facto Clause.

Justice Samuel Chase took the opportunity in the case not only to define the relevant clause but also to compose an extended opinion on the proper role of the courts in interpreting the Constitution. Chase first decided the case in favor of the Bulls by ruling that the Ex Post Facto Clause applied only to criminal and not civil cases. Chase noted the existence of the Fifth Amendment's Takings Clause, which prohibited government from taking private property without paying compensation. Applying the Ex Post Facto Clause to civil cases would have the same effect as the Takings Clause, thus making it redundant. According to Chase, this required the justices to limit the clause.

Chase went further in his opinion in stating that there were limits on government power not found in the Constitution. He listed several examples of when government acted unjustly and beyond the grant of power to act in the general welfare of citizens. He supported a natural-law view of the Constitution, meaning justices should find natural rights and enforce them even when they did not appear in the Constitution.

In a separate opinion, Justice James Iredell disagreed with Chase's approach, arguing that his idea of natural law gave judges too much power and allowed them to invade the proper powers of the other branches of government. The Chase-Iredell debate has continued throughout the Court's history, with some justices favoring the use of natural law to strike down laws considered unjust, and other justices believing in deferring to the government and striking down laws only when they were clearly unconstitutional.

While that debate has continued, Chase's original ruling that the Ex Post Facto Clause applied only to criminal cases has seemed settled law. But two major legal figures, Robert Bork in *The Tempting of America* (1990) and Justice Clarence Thomas in his concurring opinion in *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998), have questioned the correctness of *Calder,* with both men suggesting that it might have wider scope.

Douglas Clouatre

See also: Ex Post Facto Laws; Natural Law.

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Cantwell v. Connecticut (1940)

Cantwell v. Connecticut, 310 U.S. 296 (1940), was a landmark case in which the U.S. Supreme Court addressed the meaning and reach of the Free Exercise Clause of the First Amendment to the Constitution. Under that clause, Congress is prohibited from en-

gaging in activity that would interfere with the individual's right to free exercise of a chosen religion. In *Cantwell,* the Court considered whether the same prohibition should extend to state activity as well. This analysis rested on the "incorporation" doctrine. A unanimous Court, through the opinion of Justice Owen J. Roberts, incorporated (absorbed) the Free Exercise Clause into the Fourteenth Amendment's Due Process Clause and thus applied the Free Exercise Clause to state behavior for the first time.

Newton Cantwell and his two sons were arrested in New Haven, Connecticut, for distributing books and pamphlets and playing records on a portable phonograph in an overwhelmingly Catholic neighborhood; all the material distributed or played was strongly anti-Catholic. The three were charged with violating a city ordinance that required obtaining a permit from the secretary of the Public Works Council, who was to determine if the material was religious in nature as opposed to charitable or philanthropic. The Cantwells, all of whom were adherents of the Jehovah's Witnesses faith, were convicted, but the Supreme Court overturned their conviction, ruling that the city law violated the Due Process Clause of the Fourteenth Amendment because its stated concept of "liberty," according to Justice Roberts, included the Free Exercise Clause.

Justice Roberts wrote that the two religion clauses of the First Amendment (the Establishment Clause being the second) included two key concepts: "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." In essence, Roberts wrote into U.S. constitutional law the notion expressed by Thomas Jefferson in the late eighteenth century in the debate over religious freedom in Virginia: The right of free exercise of religion was indeed fundamental, but its exercise could not be not absolute; if religiously motivated action harmed the public good in some substantive manner, such action was subject to state regulation.

As the Court strongly emphasized in *Cantwell,* however, such state regulation "must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." The Court upheld neutral, nondiscriminatory legislation (time, place, and manner restrictions) in *Cantwell,* but regulations such as the New Haven ordinance, which allowed a governmental official to rule on religious matters, were held to violate the First Amendment's guarantee of free exercise of religion.

The unanimous ruling in *Cantwell* served to usher in a new era of constitutional jurisprudence in which the Court entertained cases involving nonmainstream religious groups whose practices conflicted with state regulations. *Cantwell* was the first major, modern Court ruling to address the meaning and application of the Free Exercise Clause of the First Amendment.

Stephen K. Shaw

See also: Free Exercise Clause; Incorporation Doctrine; Jehovah's Witnesses.

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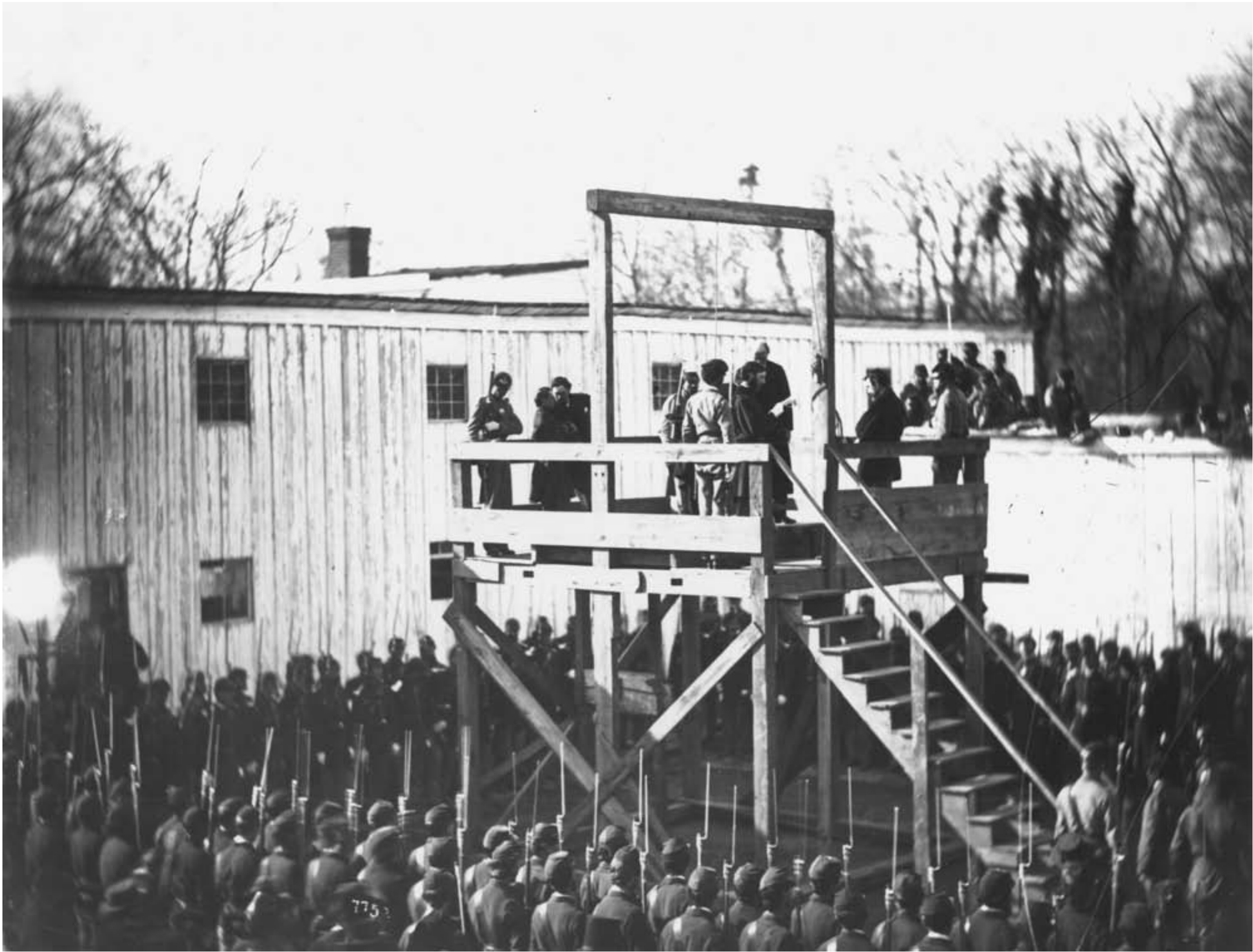
Capital Punishment

Most countries that sanction the use of the death penalty in capital crimes also have an active cadre of opponents who continually argue that it should be discarded. In the United States, the argument against capital punishment has centered on the issue of whether the death penalty under any or all circumstances violates the protection against "cruel and unusual punishments" provided in the Eighth Amendment to the U.S. Constitution. Capital punishment in the United States has, indeed, sometimes included what would be considered barbaric under contemporary interpretations of "cruel and unusual." For example, in Salem, Massachusetts, during the notorious witch trials of the late seventeenth century, the Massachusetts courts allowed accused witches to be burned or buried alive. In some parts of the country, being beaten to death was not unusual, and hangings were so popular they were considered social events. By the twentieth century, the only forms of capital



Death by hanging, a form of execution used during the colonial period and later, has not been regarded as a cruel and unusual punishment that violates the Eighth Amendment, though it was replaced by other forms of capital punishment. Here the death warrant is read to Captain Henry Wirz in Washington, D.C., November 1865, prior to his execution. *(Library of Congress)*

punishments accepted in the United States were electrocution, the gas chamber, lethal injection, and firing squad, the latter deemed acceptable in only a few states and the military.

In an early attempt to determine whether the death penalty was indeed cruel and unusual punishment, the U.S. Supreme Court held in *Wilkerson v. Utah,* 99 U.S. 130 (1879), that "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty are forbidden by [the Eighth Amendment to] the Constitution." Some twenty years later, the Court again examined the issue in *Weems v. United States,* 217 U.S. 349 (1910), overturning a Philippines statute that allowed accused criminals to be imprisoned in irons for periods between twelve and twenty years for supplying fraudulent information on public records; at the time, the Philippines was under the protection of the United States. Almost three decades later, in *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459 (1947), the Court declined to find that a botched electrocution prohibited the state from attempting to execute someone again.

During the 1930–1967 period, 3,859 individuals were executed in the United States under sentences handed down by civilian courts. Approximately 86 percent of the executions were due to murder convictions, and some 12 percent were a result of rape convictions. Ninety percent of all those executed for rape during this period were African Americans. Kidnapping, burglary, robbery, sabotage, aggravated assault,

and espionage convictions made up the remainder of executions. A full 60 percent of all executions took place in the South. By 1972, forty-two of the fifty states retained the death penalty, but thirty-one of them had not carried out executions for a number of years.

In 1972 when the Supreme Court agreed to determine the constitutionality of the death penalty in *Furman v. Georgia,* 408 U.S. 238 (1972), there were 600 people awaiting execution throughout the United States. After the decision, all of these death sentences were reduced to life imprisonment. Since *Furman,* however, more than 2,000 other defendants have received death sentences. In *Furman,* the Court decided that Georgia's death penalty *as written* violated both the Eighth and Fourteenth Amendments because the state had "arbitrarily and discriminately" imposed the death penalty. The Court's holding effectively overturned death penalty statutes in forty-two states.

The Court was so divided over the constitutionality of the death penalty in *Furman* that each justice in the majority wrote a separate opinion. Justices William O. Douglas, Potter Stewart, and Byron R. White argued that Georgia's statute was unconstitutional because the state did not make the death penalty mandatory for certain crimes, thus giving judges excessive authority over sentencing. Too much discretion, in the opinion of the Court, allowed the "penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position."

In *Furman,* the Supreme Court provided states with one of two ways to create constitutional death penalty statutes: States either could limit a jury's discretion to make arbitrary sentences by mandating the death penalty only for certain crimes, or states could set up separate proceedings for criminal trials and sentencing hearings (called bifurcation). Following the Court's advice, ten states passed mandatory sentencing laws, and twenty-five established a two-stage process for death penalty cases.

Four years later, the Supreme Court considered the revised death penalty statutes of five southern states. In *Gregg v. Georgia,* 428 U.S. 153, *Proffitt v. Florida,* 428 U.S. 242, and *Jurek v. Texas,* 428 U.S. 262, all three decided in 1976, the Court held that Georgia, Florida, and Texas, which had instituted bifurcated trials in which the sentencing juries considered aggravating and mitigating factors, had met the standards established in *Furman.* In *Woodson v. North Carolina,* 428 U.S. 280, and *Roberts v. Louisiana,* 428 U.S. 325, also decided in 1976, the Court determined that North Carolina and Louisiana, which had established mandatory penalties for certain designated crimes, had not. The Court concluded that the Eighth Amendment prohibited only "barbaric" forms of punishment and not the death penalty when constitutionally applied.

Subsequently, in *Coker v. Georgia,* 433 U.S. 584 (1977), the Court held that imposing the death penalty for rape cases involving adult women violated the "cruel and unusual punishment" element of the Eighth Amendment, and reiterated this position three years later in *Beck v. Alabama,* 447 U.S. 625 (1980). The following year, in *Lockett v. Ohio,* 438 U.S. 586 (1978), the Court overturned Ohio's death penalty law by determining that the state was too strict in establishing mitigating factors in death penalty sentencing guidelines.

In *Enmund v. Florida,* 458 U.S. 782 (1982), the Court overturned the death sentence of an individual who had driven a getaway car away from a murder scene but who had not been a party to the crime. Five years later, in *Tison v. Arizona,* 481 U.S. 137 (1987), the Court held that accomplices could be executed but only if they were major participants in the crimes or if they had shown "reckless indifference to the value of human life." In *Wainwright v. Witt,* 469 U.S. 412 (1985), the Court overturned the 1968 decision in *Witherspoon v. Illinois,* 391 U.S. 510, in which it had determined that opposition to the death penalty did not necessarily exclude a juror from a capital case, deciding in *Wainwright* that potential jurors could be excluded from death penalty cases if their views would substantially impair carrying out their role as jurors.

A little over a decade after Georgia reinstated its death penalty, the Supreme Court agreed to examine the issue of whether the state applied it discriminatorily. In *McCleskey v. Kemp,* 481 U.S. 279 (1987), the Court determined that even though studies conducted by David Baldus of the University of Iowa law school revealed that blacks were significantly more

likely than whites to be sentenced to death in Georgia, the state's death penalty was not unconstitutional. In *Stanford v. Kentucky,* 492 U.S. 361 (1989), the Court reexamined the issue of death penalties for minors, upholding the death sentence of a defendant who had been tried and convicted as an adult, although he was just past seventeen when the murder occurred.

Over the past few decades, the Supreme Court has had some difficulty in determining its position on whether capital punishment as applied to the mentally challenged violates the Eighth Amendment. In *Atkins v. Virginia,* 536 U.S. 304 (2002), the Court rejected its decision in *Penry v. Lynaugh,* 492 U.S. 302 (1989), in which it had declared that "[t]he Eighth Amendment does not categorically prohibit the execution of mentally retarded capital murderers of petitioner's reasoning ability."

In *Atkins,* the Court referred to its decision in *Trop v. Dulles,* 356 U.S. 86 (1958), in which it attempted to solidify its interpretation of what constituted "cruel and unusual punishments." In the *Atkins* decision, the Court admitted that it had not been able to identify the exact scope of the phrase, recognizing that the "scope is not static" because the Eighth Amendment must necessarily "draw its meaning from the evolving standards of decency that mark the progress of a maturing society." According to *Harmelin v. Michigan,* 501 U.S. 957 (1991), these evolving standards "should be informed by objective factors to the maximum possible extent."

Death penalty opponents have been particularly critical of the decision in *Payne v. Tennessee,* 501 U.S. 808 (1991), in which the Court upheld the use of victim-impact statements that enabled families and friends of murder victims to add an emotional element to sentencing proceedings by describing the impact the crime had inflicted on family members and its victims. Critics of the death penalty also abhorred the Court's holding in *Arizona v. Fulminante,* 499 U.S. 279 (1991), which allowed a confession made by a prisoner to a cellmate to stand, even though the cellmate was an informant paid by the Federal Bureau of Investigation (FBI).

The role of judges in sentencing in death penalty cases has also been a volatile issue. In *Ring v. Arizona,* 536 U.S. 584 (2002), the Court held that the responsibility for identifying "aggravating factors" that would determine eligibility for the death penalty lay with juries rather than with judges.

The U.S. Congress also entered the death penalty debate in late 2003 when the Innocence Protection Act passed the House of Representatives with bipartisan support. The purpose of the bill was to require all criminal courts to preserve physical evidence permanently in federal crimes and to support postconviction DNA testing to reduce the number of occasions of accused criminals being found innocent through new technology after death sentences have been carried out.

Elizabeth Purdy

See also: *Atkins v. Virginia;* Cruel and Unusual Punishments; Eighth Amendment; *Furman v. Georgia; Gregg v. Georgia; Payne v. Tennessee; Ring v. Arizona; Trop v. Dulles;* Victim-Impact Statement.

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Captive Audience

A captive audience is one that is unable to escape from an unwelcome speaker or message. The captive-audience doctrine is a court-developed means for balancing an unwelcome speaker's First Amendment right to free speech with the individual interests and

rights of unwilling audiences. The doctrine is rooted in the idea that the right to free speech is not absolute. In order for citizens to exercise their right to free speech, that right must be limited by other rights, such as the rights to privacy, safety, and property. In brief, the captive-audience doctrine states that when an audience is unable to escape from an unwelcome speaker or message, the state may intervene and limit the speaker's speech rights.

In deciding whether an audience is being held captive, the court applies two different standards: one for when the audience is in public, another for when the audience is at home. Traditionally, speakers have greater First Amendment protection when both they and the audiences are in a public place. The Supreme Court, in *Cohen v. California,* 403 U.S. 15 (1971)—which involved an individual wearing a jacket bearing vulgar language—announced that an audience in a public place was not held captive if the audience members could easily avoid the unwelcome speech. Wary of the slippery slope that could be created by allowing the state to regulate speech on behalf of offended audiences, the Court opted to err on the side of creating broad speech protection for speakers by limiting the applicability of the captive-audience doctrine in public places.

In spite of this, the Court has not completely banned application of the doctrine to speech in public places. The Court has elsewhere held that the captive-audience doctrine can be used to regulate advertising in some public transit settings and to limit the activities of antiabortion protesters outside abortion clinics.

Speech receives less protection when it is directed at an audience at home. The Court has depended upon the idea that when an audience is at home, it can claim a right to privacy that limits a speaker's First Amendment right to free speech. The home has been viewed as a sanctuary away from public places, and this premise enables the state to use the captive-audience doctrine to regulate speech that penetrates the home from the outside. This reasoning has been used to regulate indecent radio broadcasts during daylight hours, the volume on sound trucks in residential areas, and targeted-home picketing by protesters. The doctrine is limited, however, and cannot be used to regulate mail sent to the home unless the residents have notified the post office of their desire not to receive certain material.

Critics of the captive-audience doctrine have claimed that the Court applies it inconsistently and allows the state to regulate speech because of its content—traditionally an unconstitutional reason for speech regulation. Defenders of the doctrine, however, claim that it is necessary to balance the rights of the speaker against the various rights of the audience.

Joshua C. Wilson

See also: Cohen v. California; Federal Communications Commission v. Pacifica Foundation; First Amendment.

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Cardozo, Benjamin N. (1870–1938)

Benjamin Cardozo of New York served as an associate justice on the U.S. Supreme Court for the brief span 1932–1938. He had suffered a heart attack before he was appointed to the Court, and his tenure was cut short by his untimely death in the summer preceding the Court's 1938–1939 term.

Cardozo was admitted to the New York bar in 1891 while still a student at Columbia University, and he was in private practice with his brother for twenty-three years before serving on the New York Court of Appeals, the state's highest court. President Herbert Hoover appointed him to the federal bench in 1932 to replace legendary jurist Oliver Wendell Holmes.

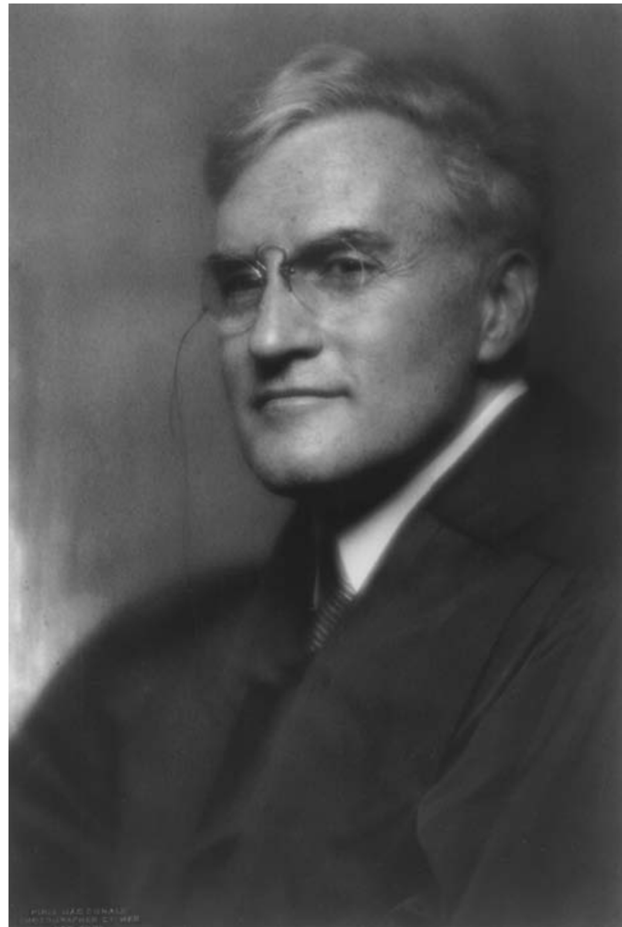
Cardozo's entry into judicial politics was as notable as the impact he made throughout his legal career. It is widely thought that President Hoover selected Cardozo to counter a recent defeat the president had suffered in Congress over the failed nomination of John J. Parker, a U.S. Court of Appeals judge. Parker's brand of conservatism enraged the likes of national

labor unions and the National Association for the Advancement of Colored People (NAACP), and Hoover wanted to distance himself from the public backlash and congressional ill-will that had accompanied the nomination. Cardozo, in contrast, was generally regarded as the most able candidate to fill the vacant post, based on his exemplary eighteen-year service on New York's highest court. The Republican president heeded the advice of congressional members in nominating Cardozo, even though he was a Democrat. The appointment was a boon to Hoover's political profile, with Senator Clarence Dill (D-WA) describing Cardozo's appointment as Hoover's "finest act of his career as President."

Justice Cardozo's service on the Court was marked by a penchant for opinion writing, at which Cardozo flourished. He had an uncanny ability to turn dense legal concepts into symbolic, meaningful prose. He relished the chance to write opinions for the Court, but was often shielded from the task by Chief Justice Charles E. Hughes, who worried about Cardozo's lingering health problems. When Justice James C. McReynolds was the senior justice in the majority and responsible for assigning opinions, his unabashed anti-Semitism toward Cardozo resulted in even fewer chances for Cardozo to voice opinions. His views often did not comport with the majority of the Court justices, who were loyal mostly to Republican ideals. Still, Cardozo made an impact on the nation's legal history with the opinions and dissents he authored. In fact, he once described the often ignored dissent as the "best inspiration of the time."

Although Cardozo is best known for his work on judicial process, he was also instrumental in deciding key constitutional questions that arose during his time on the bench. During Cardozo's tenure, President Franklin D. Roosevelt's New Deal was coming under attack, and the courts were deeply divided over the controversies being brought before them. Critics argued that the president's social welfare and regulatory legislation, for all its popularity, lacked constitutional legitimacy. Cardozo, among others, disagreed with this view and voiced this belief in several key Social Security cases while on the New York Court of Appeals. Consistent with the legal realism that formed the basis for his legal philosophy, Cardozo thought it was not the role of the judiciary role to stand in the way of the nation's needs, as expressed through the state and national legislatures.

As associate justice, Cardozo echoed this philosophy in *Palko v. Connecticut,* 302 U.S. 319 (1937), in which the Court held that the Due Process Clause of the Fourteenth Amendment did not apply the double jeopardy provision of the Fifth Amendment to the states but that it did apply those guarantees in the Bill of Rights that were "implicit in the concept of ordered liberty," a doctrine that became known as "selective incorporation." The Court continued to incorporate new rights under this doctrine, eventually applying to the states the protection against double jeopardy in *Benton v. Maryland,* 395 U.S. 784 (1969). In another notable concurring opinion in *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935), Justice



Benjamin N. Cardozo, associate justice of the U.S. Supreme Court, authored several opinions that eventually led to much of the Bill of Rights being applied to the states. *(Library of Congress)*

Cardozo agreed that Congress in the National Industrial Recovery Act had delegated excessive power to industries to regulate themselves.

The debate over whether the courts should have the power of judicial review dates back at least to the time of Thomas Jefferson, who believed this power, when exercised by federal courts to void congressional legislation, violated the will of democratic rule and the concept of separation of powers. Cardozo was a staunch supporter of judicial review, citing it as a necessary check on the improper exercise of government power. Nevertheless, he did not favor having the courts intervene in political life as a matter of course. He saw judicial review as a shadow overhanging the political arena that served to remind legislatures that their actions were not above the law. In his typically elegant writing style, Cardozo remarked that review was proper only when "the power is exercised with insight into social values, and with suppleness of adaptation to changing social needs."

Cardozo was at heart a traditionalist who felt that a jurist should not "innovate at pleasure" but "draw his inspiration from consecrated principles . . . informed by tradition, methodized by analogy [and] disciplined by system." Still, he realized that judges, like others, were not immune to emotion or prejudice. In a lecture later published (Cardozo 1921), he said that "Deep below consciousness are . . . the likes and dislikes, the predilections and the prejudices, the complexes of instincts and emotions, habits and convictions, which make the man, whether he be litigant or judge. . . . The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass judges by."

Cardozo's influence on judicial decision-making has been profound, with his collection of Yale University lectures becoming a cornerstone of legal education since their publication. Benjamin Cardozo's thoughtful and deliberative opinions and his extensive writing on legal philosophy have garnered him a place in history as one of America's greatest jurists.

Patricia E. Campie

See also: Hughes, Charles Evans; Incorporation Doctrine; *Palko v. Connecticut;* Selective Incorporation.

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Carolene Products, Footnote 4 (1938)

Footnote 4 of *United States v. Carolene Products Co.,* 304 U.S. 144 (1938), is the most famous footnote in U.S. constitutional history. It heralded the U.S. Supreme Court's shift from judicial activism in defense of economic rights to judicial activism on behalf of civil rights and liberties and the integrity of the political process. Footnote 4 provided the rationale for advances in civil rights, privacy rights, the due process rights of criminal defendants, and free expression.

Carolene Products was one of several cases in which the Court repudiated its earlier defense of corporate and individual economic rights. The case involved a federal regulation of milk content, and Justice Harlan F. Stone held that if Congress chose to set minimal standards for milk quality, that was the legislature's business, not the judicial branch's. But Justice Stone added in footnote 4 that the Court might adopt a higher level of scrutiny in cases dealing with fundamental personal rights. A more searching judicial review of state and national governmental action might be appropriate when such rights were threatened.

Stone suggested that the Court might also need to step in when the ordinary political process was not adequate to ensure justice. This may occur because either the legislation interfered with rights that were central to the political process, or it discriminated against "discrete and insular minorities." Such minorities were likely to be victims of prejudice and lacked sufficient power to protect their rights in the political arena. In these situations, the legislation may be subject to "more exacting judicial scrutiny."

Footnote 4 was transformed into a "two-tier" system for evaluating claims based on equal protection and due process during the 1960s. The Court reviews

challenges to social and economic legislation under its low-level "rationality" test, under which legislation is designed to further a legitimate governmental objective. But "strict scrutiny" is applied when legislation infringes on a fundamental right, such as the right to vote, the right to interstate travel, or the right to appeal in a criminal case. It is also applied when legislation creates a "suspect classification," such as segregation laws excluding African Americans from public life. A classification is "suspect" if it is based on a group's race, ethnicity, or religion. Such discrimination is so unlikely to be related to a legitimate state objective that it is presumed to be the product of prejudice. A law must be "narrowly tailored" to achieve a "compelling state interest" in order to pass the strict-scrutiny test.

Later Supreme Court decisions expanded the range of closely reviewed classifications beyond race and ethnicity to include illegitimacy and gender. The Court devised an intermediate-level test for equal protection claims. Legislation that discriminated against women or those of illegitimate birth must be "substantially related" to achieving "an important governmental objective." Thus, in *Reed v. Reed,* 404 U.S. 71 (1971), the Court invalidated a state law that gave an automatic preference to males over females in deciding who should administer the estate of an individual who died without a will.

In recent holdings, the Court has been reluctant to expand civil liberties and rights. Indeed, some specialists fear that some rights like abortion have been curtailed. There has also been a reassertion of judicial scrutiny of government regulation of economic rights in cases dealing with zoning restrictions on private property, as in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). These recent cases have narrowed footnote 4's gap between economic and noneconomic rights.

Timothy J. O'Neill

See also: Compelling Governmental Interest; Intermediate-Level Scrutiny; Rational-Basis Test; Stone, Harlan Fiske; Strict Scrutiny.

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Carroll v. United States (1925)

Carroll v. United States, 267 U.S. 132 (1925), is a seminal case dealing with constitutional parameters for the search of vehicles in contrast to dwellings. The argument is specific to the needs of law enforcement officials to carry out their duties permissibly under the Fourth Amendment protection against unlawful search and seizure. The Supreme Court held in *Carroll* that probable cause was sufficient for the search of vehicles and that no search warrant was required.

In this case, George Carroll and John Kiro, bootleggers who were well known to agents charged with enforcing prohibition, were seen driving en route from Detroit to Grand Rapids in Michigan. The police gave chase and stopped and searched the vehicle. In it they discovered and seized a cache of liquor and arrested the two men.

The two primary issues of conflict in the case involved the limitation of Fourth Amendment protections regarding vehicle searches and the scope of probable cause in those searches. The U.S. Supreme Court determined that only probable cause was required for the search of vehicles because they could be moved if officers took time to obtain a routine search warrant. The search of vehicles clearly includes vessels and aircraft as well as land vehicles. Regarding probable cause, the Court reaffirmed the "reasonable person" standard—that a prudent individual with the same facts would come to the same conclusion as the officer. The defense focused on the fact that the prohibition officers were not actively looking for Carroll and Kiro. The Court, however, declared that fact unrelated to the probable cause that existed for the vehicle search. The officers were well aware that Carroll and Kiro participated in the illegal liquor system in the Grand Rapids area.

Later cases drew significantly on the logic used in *Carroll* and expanded the scope of that decision. *United States v. Ross,* 456 U.S. 798 (1982), was fully

dependent upon *Carroll* in that probable cause and the subsequent search of a vehicle resulted in an arrest. Probable cause was satisfied through a reliable informant's description that Albert Ross was selling drugs from his vehicle. The search uncovered heroin and cash in the trunk of the vehicle. The Court found not only that the search of the vehicle without a warrant was satisfactory but also that the search of containers within the vehicle was covered by the same logic. Ross had heroin in a brown paper bag and money in a leather pouch.

The use of probable cause and subsequent search was expanded further in *United States v. Johns,* 469 U.S. 478 (1985), in which the Court found that the odor of marijuana satisfied the practical matter of probable cause for a search. In this case customs officers were investigating a smuggling operation in which planes carrying drugs flew into a remote airstrip in Arizona. The officers were unable to observe the landing and subsequent off-loading of material from the aircraft. The officer stopped trucks that were leaving the area and detected the odor of marijuana. That led to the search of the vehicles, discovery of marijuana, and the arrests.

Kevin G. Pearce

See also: Automobile Searches; Fourth Amendment.

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Carter, Jimmy (b. 1924)

Jimmy Carter in and out of the presidency has been an advocate of civil liberties and human rights. A onetime farmer and Georgia governor before defeating Gerald Ford for the presidency in 1976, Carter arguably has been a greater advocate of civil liberties than many presidents who were lawyers. The recipient of the 2003 Nobel Peace Prize, who as president (1977–1981) emphasized the importance of advancing human rights as a foreign policy goal, he has worked tirelessly to see to it that not only Americans but citizens of other nations as well can exercise the fundamental right of voting.

Jimmy Carter is a man with the tolerance imparted by the New Testament. Although he eliminated the serving of alcohol at White House functions in line with his beliefs, he favored the decriminalization of marijuana. A Sunday School teacher, he saw to it that religious services were not held at the White House in accordance with the tradition of the separation of church and state and the Establishment Clause of the First Amendment. Before his presidency, Jimmy Carter had availed himself of the First Amendment rights of free speech and free exercise of religion in serving as a door-to-door missionary in northern cities and towns. As former president, he strongly supported his daughter, Amy, when she protested covert activities conducted by the Central Intelligence Agency (CIA) in Central America. Carter selected as his running mate in 1976 a man who shared his strong religious background and commitment to civil liberties. U.S. Senator Walter F. Mondale (D-MI) was the son of a Methodist minister, and during his service on what became known as the Church Committee, he strongly advocated the curtailment of CIA activities that intruded on the private lives of U.S. citizens.

For civil liberties to flourish, government must be open, and Carter pursued such openness even when his actions were not popular, such as his successful efforts to secure ratification of the Panama Canal treaties in 1978. He announced in a 1976 campaign address before the Seattle, Washington, American Legion that he would pardon draft resisters. In January 1977 he did so as his first act in office. Despite his dedication to civil liberties and to tolerance, Carter sometimes demonstrated an inability to deal well with members of Congress on a personal level. Rather than attempting to persuade members to adopt his substantial number of policy initiatives, he simply expected Congress to see the wisdom of his position and enact appropriate legislation.

A major piece of legislation that President Jimmy Carter signed was the Omnibus Judgeship Act of 1978 that greatly expanded the federal judiciary and made possible the implementation of the criminal justice procedural guarantees that the U.S. Supreme

President Jimmy Carter abolished the Attorney General's List of Subversive Organizations. This list was often used to persecute Communists and civil rights groups. *(Courtesy Jimmy Carter Library)*

Court had developed during the tenure of Chief Justice Earl Warren. Jimmy Carter never had the opportunity to nominate someone for a berth on the Supreme Court. Carter's domestic policy adviser, Stuart Eizenstadt, reportedly irritated Associate Justice Thurgood Marshall by phoning him and urging him to resign while President Carter still could name his replacement. Marshall served for a decade after the Carter presidency and was eventually replaced by Clarence Thomas.

The National Organization for Women criticized President Carter and Secretary of Health, Education, and Welfare Joseph Califano for opposing government funding of abortion. Still, although he personally opposed abortion, President Carter did not favor the overturning of *Roe v. Wade,* 410 U.S. 113 (1973), the decision that struck down numerous state laws restricting legal access to abortion. Ironically, his two successors, Ronald Reagan (who beat Carter in the 1980 election) and George H.W. Bush, favored overturning it, although Reagan had signed legislation as governor of California that greatly expanded access to legal abortion, and Bush had served in a prominent position with Planned Parenthood. Carter in 1987 opposed the nomination of Robert Bork, who had been a critic of *Roe v. Wade* and many of the Court's civil liberties decisions during the tenure of Chief Justice Earl Warren.

Henry B. Sirgo

See also: President and Civil Liberties.

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Censorship

Censorship involves an authoritative decision that seeks to block expression in its various forms on the basis that it violates standards imposed by the censoring authority. Censorship in the Western world is as old as recorded history. Although Socrates epitomizes freedom of expression, his student Plato advocated a strict censorship regime. As a means for deciding what was and was not permissible, Plato proposed the position of Guardian, a class of educated-elite who would safeguard the philosopher-king's values. Greeks like Anaxagoras, who was fined, and Protagoras, who was banished for blasphemy, are illustrious victims of Greek censorship. Later, Roman poets like Ovid and

Juvenal, whom Roman officials banished, illustrate the effects of censorship in Rome. Censorship in the Roman Christian Church was extensive and began as early as 150 C.E. when the Council of Ephesus prohibited publication of *Acta Pauli*, an unauthorized biography of Saint Paul.

The desire for censorship by authorities took on a special urgency following the mid-fifteenth-century development of printing with movable type by Johann Gutenberg. As Jillette Penn once put it, "Censorship was Gutenberg's toxic byproduct." Fifty years after Gutenberg's feat, the Roman Church began what was to become one of the most elaborate systems of censorship in history. The Church's system of "indexes," beginning as early as 1510, developed into the famous *Index Liborum Prohibitorum* (Guide to Prohibited Books) initiated by Pope Paul IV in 1557, which the Church did not abandon until 1966. The Church's index included religious reformers such as Martin Luther, John (Jan) Hus, Ulrich Zwingli, and Desiderius Erasmus, along with the scientific works of astronomers Nicolaus Copernicus and Galileo Galilei.

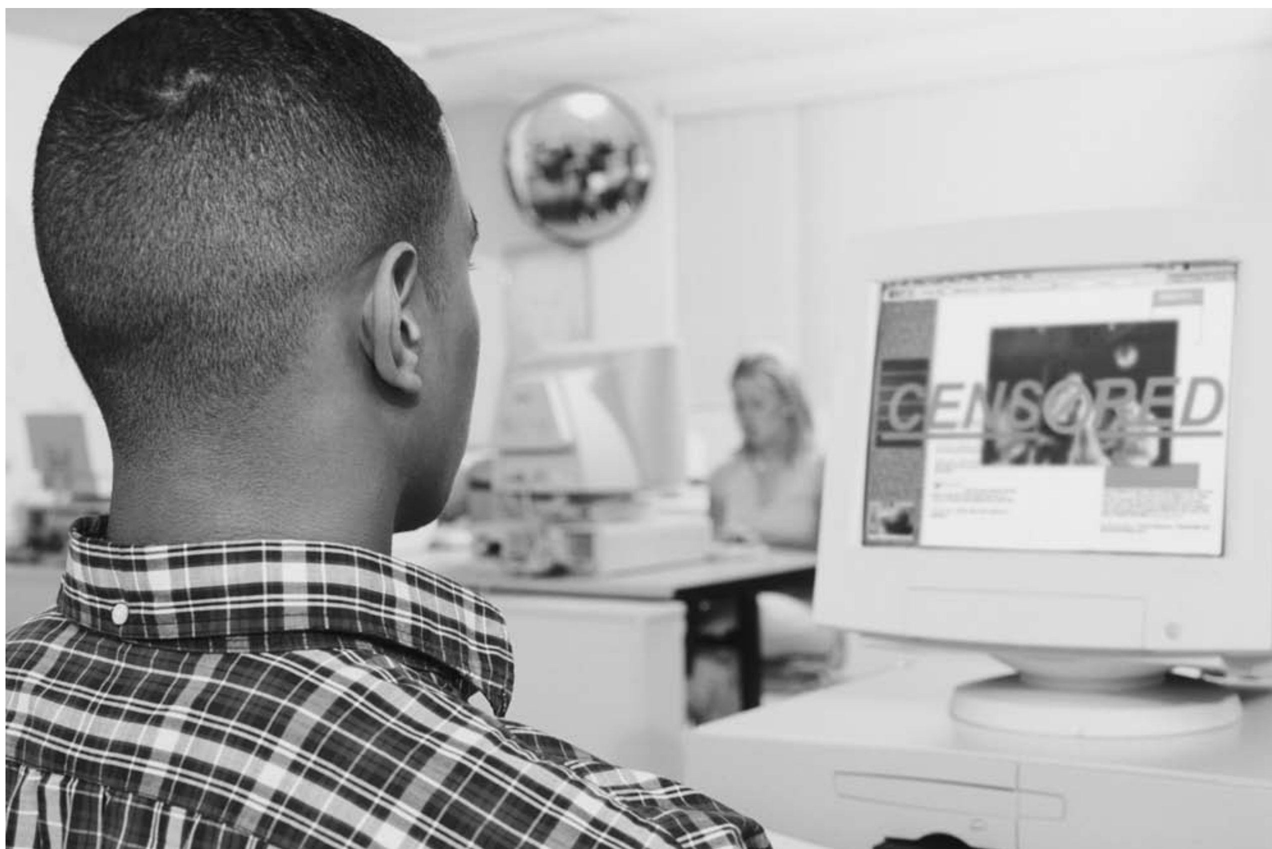
Censorship in England began well before Gutenberg during the rule of the Plantagenets with a 1414 parliamentary enactment that confirmed the archbishop's declaration that no book shall be "henceforth read . . . except the same be first examined . . . and . . . expressly approved and allowed by us." The Tudor kings (1485–1603) continued the practice of censorship and perfected the licensing of stationers (booksellers and printers) so that authors could print or sell nothing without crown approval. Following Henry VIII's excommunication, royal censorship of politics and religion merged when the crown extended stationers' licensure in 1538 to all written expression and transferred censorship authority from the church to the Privy Council (the sovereign's advisers) and the Star Chamber (judges appointed by the crown who met in private on matters of state security).

The Star Chamber became the sole instrument of censorship in England. As the English jurist John Selden put it, "there is [now] no Law to prevent the printing of any book in England, only a Decree in Star-Chamber." Thus, although the abolition of the Star Chamber by Parliament in 1641 left a huge void and led many to hope for more freedom of expression, the loyalties of the small group of royally sanctioned stationers soon turned to Parliament, ever as willing as the crown to assume duties of censorship. On June 14, 1643, Parliament enacted the Ordinance for Printing that reestablished controls over printed expression that included licensing, import control, search and seizure, arrest, imprisonment by order of parliamentary committees, and recognition of the Stationers Guild as the act's official administrator. This action of Parliament substituting Parliament and its committee for the crown and its Star Chamber led the poet John Milton to lament, "What advantage is it to be a man over it is to be a boy at school, if we have only scapt [escaped] the ferular [rod], to come under the fescu [pointer] of an *Imprimatur*?"

The 1643 Ordinance for Printing expired by its terms in 1694, never to be renewed. An early decision of the U.S. Supreme Court, *Republica v. Oswald,* 1 U.S. 319 (1788), hailed the year as the "dawn of freedom." England's North American colonies had their share of restriction on freedom of expression. Roger Williams, whom the General Court banished from Salem, Massachusetts, in 1636 for preaching freedom of conscience, is a notable example of the effects of censorship in the New World. Following passage of the First Amendment, however, censorship in the United States became an extremely disfavored practice. As Alexis de Tocqueville observed in his description of democracy in America, "[T]he influence of the liberty of the press does not affect political opinions alone, but extends to all the opinions of men and modifies customs as well as laws."

Nonetheless, various limited forms of censorship have remained. The Supreme Court noted in *Times Film Corp. v. City of Chicago,* 365 U.S. 43 (1961), that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem"—the First Amendment notwithstanding. Moreover, courts have "distinguished between laws establishing sundry systems of previous restraint on the right of free speech and penal laws imposing subsequent punishment on utterances and activities not within the ambit of the First Amendment's protection."

Two principal areas—national security and obscenity—are currently subject to some form of censorship. Chief Justice Charles E. Hughes elaborated on the



Congress has made efforts to protect children from certain content on the Internet and the Web by censoring some material or by mandating that public libraries install filters, but these efforts have raised First Amendment problems. *(Corbis)*

principle of "prior restraint" (banning expression before it is even published) in *Near v. Minnesota,* 283 U.S. 697 (1931):

> [First Amendment] protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.

An example of permissible prior restraint is the Espionage Act that Congress originally enacted in 1917. The act authorizes federal agencies to label information and material as "classified" and prevent its disclosure if it is considered to involve reasons of national security (*U.S. Code*, Vol. 18, § 798 (2003)).

Despite the brief and general definition of classifiable information in the Classified Information Procedures Act of 1980 (CIPA), courts have upheld the statute against the charge that the terms "classified information" and "national security" are unconstitutionally vague, as in *United States v. Wilson,* 571 F. Supp. 1422 (S.D.N.Y. 1983), *affirmed* 750 F.2d 7 (2d Cir. 1984), *certiorari denied* 479 U.S. 839 (1986). CIPA leaves the details to the president, who has defined the classified categories as military plans, weapon systems, foreign relations, intelligence-gathering activities, governmental programs safeguarding material or facilities, scientific or economic information related to national security, and any information regarding the

vulnerabilities or capabilities of facilities used for national security (Executive Order No. 12,958, Part IV, Sec. 1.5(a–g), April 17, 1995, 60 *Federal Register* 19,825). National security regulations restrict the availability of classified materials and information to certain officials and employees, and they require anyone with access to the material or information to execute a nondisclosure agreement. Not only is classified material and information subject to prior restraint, but violating the regulations subjects the violator to criminal penalties as well.

Beginning with *Near v. Minnesota,* 283 U.S. 697 (1931), the U.S. Supreme Court has held that censorship is constitutional under extreme circumstances. As previously noted, Chief Justice Hughes emphasized that prior restraint applied only in exceptional cases, including obscene publications. In *Miller v. California,* 413 U.S. 15 (1973), the Court formulated the following definition of obscenity:

> [S]tatutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

Following the injunction in *Miller* and its progeny, courts have upheld statutes and ordinances that lawmakers write with a sufficient focus to avoid bringing otherwise protected speech into its purview. As the Supreme Court stated in *Sable Communications of California, Inc. v. Federal Communications Commission,* 492 U.S. 115 (1989), the "Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." For example, the Court has approved laws that may establish boards of censors charged with prohibiting the dissemination of obscene material if they provide certain safeguards that are calculated to prevent abuse, as was held in *Freedman v. Maryland,* 380 U.S. 51 (1965).

Clyde E. Willis

See also: Book Banning; First Amendment; *Miller v. California;* Milton, John; *Near v. Minnesota.*

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Central Hudson Gas and Electric Corp. v. Public Service Commission of New York (1980)

Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), for the first time established a test for the courts to use in commercial speech (advertising) cases. In the 1970s, the U.S. Supreme Court in a series of cases had interpreted the First Amendment speech and press clauses to protect commercial speech. In each of these cases, the Court consistently noted, however, that commercial speech received less protection than did political speech. For example, false or misleading commercial speech and speech that advertised products or services that were themselves illegal were not protected by the First Amendment. However, in none of these earlier cases—such as *Bigelow v. Virginia,* 421 U.S. 809 (1975); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976); or *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977)—did the Court enunciate a clear test that lower courts could use in deciding when commercial speech was protected and when it was not.

Central Hudson Gas involved a rule by the Public

Service Commission of New York (PSC) that banned all advertising promoting the use of electricity. The PSC argued that the regulation was necessary in order to conserve energy supplies, whereas Central Hudson Gas and Electric claimed First Amendment protection for its commercial speech on the basis of the precedents set in *Bigelow, Board of Pharmacy*, and *Bates.* In an opinion by Justice Lewis F. Powell Jr., the U.S. Supreme Court, in an eight-one decision, developed a constitutional test for commercial speech.

The test posed four questions, the answers to which would determine whether the commercial speech at issue was protected. First, did the speech concern a lawful activity and was it not misleading? Second, was the asserted governmental interest in regulating this speech a substantial one? Third, did the regulation at issue directly advance this government interest? Fourth, was this regulation no more extensive than necessary to serve that interest?

The first question is a threshold inquiry in that if the answer is in the negative (e.g., the speech is of an illegal activity or is misleading), the speech is clearly not protected by the First Amendment, and there is no need to continue the analysis. However, if the answer to the first question is positive, then the courts must determine the answers to the remaining three questions. Under this test, the government may regulate commercial speech only if the answer to the first question is "no" or if the answer to all four questions is "yes." A negative answer to any one of the second, third, or fourth questions would mean that the government's interest in regulating the speech is not substantial enough or that the regulatory means the government is using are either ineffective or too broad to pass First Amendment muster, and thus the speech is protected.

In *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico,* 478 U.S. 328 (1986), upholding limitations on the advertising of legal casinos, the justices threw into doubt the continued vitality and usefulness of the *Central Hudson Gas* test. However, by the time of *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996), striking down the state regulation of the advertising of alcohol prices, the Court once again found itself firmly supporting the four-part test.

Michael W. Bowers

See also: Bates v. State Bar of Arizona; Commercial Speech; First Amendment.

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Central Intelligence Agency

The Central Intelligence Agency (CIA) is the main foreign intelligence agency of the United States. The CIA was created in 1947 to be a defender of the civil liberties and rights of the American people. However, the CIA is a powerful two-edged sword. Its practice of secrecy can as easily protect or do harm to civil liberties.

EARLY HISTORY

In 1947, President Harry S Truman felt compelled to establish a permanent intelligence agency in order to meet the challenge to democracy posed by communism. The legal authority, or charter, of the CIA is the National Security Act of 1947. It charges the CIA with gathering foreign intelligence and forbids spying on Americans.

Many of the CIA's first personnel were former members of the World War II Office of Strategic Services (OSS) who had conducted many special operations. The side of the CIA's work that deals with special operations, often called "black operations" or "dirty tricks," is hidden from public view. This is usually the most controversial part of its work. The Central Intelligence Agency Act of 1949 authorized the director of central intelligence (DCI) to spend agency allocations "without regard to the provisions of law and regulation." This provision gave the CIA the legal basis for covert operations.

Most of the time the CIA works to gather and analyze information about all the foreign countries of the world or emerging revolutionary groups. In the competition for power among nations, the CIA seeks to provide the consumers of its intelligence products with information about the intentions and capabilities

of all enemies, current or potential. Such capabilities must be assessed in weighing the powers that each country has.

Almost all of the information the CIA gathers is public. It comes from open sources, such as newspapers, books, reports, radio, television, visits, tourist photographs, conversations, observations, the Internet, and many other public resources. This information is then organized, evaluated, and distributed. Usually the CIA is charged with developing intelligence reports on specific questions asked by the president or by other government officials.

To the intelligence gathered from open sources is added information gathered by clandestine means. Some of this may be legal, such as listening to signals (SIGINT) or copying coded messages that are then decoded. The smallest amount of intelligence—but some of the most valuable—is that gathered by human agents (HUMINT). These are the spies who engage in espionage, which is illegal. Espionage violates the laws guarding the secrets of a country. However, all nations engage in the practice and strive to protect their own secrets from others.

THE CIA AND CIVIL LIBERTIES

The CIA has on several occasions violated its charter by gathering intelligence on Americans in the United States. In the early decades of the CIA, congressional oversight consisted more of turning a blind eye to overlook what the agency did than in exercising supervision. Following the Vietnam War and Watergate (the 1972 break-in at Democratic National Committee headquarters in the Watergate complex in Washington, D.C., orchestrated by some of President Richard M. Nixon's close aides), attitudes toward the CIA changed. Oversight of the CIA began to be conducted with an eye to true supervision.

Deputy Director of the Central Intelligence Agency Richard Helms (left) and President Lyndon B. Johnson in April 1965. In Senate hearings during the 1970s, it was revealed that the CIA engaged in many illegal spying activities against U.S. citizens. *(LBJ Library, photo by Yoichi Okamoto)*

On January 5, 1975, President Gerald R. Ford empaneled a presidential commission (Rockefeller Commission) headed by Vice President Nelson Rockefeller to investigate all illegal activities of the CIA. In addition, a Senate select committee (1975–1976) was formed on January 27, 1975, chaired by Senator Frank Church (D-ID) to investigate the CIA. Numerous revelations followed. The public learned that the CIA had organized regime changes in Guatemala (1954) and Iran (1953); had plotted to assassinate Patrice Lumumba in the Congo (1960) and Fidel Castro in Cuba (1961–1964); and had engaged in domestic spying, developing files on more than 10,000 Americans involved in the Vietnam antiwar movement. The investigation of Americans internally, in violation of the CIA's charter, had begun as an attempt to locate a link between the antiwar movement and communist countries. No significant link was found.

Despite the revelations of spy tools, poisons, and attempts to use the Mafia to assassinate Castro, the CIA was not found to be a "rogue elephant." Instead, investigation revealed that the CIA had resisted the attempts by Presidents Lyndon B. Johnson and Richard M. Nixon to manipulate its intelligence work for political purposes.

On February 7, 1976, President Ford issued an executive order banning American involvement in assassinations. On January 24, 1978, President Jimmy Carter issued an executive order placing supervision and coordination of all intelligence activity by the United States under the oversight of the Special Coordinating Committee of the National Security Council.

President William J. Clinton issued executive orders banning the CIA from using people with criminal records for intelligence gathering. This forced the CIA to depend more on signal intelligence and less on developing human intelligence assets. It also turned to protecting the country from industrial espionage by foreign powers.

The terrorist attacks of September 11, 2001, radically changed conditions. Critics charged the CIA with incompetence, saying the terrorist attacks were an intelligence failure. President George W. Bush, whose father had been a CIA director before his presidency, began a new and extensive use of the CIA.

The passage of the USA Patriot Act in 2001 and the creation of the Department of Homeland Security have legalized the sharing of information gathered by the CIA in intelligence work and the FBI in its investigative work. Some critics view this type of agency cooperation as a new threat to civil liberties.

In a world of electronic connections, gathering informational links between people in the United States and people abroad who may be linked to terrorism is likely to continue to generate controversy about civil liberties, whether such activities are conducted by the CIA or some other agency of the government. Being free of casual government supervision on the one hand, and instituting programs of government surveillance by the CIA or other agencies to protect against deadly terrorist attacks on the other, will be a balancing act that draws a boundary between order and liberty, a decision that is unlikely to please everyone.

A.J.L. Waskey

See also: Patriot Act.

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Chafee, Zechariah, Jr. (1885–1957)

A legal scholar and earnest defender of civil liberties, Zechariah Chafee Jr. was educated at Brown University. He graduated in 1907. After working in his father's foundry for three years, he determined he was not suited to be an industrialist. He entered Harvard Law School in 1910, graduating at the top of his class in 1913. After practicing law at a firm in Providence, Rhode Island, for three years, Chafee joined the Harvard Law School faculty in 1916. He became a full professor in 1919 and occupied the Christopher Co-

lumbus Langdell chair in law later in his career. In 1950 he was named a University Professor, a position that released him from teaching duties and gave him more time to write.

Chafee is most famous for his writings in the area of free speech. His interest in this issue was spurred by the repressions of dissent he witnessed during World War I. Realizing that the freedoms of speech and press were significantly unexamined as constitutional doctrine, he published a law review article and later developed it into a book. Chafee argued that the authors of the American Bill of Rights intended to abolish the English law of seditious libel, which prohibited restraints on speech prior to publication but allowed punishment of seditious speech after it had been published. He believed the First Amendment provided for a vigorous pursuit of the truth through unlimited discussion. The professor did not promote absolute protection for all speech, instead relying on balancing tests. He argued that speech could be limited when free speech was inconsistent with other valid governmental interests, such as peaceful order, protection against external aggression, and instruction of youth. Chafee's ideas became the law of the land through numerous Supreme Court rulings, especially Justice Oliver Wendell Holmes's opinion in *Abrams v. United States,* 250 U. S. 616 (1919), and Justice William J. Brennan's ruling in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

Despite the eventual popularity of his constitutional vision, Chafee's perspectives were criticized. In 1920 alumni of the Harvard Law School charged that he was a radical for publishing the 1919 article. Harvard's president defended him, and the board of overseers eventually dismissed the charges. At a U.S. Senate hearing July 2, 1952, Senator Joseph McCarthy (R-WI), on a crusade against subversives in the nation, named Chafee one of seven persons most dangerous to the existence of the United States.

Famous for his contributions to First Amendment jurisprudence, Chafee spent the bulk of his time on questions of equity and the rules that govern litigation among multiple parties in federal courts. He was the author of the Federal Interpleader Act of 1936, allowing expeditious handling of millions of dollars of claims against insurance companies and other corporations. He also helped draft an international convention governing freedom of information. The convention was never ratified because of the diverse views of the different nations to be covered by the convention.

In 1956, Chafee brought his legal theories to television, appearing on a special series broadcast by WGBH-TV in Boston. Shortly after completing the series, he suffered a heart attack in early February 1957. He died at Massachusetts General Hospital in Boston less than a week later.

John David Rausch Jr.

See also: Abrams v. United States; New York Times Co. v. Sullivan; Seditious Libel.

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Chaplinsky v. New Hampshire (1942)

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), carved out the "fighting words" exception to First Amendment free speech rights. A Jehovah's Witness (Chaplinsky) was distributing some of his sect's religious literature on the streets of Rochester, New Hampshire, when citizens complained to the city marshal that Chaplinsky was denouncing other religions as a "racket." The marshal initially told the complainants that Chaplinsky had the right to distribute his literature; he then warned Chaplinsky that the crowd "was getting restless." The parties had somewhat different versions of what happened next, but, with the exception of the reference to God, which Chaplinsky denied saying, both agreed that when the marshal attempted to arrest Chaplinsky, the latter yelled, "You are a God damned racketeer and a damned Fascist

and the whole government of Rochester are Fascists or agents of Fascists."

Chaplinsky was convicted of violating a municipal ordinance that prohibited the use of "offensive, derisive or annoying" language "in any street or other public place." The trial court refused to take into account Chaplinsky's religious "mission" or the unruly behavior of the crowd. The appellate court subsequently agreed that these factors would not constitute a defense and upheld the conviction.

In 1942, the U.S. Supreme Court refused to overturn the lower-courts' decisions. In an opinion by Justice Frank Murphy, the Court characterized Chaplinsky's speech as "fighting words" and held that "the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." The Court held that "resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."

Chaplinsky is an example of a much-debated two-level theory of speech, in which the courts will determine the "value" of the speech at issue and only then determine whether it should be protected. Under the two-level theory, speech that is lewd, obscene, or libelous may not warrant First Amendment protection. Fighting words are unprotected because, as "epithets or personal abuse," they are thought to have more in common with assaults than with the exchange of ideas or information. Fighting words are also likely to provoke a heated response and to lead to a breach of the peace.

The exclusion of so-called fighting words from the protection of the First Amendment rests in large part on the belief, enunciated in *Chaplinsky,* that such language does not form "any essential part of any exposition of ideas." Although decisions based upon the fighting-words doctrine are rare today, hot debate continues on the issue of whether any particular expression conveys an idea. Antipornography crusaders justify the suppression of material they deem obscene on the grounds that such materials do not convey ideas and are thus not entitled to First Amendment protection. Civil libertarians respond that it is precisely because an offensive idea is being transmitted that suppression is desired, and that it subverts the First Amendment to allow government to decide whether an utterance qualifies as an idea.

Sheila Suess Kennedy

See also: Fighting Words; First Amendment.

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Charles River Bridge v. Warren Bridge (1837)

Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837), marked a turning point in the constitutional law of contracts. The change was significant but not fundamental. Chief Justice John Marshall had died nineteen months before *Charles River* was decided, and his successor, Roger Brooke Taney, appointed by President Andrew Jackson, sought to chart a different constitutional course. That course did modify aspects of Contracts Clause jurisprudence but in a way that late Marshall Court decisions had foreshadowed, and it did not overturn the primary impulse of nineteenth-century constitutional law to protect property rights and economic affairs.

In *Federalist No. 10,* James Madison famously wrote that the "protection of different and unequal faculties of acquiring property" was "the first object of government." The delegates to the 1787 Constitutional Convention shared Madison's concern to insulate the private ordering of economic relationships, via contracts, from government alteration. Article I, Section 10 of the Philadelphia Constitution—the Contracts Clause—imported the language of the 1787 Northwest Ordinance: "[N]o law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide,* and without fraud, previously formed." The Contracts Clause declares, "No State shall . . . pass any . . . law impairing the obligation of contracts."

The Supreme Court during John Marshall's tenure

generally interpreted the Contracts Clause expansively (some would argue untenably) as an absolute bar against state infringement upon vested property rights. *Fletcher v. Peck,* 10 U.S. 87 (1810), and *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819), notably rested on this reading. Between these two landmark decisions, the Court handed down *Terrett v. Taylor,* 13 U.S. 43 (1815), in which Justice Joseph Story articulated the Marshall Court's core notions of Contracts Clause jurisprudence, which regarded existing contracts as sacrosanct from state alteration. This conception of the Contracts Clause shielded private entrepreneurs from public control at a time in U.S. economic history when venture capitalists needed assurance that they would receive returns on their investments in infrastructure and services.

As the nineteenth century wore on, rapid economic growth generated mounting pressures for improvements in transportation, finance, and industry. Consequently, Contracts Clause strictures on state modification of contracts that originally facilitated capitalist development became a straitjacket. Language in Marshall's *Dartmouth College* opinion suggested that state legislatures might reserve the right to modify corporate charters they granted. In *Providence Bank v. Billings,* 29 U.S. 514 (1830), Marshall explicitly marked the outer limits of constitutional restraints on legislative modification of contracts: "The power of legislation . . . is granted by all, for the benefit of all. It . . . need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burthens [burdens]."

Seven years later, the Taney Court built on this foundation in *Charles River Bridge v. Warren Bridge,* revising Contracts Clause jurisprudence in the process. The state of Massachusetts had granted the Charles River Bridge Company the right to build a toll bridge over the Charles River in 1785. This grant had superseded a previous grant of exclusive ferry rights to Harvard College, and the Charles River Bridge Company contended that a subsequent grant by Massachusetts allowing the Warren River Bridge Company to build a nearby bridge violated this implicit grant. Taney decided that when contracts involved grants from a state, they should be strictly interpreted so as only to include promises explicitly made. Taney thus shifted the emphasis from conceiving of property as a fixed right to viewing it pragmatically as an instrument of capital. In addition, Taney's decision cast states in the role of active promoters of economic development. Citing Marshall's *Providence Bank* opinion, Chief Justice Taney captured these two aspects: "[T]he object and end of all government is to promote the happiness and prosperity of the community by which it is established[.] . . . The continued existence of a government would be of no great value, if . . . it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform, [were] transferred to the hands of privileged corporations." Taney's reading marked a permanent shift in judicial readings of the Contracts Clause, later epitomized by *Home Building and Loan Association v. Blaisdell,* 290 U.S. 398 (1934), in which the Court upheld a provision of 1933 Minnesota mortgage moratorium law extending debt repayments against accusations that it violated the Contracts Clause.

James C. Foster

See also: Contracts Clause; *Home Building and Loan Association v. Blaisdell;* Property Rights.

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Chavez v. Martinez (2003)

Chavez v. Martinez, 538 U.S. 760 (2003), restricted the application of the self-incrimination clause of the Fifth Amendment and the *Miranda* rules to actual criminal cases. Oliverio Martinez had sued Officer Ben Chavez under section 1983 of the *U.S. Code,* a provision that gives citizens a way to sue state officials in federal court for alleged violation of citizens' con-

stitutional rights. Chavez had questioned Martinez over a forty-five-minute period after Martinez, who had been shot in a scuffle with police officers and believed he was dying, was being treated by medical personnel. The injuries left Martinez blind in one eye and paralyzed from the waist down. Officer Chavez had not issued *Miranda* warnings (informing prisoners of their right to remain silent, to have an attorney, and so on), and the U.S. District Court and the Ninth Circuit Court of Appeals had accordingly ruled that Martinez could sue him.

The plurality decision written for the U.S. Supreme Court by Justice Clarence Thomas, joined by Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor and Antonin Scalia, disputed the Fifth Amendment claim. Using the language of the amendment to restrict the right against self-incrimination to only criminal cases, Thomas decided that Martinez's rights had not been violated because no criminal case had been initiated against him. Thomas argued that Martinez had no more been compelled to testify in a criminal case "than an immunized witness forced to testify on pain of contempt." Although *Miranda* rules sometimes serve a prophylactic function, such rules "do not extend the scope of the constitutional right itself." Thomas likewise denied that the interrogation in question violated the Due Process Clause of the Fourteenth Amendment, since there was no evidence that the interrogation "shocked the conscience." The interrogation did not exacerbate Martinez's injuries or prolong his hospital stay and was justified by the need to ascertain whether police had been involved in improper conduct. Officer Chavez was therefore entitled to qualified immunity.

Justice David H. Souter, joined fully by Justice Stephen G. Breyer and partly by Justices John Paul Stevens, Anthony M. Kennedy, and Ruth Bader Ginsburg, agreed that there was no Fifth Amendment violation but remanded the case (returned it to the lower court for further proceedings) to ascertain whether there was a violation of substantive due process. Justice Scalia believed that Martinez had forfeited that claim by not raising it in the lower courts. Justice Stevens believed that the police conduct at issue constituted "an immediate deprivation of the prisoner's constitutionally protected interest in liberty" that was shocking and unconstitutional. Justice Kennedy believed that a violation of the self-incrimination clause could occur even in cases where interrogations were not introduced at trial. He viewed the clause as "a substantive constraint on the conduct of the government, not merely an evidentiary rule governing the work of the courts," and essential to preventing torture. In this case, he believed the police had taken advantage both of Martinez's suffering and of his belief that he would not be treated unless he cooperated. Kennedy joined Souter's call for a remand in order to preserve a plurality opinion in the case. Justice Ginsburg would have applied the self-incrimination clause "at the time and place police use severe compulsion to extract a statement from a suspect" and would thus have affirmed the lower-court decisions.

Although the Supreme Court ruled in *Dickerson v. United States,* 530 U.S. 428 (2000), that the *Miranda* rulings were constitutionally grounded, *Chavez* indicates that these rulings are to be enforced primarily, if not exclusively, in the context of criminal trials. Unless the Court gives a broad independent meaning to the Due Process Clause, the *Chavez* decision could undermine pressures against coercive police interrogations in situations where the individuals questioned are not subsequently brought to trial.

John R. Vile

See also: Fifth Amendment and Self-Incrimination; *Miranda v. Arizona*.

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Checks and Balances

The framers of the U.S. Constitution formalized "checks and balances" because they feared the concentration of power in the hands of one governmental group or institution. Checks and balances, or the idea to provide each of the three national branches of government—executive, legislative, judicial—with the

powers to prevent the centralization of power in one branch, should be understood as related to but distinct from the separation of powers, which is the idea that the branches are equal and independent. To that end, each of the three branches was empowered to limit the actions of the other two branches.

For example, although Congress initiates legislation, the president can veto it. Whereas the president nominates members of the federal courts, Congress must approve them. The president may recommend a budget, but the Congress must finalize it. Moreover, Congress can override a presidential veto by a supermajority vote of both houses, and it can impeach and convict the president. The Senate alone can ratify treaties, confirm executive and judicial appointments, and try impeachments that the House initiates. Congress can also impeach federal judges, change the budgets and jurisdiction of the federal courts (except the jurisdictions specifically assigned to the Supreme Court in Article III of the Constitution), and set the size of the Supreme Court. In turn, the Supreme Court and the rest of the federal judiciary have the power of statutory construction, by which to interpret laws, and the power of judicial review, with which the Court can declare laws and executive powers unconstitutional. Judicial review, though not in the Constitution, has been the judiciary's primary check on the executive and legislative branches since the Supreme Court recognized this power in *Marbury v. Madison,* 5 U.S. 137 (1803).

Both the executive and legislative branches have a great deal of power over the exercise of civil liberties. However, because they are popularly elected to limited terms, the normative view of these branches is that both are swayed by majority opinion and thus have not strictly protected civil liberties. For example, the president suspended the right to trial during the Civil War and allowed the Federal Bureau of Investigation (FBI) during the 1940s and 1950s to monitor and prosecute accused Communists and other individuals who spoke out against the government or associated with subversive organizations. Similarly, Congress passed laws making it a crime to speak out against the government or its officials, held inquiries about known or suspected subversives in Hollywood, and passed laws that limit access to the Internet.

The federal judiciary is generally seen as the protector of individual liberties from incursion by the elected branches, but this was not always the case. Apart from cases dealing with property rights, the early U.S. Supreme Court rarely heard cases that dealt with individual liberties. On the few occasions that freedoms were at stake, the Court tended to favor the state or propertied interests, as in *Scott v. Sandford,* 60 U.S. 393 (1857), in which it decided that African Americans were not and could not become U.S. citizens and that Dred Scott, a slave who had resided for a time in free territory, could not sue for his freedom in federal courts. This began to change with the Supreme Court's decision in *Gitlow v. New York,* 268 U.S. 652 (1925), to apply the First Amendment freedom of speech to the states. In a process of "incorporation," the Court has subsequently applied most other provisions of the Bill of Rights to the states via the Due Process Clause of the Fourteenth Amendment. The watershed moment for the protection of individual liberties was in Justice Harlan Fiske Stone's fourth footnote in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), in which he advanced the "preferred freedoms" doctrine. That is, he argued that the Supreme Court should begin to decide cases dealing with the civil rights and liberties of individuals rather than continue to limit itself to economic cases. Following this decision, the Court began to focus on cases in which individual liberties were the primary issue.

This does not mean that the Court has protected the rights of individuals against all incursions made by the elected branches. Indeed, some of the most controversial Court decisions were made in the wake of *Carolene*. For example, the Court during World War II offered the president a great deal of wartime powers that during peacetime would never have been allowed. Specifically, Japanese Americans were detained in internment camps without any right to trial, the federal government seized their property without compensation, and their right to association was compromised in the name of national security.

Deference to the president and Congress would not always remain the norm. The Court under Chief Justice Earl Warren was particularly known for its protection of individual liberties, though even this seemed to depend on the political environment. During the post–World War II "red scare" (led by Senator

Joseph McCarthy), the Court often upheld restrictions on the liberties of Communist Party members. After the McCarthy era, the Court was quick to assert that Communists did have the liberties of speech and association. The Court cannot be accused of absolute deference to the executive or legislative branches, even in time of war or unrest. Perhaps the most famous example of protection of liberties during a time of national crisis is *New York Times Co. v. United States*, 403 U.S. 713 (1971). The case involved publication of the *Pentagon Papers,* which described the history of U.S. involvement in Indochina, and the government moved in federal court to prevent further publication of them. The Court ruled that preventing the publication amounted to prior restraint of the freedom of press and was therefore unconstitutional.

The Supreme Court has protected individual liberties in several areas, with the Warren Court particularly active in criminal cases. The Court protected individuals from excessive executive power by limiting the admissibility into trial of evidence gathered in a questionable manner; strengthened the procedure police must use to get a search warrant; and required law enforcement officials to read to individuals their *Miranda* rights, from *Miranda v. Arizona,* 384 U.S. 436 (1966), upon being charged with a crime. The Court has also limited the power of Congress to regulate access to material on the Internet, holding that the Communications Decency Act of 1996 was unconstitutionally vague in that it attempted to apply the standards that would be appropriate to juveniles to all who accessed the medium.

Overall, the judiciary has lived up to the normative view that it is a protector of individual liberties, at least compared with the elected branches. However, questions remain about how effective the Court is at enforcing its decisions. The Supreme Court famously lacks the "purse" and the "sword"—the powers of funding (held by the legislature) and an official enforcement mechanism (held by the executive). Thus, critics charge that the judiciary is an ineffective guardian of liberty despite claims to the contrary. In the end, however, most observers concede that the judiciary is the best, and possibly only, branch that protects the liberties of the powerless and those with minority views. Indeed, as Justice Stone's preferred-freedoms doctrine explains, the Court not only lends a sympathetic ear to individual liberties but even finds that some liberties are so fundamental that the Court assumes the liberties have been violated and it is up to the government to prove otherwise. Although the system of checks and balances has not provided perfect protections of civil liberties, the judiciary, especially the Supreme Court, has been generally effective in defending them.

Tobias T. Gibson

See also: Carolene Products, Footnote 4; Four Freedoms; Incorporation Doctrine; Judicial Review.

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Child-Benefit Theory

The First Amendment to the U.S. Constitution provides that Congress shall make no law "respecting an establishment of religion." Current doctrine under the Establishment Clause directs that government must be neutral about religion, aiding neither a particular religion nor all religions. Under the test to determine establishment as set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), a government initiative is permissible if it (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) does not foster an excessive government entanglement with religion. Various government-sponsored programs provide public school students with free textbooks, transportation, lunches, and other services. A frequent Establishment Clause issue is whether benefits may also go to students attending parochial schools. The child-benefit theory is an approach to these questions that typically allows government programs to reach parochial school students by finding that individual students are the primary aid recipients and not the church or denomination.

In upholding a federal law subsidizing a Roman Catholic hospital in Washington, D.C., the Supreme

Court established a precursor to the child-benefit theory in *Bradfield v. Roberts,* 175 U.S. 291 (1899). The Court ruled that government support of free medical care pursued a secular objective available to all. In *Cochran v. Louisiana State Board of Education,* 281 U.S. 379 (1930), the Court upheld a state law authorizing the use of public funds to supply textbooks to both public and parochial school students of the state. The child-benefit approach led the Court to conclude that the "school children and the state alone are beneficiaries" of the appropriations, and not religious schools.

The child-benefit theory was decisive in the landmark Establishment Clause ruling in *Everson v. Board of Education,* 330 U.S. 1 (1947). *Everson* involved a New Jersey statute authorizing local boards of education to reimburse parents, including those whose children went to parochial schools, for the cost of bus transportation to and from school. Justice Hugo L. Black urged in *Everson* that a "high and impregnable" wall be maintained between church and state. Provision of certain "general governmental services," such as police and fire protection, sewer and water services, and transportation, however, were seen as services "indisputably marked off from the religious function." The state reimbursement for transporting schoolchildren was clearly within its police power—it sought only to ensure students' safe transport, and any aid to church schools was indirect. Black observed that although the First Amendment requires neutrality in the state's relations with religious groups and nonbelievers, it does not require the state to be their adversary. He argued that some expenditure of public funds may incidentally aid church schools, but that the First Amendment was not intended to discriminate against citizens who elect to send their children to church-affiliated schools.

The child-benefit theory allows religious institutions to benefit indirectly from religiously neutral governmental programs; the religious institution must not itself be the principal or primary beneficiary. Those advocating a strict separation of church and state, however, are critical of the child-benefit theory. They believe the Establishment Clause requires strict separation of church and state and prohibits *any* aid, indirect or otherwise, to *any* religious institution. In their view, once government subsidies are rationalized as primarily aid to students, there is virtually no limit to aid flowing to parochial schools through their students.

The child-benefit theory has been frequently used in school-aid cases since *Everson*. In *Board of Education v. Allen,* 392 U.S. 236 (1968), for example, the Court upheld a New York program to loan textbooks to nonpublic school students. The Court concluded that the program's purpose was the "furtherance of the educational opportunities available to the young" irrespective of religion. Similarly, all children who attend sectarian schools were made eligible for meals through the National School Lunch Act of 1946. Likewise, federal statutes such as the Higher Education Facilities Act of 1963 have provided for loans or grants to colleges and universities for buildings or educational programs. During the 1970s, the Court under Chief Justice Warren E. Burger folded much of the child-benefit concept into the more comprehensive *Lemon* test, but the concept continues to contribute to Establishment Clause jurisprudence, as seen in the ruling to uphold school vouchers in *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002).

Peter G. Renstrom

See also: Establishment Clause; *Everson v. Board of Education; Lemon v. Kurtzman; Zelman v. Simmons-Harris*.

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Child Pornography

Child pornography is a category of expression that depicts or portrays children engaged in sexual activity. Congress began proscribing child pornography in

1977 with the enactment of the Protection of Children Against Sexual Exploitation Act, which prohibited the production, distribution, and sale of material depicting obscene conduct by minors.

In 1982 the U.S. Supreme Court held in a case involving child pornography, *New York v. Ferber,* 458 U.S. 747 (1982), that the government could prohibit the production and distribution of pornographic depictions of children without having to meet the more stringent standard for obscene expression formulated in *Miller v. California,* 413 U.S. 15 (1973). The *Ferber* court focused on the exploitation aspect of children rather than the expressive aspect of the producers and distributors or the ultimate viewer's point of view. According to the *Ferber* Court,

> [The] *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test, of whether a work, taken as a whole, appeals to prurient interests of the average person, bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value."

Congress subsequently enacted the Child Protection Act of 1984, a broad revision of the 1977 law, which, among other things, criminalized the knowledgeable receipt of a "visual depiction [through the mails that] involves the use of a minor engaging in sexually explicit conduct" and eliminated a requirement that child pornography be obscene according to the *Miller* standard before its production, distribution, sale, mailing, trafficking, and receipt could be found criminal. In *Osborne v. Ohio,* 495 U.S. 103 (1990), the Supreme Court upheld an Ohio conviction under a statute that criminalized the private possession and viewing of child pornography in one's own home.

Emboldened by the *Ferber* and *Osborne* decisions, Congress passed several enactments that strengthened laws prohibiting child pornography. One was the Child Pornography Prevention Act of 1996 (CPPA) (*U.S. Code,* vol. 18, sec. 2256), which expanded the federal prohibition on child pornography by including not only pornographic images made using actual children but also "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct" (sec. 2256[8][B]). The act also banned any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that it depicts "a minor engaging in sexually explicit conduct" (sec. 2256[8][D]). The 1996 act banned sexually explicit images created by what came to be called "virtual-child pornography," because they are produced by techniques such as computer-imaging and use of adults that appear to be minors.

Despite the Court's previous rulings that exempted child pornography from the obscenity test enunciated in *Miller,* a majority of the Court refused to go as far as legitimating the CPPA's new definition of child pornography that included virtual-child pornography. The Court declared sections 2256(8)(B) and (D) of CPPA unconstitutional in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002). Justice Anthony M. Kennedy, writing for the Court, declared that the CPPA was overly broad because it included protected expression by proscribing a "significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*." Distinguishing *Ferber,* the Court declared that "in contrast to the speech in *Ferber,* speech that is itself the record of [actual] sexual abuse, the CPPA prohibits speech that records no [actual] crime and creates no [actual] victims by its production. Virtual child pornography is not 'intrinsically related' to the [actual] sexual abuse of children." The court went on to find that the CPPA fell short of the *Miller* standard by including within its breadth pornographic material that was not obscene under the *Miller* standard.

Disturbed by the Court's decision in *Ashcroft,* leg-

islators have sought widespread congressional support for proposed legislation designed to overcome the impediments imposed by the Court's decision.

Clyde E. Willis

See also: Ashcroft v. Free Speech Coalition; Miller v. California; New York v. Ferber; Obscenity.

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Chilling Effect

A law (or, more broadly, any governmental sanction) is said to produce a "chilling effect" when it discourages individuals from exercising their legally or constitutionally protected rights because they are fearful that the law or sanction will be applied to them and that they might be prosecuted, even though they might ultimately be vindicated. In other words, the concern is that individuals might balance their desire to exercise a protected right (freedom of speech, for example) against the possibility that they will be prosecuted for what they say, and that they will choose to remain silent rather than face the many burdens attendant on prosecution, even a prosecution that courts might eventually declare improper.

The preceding example is an apt one, because the reality of U.S. Constitutional development is that the chilling-effect concept was first developed in the context of First Amendment cases involving political speech and publication, particularly unpopular, dissident, or unorthodox political ideas. One of the earliest cases was *Near v. Minnesota,* 283 U.S. 697 (1931), in which the U.S. Supreme Court for the first time held that freedom of the press, protected against national governmental infringement by the First Amendment, was also protected against state governmental infringement by the Due Process Clause of the Fourteenth Amendment (via the "incorporation" doctrine, under which certain fundamental rights in the Bill of Rights are brought under the umbrella of due process and applied against the states through the Fourteenth Amendment). The case was also an affirmation of one of the oldest understandings of freedom of the press: that at the minimum, the concept precluded "prior restraint"—that is, there could be no system whereby someone must submit to governmental approval before publication. Still, that understanding of freedom of the press, which had origins several centuries earlier in English common law, did allow for punishment after publication (if, for example, the publication was obscene or libelous). What was striking in *Near* was that the Court further refined this aspect of the common law tradition (as most famously expressed by William Blackstone in the nineteenth century in his *Commentaries*) and recognized some limits on subsequent sanctions, since the prospect of severe sanctions might deter publication and act as a kind of indirect prior restraint—that is, fear of postpublication punishment could produce a "chilling effect" (though the Court did not use the phrase).

The concept came into its own during the tenure of Earl Warren as chief justice (1953–1969), and nowhere did it appear more dramatically than in the Warren Court's elaboration of the doctrines of "overbreadth" and "vagueness." Both concepts were developed in connection with First Amendment cases, and both concepts had the chilling-effect notion as their most fundamental premise. For the Court, a statute was overbroad if its terms were so sweeping that it could be applied not only to conduct that could legitimately be proscribed but also to conduct that was constitutionally protected. A statute was vague if it used terms not readily understandable by persons of ordinary intelligence. (Many of the cases involved laws that were both overbroad and vague.) The Warren Court was extremely solicitous of free speech and free-

dom of press, believing that these were among the freedoms most basic to the proper functioning of democratic government, and laws that either punished or deterred the exercise of these freedoms should be subject to particularly close scrutiny.

As the overbreadth doctrine developed, it spawned an exception to one of the fundamental rules of adjudication, namely, that individuals could challenge a law only as applied to them (that is, the individual must have "standing"). But when an overbroad law impinged on First Amendment freedoms, the Court allowed parties to challenge the law on the basis of its possible application to individuals not before the Court whose protected speech might be punished under the law, without even addressing the issue of whether the law could legitimately be applied to the party actually before the Court. In other words, the party was permitted to argue the rights of others who might be "chilled" by the existence of the overbroad statute.

An illustration of this exception appeared in *Board of Airport Commissioners v. Jews for Jesus, Inc.,* 482 U.S. 569 (1987). The Los Angeles Board of Airport Commissioners banned all "First Amendment activities" within the central terminal area of the Los Angeles Airport. A member of the religious group Jews for Jesus was told by an airport officer to stop distributing religious literature in that area. Using overbreadth analysis, the Court found the rule unconstitutional. The law not only regulated conduct that might cause obstructions or congestion—for example, passing out leaflets as the plaintiff was doing—but it also prohibited even talking and reading or merely wearing campaign buttons or symbolic clothing (all classic examples of "First Amendment activity"). Thus, the Court invalidated the regulation without even addressing the question of whether leafleting in airports was constitutionally protected.

Perhaps one of the most dramatic First Amendment initiatives taken by the Warren Court, starting with *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), involved applying First Amendment standards to libel actions brought by public officials (and, later, public figures) against critics of their public conduct. The underlying premise of *Sullivan* and subsequent cases was that robust, uninhibited public discussions—including especially criticisms of official conduct—were essential to the workings of democracy and might be "chilled" by fear of excessive libel judgments. (In *Sullivan,* the local jury demanded the *New York Times* pay $500,000 in damages—a great deal of money in 1964.)

Many types of governmental actions may produce a chilling effect. In *Laird v. Tatum,* 408 U.S. 1 (1972), the litigants argued that the U.S. Army's domestic surveillance system created a subjective "chilling effect" that might cause opponents of the Vietnam War to be reluctant to take part in antiwar rallies for fear they would be identified by Army intelligence and the information in Army files subsequently used against war critics. (The Court declined to accept that argument as establishing sufficient injury to allow the litigants to challenge the surveillance system on First Amendment grounds.) More recently, reports surfaced that the Federal Bureau of Investigation (FBI) was authorized to gather intelligence on anti–Iraq War groups, as well as groups opposed to aspects of globalization, because of concerns about infiltration by terrorists. The subjects of such surveillance in turn charged that the intention and result would be a chilling of legitimate protest activity. In November 2003 the American Civil Liberties Union (ACLU) filed a lawsuit charging that certain provisions of the Patriot Act had a chilling effect on the First Amendment rights of several nonprofit organizations providing a wide range of religious, medical, social, and educational services to communities around the country. The ACLU's brief compared the FBI activities in question to efforts in earlier eras to shut down dissent by investigating groups such as the National Association for the Advancement of Colored People (NAACP) and the Japanese American Citizens League.

Today, the term "chilling effect" has moved beyond its First Amendment origins and has become commonplace in a variety of areas where governmental actions may discourage people from exercising protected rights. A recent Internet search using the terms "chilling effect" and "civil liberties" produced 31,000 responses. The first of these reported on a 1999 decision by a judge in Puerto Rico holding that an ACLU lawsuit against the Commonwealth's sodomy statute could go forward because the law's existence, and threats by government officials to enforce it, had a "chilling effect" on sexual expression and relation-

ships. That law was nullified by the U.S. Supreme Court's 2003 decision in *Lawrence v. Texas,* 539 U.S. 558, but the larger point remains—the notion of "chilling effect" as a basis for legal challenges to a wide variety of laws and other governmental actions has become firmly embedded in the U.S. constitutional system.

Philip A. Dynia

See also: Near v. Minnesota; New York Times Co. v. Sullivan; Overbreadth Doctrine; Vagueness.

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Christian Roots of Civil Liberties

Civil liberties are those individual freedoms that in the United States are guaranteed primarily in the Bill of Rights (the first ten amendments to the U.S. Constitution), especially the First Amendment, and the Fourteenth Amendment. They are derived from ideas about the value of the individual, freedom of conscience, equality of all before God and thus before government, the right of unpopular and minority views to be heard, and a need to place limits on government. The prominent role of civil liberties in American political thought and action derives from several sources. One of these is Christianity.

The contributions of Christianity to the U.S. concept of civil liberties come from biblical teachings, the historical development of Christianity, and Christian thought and experiences in colonial America and the early United States.

BIBLICAL ROOTS

The earliest roots of U.S. civil liberties can be traced to the Bible. Unlike other ancient religions, Christianity was not linked to a specific nation, race, or country but rather preached a message of equality of all believers. The notion that individuals were created in God's image, biblical messages of peace and social justice, and even the doctrine of original sin would provide Americans with a Christian frame of reference for the concept of self-worth, human dignity, and equality underlying a respect for civil liberties. The very word "freedom" often appears in biblical passages, and although its use in this context is open to varying interpretations, such passages were the texts for many politically themed sermons in defense of civil liberties in late-eighteenth-century America.

HISTORY OF CHRISTIANITY

Because Christianity started as a religion that stood apart from the state, it was perceived in its earliest history as a challenge or threat to the state, the rationale for the persecution of early Christians. This view changed dramatically when Christianity became the state religion of the Roman Empire in the fourth century. In the centuries that followed, Christianity was dominant, and dissent and freethinking were not welcomed. With the fall of the Roman Empire and the eventual rise of the nation-state in Europe, various conflicts arose concerning the proper relationship of state and church and which should be dominant, but the idea of a religion that functioned apart from the state and the individualistic, egalitarian, and social justice elements of Christianity had become largely overwhelmed by the institutional Roman Catholic Church.

This began to change in the sixteenth century with the Protestant Reformation in Europe, which proclaimed the "priesthood of believers" and the "authority of the Bible," thus freeing believers, at least theoretically, from a dependency on the Church as their intercessor and scriptural interpreter. However, the Reformation also led to the emergence of new state religions in Europe, as countries either remained Roman Catholic or assumed the brand of Protestantism espoused by their rulers. This in turn led to the appearance of radical thinkers who rejected the idea of any established church.

AMERICAN ROOTS

The colonization of America included various groups of Christians fleeing religious persecution by other

Christians in Europe, and America became a haven for many dissenting interpretations of Christianity. In analyzing their impact on civil liberties, one scholar has divided them into two broad categories—Puritans and Evangelicals.

No group left its mark upon the American psyche in a more profound or more complex way than the Puritans. They, like many of the other early groups of religious settlers, did not themselves tolerate those who believed differently. However, they created an environment that spawned further waves of dissidents and gave birth to several early American role models for freedom of conscience.

The contribution of the Puritans to the growth of civil liberties, however, extended beyond their hostility toward dissident voices. They preached a "covenant theology" in which they viewed themselves as a new chosen people making a covenant with God, a notion that helped pave the way for American understanding and acceptance of John Locke's vision of a "social contract" between citizens and government. This contract included the protection by government of unalienable rights of individuals, including "life, liberty, and the pursuit of happiness" as stated by Thomas Jefferson in the Declaration of Independence. Not only was this phrase echoed in the Fifth and later the Fourteenth Amendments to the Constitution (with "property" substituted for "happiness"), it also provided a philosophical underpinning for the specific guarantees in the First Amendment.

Original sin and human depravity were prominent themes in Puritan theology, and these led to an inherent skepticism about human government. If all people were sinners, then rulers, too, were sinful and needed restraints on their power over others. This helped point the way toward the concept of limited

Landing of Roger Williams at Providence, Rhode Island, 1636. Williams established the colony of Rhode Island to demonstrate that people could live together peacefully in a civil society without a government-supported church or church-backed government. *(© North Wind Picture Archives)*

government and need for protections against the danger of governments elected by majorities exercising tyranny against minorities.

The second major category of early American religious groupings, the Evangelicals, included a whole spectrum of dissenters from Baptists and Anabaptists to Methodists and Moravians. Some groups came from Europe; others originated in America. They differed widely in their theological beliefs, yet they were generally united in "their insistence on liberty of conscience, disestablishment of religion, and separation of church and state."

The towering figure who gave shape to Evangelical ideas on religious liberty and freedom of conscience was Roger Williams (1603–1683). From earlier strands of Christian thought going back as far as the Epistles of Paul, Williams expounded the doctrine of freedom of conscience as an integral part of God-created humanity. He rejected the notion that the state should or could determine religious truth, and he pointed to the history of Christianity as proof that state-imposed religion did more harm than good. He not only supported the right of Christian freedom but extended this right to non-Christians as well.

Driven out of Puritan New England because of his unpopular views about church and state, he set up the colony of Rhode Island as an experiment in religious tolerance and an effort to demonstrate that people could live together peacefully in a civil society without need of a government-supported church or church-backed government. Among others, he welcomed Quakers, with whom he had strong disagreements, to Rhode Island, and he often debated theology with them—thus demonstrating his commitment to free exchange of ideas.

Williams's writings are considered to have been a major influence on the English political thinker John Locke, who in turn had a profound influence on Thomas Jefferson, one of the major architects of American civil liberties. A less circuitous line of influence was through the Baptist theologian Isaac Backus, a contemporary of the framers of the Constitution. Backus was a powerful voice for freedom of conscience as well as a vocal defender of Williams's contributions to America against others who depicted Williams as a fanatic and troublemaker.

A distinctive fact about American Christianity even in the colonial era was its pluralistic nature. Most colonies had established churches, but several others, like Rhode Island, welcomed believers of various religious persuasions. No single denomination could claim a majority of the population of the thirteen colonies. This fact in itself helped fuel the struggle against established churches and laid the groundwork for religious toleration as a prerequisite for the broader development of civil liberties. Moreover, as the country developed, it grew also in its religious diversity. New types of Christianity gave rise to even more new types, differing sometimes over minutiae and sometimes over profundities of teaching and practice.

Dissent in early America was by no means limited to dissent against government but also included dissent by upstart religions against established churches; dissent within religious denominations; and movements by laity against clergy, uneducated against scholarly, and common men and women against elites—all in the name of religion. According to one scholar, there was no "authoritative center" against which all dissident religious sects were rebelling. Instead there was a "cacophony of ideas" competing in the arena of public opinion. A thriving popular religious press developed early and served to promote one brand of religion against another. By the early nineteenth century, satirical religious verses were being published and circulated to engage the public in religious debate. Formal sermons by well-educated clergy had to compete with the zeal of "vernacular" preachers. Thus there developed a colorful and variegated marketplace of religious ideas that provided an experiential testing ground for free competition of speech, press, and religion, all within the framework of American Christianity.

It was not always an easy step from this marketplace of Christian ideas to the marketplace of all ideas, or from the concept of freedom of conscience for believers to freedom of conscience for all thinkers. But Roger Williams paved the way, and others, including Isaac Backus, followed. By the time of the drafting of the Bill of Rights in 1789, these Christian roots had become intermingled with other schools of thought. The theological views of Puritans and Evangelicals were two of the "four corners of a wide canopy of

opinion about religious liberty." The other two corners were the political views of the Enlightenment thinkers such as Thomas Jefferson and those of the civic-minded Republicans such as George Washington. (The latter group shared the commitment to religious liberty but superimposed it upon the desire to build a society based on a common religious ethos.) All four of these views found advocates among state or federal political leaders, whether in pamphlets, correspondence, or formal debates on the Constitution. Three of these views directly reflected Christian roots. The fourth reflected the Enlightenment thinkers, who were the indirect beneficiaries of Roger Williams's thought via John Locke. This canopy of interacting viewpoints protected free exercise of religion, religious pluralism and equality, separation of church and state, and, more broadly, freedom of conscience.

Many of America's early dissident minorities emerged as America's Protestant majority in the nineteenth and twentieth centuries and became resistant to the idea that civil liberties should be valued and broadly defined. Contemporary studies of public opinion indicate that Christians often rank low on scales measuring tolerance and support for civil liberties. In this respect, however, they are ignoring their own history, for no one can accurately trace the developmental path of civil liberties in America without taking note of their Christian origins.

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See also: First Amendment; Natural Law; Natural Rights.

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Christian Science

Christian Science is an indigenous religious organization founded by Mary Baker Eddy (1821–1910) that has figured in numerous legal cases involving spiritual healing not only because of the First Amendment's protection for religious beliefs but also because religious organizations enjoy special tax status. Thus the Christian Science group has been involved in cases involving freedom of religion, taxation, insurance coverage, and other matters.

Eddy claimed she discovered "Christ Science" in 1866, and she later called it Christian Science in her book *Science and Health with Key to the Scriptures* (1875). The intellectual background of her religion, however, is wide-ranging and includes New England transcendentalism, the teachings of Swedish philosopher Emanuel Swedenborg (who believed he had engaged in conversations with the spirit world), spiritualism, mesmerism, faith healing, and the thinking of charismatic mental healer Phineas Parkhurst Quimby.

DEVELOPMENT OF CHRISTIAN SCIENCE

For many years, Eddy had experienced numerous health problems while seeking relief through various cures and treatments. In 1862 she experienced healing from Phineas Quimby, a faith healer in Portland, Maine. She thereafter spent several months studying his techniques.

In 1881, Eddy opened the Massachusetts Metaphysical College for the instruction of Christian Science practitioners. In 1882, Eddy founded the First Church of Christ, Scientist, of Boston, which is known as "the Mother Church." All other Christian Science churches and reading rooms throughout the world are regarded as branches of the Mother Church.

A self-perpetuating board of five directors, originally named by Eddy, directs the church. This board oversees the publication and distribution of literature, including Eddy's writings and the politically influen-

Christian Science founder Mary Baker Eddy praying over the bed of an elderly lady, 1893. Christian Science practitioners have benefited from legislative action and court decisions putting them on a par with the medical community for purposes of medical insurance and taxation. The most controversial part of Christian Science healing practices centers on the right of parents to withhold medical care from their children for religious reasons. *(Library of Congress)*

tial *Christian Science Monitor,* founded by Eddy in 1908. It also supervises Christian Science practitioners, lecturers, religious education, and the orthodoxy of teaching throughout the movement.

Christian Science does not have ordained clergy. Instead, there are readers and teachers of the Bible and of Christian Science literature, and there are practitioners. The practitioners are professionals who devote themselves full-time to the healing ministry. Practitioners do not give advice or provide personal counseling but treat the patient through religious resources.

THOUGHT AND PRACTICE

Philosophically, Christian Science is a form of monistic idealism in which "all is mind." Christian Scientists deny the reality of the material world, including the physical nature of Christ, which orthodox Christians accept.

Healing through correct thinking or prayer is central to Christian Scientists. Disease is seen as mental misunderstanding that is best treated by reading Christian Science literature, praying, or consulting with a practitioner. Because Christian Science denies the reality of evil, sickness, and death, the *Christian Science Monitor* does not print medical stories or obituaries. In some situations Christian Scientists may submit to materialistic medical aid for vaccinations, surgery, broken bones, dental work, correctable eye problems, or help for childbirth.

Christian Scientists have lobbied aggressively to secure religious exemptions for their health care system. Practitioners have benefited from legislative action and court decisions putting them on a par with the medical community for purposes of medical insurance and taxation. Legal acceptance has occurred despite opposition from the medical community. In addition,

the courts have allowed nonmedical treatment centers to receive Medicaid and Medicare payments for care.

Many Christian Science parents request that school authorities provide accommodations for their children on grounds of religious liberty. Requests are for exemptions from physical examinations, health studies, medical instruction, immunizations, treatments, or even first aid. The 1996 federal Child Abuse Prevention and Treatment Act (CAPTA) permits the withholding of medical treatment from children for religious reasons.

Christian Scientist parents or practitioners are expected to report to a health department what appear to be infectious or contagious diseases. The requirement is often ignored because Christian Science's self-imposed medical blackout makes diagnosis unlikely. Instead, decisions about health care are left to Christian Scientists as individuals.

The most controversial part of Christian Science healing practices centers on the right of parents to withhold medical care from children for religious reasons. There are testimonials of complete cures by the church, but there are also several cases of children who suffered and died from treatable conditions but who received only the treatment from religious resources provided by Christian Science. In some such cases, charges of child neglect have been brought, but these have usually not been successfully prosecuted.

In 1997 the Supreme Court refused to hear *Children's Healthcare Is a Legal Duty, Inc. v. Deters,* 92 F.3d 1412 (6th Cir. 1996). In this case, the Sixth Circuit Court of Appeals had decided that the Eleventh Amendment provided immunity to a prosecutor who was upholding an Ohio law that accepted parental use of religiously inspired treatments for their children. The case raised the issue of religious exemption despite the decisions of courts beginning as early as 1903 that religious liberty does not include the right to withhold medical care from a child.

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See also: First Amendment.

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Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993)

Santeria is a religion that combines elements of Roman Catholicism with the traditional African religion that was brought to the United States by slaves. Some Santerian rituals include sacrifice of animals. In 1987 a group of Santerians announced plans to open a house of worship in Hialeah, Florida. In response, the city council in an emergency meeting adopted a set of ordinances that forbade the ritual killing of animals and specified certain exceptions to that rule. These exceptions substantially narrowed the persons affected by the legislation to the Santerians. Both the U.S. District Court and the Eleventh Circuit Court of Appeals found no violation of the Free Exercise Clause of the First Amendment, which prohibits restrictions on the free exercise of religion.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993), the U.S. Supreme Court disagreed with the lower courts in a unanimous holding, though there were several opinions. Justice Anthony M. Kennedy wrote the majority opinion; Justices Antonin Scalia, David H. Souter, and Harry A. Blackmun wrote concurring opinions. Justice Kennedy applied the neutrality test established in *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990) (*Smith*), and found that the Hialeah legislation was not neutral or of general applicability because its object was the suppression of ritual animal sacrifice only as practiced in Santeria. Thus, the ordinances were required to meet the test of strict scrutiny. That is, they must have been enacted in response to a compelling governmental interest and be narrowly tailored to advance that interest. In examining the ordinances, Justice Kennedy rejected Hialeah's claim that the ordinances had the secular purpose of preventing cruelty to animals, finding that they were carefully tailored to forbid the ritual

killing of animals only by the Santerians. They failed to prohibit analogous nonreligious animal killing, and thus Hialeah did not demonstrate a compelling governmental interest that might have justified their adoption. Furthermore, the ordinances were found to be overbroad, violating the second prong of the strict-scrutiny test, because they forbade Santerians from sacrificing animals even when the sacrifice would not threaten Hialeah's interest in humane methods of slaughter.

Justice Scalia in a concurring opinion took issue with the way Justice Kennedy used the terms "neutrality" and "general applicability." He also thought the Court should not have considered the subjective motivation of the city council members. Justice Souter explained why he did not think *Smith* was applicable to this case and why he thought the Court should reconsider the *Smith* rule. Justice Blackmun argued for a return to the strict-scrutiny test of *Sherbert v. Verner,* 374 U.S. 398 (1963), and expressed the view that any law that negatively targets religiously motivated behavior should automatically fail that test.

This case is important in Free Exercise Clause jurisprudence, because it identifies the only type of situation in which a law can be found to violate the clause when the controlling test is one of neutrality. That is, any law that clearly targets a particular religion is unconstitutional even if it appears to be facially neutral. Otherwise, a law must also violate some other constitutional provision.

Carol Barner-Barry

See also: Employment Division, Department of Human Resources of Oregon v. Smith; First Amendment; Free Exercise Clause; *Sherbert v. Verner.*

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CIA

See Central Intelligence Agency

Cipollone v. Liggett Group (1992)

The First Amendment gives wide scope to freedom of speech and press, and the Supreme Court has applied these rights to the states through incorporation of the guarantees of the First Amendment and most other provisions of the first ten amendments (the Bill of Rights) via the Due Process Clause of the Fourteenth Amendment. Still, these rights are not unlimited. The First Amendment has been held not to protect deceptive advertising against regulations by the Federal Communications Commission. *Cipollone v. Liggett Group,* 505 U.S. 504 (1992), a controversial ruling involving the liability of cigarette companies for deceptive advertising and marketing, indicates that such companies may be liable to sanctions under state law as well.

In addition to its implications for the First Amendment, this case is noteworthy for the controversy it generated in the lower courts. This involved the eventual removal of the trial judge for the appearance of bias in the case as well as the discovery of significant information about tobacco and the activities of tobacco companies in suppressing information about the dangers of smoking. These included a 1961 document in possession of Philip Morris reporting that carcinogens "are found in practically every class of compounds in smoke" and a 1972 study revealing an understanding of smoking as drug addiction that described a cigarette "as a dispenser for a dose unit of nicotine."

The husband of Rose Cipollone initiated this case in a trial court on behalf of his wife, who began smoking in 1942 and died of lung cancer in 1984. Their son, Thomas, continued the suit after his father died. The case focused less on issues of First Amendment law than on the issue of federal preemption, that is, the degree to which federal regulation of an area precludes similar regulation by states under the clause in Article VI of the Constitution (designated as the Supremacy Clause) indicating that the federal Constitution and laws made under it are supreme over those of the states.

Cipollone was decided against the background of two congressional laws, the Federal Cigarette Labeling and Advertising Act of 1965 and the Public Health

Cigarette Smoking Act of 1969. Both had required warning labels of the public health dangers of cigarettes. The first act specified that “No statement . . . shall be required in the advertising of any cigarettes.” The second act amended this statement to indicate that “No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes” if the packages had the specified warning. After the adoption of the second law, the Federal Communications Commission had further banned cigarette advertising through the electronic media.

Finding that Rose Cipollone had contributed to her own health problems by about 80 percent, a trial jury had still awarded her $400,000 in damages based on evidence of deceptive cigarette advertising prior to adoption of the federal laws; significantly, this was the first jury award of damages in such a tobacco case. The Supreme Court had to decide if the family might be entitled to additional damages from the time period after adoption of federal legislation under state common law actions designed to prohibit deceptive advertising, breach of warranty, and the like.

The lead decision, written by Justice John Paul Stevens on behalf of himself and Justices Byron R. White, Sandra Day O’Connor, and Chief Justice William H. Rehnquist, attempted to interpret both federal statutes according to their specific language. Justice Stevens found that these statutes had been designed to provide uniform warnings on all cigarette packaging and thus precluded further damages based on lack of such warnings. He found, however, that the acts had not been designed to preempt state common law claims for breach of express warranties, concealment of material facts, the duty not to commit fraud, and the like. It accordingly allowed actions based upon such claims to proceed. Justices Harry A. Blackmun, joined by Justices Anthony M. Kennedy and David H. Souter, found no preemption of any of the state remedies; Justice Antonin Scalia, joined by Justice Clarence Thomas, believed that most state action before 1969, and all state action after 1969, had been preempted by federal legislation.

From a civil liberties perspective, perhaps the most interesting feature of *Cipollone* is that the Court not only took it for granted that freedom of the press did not exempt advertisers from all governmental regulation, but, much as in cases that had articulated a strong presumption against prior restraint of publication—for example, *Near v. Minnesota,* 283 U.S. 697 (1931), and *New York Times Co. v. United States,* 403 U.S. 713 (1971)—the Court also clarified that the First Amendment did not necessarily absolve individuals of liability for damages that might result from consumption of their products. Faced with a phalanx of cigarette-company attorneys, however, the Cipollone family decided not to pursue the case further.

J. David Golub and John R. Vile

See also: Corporate Speech; Federal Communications Commission.

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Citizenship

Citizenship has been the linchpin of the modern nation-state. Through citizenship, the individual acquires a status in the state that ensures certain rights and defines responsibilities. The status of citizenship presumes a singular loyalty to the nation. Only the citizen is granted an active participation in the process of government. Membership, rights, and territory are the three interlocking dimensions of citizenship. In recent decades the significance of the traditional notion of citizenship has been challenged. Rights have increasingly come to be predicated on place of residence rather than on citizenship status. Few rights other than the rights to vote and to hold political office have been exclusively reserved for citizens. In the view of both ancient and modern liberal political theorists, the relationship between the individual and the state was defined by the concept of citizenship. Whether citizenship will continue to play this central role remains in question.

As a component in political theory, citizenship is a function of consent. In a constitutional democracy based on republicanism, the compact between the in-

dividual and the state is established through the constitution that outlines the terms of government and protections for the citizenry. Although the U.S. Constitution of 1787 does not define citizenship or include language or rules regarding who should be a citizen, Article I, Section 8, clause 4 granted Congress the power to "establish [a] uniform rule of naturalization." Through this power, Congress has passed numerous laws regarding the acquisition of citizenship. Congress enacted the first federal nationality and citizenship law in 1790, but national citizenship was not firmly established until after the Civil War. The legislative history of which individuals could acquire citizenship, and how they could do so, reflects a more restrictive view of membership than is suggested by the traditional notion of the United States as a land of immigrants.

The first affirmative mention of citizenship in the Constitution came in the Fourteenth Amendment, a response to the U.S. Supreme Court decision in *Scott v. Sandford,* 60 U.S. 393 (1857), in which the Court had denied that blacks could be citizens. The Fourteenth Amendment defined citizenship for the first time in the text as belonging to "all persons born or naturalized in the United States and subject to the jurisdiction thereof" and provided a set of rights to which all citizens were entitled. Although the main purpose of the amendment was to establish the citizenship of blacks, it also established national over state citizenship in the country.

In the United States, citizenship has been based on a combination of birth on the soil of the sovereign's territory (the principle of territory, *jus soli*) and by descent according to blood kinship (the principle of

A class in citizenship and English for Italians given free of charge in 1943 at the Hudson Park Library on Seventh Avenue near Bleeker Street, New York City. *(Library of Congress)*

blood, *jus sanguinis*). The children of U.S. citizens born outside of its territory, for example, receive their parents' citizenship by virtue of descent. Those who acquire U.S. citizenship in this manner cannot transmit it to their children through *jus sanguinis* unless such children have previously established residence in the United States. Stipulating residence as a criterion for the acquisition of citizenship reflects a larger issue over the degree and substance of the connections that should be necessary between a polity and its citizenry. The residence requirement is a connections test designed to prevent the transmission of citizenship across generations to descendants who have no substantial tie with the United States.

The vision of what citizenship means in terms of a national ideology has shifted historically in the United States. The requirement of assimilation and the metaphor of the "melting pot" dominant in the first half of the twentieth century have been transformed into a "mixed salad" understanding that accepts ethnic diversity and multiculturalism. Although citizenship in the United States implies great rights and freedoms, there is an overarching principle that being an American presupposes certain political values and characteristics. In times of crisis there have been tragic restrictions placed on who may be a citizen. The Japanese internment during World War II, the Communist hunts of the 1950s, and the war on terrorism targeted against Muslims in the aftermath of the terrorist attacks on September 11, 2001, all highlight the connection of citizenship to patriotism, values, and particular notions of what it means to be an American.

Still, qualifications that seek to pour ideological and political meaning into the concept of citizenship have met with judicial resistance. The Supreme Court has rejected congressional attempts at defining the allegiance of those who are already citizens. A citizen cannot be involuntarily expatriated—involuntarily be stripped of citizenship—upon commission of acts inconsistent with allegiance. Whereas Congress sought to expatriate citizens who voted in a foreign political election, deserted the armed forces in a time of war, or (in the case of naturalized citizens) took up residence in the country of their birth, the Supreme Court has held all such legislation unconstitutional. Such acts by citizens, and even by noncitizens, may be punished, but loss of citizenship cannot be predicated on them. The Supreme Court has safeguarded citizenship as "man's basic right," stating that it is "nothing less than the right to have rights." In *Perez v. Brownell,* 356 U.S. 44 (1958), Chief Justice Earl Warren heralded citizenship as a "priceless possession" and argued that if removed "there remains a stateless person, disgraced and degraded in the eyes of his countrymen."

In addition to rejecting congressional attempts to equate citizenship with ideology, the Supreme Court has also diminished the connection between citizenship and rights by tying many constitutional protections to "persons" instead. The disconnection of rights from citizenship status has generated a concern that citizenship no longer matters. In comparison to most other countries, citizenship in the United States has gradually evolved into a status that is easy to obtain, is difficult to lose, and, of most concern, offers few legal or economic advantages over the status of permanent resident alien. Since the late 1980s, citizenship has become a salient issue for policy makers, scholars, immigrants, and the public at large. It has been central to the controversy surrounding access to welfare benefits, criteria for naturalization, the legitimacy of plural nationality, and the accommodation of multicultural diversity. The increasing scale and pace of international migration have further heightened concerns over a "devalued" citizenship.

Dual citizenship has been increasingly recognized along with the understanding that multiple attachments do not compromise loyalty to the United States. In addition, the practice of citizenship has changed. Integration into "mainstream" organizations and associations (as opposed to ethnically or nationally segmented groups) and participation in civic politics have declined (voting, political parties, and the like), whereas participation in global or transnational organizations and issues has grown. At the same time, U.S. citizenship continues to be the major objective of many aliens who come to American shores in pursuit of the age-old dream of a new life and freedom.

Galya Benarieh Ruffer

See also: Rights of Aliens.

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City of Boerne v. Flores (1997)

In 1925, Catholics in Boerne, Texas, built Saint Peter the Apostle Church in the architectural style of the old Spanish missions. The parish outgrew the modest structure and in 1991 decided to replace it with a building that would hold three times as many parishioners. When the pastor applied for building permits, city officials rejected the project, citing the city's desire to preserve a historic district in order to attract tourists. Archbishop P.F. Flores sued on behalf of Saint Peter's, arguing that the city's refusal to issue permits violated the parish's First Amendment rights of free exercise of religion. By the time the case reached the U.S. Supreme Court in 1996, lawyers for the church also cited the Religious Freedom Restoration Act passed by Congress in 1993. This law prohibited both state and federal governments from burdening religious exercise unless government officials could show that they had a compelling state interest and were using the least restrictive means to further that interest. Clearly, the lawyers argued, preservation of a rather ordinary-looking sixty-year-old building could hardly qualify as a compelling interest.

Lawyers for the city of Boerne responded that the Religious Freedom Restoration Act was itself unconstitutional because Congress had passed the law specifically to overrule the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990). In *Smith,* Justice Scalia wrote for a six-three majority of the justices that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." Although the church was not an individual, the lawyers argued, it must abide by the same limits on exercise of religion. The city's preservation law was one of general applicability and therefore covered Saint Peter's.

In *City of Boerne v. Flores,* 521 U.S. 507 (1997), the Supreme Court, by a six-three vote, overturned a U.S. circuit court decision and decided in favor of the city. The Court's reasoning was as important as its holding. Justice Anthony M. Kennedy wrote that in passing the Religious Freedom Restoration Act, Congress explicitly rejected the Court's ruling in *Smith* and attempted to reinstate the compelling-state-interest rule that the Court had used in the earlier case of *Sherbert v. Verner,* 374 U.S. 398 (1963). In passing the 1993 law, Congress had exceeded its power. It is the responsibility of the judicial authority, not the legislature, to determine the constitutionality of laws in cases and controversies. The powers of the legislature are defined and limited, and the Constitution was written to ensure that those limits are not mistaken or forgotten. Justice Kennedy also said that legislation that alters the meaning of the Free Exercise Clause (as determined by the Supreme Court) is beyond the power of Congress. The case thus was decided chiefly as a question of separation of powers between branches of government rather than simply on First Amendment grounds.

Understandably, members of Congress and a variety of religious lobbyists reacted with anger to the Court's ruling. A new piece of legislation, the Religious Liberty Protection Act, passed the House of Representatives in 1999 by a 306 to 118 vote. But as it was being considered in the Senate, several troubling questions were raised about the numbers and kinds of religious liberty claims that would be protected. Even religious leaders began to have second thoughts, and the Senate never voted on the proposed bill.

Meanwhile, once the Court ruled, the city of Boerne reached a compromise with the church and Archbishop Flores whereby the church agreed to preserve 80 percent of the building, including the facade,

in return for permits to expand its seating to serve the growing community.

Paul J. Weber

See also: Compelling Governmental Interest; *Employment Division, Department of Human Resources of Oregon v. Smith;* First Amendment; Religious Freedom Restoration Act of 1993.

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City of Erie v. Pap's A.M. (2000)

In *City of Erie v. Pap's A.M.,* 529 U.S. 277 (2000), the Supreme Court held, as it had in *Barnes v. Glen Theatre,* 501 U.S. 560 (1991), that states and municipalities could place restrictions on nude dancing without violating the protection for free expression provided by the First Amendment to the Constitution. Unlike in *Barnes*, however, five of the justices in *Pap's A.M.* agreed that the proper framework for analyzing such restrictions was the four-part test enunciated by the Court in *United States v. O'Brien,* 391 U.S. 367 (1968). A majority of the justices also agreed that combating the adverse secondary effects of nude dancing was within the city's constitutional powers and unrelated to the suppression of free expression, thus satisfying the first and third prongs of the *O'Brien* test.

A majority of the justices in *Pap's A.M.* could not agree, however, on whether an ordinance adopted by Erie, Pennsylvania, requiring dancers to wear pasties and G-strings furthered an important or substantial interest of the city, and, if so, whether the incidental restriction on nude dancing was no greater than essential to further this interest (the second and fourth prongs of *O'Brien*). The plurality—Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Anthony M. Kennedy, and Stephen G. Breyer—held that Erie's public indecency ordinance furthered an important or substantial government interest under *O'Brien* because "[t]he asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing [e.g., increase in crime, decrease in property values] are undeniably important." The plurality's reliance on the secondary-effects doctrine, taken from *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986), was significant because it marked a clear departure from the *Barnes* plurality's determination that nude dancing restrictions could be justified under *O'Brien* by a government's interest in protecting societal order and morality. Further, the plurality's opinion constituted an adoption of the approach advocated by Justice David H. Souter in his *Barnes* concurrence. The *Pap's A.M.* plurality also concluded that Erie's ordinance was no greater than essential to furthering the city's interest in combating the harmful secondary effects of nude dancing, noting that "[t]he requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message."

Justice Antonin Scalia, joined by Justice Clarence Thomas, concurred in the judgment of the Court, noting that "I do not feel the need, as the [plurality] does, to identify some 'secondary effects' associated with nude dancing that the city could properly seek to eliminate. . . . The traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment." Justice Souter concurred in part and dissented in part, expressing his opinion that "the current record [does not] allow us to say that the city has made a sufficient evidentiary showing to sustain its regulation." Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg, dissented, asserting that the ordinance was a

"patently invalid" content-based ban on nude dancing that censored protected speech.

Stephen Louis A. Dillard

See also: First Amendment; Nude Dancing; Obscenity.

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City of Indianapolis v. Edmond (2000)

In *City of Indianapolis v. Edmond,* 531 U.S. 32 (2000), the U.S. Supreme Court considered whether a city procedure under which cars were stopped at checkpoints to enable law enforcement officials to screen for drugs violated the protection against unreasonable search and seizure provided by the Fourth Amendment to the U.S. Constitution. A major issue was whether the city's policy fell within an exception to the requirement that police have "individualized suspicion" of criminal activity before making a seizure. In addition, the Court considered whether the practice was sufficiently distinguishable from standard police functions to justify such seizures without having the requisite suspicion.

Indianapolis, Indiana, police instituted a procedure to stop drivers, check licenses and registrations, and inform the drivers they had been stopped at a drug checkpoint. Officers would visually inspect vehicles and check drivers for obvious signs of impairment. Drug-detection dogs then walked around every stopped vehicle. If the dogs indicated the presence of drugs, officers had probable cause to search the car. The drug checkpoint policy was challenged by a number of drivers, and the Court held six-three that it violated the Fourth Amendment.

The Court had previously upheld immigration checkpoints in *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976), and sobriety-check lanes in *Michigan Department of State Police v. Sitz,* 496 U.S. 444 (1990), on a "special needs" basis because they addressed objectives distinct from typical law enforcement functions. As a result, these practices did not require the individualized suspicion mandated for virtually all other seizures by the Fourth Amendment. Indianapolis offered the same "special needs" argument, but the Court was unpersuaded. In her opinion for the majority, Justice Sandra Day O'Connor said the "primary purpose" of the Indianapolis checkpoint program was "ultimately indistinguishable from the general interest in crime control"; thus the roadblock seizures were unreasonable. Although sympathetic to the city's goals, the Court was worried about the consequences of validating the checkpoints. If the Indianapolis program could be justified by its secondary purposes of keeping impaired motorists off the road and verifying licenses and registrations, law enforcement authorities would be able to establish checkpoints for virtually any purpose as long as the stops included license or sobriety checks. O'Connor said there would be "little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose." Exceptions to the individualized-suspicion requirement were rare, O'Connor said, and the Court had "never approved a checkpoint whose primary purpose was to detect evidence of ordinary wrongdoing."

The Court also rejected the argument that the checkpoint program was justified by the "severe and intractable" nature of the drug problem. The gravity of the drug threat was not itself sufficient to justify the checkpoints. The Court did not dispute that illegal drug trafficking created "social harms of the first magnitude" and "daunting and complex" problems for law enforcement. The same could be said for a number of other illegal activities, however, "if only to a lesser degree." In determining whether individualized suspicion was a prerequisite for seizure, the Court had to consider the "nature of the interests threatened and their connection to the particular law enforcement practices at issue." The Court concluded the Indianapolis drug checkpoint program was indistinguishable from its general crime control function and thus required individualized suspicion.

Chief Justice William H. Rehnquist and Justices Clarence Thomas and Antonin Scalia dissented. Since the Indianapolis roadblocks were objectively reason-

able methods of preventing drunken driving and checking for drivers' licenses, it was constitutionally irrelevant that the police acknowledged its goal of interdicting drugs. The addition of the drug-sniffing dogs did not lengthen the stops and thus did not render these otherwise reasonable stops unlawful. The dissenters saw the stops as brief, standardized, discretionless, roadblock seizures of automobiles, which effectively served a substantial state interest with only minimal intrusion on privacy interests.

Peter G. Renstrom

See also: Roadblocks; Search; Seizure; War on Drugs.

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City of Ladue v. Gilleo (1994)

In *City of Ladue v. Gilleo,* 512 U.S. 43 (1994), the U.S. Supreme Court considered a First Amendment challenge to a local ban on residential signs. The case pitted an individual's right to free political speech against the city government's interest in fostering pleasing aesthetics in the community.

Margaret Gilleo, a homeowner, had erected a yard sign protesting the 1991 Gulf War. Notified that such signs were prohibited in Ladue, she applied for and was denied a variance. Claiming free speech protection, Gilleo won a preliminary injunction in federal district court and subsequently posted another pro-peace sign in a window of her home. Responding to the injunction, the city enacted a replacement ordinance that again banned all residential signs with limited exceptions for residential identification markers, "for-sale" notifications, and safety warnings. Also exempt were "on-site" advertising and commercial signs in properly zoned areas. The new law included a detailed statement asserting as its purpose the minimization of "visual blight and clutter." Gilleo amended her claim and again filed suit. Both the district and appellate courts declared the revised ordinance unconstitutional, finding that it was content-based discrimination and unsupported by any compelling state interests. A unanimous Supreme Court affirmed under a different rationale.

Deviating from traditional First Amendment analysis, the Supreme Court addressed the constitutionality of the "near-total" prohibition on residential signs without assessing whether the various exemptions rendered the ban content-based. Writing for the majority, Justice John Paul Stevens reasoned that determining whether the ban was underinclusive did not necessarily resolve Gilleo's claimed right to display a political message on her property. Therefore, the justices opted to proceed to the question of whether the ban prohibited "too much" speech.

The Court agreed that the city had a valid interest in "minimizing visual clutter" but found that interest unpersuasive when weighed against the right of private political expression. Stevens explained that it was the blanket prohibition on "a venerable means of communication that is both unique and important" that rendered the ordinance problematic. Relying on precedent that repudiated total medium bans, the majority particularly noted that residential signs were an inexpensive yet effective mode of communication, imbued with special meaning by virtue of location. Moreover, the Court acknowledged that recognized liberty and privacy interests supported the right to express political beliefs from the home.

The Court rejected the argument that alternative avenues of speech were not foreclosed by the ban. Given the importance of residential displays, the majority was not convinced that "adequate substitutes" or other equally effective means of expression existed. Conversely, the justices believed that the city had numerous and viable options for addressing the incidental evils associated with residential signs. The Court thus declared the ordinance unconstitutional under the First Amendment, accepting for the sake of argument that it was content-neutral.

Writing in concurrence, Justice Sandra Day O'Connor indicated a preference for a more traditional approach that would have focused on the content-based nature of the ban. However, since she agreed that the ordinance would be invalid even if it

were ruled content-neutral, she was willing to join the Court's holding.

Lisa K. Parshall

See also: Lawn Signs.

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City of Los Angeles v. Alameda Books, Inc. (2002)

In *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425 (2002), the U.S. Supreme Court upheld the constitutionality of a zoning ordinance prohibiting multiple adult entertainment businesses from operating in the same building. The primary issue on appeal was whether the city had enacted the ordinance in accordance with a "substantial government interest," as defined by the Court in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986).

A plurality of the Court—Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas—concluded that the city's stated reason for enacting the zoning restriction (the reduction of crime) was a substantial government interest, and that the city's comprehensive study of the adverse secondary effects arising from the operation of adult entertainment establishments could reasonably be relied upon to substantiate the interest. In reaching this conclusion, the plurality emphasized that although a municipality bears the burden of providing evidence to support a nexus between the zoning restriction imposed and the secondary effects alleged, a municipality is not required to provide "evidence that rules out every theory . . . inconsistent with its own." According to the plurality, a party challenging an adult entertainment zoning ordinance must "cast direct doubt" on the municipality's rationale for its ordinance "by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings" in order to "shift the burden back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance."

Justice Scalia, in addition to joining the plurality opinion, wrote a separate concurrence to express his view that "First Amendment traditions make 'secondary effects' analysis quite unnecessary," and that "[t]he Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex."

Justice Anthony M. Kennedy also concurred in the judgment of the Court, but wrote separately to note that "the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur." In his view, the fundamental flaw in the plurality's analysis was that it did not "address how speech will fare under the city's ordinance." According to Justice Kennedy, a municipality's rationale for enacting an adult entertainment zoning ordinance must be premised upon the theory that it "may reduce the costs of secondary effects without substantially reducing speech." Nevertheless, he agreed with the plurality that a municipality's initial evidentiary burden of demonstrating a substantial government interest is light, and that it was up to the plaintiffs at trial to call into question the legitimacy of a municipality's stated rationale for enacting such ordinances.

Justice David H. Souter, joined by Justices John Paul Stevens, Ruth Bader Ginsburg (in full), and Stephen G. Breyer (in part), dissented from the Court's judgment, asserting that the ordinance should be struck down as a content-based restriction on protected First Amendment expression.

Stephen Louis A. Dillard

See also: City of Renton v. Playtime Theatres, Inc.; First Amendment; Zoning.

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City of Renton v. Playtime Theatres, Inc. (1986)

In *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986), the U.S. Supreme Court considered the constitutional validity of a municipal zoning ordinance that prohibited adult entertainment theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or within one mile of any school. *Renton* was another in a line of cases that raised issues of the right to free expression under the First Amendment to the Constitution. The Court had previously upheld the constitutionality of a virtually indistinguishable ordinance in *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976), but a majority of the justices in that case were unable to agree on a single rationale for the holding. This changed with the Court's landmark decision in *Renton,* which established an analytical framework for evaluating the constitutionality of adult entertainment zoning ordinances under the First Amendment.

As an initial matter, the *Renton* Court noted that the city's zoning ordinance did not constitute a complete prohibition of adult theaters, but merely required that such theaters be distanced from certain sensitive locations (such as churches and residential areas). For this reason, the Court concluded that the ordinance was "properly analyzed as a form of time, place, and manner regulation." In reaching this conclusion, however, the Court stressed that "[d]escribing the ordinance as a time, place, and manner regulation is, of course, only the first step in our inquiry," and that this type of "content-neutral" regulation is constitutionally permissible only if it "is designed to serve a substantial governmental interest and [does] not unreasonably limit alternative avenues of communication." The *Renton* Court found that the zoning ordinance's restrictions on the location of adult entertainment theaters satisfied this test, concluding that although "the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. . . . [it] is aimed not at the *content* of the films shown . . . but rather at the *secondary effects* of such theaters on the surrounding community [e.g., increased crime, lowered property values]." In this respect, the Court reasoned that the ordinance was "*justified* without reference to the content of the regulated speech," because (1) the city had a substantial interest in preserving "the quality of urban life"; (2) the means chosen to effectuate the city's interest was narrowly tailored "to affect only that category of theaters shown to produce the unwanted secondary effects"; and (3) the ordinance allowed for reasonable alternative avenues of communication by leaving "more than five percent of the entire land area of Renton open to use as adult theater sites."

The *Renton* decision is also notable because of the Court's pronouncement that the First Amendment does not require municipalities, prior to enacting adult entertainment zoning ordinances, to conduct new studies or produce evidence independent of that already produced by other state or local governments, so long as "whatever evidence [a] city relies upon is reasonably believed to be relevant to the problem that the city addresses."

Justice Harry A. Blackmun concurred in the judgment of the Court without writing a separate opinion, thus declining to elaborate on the aspects of the majority's reasoning with which he disagreed. Justices William J. Brennan Jr., joined by Justice Thurgood Marshall, dissented, expressing his opinion that Renton's zoning ordinance was "patently unconstitutional."

Stephen Louis A. Dillard

See also: First Amendment; Time, Place, and Manner Restrictions; Zoning.

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Civil Disobedience

To engage in civil disobedience means to break a law deliberately, for moral reasons, in order to dramatize its unjust character in a peaceful way.

CHARACTERISTICS OF CIVIL DISOBEDIENCE

Social movements use many techniques in their efforts to stimulate changes in society. One technique is demonstrating. Under the First Amendment to the Constitution, demonstrators can publicly assemble, speak, and petition to have grievances redressed. Demonstrating is usually legal and may include actions such as peaceful picketing. Civil disobedience, however, goes beyond demonstrating to deliberate breaking of the law believed to be unjust. Those who engage in civil disobedience are attempting to secure civil liberties or rights they believe are being wrongfully denied.

Most scholars regard civil disobedience as an act of more than one person. By this standard, the American writer Henry David Thoreau (1817–1862), who spent a night in jail for refusing to pay taxes in opposition to the Mexican-American War, was not engaged in civil disobedience but rather in individual "conscientious objection." In the same category would be individuals in the 1960s and 1970s who refused to be drafted to serve in the Vietnam War or those who fled to Canada to escape the draft. Civil disobedience is a collective act of conscientious objection. Those who plan to engage in civil disobedience will often form "affinity groups" for mutual support during a campaign of civil disobedience.

Civil disobedience is the public breaking of a law to dramatize its alleged injustice. The anonymous commission of destructive acts, such as the "Indians" at the 1773 Boston Tea Party who tossed chests of tea into Boston harbor or the animal rights activists who secretly "liberated" animals from research centers in the 1990s, does not fit that definition. These acts were not done publicly to mold the conscience of the community. Also, many people believe that civil disobedience must be nonviolent because it is an act performed for moral reasons.

A purposeful act that breaks a specific law deemed unjust is direct civil disobedience. However, it often is not practical to break a law connected with a policy opposed by a movement. For example, peace movements opposed to a war cannot usually directly stop the conflict. To dramatize their cause, they may engage in sit-ins, lie down in the streets, or block entrances to public buildings. In these situations the laws broken usually pertain to trespassing or disturbing the peace. This type of activity is called indirect civil disobedience.

People who engage in civil disobedience expect to be punished by the law. Some proponents of such acts have suggested that there is a legal right to break a law as an act of civil disobedience and that there thus should be no punishment. Courts in the United States have not accepted this oxymoronic claim.

The courts have imposed a variety of punishments for engaging in civil disobedience. Most acts of civil disobedience violate state laws, which may be more lenient than federal laws. Since the adoption of the federal Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), there have been attempts to use it to prosecute groups of people engaged in civil disobedience. To date the U.S. Supreme Court has refused to apply the RICO statute in this way.

Civil disobedience places burdens on police forces, who must divert personnel, time, and other resources to manage and process groups of people engaged in illegal activity. One intention of those engaged in civil disobedience is to overload the criminal justice system in order to effect policy change.

HISTORICAL PRACTICE

Many groups have used civil disobedience in American history as a means of seeking change in public policy. In the nineteenth century, the suffragettes used public marches to protest the denial of the right to vote to women, a right not recognized until adoption of the Nineteenth Amendment in 1920. In the 1960s, the civil rights movement attacked state segregation laws by engaging in such direct activities as "freedom rides," in which groups of civil rights supporters rode buses through the South testing local segregation laws and practices. Cases were dismissed against the African Americans who engaged in sit-ins in Greensboro, North Carolina. Rosa Parks was arrested for refusing to give up her seat on a Montgomery, Alabama, bus to a white passenger as required by local law; charges against her also were ultimately dismissed. The courts found the segregation laws unconstitutional, and thus prosecutions were unenforceable. In the 1980s, civil disobedience was used to oppose apartheid in South

Police use pepper spray on locked-out workers at the A.E. Staley Company in Decatur, Illinois, June 1994. The workers and their supporters were peacefully sitting in the driveway at the Staley plant as an act of civil disobedience to protest the lockout. *(© Tatsuyuki Tayama/Fujifotos/The Image Works)*

Africa and to force U.S. universities to divest endowments that were based on investment in that country.

During the Vietnam War, antiwar activists engaged in a variety of acts of civil disobedience, including blocking military trains and induction centers, burning draft cards, and disrupting shipments of military supplies. Various peace groups, often allied with new immigrant groups, have used civil disobedience since then to try to stop other wars, including the Gulf War of 1991, the conflict in Afghanistan (2001), and the war in Iraq (2003).

Protesters opposed to the U.S. Army's School of the Americas at Fort Benning, near Columbus, Georgia, have used civil disobedience to try to force its closure. Numerous activists have spent months in jail for trespassing there.

Groups associated with the environmental movement, including the antinuclear movement, have used civil disobedience to protest the nuclear arms race, the nuclear power industry, and nuclear test sites and laboratories. The animal rights movement has attempted to disrupt hunting or to stop the use of animals in research. Groups opposed to globalization have used civil disobedience to try to disrupt World Trade Organization meetings and to prevent other meetings that would spread "undesirable economics."

Most of the groups engaged in civil disobedience, such as ACTUP (AIDS Coalition to Unleash Power),

fall on the left end of the political spectrum. After the Supreme Court's decision in *Roe v. Wade,* 410 U.S. 113 (1973), however, numerous Christian groups, collectively called the Christian Right, turned to civil disobedience to block entrances to abortion clinics.

A new and growing form of activity is called electronic civil disobedience. Hackers and computer protesters try to disrupt government Web sites in order to protest the alleged denial of civil liberties or government spying.

A.J.L. Waskey

See also: Bray v. Alexandria Women's Health Clinic; "Civil Disobedience"; King, Martin Luther, Jr.

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"Civil Disobedience" (1849)

Ralph Waldo Emerson is said to have remarked that "no truer American existed than Thoreau," who introduced and defended a citizen's right to refuse to obey the law, an action not ordinarily taken to signify good citizenship in the young America of his time. Henry David Thoreau's (1817–1862) essay "Civil Disobedience" has become the canonical, classical American essay for the idea of civil disobedience, especially as a form of individual protest against governmental injustice. The essay, first published in 1849 and entitled "Resistance to Civil Government," began its life as a spoken address in which Thoreau defended his refusal to pay his tax bill, an act that landed him in the Concord, Massachusetts, jail for one night and thus proved to be a deed of rebellion that otherwise

Henry David Thoreau, author of the essay "Civil Disobedience." *(Library of Congress)*

may well have gone unnoticed. Prior to Thoreau's essay, for the most part, the alternative to resignation and acquiescence in obedience to the law was armed revolt or revolution. Thoreau's essay suggested another tactic, provided the conception for it, and gave it respectability.

"Civil Disobedience" takes a grim view of the state's (government's) competency as regards rightfulness and morality; "government is at best but an expedient," and "there will never be a really free and enlightened State, until the State comes to recognize the individual as a higher and independent power." The essay also takes an extremely skeptical view of the state's accomplishments, which are more a reflection of people's unthinkingly attributing qualities and achievements to it out of inordinate deference to it than an actual accounting of its beneficial activities. Thoreau wrote about government: *"[I]t* does not keep the country free. *It* does not settle the West. *It* does

not educate. The character inherent in the American people has done all that has been accomplished; and it would have done somewhat more, if the government had not sometimes got in its way." No man was just or virtuous because of the state or its law but rather because of the clarity of his conscience in choosing to obey a government worthy of his respect, or a law for reason of its moral soundness. Yet, Thoreau believed, most people don't recognize when the government robs them of their personhood by substituting its judgments for theirs, its prerogative for their freedoms, its moral (or immoral) vision closing in upon their individual freedom of conscience.

Thoreau was outraged that the government of a northern state was obligated to return slaves who had escaped from the South back to their owners, and that a part of the poll, highway, or other tax provided the revenue in support of efforts to adhere to this law, the Fugitive Slave Act of 1850. Hence, he refused to pay a tax and let himself be placed in the town jail, a location he regarded as the "true place for a just man" and "the only house in a slave-state in which a free man can abide with honor." Thoreau felt implicated in the system of slavery, rejected by the North, and argued that if the law "requires you to be the agent of injustice to another, then, I say, break the law" and do not lend yourself to the evil you condemn." But most people either looked to the state eventually to right the wrong or were themselves incapable of envisioning a course of action to address it.

The essay appeals to the honest citizen who says "I was not born to be forced. I will breathe after my own fashion." This person will cheerfully disobey an unjust law and personally set in motion the friction that is necessary to counter the machine of the state, ultimately to reawaken the sovereignty of the people so as to oppose their governing authorities who disrespect the right the law in question has wronged with the support of a present majority. In this way citizens will observe their ethical duty to make moral energy effective in the world. Apart from engaging in civil disobedience for the purpose of changing an unjust law, there are few outlets for the average citizen who wishes to protest a law or policy perceived to be unjust but that has widespread support in the relevant legislature or in the courts. Yet, as citizen, this person is a member of the sovereign body.

Thoreau's essay "Civil Disobedience" came to be a major influence on the thinking of the twentieth-century's leading nonviolent demonstrators, principally Indian nationalist leader Mahatma Gandhi (1869–1948) and American civil rights defender Martin Luther King Jr. (1929–1968), and it continues to recommend itself to readers who seek a better integration of their words and beliefs with their actions or who simply strive for moral integrity.

Gordon A. Babst

See also: Civil Disobedience; Conscientious Objectors.

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Civil Law System

The legal systems of the world are divided into two categories: civil law and common law. Most of continental Europe, Latin America, the former Soviet Union, the Middle East, and former French Africa are civil law countries. By contrast, the United States, the British Commonwealth, and most former British colonies are common law countries. Civil law and common law as two distinct legal systems should not be confused with "civil law" as a contrast to "criminal law." For that reason, some scholars prefer to refer to civil law systems as "inquisitorial" and common law systems as "adversarial."

The major difference between civil law and common law countries concerns the source of law relating to day-to-day legal affairs. In common law countries like the United States, legal authority comes from judges, who are appointed from the ranks of practicing lawyers and over time develop the law through rulings in legally specific cases known as "precedents." These holdings have the power to bind subsequent courts (*stare decisis,* pronounced *STAR-ry de-SI-sis*). Although state legislatures can, and often do, take this power away from judges by codifying limited areas of law (such as no-fault statutes to govern insurance coverage of damage caused in automobile accidents or to

guide divorce), common law legislation is often drafted to structure rather than replace judges' power to interpret the law. This is particularly the case in the core private law subjects of torts, contracts, and property.

By contrast, in civil law systems, these areas of law are the subject of extensive codes. Historically, civil law codes reflected a profound suspicion of judges. Thus, in eighteenth-century France, judges were seen as exemplars of aristocratic privilege. After the 1789 French Revolution, the National Assembly tried to restrict the power of the judges by drafting a code so clear and comprehensive that no judicial interpretation would be necessary. In practice, however, that clarity proved impossible, and during the twentieth century, in particular, civil law countries had to come to terms with the inevitability of some judicial interpretation of statutes. Still, the use of precedent remains extremely limited, which explains why law libraries in civil law countries are often a fraction the size of their common law counterparts.

In place of precedent, civil law countries substitute the scholarly writing of legal academics. This reflects the civil law's roots in eleventh-century Italy, where scholars rediscovered the compilation of Roman law prepared in late antiquity under the East Roman Emperor Justinian (527–565). The recovery of Justinian's *Code,* which came just as Europe was starting to emerge from the Dark Ages, provided a framework for the budding legal scholars in Bologna and other Italian cities. Eventually this framework was adopted by most European jurisdictions ("the reception of Roman law"). Most modern civil law countries now have their own modern codes, but the influence of legal academics remains paramount.

In addition to having different sources of law, civil law and common law countries also have different types of criminal procedure. Most common law countries are characterized by adversarial procedures, in which the prosecution and defense present their version of the case to the jury, which renders its verdict. The role of the judge is limited to making sure each side follows the rules of procedure and evidence. To use a familiar analogy, the common law judge is like an umpire.

By contrast, the civil law judge is the master of the proceedings. For example, in Germany, the judge decides what evidence the court will hear and usually handles the questioning of the witnesses, including the accused. The judge then retires (either with or without lay jurors) to render a verdict, which must explain, in writing, the decision reached by the judge and jurors. The roles of the prosecution and defense are limited to suggesting evidence for the judge to look at and making brief closing speeches. The judge's reasoned defense of the verdict—which stands in contrast to the common law jury's yes-or-no verdict—enables civil law jurisdictions to dispense with some of the more formalistic rules of evidence most common law systems find necessary.

The United States is predominantly a common law country. Nevertheless, the civil law has had an impact. First, Louisiana, Puerto Rico, and Guam are civil law jurisdictions, in which private law subjects are codified. Second, the inquisitorial procedures of civil law are held out by some critics of the common law justice system as a model for legal reform. On the one hand, critics see the relative absence of evidentiary rules in civil law jurisdictions as an antidote to the "battle of experts" that makes U.S. trials so long and complex. In addition, civil law criminal procedure is praised for viewing the law as a search for the truth rather than a contest between the prosecution and defense. Ironically, this comes at a time when civil law jurisdictions criticize their own inquisitorial systems for placing too much power in the hands of trial judges. Acting on these criticisms, Italy adopted a more adversarial set of criminal procedure rules in 1988.

The rise of multinational organizations (such as the European Union and the International Criminal Court) that join civil law and common law states together will place increasing attention on the compatibility of the two legal systems. While civil law and common law differ in some doctrinal matters, these are minor. Nor should the different approaches to precedent pose problems, since most international law is statutory. The bigger obstacle concerns criminal procedure. Any international tribunal will have to choose between inquisitorial and adversarial procedures. This could pose difficulties because both civil law and common law societies associate their procedures with legal fairness. Compromises will have to be worked out on a case-by-case basis.

There has been vigorous debate over which system

does better at protecting civil liberties. On the one hand, inquisitorial procedure emphasizes the search for the truth, a search conducted by the judge, a civil servant who is (theoretically) neutral and stands between prosecutor and accused. By contrast, adversarial procedure stresses fairness. The accused has the same powers as the prosecution—including the power to present evidence and question witnesses. Critics of the common law note that these powers come into play only when the accused is adequately represented by counsel, a situation that does not always exist. Furthermore, the growth of plea bargaining has made many of the legal protections of the adversarial system irrelevant.

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See also: Adversarial Versus Inquisitorial Legal Systems; Common Law.

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Civil Liberties

The term "civil liberties" describes both those areas of life in which individuals have the right to be free from governmental interference and the right of the people to be treated equally by the government.

The American approach to civil liberties is tied to the belief that government is created and empowered by the people. "The God who gave us life gave us liberty at the same time," Thomas Jefferson wrote, meaning that all human beings are endowed with liberty at the moment of their creation. God did not create governments, however. These are created by the people of a nation to provide them with physical safety and whatever other benefits they may from time to time consider necessary, including protection of their inherent rights and liberties. Government, fashioned by the people, can legitimately exercise only those powers that the people choose to give it. The First Amendment to the U.S. Constitution, for example, states that Congress cannot interfere with the people's liberties of religion, speech, and press. The Fourth Amendment prohibits the government from carrying out unreasonable searches and seizures; the Fifth, from holding people in double jeopardy; the Sixth, from punishing an accused person without a fair and public trial.

Although civil liberties restrict the government, they also limit the majority, in whose name the government acts. In effect, the Bill of Rights (the first ten amendments to the Constitution) defines democracy as majority rule with protection of the rights and liberties of the individual from both the government and the majority. Under the Constitution, neither the government nor the majority can, for example, punish the speech of people who advocate unpopular ideas, the U.S. Supreme Court held in *Brandenburg v. Ohio,* 395 U.S. 444 (1969). Nor can believers such as Jehovah's Witnesses be barred from the peaceful proselytizing that is an article of their faith, the Court ruled in *Cantwell v. Connecticut,* 310 U.S. 296 (1940); and government cannot imprison a person who is not represented by a lawyer, an issue present in *Gideon v. Wainwright,* 372 U.S. 335 (1963), and *Argersinger v. Hamlin,* 407 U.S. 25 (1972).

Civil liberties are dynamic rather than static entities. Their boundaries change as society does, whether because of evolving views or technological innovations. The term "speech" as it is used in the First Amendment, adopted in 1791, for example, did not refer to messages sent across the Internet, but the U.S. Supreme Court held in *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997), that the speech right applied there. Although the Fourth Amendment's guarantee against unreasonable searches and seizures did not originally envision electronic eavesdropping or thermal-imaging devices, the Court ruled in *Berger v. New York,* 388 U.S. 41 (1967), that the physical intrusion required to plant an eavesdropping device violated the Fourth Amendment. Similarly, it decided in *Kyllo v. United States,* 533 U.S. 27 (2001), that when Oregon police acted without a warrant and used a thermal-imaging device to ascertain whether marijuana was being grown inside a house, they engaged in an unconstitutional search.

The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, enacted after the Civil War, made the right to equal treatment by government a key element of civil liberties. The federal courts gradually applied the right to various areas where the federal or state governments had discriminated among citizens, such as race, as in *Brown v. Board of Education,* 347 U.S. 483 (1954), and gender, as in *Reed v. Reed,* 404 U.S. 71 (1971).

Perhaps the most contentious claims have been those about civil liberties not expressly mentioned in the Constitution. The word "privacy" does not appear there, for example, which is one reason the Supreme Court could state in *Olmstead v. United States,* 277 U.S. 438 (1927), that wiretapping did not violate a constitutional privacy right. Ideas had changed by the 1950s, however, when the Court held in *Griswold v. Connecticut,* 381 U.S. 479 (1965), both that the right to privacy was implicit in the Constitution and that anticontraception laws violated marital privacy. The Court then effectively overruled *Olmstead* in *Katz v. United States,* 389 U.S. 347 (1967).

The *Griswold* case became the basis for the Court's declaration in *Roe v. Wade,* 410 U.S. 113 (1973), that the right to privacy encompasses abortion, and for subsequent rulings extending the right of privacy to decisions by terminally ill people or their legal guardians to end their lives, as held in *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261 (1990); and applying the right to the private sexual behavior of gays and lesbians, as held in *Lawrence v. Texas,* 539 U.S. 558 (2003).

During the first century and a half of the nation's existence, the federal government was relatively small and uninvolved in issues that would have presented a threat to civil liberties. As a result, the definition of liberties was left in large measure to state governments. Because the Bill of Rights said only that Congress could not abridge rights, the federal government was assumed to have no role in safeguarding the people from civil liberties encroachments by the states, which were left free to violate civil liberties unless their own constitutions or statutes prohibited them from doing so. In 1925, however, the Supreme Court ruled in *Gitlow v. New York,* 268 U.S. 652 (1925), that the First Amendment guarantees of speech and press were binding on the states, and the federal judiciary began to assume the function of ensuring that the states did not violate civil liberties. The other parts of the Bill of Rights were gradually held to be binding on the states as well as the national government—for example, the First Amendment protections of speech and religion in *Cantwell v. Connecticut,* 310 U.S. 296 (1940); the exclusionary rule (tied to the Fourth Amendment) in *Mapp v. Ohio,* 367 U.S. 643 (1961); the Fifth Amendment protection against self-incrimination in *Malloy v. Hogan,* 378 U.S. 1 (1964); and the Sixth Amendment right to a jury trial in *Duncan v. Louisiana,* 392 U.S. 145 (1968).

Today, therefore, the liberties guaranteed by the First through Tenth Amendments, the Thirteenth through Fifteenth, the Nineteenth, Twenty-fourth, and Twenty-sixth are binding upon all levels of government in the United States. There is continuing disagreement about how those liberties are to be interpreted in specific situations, but the nation continues to adhere to the founding fathers' revolutionary idea that a democratic government must not transcend the boundaries the people delineate or impinge upon the civil liberties they cherish.

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See also: Bill of Rights; Fourteenth Amendment; Incorporation Doctrine.

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Civil Rights Cases (1883)

Civil Rights Cases, 109 U.S. 3 (1883), was the nonstandard caption the U.S. Supreme Court gave to several cases that it consolidated for decision. In this famous ruling, the Court held that the Civil Rights Act of 1875, enacted by Congress specifically to enforce the Thirteenth and Fourteenth Amendments, was itself unconstitutional, and that it was beyond the power of Congress to forbid private discrimination

against African Americans. The end of the Civil War and the abolition of slavery legally freed the slaves but did not end the disparate treatment of whites and blacks in the United States. The Thirteenth Amendment (1865) abolished slavery. The Fourteenth Amendment (1868) extended the Bill of Rights (the first ten amendments to the Constitution) to all citizens of the United States and forbade the making or enforcing of laws that abridged these rights. It granted to Congress the power to enforce the amendment by appropriate legislation.

In an effort to secure to African Americans their full rights as citizens of the United States, the U.S. Congress passed a series of civil rights acts, culminating in the Civil Rights Act of 1875. The act was grounded on the recently ratified Thirteenth and Fourteen Amendments. Among other items, it provided for fines and the prosecution of persons who violated the law and the civil liberties of others on the basis of race or color.

The *Civil Rights Cases* stemmed from a variety of violations of the act in widely separated parts of the nation. Two of the defendants were indicted for denying lodging accommodations to persons of color in Missouri and Kansas, another for refusing to seat an African American in the dress circle of Maguire's theater in San Francisco. Another was indicted for denial of accommodations at the Grand Opera House in New York. In Tennessee, the Memphis and Charleston Railroad Company refused to allow a woman of African descent to ride in the ladies' car. All these cases were consolidated by the Supreme Court as the *Civil Rights Cases* and were decided simultaneously.

In a major setback for civil rights, Justice Joseph P. Bradley, writing for the Court, concluded that the legislation was unconstitutional. Giving the Fourteenth Amendment a very literal and narrow reading, the Court held the amendment applied only to "state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment." Private persons were free to discriminate. The Court also concluded that private discrimination was not a "badge of slavery," and thus Congress lacked the power to prohibit it under the Thirteenth Amendment

The *Civil Rights Cases* helped encourage the hardening of racial attitudes. So called Jim Crow laws (named after an African American character in a minstrel act) were enacted, and African Americans were systematically excluded from enjoying the privileges of white Americans. State laws across the nation mandated racial separation in schools, parks, playgrounds, restaurants, hotels, public transportation, theaters, restrooms, and countless other places. African Americans were frightened into accepting these conditions by threats of violence, beatings, and lynchings, and U.S. courts gradually sustained these laws. It would be almost a century before the rights of African Americans originally intended by the Civil Rights Act of 1875 again would be enacted by the Civil Rights Acts of 1964 and 1968.

James V. Cornehls

See also: Fourteenth Amendment; *Slaughterhouse Cases*.

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Civil War and Civil Liberties

The Civil War (1861–1865) provided the most severe test of civil liberties in U.S. history by challenging, and ultimately abolishing, the institution of slavery and by spawning a host of postwar civil rights laws and jurisprudence. The Civil War actually began as a struggle to preserve the Union. Abraham Lincoln, though personally opposed to slavery, was politically opposed primarily to the extension of slavery to other states. His major concern was the preservation of the Union. In a famous letter to Horace Greeley, editor of the *New York Tribune,* in 1862, Lincoln wrote, "My paramount objective in this struggle is to save the Union, and is not either to save or destroy slavery." His vision was of America as the great bastion of democracy for the world, and he believed that promise would be destroyed by dividing the nation.

Lincoln's election in 1860 was highly divisive. By

the time he was inaugurated in March 1861, seven southern states already had seceded from the Union to form the Confederate States of America. In his inaugural address, President Lincoln warned that federal properties (forts, custom houses, and so on) located in the seceding states would continue to be occupied by the United States. The war officially began in April 1861 following the Confederate attack on Fort Sumter, one of those properties off the coast of South Carolina.

Once the war began, Lincoln exercised extensive powers on his own authority before Congress came into session. He was widely criticized for suspending the writ of habeas corpus (forcing authorities to specify grounds for incarceration) in areas where Confederate sentiment was strong, and in *Ex parte Milligan,* 71 U.S. 2 (1866), the Supreme Court eventually invalidated the conviction of a civilian who had been tried for aiding the enemy by a military court.

The Emancipation Proclamation freeing the slaves was not issued until January 1, 1863, nearly two years after the war began. The war itself helped turn the tide against slavery among many who were previously indifferent. The issue of slavery also was a delicate one with a number of foreign nations, who thought slavery was evil.

By the time the war ended with General Robert E. Lee's surrender at Appomattox, Virginia, on April 9, 1865, the point of the Civil War was to put an end to slavery and to secure the civil liberties of the newly freed men and women. The conflict ultimately laid the groundwork for a veritable explosion of civil liberties that went far beyond ending slavery, though for African Americans these would be extraordinarily slow in being realized. The war also ended once and for all the question of any state's claimed right to secede from the Union.

During the postwar Reconstruction period, Congress quickly proposed and in 1865 the necessary number of states ratified the Thirteenth Amendment prohibiting slavery. It was followed in 1868 by the Fourteenth Amendment, which made the former slaves U.S. citizens and extended to them the equal protection of the laws. In 1870, by the Fifteenth Amendment, states were prohibited from denying the right to vote to any man because of his race. There also followed a series of civil rights statutes, culminating in the Civil Rights Act of 1875, which purported to prohibit discrimination against African Americans by private citizens in the provision of hotel accommodations, public entertainment, and the like.

Nevertheless, it became increasingly clear that although the former slaves were legally free, the states, private individuals, and the courts would not permit them to exercise the same rights and privileges enjoyed by white Americans. Their civil liberties were those of second-class citizens. The states, especially in the South, began the systematic enforcement of segregation of the races by the enactment of "Jim Crow" laws (named after an African American character in a minstrel act). Many of the northern states, which had no slaves before the war, had practiced segregation for decades, especially by maintaining racially segregated schools. Segregation increasingly became the law of the nation, despite congressional intent to provide equal access to all citizens.

The Supreme Court further contributed to the ineffectiveness of the Fourteenth Amendment and other civil rights legislation intended to end racial discrimination. First, in the *Slaughterhouse Cases,* 83 U.S. 36 (1873), the Court interpreted the Privileges or Immunities Clause of the Fourteenth Amendment in such a restrictive manner as to make it almost completely ineffective in the protection of the rights of the freed men and women.

Subsequently, in the *Civil Rights Cases,* 109 U.S. 3 (1883), the Court declared unconstitutional the Civil Rights Act of 1875, which provided for fines and even imprisonment for those who denied access to hotels, theaters, public transportation, and other public facilities to others on the basis of race or color. In another narrow interpretation, the Court found that the Thirteenth and Fourteenth Amendments did not apply to the actions of private persons who practiced discrimination in the provision of such facilities and services. This decision also had a major impact on lower-courts' interpretation of the Civil Rights Act of 1871, a statute passed in the wake of the war and the Fourteenth Amendment.

That legislation, also known as the Ku Klux Klan Act, was destined to become very important. It too was intended to protect the civil rights of African Americans through the Fourteenth Amendment. However, it was also destined to remain dormant until

The Civil War ended with General Robert E. Lee's surrender at Appomattox, Virginia, on April 9, 1865. Intended to end slavery and secure the civil liberties of newly freed blacks, the war ultimately laid the groundwork for an explosion of freedoms that went far beyond the termination of slavery. *(Library of Congress)*

the 1960s, largely because of the belief that the *Civil Rights Cases* decision of 1883 had rendered it unconstitutional as applied to any action not undertaken by a state.

One of the great ironies of the Fourteenth Amendment is that it was interpreted by the Supreme Court as placing limits on state action primarily with respect to property and private economic interests. It became the civil liberties beacon for business long before it was made effective for its originally intended beneficiaries, black Americans.

Reconstruction ran its course; Americans began to lose interest in the cause of civil liberties for African Americans and other minorities; political compromise coincident with the 1876 election diminished congressional concern; and civil liberties were dealt yet another crippling blow by the Court in *Plessy v. Ferguson,* 163 U.S. 537 (1896), which provided the legal justification for the "separate but equal" concept. The civil liberties of African Americans began a dismal spiral downward, as Jim Crow laws proliferated throughout the early twentieth century and racial discrimination hardened markedly. African Americans were disenfranchised, barred from attending white schools, refused service in public establishments, and forced to use separate restrooms and to drink from separate public water fountains. Moreover, white racists treated them with calculated indignity, hatred, and violence. The dark cloud that hung over African American citizens in the United States for almost a century after the Civil War would not begin to lift until the 1950s and the civil rights movement of the

1960s. In *Brown v. Board of Education,* 347 U.S. 483 (1954), the Court finally overruled *Plessy v. Ferguson* in finding segregation in schools unconstitutional. The Civil Rights Acts of 1964 and 1968 restored the promises of the Civil Rights Acts of 1870 and 1875, and the Voting Rights Act of 1965 extended the franchise to African Americans.

James V. Cornehls

See also: Civil Rights Cases; Fourteenth Amendment; Lincoln, Abraham; *Slaughterhouse Cases.*

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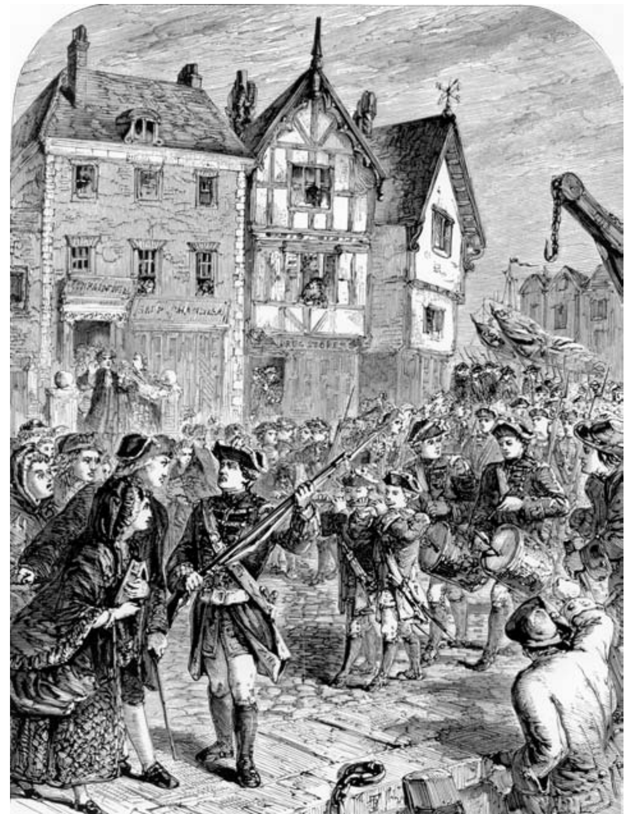
Civilian Control of the Military

Civilian control of the military refers to the practice of vesting ultimate authority over the military forces in a country in civilian, or nonmilitary, control. Such civilians head the government, control the heads of the armed services, and provide oversight over military management. The civilians are, in turn, accountable to the people through elections and through the ability of the people to seek redress of constitutional violations in the courts. This principle is primarily embodied in the provisions of the U.S. Constitution that vest Congress with the power to declare war and that make the president the commander-in-chief of the armed forces. Civilian control of the military is a prerequisite for a democracy and is critical to the protection and maintenance of civil liberties in the United States. In many other nations, sometimes even where civilians are officially vested with power, military officials have toppled regimes in coups and have ignored human rights.

The tradition of civilian control of the military in the United States dates back to George Washington's willingness, as commander-in-chief of the Continental forces that opposed the British, to accept orders from Congress (as weak and unable to provide resources as it often proved to be). Washington refused to use or approve of military force to get what he thought members of the military were due to receive from Congress, and he renounced military power when the war was over. Washington was often likened to the Roman general Cincinnatus, who left his fields to take up arms in defense of his nation and then returned to his farm after the crisis ended.

Prior to independence, the Boston Massacre (1770) created an important impression on the colonies regarding the necessity of civilian control over the military. In this violent event, British troops in Boston fired on a crowd that was harassing them. In addition, the colonial population was especially outraged at the



British troops entering Boston to enforce taxation and other colonial legislation. A common complaint during the establishment of the United States was based not only on the presence of British military members in the towns and fields of the colonies but also on their being forcibly lodged in the homes of the people. *(© North Wind Picture Archives)*

quartering of British troops in their private homes. This concern was expressed in the Declaration of Independence and subsequently addressed by the Constitution's Third Amendment (part of the Bill of Rights), which prohibited such billeting of troops in times of peace without an owner's consent and in times of war except "in a manner to be prescribed by law."

Many Americans, especially those who were influenced by the "republican" political tradition, were so concerned about military influences that they hoped to avoid a standing army altogether. The hope that private individuals might come to the military aid of their country, much as the "minutemen" had done in the Revolutionary War, was one impetus for the right to bear arms that is specified in the Second Amendment. The idea of relying completely on nonprofessional volunteers did not ultimately prove feasible. Many Federalist proponents of the new Constitution argued that a small standing army might preserve civil liberties by deterring foreign aggression, and the Constitution did not prohibit such an institution. Still, the Constitution limited the length of military appropriations and subjected members of the military to civilian control. Citizens and elected officials have continued to guard against granting excessive powers to the military. President Dwight D. Eisenhower, himself a former commander of the Allied forces in Europe during World War II, later warned about the dangers of a "military-industrial complex."

Although times of war and crisis have never resulted in military rule within the United States (except in parts of the South during the Civil War and its aftermath), such events have often tested the boundaries between military and civilian life. During the Civil War, Abraham Lincoln exercised broad powers and suspended the writ of habeas corpus (petition for release from unlawful confinement) in the South. In *Ex parte Milligan,* 71 U.S. 2 (1866), the U.S. Supreme Court invalidated the trial and conviction of a civilian by a military court that Lincoln had authorized. In *Ex parte McCardle,* 74 U.S. 506 (1868), however, the Court allowed Congress to withdraw its appellate jurisdiction in a case involving habeas corpus appeals from a Vicksburg, Mississippi, newspaper editor convicted by a military commission of publishing libelous editorials inciting insurrection.

Although civilian authorities remained in control during World War I, World War II, and the Cold War, these conflicts often tested America's commitment to civil liberties. In *Schenck v. United States,* 249 U.S. 47 (1919), the Court upheld the conviction of an individual who had attempted to interfere with U.S. recruiting by mailing pamphlets to potential inductees, and in *Gitlow v. New York,* 268 U.S. 652 (1925), the Court subsequently upheld the Espionage Act of 1917.

In actions that many believe reflected undue executive and judicial deference to military assessments of potential danger, World War II was marked by an executive order excluding Japanese Americans from designated military zones in the American West and by their subsequent detention in camps. The U.S. Supreme Court validated the exclusion in *Korematsu v. United States,* 323 U.S. 214 (1944).

All these conflicts put pressures on the exercises of freedom of speech and association, pressures that have been renewed with recent fears over the threat of terrorism in the aftermath of attacks against New York and Washington, D.C., on September 11, 2001. As in the Civil War, this threat has also raised issues as to the authority of military courts over potential saboteurs.

The Korean War served as an example of a major confrontation between civilian and military authorities when General Douglas MacArthur attempted to pursue a more aggressive military policy on the Korean Peninsula than President Harry S Truman believed was appropriate for the political objectives being sought. After MacArthur continued publicly to criticize U.S. policies, Truman exercised his prerogative as commander-in-chief to fire MacArthur on April 11, 1951.

Combined with explicit constitutional provisions, this example and others have served to create a strong tradition of civilian control of the military in the United States. This has, in turn, provided that elected officials, who are accountable to the people, will control the wielding of the military sword.

Debate continues about the proper balance of power between Congress and the president (courts exercise almost no authority in this area) in military affairs. This concern was evident in the adoption, over President Richard Nixon's veto, of the War Powers

Act of 1973. At a time of heightened concern over how America had become involved in the Vietnam War, this congressional resolution sought to provide for greater consultation between the president and Congress, for notification of presidential commitments of troops into hostile situations, and for termination of such commitments that did not receive congressional approval after specified time periods. Significantly, however, the conflict was between the proper balance of authority that should be exercised in foreign affairs by two civilian authorities and not over whether civilian or military officials should dominate.

Kevin G. Pearce and John R. Vile

See also: Civil War and Civil Liberties; *Gitlow v. New York*; *Korematsu v. United States*; Lincoln, Abraham; *Schenck v. United States*; Second Amendment; Third Amendment.

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Clear and Present Danger

The phrase "clear and present danger" became the U.S. Supreme Court's test in 1919 for assessing whether speech could be punished or whether doing so violated the free speech rights guaranteed by the First Amendment to the Constitution. The test was first enunciated by Justice Oliver Wendell Holmes Jr.

Earlier Courts had followed the rule that speech could be punished if the expression might tend to disturb the peace or encourage a crime. In *Schenck v. United States,* 249 U.S. 47 (1919), however, Justice Holmes declared that the test instead should be whether the words were spoken "in such circumstances and are of such a nature as to create a clear and present danger" that they would result in evils that a legislature might legitimately want to prevent. The relevant "circumstance" in *Schenck,* Holmes thought, was that the nation was in the midst of World War I, and thus Charles Schenck could legitimately be punished for creating the clear and present danger of obstructing the war effort by sending new draftees a pamphlet denouncing the military draft as unconstitutional.

After the *Schenck* decision, however, Holmes rethought his approach to speech and dissented when the Court relied on it to uphold the conviction of another man who published a pamphlet criticizing the president and urging workers to strike in protest against the war. In dissenting in *Abrams v. United States,* 250 U.S. 616 (1919), Holmes argued that the societal good was best served by "free trade in ideas." Wide latitude should be given to speech unless it "imminently threaten[s] immediate interference" with the law. Holmes asserted a similar dissent in *Gitlow v. New York,* 268 U.S. 652 (1925). His new formulation substituted the word "imminent" for "present," suggesting that speech could be punished only if it incited an immediate evil.

Another modification of the doctrine was suggested by Justice Louis D. Brandeis in *Whitney v. California,* 274 U.S. 357 (1927). In that case, the Supreme Court in effect relied on the doctrine of clear and present danger when it upheld the conviction of a woman who remained in the California Communist Labor Party after the party adopted a platform advocating the use of force to change the government, even though she specifically expressed that she was against the use of such force. Brandeis believed the Court's approach to clear and present danger failed to provide sufficient protection for the blunt expression of ideas necessary in a democratic society. Concurring in *Whitney* for procedural reasons, Brandeis nonetheless suggested that speech could not be punished unless there was "reasonable ground" to fear "that serious evil

will result" and that "the danger apprehended is imminent." Advocacy of violence was not sufficient, he argued, if there was still opportunity for the kind of "full discussion" that could "avert the evil by the processes of education."

The Holmes-Brandeis view remained a minority one for several decades. When speech cases next reached the Supreme Court during the Cold War years of the 1950s, it interpreted the clear-and-present-danger test to restrict unpopular speech so severely that even advocacy of future violence was punishable. In *Dennis v. United States,* 341 U.S. 494 (1951), the Court held both that the Cold War was not the kind of "comparatively isolated event" that had confronted Holmes and Brandeis in cases such as *Abrams,* and that a clear and present danger existed if a group was indoctrinating members for possible future action.

By the late 1950s and early 1960s, however, judicial thinking had evolved, especially as Cold War fears eased somewhat and the justices recognized the central role played by speech in the civil rights movement. The Court began redefining clear and present danger, striking down restrictions on speech in cases such as *Yates v. United States,* 354 U.S. 298 (1957), and *Keyishian v. Board of Regents,* 385 U.S. 589 (1967). Finally, in 1969, when the state of Ohio attempted to punish a Ku Klux Klan leader's speech at a poorly attended rally on a remote farm, the Court formally adopted the standard enunciated by Justice Brandeis. The First Amendment does not permit a state to criminalize advocacy, it declared in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

With *Brandenburg,* the doctrine that speech cannot be punished unless it presents a substantial and imminent danger became the law of the land. "Clear and present danger" remains a catchphrase in the American vocabulary, but the country's approach to speech is much more lenient than that initially envisioned by Justice Holmes.

Philippa Strum

See also: Abrams v. United States; Brandenburg v. Ohio; Dennis v. United States; First Amendment; *Gitlow v. New York; Schenck v. United States.*

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Clemency

Pardons and amnesties are forms of clemency (official forgiveness or at least leniency by the government) that derive from Article II, Section 2 of the U.S. Constitution, which gives the president "[p]ower to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." (Analogous provisions in state constitutions confer a similar power on state governors for offenses against the state.) Legal scholars often make artificial distinctions between pardon and amnesty, but presidential exercise of the pardoning power has ignored these academic delineations, especially during the modern media age. Nonetheless, amnesties tend to deal with large groups, whereas pardons are bestowed on individuals. The fundamental issue is whether the type of clemency is intended as limited or broad, regardless of the label applied.

ORIGINS

Regardless of what the form of clemency is termed, the exercise of that executive power is typically unpopular with the public, since it shortcuts the normal judicial process. Yet that is precisely why this power was conferred upon the chief executive; it sometimes is needed under special circumstances and may provide a safety valve to dispel national tension. It is based in the classical notion of "magnanimity," or benevolence, associated with great leaders. Alexander Hamilton defended the power in *Federalist No. 74.* He understood that law is man-made, that matters are not always black and white, and that absolutes are not

always the best resolution of such matters. This concept was immortalized in the 1880s in author Herman Melville's classic novella *Billy Budd.*

Hamilton's defense of the presidential power was based on his experience with George Washington. An exemplar of classical prudence, as military commander during the American Revolution, Washington had exercised the power with restraint and called for its application to the loyalists after the colonists won the war. As president, Washington set the precedent for exercise of the only unchecked constitutional power granted to the chief executive by rarely granting clemency. Unlike its historical use by state governors, prompting numerous scandals, presidents, until perhaps quite recently, have been remarkably responsible in how they used this constitutional power. To institutionalize this power to grant "reprieves and pardons," a bureaucratic process involving the Justice Department has been developed for pardons. Amnesties are relatively uncommon but are a consistent part of the judicial policy of chief executives capable of magnanimity.

HISTORICAL PATTERNS

A consistent, if largely underrecognized, pattern can be discerned in the clemency record of presidents. America's greatest presidents as ranked by scholars—the Mount Rushmore quartet (George Washington, Thomas Jefferson, Abraham Lincoln, Theodore Roosevelt) plus Franklin D. Roosevelt—form a group of the most active and flexible chief executives. This same quintet of great presidents issued more amnesties, including individual pardons, than all the other presidents combined. In addition to George Washington's precedent, Abraham Lincoln, the Great Emancipator willing to free slaves, became even more magnanimous as the Great Reconciler of a torn nation. His "with malice toward none" philosophy personified the modern equivalent of the classical magnanimous leader. Lincoln granted the second-largest number of amnesties in American history. The policy exercised by Lincoln was virtually *sui generis* (a legal phrase loosely meaning "in a class by itself") for leadership during a civil war.

Given the media's magnification of every presidential act, dynamic, flexible chief executives in the twenty-first century may be more reluctant to withstand public criticism because of the inherent political risk involved in a magnanimous policy. From the 1970s forward, pardons became as closely scrutinized and sharply criticized as amnesties. Jimmy Carter had to present his clemency for Vietnam War resisters, which was more generous than Gerald Ford's, by calling it a "pardon" rather than an amnesty. Gerald Ford's controversial pardon of Richard Nixon may have deprived the unelected chief executive of an electoral victory. His pardon was instantly characterized as a Machiavellian act rather than as a magnanimous one. Modern political campaigns have used the pardoning-power record of candidates as the basis for negative campaign attacks. George W. Bush castigated Governor Michael Dukakis (D-MA) during the 1988 presidential campaign with advertisements focusing on his pardon of Willie Horton, who committed a vicious crime while on probation. The lesson was not lost on Bill Clinton, who waited until the waning hours of his administration to grant pardons instead of granting them annually. As a result, what would have been a fairly typical number of pardons if granted annually over his administration was portrayed as a proverbial mountain of pardons rather than a series of molehills.

Such reactions may persuade modern active presidents that they should restrain their use of clemency and act as traditional passive presidents who do not exercise their power to grant pardons and amnesties. Warren G. Harding initially favored clemency for World War I opponents but reversed his stance following heavy criticism directed at him for pardoning Eugene V. Debs, the Socialist Party leader who had been convicted under a statute prohibiting antiwar activity. Calvin Coolidge appointed the first clemency commission in U.S. history as a political shield from public criticism; he agreed to abide by the commission's recommendations.

Harding's initial leniency was a reaction triggered by southern-born Woodrow Wilson, who demonstrated an extremist streak that blocked any consideration of leniency for those who opposed his foreign policy or criticized his racist attitude. At the other end of the clemency spectrum was Andrew Jackson, who issued the highest number of amnesties in American history. Jackson acted not from magnanimity but

from political motivation designed to subvert the intentions of radical Republicans and win favor from fellow southerners.

A survey of the clemency record of presidents suggests that the founders were wise to confer such an unchecked judicial power on the executive. It allows for decency, even if in the modern media age it also poses additional political risks to chief executives and those who would benefit from clemency.

William D. Pederson

See also: United States Constitution.

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Clinton v. Jones (1997)

In *Clinton v. Jones,* 520 U.S. 731 (1997), the U.S. Supreme Court addressed the issue of whether a president had any immunity for his nonofficial acts. The case began when Paula Corbin Jones brought a civil damages case against President William Jefferson Clinton claiming that while he was governor of Arkansas and she was an Arkansas state employee, he made crude sexual advances that she rejected.

Justice John Paul Stevens, writing for a unanimous Court, rejected the president's claim of temporary immunity from the civil suit. First, he rejected the president's argument, based on precedent, that the Supreme Court had granted public officials immunity from civil litigation in order to enable them to perform their public duties without fear that their decisions would give rise to personal liability. In *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), the Court applied this rationale to hold that a president was entitled to absolute immunity from civil damages only for his official acts, but it did not suggest that immunity extended to his unofficial conduct.

Justice Stevens then turned to the president's argument for a postponement of the litigation based on the Article II character of his office and separation-of-powers principles. Separation of powers was not involved, Stevens said, because the judiciary was not being asked to perform an executive function but to exercise its Article III powers that govern the judiciary. Nor did separation of powers forbid the burdens that judicial review would impose on the president, because "the burden on the President's time and energy . . . cannot be considered as onerous as the direct burden of judicial review and the occasional invalidation of his official actions." By contrast, Stevens feared that delay could prejudice Jones's interest in a timely trial and in the preservation of evidence.

Justice Stephen G. Breyer, concurring, argued that the Court had unwisely dismissed *Nixon v. Fitzgerald* as dictum (nonbinding analysis) and thereby minimized the potential impact civil litigation could have on the president's time and energy. The Court had also undervalued separation of powers by relying on a district court to make the accommodations necessary to avoid disrupting the president's performance of his duties, including a stay of litigation. To give greater recognition to separation of powers, Justice Breyer argued that Article II contained a requirement forbidding judicial interference with the president's discharge of his public duties, and that once a president had explained the nature of the conflict and the burden it would impose, the district-court judge would be permitted to schedule a trial to avoid the conflict.

In sum, the Court in *Clinton v. Jones* denied the president the right to temporary immunity that would permit him to delay a trial for civil damages until after he left office. President Clinton's case, however, never went to trial but was dismissed and settled out of court. Along with a grand jury inquiry into his sexual relationship with Monica Lewinsky, a White House intern, however, the case did lead to an impeachment inquiry. The House of Representatives approved two articles of impeachment, one for perjury before the federal grand jury and the other for obstruction of

justice, but the Senate failed to convict Clinton on either one.

William Crawford Green

See also: President and Civil Liberties; Sexual Harassment.

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Cloning Human Beings

Cloning is an asexual reproduction technique that has been successfully used to reproduce genetically identical plants and nonhuman animals such as the late, famous sheep Dolly, cloned in 1997. The prospect of research into the development and application of cloning techniques to human beings has raised both hopes and fears and multiple issues pertaining to civil liberties, rights of privacy, and definitions of personhood. Some political leaders, including Presidents William J. Clinton and George W. Bush, have called for either a moratorium or an outright ban on human cloning. On the other side, researchers, patients, and family members of patients with currently incurable diseases or injuries hope that the application of cloning techniques for the purpose of extracting embryonic stem cells—undifferentiated cells that can potentially become any type of cell in the human body—will lead to cures. They argue that a distinction needs to be made between "therapeutic cloning" and "reproductive cloning." Therapeutic cloning is done in order to extract stem cells of a known genetic origin and does not result in the birth of any cloned individual. Reproductive cloning is designed to bring about the birth of a baby.

Opponents of both forms of cloning sometimes contend that cloning is wrong because it is an act of hubris, and that humans should not "play God." Proponents of cloning respond that it is difficult to say why this particular form of medical intervention is objectionable on these grounds, whereas other commonly accepted medical interventions, such as organ transplants and fertility treatments, are not. If the argument against hubris is accepted to ban cloning, then that completes the task of deciding on a reasonable position on the issue of human cloning. If, on the other hand, it is too difficult to provide a principled distinction between those medical interventions that are instances of overweening pride and those that are not, then it becomes necessary to consider whether there are other reasons to ban human cloning of either type.

There is widespread agreement that at least a temporary ban on human reproductive cloning is justified until more research shows it to be safe and reliable for individuals who would thus be brought into existence—some animals that have been cloned appear to have health problems as a result of the way they were created. Some proponents of a permanent ban on even safe cloning argue that reproductive cloning would be an affront to the sacredness of the sexual union of a loving couple as the cause of human reproduction.

Other opponents point to the potential for a strain on family relations when the child is actually the genetic twin of one of the parents, and the parents attempt to seek fulfillment of their own dreams through such a child. Some also see a threat to the value of individuality and uniqueness, a step on a slippery slope that could lead to treating human beings as commercial products rather than as moral agents with individual rights. In response, some contend that arguments for the sacredness of the union are based on a particular religious perspective that would be inappropriate for governments to consider, or that other concerns, such as those of possible resulting social problems or mistreatment, are highly speculative. Here, the question is whether such concerns are so well supported as to trump the value of reserving a private sphere in which the individual is free of interference from others. If so, then a permanent ban on reproductive cloning is justified. If not, then at most a temporary ban is justified.

Regardless of how the question of reproductive cloning is resolved, the issue of therapeutic cloning remains. Proponents of a permanent ban on such therapeutic cloning often contend that even in cloning an early pre-implantation embryo, a researcher brings into existence something that, under the right con-

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ditions, would develop into what is indisputably an individual human being, with rights that deserve to be protected. That is, if the very early, pre-implantation embryo were nurtured properly and successfully implanted in a woman's uterus and successfully carried to term and delivered, the result would be a human baby. Working backward from this result of a gradual process of development to its beginning means that the only principled place to draw the line prior to which the resulting human being did not yet exist is the time at which the researcher first cloned the early-stage embryo. On this reasoning, whether or not the researcher ever intended to bring someone into existence is irrelevant. Once the researcher has successfully cloned a very early human embryo, the researcher has brought a human being into existence and is from that point forward obligated to try to keep him or her alive. Extracting stem cells for research or therapy results in the death of that human being and cannot be justified, no matter how many other lives might be potentially saved or how much suffering alleviated through that means.

The crucial premise of this argument in favor of banning therapeutic cloning, identical to that expressed by those opposed to abortion, is expressed by saying "Life begins at conception." Clearly, a living sperm and a living ovum are required for conception to occur; but, just as obviously, neither that sperm alone nor that ovum alone is already the resulting individual. Before their fusion, each of these gametes is the potential origin of many different individual people, or none at all, depending on whether it ever fuses with another gamete and, if so, with which one, of many. The parallel claim applied to cloning is that life

begins at the moment of cloning, meaning that the life of a unique individual human begins then.

One response to this line of reasoning, based on a particular view of embryonic development, is to argue that even after the moment of conception or of cloning, the identity of a particular individual human being is not immediately determined. Thus, during the first fourteen days of cell divisions within the early pre-implantation embryo, each component cell is an undifferentiated, pluripotent cell, that is, capable of producing, through further divisions, any of the many different kinds of cells that make up the human body, but not yet itself any one of those kinds. In fact, some of those cells will become part of the placenta rather than of the developing embryo itself. Because of this lack of differentiation during the first fourteen days, it is possible for a pre-implantation embryo to split, resulting in two embryos. Although the original early embryo had to exist in order for either resulting twin to come into existence, neither could trace his or her identity as an individual any further back than the split. Furthermore, as sometimes happens naturally in multiple births, additional splits can occur, so two become three, four, five, or more. In principle, any pre-implantation embryo could be split artificially using a process called "blastomere separation" that is one form of cloning.

However, fourteen days after the first cell divisions that begin soon after conception or cloning, the new resulting cells are irreversibly differentiated. From that point on, the parts of the early embryo can no longer become separated and still produce separate, viable embryos. Accordingly, this point, rather than the moment of fertilization or cloning, might be identified as the place where a unique individual human being comes into existence. Therapeutic cloning would involve the destruction of a very early embryo. However, since the purpose is to extract stem cells, it would be done prior to the period of cell differentiation, and so would not involve bringing someone into existence and then killing that being. By this reasoning, an embryo during the first fourteen days of cell division can more reasonably be compared to contraception, in that it prevents one or more potential people from coming into existence but does not kill any unique individual who already exists.

Does this analysis successfully refute the view that therapeutic cloning violates the cloned embryo's right to life? A fair answer will depend both on the relevant empirical evidence about embryonic development and the conceptual issues of what constitutes the existence of a unique individual. In the meantime, medical science continues to advance, highlighting ethical concerns over both therapeutic and reproductive cloning.

Jack Call

See also: Roe v. Wade.

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Cohen v. California (1971)

In *Cohen v. California*, 403 U.S. 15 (1971), the U.S. Supreme Court significantly expanded the limits of offensive speech as an extension of the protection for expression provided by the First Amendment to the U.S. Constitution.

Paul Cohen was arrested for displaying the message "Fuck the Draft" on the back of his jacket in the corridor outside the municipal court in the Los Angeles County Courthouse. Cohen was convicted of violating a disturbing-the-peace statute that made "maliciously and willfully disturbing the peace or quiet of any neighborhood or person by offensive conduct" a crime. At trial, Cohen testified that the purpose of the message on his jacket was to state publicly his opposition to the military draft during the Vietnam War. Although no evidence was presented that he engaged in any violence or that anyone was pro-

voked to violence as a result of his message, he received a thirty-day jail sentence.

Upon appeal, the California Supreme Court defined "offensive conduct" as "behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace." The court held that "it was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forcibly remove his jacket," relying on the "fighting words" doctrine from the Court's 1942 decision in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), in upholding Cohen's conviction and fine.

Cohen appealed the California ruling to the U.S. Supreme Court. In an opinion written by Justice John M. Harlan, the Court based its decision primarily on the First Amendment guarantee of free speech. In *Chaplinsky,* the Court had upheld a ban on speech in a narrow set of circumstances that might cause a violent reaction by listeners. The case involved a Jehovah Witness who had called a city marshal a "god damned racketeer and a god damned fascist." Although *Chaplinsky* has never been officially overruled, the case has not been cited as precedent in a majority opinion since 1942, and the majority in *Cohen* refused to apply the fighting-words doctrine to the particular four-letter word on Cohen's jacket.

The Court rejected the rationale that Cohen's conduct could be repressed, stating that "while the particular four-letter word being litigated . . . is perhaps more distasteful than most of its genre, it is nevertheless often true that one man's vulgarity is another man's lyric." The opinion concluded with the directive "the State may not, consistent with the First Amendment, make the simple public display here involved of this single four-letter expletive a criminal offense." Interestingly, the obscenity issue was not considered, since Cohen was never charged with violating any obscenity statute, and the message he conveyed was not considered to be erotic.

Justices Harry A. Blackmun and Hugo L. Black and Chief Justice Warren E. Burger dissented in *Cohen*, arguing that the defendant's conduct constituted fighting words that could be repressed under *Chaplinsky*. They maintained Cohen's act was an "absurd and immature antic," and that since it constituted action rather than speech, the First Amendment did not protect it.

Supporters of the controversial *Cohen* decision maintained the case championed the principle that the definition of what constituted offensive speech was enlarged and therefore an individual's right to freedom of speech clearly triumphed. Critics of *Cohen,* however, argued that the decision denied state legislatures and judges the right to reflect the will of the people in determining that actions such as Cohen's were unacceptable rather than protected free speech. They also argued the decision denied the basic ability of legislators and judges to make reasonable, commonsense judgments—namely, that wearing the phrase "Fuck the Draft" on a jacket in courthouse corridor was unacceptable behavior rather than protected speech.

The impact of *Cohen* as precedent was readily seen in 1972 in four related cases in which the Court vacated state-court judgments restricting the use of offensive speech. Specifically, the phrases "white son of a bitch, I'll kill you," *Gooding v. Wilson,* 405 U.S. 518 (1972), and "god damn mother fuckers," *Lewis v. Orleans,* 415 U.S. 130 (1974), were leveled against arresting police officers. Also, "mother fuckers," *Rosenfeld v. New Jersey,* 408 U.S. 901 (1972), was shouted at school board members and teachers at a public board meeting. And finally, "mother fucking pigs, and mother fucking fascists," *Brown v. Oklahoma,* 408 U.S. 914 (1972), were statements made by individuals referring to policemen at a meeting in a university chapel. Chief Justice Burger and Justices Blackmun and Rehnquist also dissented in these cases.

In retrospect, however, *Cohen* was an early volley fired in what later came to be called the "culture wars"—the fault lines in U.S. culture and politics that denote divisions about what society believes are its core moral values and the degree to which the courts and the legislatures should determine the limits of social and political behavior. These fault lines, of course, are evident not only in free speech questions but also in issues relating to the very definition of obscenity as seen in movies and books and on television and the Internet. Finally, these fault lines also apply to the

limits of conduct in highly controversial matters such as abortion- and gay-rights conflicts.

Warren R. Wade

See also: Fighting Words; Obscenity.

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Colegrove v. Green (1946)

In *Colegrove v. Green,* 328 U.S. 549 (1946), the U.S. Supreme Court refused to decide whether legislative malapportionment violated the Constitution, on the grounds that this issue presented a "political question," which the Court has historically declined to address. In the *Colegrove* case, residents of Illinois brought suit claiming that because the electoral districts in the state had vastly unequal populations, the apportionment violated the principle that every person's vote should count as much as the next person's. Due to population shifts over time, the largest district in Illinois had a population of 914,053; the smallest district had a population of 112,116. This disparity in the population of congressional districts is referred to as "legislative malapportionment." Other states, including Ohio, Maryland, Texas, and Florida, also had significant disparities in the population of their districts. In general, legislative malapportionment favored the rural areas at the expense of the fast-growing suburban and urban centers.

The Illinois residents argued that because they lived in a heavily populated district, their vote was much less effective than the vote of those living in a less populated district. Residents of the heavily populated districts were allowed to choose only one representative for Congress even though their population was nine times the population of the least populated districts. In practice, this meant that urban areas were underrepresented and were therefore less able to protect their policy interests. The Illinois residents argued that this inequality in the voting power of citizens violated the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution.

In a closely divided opinion (four–three), the Supreme Court held that legislative malapportionment was a "political question" and therefore should not be decided by the courts. In what has now become a famous phrase, Justice Felix Frankfurter stated that courts should not enter "the political thicket." The Court held that it would be harmful for democracy to involve the judiciary in the politics of the people. In addition, the Court held that there was no federal requirement that congressional districts contain an equal number of inhabitants. The dissenting justices argued, however, that legislative malapportionment constituted a form of discrimination against the residents of the heavily populated districts because their votes were less effective than the votes of those living in less populated districts. The dissenting justices claimed that the Equal Protection Clause of the Fourteenth Amendment forbade discrimination of this kind.

In 1962, the Supreme Court overturned its holding in *Colegrove v. Green*. In a landmark decision, *Baker v. Carr,* 369 U.S. 186 (1962), the Court held that legislative malapportionment was a legitimate subject for judicial review. The *Baker* decision triggered the famous "reapportionment revolution," as a result of which electoral districts across the country were divided along the "one-person, one-vote" principle announced by the Court in *Reynolds v. Sims,* 377 U.S. 533 (1964).

Yasmin A. Dawood

See also: Baker v. Carr; Political-Question Doctrine.

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Colorado Republican Federal Campaign Committee v. Federal Election Commission (1996)

Complex First Amendment issues arise in the context of election campaigns and legislative efforts to regulate campaign money—and therefore speech—in an attempt to maintain the integrity and fairness of the political system. Efforts to restrict speech and assembly collide with constitutional protections, and the outcome under any particular set of facts is difficult to predict.

In *Colorado Republican Federal Campaign Committee v. Federal Election Commission,* 518 U.S. 604 (1996), the U.S. Supreme Court found unconstitutional an element of the Federal Election Campaign Act (FECA) of 1971 that restricted expenditures by political parties during the general election campaign of congressional candidates. In 1986, the Colorado Republican Party paid for radio ads attacking the presumptive Democratic nominee in the upcoming senatorial election. Because the amount spent exceeded the dollar limit allowable under the provision, the Federal Election Commission (FEC) and the Democratic Party successfully charged the Colorado Republicans with violating the FECA.

In a ruling invalidating the provision, Justice Stephen G. Breyer, writing the plurality opinion for the Court, reasoned that political parties should be free to make unlimited independent expenditures just as would any ordinary political committee, individual, or candidate. Rejecting the government's claim that "independent" party *expenditures* were the functional equivalent of *contributions*—in that there exists an inherent and unavoidable "coordination" between a party and its candidate—the Court found no evidence to suggest that such expenditures were any more problematic than those afforded constitutional sanction by *Buckley v. Valeo,* 424 U.S. 1 (1976), and its progeny. Of significance, however, is that the plurality declined to reach the question of whether expenditures that were not truly "independent"—those that *were* explicitly "coordinated" between parties and candidates, in other words—would be deserving of similar constitutional protection.

Concurring in the result, though dissenting in part, Justices Anthony M. Kennedy and Clarence Thomas, writing separately, criticized the plurality opinion for failing to invalidate the limits as facially unconstitutional restrictions on the party's First Amendment rights—no matter the form of the expenditure. The state's emphasis on the potential for a corrupt relationship between the organizations making the expenditures and the individuals benefiting from them—following the logic sustaining contribution limits in *Buckley*—was misplaced for the dissenters: Of course parties hold influence over the views, values, and activities of their candidates—that is what they are supposed to do.

For Justice John Paul Stevens, dissenting from the Court's ruling and reasoning, it was precisely this potential for corruption that justified deference to the congressional perceptions expressed in the FECA. Parties, especially those with deeper pockets, have the potential to exert an undue and unhealthy amount of influence over both their candidates and the electoral process in general. Thus, this element of the FECA provided a leveling of the electoral playing field and a cleansing of the political process.

Parties are deserving of speech rights generally on par with those of individuals, the Court said in *Colegrove,* as it chipped away further at the campaign finance restrictions of the FECA. Still, significant unresolved theoretical questions remained: What, for example, is the proper place and purpose of political parties in today's campaigns and elections? Can candidates or potential candidates be "corrupted" by their party? Do independent expenditures by parties inspire problems that require state regulation? For the plurality, the answer was "no," though the *Colegrove* decision left open the question of whether party expenditures made in "coordination" with candidates would receive the same constitutional protection as "independent" expenditures. The issue was eventually resolved in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001), in which the Court ruled that parties may

not coordinate their expenditures with candidates' spending.

Brian K. Pinaire

See also: Buckley v. Valeo; Federal Election Campaign Act of 1971.

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Commercial Speech

Despite the admonition that "Congress shall make no law . . . abridging the freedom of speech," the First Amendment periodically has been deemed inapplicable to certain entire categories of expression. Libel and obscenity are among the most notable examples of speech that the U.S. Supreme Court considers unworthy of constitutional protection. For a time, commercial advertising was also a category of expression that the Supreme Court considered to be outside of the First Amendment. In *Valentine v. Chrestensen,* 316 U.S. 52 (1942), the Court tersely held that government could restrict or even ban commercial leafleting without running afoul of the constitutional right to free speech.

In the 1970s, however, the Court signaled its readiness to reconsider the issue, and in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), the Court abandoned its absolutist posture and conceded that commercial speech was entitled to some form of constitutional shelter. Citing the need for consumers to be able to make informed economic decisions, Justice Harry A. Blackmun determined that the First Amendment protection for free speech could be construed as covering the right to receive economic information. But by couching the issue in terms of the rights of the listener rather than the rights of the speaker, the Court left the door open for paternalistic regulation of advertising. Commercial speech was entitled to constitutional protection only as long as it would be beneficial to consumers; advertisers could not claim an unqualified right to speak their mind about their product or service analogous to the right of political speakers to advance their ideological agenda.

Once advertising's constitutional merit was transformed from a nonstarter into an exercise in drawing legal lines, it became inevitable that the Court would devise a procedure to govern when and how those lines would be drawn (a task left unfinished in *Virginia Board of Pharmacy*). Amazingly, it took four full years, during which time the Court groped its way through six more cases involving commercial speech, before a methodology finally emerged.

The four-part test announced in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980), focused both on the contested regulation of commercial speech and on the commercial speech itself: "For commercial speech to come within [the First Amendment] . . . it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest."

Although the clear purpose of the *Central Hudson* test was to foment streamlined and consistent resolution of commercial speech cases, it ultimately created more problems than it fixed. Five of the first fifteen commercial speech cases decided after *Central Hudson* could be resolved only via plurality opinions, and many of the majority opinions were unusually fragmented. In addition, a debate raged on the Court for a decade over whether the fourth *Central Hudson* prong merely provided an upper limit to regulatory behavior, or whether it triggered the application of "least restrictive means" analysis mandating a minimum level of legislative or municipal control. Amid

this turmoil, Chief Justice William H. Rehnquist (who had vociferously dissented from the decision to abandon the absolutism of *Chrestensen*) commanded a five–four majority in *Pacific Gas and Electric Co. v. Public Utilities Commission,* 475 U.S. 1 (1986), in favor of the argument that the greater power to outlaw a particular activity, such as casino gambling, necessarily included the lesser power to outlaw advertising about that activity, even if the activity itself was legalized—only for the Court to disavow this "greater-includes-the-lesser" approach in *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996), after three of its adherents retired. Eventually, the Court melded the final two *Central Hudson* prongs into a looser inquiry of whether there is a reasonable "fit" between the legislative ends in restricting advertising and the means selected to achieve them, as it held in *City of Cincinnati v. Discount Network, Inc.,* 507 U.S. 410 (1993), and in *Edenfield v. Fane,* 507 U.S. 761 (1993).

One potential explanation for the continuing confusion over the circumstances in which First Amendment protection will be extended to commercial speech is that a sizable portion of the Court's jurisprudence in this area has been hashed out in cases pertaining to advertising by attorneys. Traditionally, the American Bar Association and its state-level incarnations have considered advertising to run contrary to norms of lawyerly decorum. Although this instinct has receded somewhat in recent years, antipathy for attorney advertising remains prominent within the legal profession. Sitting at the apex of that profession, Supreme Court justices have had to reconcile their evolving receptiveness to bringing advertising within the purview of free speech protection with their natural inclination to safeguard the dignity of their field.

The former trend often sees the Court invalidate regulations on commercial speech; by contrast, the latter consideration induces the Court to give state bar associations significant latitude to restrict lawyers from peddling their services in an unacceptable manner and to punish lawyers who run afoul of these restrictions. The fact that a former ABA president, Justice Lewis F. Powell Jr., wrote the *Central Hudson* test as well as the majority opinion in three attorney advertising cases is among the reasons the Court's work on commercial speech has been alarmingly incoherent.

The constitutional status of commercial speech remains in a state of flux, to the point that litigants in many recent commercial speech cases, such as *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001), have asked the Court to dispose of the *Central Hudson* test altogether. Interestingly, it is not a debate that fits neatly into the current Court's perceived ideological alliances. Chief Justice Rehnquist remains unconvinced that the right of free speech gives rise to "a merchant's unfettered freedom to advertise in hawking his wares" (as he put it in his dissent in *Central Hudson*); meanwhile, his conservative colleague Clarence Thomas is the current Court's leading voice for granting commercial speech the identical level of constitutional protection as is afforded to noncommercial speech.

Steven B. Lichtman

See also: Central Hudson Gas and Electric Corp. v. Public Service Commission of New York.

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Common Law

Common law consists of judicial decisions that apply society's common values and principles to specific controversies. In its broadest sense, common law is the amalgam of customs, convictions, and practices that reflect the values, attitudes, and mores of the people of a country or jurisdiction and that serve as a foundation for decisions by courts in resolving disputes or remedying injuries. In a common law system, the main source of law comes from judges who decide particular disputes in individual cases between private parties. Some of the subjects of the common law include rights in land and other property, inheritance issues, contracts, and negligence and other individual harms. The system of common law developed primarily in England and was adapted and adopted in the United States. This original connection between

the common law of England and that of the United States is evident in the U.S. Constitution, where the Seventh Amendment provides that "[i]n suits at *common law* . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court in the United States, than according to the rules of the *common law*."

The common law system is to be contrasted with the *civil law system,* in which the primary source of law is a unified body of written law, such as a code or series of connected legislative enactments. These codes or legislative acts are meant to be relatively comprehensive and to provide the basis for deciding individual cases or disputes. The civil law system prevails in many European countries, including France, Germany, Italy, and Spain, as well as in some non-European countries, such as Japan.

In the modern world, these two systems of law, common and civil, have tended to grow closer together. Common law countries have developed extensive statutory laws that to some extent replace the common law. Civil law countries have developed a body of case law in which judges apply (and necessarily interpret) the codes. Still, the focus of the common law system is on the ability of judges to make law as well as to apply it, whereas the civil law system emphasizes the limited role of judges in simply applying a statute or code to a particular situation.

In a common law system, each case or dispute is decided on its own merits based on the body of common law extant at that time. The common law changes only as specific new disputes are brought to judges for resolution. Evolution in the common law occurs as judges apply existing principles to new situations, sometimes causing modification of the underlying principle or distinguishing its application to the particular current controversy or dispute. Therefore, change in the common law is incremental in nature.

There is an inherent tension in the common law between certainty and consistency, on the one hand, and the changing conditions of society and notions of public policy, on the other. The balance between these competing factors comes in the application of two important related principles. The first is that each decision by a judge in resolving a specific case or dispute operates as a *precedent* in the common law system. A precedent serves as an example of the application of the legal principles of the common law and can influence decisions in similar subsequent cases.

The second important concept is that of *stare decisis* (pronounced *STAR-ry de-SI-sis*), literally, "to stand by the decision." This doctrine provides that, absent extraordinary justification, a *precedent* by a court serves to bind that same court (or courts below it within the same jurisdiction) in similar subsequent cases or disputes. *Precedent* and *stare decisis* operate in the common law system to create a presumption that similar fact patterns and disputes will be resolved consistently with each other. This allows people to plan their activities knowing what the law is and having confidence that judges will apply the law consistently to new situations unless there are strong distinguishing factors or public policy justifications that require a different resolution.

The common law has always played an important part in the development and protection of civil liberties. For example, the right not to be compelled to testify against oneself and the right to a jury trial, embodied in the Fifth and Seventh Amendments to the Constitution, respectively, were long recognized in and adopted from the English common law. Similarly, the judicial development of the right of privacy in its various aspects is an example of the recognition and protection modern common law courts have given to fundamental civil liberties.

John H. Matheson

See also: Holmes, Oliver Wendell, Jr.

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Communists

The Communist movement shaped civil liberties in the United States both by the positions it championed and by the police measures it inspired. Communists

advocated the rights of the working class and racial minorities long before the political mainstream did, yet they employed undemocratic conspiratorial methods in pursuit of their goals. Government responses to the movement stretched the Constitution to its limits and violated fundamental rights to political speech and association as provided by the First Amendment to the Constitution.

The Communist Party inspired fear throughout American society due to its roots in the Russian Revolution (1917), its allegiance to Soviet communism, and its penchant for conspiracy. The fears betrayed a lack of faith in the democratic process, but they were grounded in an accurate sense of the Communist agenda. In the decades before World War II, fears were compounded by social inequalities that existed independent of the Communist Party. Communists first split off from the Socialist Party in 1919 over its refusal to proclaim sympathy for Soviet Russia. The new party quickly divided over use of conspiratorial methods, but it merged again in 1921 as the Workers Party and became the Communist Party in 1929.

The movement remained committed to revolutionary change and was loyal to the Third International based in Moscow. The American Communist Party accepted the Leninist principle of democratic centralism, and for many years it advocated overthrow of the government. Party policy oscillated between cooperation and competition with labor unions and other progressive social organizations, occasionally inducing party members to infiltrate these groups with the intent of subverting their agendas. Reliance on secret methods should not obscure the fact that, at times, some sector of the public shared the Communists' views. Communist support for union activism and the redistribution of wealth proved popular during the Great Depression of the 1930s.

For almost fifty years, the government, supported by much of the electorate, used harsh and sometimes unconstitutional measures to control Communists. State and federal governments prosecuted Communists with a vigor that weakened the "free trade of ideas" extolled by Justice Oliver Wendell Holmes Jr. in his 1919 dissent to *Abrams v. United States,* 250 U.S. 616 (1919), in which a protester was convicted of distributing pamphlets criticizing American intervention against the Bolsheviks. Laws directed at Communists and other leftists have provided the First Amendment some of its sorest tests. The Espionage Act of 1917 forbade citizens "to willfully obstruct the recruiting or enlistment service of the United States," and the Sedition Act of 1918 added restrictions on false statements and speech against the government. The laws silenced many who objected to World War I, including socialist Eugene Debs. In *Schenck v. United States,* 249 U.S. 47 (1919), the Court upheld the conviction of a prominent socialist for urging resistance to the draft, ruling that speech is not protected by the Constitution if it creates a "clear and present danger" of "substantive evil." Fear of alien subversion inspired the federal government to deport suspect aliens in the 1920s and 1930s, and states in turn passed laws prohibiting the advocacy of "criminal anarchy" and "criminal syndicalism." In 1925, the Court in *Gitlow v. New York,* 268 U.S. 652 (1925), upheld the conviction of Benjamin Gitlow, a member of the Socialist Party, under a New York law prohibiting criminal anarchy. California convicted Anita Whitney of criminal syndicalism for attending the 1919 Communist Labor Party convention, a decision the Supreme Court upheld in *Whitney v. California,* 274 U.S. 357 (1927).

President Roosevelt pardoned all remaining violators of the Sedition and Espionage Acts when he came to office 1933. The "red scare" abated during his presidency, as economic conditions brought the mainstream closer to leftist ideas. Although the Alien Registration Act of 1940 (Smith Act) made it "unlawful knowingly to advocate or teach the duty, necessity, or propriety of overthrowing the government by force or violence," hostility toward Communists was eclipsed by wartime friendship with the Soviet Union. The Smith Act was not directed against Communist subversion until after the war, when international tensions raised new and powerful fears.

Infringement of civil liberties reached its zenith in the post–World War II years, when world events triggered an atmosphere in which any citizen could be suspected of Communist sympathies. In *Dennis v. United States,* 341 U.S. 494 (1951), leaders of the Communist Party were convicted under the Smith Act for mere advocacy of insurrection, without any proof of action. Membership in the Communist Party was proof alone of the offense. Congress reacted to

public fears by creating a permanent standing House Committee on Un-American Activities (HUAC). The committee investigated Communist influence in the motion-picture industry in 1947, which led to the blacklisting of many talented members of the profession; in 1948 HUAC investigated Communist influence in the State Department, which led to the perjury conviction of Alger Hiss. HUAC followed the Hiss case by looking into Communist influence in almost all areas of life. State legislatures also went on the hunt for Communists. As a result, public employees and some employees in private industries were compelled to take loyalty oaths.

The Senate proved no less vigilant. It authored the Internal Security Act of 1950 (McCarran Act), which required that all Communist and Communist-dominated organizations register with the federal government, and created a Subversive Activities Control Board. The Senate strengthened the act with the Communist Control Act of 1954. Senator Joseph McCarthy (R-WI) of the Senate Permanent Subcommittee on Investigations began scandalous investigations into Communist infiltration throughout government and society. Although his well-publicized claims were often baseless, McCarthy ruined many careers but encountered little opposition from fellow senators. Many citizens collaborated willingly with his committee, others only under threat. McCarthy's downfall came in 1954 when he accused the Army of "coddling Communists" during nationally televised hearings. Countercharges of improper conduct by members of McCarthy's staff cost him public support, and the Senate soon sanctioned him for other misconduct.

The Supreme Court was inconsistent in its defense of Communists' civil liberties. The "clear and present danger" standard established in 1919 eroded significantly before the Court reasserted the right to espouse Communist ideas in a series of decisions in the period 1955–1958. It ruled in 1957 that teaching communism or other revolutionary theories was not, in itself, grounds for conviction. Proof was required that a defendant urged direct action to overthrow the government. Yet in 1961, the Court again upheld the conviction of a Communist Party member, maintaining that the defendant had been an active party member and had intended to overthrow the government.

Communists have played an ambiguous role in the history of American civil rights. Communists advocated the rights of disenfranchised social groups before the political mainstream recognized them, and they were alert to the Nazi threat long before others. Yet Communists also betrayed democratic ideals when they advocated overthrowing the government. Government authorities pushed civil liberties to their limit in response to the perceived threat of communism, and in this they were supported by the courts, by agencies such as the Federal Bureau of Investigation, and by mainstream social institutions. Communists inspired some of the darker episodes in the history of American civil liberties, creating precedents used by later governments that encroached on civil liberties in response to conspiratorial threats.

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See also: Abrams v. United States; Dennis v. United States; Gitlow v. New York; McCarthy, Joseph; McCarthyism; *Schenck v. United States; Whitney v. California*.

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Compelling Governmental Interest

"Compelling governmental interest" is a term used to defend state (state in the broad sense, from local to federal) action that curtails or limits the exercise of fundamental rights by citizens. As the name implies, state actions taken against fundamental rights, such as free speech or equal protection, must be undertaken in furtherance of essential (compelling) state interests. The requirement that the state show such a compelling interest in cases involving the Equal Protection Clause is a fairly recent development, but it has become one of the most important standards for the protection of rights under the U.S. Constitution.

In the mid-1930s, the U.S. Supreme Court began

a reexamination of the long-held belief that all rights were equal under the law. Despite the fact that the Constitution itself makes no hierarchical division among rights, justices such as William O. Douglas and Frank Murphy argued that some rights were clearly more important than others. These and other liberally minded judges began to assert that some freedoms, such as the First Amendment's protections for speech, press, assembly, and religious exercise, were fundamental to any truly democratic process, and that those rights were clearly more important than others, such as run-of-the-mill regulations governing driver's licenses or trash-pickup days. Their argument was that democracy could continue without vigorous protection of property or other rights, but it could not long exist without freedom of speech or of the press precisely because those rights were fundamental to the democratic enterprise.

This was not simply an academic debate, however. The logical conclusion for this argument was that legislation or executive action that impinged on these "preferred," or "fundamental," rights deserved far less judicial deference and required a more gripping reason than did state action limiting the exercise of other, less important rights.

Laws that limit the exercise of nonpreferred, or nonfundamental, rights are judged on the basis of their reasonableness, subject to only minimal scrutiny by courts. If the law or regulation is "reasonably" related to any "legitimate" government purpose (interest), then the law or regulation is normally presumed by the Supreme Court to be a constitutional exercise of power.

In contrast, laws that limit the exercise of fundamental freedoms are subject to the much higher standard of strict scrutiny by courts. In cases involving preferred freedoms, such as freedom of speech or equal protection, the Supreme Court abandons its usual assumption of constitutionality of laws passed by government. Any law that limits the exercise of fundamental rights or freedoms is assumed by the Supreme Court to be unconstitutional until the government can show otherwise by meeting the strict-scrutiny standard.

Under strict scrutiny, as articulated in cases such as *Korematsu v. United States,* 323 U.S. 214 (1944), or *Texas v. Johnson,* 491 U.S. 397 (1989), the government must show that it is acting in response to a "compelling" state interest. Further, it must show that the law in question is tailored as narrowly and specifically as possible to accomplish its ends. Finally, it must demonstrate that the law in question is the least restrictive alternative capable of achieving those ends.

David A. May

See also: Fundamental Rights; Least-Restrictive-Means Test; Strict Scrutiny; Suspect Classifications.

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Comstock Acts

Named for nineteenth-century antiobscenity crusader Anthony Comstock (1844–1915), the Comstock Acts refer to a series of federal and state laws prohibiting the dissemination of obscene materials. Though modified over the years by statute and court decision, the antiobscenity laws inspired by Comstock and his followers remain on the books and continue to be enforced at the local, state, and federal level.

Prohibitions on obscenity did not begin with Comstock. Some colonial governments passed laws prohibiting obscenity and several states legislated against such materials from independence and throughout the nineteenth century. The federal government began prohibiting the import of obscene materials in 1842 and amended its customs laws as technological advances required (adding in 1857, for example, obscene daguerreotypes and photographs to the items prohibited). The first federal prohibition against sending such materials through the mails was passed in 1865 and provided fines of up to $500 and imprisonment of up to one year for each violation. This law, in slightly modified form, was reenacted in 1872.

Despite the existence of these earlier laws, it was Comstock's tireless crusade against obscenity beginning in the late 1860s that made the issue a nationally

contentious one for the first time. Comstock was born in 1844 in New Canaan, Connecticut, the son of a successful farmer. His mother died when he was ten, and by the time of the Civil War, his father had lost his farm. Following the death of his brother at Gettysburg, Comstock joined the Union Army but saw no action. He was devoutly religious and neither smoked nor drank alcohol—attributes that earned him the derision of his fellow soldiers. After the war, he moved to New York City, became a clerk in a dry goods store, and married. In New York, he was appalled by the vice he saw around him and became especially concerned about its effects on the young men then pouring into the city in search of jobs. In 1868, relying on a new state law that prohibited the sale of obscene material, Comstock began purchasing obscene books and then having the sellers arrested. Approving of his efforts, the Young Men's Christian Association (YMCA), which had lobbied for the state antiobscenity law, began secretly funding him through its Committee for the Suppression of Vice.

In 1873, Comstock, accompanied by two other members of the committee and funded by wealthy New Yorkers, traveled to Washington to lobby for a tougher federal obscenity law free of the loopholes that had frustrated earlier enforcement efforts. This new law, commonly referred to as the Comstock Act, not only prohibited the mailing or importation of obscene materials but also made it illegal to mail or import information about contraception or abortion as well as items that might be used for contraception, abortion, or indecent purposes. The new law also prohibited people from intentionally receiving such materials by mail. It increased the maximum fine to $5,000 and the maximum prison term to ten years for each violation. In the wake of the federal statute, dozens of states passed new laws prohibiting the advertisement or dissemination of indecent materials or materials related to contraception or abortion. These actions at the federal and state levels complemented a successful movement to prohibit abortion in almost all states by 1900.

Armed with the federal statute and granted the powers of a U.S. postal agent, Comstock vigorously enforced federal and state laws against hundreds of people over the next forty years, including feminist and free-love advocates Victoria Woodhull and Ezra Heywood, publisher Frank Leslie, New York abortionist Madam Restell (Ann Lohman), and family planning pioneer Margaret Sanger and her husband, William. Comstock drew political and financial support for his activities from wealthy and powerful men who made up the memberships of the New York Society for the Suppression of Vice (which had spun off from the New York YMCA in 1873) and the New England Society for the Suppression of Vice (founded in 1878 and known after 1890 as the Watch and Ward Society). The passage of state Comstock Acts demonstrated widespread support for the antiobscenity, anticontraception, and antiabortion campaign.

Not everyone supported Comstock or the laws he inspired. Many saw Comstock as a puritanical busybody, hounding and entrapping his enemies. He was frequently ridiculed by the mainstream press and by intellectual and cultural elites angered by his refusal to discriminate between low-grade pornography (which most disdained) and works of important literary and artistic merit. In 1878 a petition signed by 50,000 citizens was presented to the House of Representatives requesting repeal of the Comstock Act. The House refused, and Comstock labored on, pursuing individuals and campaigning for a variety of antivice causes right up to his death in 1915.

People charged under the acts also challenged them in court, arguing that the materials were protected by the First Amendment, that Congress was without authority to regulate such materials, or that their materials were not obscene. In *Ex parte Jackson,* 96 U.S. 727 (1878), the U.S. Supreme Court held that Congress had the authority to ban obscene materials from the mails and, implicitly, that obscenity did not fall within the First Amendment's protections. A far more difficult issue was to define "obscene." Initially, state and federal jurisdictions adopted the definition first articulated by a British court in *Regina v. Hicklin,* L.R. 3 Q.B. 360 (1868). In *Hicklin,* the court held that materials were obscene if any part of them would cause sexual excitement in persons most vulnerable to such stimulation. The *Hicklin* test set a very low standard for proving obscenity. Though the rule was sometimes criticized, it was not until *United States v. One Book Entitled "Ulysses,"* 72 F.2d 705 (2d Cir. 1934), that an alternative was offered. In this case, the U.S. Court of Appeals for the Second Circuit rejected

Hicklin. Instead, works were not obscene when the literary nature of the work was sincere, the erotic material was not introduced to promote lust, and it did not furnish the dominant note of the publication. Critical acclaim for the work or its designation as a classic was also evidence that it was not obscene. The decision in *Ulysses* was adopted by numerous federal and state courts. Because it looked at the work as a whole and because it rejected *Hicklin*'s depraved-person standard, it became much harder to prove a work was obscene in the jurisdictions in which *Ulysses* was adopted. In *Roth v. United States,* 354 U.S. 476 (1957), the U.S. Supreme Court explicitly defined obscenity in the context of a challenge to a conviction under the federal Comstock Act.

The Court first held that the First Amendment did not protect obscene material. Material was now obscene if the average person, applying contemporary community standards, would determine that the material taken as a whole appealed to a prurient interest. In *Miller v. California,* 413 U.S. 15 (1973), the Court reaffirmed its basic holding in *Roth,* refined its definition of obscenity, and applied it to state obscenity laws. The Court held that in a state obscenity prosecution, the First Amendment was not violated by a prosecution so long as jurors determined that the work depicted, in a patently offensive way, sexual conduct specifically defined by the state obscenity law and that the work, taken as a whole, lacked serious literary, artistic, political, or scientific value. *Miller* is still the standard for determining whether a work is obscene and thus unprotected by the First Amendment for federal and state law purposes.

A variety of theories have been put forth to explain Comstock and the antiobscenity movement. Some have argued that Comstock's obsession with obscenity reflected his own prurient interests in the material. Others, noting the anticontraception and antiabortion elements of the campaign, argue that it was motivated by a desire to control female sexuality and was thus primarily patriarchal in character and sexist in intent. Still others argue that the campaign against obscenity reflected anxiety on the part of ruling elites threatened by the urbanization, immigration, and new mass culture of the era—developments that threatened the more traditional cultural, social, political, and moral power structures. Still others claim that middle- and upper-class parents supported the antiobscenity movement because they were worried about the impact of obscenity on their children's futures. In a world where traditional restraints were breaking down, obscenity might encourage young people to engage in behavior such as masturbation, premarital sex, homosexuality, and adultery, the consequences of which could destroy their ability to contract favorable marriages, successfully reproduce, and maintain the integrity and status of their own families. These explanations for "Comstockery," as British playwright George Bernard Shaw critically described the campaign against obscenity, are not mutually exclusive.

More than 130 years after the Comstock Act was passed, federal law was still prohibiting the mailing or importation of obscene or abortion-related materials and imposing fines and lengthy prison sentences for its violation. In *Griswold v. Connecticut,* 381 U.S. 479 (1965), the U.S. Supreme Court struck down as unconstitutional state laws limiting access to contraception information and devices. In 1971, Congress amended the Comstock Act, dropping the prohibitions on mailing or importing materials related to contraception. And in the wake of the Supreme Court's decision in *Roe v. Wade,* 410 U.S. 113 (1973), the constitutionality of the provisions relating to abortion was left in question.

Hal Goldman

See also: Hicklin Test; *Miller v. California;* Obscenity; *Roe v. Wade; Roth* Test.

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Confrontation Clause

The Sixth Amendment to the Constitution contains the Confrontation Clause, a critical feature of the adversarial system of criminal law used in U.S. courts. The Confrontation Clause requires that an accused person be permitted to challenge, through cross-examination, the arguments, testimony, and credibility of those who would testify against the accused. The Sixth Amendment states in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The right to confront one's accusers is a crucial element of the Sixth Amendment and the Bill of Rights; it was intended to end the eighteenth-century British practice of admitting depositions and ex parte (one-sided) affidavits as evidence in criminal proceedings.

The Confrontation Clause was first made applicable to the states through the Due Process Clause of the Fourteenth Amendment in *Pointer v. Texas,* 380 U.S. 400 (1965). In this case, the defendant was convicted of robbery based primarily on the testimony of a victim who had moved out of state after he testified at the preliminary hearing but before the trial was conducted. Equally important, the defendant was not represented by counsel at the preliminary hearing. The Supreme Court, in a unanimous decision, held that the Confrontation Clause guarantees an accused the opportunity to confront witnesses and have them cross-examined by counsel. Because the victim was never cross-examined by counsel, the defendant was deprived of his right of confrontation, and the victim's testimony was deemed inadmissible. The Court did note that there were certain exceptions to the Confrontation Clause, such as the admission of a dying person's statement or the sworn testimony of a deceased witness who had testified at a previous trial. The meaning of the Confrontation Clause was further defined in *Davis v. Alaska,* 415 U.S. 308 (1974), in which the Court reiterated the right to cross-examination, and *Mattox v. United States,* 156 U.S. 237 (1985), in which it held that the accused has the right to have his jury observe a witness's demeanor during testimony.

The confrontation right was expanded in *Coy v. Iowa,* 487 U.S. 1012 (1988). In this case, John Coy had been accused of sexually assaulting two thirteen-year-old girls. Pursuant to an Iowa statute, a translucent screen was placed between the two girls and Coy while they testified. The Supreme Court ruled five–four that the use of the screen was unconstitutional because the Confrontation Clause guarantees a criminal defendant the right to a physical face-to-face confrontation with adverse witnesses during testimony.

The protection afforded in *Coy* was narrowed in *Maryland v. Craig,* 497 U.S. 836 (1990). Here, the defendant had been convicted of child abuse. The victim's testimony had been taken via a one-way closed-circuit television, as permitted under Maryland law provided it could be shown that the child would suffer "serious emotional distress" if not protected from viewing the defendant. Craig argued that the one-way closed-circuit television was unconstitutional because it deprived her of the opportunity to confront her accuser. In a narrow decision (five–four), the Court upheld the constitutionality of the Maryland statute because it achieved the purpose of the Confrontation Clause: It ensured the reliability of evidence, presented an opportunity for the defense to cross-examine, allowed for the witness to take an oath, and provided a way for the jury to observe witnesses' demeanor during testimony. The result of *Craig* was that the Confrontation Clause did not entitle an accused to an inviolate right of face-to-face confrontation if it could be shown that an overriding state interest existed, such as protecting a child witness from trauma. Justice Antonin Scalia dissented from the majority opinion, stating that the Court should not ignore explicit constitutional text and substitute for it the current favored public opinion, and that even though Maryland's practice may not be unfair, it is not permitted by the Constitution. There is a prominent distinction between *Craig* and *Coy* that should be noted. In *Craig,* the Maryland statute that was held constitutional required a case-specific finding that a child witness would suffer "serious emotional damage," whereas the

Iowa statute struck down in *Coy* relied on an assumption of psychological trauma.

Idaho v. Wright, 497 U.S. 805 (1990) was a companion case to *Craig*. In *Wright,* a mother had been charged with lewd conduct on her five-and-a-half- and three-and-a-half-year-old daughters. The Idaho trial court had admitted into evidence statements made by the younger daughter to her physician. The Supreme Court held (five–four) that the admission of the child's statements violated the mother's rights under the Confrontation Clause because the statements did not fall under traditional hearsay exceptions, and the interview lacked "particularized guarantees of trustworthiness," since it was conducted without procedural safeguards: The physician failed to videotape the interview, he asked leading questions, and he possessed a preconceived idea of how the child should answer. These procedural errors were not harmless beyond a reasonable doubt, and admission of the interview was unconstitutional.

In short, the Confrontation Clause guarantees the accused a right to confront adverse witnesses in all significant criminal proceedings, the purpose of which is to ensure the reliability of evidence. This is accomplished by allowing the jury to observe the demeanor of a witness during testimony and by permitting defense counsel to question the credibility, arguments, and testimony of witnesses.

Sean Patrick Meadows

See also: Coy v. Iowa; Right of Confrontation.

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Congress and Civil Liberties

The U.S. Congress is sometimes accused of being hostile to individual rights. This accusation is not without foundation, but it is also true that Congress has intervened from time to time to protect civil liberties from infringements by the administrative (executive) branch of government.

The founders of the country placed responsibility for upholding the Constitution with all three branches of government. It was not until 1803, with Chief Justice John Marshall's (1785–1835) opinion in *Marbury v. Madison,* 5 U.S. 137 (1803), that the doctrine of judicial review was interpreted to make the U.S. Supreme Court the final arbiter of constitutionality. In *Marbury,* Justice Marshall ruled that Congress had exceeded its constitutional authority by enacting a provision of the Judiciary Act of 1789, and that the provision could not be enforced. The consequences of that decision were profound, because *Marbury* established that the Supreme Court has the final say about constitutionality of a law.

Since *Marbury,* Congress has repeatedly tested the limits of its constitutional authority, and the Supreme Court has often (but certainly not always) responded by striking down laws infringing on the liberties of U.S. citizens. In the process, many observers feel that congressional responsibility to legislate in conformity with the Constitution and Bill of Rights has been compromised. In this view, Congress responds to voters' demands by passing laws its members know are unconstitutional, secure in the knowledge that the Court will overturn them.

THE "MOST DANGEROUS BRANCH"

Members of Congress are elected. Unlike federal judges, who are appointed to serve for life and who are thought to be insulated from majority passions, elected officials are—and are intended to be—responsive to the will of the people who elected them. This may be why the founders considered Congress "the most dangerous branch" of the new government. Indeed, the First Amendment begins with James Madison's phrase "*Congress* shall make no law . . ."

Although the Constitution gave the federal government certain powers, the scope of those powers was limited not only by the Bill of Rights (the first ten amendments to the Constitution) but also by the notion of *delegation;* that is, unless the Constitution had specifically granted, or delegated, a power to the central government, that power was reserved to the states or to the people. Among the delegated powers, how-

ever, were some that have been used to authorize broad exercises of central authority. The Commerce Clause, for example, gives Congress the right to regulate interstate commerce, a regulatory authority that has been used to justify all manner of legislation, from federal regulation of aviation and cable television to the passage of civil rights laws.

As Congress has steadily increased government's presence in the lives of U.S. citizens, constitutional challenges to that presence have increased as well.

HISTORICAL EXPERIENCE

While government expansion has increased the likelihood of constitutional conflicts, the tendency of Congress to ignore constitutional constraints is hardly a new phenomenon. In 1798, in response to a threatened war with France, and with the ink barely dry on the Bill of Rights, Congress passed four laws known collectively as the Alien and Sedition Acts. Both Thomas Jefferson and James Madison argued that the acts were unconstitutional, and some historians attribute Jefferson's election as president in 1800 to widespread outrage over their passage.

Despite subsequent consensus in the legal community that the Alien and Sedition Acts had been unconstitutional, Congress passed substantially similar legislation during World War I. The Espionage and Sedition Acts of World War I imposed significant restrictions on free expression, and Congress justified those restrictions on the basis of national security. Criticism of the war effort or the draft were made federal crimes, and socialist leader Eugene V. Debs was given a ten-year jail sentence for saying to an audience, "You are good for more than cannon fodder[;] there's more I'd like to say but I can't for fear of going to prison."

World War II brought violations of civil liberties on an even greater scale. After the December 1941 attack on Pearl Harbor, Congress authorized the internment of 120,000 Japanese Americans, 70,000 of whom were U.S. citizens, even though no Japanese American had ever been indicted for any crime against the United States. President Franklin D. Roosevelt called the camps to which they were taken "concentration camps."

During the 1940s and 1950s, fear of "godless communism" led to laws like the Smith Act of 1940, which made it a crime to "print, publish, edit, issue, circulate, sell, distribute or publicly display any written or printed matter advocating, advising or teaching" the violent overthrow of the government. Section three of the act prohibited the organization of "any society, group, or assembly of persons" to engage in such advocacy. In an indication of the depths of popular hysteria over communism, the supposedly insulated Supreme Court upheld as constitutional both the internment of the Japanese Americans and the application of the Smith Act to various political activists. One explanation of the Court's seeming timidity can be found in the *Congressional Record* of the times; during the height of anti-Communist fears, the Court's free speech decisions were routinely the subject of congressional diatribes. The Court was accused of "coddling Communists," and efforts were even made to impeach Chief Justice Earl Warren.

After the 1995 bombing of the Alfred P. Murrah Federal Office Building in Oklahoma City, Oklahoma (a bombing carried out by native-born U.S. citizens), Congress expanded federal authority to infiltrate "suspicious" domestic groups and authorized the Immigration and Nationalization Service to deport resident aliens for even minor infractions.

Although legal history is filled with such examples of congressional overreaching, Congress occasionally has stepped in to prevent violations of civil liberties by government agencies. For example, Congress passed the Privacy Act of 1974 in the wake of revelations that the Federal Bureau of Investigation (FBI) had amassed files on citizens who were not suspected of criminal activity but who held political opinions of which the FBI disapproved. Among those with FBI files were actor Rock Hudson, industrialist Henry Ford, and labor leader Cesar Chavez. Congressional oversight committees regularly question officials about the activities of government agencies in order to ensure the compliance of those agencies with due process, equal protection, and other constitutional guarantees.

CONTEMPORARY CONFLICTS

Wars and other dangers have prompted many of the most egregious congressional incursions on individual liberties, but overreaching legislation has not been

High school recess period, Manzanar Relocation Center, California, 1943. World War II brought violations of civil liberties on a grand scale. After the attack on Pearl Harbor, Hawaii, Congress authorized the internment of 120,000 Japanese Americans, 70,000 of whom were U.S. citizens. *(Library of Congress)*

limited to wartime. New technologies, especially, have often generated attempts at suppression. In 1997, invoking the First Amendment, the Supreme Court overturned the Communications Decency Act of 1996, an effort to prevent the posting of undefined "indecent" materials in cyberspace. Much of the contemporary tension between individual liberties and state regulation falls within the zone of the so-called social issues: Abortion, gay rights, and pornography have all generated constitutional confrontations between advocates of "community" or "family" values and defenders of the individual's right to personal autonomy. Central to these conflicts is the contested notion of social harm: Advocates of restrictions on personal behavior argue that these behaviors harm society by diminishing common standards and vulgarizing public life; opponents of such restrictions argue that it is inconsistent with the Constitution and American values to criminalize private behaviors that do not harm the person or property of others. Depending upon the results of a given election, either side may be in control of Congress at any particular time.

Today, some of the thorniest issues raised by congressional action are in the areas of drug prohibition and national security. Rather than approaching drug abuse as a public health problem, Congress has steadfastly maintained its right to outlaw the use of disfavored substances and has given various federal agencies broad authority to act against those found to be in violation of drug laws. The drug war has generated a significant number of cases in which Fourth Amendment protections have been narrowed and exceptions made to that amendment's protections

against unreasonable search and seizure. Laws authorizing civil forfeitures in drug cases have also been criticized on constitutional grounds.

In the aftermath of the September 11, 2001, terrorist attacks on the World Trade Center in New York City and the Pentagon in Washington, D.C., Congress that fall passed two laws that have generated multiple constitutional challenges: the USA Patriot Act (2001) and the Homeland Security Act (2002). Among other provisions, these laws allow the government to compel businesses to provide information about any person—including medical and educational records and even books checked out of public libraries or purchased from bookstores. They also authorize the indefinite detention of those persons designated by the administration as "enemy combatants," and no appeal of that designation is provided. "Enemy combatants" can be denied access to lawyers, or, if they are allowed counsel, discussions with their lawyers can be wiretapped without their knowledge and without a warrant. Enemy combatants can ultimately be tried and condemned to death by military tribunals that are not bound by traditional rules of military justice or by constitutional norms, and from which no appeal can be taken.

Not surprisingly, these laws have provoked considerable criticism, and lawsuits challenging various parts of both bills will ultimately be decided by the Supreme Court. As of September 1, 2004, although it had dealt with related issues in cases like *Rasul v. Bush,* 124 S. Ct. 2686 (2004), *Rumsfeld v. Padilla,* 124 S. Ct. 2711 (2004), and *Hamdi v. Rumsfeld,* 124 S. Ct. 2633 (2004), the U.S. Supreme Court had yet to directly address the constitutionality of these laws. A U.S. District Court for the Central District of California did decide in *Humanitarian Law Project v. Ashcroft,* 309 F. Supp. 2d 1185 (2004), that a provision of the Patriot Act prohibiting the "expert advice or assistance" to terrorist organizations was "unconstitutionally vague and overbroad." Defenders will argue that the dangers posed by terrorists justify these actions, and that at least some civil liberties must be traded for security. Critics will remind the Court of its acquiescence in the internment of the Japanese in World War II, and will argue that terrorism wins if it causes the United States to abandon the constitutional principles of individual rights that have defined the country for over two hundred years. The Court will uphold some of the new powers Congress has handed to the administrative branch and will strike down others, further defining—and refining—congressional authority to make laws that infringe on the civil liberties of American citizens and continuing the tug-of-war that began with *Marbury v. Madison.*

Sheila Suess Kennedy

See also: Bill of Rights; Checks and Balances; United States Constitution.

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Congressional Investigations

The U.S. Supreme Court held in *McGrain v. Daugherty,* 273 U.S. 135 (1927), that the power to investigate, which includes the power to compel testimony, is an inherent part of the legislative process. The investigative power is the way Congress gets the accurate and up-to-date information it needs to make effective laws.

SCOPE AND PROCEDURES

Congressional standing committees are continually sending out requests for information and receiving the answers, mostly in writing. Sometimes they conduct surveys. Committees also hold formal investigative sessions, called *hearings,* in which witnesses testify in person and answer questions posed by members of Congress or staffers. Though most are held in Washington, D.C., committee members have on occasion traveled to other parts of the country to hold hearings on some regional problem or to make the hearings more convenient for the witnesses.

Most hearings inquire into some social problem within the subject-matter specialty of a standing committee; others study the possible impact of a proposed piece of legislation. The witnesses are usually people affected by the problem or bill, and they want to tes-

tify about it. They may be lobbyists representing affected groups, officials of the executive branch who will have to enforce the proposed legislation, or academic or other private-world experts in the subject. A verbatim record is made of such hearings and published, together with whatever written testimony is received on the subject. Copies are placed in public libraries nationwide that store government documents; the materials can then be used by students, academic researchers, or other concerned people. The records often contain the most up-to-date information on such subjects as patterns of illegal drug use in the United States, research on the behavioral impact of television watching, or regional distribution of poverty.

SENSITIVITY AND SECRECY

On occasion, Congress will also investigate some disaster, scandal, or political problem, sometimes creating a special committee for this sole purpose. In this way, the causes of Gen. George Armstrong Custer's last stand, intelligence failures before the Pearl Harbor attack in 1941, and war profiteering during the 1939–1942 defense buildup have all been investigated. Later committees focused on the Watergate debacle (the 1972 bungled burglary of Democratic National Committee headquarters by people associated with President Richard M. Nixon's reelection campaign) and the Iran-contra scandal (U.S. involvement in secret arms sales in the mid-1980s to fund opposition in Nicaragua to the Sandinista government). Other committees have studied the scope of organized crime in America, labor racketeering, or illegal drug trafficking. Because these committees touch on sensitive subjects, many potential witnesses—often the only people with relevant and accurate information—are unwilling to testify. They may fear criminal prosecution, deportation, lawsuits, or economic or other private reprisals by people harmed by the scandals, or the witnesses may simply suffer embarrassment.

The problem is made worse by the fact that hearings are almost always public. The mass media will report, and the public will gain access to, whatever immoral or potentially criminal behavior the witness is forced to admit under the relentless questioning of the lawyers employed by the committee staff. During investigations in the 1950s into the penetration of international communism into American government, entertainment media, and educational institutions, secret testimony, taken from government informants, was used to discredit witnesses. (Even today, government informants are sometimes allowed to testify in disguise, and their names are not given to witnesses.) Hearing sessions were sometimes closed to the public for reasons of national security. These rare forays into secrecy did not benefit the hapless witnesses, as might be supposed. Rather, they harmed the witnesses by allowing rumors and speculations to develop—rumors that painted a worse portrait of the witness than the secret testimony itself.

CIVIL LIBERTIES ABUSES

The legality of the use of secrecy in the 1950s was never definitively resolved. Later court rulings on criminal procedure generally have disfavored secrecy, however, and there also have been shifts in public opinion. The public has become less willing to extend unqualified trust to federal agencies such as the Federal Bureau of Investigation, instead insisting on openness of information for public inspection. For this reason, secrecy has become rare. A public questioning of motives and behavior, relentlessly driven by a sneering, contemptuous lawyer, is the usual fate of the present-day "hostile witness."

Witnesses are forced to endure this painful and harmful questioning wherever it leads, because Congress possesses the power of "compulsory process," or *subpoena*. When properly notified, the witness must appear before the committee and answer all of its questions, on pain of being held in contempt of Congress. In the nineteenth century, there were examples of contemptuous witnesses being arrested by the House sergeant-at-arms and locked up in the basement of the Capitol until they purged their contempt or until Congress adjourned, treatment the Supreme Court approved in *Anderson v. Dunn,* 19 U.S. 204 (1821). Later, Congress passed a law making contempt of Congress a federal crime. Under a federal statute, a witness who refuses to answer can be turned over to a federal prosecutor, indicted, tried, and, if

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convicted, fined and imprisoned for up to a year (*U.S. Code,* vol. 2, sec. 192).

Thus, hostile witnesses face a dilemma. When confronted with an embarrassing question, the witness can answer and face whatever consequences the answer entails, or refuse to answer on pain of prosecution for contempt. To avoid being impaled on the horns of this dilemma, witnesses have raised numerous constitutional issues. Under some circumstances, the Supreme Court has held that the separation of powers operates to protect certain members of the executive or judicial branches from hostile questioning, though it does not protect every official all of the time. The Court held in *Watkins v. United States,* 354 U.S. 178 (1957), that congressional questioning must also be relevant to some legitimate legislative purpose. There is no power to "expose for the sake of exposure." However, because the substantive powers Congress has are so extensive and discretionary, this limit may require little more than the procedural quibble that Congress must clearly state a good reason for asking the questions, as the Court noted in *Barenblatt v. United States,* 360 U.S. 109 (1959).

RIGHTS OF WITNESSES

Through the years, certain civil liberties issues have been raised under constitutional provisions. Some witnesses have cited the First Amendment to justify a refusal to answer, on the theory that the right to speak includes a right to remain silent or, at the very least, to edit the contents of speech. Courts have generally refused to accept this rationale. Witnesses have been more successful in claiming the protection of the

Fifth Amendment right against compulsory self-incrimination. The Supreme Court has held that this right can be invoked during congressional hearings if the purpose is to keep the witness from uttering words that a prosecutor could record and use in a criminal court proceeding later on. (The words must incriminate the witness, however. There is no right to keep silent to protect some third party from being prosecuted.)

If the Fifth Amendment is invoked, Congress may either excuse the witness or offer immunity. In a broad sense, a grant of immunity (which the witness may not refuse) can supplant the Fifth Amendment. The witness must then answer the questions. But in return, if federal prosecutors put the witness on trial, they cannot use the information provided by the witness. Immunity has been described as a practical compromise, allowing Congress access to necessary information but for the trade-off of making it more difficult to bring some evildoers to justice. In theory, prosecutors can still prosecute persons who have been given immunity, but that has become increasingly difficult. For example, Oliver North, a Marine officer who worked in the White House during President Ronald Reagan's tenure, had unique information about the Iran-contra scandal. When he testified under a grant of immunity, the prosecutor took elaborate precautions to avoid using the information North provided, even ordering staff members not to watch the televised hearings or read about them in the newspapers. He successfully prosecuted North for felonies arising out of the scandal. But an appellate court reversed, holding that there was no way to be sure that information from North's testimony did not find its way into the prosecutor's files.

Finally, congressional power to investigate is limited by certain procedural protections. Witnesses are entitled to be told the questions, to know in at least general terms the purpose of the inquiry, and to have access to counsel. Though hearings are not adversarial proceedings, and witnesses have no right to question the members of Congress or their staffs, some have been allowed to make exculpatory statements and even to produce exculpatory or explanatory witnesses of their own. Some congressional committees have recognized such common law rights as attorney-client privilege, while others have not done so. As is typical of congressional procedures, there are few rules but many precedents. Although the Supreme Court has suggested that the Bill of Rights broadly applies to hostile questioning, it has provided few guidelines regarding what those rules are.

Paul Lermack

See also: Barenblatt v. United States; House Un-American Activities Committee.

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Conscientious Objectors

The term "conscientious objector" (CO) refers to an individual who refuses to carry weapons or serve in the military because of a deeply held moral or religious aversion to killing. This aversion poses a dilemma for the state, which must balance the competing goals of national defense with respect for the rights of its citizens to abstain from acts they find morally repugnant. Although the United States currently grants CO status to those opposed to war on religious or moral grounds (including individuals on active duty), the expansion of the rights of COs has been a slow, uneven process.

The Quakers and other radical Protestant sects who settled in the American colonies in the seventeenth and eighteenth centuries were the first groups to win the right to refuse to serve. Their pacifism was religious in nature—the Quakers believed that each person contained part of the Spirit of God. Most colonial governments respected the preferences of these industrious and often prosperous citizens by allowing them

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to substitute militia service with payment of a fine. Quaker Pennsylvania even made do without a militia for several decades. But there were exceptions. Local sheriffs sometimes imprisoned and beat COs, especially those who refused on religious grounds to pay the fine. Only Georgia, founded explicitly as a military colony, made no provision for conscientious objectors.

During the Revolutionary War, the Continental Congress passed a law allowing for conscientious objection, and when James Madison proposed the Bill of Rights, he included an amendment stating that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." Although the amendment did not pass, during the Civil War both the North and South allowed conscientious objectors to pay a fine or hire a substitute.

World War I brought an end to the use of fines and substitutes. The 1917 Selective Draft Act restricted CO status to members of traditional peace churches and required that COs perform alternative service. Significantly, the act left both the decision whether to grant CO status and the alternative service itself in the hands of the military. Those individuals denied deferments, as well as "absolutists" who refused to perform alternative service, were placed in military jails where they faced brutal conditions. In part for these reasons, the rate of conscientious objection was extremely low—out of 2.8 million inductees (66,000 of whom sought CO status), the state granted only 3,500 exemptions.

During World War II, the conscientious objection system was returned to civilian hands. In addition, the 1940 Selective Service Act expanded the definition of conscientious objection to include those whose opposition to war rested on "religious training and be-

lief." This formulation covered Jews, Catholics, and members of mainline Protestant churches but excluded secular objectors and Jehovah's Witnesses, who refused to fight on behalf of "Satanic" governments.

With the Cold War era came an increase in the number of CO exemptions granted, such that by the late 1950s nearly one in ten inductees obtained CO status. Many of these new applicants were motivated by moral opposition to war. The Vietnam War accelerated this phenomenon. By 1972, the last year of the military draft, more people were granted CO status than were inducted into the armed forces.

Meanwhile, the U.S. Supreme Court substantially broadened the scope of conscientious objection. In *Seeger v. United States,* 380 U.S. 163 (1965), the Court broadly interpreted the phrase "religious belief" in the Selective Service Act (section 6j) to cover persons whose belief in a supreme being played the same role as a traditional religious belief. In *Welsh v. United States,* 398 U.S. 333 (1970), the Court expanded this term to include those whose deeply held moral objection to killing did not rest on a belief in a higher power. As Justice John M. Harlan, concurring in *Welsh,* pointed out, the Court read section 6j so expansively to avoid a conflict with the two religion clauses (the Free Exercise and Establishment Clauses) of the First Amendment. In *Gillette v. United States,* 401 U.S. 437 (1971), however, the Court refused to extend CO status to selective objectors (for example, those who opposed only the Vietnam War).

In the postconscription era, conscientious objection remains an issue for the several hundred members of the armed forces who each year seek discharges on the basis of a moral or religious opposition to war. In assessing these cases, courts examine the sincerity of the soldier's belief and will grant exemptions even when the objection to war surfaces shortly after induction. The rate of conscientious objection claims in the military increased during the 1991 Gulf War. A progressive Web site reported a similar increase in the number of such applicants when war with Iraq began in March 2003.

Robert A. Kahn

See also: Civilian Control of the Military; Federal Conscription Act of 1863; Quakers; Vietnam War.

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Conservatism

Conservatism is a body of thought that values tradition, history, and imagination. It emerged in its modern form in the writings of the statesman Edmund Burke (1729–1797), who served in the British House of Commons. Burke's *Reflections on the Revolution in France* (1790) is generally considered the first sustained defense of conservatism. Burke wrote *Reflections* to counteract what he saw as the radical influence of the French Revolution in England. The book emphasized history, tradition, and loyalty to old customs, in contrast to the French revolutionaries' emphasis on abstract rights, and was extremely influential in Europe and in America.

Modern conservatism in America began shortly after the end of World War II. Books such as Russell Kirk's *The Conservative Mind* (1953), Richard Weaver's *Ideas Have Consequences* (1948), Whittaker Chambers's *Witness* (1952), and Robert Nisbet's *The Quest for Community* (1953) and magazines such as *National Review* served to orient the young conservative movement.

Conservatives confronted civil liberties questions from the beginning, and over the past half century have examined them in several areas. One of the first issues concerned the influence of Communist spies in the United States. In the 1950s, many conservatives considered communism the greatest threat to American security. The activities of the Un-American Activities Committee in the House of Representatives and the series of hearings held by Senator Joseph McCarthy (R-WI), which were designed to reveal the existence of alleged spies in the U.S. government, generated great controversy in America over the extent to which the government could prohibit or punish persons simply for believing in Communist principles.

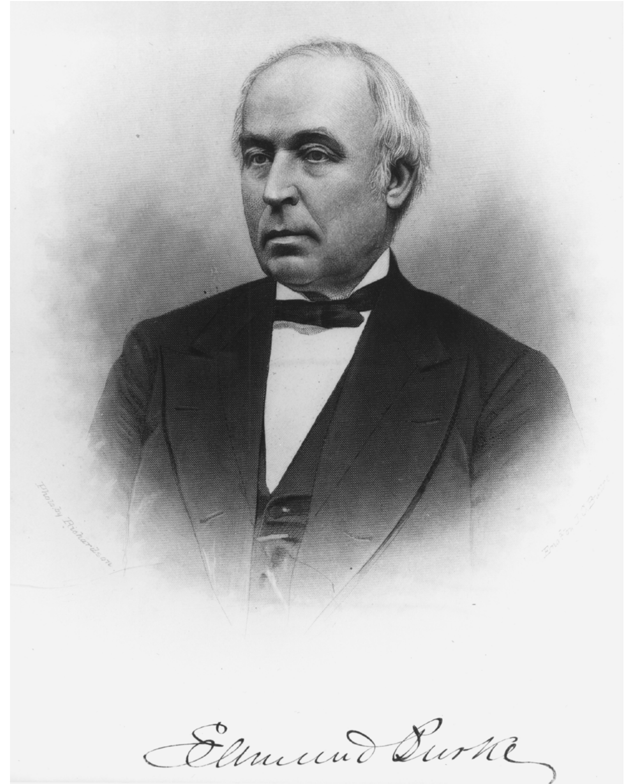
Conservatives were torn in their support for Mc-

Carthy. William F. Buckley Jr. and L. Brent Bozell, two prominent conservatives of the time, published *McCarthy and His Enemies*, which defended the senator's hearings into "un-American activities." Others, such as Russell Kirk, thought that the Wisconsin senator was a "destructive critic" who obscured the more important issues of Communist infiltration. In an important essay on the McCarthy controversy, Willmore Kendall, a conservative Yale political theorist, depicted the controversy as one about the nature of civil liberty in America. Conservatives, he argued, believed that there were some opinions so dangerous that the government could restrict or even prohibit them. Liberals, on the other hand, thought that tolerance of all opinions was the more important value. Because of their belief, conservatives were more willing to restrict what liberals considered civil liberties in the name of security or social order. Many conservatives still believe that the Constitution is not a "suicide pact" and does not require tolerance of opinions that would destroy it.

The 1960s raised a different set of civil liberties issues. This time, conservatives were concerned that the actions of the federal courts, especially the U.S. Supreme Court, would damage the fabric of society. In a range of decisions on pornography, free speech, religious liberty, criminal law, states' rights, and racial and gender discrimination, the Supreme Court expanded the notions of civil liberties in significant ways. In general, the Court extended the explicit rights guaranteed under the Constitution to areas that did not appear to have been contemplated by the framers, such as the right to privacy. The Court also reduced the influence of nonlegal custom or convention that served to restrict individual liberty.

Conservatives opposed almost all of these actions by the courts, on the ground that the interpretation of the Constitution set out in these decisions was invalid. Specifically, many conservatives rejected what they saw as an overly individualistic reading of the Constitution, which placed sometimes ill-defined rights at the center of the text.

Some liberals agreed with this assessment; they split off from their former colleagues and became known as the "neoconservatives." The neoconservatives attacked what they saw as liberalism's destruction of social mores and intermediate institutions in the name of an abstract "liberty" that would ultimately undermine any foundation for civil liberties. Rather than promoting civil liberties, these conservative critics maintained, such decisions were restricting the traditional freedoms of Americans.



Conservatism emerged in its modern form in the writings of statesman Edmund Burke (1729–97), pictured, who served in the British House of Commons. Burke's *Reflections on the Revolution in France* (1790) is generally considered the first sustained defense of conservatism.
(Library of Congress)

With liberalism destroying intermediate institutions and authorities between the individual and the government, conservatives believed that civil liberties would be at the sole discretion of the national government. Ultimately, government would act to restrict civil liberties because government was always tempted to greater power. These disputes forced conservatives to develop their own theories about the bases of civil liberties. Most conservatives grounded their belief in civil liberties to some sort of natural law. The natural law provided certain basic liberties that every government must respect for it to be legitimate and democratic. The difficulty for conservatives was translating

the general dictates of the natural law to specific protections. To solve this problem, many conservatives contended that civil liberties should develop naturally from local communities and institutions such as churches, schools, and towns rather than the central government. Conservatives such as Kirk also argued that civil liberties must be joined with civic duties. No one in a society had absolute freedom or liberty to do whatever that person wished. Rather, civil liberties had to be balanced by the responsibility of every citizen to use those liberties appropriately. This approach may protect civil liberties from reduction by a central governmental power, but conservatives have been less able to answer the question of local oppression of individuals or groups by the majority.

Since the terrorist attacks on the United States on September 11, 2001, conservatives again have become concerned about civil liberties in America. The dramatic proposals offered by the U.S. attorney general and Congress, such as the Patriot Act, worry some conservatives, because the extensive new powers granted to government may encroach on traditional protections under the federal and state constitutions. Other conservatives believe that the circumstances have changed sufficiently to justify added burdens to protect freedom.

Gerald J. Russello

See also: Barenblatt v. United States; Communists; House Un-American Activities Committee.

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Constitutional Amending Process

The constitutional amending process is the two-step procedure, outlined in Article V of the U.S. Constitution, that provides for written additions to the document. Although it has not been successfully exercised frequently, the constitutional amending process has been used throughout most of U.S. history to make the Constitution more democratic and to expand civil rights and liberties. This process replaced a much more rigid provision under the Articles of Confederation, the initial outline for governance of the new nation, whereby amendments had to be proposed by Congress and unanimously ratified by the states. By contrast, the framers of the Constitution provided two methods to propose amendments and two ways to ratify them. These mechanisms were designed to assure that U.S. citizens would not have to resort to revolution in order to bring about needed constitutional changes.

To date, two-thirds majorities in Congress have proposed all amendments that have been ratified, but there is an unused alternative that provides that Congress must call a convention to propose amendments if so requested by two-thirds of the states. The Constitution further requires that amendments be ratified by three-fourths of the states. They do this, at congressional specification, either through existing state legislatures or, as in the solitary case of the Twenty-first Amendment repealing national prohibition of alcohol, through special conventions called for this purpose. Given that Rhode Island did not send delegates to the 1787 Constitutional Convention in Philadelphia, the three-fourths majority required to ratify amendments is roughly equivalent to the nine states that Article VII of the Constitution required to ratify the Constitution before it would go into effect.

Article V contains two so-called entrenchment clauses. The first was designed to prevent the taxation of the importation of slaves, a provision that terminated by specification in twenty years. The remaining entrenchment clause provided that no state may be deprived of its equal representation in the U.S. Senate without its consent. This clause reflected the importance of the Connecticut Compromise at the Constitutional Convention, in which delegates agreed that states would be represented in the U.S. House of Representatives by population but in the U.S. Senate equally (two senators per state). Scholars debate whether the judiciary would be able to enforce unstated limits on amendments, such as those that might follow from principles articulated in the First or Fourteenth Amendments.

The Article V amending process has been a for-

midable obstacle to textual changes. Although members of Congress have introduced more than 11,000 proposals (most of them repetitive), it has only proposed thirty-three amendments by the requisite two-thirds majorities. Of these, twenty-seven have been ratified. Given the difficulty of the amending process, many expansions of individual rights have necessarily been initiated by changing customs and usages as well as through judicial decisions.

In the nation's early history, the Court decided in *Hollingsworth v. Virginia,* 3 U.S. 379 (1798), that the president did not need to sign amendments for them to become valid. In the *National Prohibition Cases,* 253 U.S. 350 (1920), the Court upheld the constitutionality of the Eighteenth Amendment. In *Dillon v. Gloss,* 256 U.S. 368 (1921), it further upheld the provision in that amendment specifying that it would have to be ratified within a seven-year period (though the Twenty-first Amendment repealed prohibition in 1933). In *Coleman v. Miller,* 307 U.S. 433 (1939), however, the Court decided that the question as to whether the ratification of an amendment represented a "contemporary consensus" was a "political question" largely left to congressional discretion. Congress seemingly exercised such discretion in 1992 when it accepted the belated ratification of the Twenty-seventh Amendment limiting the timing of congressional pay raises. Originally proposed as part of the Bill of Rights with no time limit, it was finally ratified after continuing displeasure with Congress.

Many amendments have dealt with structural features of American government. The large majority of amendments that have addressed civil rights and liberties, most notably the first ten amendments (the Bill of Rights), the post–Civil War Amendments (Thirteen through Fifteen), and amendments relating to voting rights (for example, the Nineteenth, addressing women's suffrage, and the Twenty-sixth, making the voting age eighteen) have expanded them. The Eighteenth Amendment, providing for national prohibition of alcohol, was arguably an exception, but the Twenty-first Amendment repealed it. Most provisions of the Bill of Rights, which once were applied only to limit the national government, have subsequently been applied to the states as well in a process often called "incorporation." Scholars continue to debate the extent to which this development was mandated by the language and the intentions of those who drafted and ratified the Fourteenth Amendment (specifically the Due Process Clause and the Privileges or Immunities Clause) and the extent to which the incorporation doctrine represents judicial innovation.

A number of unanswered questions surround the constitutional amending process. Although practice appears to indicate that states may ratify amendments they have previously rejected, it is not as clear whether they should be able to rescind ratification of pending amendments. Congress extended the original seven-year deadline (a time specified in the authorizing resolution that accompanied the amendment rather than within its text) for the proposed Equal Rights Amendment for women, but the amendment did not receive additional state ratifications during this extension, and the case became moot before the Supreme Court decided whether this extension was valid. As already noted, Congress accepted ratification of the Twenty-seventh Amendment, which contained no such deadline, more than 200 years after Congress proposed it. Scholars continue to debate whether two-thirds of the states can call an unlimited convention or whether they can limit the scope of such a convention to specific topics.

From time to time, surveys indicate that Americans are more devoted to the general principles of civil liberties than to their concrete application in individual cases. The difficulty of the amending process arguably serves as a guard against popular passions that might lead to improvident amendments that would restrict such applications of civil liberties. Scholars sometimes express fears over the possible uses of the untried convention mechanism (especially were such a convention to be unlimited) for proposing amendments. However, members of Congress have introduced relatively few amendments that would have restricted the scope of civil liberties; no amendments have restricted provisions within the Bill of Rights; and the convention mechanism would be subject to a number of political and constitutional restraints, including the provision for ratification by three-fourths of the states.

John R. Vile

See also: Bill of Rights; United States Constitution.

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Constitutional Amendments

Constitutional amendments have played a key role in the protection of civil rights and liberties in U.S. history. The Constitution adopted at the 1787 Constitutional Convention in Philadelphia contains some guarantees prohibiting or limiting certain actions restricting civil liberties within the text, most notably in Article I, Sections 9 and 10. These guarantees, however, like protections for rights later incorporated into the text of constitutional amendments, would be relatively meaningless without provisions for separation of powers among the three branches of the national government and for division of power between the nation and the states. In this respect, the entire Constitution can be considered to be a bill of rights.

Article V of the Constitution provides for two methods of proposing and two ways of ratifying amendments. To date, two-thirds majorities of both houses of Congress have proposed all amendments, but the Constitution also provides that Congress must call a convention to propose amendments at the request of two-thirds of the states. Three-fourths of the states must ratify amendments. At congressional specification, they do so either through their state legislatures or, as in the solitary case of the Twenty-first Amendment repealing national prohibition of alcohol, through special conventions called for this purpose.

The first and one of the most important uses of the amending process resulted in the adoption of the first ten amendments known as the Bill of Rights. The founding fathers devoted little discussion to this issue at the Constitutional Convention, apparently believing that the strengthened national government they were creating would pose little threat to civil rights and liberties. During debates over the ratification of the Constitution, Antifederalists used the absence of a bill of rights to argue against it. Initially responding that such a bill was unnecessary and might, in the event of omissions, even prove dangerous, leading Federalists eventually agreed that if the Constitution were adopted without prior amendments, thus avoiding a second constitutional convention, they would push for its later adoption. James Madison, one of the most influential architects and ardent defenders of the new Constitution and a member of the first session of the House of Representatives, accordingly gathered proposals from the states and reworded and grouped

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SCENE IN THE HOUSE ON THE PASSAGE OF THE PROPOSITION TO AMEND THE CONSTITUTION

Scene in the House of Representatives on the passage of the proposition to amend the Constitution, January 31, 1865. Since 1787, the Constitution has been successfully amended twenty-seven times. *(Library of Congress)*

them into concrete proposals that, with revision, later became the first ten amendments, which became part of the Constitution in 1791.

The importance of these amendments in protecting civil liberties is evidenced by the number of entries in these volumes that stem from them. The First Amendment prohibits governmental establishment of religion or abridgment of its free exercise; it also guarantees rights of speech, press, peaceable assembly, and petition. The much-debated Second Amendment deals with the right to bear arms, and the Third prohibits the billeting of soldiers in private homes. These two amendments were drafted in reaction to abuses suffered under the British. The Fourth Amendment outlaws unreasonable searches and seizures and specifies procedures for obtaining search warrants. It prohibited the general warrants, or writs of assistance, that the British king had allowed.

The Fifth Amendment primarily deals with the rights of individuals who are accused of crime. It provides for grand jury indictment, prohibits double jeopardy and compulsory self-incrimination, guarantees "due process," and provides that any governmental taking of property must be compensated.

The Sixth and Seventh Amendments deal with the rights of individuals on trial, the first applying to criminal and the second to civil cases. Sixth Amendment guarantees include protections for a speedy and public trial; the right to an impartial jury (also guaranteed by the Seventh Amendment); and the rights of the accused to be informed of charges, to confront adverse witnesses, to have compulsory process for obtaining witnesses, and to have the assistance of counsel.

The Eighth Amendment limits excessive bail and fines and prohibits "cruel and unusual punishments." The Ninth Amendment is the framers' attempt to recognize the existence of unenumerated rights. The Tenth Amendment further recognizes the existence of powers reserved to the states.

Whereas the Bill of Rights arguably recognized rights that the framers already acknowledged, the post–Civil War amendments extended these rights to all individuals, including those once held in bondage. The Thirteenth Amendment prohibited such slavery. The Fourteenth Amendment defined citizenship to include all persons born or naturalized within the United States. It further guaranteed all such persons their privileges and immunities, their right to due process, and the equal protection of the laws. This last clause became the vehicle through which the Supreme Court gradually applied most of the provisions in the Bill of Rights, which originally limited only the national government, to the states as well.

Other amendments have not so much expanded civil rights as they have served further to democratize American government. Amendments Fifteen (1870), Nineteen (1920), Twenty-three (1961), and Twenty-six (1971) have all lifted restrictions on voting rights, with the Fifteenth and Nineteenth being the most significant. The Fifteenth Amendment, long evaded by a diverse array of tactics, was designed to prohibit discrimination on the basis of race, whereas the Nineteenth prohibited discrimination on the basis of sex.

Unless one classifies acceptance of the income tax in the Sixteenth Amendment as such a measure, the only amendment significantly restricting civil liberties was the Eighteenth (1919). It provided for national prohibition of alcohol. Notably, that amendment was repealed by the Twenty-first (1933).

On at least four occasions, including when the Fourteenth Amendment reversed the Supreme Court's notorious decision in *Scott v. Sandford,* 60 U.S. 393 (1857), in which the Court had declared blacks to be property and not citizens, amendments have overturned unpopular judicial decisions. Opponents of amendments restricting burning the American flag or of proposals responding to other contemporary Supreme Court decisions have argued that the amending process has never yet been, and should never be, used to restrict guarantees of liberty in the Bill of Rights or elsewhere.

Constitutions of many other nations provide for the protection of social and economic rights and not simply political rights. Scholars continue to debate the wisdom of such provisions, which sometimes serve in other nations as articulations of national hopes rather than as legally enforceable mechanisms.

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See also: Bill of Rights; Constitutional Amending Process; United States Constitution.

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Constitutional Interpretation and Civil Liberties

Despite the human longing for self-evident propositions, laws must be interpreted, except in rare circumstances. Someone must say, "This is what it really means." For example, on the subject of religion, the First Amendment provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof." The word "Congress" is clear, but what does "respecting" mean? or "establishment"? or "prohibiting"? or "free exercise"? or even "religion"? Hundreds of court cases have explored the legal meaning of these words. Most people are surprised to learn that the word "respecting" meant that Congress could not rule on religion one way or another. It could neither establish nor disestablish religion in the states. As a result, Massachusetts had an established church until 1834, and it was perfectly legal. Similarly, most people think "establishment" means officially recognizing one religion as the preferred religion of the state having a protected legal status. For many years, however, courts interpreted the word to mean any financial aid. More recent courts have counted as establishment any symbol or ritual that might imply endorsement or preference.

How can laws be interpreted in a principled, consistent way? For judges and justices trying to apply a law so that citizens deem it legitimate and fair rather than arbitrary, dependence on personal values or preferences will not do. Scholars divide these variously, but there are essentially five different approaches to interpretation.

The first is called "the plain meaning of the words" or sometimes "textualism." Basically, this means taking the dictionary meaning of words or the commonsense meaning given to words by reasonable people. It helps to look at dictionary meanings at the time the phrases were written. This approach works well when deciding how many houses of Congress there will be, how many senators shall be elected by each state, and other numerical-type phrases. It is not useful for many words and phrases such as those pertaining to the religion clauses or most other civil liberties. What are "unreasonable searches and seizures" (Fourth Amendment) or "cruel and unusual punishments" (Eighth Amendment)?

The second approach is called "original intent" or "the intent of the founders" or, when interpreting statutes, "intent of the legislators." Scholars look for explanations the writers might have given at the time of passage of the bill or subsequently—for example, debates in the legislature (reported in the *Congressional Record* or similar official record in the states) or possibly in letters to others or later writings, such as autobiographies. Scholars also study other writings. For example, scholars today legitimately read James Madison's *Memorial and Remonstrance*, even though it was written in 1785, to get a sense of his intent in proposing the First Amendment religion clauses. There are several difficulties with this approach. The intent is often not clear. There were roughly fifty-five founders and many more ratifiers, and they often had conflicting intentions. Which ones matter? Finally, in many civil liberties issues that arise in the modern world of technology, the founders could have had no intentions at all. Thus, to insist on using only these first two means of interpretation would render the Constitution irrelevant for most modern issues.

A third way to interpret constitutional phrases or statutes is to look at their meaning in the cases previously decided by the U.S. Supreme Court. Phrases and statutes have a history; they have been interpreted and applied by courts in earlier cases and so have developed through the use of precedents. In the common law tradition, this is the primary way laws change, adapt, and take on new meanings. U.S. courts have used past case law to interpret the Fourth

Amendment's prohibition against unreasonable search and seizure when applying it to searches of automobiles and computer hard drives.

A fourth way to interpret constitutions and statutes is to acknowledge development of meaning "within the spirit" of the particular law. It is to acknowledge that the writers of laws could not have foreseen all the circumstances and technological developments that were to come and to which their laws must be applied. Therefore, one looks to the spirit of the law and applies it accordingly. This could be called "the living constitution" approach to interpretation. For example, the founders could never have anticipated the telegraph, telephone, fax machine, e-mail, or cell phones. They did adopt the Fourth Amendment, however, which provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." According to this method of interpretation, it is perfectly reasonable to adapt the desire for privacy expressed in this phrase to developing technology. That adaptation is surely within the spirit of what the founders were trying to achieve.

The fifth way to interpret constitutional phrases or statutes is candidly to admit that times and values change dramatically and that laws must be adapted "to meet the needs of the time." Supreme Court justices who have used this approach have then tried to tie interpretation into the basic structure or inferred meaning of the U.S. Constitution. For example, they have found constitutional meaning in "liberty of contract," "privacy," and "separation of church and state." Of course, these phrases do not appear in the Constitution in so many words. This approach goes to the outer edge of the "living Constitution" school of thought. Both liberals and conservatives have thought it necessary to adapt the Constitution to meet the needs of the times in different circumstances. For example, early in World War II, some 200,000 people of Japanese ancestry, many of whom were citizens born in the United States or naturalized, were forcibly removed from the West Coast and put into internment camps in places like Arizona, Utah, and Nevada based on the fear that they might sabotage war efforts against Japan. This was clearly racial profiling that violated both equal protection and due process rights guaranteed in the Constitution. But military commanders, supported by President Franklin D. Roosevelt, sincerely believed removal was necessary to protect the nation. The Supreme Court, over the strenuous objection of its liberal justices, ruled that these actions did not violate the Constitution in a time of war.

Proponents of a woman's right to choose abortion have argued that a "zone of privacy" is implied in the Constitution. Opponents of laws setting minimum wages, mandating safe working conditions, and protecting union organizing argued in the 1920s and 1930s that the Constitution protected a "liberty of contract" that forbade such laws. Neither of these examples, one considered a liberal issue, one a conservative issue, would be constitutional under the plain-meaning or original-intent approaches to civil liberties.

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See also: Bill of Rights; Fourteenth Amendment; Incorporation Doctrine; Judicial Review.

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Constitutionalism

Constitutionalism is a normative political theory of limited government and the rule of law. A constitution refers to the nation's (or a state's) arrangement of the powers and institutions of government and the rights of individuals. In a broad sense, constitutionalism refers to the adherence to norms and principles as defined in a particular constitutional text or, where there is no text, the constitutional order. Although broadly defined, constitutionalism is value-neutral and refers to the adherence to any constitutional text or order, be it authoritarian or liberal, the concept of constitutionalism presupposes substantive and procedural

limitations on government power and protection of individual rights and human dignity. Constitutionalism presumes that there are some things government should not do, even if proper procedures specified in the constitutional text are followed.

In the United States, constitutionalism is combined with representative democracy to form constitutional democracy. The fundamental principle distinguishing constitutional democracy from other forms of constitutionalism is the notion of "popular sovereignty"—that the people shall govern. The central tension of constitutional democracy concerns the balance between the power of the people and the ideals and principles of constitutionalism that seek to restrain them.

Constitutionalism assumes that people are by nature free and should protect their rights through a system of government in which they give permission for others to rule them but limit that permission in time and scope through an institutional structure based on rights and rule of law. Constitutionalists are often pessimistic about human nature. Whereas democratic theorists trust that people can govern themselves, constitutionalists fear the human inclinations to act selfishly and abuse public office. According to constitutionalism, there is a higher authority that restricts choices and transcends the individual's obligations to government. Historically, this higher authority was understood as derived from a Supreme Being, but over time the higher authority has become the constitutional order itself viewed as embodying principles of natural and fundamental rights.

In American constitutionalism, the supremacy of the U.S. Constitution stems from its foundation in popular will. Although the founding fathers drafted the text, the people breathed life into the constitutional order when they ratified the document. Earlier the supremacy accorded to constitutions stemmed from the belief that they embodied principles of right and justice, which were regarded as above human hands and part of the natural rights of man. The Ninth Amendment of the U.S. Constitution, in stipulating that "the enumeration of certain rights in this Constitution shall not prejudice other rights not so enumerated," illustrates this theory as translated into terms of personal and private rights. Unlike democracy, constitutionalism defines substantive criteria upon which government may not trample, even with the enthusiastic acceptance of a massive majority of the nation. Reasoned argument and deliberation resolve conflicts and disagreements regarding the content of those rights and powers. Whereas in a pure democracy a law is valid as long as it was enacted through proper procedures of legislative selection, debate, and administration, constitutionalism denies legitimacy to a law that violates the constitutional text and/or the concept of human dignity it seeks to protect.

After the collapse of communism in the early 1990s, many countries began to draft constitutional texts. In seeking to form enduring and secure constitutional orders that respect the rights of members, these founders contemplated anew the procedural and substantive demands of the concept of constitutionalism. In the United States, the constitutional order offers a procedural framework of government that guarantees the liberal rights of life, liberty, and property and the political rights of participation. In contrast, many of these newly formed constitutional orders emphasize highly substantive views of constitutionalism guaranteeing such social rights as the right to work, to welfare, and a place to live.

Scholars agree on several basic principles of constitutionalism. These include requirements for the establishment of government such that the exercise of power must be in accordance with established standards and that governments be limited in the ends they may seek and in the means they may use to pursue legitimate ends. The people of a democracy, as sovereign, must agree to limit not only their government but also themselves. In addition, laws must result from a stipulated set of procedures and must be made to comport with the "rule of law" by being evaluated according to a set of fundamental standards and subject to judicial review. Aside from these limitations on governmental power and the legitimacy of legal enactments, the rights of individuals may be protected by guarantees of specific rights beyond the control of government, or by specific grants of powers to governmental institutions to protect rights. Finally, there are some aspects of life that are not the proper business of politics and government and are accordingly placed beyond the reach of its authority.

In establishing the form and character of a political

system, constitutional drafting can be a profoundly democratic act. Through a process of public deliberation, the "founding" culminates in the endorsement of a constitution by the people. In the United States, there are a number of structures that combine to form a constitutional democracy. The separation of powers among the legislature, executive, and judiciary creates an overlapping system that restrains and checks each branch of government. The federal structure divides powers between the national government and the states to ensure that power will not become overly centralized at the national level. Together with the Bill of Rights (the first ten amendments to the Constitution), these form the broad limitations on power and boundaries of rights. In addition, the United States employs a system of staggered elections for the two houses of its national legislature that ensures that no party can gain a majority of both at a single election.

The cornerstone of these limitations is the judiciary, which, insulated politically, is authorized to invalidate legislative and executive action found to violate those rights. In the early history of the United States, controversy centered on who held the final authority on what the constitutional text required. In the seminal opinion *Marbury v. Madison,* 5 U.S. 137 (1803), the Supreme Court established its authority over constitutional resolution. More recently, an evolving understanding of civic constitutionalism has expanded the scope of constitutional interpretation to include the legislative and executive branches of government, the states, civil and social groups, and the public more generally.

Constitutionalism tries to limit risks to liberty and dignity by lowering the stakes of politics. Constitutional democracy adds the further safeguard of promoting, directly and indirectly, the right to participate in governmental processes. The Achilles heel of constitutionalism is that there are certain political questions such as abortion and the death penalty that are either "zero-sum" or have no "correct" answer and are simply too controversial for resolution. Although constitutionalism offers no method by which to resolve such disputes fully, it offers an ongoing civic discourse that comprehends constitutional meaning as something derived gradually over time. As such, the promise of constitutional democracy is not the end of economic and political struggle but rather is peaceful deliberation and consideration of disputes through consistent and open processes that allow multiple interests to be heard and respected. Still, constitutionalism has proved to be particularly vulnerable in times of crisis, when it has generally failed to safeguard fundamental rights and human dignity. The Alien and Sedition Acts during World War I, President Abraham Lincoln's suspension of the writ of habeas corpus during the Civil War, U.S. Attorney General A. Mitchell Palmer's raids after World War I to crack down on alleged radicals, the internment of Japanese Americans and confiscation of their property during World War II, and the restrictions on civil liberties particularly targeted against Muslims in the aftermath of the September 11, 2001, terrorist attacks in the United States all call into question the ability of constitutionalism to restrain governmental power and public hysteria in a time of crisis.

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See also: Bill of Rights; Common Law; Congress and Civil Liberties; Judicial Review.

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Contempt Powers

In the English common law, contempt is a crime consisting of the willful disregard of public authority. Al-

though the Constitution of the United States does not acknowledge the offense, courts and legislatures, both state and federal, have long punished disobedience and disrespect as a power inherent in the judicial and legislative process. Frequent clashes have occurred between individuals exercising their civil liberties and judges and legislators who regard such behavior as contemptuous. The justices of the Supreme Court have found it difficult to balance two public values—the need to maintain the authority of the judicial and legislative process, on the one hand, and the desire to protect citizens from arbitrary punishment and curtailment of their freedoms, on the other.

Disrespect for a court of law can take many forms. Rudeness toward a judge by a defendant, witness, or attorney, bad behavior in the courtroom, refusal to answer a proper question, failure to file papers on time or to follow local judicial rules, and disobedience of a court order can subject the contemner to a fine or imprisonment. In many cases, however, punishment will not produce the result desired by the court. Contempt, therefore, may be either civil or criminal. If a judge cites a litigant for criminal contempt, payment of a fine or completion of a jail sentence ends the matter. The wrong is to the court, and the purpose of the action is punitive. If a judge demands that the witness answer an attorney's question or turn over a document and the witness ignores the court's request, the judge can cite the witness for civil contempt. The person will pay a daily fine or stay behind bars until he or she complies with the judicial order. The wrong is to a litigant, and the purpose of the judge's action is remedial. Failure to pay child support or alimony is a common example of civil contempt. In cases of civil contempt, prisoners are said to carry the key to their cells in their own pocket. Defendants can purge themselves of the contempt by complying with the order.

CONTEMPT AND FIRST AMENDMENT RIGHTS

In the period 1900 to 1940, judges frequently issued injunctions against labor organizers to prevent strikes, picketing, and boycotts of employers. Unions claimed that the judges were interfering with their constitutionally protected freedoms of speech, assembly, and association. Defiance of such judicial orders usually resulted in fines and imprisonment for contempt. The Supreme Court attempted to strike a balance between the competing values of judicial authority and individual freedom. In *Gompers v. Buck's Stove and Range Co.,* 221 U.S. 418 (1911), for example, the Court overturned the conviction of Samuel Gompers, leader of the American Federation of Labor, a large trade union organization, on the grounds that the local court had treated a boycott as criminal contempt when in fact it was civil. The judge should have given Gompers an opportunity to purge himself of the contempt by ending the boycott.

Local white officials hostile to the effort by black civil rights activists to effect an end to segregation by peaceful marches and demonstrations appealed to state judges to issue injunctions to stop such direct action. The claim by demonstrators that the First Amendment gave them the right to protest in public places against unjust laws collided with the courts' authority to enforce their orders. In April 1963, Martin Luther King Jr., leader of the Southern Christian Leadership Conference, was arrested and summarily convicted of criminal contempt in Birmingham, Alabama, for defying an injunction against parading without a permit. Four years later the U.S. Supreme Court upheld Dr. King's conviction in *Walker v. Birmingham,* 388 U.S. 307 (1967), and he served a four-day sentence. The justices said that the protesters should have gone to court to challenge the constitutionality of the injunction rather than simply ignore it.

Courts can subpoena journalists and demand that they reveal the sources of their news stories or turn over notes and other documents. Reporters have claimed immunity from such coercive orders under the First Amendment's guarantee of freedom of the press. The Supreme Court, however, refused to recognize a "reporter's privilege" against subpoenas in *Branzburg v. Hayes,* 408 U.S. 665 (1972). The period of incarceration for a reporter found in contempt is typically brief. Citation for civil contempt in principle could lead to indefinite confinement. To avoid this possibility, courts have ruled that the incarceration ends when the authority of the sentencing body ex-

pires. The recalcitrant prisoner thus is released within a few months, such as when time expires for the grand jury then sitting or when the term of court ends.

RESTRICTIONS ON THE CONTEMPT POWER

American law has made many changes in the law of contempt to make it less threatening to civil liberty. Under English common law, courts could punish behavior that occurred outside the courtroom if the judge regarded it as disrespectful. Judges, for example, found authors in contempt for writing publications that brought the court into disrepute. The House of Representatives, however, in 1830 impeached U.S. District Judge James H. Peck because of his conviction and punishment for criminal contempt of a lawyer who had published an article critical of a decision of the judge then on appeal. The Senate refused to convict the judge of "high crimes and misdemeanors," but Congress then passed a law in 1831 making it clear that federal judges had no such power as the one claimed by Judge Peck. The First Amendment protects expression of opinions critical of a judge outside his or her presence. No one is guilty of contempt for any publication made or act done out of court that is not in violation of a judicial rule or order or in disobedience of the court's process.

In *Malloy v. Hogan,* 378 U.S. 1 (1964), the Supreme Court ruled that the Fifth Amendment privilege against self-incrimination, as also applied against the states by the Due Process Clause of the Fourteenth Amendment, permitted witnesses to refuse to answer questions posed by a grand jury, trial court, or legislative committee if the answers could lead to criminal prosecution. Witnesses granted immunity from prosecution before testifying, however, must answer all questions or face commitment for civil contempt.

SUMMARY PUNISHMENT FOR CONTEMPT

In common law, judges are empowered to impose summary punishment for contempt. An offended judge can impose a fine or prison sentence without trial. The judge acts as prosecutor, judge, and jury. Further, findings of contempt cannot be appealed unless the fine or prison term is excessive. American law, however, places limitations on this power. In some states, only a judge other than the one whose authority was defied can impose convictions of criminal contempt.

In *Green v. United States,* 356 U.S. 165 (1958), the Supreme Court, in a five–four vote, upheld a three-year prison sentence summarily imposed by a judge on two convicted felons who had failed to surrender themselves to begin a prison term following their trial. In the principal dissent, Justice Hugo L. Black argued that such tremendous power, vested in a judge without the protection of an indictment by a grand jury or a trial by a petit jury, was contrary to the spirit of the Constitution and totally unjustified historically. Ten years later, in *Bloom v. Illinois,* 391 U.S. 194 (1968), the majority agreed with Justice Black and held that serious criminal contempt was so nearly like other serious crimes that it was subject to the Constitution's jury trial provisions. The Court said that only petty contempt could be tried without honoring a demand for trial by jury.

Six months' incarceration is the line between petty and serious criminal contempt. The Seventh Circuit Court of Appeals ruled in *In re Dellinger,* 461 F.2d 389 (1972), that federal judges could not impose sentences of more than six months for criminal contempt without a jury trial. In 1969 U.S. District Judge Julius Hoffman had summarily sentenced each of the "Chicago Seven" defendants and their two defense attorneys in a conspiracy case arising out of an antiwar protest at the 1968 Chicago Democratic National Convention to lengthy prison terms on 159 specifications of criminal contempt. The specifications included acts of disrespect such as not standing for the judge, blowing kisses to the jury, and insulting the court, such as by calling Judge Hoffman "a pig" and "a fascist." William Kunstler, one of the attorneys, received a sentence of four years and thirteen days. The Court of Appeals in *Dellinger* overturned all their convictions.

Current federal practice requires the judge faced with serious criminal contempt to refer the disrespectful behavior to a prosecutor. Federal prosecutors must present the evidence to a grand jury and obtain an indictment before proceeding to trial, where the de-

fendant is entitled to a jury. In *International Union, United Mine Workers v. Bagwell,* 512 U.S. 821 (1994), the Supreme Court held that a criminal contempt fine was punitive and therefore could be imposed only through criminal proceedings, including the right to jury trial.

LEGISLATIVE CONTEMPT

The U.S. Congress and the state legislatures have the inherent power to issue subpoenas, compelling testimony or the production of documents, and to impose per diem fines or to commit to jail witnesses who fail to appear or to answer a question. Legislative contempt, like judicial contempt, may be criminal or civil. Legislatures, however, lack the power of summary conviction enjoyed by judges in cases of petty criminal contempt. In federal law, contempt of Congress is the crime of obstructing its work, with a punishment of up to one year in prison and up to $1,000 in fines. There have been convictions for contempt for bribing members of Congress.

In 1857, Congress passed a law to prevent members of the House and Senate from punishing their political enemies. If anyone commits criminal contempt in the eyes of a congressional committee, the committee must ask the full legislative house to vote a contempt citation and refer the matter to the U.S. attorney, who may then bring the alleged offender before a grand jury for indictment and a criminal court for trial. A commitment for civil contempt cannot last more than two years because it expires when the session of Congress ends.

Because of repeated abuses by legislators, especially during the Cold War and the civil rights protests, the Supreme Court further limited the contempt power of Congress. Congressional committees, especially the House Un-American Activities Committee, and state legislatures in the South attempted to expose Communist sympathizers and members of the National Association for the Advancement of Colored People by subjecting them to legislative questioning. The Supreme Court intervened and in *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539 (1963), ruled that before issuing subpoenas, a congressional committee must have authorization from the full House or Senate to conduct the investigation. The investigation, moreover, must have a clear legislative purpose. The questions posed by the legislators must be pertinent to the subject of the investigation. The Court held that witnesses had a constitutional right to refuse to answer any question that was on an unauthorized topic, was irrelevant to the topic, or might incriminate them.

Kenneth Holland

See also: Branzburg v. Hayes; Congressional Investigations.

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Contract, Freedom of

A contract is an agreement between two or more parties that creates binding legal obligations. Freedom of contract is the right of individuals and organizations to create and enter into legally binding agreements with others, based on mutual consent. In this manner, people are able to create their own promissory obligations, which the state will enforce in most circumstances.

Freedom of contract is a fundamental principle of the common law legal system and one of the most basic civil liberties in the United States. This principle rests on the idea that it is in the public interest to allow people to structure their future obligations through binding agreements free from government interference. For this reason, a contract derives its legitimacy from the intent of the parties and their personal

expectations rather than government policies. Allowing people to create their own binding obligations maximizes freedom and enhances the economic efficiency of society by promoting the allocation of resources to their highest valued uses.

The courts use an objective standard to determine whether parties have formed a contract. Contracts may be express or implied; the distinction lies merely in the mode of manifesting assent. A party may reveal the intention to *make* a promise with language or by implication from other circumstances, including course of dealing (how the parties have dealt in the past), usage of trade (what conduct is typical in the particular field), or course of performance (if a party performed but did not specifically "make" a promise). Agreement to *accept* a promise may be manifested by words or other conduct, even silence.

The law presumes the validity of contracts, and courts are generally reluctant to invalidate them. Courts may refuse to enforce contracts for a variety of reasons. For example, courts will not enforce an illegal contract. Contracts for murder or other crimes are not protected by freedom of contract. Similarly, contracts by minors or others whose status is presumed to negate their ability to understand freely the consequences of their actions will not be enforced. Other nonenforceable contracts are those procured by fraud or duress or the result of a mistaken assumption of a material fact.

When contracts violate an important public policy, they are not enforced if the policy being enforced is stronger than the policy of freedom of contract itself. An example of public policy important enough to overcome the principle of freedom of contract is the policy against restraints of trade. Certain noncompetition, price-fixing, or monopolistic contracts are not protected by freedom of contract.

The concept of freedom of contract, or liberty of contract, also has a basis in the U.S. Constitution and appears in most state constitutions as well. Article I, Section 10 of the U.S. Constitution provides that no state shall pass any law impairing the obligation of contracts. In addition, although not explicitly mentioned in the Fifth or Fourteenth Amendments, freedom of contract has been construed as being protected by the Due Process Clause found in both provisions.

The constitutional liberty-of-contract doctrine was employed by the U.S. Supreme Court in the late nineteenth and early twentieth centuries to invalidate social and economic reform legislation. On this basis, maximum-hour and minimum-wage legislation was deemed inconsistent with liberty of contract. This strict construction of liberty of contract was subsequently abandoned as a legal doctrine and is no longer used to strike down social or economic legislation.

John H. Matheson

See also: Lochner v. New York; Slaughterhouse Cases; Substantive Due Process.

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Contracts Clause

Article 1, Section 10 of the U.S. Constitution provides that "No state shall . . . pass any law impairing the obligation of contracts." Now largely forgotten, the Contracts Clause figured prominently in constitutional law until the early twentieth century and served as a key protection for property rights.

In the post–Revolutionary War era, state legislatures repeatedly intervened in debtor-creditor relations with a variety of laws designed to assist debtors at the expense of creditors. Although the Contracts Clause was little debated at the 1787 Constitutional Convention in Philadelphia, the provision was clearly intended to curb state debtor-relief laws that undercut the sanctity of private contracts and threatened to disrupt credit relationships. The clause was modeled after a similar provision in the Northwest Ordinance of 1787 that banned legislative interference with private contracts. It is significant that the framers selected more comprehensive language that seemingly covered all types of public as well as private contracts. Many state constitutions also included language forbidding the impairment of contracts.

The Contracts Clause assumed a major role early in constitutional development. In 1792 a federal circuit court struck down a state debtor-relief law as an impairment of contract. Alexander Hamilton, in a 1795 opinion letter, called for a broad reading of the Contracts Clause and asserted that a state land grant was the equivalent of a contract. During the tenure of John Marshall as chief justice (1801–1835), the Contracts Clause served as the principal vehicle by which the Supreme Court vindicated the rights of property owners against state infringement. A supporter of private property, business enterprise, and the national market, Marshall looked skeptically at state interference with private economic arrangements. He elaborated the meaning of the clause in a series of famous cases.

In the landmark case of *Fletcher v. Peck,* 10 U.S. 87 (1810), Marshall ruled that the Contracts Clause covered every description of contract and prevented a state from breaching its own agreements. It followed that the Georgia legislature could not rescind a land grant despite allegations of bribery in the original sale. Revealingly, in *Fletcher* Marshall characterized the Contracts Clause, along with clauses prohibiting ex post facto laws (providing for retroactive punishment) and bills of attainder (providing for punishment without trial), as a "bill of rights for the people of each state." Thereafter the Marshall Court applied the Contracts Clause to a variety of public contracts. In *New Jersey v. Wilson,* 11 U.S. 164 (1812), for instance, the Court held that repeal of a grant of a tax exemption impaired the obligation of contract. Further, the Court in *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819), determined that the grant of a corporate charter, even one issued before the current U.S. government, was a constitutionally protected contract, and that legislative changes to the charter violated the Contracts Clause. This decision encouraged the growth of corporate enterprise by affording constitutional protection against legislative infringement of charters of incorporation.

In the absence of a national bankruptcy law, the states continued to enact debtor-relief legislation. In *Sturges v. Crowninshield,* 17 U.S. 122 (1819), Marshall concluded that New York's bankruptcy law was invalid because it relieved debtors of the obligation to pay debts contracted before the measure was passed. On the other hand, in *Ogden v. Sanders,* 25 U.S. 213 (1827), over a rare dissent by Marshall, the Court insisted that the Contracts Clause did not operate prospectively. Hence, state laws could reach debts incurred after the date of enactment.

Despite differences in outlook between Marshall and his successor as chief justice, Roger B. Taney (1835–1864), the Supreme Court continued to apply the Contracts Clause vigorously. To be sure, Chief Justice Taney was inclined to give the states greater latitude in fashioning economic policy and to cut back on judicial supervision of contracts when the state was a party. In *Charles River Bridge v. Warren Bridge,* 36 U.S. 420 (1837), for example, Taney maintained that state grants and charters must be strictly construed to facilitate progress, and he rejected the notion that implied corporate privileges were protected by the Contracts Clause. Yet the Court under Taney strictly enforced the clause in cases involving debtor-relief laws and grants of tax exemption. In the leading case of *Bronson v. Kinzie,* 42 U.S. 311 (1843), the justices found two Illinois statutes that retroactively limited mortgage foreclosure sales to be an unconstitutional abrogation of contractual obligations.

The attempted repudiation of bonded debt by localities in the late nineteenth century was repeatedly challenged as a violation of the Contracts Clause. Drawing upon principles derived from the clause, the Taney Court in *Gelpche v. City of Dubuque,* 68 U.S. 175 (1864), protected the legitimate expectation of bondholders from a subsequent state-court decision that the bonds were invalid under state law. In effect, the Court decided that a state court could not divest the rights of bondholders by a retroactive change in the law. Thereafter the Court under Morrison R. Waite as chief justice (1874–1888) and his successor, Melville W. Fuller (1888–1910), regularly sided with creditors, invoking the Contracts Clause to uphold local government bonds in the hands of creditors against repudiation.

Despite the high regard for the sanctity of contract manifest in these decisions, the Contracts Clause gradually diminished in importance during the late nineteenth and early twentieth centuries. In part this was because other constitutional provisions, such as the Due Process and Takings Clauses, emerged as stronger guarantees of property rights. But other factors were

also at work. By its terms, the Contracts Clause applied only to the states and afforded no protection from federal interference with contractual arrangements. Congress, for example, could authorize the revamping of contracts by means of bankruptcy laws. Further, the clause prevented only retroactive impairment of existing contracts, leaving the states free to regulate the terms of future contracts.

Even more significant was recognition by the Supreme Court of exceptions to the Contracts Clause. In *Stone v. Mississippi,* 101 U.S. 814 (1880), the justices ruled that a state could ban the sale of lottery tickets notwithstanding the fact that a charter had previously granted the right to operate a lottery. The Supreme Court reasoned that a state legislature could not bargain away its authority to control the health, safety, and morals of the public. The concept of an alienable police power opened the door for state legislatures to modify or revoke public contracts. Similarly, the Court determined in *Illinois Central Railroad v. Illinois,* 146 U.S. 387 (1892), that under the public trust doctrine, a state could not irrevocably grant land under navigable waters.

Nonetheless, the Supreme Court in the first two decades of the twentieth century still relied on the Contracts Clause to strike down debtor-relief laws and measures designed to frustrate the payment of state bonds. The eclipse of the Contracts Clause is linked with *Home Building and Loan Association v. Blaisdell,* 290 U.S. 398 (1934). At issue was the validity of a state mortgage moratorium statute enacted during the Great Depression. Although this was the very type of law that seemed to fall within the purview of the Contracts Clause, a sharply divided Supreme Court upheld the statute as a reasonable response to emergency economic conditions. The Court in *Blaisdell* did not intend to undercut the Contracts Clause fatally, and in fact, the justices applied the clause several times to invalidate state debtor-relief laws in the late 1930s. But after the constitutional revolution of 1937, during which the Court began to acquiesce to the wishes of the executive and legislative branches, the Court ceased to scrutinize economic regulations meaningfully, and the once-powerful Contracts Clause was neglected for decades.

It would be a mistake, however, to dismiss the Contracts Clause as a dead letter. In the 1970s, the Court invoked the clause to strike down state laws in *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977), and in *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978). Some lower federal and state courts have also used the Contracts Clause to curb state legislative interference with private and public contractual arrangements. Thus, the Contracts Clause retains a modest degree of vitality as a safeguard for economic rights.

James W. Ely Jr.

See also: Home Building and Loan Association v. Blaisdell; Marshall, John; Property Rights; *Trustees of Dartmouth College v. Woodward.*

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Cooley, Thomas McIntyre (1824–1898)

Born in New York, Thomas McIntyre Cooley at age eighteen moved to Michigan, where he became one of the most influential scholars and jurists of the nineteenth century. He was elected to the Michigan Supreme Court in 1865 where he and fellow justices James V. Campbell, Benjamin Graves, and Isaac Christiancy formed the so-called Big Four of the Michigan Supreme Court who became nationally famous for the intellectual rigor and insight of their decisions. During his time on the bench, Cooley also served as professor and the first dean of the University of Michigan's Law Department, which was the forerunner of the current University of Michigan Law School.

Although Cooley was a prolific writer who published several leading works on torts and tax laws and who edited the writings of William Blackstone and Joseph Story, his greatest influence on U.S. constitutional theory rests upon his treatise in the field (Cooley 1868). In it, Cooley developed the notion of due process of law as a powerful protector of property and liberty rights. In particular, he argued for strong substantive property rights, including the liberty to contract, and for limits on the state police power to interfere with economic enterprises. Cooley believed strongly in a self-regulating market, and his ideas mixed common law traditions of due process with the Jacksonian libertarian ideal of equal rights without class legislation. Accordingly, Cooley vehemently opposed the legislative delegation of special privileges to certain groups, including the use of public powers like taxation and eminent domain for the benefit of only a few private entities.

Along with Christopher G. Tiedeman's book on the state's police power (1886), Cooley's work provided the intellectual foundation for the era of laissez-faire constitutionalism between the Civil War and the Great Depression, and it informed much of the judicial thinking during this time about police power, property rights, and the ability of state legislatures to regulate economic rights. In this last regard, Cooley's thought also paved the way for the eventual application of substantive due process guarantees to state activities through the Fourteenth Amendment.

Following his defeat for reelection to the Michigan Supreme Court in 1885, Cooley was appointed the first chairman of the newly formed Interstate Commerce Commission (ICC) in 1887. Just as his judicial acumen had raised the prestige of the Michigan Supreme Court and the University of Michigan's Law Department, his presence as chairman of the ICC enhanced its legitimacy, too. Moreover, as head of one of the first federal administrative agencies in U.S. history, Cooley advanced standards of understanding administrative law that would be followed decades later when the U.S. administrative state began to grow at a more rapid pace. For example, Cooley helped to establish an administrative rule-making process at the ICC, and he articulated a concept of administrative due process to protect parties with complaints before the agency. He also argued strongly for judicial deference to administrative determinations. Cooley served as ICC chairman until 1891 and died in 1898. In 1972 the chief justice of the Michigan Supreme Court led a group of lawyers and judges to found the Thomas M. Cooley Law School in Lansing.

James McHenry

See also: Police Power; Property Rights; Substantive Due Process.

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Copyright, Patent, and Trademark

Copyrights, patents, and trademarks are forms of intellectual property that Congress has been given constitutional authority to regulate. The founding fathers' intent was to provide protection for inventions and authored works that people create. Article I, Section 8, clause 8 of the Constitution provides that Congress shall "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Patents and copyright—if not trademarks—have a long history. One of the earliest patents was a three-year monopoly granted to the Florentine architect and engineer Filippo Brunelleschi in 1421 for the manufacture of a barge with hoisting gear used to

transport marble. Copyrights grew out of the royal practice of granting patent monopolies. The British crown granted monopolistic copyrights to the London Stationers Company, which the court of Star Chamber regulated to maintain control over the political and religious content of publications within the realm.

PATENTS

Congress enacted the first federal patent law in 1790. President George Washington signed the first patent on July 31, 1790, after Thomas Jefferson, the secretary of state and ex officio patent examiner, granted a patent to Samuel Hopkins of Pitsford, Vermont, for a new method of making potash, an industrial chemical used in making soap, glass, fertilizers, and gunpowder. Notable patent-holders include Thomas Edison (electric lamp, among others), Alexander Graham Bell (telegraphy machine), Orville and Wilbur Wright (flying machine), John Deere (steel plow), and Edward Land (Polaroid camera). In 1870 Congress gave the Patent Office trademark jurisdiction, and currently the Patent and Trademark Office is under the jurisdiction and supervision of the Department of Commerce.

The basic authority for current patent law is derived from legislation passed July 19, 1952, and codified in Title 35 of the *United States Code.* Inventions are eligible for patent protection. The patent gives inventors "the right to exclude others from making, using, offering for sale, or selling" the patented item in the United States or "importing the invention into the United States." There are three types of patents: A "utility patent" for twenty years (effective June 8, 1995) is granted to anyone who "invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof"; "plant patents" are granted to anyone who "invents or discovers and asexually reproduces any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuber propagated plant or a plant found in an uncultivated state"; and "design patents" are granted for fourteen years to anyone who "invents any new, original and ornamental design for an article of manufacture."

TRADEMARKS

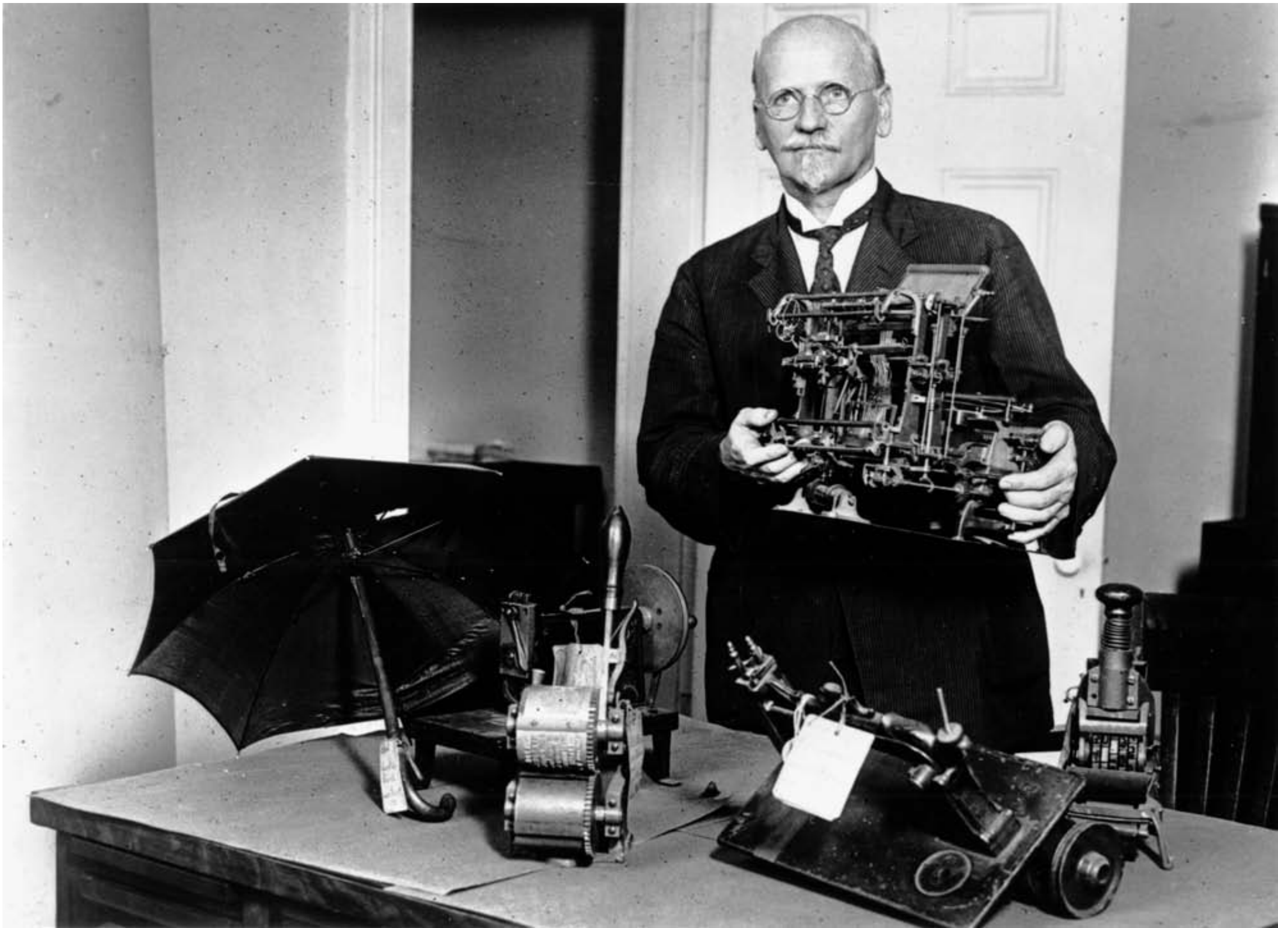
The Trademark Act of 1946 governs the registration and administration of the trademark laws. Trademarks include "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others." Closely associated to a trademark is a "service mark," which the statute defines as "a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others." Examples of a trademark include Apple Computer's multicolored apple with a bite taken on the right side, and the golden arches of McDonald's. An example of a service mark is "Midas Muffler Shops," in which "Midas" is the associated trademark.

Trademarks do not create any exclusive rights in the services or products they represent. They merely become the exclusive property of the owner and user for identification purposes. Trademark applicants must usually show that they have adopted and are using the mark as shown on a drawing that must accompany an application; that they believe they are the owners of the mark; that the mark is in use in commerce; that to the best of their knowledge and belief, no one else has the right to use the mark in commerce, either in the identical form or in such near resemblance as to be likely, when applied to the goods or services of the other person, to cause confusion or mistake, or to deceive; and that the drawing shows the mark as currently used on or concerning the goods or services.

COPYRIGHT

Congress enacted the first national copyright law in 1790, and registrations of copyrights were administered by the clerks of the federal district courts. The U.S. Supreme Court stated in *Twentieth Century Music Corp. v. Aiken,* 422 U.S. 151 (1975), that

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public in-



Thomas E. Robertson, U.S. commissioner of patents, with patented machinery, tools, and umbrella, 1930. In 1870, Congress granted the Patent Office trademark jurisdiction. Currently, the Patent and Trademark Office is under the jurisdiction and supervision of the Department of Commerce. *(Library of Congress)*

> terest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

The administration of copyrights moved to the Library of Congress in 1870 to be conducted under the direction of the Librarian of Congress, and in 1897 it became the Copyright Office, a separate Library of Congress department. As of fiscal year 2001, the Copyright Office had recorded 29,732,771 copyrights. The first copyright law granted a copyright privilege to books, maps, and charts for a term of fourteen years with the right to renew for an additional fourteen years. John Barry registered the first copyright entry for *The Philadelphia Spelling Book* in Philadelphia.

Copyright literally means the "right to copy." Copyright is a privilege granted to producers of original works of authorship that grants them the exclusive right to their works in certain regards. Section 106 of the Copyright Act of 1976 (the last general revision of the copyright laws) grants copyright owners the exclusive right to reproduce the work in copies or phono records; to prepare derivative works based upon the work; to distribute copies or phono records of the work to the public by sale or other transfer of

ownership, or by rental, lease, or lending; to perform the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works; and to display the copyrighted work publicly, in the case of literary, musical, dramatic, choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work; and, in the case of sound recordings, to perform the work publicly by means of a digital audio transmission. Copyrights are available for published and unpublished works, but cannot be applied to an idea, procedure, process, slogan, principle, or discovery.

Copyright protection begins at the point in time that authors produce the work. Only the author or the author's designee can claim copyright protection. Although copyright protection is available to all unpublished works, and registration with the Copyright Office is not required to secure copyright protection, there are certain advantages to publication and registration, particularly with regard to overcoming a claim of "innocent infringement."

The Sonny Bono Copyright Term Extension Act of 1998 extended the copyright period. Works created before January 1, 1978, are protected for the author's life plus seventy years, and in cases where there are multiple authors, the seventy-year period begins on the death of the last surviving author. For "works for hire" (works prepared by employees within the scope of their employment or works specifically commissioned for use of such products as an instructional text or atlas), and for anonymous and pseudonymous works, the protected term is ninety-five years from publication or 120 years from creation, whichever is shorter. The period of copyright protection for works created before January 1, 1978, is generally seventy-five years including available renewal periods. In *Elred v. Ashcroft,* 537 U.S. 186 (2003), some individuals and businesses whose products or services were built on copyrighted works that had gone into the public domain unsuccessfully challenged the Copyright Term Extension Act because it violated the "limited times" provision of Article I, Section 8, clause 8 and the free speech guarantee of the First Amendment.

Copyright privileges are limited. For example, section 107 of the 1976 Copyright Act contains the "fair use doctrine," which provides that "use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." The factors that must be considered in determining the existence of fair use are "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work" (*U.S. Code,* vol. 17, sec. 107). The law also requires that some copyrighted works be licensed upon payment of specified fees such as those paid under the Audio Home Recording Act of 1992, which requires manufacturers of consumer digital audio recorders to pay royalties designed to cover recordings of registered works by consumers. In exchange for this payment, manufacturers are granted statutory immunity from copyright infringement suits based on the use of these devices by consumers.

Finally, as new information technologies evolve, such as the Internet and the World Wide Web, protection of copyrights, trademarks, and patents becomes more difficult. For example, it has become easier to exchange music or videos across the Internet, making it easier to infringe on these intellectual property rights.

Clyde E. Willis

See also: United States Constitution.

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Corfield v. Coryell (1823)

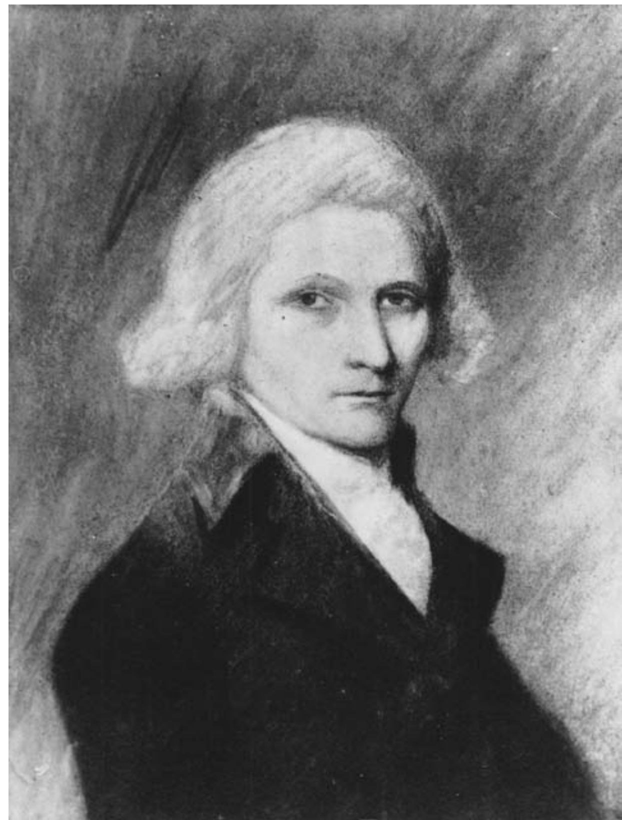
Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230), was the first leading case construing the Privileges and Immunities Clause of Article IV, Section 2, of the U.S. Constitution, and the case remains important today. It held that a state's constitutionally required extension of privileges and immunities to persons regardless of state citizenship applied only to fundamental rights and did not preclude all regulatory distinctions based on a person's citizenship status.

The case resulted from the effort by the state of New Jersey to prohibit noncitizens from collecting oysters except from aboard a vessel owned by a New Jersey resident. Offenses were punishable with monetary fines and seizure of property. When a nonresident vessel discovered in New Jersey waters collecting oysters was "seized, condemned, and sold," the statute was challenged as unconstitutional. *Corfield* was a circuit court case decided by Supreme Court Justice Bushrod Washington. It raised two constitutional questions. The first was a "dormant Commerce Clause" challenge. How exclusive is the power of Congress to legislate on the subject of interstate commerce? Does the congressional power enumerated in Article I, Section 8 preclude all state regulation of commerce, even in the absence of overriding federal regulation?

The second constitutional challenge was pertinent to the national extension of civil rights and provided the decision with its most lasting significance. Did the New Jersey statute violate the Constitution's guarantee that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" (IV.2.1)? Article IV as a whole presented several interpretive obstacles in the early years of the republic. The Constitution's first three articles structure the institutions of the new national government. The three sections of Article IV address the relationship between the national government and the preexisting state governments. The disputes that arose over the meaning of the three sections of Article IV were therefore closely related to the constitutional debates that culminated in the Civil War. The U.S. Supreme Court addressed these issues in *Prigg v. Pennsylvania,* 41 U.S. 539 (1842), *Luther v. Borden,* 48 U.S. 1 (1849), and *Scott v. Sandford,* 60 U.S. 393 (1857).

At issue in *Corfield* was whether the Privileges and Immunities Clause established a blanket requirement that states make no distinctions between their citizens and the citizens of other states, or if it established the nondiscrimination requirement only with respect to fundamental rights. In other words, can states ever favor their own citizens?

Justice Washington concluded that the clause applied only to fundamental rights and therefore states could limit some benefits to their own citizens. The state must never distinguish between its citizens and noncitizens in the provision of fundamental liberties, such as freedom of speech or religion, but regulatory distinctions based on particular state-specific benefits remained acceptable:



Corfield v. Coryell, a circuit court case decided by Supreme Court Justice Bushrod Washington (pictured), was an important case outlining the economic rights states must afford nonresidents under the Privileges and Immunities Clause of the Constitution. *(Library of Congress)*

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

Washington's interpretation of the clause allowed for substantial regulatory distinctions based on one's state citizenship status, as long as those distinctions did not interfere with certain fundamental liberties.

The inability to collect oysters did not seem to affect a person's natural rights adversely, and therefore it is not surprising that Washington rejected the claim that the New Jersey statute violated the Constitution: "But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens."

The continued influence of Washington's interpretation led to failure of many privileges and immunities claims, as evidenced in Chief Justice William H. Rehnquist's finding in *Baldwin v. Fish and Game Commission of Montana,* 436 U.S. 371 (1978), that citizenship-based disparities in the cost of hunting licenses did not violate privileges and immunities. Still, in recent years there has been some effort to revive the clause, as the Court ruled in *Saenz v. Roe,* 526 U.S. 489 (1999), that a state violated privileges and immunities by restricting welfare benefits to long-term state residents. Rehnquist, this time writing in dissent, used Justice Washington's opinion in *Corfield* to support his argument for the continuation of a more limited reading of the Privileges and Immunities Clause.

Brendan Dunn

See also: Property Rights; *Slaughterhouse Cases;* Substantive Due Process.

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Corporate Speech

Corporate "speech" is a protected form of expression under the First and Fourteenth Amendments to the Constitution. American corporations are organizations created and structured by federal and state law. States and the federal government have developed a bewildering number of corporate forms to enhance the economic performance of businesses, to facilitate legal transactions, and to promote and regulate social and political action and advocacy. Whether corporations should have free speech rights equal to those of individuals, or free speech rights at all, has been an issue of great contention and is one aspect of a larger debate over the public role of corporations in American society.

Corporations have rights, including free speech rights, because they are considered "persons" within the meaning of the Constitution. The Supreme Court established corporate personhood in *Santa Clara County v. Southern Pacific Railroad. Co.,* 118 U.S. 394 (1886). The Court did not address the issue explicitly but rather assumed the status of corporations as constitutional persons after Chief Justice Morrison R. Waite, prior to oral argument, simply declared they were.

Corporate speech is of two general types: commercial and noncommercial. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations Commis-*

sion, 413 U.S. 376 (1973), the Supreme Court defined "commercial speech" as expression that does "no more than propose a commercial transaction." This is a purposely narrow definition because, as a general matter, commercial speech is a less protected form of expression under the First Amendment, and the Court does not want to stifle corporate participation in public discourse, as it noted in *Bigelow v. Virginia,* 421 U.S. 809 (1975).

Laws regulating commercial corporate speech, as well as that of individuals, are examined using a four-part test articulated in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980). The *Central Hudson* test allows states and the federal government to regulate commercial speech if it is false or misleading or promotes unlawful activity, or if the regulation directly promotes a substantial government interest while only regulating as much speech as is necessary to achieve the government's regulatory purpose. At the same time, regulations on commercial speech that attempt to reduce demand for a product or influence consumer behavior by restricting the flow of accurate information to consumers are unconstitutional, as the Court held in *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996).

Noncommercial speech is corporate expression that falls outside the Court's narrow definition of commercial speech and includes speech on topics of current public concern. The Supreme Court has been particularly interested in evaluating federal and state regulation of corporate comment on political issues and the corporate use of money to influence electoral outcomes.

As a general matter, courts protect corporate speech that takes a position on an issue of political significance as much as it does similar speech by individuals. The Supreme Court, in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), held that regulation of corporate political speech is unconstitutional unless enacted to achieve a compelling governmental interest and narrowly drawn to avoid unnecessarily burdening corporate expression.

The Court concluded that the expression of political views is valuable, regardless of the source of those views. The Court rejected the argument that regulating corporate political speech was of compelling interest because corporations exerted undue influence on political discourse and the democratic process; the Court stated simply that there was no empirical evidence of that assertion. Even when corporations have taken advantage of their business position to influence a captive audience, the Court has protected corporate speech. For example, in *Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530 (1980), the Court held that a utility company with a government-granted monopoly was protected by the First Amendment when it sent politically oriented messages to its customers in billing envelopes.

The right of corporations to attempt to influence the outcome of political elections is a highly contentious issue in American law and politics. When corporations contribute money directly to a political campaign or spend money to endorse or criticize a particular candidate for office, they are protected by the First Amendment. Because it is virtually impossible to communicate effectively to a mass audience without spending money, the spending of money itself is a form of protected expression, the Court stated in *Buckley v. Valeo,* 424 U.S. 1 (1976).

As a general rule, the direct contribution of political money to political campaigns by both individuals and corporations ("contributions") is subject to greater government regulation than spending by individuals and corporations on behalf of or against a candidate independent of the candidate's input ("independent expenditures"). The Court in *Buckley* held that governments have a compelling and constitutional interest in preventing political corruption or the appearance of corruption. Governments are justified, therefore, in regulating contributions to political campaigns because inordinate individual or corporate financing of a political campaign creates the danger or appearance of a quid pro quo relationship between the politician and the donor.

As a result, federal and state governments may prohibit corporations from making contributions to political campaigns from their general treasury. Corporations are usually allowed to set up political action committees (PACs) that may solicit funds and make contributions to candidates. The law may also set the maximum amount of money that PACs may give to political candidates. In addition, under *Federal Election Commission v. National Right to Work Com-*

mittee, 459 U.S. 197 (1982), federal or state law may limit from whom a corporation may solicit funds for its PAC. The law upheld in *National Right to Work Committee* limited solicitation to a corporation's stockholders and their families and employees and their families, or, for nonstock corporations, its members.

Generally, regulations of "independent expenditures" are less likely to be constitutional than limitations placed on direct campaign contributions, because the danger of an actual or apparent quid pro quo does not exist. For this reason, corporate and individual spending on referendums, which involve no political candidates, may not be regulated, as the Court held in *Bellotti*.

Nevertheless, the Supreme Court decision in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), opened the door to greater government regulation of corporate campaign spending. The Supreme Court, for the first time, held that states could prohibit most types of corporations, including umbrella organizations such as trade associations and chambers of commerce, from using funds in their general treasuries to make independent expenditures for or against political candidates.

The *Austin* opinion noted that the *Bellotti* decision held open the possibility that corporate speech might be regulated more closely than individual speech if a compelling governmental interest in treating it differently could be shown. The Court stated that Michigan's compelling interest was not in preventing an actual or apparent quid pro quo relationship but rather in ensuring that the amount of money spent, and therefore support given, to political candidates was proportional to numerical support among the population. In other words, the Court accepted the argument, rejected in *Bellotti* as empirically unfounded, that corporate speech has an unfair influence on elections.

The Court distinguished its ruling from the decision in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986), in which the Court struck down a federal law that banned corporate independent expenditures, as applying to a different type of corporate entity. Corporations that meet the following criteria are exempt from laws like the one upheld in *Austin*: The corporation (1) exists specifically to discuss political ideas and cannot act as a business or have a multifaceted mission; (2) has no shareholders or people with a claim to the corporation's assets; (3) must be independent of business corporation influence.

In conclusion, corporations share many of the same free expression rights as individuals. Corporate commercial speech is subject to greater regulation than corporate political speech, and politically oriented corporate expression is subject to greater regulation than individual political expression if the nature of the corporate form creates a compelling governmental interest in specifically limiting corporate speech.

James Daniel Fisher

See also: Central Hudson Gas and Electric Corp. v. Public Service Commission of New York; Commercial Speech; Federal Election Campaign Act of 1971; First Amendment.

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Corrupt Practices Act of 1925

The U.S. Supreme Court's decision in *Newberry v. United States,* 256 U.S. 232 (1921), which held that Congress lacked the constitutional power to regulate primary elections, prompted Congress to enact the Corrupt Practices Act of 1925. The act is significant as it represented a comprehensive revision of existing campaign legislation. It attempted to address the First Amendment free speech issues and other constitutional matters that necessarily arise in election campaigns.

The new law extended the prohibition against corporate contributions previously covered by the Tillman Act of 1907 to include "anything of value," and it criminalized making and accepting corporate contributions. The act continued the limitation on the right of federal employees to contribute to political campaigns that was first instituted by the 1867 Naval

Appropriations Act. The act also expanded campaign disclosure requirements by requiring political committees (defined as organizations that accept contributions or make expenditures "for the purpose of influencing or attempting to influence" the presidential or vice presidential elections in two or more states or as part of a national committee) to report total contributions and expenditures, including the names and addresses of contributors of $100 or more and recipients of $10 or more in a calendar year. A significant innovation was the act's requirement that campaign financial reports had to be filed quarterly—before the relevant election.

The U.S. Supreme Court upheld the Corrupt Practices Act against a challenge that the limit on the right of federal employees to make financial contributions to federal candidates violated the rule established in *Newberry,* in which the Court held that Article I, Section 4 of the Constitution granted state governments the exclusive right to regulate and administer elections. Justice Oliver Wendell Holmes Jr., writing for the Court in *United States v. Wurzbach,* 280 U.S. 396 (1930), quickly disposed of the argument by refusing to acknowledge the relevance of *Newberry,* stating that it "hardly needs argument to show that Congress may provide that its officers and employees neither shall exercise nor be subjected to pressure for money for political purposes, upon or by others of their kind, while they retain their office or employment."

The Court upheld the act in a second attack in a case that charged a political committee with conspiracy in accepting contributions and making expenditures to influence the election of presidential and vice presidential electors in two states. In upholding the act against a challenge similar to the one in *Wurzbach,* Justice George Sutherland, speaking for the Court in *Burroughs v. United States,* 290 U.S. 534 (1934), stated that the "power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." *Burroughs* is among several cases the Court decided in the 1930s in which the justices expressed strong intent to bow to the wishes of Congress.

Clyde E. Willis

See also: Federal Election Campaign Act of 1971; Tillman Act of 1907.

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County of Allegheny v. American Civil Liberties Union (1989)

The decision in *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573 (1989), was one in a series of efforts by the U.S. Supreme Court to clarify the meaning of the test developed in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), and to balance the First Amendment need for state neutrality toward religion and the right of citizens to practice their religion freely. In this instance, the controversy centered around two holiday displays located on public property in downtown Pittsburgh, Pennsylvania. The first display was a crèche, or Christian nativity scene, which was placed on the Grand Staircase of the Allegheny Courthouse. At other times, this space might be used for concerts, art displays, or other public events. The crèche display would be visible to anyone visiting the courthouse. At the top of the manger rested an angel holding a banner reading "Gloria in Excelsis Deo" (Glory to God in the Highest). The second contested display was located just outside the City-County Building. This display included a forty-five-foot decorated Christmas tree, an eighteen-foot Hanukkah menorah, and a sign noting the city's "salute to liberty."

The holding in this five–four decision suggested the growing pressure within the Court to revisit the *Lemon* test as well as the contextual nature of the decisions involving holiday displays. Under the Estab-

lishment Clause of the First Amendment, the constitutionality of such displays depends not only upon their religious content but also upon the length of time they are displayed, the physical location of the display, and the presence of secular symbols of the season along with overtly religious symbols.

In his opinion for the Court, Justice Harry A. Blackmun reaffirmed the *Lemon* precedent, which required a three-pronged analysis. The Court first inquired as to the purpose of the display; only a secular purpose would pass constitutional muster. Next, the Court assessed the primary effect of the display, which must also be secular. Finally, the Court had to determine whether the display (regardless of its purpose or effect) created an "excessive entanglement" between government and religion. Blackmun proceeded to refine the third prong by replacing the "excessive entanglement" language. He suggested that excessive entanglement would be present if a "reasonable person" observing the display would perceive it as an "endorsement" of a particular religion or of religion in general. The "endorsement" language shifted the focus from the Court's assessment of entanglement to the public's probable reading of the display.

The majority held that the crèche display, because of its prominent placement and its overtly and purely religious message (Glory to God in the Highest), violated the Establishment Clause. In so holding, the Court had to distinguish the display in Allegheny from a crèche display that was held to be constitutionally permissible in the earlier case of *Lynch v. Donnelly,* 465 U.S. 668 (1984). In *Lynch,* the crèche was placed in a private park and was accompanied by more secular seasonal items, such as Santa and his reindeer, a Christmas tree, and oversized candy canes. The city provided all materials for the display and covered the cost of lighting. Yet because the display appeared on private property, it was not an "endorsement" of religion in the same way that the crèche in Pittsburgh was. The Court deemed the display containing the tree and the menorah permissible, as the symbols had both cultural and religious significance and were accompanied by a sign praising religious liberty; their less prominent placement also rendered the display less of an endorsement than the crèche.

Justice Anthony M. Kennedy filed a lengthy and strongly worded dissent, joined by Chief Justice William H. Rehnquist and Justices Antonin Scalia and Byron R. White, in which he argued that the *Lemon* test was an overly rigid interpretation of the Establishment Clause. For Kennedy and the other dissenters, the key question was whether the government was engaging in "proselytization" on behalf of a particular religion—that is, whether it actively promoted specific religious beliefs through its actions and displays. For example, a large cross attached to the top of the courthouse, year-round, would clearly constitute an attempt to proselytize. A crèche display acknowledging Christmas tradition, in Kennedy's view, did not.

In sum, the *Allegheny* case represents yet another attempt by the Court to sort out Establishment Clause doctrine and to confine the government to neutrality without requiring it to promote secularism.

Sara Zeigler

See also: Establishment Clause; First Amendment; *Lemon v. Kurtzman; Lynch v. Donnelly.*

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County of Riverside v. McLaughlin (1991)

In *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991), the U.S. Supreme Court analyzed whether there was a requisite time limit within which individuals arrested without a warrant were entitled to appear before a neutral magistrate following the arrest. The timing would be especially important because a judicial officer would not yet have determined the existence of probable cause for the warrantless arrest. The probable-cause requirement as incident to an arrest

has its origins in the Fourth Amendment to the U.S. Constitution.

In *Gerstein v. Pugh,* 420 U.S. 103 (1975), the Court held that this appearance before a magistrate should occur "without unnecessary delay," but did not set forth a specific standard to determine unnecessary delay. Rather, the *Gerstein* Court required that persons arrested without warrants have "prompt" judicial determinations of the existence of probable cause. The Court attempted to clarify "promptness" in *McLaughlin.*

Riverside County, California, incorporated probable-cause determinations into its arraignment procedure (arraignment is a defendant's initial court appearance during which charges are leveled). Under the county's policy, arraignments had to take place within two days of arrest, excepting weekends and holidays. The five–four Court, speaking through Justice Sandra Day O'Connor, said *Gerstein* had established a "practical compromise" between the interests of arrested persons and the "realities" of law enforcement. *Gerstein* allowed local jurisdictions some latitude in procedures used to make probable-cause determinations because, in O'Connor's words, some delays would be "inevitable." Postponing probable-cause hearings was reasonable in some situations because police must "cope with the everyday problems of processing suspects through an overly burdened criminal justice system." At the same time, she said, "flexibility has its limits; *Gerstein* is not a blank check." O'Connor indicated that although the Constitution did not compel a specific time limit, it was necessary to provide "some degree of certainty" so that states and counties could establish procedures "with confidence that they fall within constitutional bounds."

A jurisdiction that chooses to combine probable-cause determinations with other pretrial proceedings, such as arraignments, must do so "as is reasonably feasible." The Court concluded that hearings conducted within forty-eight hours of arrest would, "as a general matter, comply with the promptness requirements of *Gerstein.*" *Gerstein* violations may still occur within the first forty-eight hours, but the burden of demonstrating unreasonable delay rests with the arrested party. After forty-eight hours, the "calculus changes." The burden then shifts to the government to demonstrate the existence of a "bona fide emergency or other extraordinary circumstance." Neither delay exceeding forty-eight hours in order to consolidate pretrial proceedings nor intervening weekends or holidays can provide the basis for delay. Both were presumptively unreasonable, said O'Connor, and would not qualify as extraordinary-circumstance exceptions. Using this standard, the Riverside County policy did not meet the *Gerstein* promptness requirement. Although *McLaughlin* indicated that judicial review of warrantless arrests should occur within forty-eight hours, the time limit was not rigidly set. Rather, the Court spoke of the shifting burdens of proof at the forty-eight-hour point.

Justices Antonin Scalia, Thurgood Marshall, Harry A. Blackmun, and John Paul Stevens dissented. In their view, the Fourth Amendment required that an arrestee appear before a judicial officer as soon as reasonably possible; a probable-cause hearing should occur "immediately upon completion of the administrative steps incident to arrest." The dissenters did not see the combining of a probable-cause determination with other proceedings as sufficient justification for delay. Justice Scalia indicated that twenty-four hours should define the outer limit of reasonable delay.

Peter G. Renstrom

See also: Arraignment; Arrest.

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Court-Packing Plan

During a totalitarian era in world history when some people advocated new fascist and communist regimes as superior to democracy, Franklin D. Roosevelt (FDR) was eager to demonstrate to doubters at home

and abroad that democracy provided a viable framework to address the crippling Great Depression. The New Deal was his ad hoc, experimental solution launched during his first presidential term to combat the economic, social, and political crisis the depression triggered. However, the Supreme Court of the United States, dominated in the 1935–1936 term by an active conservative bloc, declared several major pieces of Roosevelt's New Deal legislation unconstitutional. These included the National Recovery Administration Act, the Agricultural Adjustment Administration Act, and the Bituminous Coal Conservation Act. By the end of 1936, the Court had struck down New Deal legislation in seven of nine cases brought before it.

For FDR, the situation was aggravated by the fact that he did not have the opportunity to nominate even one justice to the Court during his first term. A landslide 1936 reelection victory bolstered FDR's confidence and contributed to a disastrous attempt to concoct a political remedy that would prevent the Court from declaring further New Deal legislation unconstitutional and would strengthen the presidency. The ill-thought-out scheme, quickly dubbed FDR's Court-packing plan when introduced, became the first major political blunder of his four-term presidency.

PURPOSE AND PLAN

Both FDR and Homer S. Cummings, his first attorney general, agreed that a constitutional amendment to address composition of the Supreme Court would take too long. They sought an expedited approach to overcome the rejection of New Deal legislation by the Court's consistent five–four holdings despite overwhelming support for the measures from the public and the Congress. Bolstered by hubris from his landslide victory, FDR elected to attempt a political shortcut rather than wait for attrition to alter the conservative Court. Cummings secretly drafted a bill that concealed the underlying intent by broadening it to allow for forty-four new judges on the lower federal benches and up to six additional Supreme Court justices. It applied to everyone with ten years of judicial service who failed to retire within six months after reaching the age of seventy. Six of the justices were already beyond seventy years old. Other than the president, the attorney general, and two top Justice Department assistants, only Solicitor General Stanley F. Reed and Robert H. Jackson, who later became attorney general and went on to become Reed's replacement, knew of FDR's plan. The president's failure to consult with others before launching his plan was the first of a series of misjudgments that undermined approval of it.

Schemes to enlarge the Court had precedents from the Abraham Lincoln and Ulysses S. Grant administrations, and a nine-member Court was not chiseled in stone. A great irony of FDR's Court-packing episode was that the most recent previous attempt to assure a younger judiciary had been made by former U.S. Attorney General James C. McReynolds, one of the sitting justices targeted by FDR for removal. The racist McReynolds had been attorney general for President Woodrow Wilson before Wilson appointed him to the Supreme Court to rid his administration of the disruptive attorney general. The Court's most bigoted member, McReynolds now was among the four most conservative and elderly activist justices. The conservative bloc's consistent voting record against New Deal economic and social legislation had led a frustrated FDR to accuse the four justices of wanting to turn the nation back to its "horse-and-buggy days." These so-called Four Horsemen, an appellation drawn from the biblical Four Horsemen of the Apocalypse, triggered FDR's jeremiad, just as McReynolds's behavior had triggered Wilson to appoint him to the Supreme Court to clean the presidential cabinet.

REACTION

FDR stunned Congress on February 5, 1937, with introduction of the Court-packing scheme. A five-month battle ensued. Congressional Republicans, newspaper editors, and the organized bar came out strongly against the bill. By contrast, it attracted strong support from many Democrats. Hatton W. Sumners (D-TX), House Judiciary Committee chairman, favored the retirement of senior justices, and Henry F. Ashurst (D-AR), Senate Judiciary Committee chairman, initially supported the bill. Future Supreme Court justices Hugo L. Black and Frederick Moore Vinson, along with Reed and Jackson, helped FDR to prepare his March 9, 1937, fireside chat justifying the proposal. Ultimately, FDR was counting

on the popular leadership of Senate Majority Leader Joseph T. Robinson (D-AR), to carry the Senate fight. The Senate knew that Robinson had been tapped to be FDR's first Supreme Court nominee under the new plan.

If that deal were not enough, top presidential aide Tommy "the Cork" Corcoran attempted to solidify Senate support with a thinly veiled promise to another senator, but his overture backfired and created a vocal opponent instead. Corcoran suggested to Senator Burton K. Wheeler (D-MT) that he would have the opportunity to influence the choice of other justices to the reconstituted Court if he supported the measure. The semibribe resulted in Wheeler's leading the bipartisan opposition. Wheeler first attracted national attention during the forced resignation of Harry M. Daugherty, Warren Harding's attorney general, and he had been the first national figure to endorse FDR's presidential ambitions. The Court-packing plan led to their permanent break. Wheeler would go on to become the senatorial filibuster hero in Frank Capra's 1939 movie classic *Mr. Smith Goes to Washington.*

The bill's fate was doomed by three strikes against it in quick succession. First, in late March 1937, under the able leadership of Chief Justice Charles Evans Hughes, the Supreme Court suddenly began to reverse itself on New Deal measures. Next, on May 18, conservative activist Willis Van DeVanter, one of the Four Horsemen, announced his retirement on the same day that the Senate Judiciary Committee voted ten to eight against the bill. Finally, Robinson suffered a fatal heart attack on July 14, only eight hours after formal Senate debate on the bill began. Just as suddenly, a group of freshmen Democratic senators announced opposition, and others felt Robinson's death freed them from their pledge to support the bill. On July 22, Democratic Senator Mavel Logan of Kentucky, McReynolds's home state, moved that the bill be recommitted to the Judiciary Committee. As a face-saving measure, FDR on August 26 signed the Judiciary Procedures Reform Act, which reformed lower-court procedures without mentioning judicial enlargement.

It was a costly—and avoidable—major political miscalculation for an activist administration. The president would have suffered less political harm if he had directed that the bill be withdrawn after the Court modified its stance. Perhaps the ultimate irony was that if FDR's Economy Act of 1933 had not reduced retirement pensions for justices by half, some of them might have retired prior to 1937. The controversy had two direct adverse results: It caused FDR to postpone for more than two years his plan to strengthen and reorganize the executive branch, and it weakened the New Deal coalition by contributing to the rise of the "conservative coalition" of Republicans and southern Democrats. The president, who was unable to name a single justice to the Court during his first term or enlarge the Court during his second, eventually named more justices than any president since George Washington. In that way, he lost his battle to enlarge the Court but won the ultimate war to "pack" the Court.

William D. Pederson

See also: Carolene Products, Footnote 4; United States Supreme Court.

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Coy v. Iowa (1988)

In *Coy v. Iowa,* 487 U.S. 1012 (1988), the U.S. Supreme Court overturned an Iowa law that permitted installation of a screen between an underage victim of sexual assault and the defendant accused of the assault during the victim's testimony in order to protect the victim from further trauma. The case posed important issues pertaining to defendants' right to confront their accusers under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution.

The state of Iowa charged John Coy with sexually assaulting two thirteen-year-old girls. Concerned that testifying before the defendant in court would further harm the girls, the trial court acted in accordance with Iowa law and placed a screen between Coy and the victims when the victims took the witness stand. (The Iowa law also allowed victims to testify over closed-circuit television.) The defendant could observe the testimony of both girls through the screen, but the girls could not see the defendant. The jury later found Coy guilty on two counts of assault. Coy appealed his conviction, claiming the use of the screen violated the Confrontation Clause, which he argued required face-to-face contact between accused persons and their accusers.

The Supreme Court found the Iowa law unconstitutional. Justice Antonin Scalia, writing for the six-two majority, underscored the long-standing principle of face-to-face contact embodied by the Confrontation Clause. Scalia argued that the requirements of the clause did more than enable cross-examination but also added to the perception of fairness essential to the functioning of the judicial branch and made it more difficult for witnesses to lie because they were in the visual presence of those they were accusing. Although the state may be interested in the well-being of underage victims of sexual assault, this interest did not outweigh the right of accused individuals to confront their accusers. In addition, the Court found the Iowa law too broad in its assumption that all underage witnesses were subject to trauma from testifying. The Court remanded the case to the Iowa Supreme Court to decide if use of the screen affected the outcome of the case.

Justice Sandra Day O'Connor wrote a concurring opinion emphasizing the view that the principles of the Confrontation Clause were not absolute. Although she agreed with the outcome of *Coy,* Justice O'Connor argued that other arrangements, such as the use of closed-circuit television, could be used in other situations if the state demonstrated a justifiable interest in protecting an underage witness from harm. The Court accepted this reasoning two years later in *Maryland v. Craig,* 497 U.S. 836 (1990), by allowing a six-year-old victim to testify over closed-circuit television after the state showed the young girl would not have been able to communicate in front of the group gathered in the courtroom. Justice Scalia and three other justices dissented in *Craig,* producing a five–four ruling.

Jason Stonerook

See also: Confrontation Clause.

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Creation Science

Creation science is an offshoot of creationism, a loose set of cultural-religious beliefs that holds that the physical universe and life within it appeared suddenly and have not changed substantially since their creation. In its most common form, creationism is simply literal adherence to the text of the Book of Genesis, an Old Testament narrative crediting an omnipotent God with creating all planetary life at some point in the past. Some creationists have extrapolated from the genealogical record of Genesis that this event, and the creation of the universe and Earth, occurred approximately 7,000 years ago.

Creationism was not defined as a movement until adherents began viewing it as an opposing force to the theory of evolution, which emerged in the 1800s and grew in popularity thereafter. The initial controversy was triggered in 1859 with naturalist Charles Darwin's publication of *On the Origin of Species,* which asserted that all life developed from simple organisms and gradually diversified into more complex forms. In this view, the various life forms on Earth are the random outcome of billions of years of mutation, isolation, and natural selection, not the result of a divine plan as creationists argue. The dispute between creationism and evolution intensified in 1871 when Darwin published *The Descent of Man.* This account plainly contradicted the Old Testament view that humans were the product of a separate creative act by God but rather asserted that *Homo sapiens* evolved from "lower" animals through numerous transitional forms.

Initially tied to the biblical narrative, creationism did not make a serious claim to being a scientific discipline until the latter part of the twentieth century. In its most sophisticated form, "intelligent design," creation science usually dispenses with the "young earth" claim of its precursors and accepts the geological age of Earth and various principles of evolution. Although most creationists continue to argue that animal and plant species are distinct creations or "kinds" that are not related developmentally to each other, proponents of the intelligent-design theory usually acknowledge that a limited amount of evolutionary transformation has occurred, but they also claim that some organic structures are too complex to have developed on their own and thus had to have been designed, as if they were a watch or a mousetrap. They therefore conclude that evolutionary science should not discount the presence and necessity of a creator in its paradigm.

The legal clashes between the two camps have generally focused on the constitutionality of teaching creation science in the public schools, although initially evolution had to fight an uphill battle to be included in the science curriculum. Those who advocate intelligent design claim that as a scientific explanation it is sufficiently rigorous to compete with evolution in the classroom, or conversely, that evolution is, at best, only a theory and that academic freedom allows, or even requires, alternative accounts of life's origins to be offered. Others simply maintain that the teaching of evolution alone, or the exclusion of the creationist account from the public schools, amounts to a violation of students' religious rights. Opponents of creation science generally regard it as nothing more than a thinly veiled effort to make the biblical account of creation look more scientifically respectable. From this perspective, even at its most sophisticated, creation science is at best an ad hoc compilation of specious hypotheses designed merely to undermine evolution, with no independent data to buttress its claims.

At first glance, this controversy implicates both religious clauses of the First Amendment. Under the Free Exercise Clause, government is prohibited from interfering with an individual's free exercise of religion, but generally the courts have not viewed this clause as being violated by the teaching of evolution or by creationism's exclusion from the curricula. On the other hand, the Establishment Clause prohibits government from engaging in activity that would constitute an establishment, or furtherance, of religion. Inclusion of creation science in the science classroom has been held to violate the Establishment Clause because it promotes religious doctrine and not scientific inquiry and methodology. Moreover, its inclusion in curricula outside the sciences is still constitutionally problematic because the Genesis story is usually the only cultural account of the origins of life that is taught.

As a legal dispute in the United States, the evolution-creationist controversy first came to prominence in 1925 with the much-celebrated "monkey" trial of John Scopes. Because there was as yet no creationist science, only a resolute desire to protect the biblical account from being discredited, Tennessee, like many states, simply prohibited teaching that man had descended from a lower order of animals. Scopes, a high school science teacher, tested the law, and the American Civil Liberties Union (ACLU) took up his cause. In the sensational trial that followed, three-time Democratic presidential aspirant William Jennings Bryan squared off against renowned agnostic litigator Clarence Darrow.

The ACLU actually wanted to lose so that the case could advance to higher courts and have more impact when it was eventually overruled. Scopes did lose, but the Tennessee Supreme Court overturned his conviction in 1927 in *Scopes v. State,* 154 Tenn. 105, 289 S.W. 363, on a technicality, effectively indicating that it would no longer enforce Tennessee's Anti-Evolution Act. It would be many years before a more definitive ruling on this dispute would be issued.

In *Epperson v. Arkansas,* 393 U.S. 97 (1968), the U.S. Supreme Court finally got an opportunity flatly to reject statutes that banned evolution science from being taught in the classroom as a violation of the Establishment Clause. By the time of *Edwards v. Aguillard,* 482 U.S. 578 (1987), antievolutionists had developed a creationist science to compete with evolution. A Louisiana law, the Balanced Treatment Act, required that creation science be taught alongside evolution in the science classroom or that neither account could be taught. The state attempted to justify the law as one giving "equal time" to different viewpoints in the interest of academic freedom. The Supreme

Court ruled against the act and declared that creation science's inclusion in (or evolution's exclusion from) the science curriculum violated the Establishment Clause.

The controversy has continued to simmer in recent years. School boards and localities still occasionally undertake rearguard efforts to circumvent court rulings and keep creation science viable as an alternative to evolution. In 1999 the Kansas State Board of Education issued new educational guidelines that neither required nor prohibited the teaching of evolution, or the "big-bang theory," in the state public classrooms. Although the board used facially neutral language, it was clear that creationist forces had motivated this revision in curricula standards. Before a legal challenge could be mounted, however, a new board in 2001 reinstated the requirement that evolution be taught. A similar controversy arose in Georgia in 2004 when the state proposed banning the word "evolution" from its science curricula, but the issue faded after the state backtracked on its decision.

Timothy Gordinier

See also: Establishment Clause; Evolution; Free Exercise Clause.

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Cruel and Unusual Punishments

The Eighth Amendment to the U.S. Constitution contains what is called the Cruel and Unusual Punishments Clause. The clause is a constitutional limit on the types of punishments that can be imposed within the United States. Since the founding of the nation, the U.S. Supreme Court has ruled that three kinds of punishments may be deemed cruel and unusual: barbaric punishments that involve torture and mutilation; punishments that are grossly disproportionate to the crime committed, for both capital (death penalty) and noncapital cases; and prison conditions and practices that are inhumane and abusive.

TORTURE AND MUTILATION

The text of the Eighth Amendment's ban on cruel and unusual punishments is borrowed almost verbatim from Section 10 of the English Bill of Rights (1689): "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." Face branding, nose splitting, whipping, crucifixion, and burning alive at the stake were some of the punishments inflicted on offenders under English criminal law during the fifteenth through seventeenth centuries. The ban on cruel and unusual punishments in the English Bill of Rights, and later in the Eighth Amendment to the U.S. Constitution, was intended to prevent the use of such barbaric and inhumane punishments. For almost a century after ratification of the Bill of Rights (the first ten amendments to the Constitution) in 1791, no "cruel and unusual punishment" cases reached the U.S. Supreme Court because the terrible punishments imposed under English law, except for flogging, were not used in the United States. During this period, courts at all levels interpreted the clause to prohibit certain methods of punishment rather than to guarantee proportionality between crime and sentence. Basically, if a punishment was sanctioned by state law, it was not considered cruel and unusual.

CAPITAL PUNISHMENT

The death penalty was in use in all of the states at the time the Bill of Rights was ratified. Death by hanging, which has been a punishment since ancient times, was a form of execution used during the colonial period and has not been regarded as cruel and unusual. In its early decisions on the Eighth Amend-

ment, the Supreme Court confronted new methods of administering the death penalty—firing squad and electrocution—and had to determine if these novel modes of execution were cruel and unusual. In *Wilkerson v. Utah,* 99 U.S. 130 (1879), the Court held that death by firing squad for a murder conviction was not a violation of the Eighth Amendment. Death by shooting, the Court reasoned, did not fall into the same category of such barbarous punishments as disembowelment, beheadings, public dissections, and burning alive at the stake. Twelve years later, in the case *In re Kemmler,* 136 U.S. 436 (1890), a unanimous Supreme Court upheld the use of the electric chair. Death by electrocution was certainly unusual, but it was held not cruel. For a punishment to be "cruel," it must entail something more than "the mere extinguishment of life" and involve "unnecessary mutilation of the body."

Although capital punishment itself has never been ruled cruel and unusual, the Court in *Furman v. Georgia,* 408 U.S. 238 (1972), held that the death penalty, as it was then being administered for murder and rape, was so "arbitrary" and "wantonly and freakishly" imposed as to be cruel and unusual. Following the *Furman* decision, thirty-five states revised their death penalty statutes to address the concerns of the Court. In *Gregg v. Georgia,* 428 U.S. 153 (1976), the Court upheld these new death penalty statutes and declared that the death penalty was not a cruel and unusual punishment. In a subsequent case, however, the Court in *Woodson v. North Carolina,* 428 U.S. 280 (1976), held that a mandatory death penalty for murder was cruel and unusual because it sought to avoid arbitrariness by eliminating individualized sentencing.

In other cases, the Court has held that a sentence of death is too severe for certain crimes. In *Coker v. Georgia,* 433 U.S. 584 (1977), the Court ruled that death was an inherently disproportionate penalty for rape of an adult and was therefore cruel and unusual punishment, and in *Eberheart v. Georgia,* 433 U.S. 917 (1977), a sentence of death for kidnapping was held to be grossly disproportionate to the crime. In *Tison v. Arizona,* 481 U.S. 137 (1987), the Court ruled that the death penalty could be imposed on someone who participated in felony murder and showed reckless indifference to human life.

The Eighth Amendment also forbids the execution of certain types of persons because of their age or mental capacity. It is cruel and unusual to execute someone who is insane at the time of the execution. Imposing the death penalty on offenders who are less than sixteen years old at the time they committed the crime is also a violation of the Eighth Amendment, but in *Stanford v. Kentucky,* 492 U.S. 361 (1989), the Court held that the imposition of the death penalty on sixteen- and seventeen-year-old offenders did not amount to cruel and unusual punishment. In a recent decision, the Court said that it was cruel and unusual to execute a mentally retarded offender.

EXCESSIVE PRISON TERMS

In *Weems v. United States,* 217 U.S. 349 (1910), the Supreme Court for the first time applied a proportionality standard under the Eighth Amendment. Weems received a sentence of fifteen years of hard prison labor in chains and a loss of all civil rights for life for falsifying public documents. In its holding, the Court remarked that the Eighth Amendment's protections were not tied to a particular theory or moment in time but "should be determined by current sensibilities." The Court found the punishment cruel and unusual because it was excessive and disproportionate to the crime. In *Trop v. Dulles,* 356 U.S. 86 (1958), the Court ruled that expatriation, which is a loss of citizenship, was a cruel and unusual punishment for the crime of desertion from the army. The Court stated that "the concept underlying the Eighth Amendment is nothing less than the dignity of man," and that the clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In the first application of the clause to a state criminal law, the Supreme Court in *Robinson v. California,* 370 U.S. 660 (1962), struck down a ninety-day sentence for the status offense of drug addiction. Narcotics addiction is an illness, the Court said, and it is cruel and unusual to punish persons for being sick.

In cases involving mandatory prison terms, the Supreme Court ruled in *Rummel v. Estelle,* 445 U.S. 263 (1980), that a mandatory life sentence for conviction of three nonviolent felonies was not cruel and un-

usual. Just three years later, however, the Court struck down a sentence of life without parole for a similar offense. In *Harmelin v. Michigan,* 501 U.S. 957 (1991), the Court declared that a sentence of life in prison without parole for a first-time conviction of possessing more than 650 grams of cocaine was not grossly disproportionate given the seriousness of the crime. Most recently, a bare majority of the Supreme Court upheld California's tough "three strikes" law in *Ewing v. California,* 538 U.S. 11 (2003), ruling that a prison term of twenty-five years to life for petty theft was not cruel and unusual. In affirming the punishment, the Court noted the popularity of such laws and the need for state legislatures to have the flexibility to incarcerate habitual offenders.

PRISON CONDITIONS

The protections of the Eighth Amendment have been applied to the conditions of confinement and the practices of prison administrators as well. For example, in *Estelle v. Gamble,* 429 U.S. 97 (1976), the Court held that denying prisoners adequate medical care violated the Eighth Amendment. Although a precise definition of what prison conditions constitute cruel and unusual punishment remains unclear, the Court has ruled that conditions of confinement "must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." The Court also has said that the Eighth Amendment is violated if prison officials acted intentionally or as the result of "deliberate indifference" to improper prison conditions. Double-celling of inmates is not cruel and unusual, but excessive overcrowding, unsanitary conditions, and abusive treatment of inmates by guards may be considered cruel and unusual, especially when such factors are examined in their totality.

John Fliter

See also: Capital Punishment; Eighth Amendment; *Ewing v. California.*

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Cruzan v. Director, Missouri Department of Health (1990)

In *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261 (1990), the U.S. Supreme Court held that Americans have a constitutionally protected right to die under the Fourteenth Amendment. Nancy Cruzan was in an automobile accident that left her severely brain-damaged. Despite her condition, Cruzan did not require artificial respiration and was not terminally ill, but she was unable to feed herself, and doctors had to provide her with artificial nutrition and hydration through a feeding tube. Nancy's parents brought suit on her behalf in an effort to be permitted to withdraw her life-sustaining treatment.

This case presented a unique issue to the Supreme Court: The patient who wished to refuse treatment did not in fact have the capacity to make that desire known. Cruzan was in a persistent vegetative state (PVS). Dr. Fred Plum, the creator of the term "persistent vegetative state" and a renowned expert on the subject, has described PVS as follows: " 'Vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature; it maintains heart beat and pulmonary ventilation; it maintains digestive activity; it maintains reflex activity of muscles and nerves for low-level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner.' "

The *Cruzan* case questioned the constitutionality of the Missouri statute that required "clear and convincing evidence" of a patient's decision to terminate life-sustaining treatment. It reasoned that this standard of proof was appropriate in light of the critically important decision to terminate a human life. The Court engaged in an exhaustive discussion of the cases and principles applicable to the "right-to-die" trend

that had been litigated up until that time. The Court held that under the Constitution, Americans possess a "constitutionally protected liberty interest" in refusing medical treatment. The Court noted a second foundational principle for this holding in the doctrine of "informed consent."

The Court held that "[T]he logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment." The establishment of a liberty interest necessarily requires that that interest be balanced against the state's compelling interest in protecting and preserving life. In balancing Cruzan's interest in terminating life-sustaining treatment against the state's interest in preserving life, the Court held that the Missouri statute passed constitutional muster. The practical result was that Nancy Cruzan's parents were not permitted to remove her artificial nutrition and hydration as they had hoped in light of the factual finding that there was a lack of clear and convincing evidence of Nancy's desire to refuse life-sustaining medical treatment. The Court explained in *Cruzan* that

> [T]he choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements. . . . Finally, we think a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual.

At the core of this landmark right-to-die case is the basic principle that individuals possess a right to refuse medical treatment that can be exercised on their behalf in the presence of clear and convincing evidence of their desire to do so. *Cruzan* has had a profound impact on constitutional law and has led the majority of states to establish specific procedures for ensuring that an individual's wishes regarding life-sustaining treatment will be followed in the event of that person's incapacity.

Laurie M. Kubicek

See also: Physician-Assisted Suicide; Right to Die; Right to Privacy.

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D

Darrow, Clarence (1857–1938)

Clarence Seward Darrow was the most well-known and well-respected criminal defense attorney in the first half of the twentieth century. He also has served as an inspiration for legions of lawyers who share his commitment to advancing civil rights and civil liberties. Darrow gained this reputation as a champion for civil liberties and civil rights not only through the cases he defended but also through the many articles and speeches he gave defending the rights of every citizen.

Clarence Darrow was born April 18, 1857, in Farmdale, Ohio. At a very young age, he moved with his family into the famed "octagon house" in Kinsman, Ohio, where his father, Amirus, quickly gained a reputation as the "village atheist." In fact, this moniker would later be ascribed to Clarence Darrow as well. The Darrow home was a wonderful place to grow up, Darrow would state later, because he was always surrounded by books and healthy philosophical and political discussions around the dinner table. Darrow took this thirst for knowledge with him as he studied at Allegheny College and later at the University of Michigan Law School. After law school, Darrow returned to northeastern Ohio and started a law practice. The small disputes of rural Ohio did not hold Darrow's attention for long, however, and he moved with his young family to Chicago, Illinois. It was in Chicago that Darrow would make his mark on the law.

When Darrow first moved to Chicago, he represented railroad interests there—an unlikely job to those who know Darrow's reputation. Still, it was through this representation that he met two individuals who became inspirations to him: John Altgeld and Eugene Debs. John Altgeld, who would later become governor of Illinois, was a young and active politician who espoused the same progressive beliefs that Darrow held. He encouraged Darrow to get active in politics, and it was Altgeld's influence that led Darrow to become an advocate for those who were shunned by society. Eugene Debs was a union organizer and one of the protagonists in the 1894 strike against the Pullman railroad car company. At the time of the strike, Darrow represented railroad interests, which was how he originally met Debs, but Darrow soon quit his job representing the railroads in order to defend Debs. Though Darrow did not win Debs an acquittal, Darrow's career path was changed forever, as he went on to defend others like Debs who were hailed into court for taking actions or holding beliefs despised by the majority of society.

The case that first vaulted Darrow's name to the forefront of the American legal psyche—symbolic of his defense of unpopular beliefs and people—was the trial of William Haywood in Idaho. Haywood was a leader of the Western Federation of Miners, and he was accused of blowing up Idaho's former governor, Frank Steunenberg. Darrow's famed defense skills first gained wide acclaim in the case. Darrow understood that the mine owners were blaming Haywood for the death of the former governor as a way to silence Haywood's unionizing activities. In a stunning trial, Darrow was able to gain Haywood's acquittal, and his reputation was made as both a defense lawyer and a defender of unpopular beliefs.

Darrow's next great trial came in Los Angeles, California, where he defended the McNamara brothers, James and John, who were accused of bombing the *Los Angeles Times* building. The McNamara brothers' defense was supported by the labor movement; in fact, it was Samuel Gompers, the founder of the American Federation of Labor, who lured Darrow to California to defend them. Also present in Los Angeles with Darrow was the noted liberal commentator Lincoln Steffens, who attempted to get Darrow to plea bargain the case because he was certain of the brothers' guilt. Darrow, however, attempted to gain an acquittal for the McNamaras. Unfortunately, Darrow's lead defense investigator was apprehended bribing one of the jurors, which caused Darrow to have the brothers plead and caused Darrow himself to be indicted. Darrow was ultimately acquitted of wrongdoing, but he decided to retire from the practice of law.

In a busy retirement, however, Darrow gave hundreds of lectures, engaged in thousands of debates, and

Clarence Seward Darrow (1857–1938), a famous attorney and supporter of civil liberties, defended teacher John Scopes for teaching evolution in Tennessee in violation of a state law. The Scopes case became known as the "monkey trial." *(Library of Congress)*

wrote numerous articles on many liberal and socialistic topics. By 1920 he was lured back into the practice of law by a fledgling new group that advocated the basic rights of individuals—the American Civil Liberties Union (ACLU). His first major case with the ACLU was the defense of the Communist Benjamin Gitlow on the charge of trying to overthrow the U.S. government. Although he was unable to gain Gitlow's original acquittal, his actions—including an appeal to the U.S. Supreme Court—ultimately led to the high court's incorporation of the First Amendment right to free speech into the Due Process Clause of the Fourteenth Amendment, thus applying free speech rights against the states.

During the next decade, Darrow defended many cases that expanded the civil rights and civil liberties of the citizenry. In 1924 he defended two young Chicagoans who committed a thrill killing of a fourteen-year-old boy, Bobby Franks. Richard Loeb and Nathan Leopold were charged with murder and faced the death penalty. Both boys had confessed, but Darrow wanted to save their lives. Darrow had both Leopold and Loeb plead to the murder. He then stated that he wanted the judge to consider testimony from medical witnesses before levying a sentence: "We want to state frankly here that no one believes these defendants should be released. We believe they should be permanently isolated from society. . . . We ask that the court permit us to offer evidence as to the mental condition of these young men. We wish to offer this evidence in mitigation of punishment." Darrow then brought forth all types of psychological experts who described how the boys' upbringing and mental features argued for them not to be executed. Darrow argued that the boys showed no remorse, and although he claimed they were not insane, the boys were not normal. Darrow also argued that the death penalty was barbaric, and it was improper to kill men who were so young. The judge agreed and sentenced both Leopold and Loeb to life in prison. Thus Darrow set a precedent for mitigating the death penalty through psychological testimony highlighting the upbringing of the defendant.

Probably Darrow's most famous case, however, came in 1925, when the ACLU asked him to defend a young biology teacher in Dayton, Tennessee, named John Scopes; his prosecution became known as the "monkey trial." At that time, Tennessee had a law prohibiting the teaching of evolution; however, Scopes chose to teach evolution in his class and was arrested. Darrow went to Tennessee to defend Scopes, and the prosecutors retained the services of the famed statesman William Jennings Bryan, "The Great Commoner," to assist them. The trial gained national attention, much of it through the actions of prominent newspaper commentator H.L. Mencken. The trial took on a circus atmosphere, with every conceivable souvenir that had a monkey motif put on sale. The prosecution's major piece of evidence was the Bible. The defense called a noted zoologist to explain evolution. Both sides fought over God's role in the origin of the species, but it was Darrow's defense strategy of calling William Jennings Bryan as an expert on the Bible that resulted in the great fame of this case. Darrow got Bryan to testify to all sorts of events from the

Bible, but when Darrow got Bryan to admit that the earth was not created in six conventional days, the fallacy of some of Bryan's beliefs was evident. Although the testimony was later deemed inadmissible, Darrow won a great victory for freedom of religion, although Scopes was ultimately convicted (his conviction was overturned by the Tennessee Supreme Court on a technicality).

The last great case of Darrow's career that affected the history of civil rights directly was his defense of Ossian Sweet, a black doctor, in Detroit, Michigan, later in 1925. Sweet had been charged with murder after a man was killed by shots coming from the Sweet home. Sweet and his brothers were defending their house from an angry mob of people who were incensed that a black family had moved into a white neighborhood. Darrow was quickly approached by the National Association for the Advancement of Colored People (NAACP) to assist in Sweet's defense. The trial was presided over by Frank Murphy, who would go on to become a U.S. Supreme Court justice.

The defense's main theory was self-defense; however, the prosecution argued that there had been no mob at the Sweet home that night. Darrow, however, was able to show that the angry mob and extreme climate of racism had caused the unfortunate killing of the man near the Sweet home. At the end of the first trial, the jury was deadlocked and could not reach a verdict. On retrial, Darrow won acquittal for Sweet. He stated during his closing argument at the first trial: "There are persons in the North and South who say a black man is inferior to a white and should be controlled by whites. There are those who recognize his rights and say he should try and enjoy them. To me this case is a cross-section of human history. It involves the future, and the hope of some of us that the future shall be better than the past."

Darrow tried only a limited number of cases in the last years of his life, but when he died March 13, 1938, his reputation as an advocate for civil rights and civil liberties was well established, particularly as a result of the 1924–1926 cases. Adding to his fame as an advocate for individual rights was the publication of his autobiography, *The Story of My Life,* in 1932. Darrow's life, and the cases he tried, served as the inspiration for many a young lawyer. But his effect on civil rights and civil liberties transcended his legal representation of criminal defendants; it surfaced in the unpopular issues he advocated and brought into the mainstream of beliefs by his mere presence. To understand the legacy of Clarence Darrow is to understand the climate of change that occurred in civil rights and civil liberties because of his advocacy and writings. His fidelity to the cause of righting injustice ensures that his reputation will serve as an inspiration for years to come. As he famously remarked, "You can only protect your liberties in this world by protecting the other man's freedom. You can only be free if I am free."

David T. Harold

See also: American Civil Liberties Union; Capital Punishment; Debs, Eugene Victor; Evolution.

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Death Penalty for the Mentally Retarded

Mentally retarded individuals were subject to the death penalty in the United States until 2002, when the U.S. Supreme Court decided *Atkins v. Virginia,* 536 U.S. 304 (2002). By a six–three margin—six justices against state-sanctioned death of the mentally retarded and three justices for it—the Court imposed a moratorium on capital punishment of the mentally

retarded, holding that it constituted cruel and unusual punishment prohibited by the Eighth Amendment to the Constitution. The majority believed a national consensus had developed against executions of mentally retarded persons, noting that since it last addressed the issue in 1989, eighteen state legislatures had passed laws limiting the death eligibility of certain defendants based on mental retardation alone. Justice John Paul Stevens delivered the majority opinion; Chief Justice William H. Rehnquist dissented, joined by Justices Antonin Scalia and Clarence Thomas.

In 1989 the Supreme Court decided in *Penry v. Lynaugh,* 492 U.S. 302 (1989), that the Eighth Amendment did not categorically prohibit imposition of the death penalty upon the mentally retarded. The Court found no societal consensus against their execution and held that when a mentally deficient defendant is found competent to stand trial and thus sane—able to appreciate the wrongfulness of his or her actions—the Constitution did not prohibit the imposition of a death sentence on that defendant. Under this view, mental retardation would be considered a mitigating factor in determining a death sentence.

The Court in *Atkins,* revisiting the issue thirteen years later, reversed course in its holding that such executions were cruel and unusual punishment. The Court left it to the state courts and legislatures to determine what conditions must exist for a person to be declared mentally retarded.

In a separate dissent, Justice Scalia did not find that such executions breached standards of decency:

> [T]he Court concludes that no one who is even slightly mentally retarded can have sufficient moral responsibility to be subjected to capital punishment for any crime. As a sociological and moral conclusion that is implausible; and it is doubly implausible as an interpretation of the United States Constitution. Under our Eighth Amendment jurisprudence, a punishment is cruel and unusual if it falls within one of two categories: those modes or acts of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted, and modes of punishment that are inconsistent with modern standards of decency as evinced by objective indicia.

In Justice Scalia's view, administering the death penalty against those judged mentally retarded was not inconsistent with "modern standards of decency." Chief Justice Rehnquist in his separate dissent said that "the current legislative judgment regarding the execution of defendants like petitioner more resembles a post hoc rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of evolving standards of decency."

The majority in *Atkins* noted that in the years since *Penry,* eighteen state legislatures had passed laws limiting the death eligibility of certain defendants based on mental retardation alone. It also noted polls and statistics indicating that execution of such individuals did not conform to the public's ideal of "evolving standards of decency." Justice Stevens in his majority opinion expressed the belief that society must make accommodation for mentally retarded individuals because they are to some degree less culpable for their crimes than other people.

Gladys-Louise Tyler

See also: Atkins v. Virginia; Cruel and Unusual Punishments; Eighth Amendment; Evolving Standards of Decency.

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Death-Qualified Juries

"Death-qualification" refers to the process of screening potential jurors in capital cases and eliminating those persons who are hesitant or unwilling to play a role in imposing the death penalty. Such persons are dismissed "for cause" and may not sit on the jury. In the thirty-eight states that currently authorize capital punishment, the jury makes the decision to impose death, or a lesser sentence, after finding the defendant guilty. Death-qualified juries have become especially important in light of the U.S. Supreme Court's decision in

Ring v. Arizona, 536 U.S. 584 (2002), deciding that only juries can impose death sentences. Death-qualification excludes jurors who are unwilling to impose or recommend a sentence of death as well as "nullifiers"—jurors who acquit a defendant they believe to be guilty out of concern that a death sentence will be imposed by the judge.

Proponents of death-qualification argue that it is necessary to the efficient and consistent application of a penalty that is duly prescribed by law; jurors who are unwilling or unable to apply the law should not be allowed to decide capital cases. Critics of death-qualification argue that it violates the defendant's Sixth and Fourteenth Amendment rights to an impartial jury because it creates a jury that is predisposed to favor the prosecution both in determining guilt and imposing a sentence. Critics also claim that death-qualification creates juries that are not a fair cross-section of the population, and that it is biased against particular groups of potential jurors and defendants. The U.S. Supreme Court has addressed these issues in a series of cases.

The Court first faced the issue of death-qualification in *Witherspoon v. Illinois,* 391 U.S. 510 (1968). Illinois law allowed the removal of any juror with "conscientious scruples against capital punishment," even if the juror asserted that he would be able to follow and apply the law. The trial judge began the selection process by saying "let's get these conscientious objectors out of the way," after which nearly half of the potential jurors were eliminated. William Witherspoon appealed both his murder conviction and death sentence on the grounds that the Illinois procedure excluded all jurors who had even the slightest hesitation about imposing the death penalty. He argued that such a jury would be predisposed to impose the death penalty after conviction, and he offered social science research supporting his claim that death-qualified jurors would also be more prone to convict. The Supreme Court upheld Witherspoon's conviction, finding the evidence on conviction-proneness to be inconclusive, but it reversed his death sentence. "In its quest for a jury capable of imposing the death penalty," the Court said, "the State produced a jury uncommonly willing to condemn a man to die." Nonetheless, the Court suggested that it would be acceptable for the state to exclude those jurors who indicated a complete unwillingness to impose death in any circumstances. Such jurors have become known as "*Witherspoon*-excludables."

The *Witherspoon* decision led to increased efforts to document the effects of death-qualification. Although the numbers vary year to year, a substantial minority of Americans do not support the death penalty; even fewer feel personally able to impose it. A survey conducted after *Witherspoon* found that 38 percent of those questioned would never vote guilty in a death penalty case, or would vote guilty but then refuse to impose the penalty. If this survey is accurate, nearly 40 percent of the population would be considered "*Witherspoon*-excludable." Studies also show that those opposed to the death penalty are disproportionately women, racial minorities, and lower-income people; death-qualification thus appears to conflict with Supreme Court rulings that the jury must represent a fair cross-section of the community. Because prosecutors seek the death penalty disproportionately against black defendants, it appears especially troubling that black jurors are more likely than whites to be excluded. These findings also raise questions about the role of the jury in a democratic society. The jury is often said to act as the "conscience of the community" by mitigating or rejecting harsh laws, and death-qualification appears to limit severely the jury's ability to perform this function.

The new social science evidence about the effects of death-qualification was brought before the Supreme Court in *Wainwright v. Witt,* 469 U. S. 412 (1985), and *Lockhart v. McCree,* 476 U.S. 162 (1986). Although the studies introduced by the condemned were unanimous in supporting the argument that death-qualification produced juries more likely both to convict and to impose the death sentence, the Court in *McCree* dismissed all of this evidence as flawed or inconclusive. Further, Justice William H. Rehnquist argued in the Court's majority opinion that even if the evidence were sufficient to show that death-qualified juries were conviction-prone, this did not create a violation of the Sixth Amendment. A jury, Justice Rehnquist said, failed to be a fair cross-section of the population only if it excluded certain "distinctive groups," such as racial or ethnic groups. *Witherspoon*-

excludables, according to the Court, did not form such a distinctive group.

The Court in *McCree* not only did not limit the states' ability to death-qualify juries, but it even expanded the states' power. The Court said that the question should not be whether a juror was completely and always opposed to capital punishment, but whether his feelings against it "would prevent or substantially impair the performance of his duties as a juror." Thus, after *McCree,* jurors can be excluded even if their opposition to the death penalty is not so complete that they would automatically vote against it.

Although *McCree* made it easier for prosecutors to exclude jurors who oppose the death penalty, in *Morgan v. Illinois,* 504 U.S. 719 (1992), the Court ruled in favor of defendants by allowing what has been called "life-qualifying" exclusions of jurors. At the defendant's trial, after the judge excluded all jurors who had moral scruples that would prevent them from voting for the death penalty, the defense attorney asked that the court exclude those jurors who would automatically vote to impose the death penalty if the defendant were found guilty of murder. The judge refused the request, and after being convicted, the defendant appealed to the Supreme Court. Reiterating a position it had previously suggested in *Ross v. Oklahoma,* 487 U.S. 1250 (1988), the Court held that a juror who would automatically impose the death sentence without considering all the evidence as to the defendant's culpability was not impartial, as required by the Constitution. In *Morgan,* therefore, failure to exclude such a juror thus violated the defendant's Sixth Amendment rights, and his death sentence was reversed.

In its death-qualification rulings, the Supreme Court has tried to avoid not only juries that automatically support capital punishment, but also those that automatically reject it. It is fair to say, however, that the balance is tilted in favor of the death penalty because the prosecutor's ability to exclude death penalty opponents is broader than the defendant's ability to exclude those who favor capital punishment. The balance has shifted over time, however, and as social science research advances and attitudes toward the death penalty change, it is likely to shift again.

Thomas A. Schmeling

See also: Cruel and Unusual Punishments; Eighth Amendment; Trial by Jury.

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Debs, Eugene Victor (1855–1926)

A five-time U.S. presidential candidate, Eugene V. Debs was also an eloquent leader of the American labor movement and of the Socialist Party of America. Through his activism in forming the American Railway Union to protect the rights of railroad employees, his criticism of World War I, and his efforts to draw attention to capitalist exploitation of labor, Debs made important contributions to the development of civil liberties in the United States.

Eugene Debs was born in Terre Haute, Indiana, to Alsatian immigrants. He dropped out of high school at age fourteen and began working in the railroad industry. Debs held several positions in that industry, including working as a laborer, painter, and fireman. These experiences gave him valuable insight into the life of a laborer. He quit his job as a fireman after one of his friends was crushed by a locomotive. Debs then became a billing clerk at a grocery store. His unending passion for the railroad, however, led to his association with the Brotherhood of Locomotive Firemen, a labor union for railway firemen. Debs held several positions within that organization, serving as secretary for the Terre Haute lodge, assistant editor of the *Locomotive Firemen's Magazine*, and secretary-treasurer of the entire organization. His commitment to the brotherhood is evident in comments he made in the April 1902 issue of *The Comrade*, a popular socialist magazine, "I was filled with enthusiasm and my blood fairly leaped in my veins. Day and night I worked for the brotherhood. To see its watch fires glow and ob-

Eugene V. Debs, as he left the federal penitentiary at Atlanta, Georgia, on Christmas Day, 1921. Debs, a famous Socialist and labor organizer, often was jailed for his political views and activities. *(Library of Congress)*

serve the increase of its sturdy members were the sunshine and shower of my life."

His experience with railroad unionization led him to believe that it would be advantageous for railroad employees to have a general organization open to all types of railroad workers, as opposed to the specialized unions in existence at the time. Debs believed that if all railroad men belonged to the same union, then railroad companies would have no choice but to listen to their concerns. In 1893 he organized the American Railway Union (ARU) to that end. This new organization was successful in a strike against Great Northern Railroad, which had decreased workers' wages during an economic depression. However, the ARU was crippled after its role in one of the most significant strikes in American history, the 1894 strike against the Pullman Company.

The Pullman Company employees protested wage cuts, layoffs, and poor working conditions. Many of the Pullman employees were members of the ARU, and after much deliberation the organization voted to boycott all trains carrying Pullman passenger cars. Debs was initially reluctant to become involved with the strike because he feared that his young organization would be unable to win against the powerful company. He was correct. The strike and boycott disrupted rail traffic across the country. Ultimately, violence broke out and President Grover Cleveland sent

in federal troops to maintain order. In another blow to the strikers, a federal court in Chicago issued an injunction prohibiting the strike leaders from assisting with the boycott because it was interfering with the U.S. mail. Debs and the other leaders decided to defy the order and were sentenced to jail on charges of contempt and conspiracy to obstruct the mail.

The six-month sentence Debs served at the McHenry Jail in Woodstock, Illinois, proved to be a turning point in his life. Prior to the Pullman strike, Debs thought of himself as a trade unionist. While he was imprisoned, however, he was exposed to the writings of several prominent Socialists, and after his incarceration, he began to speak in favor of many Socialist ideals. Debs argued that capitalism was a system of exploitation that needed to be overthrown. An important component of his thinking was the Marxist concept of class struggle. In other words, in society there was a struggle between the rich and the poor, the haves and the have-nots. The rich capitalists exploited the poor by not paying fair wages and by subjecting them to hazardous working conditions in order to increase their profits. Because this system was unjust, Socialists argued, it should be abolished.

Debs was a charismatic speaker and believed that one of the most important tasks for the socialist movement was the education of American workers so that they were aware of their plight. He believed the workers' ignorance was a major obstacle to the achievement of Socialist goals. Although he was committed to abolishing the capitalist system, he did not condone the use of violence and rarely advocated its use.

His opposition to violence extended even to war. Debs was opposed to U.S. involvement in World War I and was convicted of violating the Espionage Act of 1917, which made it a crime to obstruct or attempt to obstruct the military recruiting and enlistment service of the United States, and he was sentenced to ten years in prison. His conviction came after a speech he made in Canton, Ohio, that centered primarily on socialism. In *Debs v. United States,* 249 U.S. 211 (1919), the U.S. Supreme Court upheld his conviction because his speech was intended to obstruct the war effort. This was just one in a series of cases in which the Court upheld government limits on speech during a time of war. President Warren G. Harding commuted his sentence in 1921.

In order to promote Socialist goals, Debs ran for president five times. He ran on the Social Democratic Party ticket in 1900 and on the Socialist Party ticket in 1904, 1908, 1912, and 1920. The 1920 campaign was run from prison where Debs was still serving part of his sentence, and yet he won almost a million votes.

Eugene V. Debs was the most prominent Socialist in U.S history. He was a key figure in the labor movement and was a significant voice of dissent to U.S. policies in the early twentieth century.

Kara E. Stooksbury

See also: Communists; Subversive Speech.

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Debs, In re (1895)

In re Debs, 158 U.S. 564 (1895), arose out of sharp conflict at the end of the nineteenth century between labor and management in the railroad industry and culminated in a holding by the U.S. Supreme Court that allowed the use of injunctions by lower courts to thwart the efforts of labor groups to organize. It was one of only three major cases decided in the Court's 1894 term, but it paved the way for industry's widespread use of injunctions as a means of curbing the nascent labor movement in the United States.

In June 1894, after the Pullman Palace Railroad Company cut wages by 20 percent, the workers of the American Railway Union (ARU) declined to work on any Pullman Palace railroad cars. The strike immediately immobilized both the east and west lines of rail in and out of Chicago and eventually brought trains in over half the country to a halt. The dispute between the largest industrial union and twenty-four railroads affected commerce across the nation. Pur-

suant to orders from the U.S. Attorney General, local U.S. attorney Richard Olney sought and obtained an injunction against the ARU through its leaders. The broad injunction prohibited ARU leaders from engaging in any activity to further the strike in any fashion. The court based its jurisdiction upon the union's obstruction of passage of the U.S. mail.

Eugene V. Debs, president of the ARU, and other union officers refused to comply with the injunction. Although Illinois Governor John Peter Altgeld objected to forceful federal intervention to end the strike, President Grover Cleveland sent federal troops to break it up. Once the troops ended the strike, the federal government petitioned the trial court for orders of contempt against Debs and the other union officers. The court found Debs and his codefendants in contempt and ordered a six-month jail sentence for Debs and three-month sentences for the others. The legal foundation for the conviction rested on violations of the Sherman Antitrust Act. Through his attorneys, Clarence Darrow and former Senator Lyman Trumbull, Debs appealed to the U.S. Supreme Court for a writ of habeas corpus (petition for release from unlawful confinement).

The Supreme Court upheld the convictions under a very broad interpretation of the scope of federal power to act to protect interstate commerce and the mails. In the opinion, the Court did not address the applicability of the Sherman Act to labor union activities but found "the United States may remove everything put upon highways, natural or artificial, to obstruct the passage of interstate commerce, or the carrying of the mails." This sweeping expansion of federal-court equity jurisdiction gave both the state and federal governments a powerful new mechanism to thwart the efforts of organized labor. This case stood in stark contrast to *Pettibone v. United States,* 148 U.S. 197 (1893), in which two years earlier a unanimous Supreme Court had held no federal equity jurisdiction could be invoked over state criminal law processes. The impact from *Debs* was immediate. State and federal judges issued injunctions to stop organized labor activities. Labor leaders who disobeyed these injunctions were quickly jailed for contempt. The use of injunctions as a weapon against labor became so widespread that the Democratic platform of 1896 specifically criticized government by injunction.

Eugene Debs ultimately abandoned organized labor and moved to the political sphere by joining a coalition that formed the Socialist Democratic Party. Debs was the presidential candidate of the new party from 1900 through 1912 and again in 1920. He won 6 percent of the national vote in 1912, and in 1920, imprisoned for giving an antiwar speech, he won 3.5 percent of the national vote from his jail cell.

Charles Anthony Smith

See also: Debs, Eugene Victor; Labor Union Rights.

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Declaration of Independence

The Declaration of Independence was a signed statement by fifty-six colonial leaders stating their reasons the thirteen colonies should separate from British rule. Today it remains both a symbol of, and a symbol to, the nation. It represents both the founding of the United States of America in 1776 and the principles upon which that regime—both the government and the way of life it fosters—are based. A committee of five, Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert Livingston, drafted the Declaration. Jefferson was the principal author. The Declaration proposed three major principles: (1) equality, (2) consent, (3) and revolution.

The principle of equality was perhaps the most popular and most controversial idea articulated in the document. Jefferson stated the principle as follows: "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." Interestingly, the Declaration marked the first time in 5,000 years of history that any nation had been founded on the principle of equality.

Reading of the Declaration of Independence from the east balcony of the Old State House, Boston, Massachusetts, July 18, 1776. *(National Archives)*

There are many dimensions to the meaning of equality, and the debates that have evolved from these have had a profound impact on American history. First, Jefferson saw the principle of equality as recognizing that no person had the right to rule any other person by nature—that is, by birth. Drawing upon the ideas of seventeenth-century English philosopher John Locke, Jefferson stated that each person had an equal right to pursue life, liberty, and happiness and to be free of unreasonable interference from government. By this, he was not referring to equality in material things such as wealth or property, since physical strength, intelligence, talents, and environmental influences could affect them, but rather to the precept that each person deserves equality of opportunity. Indeed, this interpretation of equality—equal opportunity for all—has served as the basis for many other political, social, and economic conflicts, from women's suffrage in the late nineteenth and early twentieth centuries to the civil rights movement in the 1950s and 1960s to the school busing conflicts and affirmative action struggles that followed. Moreover, it has driven contemporary debates over diversity and multiculturalism as well.

The second principle, consent, evolved directly from the principle of equality. Although Jefferson stated that the goal of government was to secure the rights to life, liberty, and the pursuit of happiness, the government must be based upon the consent of those to be governed. In other words, government is not legitimate unless the people have agreed to it. Accordingly, although the Declaration encouraged a love for liberty, it did not specifically advocate any particular form of government. However, the debates in the Continental Congress as well as later writings of Jefferson and other founding fathers left little doubt that a representative, or republican, government was preferable.

Implied in Jefferson's idea of consent is the notion that once consent is given to the government and its laws, the citizen has the duty to obey the laws. Jefferson saw consent as a necessary element to maintain civil society so that citizens would be connected to their government and hence give it legitimacy.

The third principle, also central to the Declaration, is the right to revolution. The principle grants citizens the right to revolution when political conditions threaten to destroy their freedom. The justification for revolution is located in the Declaration immediately after the statement of the consent principle: "That whenever any form of government becomes destructive of these ends [the principles of equality and consent], it is the right of the people to alter or to abolish it." A very important qualification on that right, however, appears in the next two sentences: "Prudence, indeed, will dictate that governments long established should not be changed for light and transient reasons." Nevertheless, "when a long train of abuses" places people under "absolute despotism," it is their "right" and their "duty" to change such a government and "provide new guards for their future security." Accordingly, Jefferson clearly opposed engaging in revolution solely because of a disagreement with a particular policy or action. Were he alive today, for example, Jefferson probably would have opposed revolution based upon opposition to U.S. involvement in Vietnam in the 1960s or Iraq in 2003, as these

events have not destroyed life, liberty, and happiness in any overall way affecting the entire nation. Therefore, they would not have constituted for Jefferson a "long train of abuses," even though some individual citizens and groups strongly opposed these policies.

In the last part of the Declaration, Jefferson included a bill of particulars: a list of reasons justifying the break with England. He condemned King George III, to whom the colonists had previously expressed loyalty, for dissolving the colonial legislatures, obstructing justice by making the length of judges' terms dependent on his will, denying trial by jury, quartering troops in colonists' homes without consent, and imposing taxation without representation, to name a few. Beyond their immediate impact, the most important result of listing the grievances was that they could serve as a model for future generations to judge whether revolution could be justified.

In addition, it cannot be overlooked that the Declaration was an important cause of the nation's Civil War. Although it is generally argued that slavery and related sectional issues caused the war, all too few fully understand that the Declaration provided the underlying philosophical base for the abolitionist movement that arose in the thirty years prior to 1861. Nearly every abolitionist pamphlet quoted or referred to the principle of equality in order to justify opposition to slavery. Ironically, the principle of equality also provided support for the proslavery forces, as they had a strong belief in states' rights and resented the intrusion of the national government and the Northern free states into their internal affairs. In addition, many Southerners believed that the principle in the Declaration contributed significantly to what many historians have called an inevitable conflict. Although the Civil War might have occurred eventually in spite of the Declaration, it is doubtful that it would have taken place as early as 1861 without it.

It should also be noted that there were some inherent conflicts in the Declaration concerning its desires for liberty, government by consent, and just and effective government. For example, how could a tyrannical majority be prevented from seizing power and denying liberty to a weak minority? And what if the people had willingly consented to such a condition? The Declaration provided no specific answers to these conflicts because it was not establishing a government. This was, of course, the task of the framers of the Constitution in 1787. They sought to provide ways to solve these conflicts through such principles as republican, or representative, government; separation of powers; federalism; bicameralism; right to trial by jury; the guaranteed right of habeas corpus (the right to be charged in open court and to challenge legally one's imprisonment); the prohibition against ex post facto laws (not being charged with a crime when the committed act was not a crime); bills of attainder (imprisonment by a legislative body without benefit of a trial); and, eventually, the first ten amendments to the Constitution, known as the Bill of Rights.

The Declaration did, however, state the universal principles upon which this nation was founded in order to justify to the world why the colonists believed their revolution was necessary and why the principles of natural rights, consent, and revolution effectively served not only the political well-being of the nation in 1776 but also potentially all future nations and their citizens. Accordingly, the American independence movement exemplified by the Declaration has inspired most of the major movements for independence in the world since 1776. This was true of the French Revolution of 1789, the various independence movements against Spanish rule in the 1820s, the Russian Revolution of 1917 (the Bolsheviks' demands for equality, not their tyrannical exercise of power), and of the post–World War II independence movements in the underdeveloped nations of European powers' former colonies.

Warren R. Wade

See also: Jefferson, Thomas; Natural Rights; United States Constitution.

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Deep Throat

Deep Throat is the best-known, most profitable, and most controversial pornographic film ever made. Filmed in 1972 for about $25,000, the movie had made an estimated $600 million by 2002. The movie created controversy by repeatedly being in court on obscenity charges, which raised important First Amendment free speech issues, and because of the turbulent and tragic life of its star, Linda Lovelace (nee Boreman).

Contradiction and controversy cloud any attempt to tell the story of *Deep Throat* completely. Apparently the film was made in Miami, Florida, and directed by Gerald Damiano, who had met Linda Lovelace and her husband, Chuck Traynor, at a party. Traynor and Lovelace had made short pornographic films, called "loops," for some time before meeting Damiano. Lovelace was paid $1,200 for her performance, and many reports suggest that the Colombo crime family from New York City supplied the film's entire budget.

Originally entitled *The Doctor Makes a House Call*, the film is sixty-two minutes long. The plot is the story of a young woman who, after several encounters, finds she cannot have an orgasm. She visits a doctor who discovers that her clitoris is located in her throat, and for the rest of film she serves as a "therapist" to several other individuals who experience sexual problems.

The success of *Deep Throat* was phenomenal, and it attracted attention from many mainstream media outlets. Lovelace appeared on *The Tonight Show* with Johnny Carson as well as on the covers of *Esquire* and *Playboy.* She published an "autobiography" and released other movies (mostly reedited loops from her earlier career).

Controversy followed quickly on the film's success. Throughout the 1970s and early 1980s, *Deep Throat* was the subject of many court battles over the definition of obscenity and community standards. Under the *Miller v. California* decision, 413 U.S. 15 (1973), juries were allowed to declare material obscene if, based on contemporary community standards, the material, taken as a whole, appealed to prurient interest. Prosecutors around the United States placed *Deep Throat* on trial and asked juries to declare it obscene. The film was declared obscene in New York City, but prosecutors failed to gain convictions in Massachusetts and Tennessee. The most famous case was in Memphis, Tennessee, where one of the film's stars, Harry Reems, was put on trial.

Deep Throat was the first "out-of-the-closet" pornographic movie in American history. The film made millions for its creators and distributors, many of whom were reputed to be organized crime figures from New York and Florida.

The film's stars did not fare as well as its producers. After divorcing Chuck Traynor, Linda Lovelace married Larry Marchiano and quit pornography altogether. In 1980, now Linda Marchiano published *Ordeal*, an autobiography that claimed her former husband forced her into sexual acts. Marchiano gave speeches, testified before city councils, and in 1985 addressed the Meese Commission on Pornography. She died as a result of injuries sustained in a car wreck in 2002. Harry Reems tried for many years to establish a mainstream acting career but ended up selling real estate.

Despite the huge sums of money government officials spent trying to suppress *Deep Throat,* the film has become a part of America's popular culture and legal history.

Charles C. Howard

See also: Censorship; First Amendment; *Miller v. California;* Obscenity; Pornography.

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Democracy and Civil Liberties

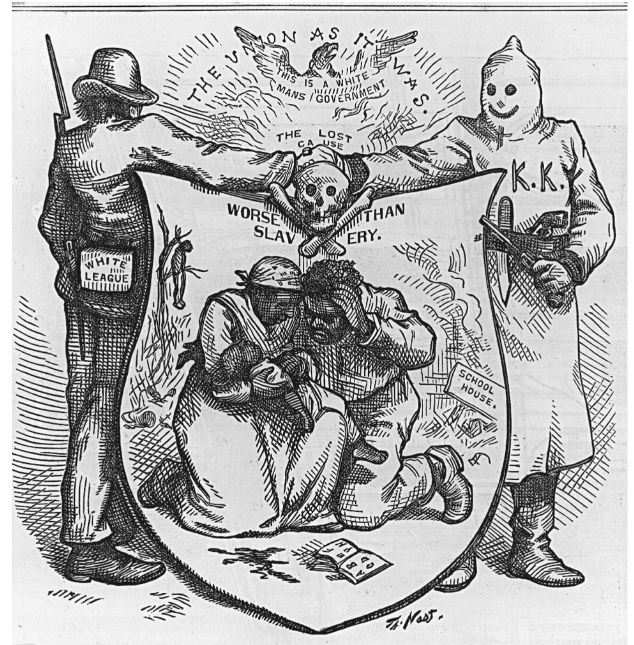
The term "democracy" is derived from the Greek word *demokratia*, which means rule (*kratos*) by the people (*demos*). A democracy, unlike a monarchy or an aristocracy, is a system of government in which the

people rule. A fundamental tenet of democratic government is the political equality of all citizens. Because the people are rarely unanimous, democratic rule is commonly understood as rule by the majority of citizens, or majority rule.

Majority rule, however, can endanger the rights and liberties of a powerless minority. James Madison, a principal architect of the U.S. Constitution and one of the authors of *The Federalist Papers*, identified a problem that subsequent thinking has called the "tyranny of the majority." In essence, the tyranny of the majority occurs when a democratic majority votes to persecute the members of a minority group or deprive them of their rights and liberties. In other words, majority rule can result in the denial of the civil liberties of certain citizens. Civil liberties are defined as the freedoms that protect against the interference of others, in particular, against the coercive power of the state.

The framers of the U.S. Constitution designed a system of government that would minimize the tension between democracy and liberty. There are two basic principles of the U.S. system of government, which are counterbalanced against one another. The first principle is that of democratic rule by a majority of the people through their elected representatives. The Constitution establishes a representative democracy because all citizens have the right to vote for representatives at the local, state, and national levels. The second principle is that the power of majority rule must be limited in order to ensure the civil liberties of all citizens. Various provisions of the Constitution provide protection against the violation of civil liberties. The purpose of providing constitutional protection for civil liberties is to prevent a majority of the people from depriving a minority of their rights and liberties.

The U.S. Constitution guarantees a range of civil liberties, including the freedom of speech and assembly, the right to vote, the right to equal protection under the law, and procedural guarantees in criminal and civil trials. These civil liberties are protected by certain provisions in the Constitution, such as the prohibition on ex post facto laws (laws that apply retroactively) and the right to habeas corpus (a petition to be released from illegal detention). Civil liberties are also guaranteed by the first ten amendments of the



Despite the passage of the Thirteenth through Fifteenth Amendments as well as several civil rights laws, former slaves faced many threats and limits on their ability to exercise their newfound liberties. Throughout the nineteenth century and much of the twentieth century, groups such as the Ku Klux Klan often harassed or even murdered African Americans who sought to exercise their rights.
(Library of Congress)

Constitution (known collectively as the Bill of Rights) and by the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments.

The Bill of Rights guarantees the majority of civil liberties. The First Amendment guarantees the freedom of speech, association, and assembly and the freedom of the press. The First Amendment also protects the free exercise of religion and provides for a strict separation between state and church. The Fourth, Fifth, and Sixth Amendments provide a number of guarantees against arbitrary state action in civil and criminal trials. All persons are protected against unreasonable searches and seizures, against arbitrary arrest and detention, and against double jeopardy (being tried twice for the same crime). All persons have a right to "due process," which means that the government may not deprive any person of life, liberty, or property without following a fair and legal process. Other civil liberties include the right to counsel, the right to a speedy and public trial, and the right to be confronted by witnesses. The Supreme Court has also

read a "right to privacy" into the Bill of Rights. The right to privacy protects all persons from governmental interference in personal and private affairs. The freedom of a woman to choose to have an abortion falls under the privacy right. The Second Amendment protects the right to bear arms. As originally written, the Bill of Rights protected citizens from the actions of the federal government, but these rights were eventually applied against actions of the state governments in a series of cases decided by the Supreme Court between the 1930s and the 1960s.

After the Civil War, three amendments were made to the U.S. Constitution. The Thirteenth Amendment outlaws slavery. The Fourteenth Amendment declares that the states must provide equal protection under the law, and that they may not deprive any person of life, liberty, or property without the due process of law. The clause guaranteeing equal protection under the law is the primary protection against state discrimination on the basis of race, sex, and national origin. The Fifteenth Amendment provides that the right to vote shall not be denied on account of "race, color or previous condition of servitude." In addition, the Nineteenth Amendment, adopted in 1920, protects the right of women to vote.

Many of the civil liberties discussed here, such as the freedom of speech and association, the right to vote, and the right to equal treatment under the laws, are indispensable for the proper functioning of democracy. These civil liberties are preconditions for democratic government. For much of the history of the United States, however, these basic civil liberties were denied to entire segments of the population for many years. Despite the existence of constitutional protections, powerful majorities were able to deprive minorities of their rights and liberties.

After the Civil War, white supremacist groups, such as the Ku Klux Klan, killed hundreds of blacks who voted or ran for office. At the same time, southern states adopted numerous tactics, including literacy tests, property qualifications, and poll taxes, to deprive blacks of the right to vote. In addition, southern states implemented a program of segregation in which blacks were separated from whites in every aspect of life, including housing, transportation, restaurants, education, and employment. The U.S. Supreme Court upheld the constitutionality of segregation in *Plessy v. Ferguson,* 163 U.S. 537 (1896), on the grounds that "separate but equal" accommodations for blacks and whites in railroad cars did not violate the Equal Protection Clause of the Fourteenth Amendment.

The civil rights movement of the 1950s and 1960s challenged the injustice, oppression, and discrimination that blacks faced. Civil rights protesters organized sit-ins and boycotts to protest the inequality of public accommodations. Important leaders in the African American community, such as Dr. Martin Luther King Jr., rallied their followers to resist the discriminatory practices and institutions that had been forced upon blacks. In 1954, the Supreme Court finally overturned its decision in *Plessy v. Ferguson* (1896). In *Brown v. Board of Education,* 347 U.S. 483 (1954), the Court explicitly rejected the "separate but equal" doctrine as a violation of the Equal Protection Clause of the Fourteenth Amendment and ordered the desegregation of public schools. Congress passed the Civil Rights Act of 1964, which banned discrimination on the basis of race. In 1965, Congress passed the Voting Rights Act, which prohibited the use of any voting device that denies the right to vote on the basis of race or color. As a result of the civil rights movement, the basic civil liberties of all citizens are better protected, and the democratic system of government is more inclusive.

Yasmin A. Dawood

See also: Constitutionalism; Judicial Review; Tyranny of the Majority; United States Constitution.

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Democratic Party

At the end of the twentieth century, the Democratic Party was viewed as the political party more supportive of civil liberties than its Republican rival. Yet, it is noteworthy that the Democrats historically have not been the party of civil libertarians. Until the middle of the twentieth century, the party pursued policies hostile to the wishes of advocates of civil liberties.

At the outset of World War I, the Democratic president, Woodrow Wilson, signed into law two bills limiting free expression. Under these laws, it became unlawful for anyone to say anything critical of the president, Congress, the American flag, or the military or to oppose the war effort. Under the Espionage and Sedition Acts, individuals were prosecuted for expressing their views in a public manner. Prominent figures, such as the leader of the Socialist Party, Eugene V. Debs, were arrested along with individuals less well known. Following the end of hostilities on November 11, 1918, the Wilson administration continued to enforce these measures. Wilson's attorney general, A. Mitchell Palmer, conducted "raids" of political meetings that he deemed to be controversial and threatening to the nation.

During the 1920s, the Democrats did not hold the presidency. This was the Republican era of Warren G. Harding, Calvin Coolidge, and Herbert Hoover. Although out of office, the Democratic Party continued to operate its mechanism for presidential nominations on an old rule that effectively prevented presidential candidates who held certain viewpoints from receiving the party's nomination. The two-thirds rule meant that the party nominee had to receive the votes of two-thirds of the delegates to Democratic national conventions. In effect, this rule gave the southern states a veto over the presidential nomination. This, in turn, could prevent any serious consideration of ideas within the party relating to civil rights reforms.

With the election of Franklin D. Roosevelt (FDR) in 1932, the Democratic Party was returned to the White House and to control over both houses of Congress. So strong was the reaction against the Republicans that Democratic control of the Senate and House of Representatives gave the new president an excellent opportunity to pass programs to deal with the economic crisis of the Great Depression. FDR's New Deal, which included numerous programs to address social and economic ills and which ushered in an era of growing governmental intervention in citizens' lives, became a permanent fixture of American life. Through the Works Progress Administration (WPA), the government became active in infrastructure projects (roads, dams, bridges), and Social Security was created as an economic safety net. Through the Civilian Conservation Corps (CCC), the government hired many people to build or maintain parks. Although the New Deal reform impulse died by the end of the twentieth century, New Deal programs remained in effect and enjoyed high levels of support from the general public.

In his reelection campaign of 1936, FDR was able to convince enough members of his party to drop the two-thirds rule. This change in party procedures relating to presidential nomination would have far-reaching consequences for the Democrats and the nation. With this change, the South, with its system of racial segregation and intimidation, would lose its veto power over presidential nominees. As a result, Democrats seeking the presidency in the future would be able to discuss civil rights reforms and stand a chance of receiving the party nomination. The debate of ideas within the Democratic Party was expanded by this change. The liberal wing of the party gained enhanced influence, and this was crucial to the eventual success of many civil rights and civil liberties issues in the years ahead.

Although FDR's actions on behalf of repealing the two-thirds rule had positive effects in the long term, wartime led him, just as it had Wilson before him, to take actions that infringed on the civil liberties and civil rights of many Americans. It was during World War II that President Roosevelt signed an executive order establishing internment camps for Americans of Japanese ancestry. Those sent to camps had no way to appeal to justice, no chance to speak out against the action. Individuals were simply informed they had to leave their homes and enter a government camp.

With the election of Franklin D. Roosevelt in 1932, the Democratic Party took control of both houses of Congress. This control gave the new president an excellent opportunity to pass his New Deal programs to address the economic crisis of the Depression. *(National Archives)*

In taking this step, the president had the support of Congress and public opinion, but this episode in American history is illustrative of the power of a majority to take away basic freedoms of unpopular minority groups. Referred to as the "tyranny of the majority" by political theorists, it is truly a dangerous reality when it makes the leap from political theory to political reality. Although it is difficult in retrospect to grasp the intensity of the hatred toward Japan and the Japanese people, its effect on people of Japanese backgrounds in the United States is quite clear. Homes, investments, careers, and family possessions were lost as a result of this forced resettlement program of the U.S. government.

By the middle of the twentieth century, the Democratic Party was moving increasingly in the direction of supporting federal legislation to require basic civil rights for black Americans. President Harry S Truman desegregated the armed forces and sent to Congress a message on civil rights. He also delivered a public speech on civil rights. His actions caused the southern states to break with the Democrats in the 1948 election. Strom Thurmond of South Carolina ran as a Dixiecrat (a Democrat from the South) opposed to Truman's policies on civil rights. However, momentum continued to build for changes in the ways black Americans were treated. The Supreme Court's decision in *Brown v. Board of Education,* 347 U.S. 483 (1954), prohibited racially segregated schools. The emerging civil rights movement of the mid- and late 1950s set the foundation for the changes that would come in the 1960s.

Americans risked arrest, physical harassment, and even death in many southern states for expressing views in favor of equal rights for black Americans. As civil rights supporters began to express opinions publicly, tensions in the South increased dramatically. A young minister from Atlanta, Georgia, Dr. Martin Luther King Jr., became the leader of the movement.

Influenced by the work of the leader for Indian independence, Mahatma Gandhi, King believed it necessary to confront injustice peacefully but directly. In this way, the elements enforcing an unjust set of laws would become ashamed of their actions and changes would result. To carry out these measures, King led demonstrations, marches, and planning sessions. Every act of expressing ideas and planning ways to change American policy in the South was met with a set of dangers. Many people working for civil rights lost their lives, and King himself was under surveillance by the Federal Bureau of Investigation (FBI).

The Democratic Party of the 1960s moved to change policies on civil rights. Laws were enacted to guarantee the right to vote for black Americans and to prohibit discrimination in public accommodations, housing, and employment. It was also a time when greater tolerance was expressed with regard to protesters marching against the war in Vietnam and to news coverage of events during that war. However, officials in charge of the 1968 Democratic National Convention in Chicago displayed a less than enthusiastic embrace of people's civil liberties. Chicago police, at the direction of Mayor Richard Daley, tried to

repress the demonstrators who had gathered in that city for the Democrats' presidential convention. There were violent confrontations that resulted in several injuries.

In the years after 1968, a new group of politicians, more supportive of civil liberties than their predecessors, emerged as leaders of the Democratic Party. Certainly, the 1972 break-in of Democratic National Committee headquarters by agents associated with the Richard Nixon White House (an episode known as Watergate) made these Democrats more sensitive to issues tied to liberties and freedoms. Congressional Democrats started investigations of the Central Intelligence Agency (CIA) and the FBI, and these led to new limits on surveillance by the two agencies.

After the September 11, 2001, terrorist attacks in New York City and Washington, D.C., Congress passed the USA Patriot Act. Sought by the Republican administration of George W. Bush, the new legislation gave the Department of Justice new powers of surveillance over American citizens and noncitizens and of their indefinite detention by authorities. Critics charged that this legislation violated many civil liberties, such as the right to due process. Many Democrats voted in favor of the legislation. Despite that, opposition to the civil liberties policies of the Bush administration has come primarily from the Democratic Party.

Michael E. Meagher

See also: Minor Political Parties; Republican Party.

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Dennis v. United States (1951)

In *Dennis v. United States,* 341 U.S. 494 (1951), the U.S. Supreme Court held that in order for speech to be suppressed, there must be a showing that the would-be suppressor employed a balancing test and found the evil caused by the speech was greater than the protections guaranteed by the First Amendment of the U.S. Constitution. The case also served as what very well may be the loosest construction of the incitement test by the Court.

The plight of Eugene Dennis and his eleven comrades was the basis for the first major prosecution of Communists during the Cold War "red scare" of the 1950s. Dennis and eleven other Communist Party leaders were prosecuted under the Smith Act of 1940. The Smith Act "made it a crime to teach or advocate the violent overthrow of any government in the United States, to set up an organization to engage in such teaching or advocacy, or to conspire to teach, advocate, or organize the violent overthrow of any government in the United States." Dennis was indicted for conspiring, along with eleven other Communist leaders, to overthrow the U.S. government. The trial before Judge Harold Medina of the U.S. District Court for the Southern District of New York became known as the "battle of Foley Square," which referred to the name of the courthouse where the case was tried. Lasting for over nine months, the trial resulted in the conviction of the twelve Communist leaders and the creation of a 16,000-page court record.

On appeal, the case was heard by the U.S. Court of Appeals for the Second Circuit with judges Learned Hand, Thomas Swan, and Harrie Chase serving as the panel. It fell to that court's most lauded jurist, Learned Hand, to write the opinion in *United States v. Dennis,* 183 F.2d 201 (2d Cir. 1950), the precursor to the Supreme Court case. Judge Hand was no newcomer to the field of First Amendment law; in fact, he had penned the first major First Amendment incitement case, *Masses Publishing Co. v. Patten,* 244 F. 535 (S.D.N.Y. 1917), when he was a federal district court judge. But Hand's opinion in *Dennis* was vastly different from his earlier pronouncement.

First Amendment law had changed markedly in the thirty-three years since *Masses* was released, mostly as a result of World War II. During the late 1940s and early 1950s, a renewed fear of communism also became ever present. *Dennis* was decided in this atmosphere. Influenced by previous Supreme Court decisions and his own decision in *United States v. Carroll Towing Co.,* 159 F.2d 169 (2d Cir. 1947), a negligence case, Hand created a balancing test for incitement cases that the Supreme Court adopted less than a year later. "As we have said, 'clear and present danger' depends upon whether the mischief of the repression is greater than the gravity of the evil, discounted by its improbability; and it is of course true that the degree of probability that the utterance will bring about the evil is a question of fact." For Hand, this question of fact was best left to be answered by Congress.

Dennis was ultimately argued at the Supreme Court in December 1950, but the decision was not issued until the following June. Chief Justice Frederick M. Vinson delivered the opinion of the fractured Court and stated that "[s]peech is not an absolute, above and beyond control of the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction." But these words hid Vinson's intent to hamper communism in any way he could. To do this, the Court gave the government power to take action, even if there was no imminent threat, to stop communism. Vinson stated, "If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."

Vinson did not speak for the entire Court. Grounding their opinions upon the First Amendment historically, Justices Felix Frankfurter and Robert H. Jackson concurred only in the judgment. In fact, Justice Frankfurter's words were a harbinger of later free speech jurisprudence: "The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illuminated by the presuppositions of those who employed them." Justice Hugo L. Black and William O. Douglas dissented strongly. Justice Douglas's declaration that "free speech is the rule, not the exception" became the battle cry of First Amendment advocates.

Dennis v. United States was to be the most restrictive decision the Court would issue concerning free speech, especially incitement. Later decisions chipped away at the edifice of anticommunism present both in this decision and in the nation as a whole. In fact, the Court in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), would later adopt Hand's earlier opinion in *Masses* to protect those who held opinions disparate from the society at large.

David T. Harold

See also: Communists; *Masses Publishing Co. v. Patten.*

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Department of Justice

The Department of Justice (DOJ), created in 1870, has the primary responsibility of enforcing federal laws. In addition, the DOJ is involved with preventing and controlling crime and supervising federal prisons. The Attorney General (AG) of the United States heads the Department of Justice and is charged with the responsibility of investigating and prosecuting those who violate federal laws, including those who hinder others from enjoying their civil rights.

Several prominent federal law enforcement agencies are part of the DOJ, including the Federal Bureau of Investigation, the Drug Enforcement Administration, the U.S. Marshals, and the Civil Rights Division. Of course, not only must these agencies investigate and prosecute violation of civil rights laws, but they also are bound to respect those same laws as they conduct their activities.

HISTORY

Congress enacted the Judiciary Act of 1789, which provided for a U.S. attorney general (AG) and district attorneys to manage criminal and other matters that involved the interests of the federal government. During this period the district attorneys were not under the supervision of the AG and were free to hire private counsel to assist them with government matters. However, as the nation and its business grew, Congress saw the need for a federal agency to administer these matters and established one by law in 1870.

LAW ENFORCEMENT AGENCIES UNDER THE DOJ

Federal Bureau of Investigation (FBI)

Initially named the Bureau of Investigation in 1908, this agency was renamed the Federal Bureau of Investigation (FBI) in 1935. An investigative agency of the federal government, the FBI has jurisdiction over federal crimes, including civil rights violations. J. Edgar Hoover headed the FBI from 1924 to 1972. Although he was credited with advancing the professionalism of the agency—for example, establishing the FBI training academy and the FBI's Ten Most Wanted List—Hoover also indulged in controversial acts that hindered the integrity of the agency for decades.

J. Edgar Hoover headed the Federal Bureau of Investigation (FBI) from 1924 to 1972. An investigative agency of the federal government, the FBI has jurisdiction over federal crimes, including civil rights violations. *(National Archives)*

U.S. Marshals Service

President George Washington named the first appointees to the U.S. Marshals Service in 1789. Responsibilities of these early marshals included protecting government officials and providing law enforcement for unsettled western territories. With the development of state governments, the marshals were assigned to work for U.S. district courts and provide various services. Some services, such as providing security for federal courts, judges, and witnesses, remain an integral part of their work today. A more recent responsibility of U.S. marshals came as a result of the enactment of the 1984 Comprehensive Crime Control Act and its provisions for forfeiture of assets. U.S. marshals are given the responsibility for the inventory and disposal of property seized as a result of defendants' federal offenses. Although the U.S. Marshals Service is the oldest federal law enforcement service, it was not given agency status until 1969.

Drug Enforcement Administration (DEA)

The Drug Enforcement Administration (DEA) is charged with the responsibility of enforcing the drug laws and regulations in the United States. In addition, the DEA assists other law enforcement agencies in the investigation of crimes involving the manufacturing, distribution, and trafficking of legal and illegal controlled dangerous substances.

The forerunner of the DEA was the Federal Bureau of Narcotics, which was established in 1930. Multiple agencies became involved with drug crime as illegal drug use grew. There was no coordination of these law enforcement efforts until 1973, when the DEA was formed to assist in this area.

DOJ AND CIVIL LIBERTIES

The Department of Justice has a significant history of investigating civil rights violations. As a result of the civil rights movement, Congress passed important civil rights legislation during the 1960s. Attorney General Robert F. Kennedy used the new laws to involve the DOJ in civil rights violations. These federal laws were designed to criminalize behaviors that interfered with or deprived others of their constitutionally protected civil liberties, including (1) conspiracy to deny civil rights; (2) forcible interference with civil rights (prohibiting interference with individuals who are exercising their constitutionally guaranteed rights, such as enrolling in a public school or eating in a public restaurant); (3) deprivation of civil rights under color of law, which prohibits public officials from attempting to deprive individuals of their civil rights through the power of their office; and (4) willful interference with civil rights under the Fair Housing Act, which prohibits any interference with individuals' right to buy, rent, or live in their home.

Despite the mandate of the DOJ that included enforcement of federal civil rights laws, the agency did not always observe that charge. J. Edgar Hoover, the most famous and controversial director of the FBI, used illegal investigative techniques, such as unauthorized wiretaps, against several civil rights advocates. Hoover and the FBI targeted Dr. Martin Luther King Jr. for such treatment, thereby compromising his constitutional rights.

In more recent years, legislation adopted to wage war against terrorism has given the DOJ greater law enforcement powers that concern some civil rights advocates. For example, the FBI has greater latitude in conducting electronic surveillance of religious and political organizations and in detaining foreign nationals suspected of terrorism for longer periods of time without charging them. Some civil rights advocates view the increased powers of the DOJ with suspicion, as being potentially in violation of such constitutional rights as due process.

Carolyn Turpin-Petrosino

See also: Attorney General; Federal Bureau of Investigation.

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DeShaney v. Winnebago County Department of Social Services (1989)

In *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989), the U.S. Supreme Court refused to hold a local governmental agency liable for violating an individual's right to due process when it failed to act to protect a son from his father's abuse. Joshua DeShaney and his mother had sued the Winnebago County Department of Social Services alleging that it had deprived Joshua of his liberty interest in violation of his rights under the Fourteenth Amendment's Due Process Clause. Joshua DeShaney was a young child who had been subjected to a series of beatings by his father. County social services and several of its social workers received complaints that Joshua's father was abusing him, but did little to protect him and did not intervene on his behalf when strong evidence of child abuse existed. Joshua's father finally beat him so severely that he suffered permanent brain damage and was rendered profoundly retarded.

The U.S. Supreme Court held in a six–three de-

cision written by Chief Justice William H. Rehnquist that nothing in the Fourteenth Amendment required a state to protect its citizens from a violation of their rights by a private individual. The Court found that the Due Process Clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security. The clause forbids the state itself from depriving individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means. The majority further held that Joshua's father created the danger, not the government. The government's duty to protect persons against violence amounts to a violation of due process only when the state creates the danger, such as if Joshua were injured while in the state's custody at a prison.

In dissent, Justices William J. Brennan Jr., Thurgood Marshall, and Harry A. Blackmun argued that inaction can be every bit as abusive as action, and that oppression can result when a state undertakes a vital duty and then ignores it. The dissenters argued that direct physical control was not required to create a duty on behalf of the state, and that the state's knowledge of an individual's predicament and its expressions of intent to help that person could amount to a limitation on the individual's freedom to act on his or her own behalf or to obtain help from others. The dissenters claimed that through its child protection program, the Winnebago County Department of Social Services actively intervened in Joshua's life, became increasingly certain that Joshua was in grave danger, and failed to protect his life and liberty. They claimed the Fourteenth Amendment was, in part, designed to undo the formalistic legal reasoning that infected antebellum jurisprudence, and they argued for a broader reading of the amendment that comported with dictates of fundamental justice.

The case is symbolic for its clarification of positive and negative rights under the Fourteenth Amendment. The majority held that an individual's civil liberties are negative rights with which the state must not interfere; nothing in the language of the Due Process Clause itself requires the state to protect the life, liberty, and property of its citizens against invasion by private actors. The minority argued that civil liberties are positive rights that impose an affirmative duty on the state for protection. They pointed to the U.S. constitutional tradition, the origins of the right to protection, and the meanings and applications of the Fourteenth Amendment to prove the need for a federal guarantee of the right to protection as an essential part of the amendment's history.

James Barger

See also: Due Process of Law; Fourteenth Amendment; Negative and Positive Liberties.

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Dickerson v. United States (2000)

In *Dickerson v. United States,* 530 U.S. 428 (2000), the U.S. Supreme Court declared unconstitutional a federal statute that permitted use of "voluntary" confessions at trial even if secured in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966), the case that gave rise to the famous *Miranda* warnings the Court held that law enforcement officials must give criminal defendants to advise them of their rights under the Fifth and Sixth Amendments. Two years after the Court's decision in *Miranda,* Congress enacted the Crime Control and Safe Streets Act of 1968 (CCSSA). Under *Miranda,* confessions secured in violation of the warnings police were required to give suspects prior to custodial interrogation were inadmissible at trial. Section 3501 of the CCSSA, as codified, provided, however, that a *Miranda* violation was only one factor to be considered by courts in determining whether a confession was "voluntary" and therefore admissible in federal criminal prosecutions.

Given the obvious inconsistency between the *Miranda* decision and the 1968 statute, both Democratic

and Republican administrations consistently declined to invoke CCSSA's section 3501. Beginning with *Harris v. New York,* 401 U.S. 222 (1971), however, the Supreme Court recognized exceptions to the *Miranda* ruling. In *Harris* the Court held, for example, that confessions secured in violation of *Miranda* could be used to impeach a defendant's trial testimony. Later cases upheld use of *Miranda*-tainted confessions to secure other evidence against the accused and held that *Miranda* did not apply to grand jury proceedings or to questioning in the field designed to prevent imminent threats to public safety. As a rationale justifying such exceptions, a majority reasoned that *Miranda* was a judicially created prophylactic designed to deter police misconduct rather than a constitutional requirement applicable to every context.

Against that background, a federal district judge in Virginia suppressed statements that accused bank robber Charles Thomas Dickerson made to police on the ground that although they were voluntary under traditional constitutional standards, they were secured in violation of the required *Miranda* warnings. The government appealed that ruling to the U.S. Court of Appeals for the Fourth Circuit.

The trial judge had not included consideration of section 3501, and the Department of Justice had forbidden the local U.S. attorney to raise it on appeal. Nevertheless, in a highly unusual move, a divided appeals court panel, declaring that "[f]ortunately, we are a court of law and not politics," 166 F.3d 667, 672 (5th Cir. 1999), used the case to hold that section 3501, not *Miranda,* governed the admissibility of confessions in federal court. Citing *Harris* and its progeny, the panel reasoned that *Miranda* was not a constitutional requirement but merely a judicially created rule that Congress had power to overrule through legislation, such as section 3501.

Acting for the government, the solicitor general refused to raise a section 3501 claim before the Supreme Court. As a result, the Court named a scholarly critic of the *Miranda* decision as an amicus curiae (friend of the court) to defend the law's constitutionality. His efforts, however, were to no avail. Speaking through Chief Justice William H. Rehnquist, himself a frequent *Miranda* critic over the years, a seven–two majority concluded that *Miranda* had a constitutional basis and that section 3501 thus conflicted with the Constitution. Distinguishing *Harris* and related rulings, Rehnquist conceded that language in a number of the Court's opinions supported the Fourth Circuit's position, but he emphasized that no constitutional rule was immutable—that all were subject to modification in later cases. He insisted, moreover, that *Miranda* had constitutional underpinnings, especially since it had been consistently applied in state as well as federal cases even though the Court had no general supervisory power over state courts of the sort it exerted over federal judges, only the authority to assure that state-court rulings conformed to the Constitution. Leaving open the question of whether the current Court would adopt the *Miranda* rule were the issue before the justices for the first time, Rehnquist further concluded that the force of *stare decisis* (to adhere to previous decisions, pronounced *STAR-ry de-SI-sis)* weighed heavily against overruling a precedent of such long standing.

Justice Antonin Scalia, joined by Justice Clarence Thomas, registered a biting dissent. Scalia readily conceded that the fairest reading of *Miranda* would assign the warnings announced there the status of a constitutional rule. He contended, however, that the Court had long since abandoned that notion, endorsing instead the position that *Miranda* constituted only a judicially created rule broader than the constitutional ban on compulsory self-incrimination. Since, as the majority observed, the Court could not require state courts to adhere to such nonconstitutional rules, Scalia declared, *Miranda* should be overturned.

Tinsley E. Yarbrough

See also: Fifth Amendment and Self-Incrimination; *Miranda v. Arizona*.

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Directed Verdicts

A directed verdict is a court-ordered disposition of a civil lawsuit after trial has begun. Such action is handled under the court's procedural rules, such as the *Federal Rules of Civil Procedure* that govern trials in federal courts, combined with assessment of sufficiency of the evidence. Typically, the defendant moves for a directed verdict at the end of plaintiff's presentation of evidence. If the judge determines that the evidence presented is insufficient to supply the jury with any reasonable basis to find for the plaintiff, the judge may withdraw the case from the jury and enter judgment as a matter of law for the defendant. This is called a directed verdict.

If the judge does not grant the motion for a directed verdict, the defendant typically proceeds to present evidence, and the jury renders a verdict. After the verdict, the losing party may ask the court to grant a "judgment notwithstanding the verdict" (sometimes called judgment NOV) of the jury. Once again, the court will make a determination of whether the evidence is sufficient, this time in relation to the verdict of the jury. If there is not sufficient evidence to support the verdict, the court will reverse the jury determination and grant judgment notwithstanding the verdict.

Both the directed verdict, typically granted at the end of plaintiff's evidence, and the judgment notwithstanding the verdict, granted after the jury decision, are governed by the same legal standard. Under the *Federal Rules of Civil Procedure,* both the directed verdict and the judgment notwithstanding the verdict are alternative forms of *judgment as a matter of law.* Judgment as a matter of law may also be granted on behalf of a defendant in a federal criminal proceeding under the *Federal Rules of Criminal Procedure.*

Although the standard for granting a directed verdict or a judgment notwithstanding the verdict is the same, the precise nature of that standard has varied among courts and throughout time. Some courts, erring on the side of preserving the greatest role possible for the jury, refuse to grant a directed verdict if there is *any* evidence to support the nonmoving party, sometimes referred to as the requirement of a mere *scintilla of evidence.* Other courts, less jury-friendly, have required that there be *substantial evidence* to avoid a directed verdict. Some courts consider only the evidence presented by the nonmoving party; others consider the same evidence but only when viewed most favorably to the nonmoving party; and still others purport to consider all of the evidence. The modern standard under the *Federal Rules of Civil Procedure,* Rule 56, is that judgment as a matter of law should be entered against a party when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party."

The concept of the directed verdict initially appears to be inconsistent with the right to a jury trial guaranteed by the Seventh Amendment to the U.S. Constitution. When the court grants the motion, the jury never gets to decide the case.

When there is a genuine dispute over which party should win based on conflicting evidence, the jury must decide. If one party's evidence is so weak or so limited that only one reasonable conclusion could be reached based on it, then the judge has the right to direct a verdict—that is, to grant judgment as a matter of law; there is nothing for the jury to decide. In this context, the constitutional right to trial by jury is not impaired.

John H. Matheson

See also: Discovery; Trial by Jury.

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Disability Rights

In the United States, the civil rights of people with disabilities are primarily ensured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution. In addition, landmark national legislation has been passed since the 1960s aimed at codifying specific rights and antidiscrimination protection in areas such as education, em-

ployment, and access to public services and accommodations. In the area of disability, questions over the cost of strict implementation and the interpretation of statutory provisions often make these rights uncertain.

HISTORICAL PERSPECTIVE

Historically, the rights of the disabled were not ensured or protected. Legislatures avoided the topic, and the courts did not often rule in favor of the disabled. One of the first major court cases concerning the rights of the disabled was *Buck v. Bell,* 274 U.S. 200 (1927), in which the U.S. Supreme Court allowed the state forcibly to sterilize a mentally handicapped woman, Carrie Buck. In its decision, the Court found that the state had a legitimate interest in preventing "those who are manifestly unfit from continuing their kind." Using a consequentialist argument, the Court found that the state could engage in this action if it benefited the rest of society.

LEGISLATION

Social Security

Despite the Court's decision in *Buck,* by the end of World War I Americans were beginning seriously to consider the civil rights and liberties of the disabled. Among the first significant laws to benefit the disabled was the Social Security Act of 1935. This piece of legislation authorized assistance to blind and disabled children in the form of matching grants to the states. However, assistance under the original act was limited, and not until the 1950s was the Social Security Act amended to include substantial disability rights. The 1950 amendment provided public assistance in the form of state grants-in-aid to permanently and totally disabled individuals. In 1954, the Vocational Rehabilitation Act was revised, and in 1956, Social Security Disability Insurance (SSDI) was created for disabled workers ages fifty to sixty-four. A number of important acts have been adopted since then.

President George H. W. Bush signs into law the Americans with Disabilities Act of 1990 (ADA) on the south lawn of the White House, July 26, 1990. The ADA was the most important federal law protecting the rights of the disabled.
(George Bush Presidential Library)

Architectural Barriers Act

Congress passed the Architectural Barriers Act in 1968. Considered to be the first truly federal disability rights legislation, this law mandated that all federally constructed or leased buildings be accessible to those with physical disabilities.

Rehabilitation Act

The Rehabilitation Act of 1973 was enacted "to promote the rehabilitation, employment, and independent living of people with disabilities." The act was proffered with no significant commitment of federal authority. Section 504, a somewhat routine inclusion, was but a tip of the hat to equal access for people with disabilities, physical and mental. This provision, which was modeled after Title VII of the Civil Rights Act of 1964, prohibits employers who receive federal financial assistance, federal employers, and employers having certain contracts with the federal government from discriminating against people with disabilities. Section 504 represented a significant departure from the assumptions of dependency and incapacity inherent in much of the earlier U.S. vocational rehabilitation policy.

Individuals with Disabilities Education Act (IDEA)

Congress adopted the Education for All Handicapped Children Act in 1975 on the basis that "improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity." This bill established the right of children with disabilities to a public education that is individualized to meet each disabled child's needs. It also called for the public school system to mainstream this education by educating disabled children alongside their peers who were not disabled. In *Honig v. Doe,* 484 U.S. 305 (1988), the Supreme Court affirmed the "stay put" rule of the legislation under which a disabled child could not be moved, expelled, or suspended from the child's agreed-upon "individualized education program" without due process. In 1997 the Congress reauthorized the act under the title Individuals with Disabilities Education Act (IDEA). The reauthorization sought to strengthen parental and child involvement in individualized education programs, increased and strengthened assessment programs, and provided additional funding through state programs.

Developmentally Disabled Assistance and Bill of Rights Act

In 1975 the Developmentally Disabled Assistance and Bill of Rights Act provided federal funding for programs assisting the developmentally disabled. It also delineated the rights of those who are institutionalized. However, subsequent Supreme Court rulings effectively blocked some of the rights and liberties in the legislation. In *O'Connor v. Donaldson,* 422 U.S. 563 (1975), the Court, relying on due process rights, ruled that nondangerous individuals who were found to have a mental illness could not be held without their consent or treatment. However, in *Pennhurst State School v. Halderman,* 451 U.S. 1 (1981), the Court significantly narrowed the scope of disability policy when it found that the Developmentally Disabled Assistance and Bill of Rights Act constituted merely federal-state funding statutes, and there was no obligation for the states to provide the high costs of "appropriate treatment" and a "least restrictive environment" to its mentally retarded citizens. This decision overturned a Pennsylvania appellate court's ruling that the unsafe, unsanitary, and inhumane conditions at the Pennhurst State School violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Justice William H. Rehnquist's opinion stated that the Developmental Disabilities Assistance and Bill of Rights Act did not imply that states must enforce Fourteenth Amendment guarantees.

Americans with Disabilities Act (ADA)

With the Americans with Disabilities Act (ADA) of 1990, Congress acted in order "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." This law has been hailed as the most comprehensive guarantee of civil liberties and civil rights for disabled

individuals. Similar to, but more comprehensive than, the Rehabilitation Act, the ADA defines disability as (1) a physical or mental impairment that substantially limits an individual's major life activities, (2) a record of such an impairment, or (3) being regarded as having such an impairment. The ADA expands the employment coverage of the Rehabilitation Act to include entities in the private sector. Further, the ADA significantly expands the scope of antidiscrimination protection for people with disabilities to include public services and public accommodations and services operated by private entities.

LIMITATIONS ON CIVIL RIGHTS

The rights of the disabled have waxed and waned, not only with federal legislation but also with various Supreme Court decisions. In *Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), for example, the Court applied the Equal Protection Clause of the Fourteenth Amendment to argue that localities may not prevent group homes for the disabled from being built in residential areas solely because the residents are disabled. However, in *Heller v. Doe,* 509 U.S. 312 (1993), the Court carefully distinguished between mental retardation and mental illness to allow the guardians of the mentally retarded to commit them to state facilities against their wishes.

The ADA, which dramatically expands the rights delineated in the Rehabilitation Act, defines people with disabilities as an "insular minority." Yet, the civil rights of these people are far less absolute than those for other groups considered insular minorities. Amendments to the Rehabilitation Act allow investigation of what is "reasonable." Similarly, "undue hardship" is the safe harbor that prevents many accommodations from being deemed "reasonable" under the ADA's Title I employment protection. In *Olmstead v. L.C.,* 527 U.S. 581 (1999), the ADA's Title II protection was also interpreted to permit cost to be a consideration in a municipality's provision of public services.

In 1999 the Supreme Court issued a trio of opinions that established precedent for a dramatic narrowing of the ADA's Title I employment protection. In *Sutton v. United Air Lines, Inc.,* 527 U.S. 471 (1999), the Court affirmed a lower-court decision that the petitioners, commercial airline pilots with correctable vision, were not substantially limited in any major life activity. Thus, the twin sisters had no claim of disability under the ADA, as they were precluded from one specific job, not a class of jobs. Using similar reasoning, in *Murphy v. United Parcel Service, Inc.,* 527 U.S. 516 (1999), the Court held that a mechanic with controllable high blood pressure was not precluded from a class of mechanic jobs, as necessary for ADA protection, rather only from mechanic jobs that required driving commercial vehicles. In *Albertsons, Inc. v. Kirkingburg,* 527 U.S. 555 (1999), the Court held that the appellate court was in error when it found a monocular truck driver disabled for purposes of ADA protection, as he continued to work in a mechanic position that he had held for more than twenty years.

The concept of federalism has also come to play an important role in the judicial application of the ADA's protection. In *Board of Trustees v. Garrett,* 531 U.S. 356 (2001), the Supreme Court decided that Title 1 of the ADA was unconstitutional when applied to state employees. The petitioners sued their state employers for violations of the ADA. The Court found the Eleventh Amendment, which prohibits private citizens from suing the state in federal court, applied to the ADA, and thus disabled state workers could not sue their respective states to recover monetary damages. However, states are still required to follow the mandates of the ADA, and state employees can pursue enforcement of the law. In *Tennessee v. Lane,* 124 S. Ct. 1978 (2004), the Supreme Court ruled that states may be sued if they deny disabled individuals access to the courts. In this case, George Lane was using a wheelchair when he was required to appear in court. Because the courthouse lacked a ramp or elevator, Lane had to crawl up two flights of stairs to reach the courtroom. Overall, states are still required to follow the mandates of the ADA, with state employees and some private individuals able to pursue enforcement of the law.

The struggle to attain rights and civil liberties thus continues for disabled individuals and their advocates. Organized political groups and movements as well as individual citizens continue to seek new and improved legislation as well as court decisions that will promote

equality of opportunity and inclusion and eliminate discrimination against disabled people.

Clenton G. Winford II and Lynne Chandler Garcia

See also: Buck v. Bell; Eugenics.

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Discovery

Discovery is the process during litigation, either civil or criminal, by which the parties and their attorneys disclose information relating to the litigation. Discovery is important because it can reveal whether there is sufficient evidence, for example, to continue a case. In a criminal case, discovery allows the accused to see what evidence the prosecution has and thus be more able to develop a defense. Discovery rules and methods differ among the various state and federal jurisdictions and between civil and criminal litigation; in cases in federal courts, the *Federal Rules of Civil Procedure* and the *Federal Rules of Criminal Procedure* govern discovery. Discovery rules may also differ as to whether a party must disclose information merely because the action has been filed, or whether a party must disclose information only at the request of the other party. No matter what rules and methods apply, the philosophy behind modern discovery rules is to preserve the fairness of the trial and prevent surprise at trial.

Discovery permits a party to gain access to evidence in the opponent's sole possession. It permits one party to anticipate the other party's theories of the case. Discovery improves the productivity of the investigative process by requiring the parties to share names of witnesses. It also preserves witnesses' testimony. Discovery enhances efficiency in the trial process so that the parties, in advance of trial, can determine what the witnesses know. The parties can then determine which witnesses should be called at trial and, if called, the subject of the testimony. Discovery exchange gives parties the information needed to decide to negotiate a settlement or proceed to trial.

Modern discovery rules permit discovery into "any matter, not privileged, that is relevant to the subject matter of the pending action," or under recent amendments to the federal rules, "any matter, not privileged, that is relevant to the claim or defense of any party."

State rules normally require a party to disclose information only if the other party requests, whereas federal rules automatically mandate disclosure of some information. Both systems provide for interrogatories, depositions, requests for admission of fact and law, and requests for production of documents and tangible things. Interrogatories are written questions a party must answer in writing under oath. A deposition is a transcribed question-and-answer session in which a party or other witness under oath answers questions asked by an attorney. In certain circumstances, a party may use these depositions as a substitute for a witness's live testimony at trial. Requests for admissions of fact and law reduce the number of issues in dispute by a party admitting them. Requests for production of documents and tangible things make documentary and tangible evidence available to the parties.

The federal rules not only permit these discovery methods but also require voluntary disclosure of certain information shortly after the filing of suit. Each party must initially disclose the identity of individuals likely to have information the party may use to support a claim or defense. Each party must also produce

a copy or description and location of all documents, data compilations, or tangible things the party may use to support a claim or defense. A party seeking damages must produce a computation of the damage claims and the documents upon which the computation depends. Those defending a damage claim must produce any insurance agreement that may be liable to satisfy part or all of any judgment entered in the case. All parties must identify and produce a written report of any experts expected to testify at trial.

A party may object to certain requested discovery on various grounds, such as that the discovery seeks to invade the attorney-client privilege (what clients tell their attorney is confidential), seeks to invade the marital privilege (one spouse has the privilege not to testify against the other spouse), seeks the mental impressions and theories of the attorney (commonly called attorney work product), or is not reasonably likely to lead to the discovery of admissible evidence. The court then decides the discovery dispute, or the parties may resolve the issue by negotiation.

After completion of this initial discovery and in advance of trial, courts may require the parties to identify witnesses expected to testify at trial, witnesses expected to testify by deposition, and documents or things the parties expect to introduce into evidence.

Criminal discovery rules rely upon the same discovery methods but also provide for the prosecution's disclosure of certain information, upon request, without a court order. These include

1. The identity of persons the government intends to call as witnesses, along with any written or recorded statements and memoranda reporting oral statements;
2. Any defendant or codefendant's written or recorded statements and the substance of any oral statements the person made;
3. Those portions of any existing transcript of grand jury proceedings containing the testimony of the defendant and any persons whom the state intends to call as witnesses;
4. Any existing transcript of the preliminary hearing and any prior trials held in the defendant's case;
5. Any reports or statements of experts concerning the case, including the results of any physical or mental examinations and of scientific tests, experiments, or comparisons;
6. Any books, papers, documents, or photographs the government intends to introduce, which were obtained from or belong to the defendant;
7. Any record of any prior criminal convictions for any of the witnesses the state intends to call;
8. Any criminal charges against a witness the state intends to call and whether any deal exists between that witness and the prosecution;
9. A written statement by counsel for the government setting forth the facts relating to the time, place, and person making any photograph or electronic surveillance;
10. Any material or information that tends to negate the guilt of the defendant, mitigate the degree of the offense, or reduce the punishment; and
11. If the state expects notice of any defense of alibi, the date, time, and place of the alleged offense.

In turn the prosecution may request the defendant to disclose these items:

1. Reports or statements of experts in connection with the case;
2. Results of physical or mental examinations and scientific tests, experiments, or comparisons the defense intends to introduce;
3. The identity of witnesses the defense intends to call, together with written or recorded statements and memoranda reporting part or all of their statements;
4. Those parts of any books, papers, documents, photographs, or objects the defendant intends to introduce;
5. Whether the defendant intends to rely on the defense of mental disease or defect (insanity); and
6. The identity of any witnesses to any alibi defense.

Postjudgment discovery occurs after trial and judgment, usually to determine the nature of the judgment debtor's assets or to obtain testimony for use in future proceedings.

Patrick K. Roberts

See also: Brady Rule; Due Process of Law; Exclusionary Rule; *Mapp v. Ohio.*

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DNA Testing

The collection of large databases of deoxyribonucleic acid (DNA) identifiers is a double-edged sword for the public and civil rights. At conflict are the scientific ability to specifically identify a person beyond doubt, on the one hand, and the protection of individual privacy and liberty, on the other. DNA is of major importance in criminal prosecutions but also plays a critical role in civil cases such as suits to establish paternity.

As the blueprint for every cell in the body, DNA is truly individual, with the minor exception of identical twins. Several DNA "markers" can be reviewed from cells to narrow a pool of people to a single person. The testing of DNA has been used to identify the perpetrators of crimes and to exonerate the innocent. DNA also is collected to identify U.S. military members.

The Justice Department prepared a research report that included twenty-eight case studies for individuals exonerated by DNA evidence after they were found guilty in a jury trial. The report revealed significant policy implications regarding validity of eyewitness testimony, definitions of "expert witness," and laboratory standards applicable to samples from crime scenes. Third-party consensual sex in rape cases, multiple-defendant crimes, and time frames for the completion of testing also were issues raised in the report.

In another set of cases, the quality of DNA testing and the credentials of individuals performing these tests were at issue. In Bexar County, Texas, the forensic expert, Frank Zain, lied. Inconclusive test results were evaluated in favor of the prosecution, and Zain testified in several cases that test results confirmed the defendant had committed the crime. Zain and his testing results were excluded, after which four other cases were appealed in West Virginia. Retesting excluded those individuals as well. More than 130 cases in West Virginia and Texas came under doubt because Zain was the testing specialist involved.

In 1998 the National Institute of Justice (NIJ) reported on the wide uses of DNA testing and noted the increasing awareness of a variety of shortfalls in the processes of collection, use, and capacity of testing in the sphere of law enforcement. The NIJ also took note of the significant backlog of testing already evident in that year.

More recently, the NIJ reported to the Attorney General's Office on delays in forensic DNA analysis. The NIJ estimated that 350,000 rape and homicide cases were awaiting DNA testing. A significant portion of these samples were being held at the 17,000 law enforcement agencies, not in laboratories. Much of this backlog was the result of resource shortfalls, jurisdiction funds, and lack of adequately trained technicians and scientists.

In addition to samples directly related to crimes, all states have mandates for the collection of samples from convicted felons (in thirty-three categories of crimes) for inclusion in the DNA databases. These databases are usually a state system but have been pulled together by the Federal Bureau of Investigation into the Combined DNA Index System (CODIS). The collection of DNA samples from individuals convicted of crimes has been challenged under the First, Fourth, and Fifth Amendments to the Constitution, but these claims have often failed because of the assumption that these individuals have forfeited some of their rights through the commission of a crime or that the collection of a sample is not subject to the same search and seizure protections (Fourth Amendment) as a home or property. The rationale is that the collection of DNA is for identification purposes only and is unrelated to a criminal investigation. This DNA information may help to "identify" the individual in unsolved cases.

Privacy concerns regarding samples collected through other mechanisms must be considered. The Armed Forces Institute of Pathology in Maryland has

Texas Governor Rick Perry at the signing ceremony for legislation providing for postconviction DNA testing, Washington, D.C., April 2001. Since the late 1990s, DNA evidence has led to the overturning of the convictions of over 100 individuals convicted of murder and sentenced to be executed. *(© Bob Daemmrich/The Image Works)*

collected over 3.3 million DNA samples from military members since 1994. Although the destruction of samples may be requested, this can occur only after the person completes all military service; for many individuals, this could be a lifetime. A person beginning a career that spans thirty years and is "retired" to the inactive reserve would remain registered.

Many universities have DNA banking programs for research and organ transplants. These programs conduct epidemiological studies that have a great deal of value in genome projects and treatments of disease and conditions ranging from arthritis to mental disease to cancers. These DNA banks could be compromised under the guise of research. The release of genetic information that could be tied to an individual could result in invasion of privacy and curtailment of liberty. An individual might be excluded from the workplace or not allowed a driver's license because of genetic markers for hemophilia (a blood-clotting disorder) or chorea (a nervous system disorder).

Realistically, the collection of DNA samples has a potentially massive impact on the scope of privacy for an individual. The public may see clear reasons to collect samples in order to identify war dead, to condemn or exonerate alleged criminals, and to cure disease. The release of genome information for other purposes, however, could be deleterious: Insurance companies could potentially exclude coverage for "preexisting conditions"; groups could be stigmatized in schools or workplaces because of a genetic anomaly; inferences regarding the legitimacy of birth could destroy families. Critics concerned about the erosion of personal liberties are aware of the potential shortfalls and fears associated with the indiscriminate collection of DNA samples and are concerned that such collection could result in major discrimination in the future.

As early as the mid-1990s, experts began offering proposals for the control of personal information developed through the collection of DNA samples. The Genetic Privacy Act of 1995 was a model law created by three professors at the Health Law Department at Boston University's School of Public Health. The model act defines the term "DNA sample" as "any human biological specimen from which DNA can be extracted, or DNA extracted from such specimen." This would be a valuable definition because patients provide potential DNA samples through routine blood donation or routine laboratory studies.

The collection of DNA information has surely aided law enforcement in the identification of perpetrators of crime and in the elimination of potential suspects. Like all sources of personal information, DNA has proved very useful but at the same time may be misused. There have been efforts to control the dissemination of personal information procured through medical activities. For example, the Privacy Act of 1974 provides for the control and release of information and includes conditions for "need-to-know" parameters, such as access by law enforcement, debt collectors, and the census. The law also provides civil remedies and criminal penalties for the unauthorized release of information.

The Health Information Portability and Accountability Act (HIPAA) of 1996 and subsequent regulations require providers of medical care to control personal information, to notify the individual of any release of that information, and to adopt other protective measures. The balancing test between society's needs to identify an individual fully and that individual's right to privacy will no doubt be refined in the courts.

The engagement of policy makers, law enforcement, the medical community, and, most important, the public will be critical to determining the boundaries of DNA collection and use. Key components will be the ability to bifurcate personal information from samples and a provision for the subsequent destruction of samples after reasonable use.

Kevin G. Pearce

See also: Right to Privacy.

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Doe v. Bolton (1973)

On January 22, 1973, the same day it handed down its landmark opinion in *Roe v. Wade,* 410 U.S. 113 (1973), recognizing a woman's right to choose abortion, the U.S. Supreme Court decided a companion case, *Doe v. Bolton,* 410 U.S. 179 (1973), finding unconstitutional a Georgia law that regulated abortions.

Sandra Bensing, who was publicly designated as "Mary Doe," had attempted to receive a therapeutic abortion in Atlanta, Georgia, in 1970. The pregnancy she wished to terminate was her fourth. Two of her previous children were in foster care; the third had been adopted. She and her husband, who was employed only sporadically and who had abused both Sandra and the children, were separated at the time. In addition, she had spent time in a state psychiatric hospital. When Sandra's attempt to secure an abortion was denied by the hospital, she brought a case against state Attorney General Arthur K. Bolton. Also joining the suit were a number of physicians who claimed that the Georgia law chilled and deterred their practice of medicine, as well as several clergy, nurses, and social workers.

The Georgia legislation, which had been adopted

in 1968, was considered a reform statute compared with laws that totally banned abortion. Performing an abortion remained a crime under the 1968 law, but it provided a series of conditions under which the procedure could be legal. A physician, licensed in the state, must find that terminating the pregnancy was necessary to protect the life or health of the mother, either because the fetus was likely to be born with a grave and permanent mental or physical defect or because the pregnancy was the result of rape. The mother had to be a Georgia resident. In addition, the law required that two other physicians must independently concur in the diagnosis and that three members of the hospital's staff, serving on a special committee, must also approve the procedure. After all those authorizations, the abortion had to be performed in a specially licensed hospital.

In a seven–two decision, the Supreme Court found the Georgia law unconstitutional. Reiterating that they did not believe a woman's constitutional right to an abortion was absolute, the justices found that the restrictions creating the three-stage approval process were not justifiable because they interfered with a woman's decision made in accordance with her physician's best clinical judgment that an abortion was necessary. No other medical procedures required physicians to seek approval as a matter of criminal law. The Court also found unconstitutional the provision mandating that a woman seeking an abortion be a Georgia resident. A state could not limit the medical care within its borders to its own residents.

Justices Byron R. White and William H. Rehnquist dissented, as they had in *Roe v. Wade.* They claimed that, in both decisions, the Court was valuing the convenience or whim of mothers over the life of the fetus. They believed that the majority was exceeding its powers by creating a new constitutional right and overriding the will of citizens expressed through state legislation banning or limiting abortion rights.

Doe v. Bolton is significant as a supplement to *Roe.* Whereas the latter decision found state laws that prohibited abortion unconstitutional, *Doe* held that laws imposing unacceptable restrictions on legal procedures were also unconstitutional.

Mary Atwell

See also: Planned Parenthood of Southeastern Pennsylvania v. Casey; Right to Privacy; *Roe v. Wade.*

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DOJ

See Department of Justice

Dolan v. City of Tigard (1994)

State and local governments are empowered to restrict the use of private property through the use of zoning regulations and building permits. These ordinances are frequently intended to alleviate flooding and traffic congestion around a developed area. Yet these regulations must abide by the Fifth Amendment, under which the government must compensate individuals when their property is taken for public use, a provision referred to as the Takings Clause.

In *Dolan v. City of Tigard,* 512 U.S. 374 (1994), the U.S. Supreme Court considered the balance between zoning regulations and the Takings Clause. Florence Dolan sought to expand her hardware business by extending her building and paving a parking lot for her customers. The city of Tigard agreed to issue a building permit for her expansion with the requirement that she surrender approximately 15 percent of her land to build a greenway/bicycle path and to provide for flood control for a nearby creek.

Dolan refused the permit requirements and sued the city. She claimed that Tigard was taking her property without compensation. The Supreme Court agreed. In his opinion for the five-member majority, Chief Justice William H. Rehnquist referred to the Court's opinion in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987). In *Nollan,* the Court had ruled that when the government required that land be surrendered in exchange for a permit, the regulation of the land had to advance a public purpose and there had to be a nexus, or close connection, be-

tween the regulation and the purpose for the regulation.

In *Dolan,* Chief Justice Rehnquist agreed that preventing flooding and reducing traffic congestion were proper public purposes for the city to have. He also agreed that there was a close connection between the setting aside of some property to handle the greater traffic congestion and flood problems created by the expansion of the business. But he disagreed with the 15 percent number required by the city. The Court said that the city of Tigard had not explained why it needed 15 percent of Dolan's land for flooding and traffic purposes rather than 10 percent or 5 percent. Rehnquist set down the requirement that any seizure of private property be roughly proportional to the problems that the seizure was supposed to solve. Under this ruling, the city of Tigard would be required to show that the 15 percent number would alleviate traffic and flooding concerns as it was supposed to do. Otherwise, the city would have to compensate Dolan for taking any land in excess of that needed to solve the problems of flooding and traffic.

The *Dolan* decision placed an additional burden on governments that sought to take land for public use in return for granting a permit. The government would have to show that the amount of land it sought would be just enough—but not too much—for carrying out its stated goals.

Douglas Clouatre

See also: Eminent Domain; Land Use; Property Rights.

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Double Jeopardy

"Double jeopardy" refers to the criminal prosecution of the same person more than once for the same offense. According to the Fifth Amendment of the U.S. Constitution, no individual shall be "subject for the same offense to be twice put in jeopardy of life or limb." Even before the Constitution was written in 1787, common law effectively protected Americans from being tried twice for the same crime. Traditionally, the U.S. Supreme Court has held that restrictions on double jeopardy protect individuals from *multiple prosecutions* for the same crime and against *multiple punishments* for the same crime. However, determining what does and does not constitute double jeopardy is not always so simple.

An individual may be tried in both federal and state court on separate charges arising from a single offense without being put in double jeopardy. For example, in *United States v. Lanza,* 260 U.S. 377 (1922), the Court held that an individual's protection from double jeopardy had not been violated when the state of Washington charged him with violating state prohibition laws and the U.S. government charged him with violating federal prohibition law. Similarly, when four California police officers were acquitted in state court of beating Rodney King during an arrest in 1991, federal prosecutors were allowed to charge the four with violating King's civil rights.

The issue of being tried by separate jurisdictions for the same crime also arises when more than one state has a nexus to a crime. The Court dealt with this issue in *Heath v. Alabama,* 474 U.S. 82 (1985), involving the murder of Rebecca Heath, who was nine months pregnant when two killers hired by her husband kidnapped her from her home in Phoenix City, Alabama, and transported her across the state line to Troup County, Georgia, where she was killed. Larry Heath pled guilty to "malice murder" in Georgia and was sentenced to life in prison. The state of Alabama subsequently convicted him of murder in connection with the kidnapping and imposed the death penalty. Heath claimed that Alabama was placing him in double jeopardy, but the Court rejected his claim, contending that "under the dual sovereignty doctrine, successive prosecutions by two States for the same

conduct are not barred by the Double Jeopardy Clause of the Fifth Amendment."

Since double jeopardy generally means that a person cannot be *convicted* twice for the same crime, the protection does not extend to indictments, because determining guilt is not part of such proceedings. If one grand jury fails to indict a person, prosecutors still can bring the evidence before additional grand juries without putting the accused in double jeopardy. By contrast, if a person is found not guilty in one trial, prosecutors cannot try the person again for the same crime in hopes that the second jury might find the person guilty. For instance, in *Kepner v. United States,* 195 U.S. 100 (1904), the Supreme Court overturned the actions of an appeals court in the Philippines (which was under the protection of the United States at the time of the alleged crime) that found a lawyer guilty of embezzlement after a trial jury had acquitted him, determining that the defendant was protected from double jeopardy under both Filipino common law and the U.S. Constitution.

In *Serfass v. United States,* 420 U.S. 377 (1975), the Court held that in jury trials, jeopardy attaches at the point that the trial court begins to hear evidence. Only rarely would a trial be halted once it has begun. This might occur when a juror is disqualified or when a jury fails to reach a verdict. For example, the Court held in *United States v. Perez,* 22 U.S. 579 (1824), that because the defendant had been neither acquitted nor convicted by the time his trial was halted, prosecutors were free to bring him to trial again without placing him in double jeopardy; the Court reaffirmed this position in *Richardson v. United States,* 468 U.S. 317 (1984). In *Sattazahn v. Pennsylvania,* 537 U.S. 101 (2003), the Court held that double jeopardy likewise did not apply when an initial penalty-phase jury was unable to reach a decision but a second penalty-phase jury handed down a death sentence.

Under normal circumstances, the government has no right to appeal a case in which a defendant was exonerated; however, the Supreme Court determined in *Palko v. Connecticut,* 302 U.S. 319 (1937), that when an error occurred in a trial court that prejudiced the state's case, the government was within its rights to call for a new trial. Frank Palko had been tried in a Connecticut court on charges of first-degree murder, but the jury had instead found him guilty of second-degree murder. Under Connecticut law, the government appealed on the grounds that the state's case had been damaged because the judge excluded testimony concerning the defendant's confession of guilt and cross-examination testimony in which the defendant's credibility was impeached. The judge also failed to explain to the jury the differences between first- and second-degree murder. The appellate court agreed with the government.

Palko then was retried and found guilty of first-degree murder. He claimed the second trial placed him in double jeopardy, violating his rights under both the Fourteenth and Fifteenth Amendments. The Supreme Court held that federal double jeopardy standards did not apply to the states except in cases where a defendant's rights were violated by "a hardship so acute and shocking that our polity will not endure it." In such cases, the Fourteenth Amendment became applicable.

Some thirty years after *Palko,* the Court reversed course in *Benton v. Maryland,* 395 U.S. 784 (1969), deciding that the double jeopardy protection of the Fifth Amendment was included in the protections of the Fourteenth Amendment—that is, the Court incorporated the double jeopardy protection into the Due Process Clause of the Fourteenth Amendment, thus applying the federal protection against the states as well. In this case, the defendant had been exonerated on charges of larceny but was convicted of burglary charges and sentenced to ten years in prison. An appeals court later found that both the grand and petit juries had been constitutionally selected, and Benton was retried. Despite his claim of double jeopardy, the second jury convicted Benton on both charges and sentenced him to fifteen years for burglary and five years for larceny. The Supreme Court overturned both convictions, declaring that the "petitioner's larceny conviction cannot stand once federal double jeopardy standards are applied." The Court announced that henceforth "the double jeopardy prohibition of the Fifth Amendment, a fundamental ideal in our constitutional heritage, is enforceable against the States through the Fourteenth Amendment."

The Court has held that in most cases where a defendant wins a new trial, the trial must not place a

defendant in double jeopardy. For instance, in *Green v. United States,* 355 U.S. 184 (1957), the Court considered whether double jeopardy attached for Everett Green, who initially had been found guilty of arson and second-degree murder but exonerated of first-degree murder. After he was sentenced to one to three years on the arson charge and five to twenty years on the murder charge, an appeals court overturned Green's conviction and ordered a new trial on the first indictment. Green claimed he had been placed in double jeopardy when he was found guilty of first-degree murder in the second trial and was given the death sentence. The Supreme Court overturned Green's conviction, asserting that "a defendant need not surrender his valid defense of former jeopardy on a different offense for which he was not convicted and which was not involved in his appeal."

As long as the statute of limitations on a crime has not expired, a person may be tried years later without being placed in double jeopardy. This issue arose in a case involving a murder committed in Mississippi in the early days of the civil rights movement. White supremacist Byron de la Beckworth was charged with the murder of civil rights leader Medgar Evers, which occurred June 12, 1963, in the driveway of Evers's home in Jackson. On two separate occasions, all-white juries had failed to render verdicts against Beckworth. Thirty-one years later, in 1994, the courts rejected Beckworth's claim of double jeopardy because no verdict had been reached in the earlier trials; a third trial jury found Beckworth guilty of the murder and sentenced him to life in prison.

Elizabeth Purdy

See also: Palko v. Connecticut.

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Douglas, William O. (1898–1980)

For almost thirty-seven years (1939–1975), William O. Douglas, an activist for liberal causes and underdog individuals, served as conscience of the nation from his chair on the U.S. Supreme Court. He had the longest tenure of any justice in the history of the tribunal, participating in more than 1,200 decisions and filing 795 dissents. According to one scholar: "It is now a commonplace that most of the dissents of Justices [Oliver Wendell] Holmes and [Louis D.] Brandeis became the law during the period of Douglas' tenure on the Court. What is less well appreciated is that during the same period of time even more of the dissents of Douglas became the law."

Douglas and Hugo L. Black were allies on the Court for thirty years. They had an absolutist belief that the First Amendment forbade any judicial restraint on speech and press. They argued, at first in dissent, that the Bill of Rights (the first ten amendments to the Constitution) was applicable to the states through the Due Process Clause of the Fourteenth Amendment. After *Mapp v. Ohio,* 367 U.S. 643 (1961), a majority of the Court accepted that interpretation. Black and Douglas parted company, however, in the sit-in and right-to-privacy cases of, for example, *Cox v. Louisiana,* 379 U.S. 536 (1965), and *Adderley v. Florida,* 385 U.S. 39 (1966).

Douglas was brilliant but prone to sweeping generalizations. He used bold and blunt language: "The Constitution is not neutral. It was designed to take the government off the backs of people." "The right to be let alone is indeed the beginning of all freedom." "Common sense often makes good law."

His opinions were succinct. Some of his brethren felt overworked, but Douglas urged the Court to decide more of the cases brought before it.

Douglas grew up in the state of Washington. He attended Whitman College and went to New York to attend Columbia University Law School, where he graduated second in his class. A few years later he was teaching at Columbia Law School and then at Yale Law School. Douglas was one of the leading contributors to realist scholarship, recasting the teaching of the law of business and finance along functional lines

(including the subject of bankruptcy and clinical studies of the cause of business failure).

In 1934 he was selected to direct an eight-volume study for the new Securities and Exchange Commission (SEC). He brought in as his number-two person for the study Abe Fortas, his prize student at Yale. Douglas was appointed to the SEC in 1936 and became its chairman in 1937. In 1939 he was appointed to the Supreme Court, at age forty the second-youngest justice in U.S. history. He was one of the most intellectually talented persons ever appointed to the Court. In 1944, President Franklin D. Roosevelt considered selecting Douglas as his running mate (as did Harry S Truman in 1948).

Douglas was a defender of free speech during the Cold War years. In *Terminiello v. Chicago,* 337 U.S. 1 (1949), he wrote to overturn a disorderly conduct conviction of an unfrocked Catholic priest who harangued an audience in an auditorium, but Douglas dissented in *Feiner v. New York,* 340 U.S. 315 (1951), when the Court sustained the disorderly conduct conviction of a street speaker who ignored a police officer's order to stop speaking.

Douglas and Black dissented in *Dennis v. United States,* 341 U.S. 494 (1951), in which the Court upheld the convictions of leading U.S. Communists for conspiring to advocate and organize to advocate the forcible overthrow of the government.

To his later shame, Douglas had joined the majority in the 1944 Japanese relocation case of *Korematsu v. United States,* 323 U.S. 214 (1944). He was able to rationalize his actions at the time because he was authoring the Court's unanimous opinion in *Ex parte Endo,* 323 U.S. 283 (1944), freeing a loyal secretary from a relocation center.

During the Vietnam War, Douglas was unable to persuade the Court in *Parker v. Levy,* 417 U.S. 733 (1974), to consider the validity of the use of the Selective Service Act to draft men for a conflict not sanctioned by a congressional declaration of war. The law was challenged as being in violation of international law and of treaties to which the United States was a party.

Douglas was the son of a Presbyterian minister. Over time he became more absolute in insisting on the separation of church and state. He was in the majority in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), which held unconstitutional a law mandating the flag salute in schools. Yet in *Zorach v. Clauson,* 343 U.S. 306 (1952), he agreed that a New York City program could permit public schools to release students during the school day so that they might attend religious centers for religious instruction.

He concurred in *Engel v. Vitale,* 370 U.S. 421 (1962), that a state-prescribed prayer for public schools violated the First Amendment and took the occasion to say he had been wrong to accept state-supported school busing for parochial schools as constitutional in *Everson v. Board of Education,* 330 U.S. 1 (1947).

In *Girouard v. United States,* 328 U.S. 61 (1946), his opinion for the Court was that a Seventh-Day Adventist who was not willing to take up arms in defense of the United States could nevertheless be naturalized. This ruling overturned *United States v. Schwimmer,* 279 U.S. 644 (1929), and *United States v. Macintosh,* 283 U.S. 605 (1931).

Douglas held in *Schneider v. Rusk,* 377 U.S. 163 (1964), that a naturalized citizen should not lose citizenship for having had a continuous residence of over three years in the foreign state in which she was born.

Douglas championed a right of privacy. He helped strike down in *Griswold v. Connecticut,* 381 U.S. 479 (1965), a ban on contraceptive information. This support for the patient-physician relationship led to *Roe v. Wade,* 410 U.S. 113 (1973). Douglas dissented in cases holding "obscenity" not protected by the First Amendment, such as *Roth v. United States,* 354 U.S. 476 (1957), and *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973).

Douglas took a leading part in Fourth and Fifth Amendment decisions that curbed coerced confessions, protected the right against self-incrimination, and prohibited illegal searches. In *Furman v. Georgia,* 408 U.S. 238 (1972), he was one of the five justices who voted to strike down the death penalty as a cruel and unusual punishment prohibited under the Eighth Amendment. (After he retired, the Court in *Gregg v. Georgia,* 428 U.S. 153 (1976), reinstated capital punishment if conducted under acceptable standards.)

Douglas helped to breathe life into the Equal Protection Clause in cases dealing with civil rights for blacks. He was sensitive to laws that discriminated

against the poor. His *Points of Rebellion* (1969) was an advocacy of dissent. Off the Court, he displayed concern for the environment and support for antiwar activists.

All of these liberal leanings provoked efforts to have him impeached. (Leading the pack in 1970 was House Republican leader Gerald Ford, who said that an impeachable offense was one for which there were the votes.) Opponents of the Court's rulings on First Amendment issues, civil rights, and criminal due process went after Douglas. Even his marital situation (he married a twenty-three-year-old) played a role in the effort to drive him from the Court. There had also been efforts to impeach Douglas after he stayed the execution of alleged spies Julius and Ethel Rosenberg in 1953, although the Court ultimately voted six–three that their execution could proceed.

Martin Gruberg

See also: Bill of Rights; Establishment Clause; First Amendment; Incorporation Doctrine.

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Draft Card Mutilation Act of 1965

In spring 1965 a group of antiwar protesters culminated a chaotic demonstration outside U.S. Army induction headquarters in lower Manhattan by dropping their draft cards into a pot and setting them on fire. This behavior became a hallmark of what came to be known as "symbolic speech"—expression communicated not by literal speech but by symbolic actions. The civil liberties issue that arose was whether such symbolic speech was entitled to protection under the First Amendment to the Constitution.

At the time, it was a federal crime, punishable by up to five years in prison and a substantial fine, to forge or alter a draft card, called a "registration certificate." Angered by criticism of Vietnam policy both in fact and in form, Congress quickly responded to this latest episode in a rash of draft-card burnings. On August 5 the chairman of the House Armed Services Committee, L. Mendel Rivers (D-SC), introduced the Draft Card Mutilation Act of 1965, which provided criminal penalties for anyone who "knowingly destroys, knowingly mutilates, or in any manner changes such certificate."

The Draft Card Mutilation Act was unquestionably intended to be a political response to the rising tide of protest over the Vietnam War (1964–1975). Congressman Rivers flatly stated on the floor of the House that the new language was inserted as "a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards. If it can be proved that a person knowingly destroyed or mutilated his draft card, then . . . he can be sent to prison, where he belongs. This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government." The bill's Senate cosponsor, Strom Thurmond (R-SC), likewise made it plain that the new legislation was aimed at more than flamboyant protest; it was inspired by general distaste for political dissent: "[D]efiance of the warmaking powers of the Government should not and must not be tolerated by a society whose sons, brothers, and husbands are giving their lives in defense of freedom." The legislation was passed by the Senate on a unanimous voice vote and sailed through the House of Representatives by the overwhelming margin of 393-1; the lone dissenter was Rep. Henry Smith III (R-NY), whose courage in opposing the bill was subsequently feted in a *Washington Post* editorial.

It was not long before the new provisions were put into action. On March 31, 1966, David O'Brien burned his draft card during an antiwar protest on the

Burning draft cards to protest the Vietnam War, 1960s. The Supreme Court ruled that the burning of a draft card was not constitutionally protected symbolic speech. *(© Mark Godfrey/The Image Works)*

steps of the South Boston courthouse. He was rescued from an angry mob and spirited inside the courthouse by Federal Bureau of Investigation agents, who promptly read him his rights and arrested him. At his trial, O'Brien admitted to burning his draft card but claimed he did so as an attempt to foster debate over the war and the selective service system, further arguing that the 1965 amendments were an unconstitutional infringement on his right to free speech. He was convicted, but the First Circuit Court of Appeals overturned his conviction, holding that the statute violated the First Amendment.

The Supreme Court, however, reinstated his conviction, although in so doing the justices conceded that O'Brien's behavior had an expressive dimension. *United States v. O'Brien,* 391 U.S. 367 (1968), stands as the first recognition that so-called symbolic speech could in certain circumstances qualify for First Amendment protection. Those circumstances were laid out by Chief Justice Earl Warren in a four-part test: "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

The "substantial interest" cited by the Court as the justification for the Draft Card Mutilation Act was the need for the Selective Service System to run efficiently. Requiring participants in the system to have their registration certificate on their person at all times facilitated communication between registrants and draft boards and enabled registrants to demonstrate proof of their enrollment at any time such proof was

requested. The acknowledged fact that O'Brien was communicating a political message by burning his draft card did not immunize his behavior; as long as the need to restrict his action was sufficient and noncensorial, his speech could be curtailed.

The comments of the new statute's sponsors revealed an unequivocally censorial motive and thus represented patent violations of multiple prongs of the new *O'Brien* test. Yet the Court opted to disregard the intentions of Representative Rivers and Senator Thurmond, despite the fact that the test assigned legislative intent a central and dispositive role in the symbolic-speech inquiry. The Court cavalierly suggested that legislative debate was fundamentally irrelevant to the purpose of divining the intent behind an unambiguously worded law: "[W]e are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." This suggestion disingenuously suppressed the fact that the remarks David O'Brien was citing in his defense came from not merely a "handful of congressmen" but from the authors of the statute. Consequently, it is hard to avoid the conclusion that the Court crafted its own conveniently constitutional rationale for the act and substituted it for the constitutionally illicit rationale promulgated by the act's drafters.

Notwithstanding O'Brien's defeat at the Supreme Court (he received a six-year prison sentence—considerably longer than the one to three years typically meted out to someone who refused induction—though he ultimately served only two years), his violation of the Draft Card Mutilation Act broke new ground by prompting the Court to grant politically expressive conduct some degree of First Amendment immunization.

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See also: R.A.V. v. City of St. Paul; Symbolic Speech; *Texas v. Johnson; United States v. O'Brien.*

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Drug Kingpin Act

The Drug Kingpin Act is the common name given to the Foreign Narcotics Kingpin Designation Act of 1999. Signed into law by President William J. Clinton, the bipartisan legislation was cowritten by Senator Dianne Feinstein (D-CA) and Senator Paul Coverdell (R-GA), who has since died. The statute has raised significant constitutional issues because of its encroachment on such rights as due process as it focuses on ways to curb drug trafficking.

The statute grants the president plenary power to identify and sanction suspected international drug entities and individuals. The president may create a "blacklist" of alleged kingpins (Tier I kingpins) and may direct the Treasury Department, most notably, to freeze U.S.-based financial assets and transactions of all on the list, and such actions are not subject to judicial review. In Tier II are all those doing business with the targeted entities or individuals or who have gained in some way from these bodies; they also are subject to these sanctions. In determining who qualifies as a kingpin under the statute, the president uses classified information provided by the Central Intelligence Agency, the Federal Bureau of Investigation, the Customs Department, the Drug Enforcement Agency, and the Departments of Defense and State. A nonclassified public report of these determinations must be made in June of each year before sanctions can be imposed. Noncompliance with the terms of the act subjects violators to fines up to $10 million as well as incarceration for as long as ten years.

Since being signed into law in 1999, the act has given rise to several blacklists, but the Treasury Department did not act to freeze assets or limit transactions until January 2002. At that time, Treasury

targeted twenty-seven Tier II entities that were accused of financially supporting the Tier I kingpins designated publicly since 1999. Most of these entities were located in the Caribbean and Mexico and represented a wide array of business interests said to be acting as fronts for drug kingpin activities. These businesses included a drugstore chain and pharmaceutical distributor as well as a hotel resort, courier services, real estate, and electronic security firms.

Supporters of the legislation argue that the financial networks used to support drug kingpin activity compromise national security. Civil libertarians, however, worry about the act's lack of judicial review and the potential to sanction innocent people doing business with a suspected Tier II entity. Information used to identify targets is classified. The president has complete authority either to pursue or not pursue these targets. There are no allowances for the due process guarantees of search and seizure, notice, or presumption of innocence until proven guilty. The only form of judicial review allowed under the act is in reference to civil penalties imposed under it. Critics worry that innocent businesses will have little recourse if they, too, fall under suspicion when one of their associates is blacklisted or has its assets frozen.

Patricia E. Campie

See also: Congress and Civil Liberties; Due Process of Law; Federal Bureau of Investigation; Property Rights.

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Due Process of Law

Although the term "due process" is not easily defined, the guarantee that no individual shall be deprived of "life, liberty, or property, without due process of law" is one of the most litigated and important civil liberties in the United States today. The provision is found in both the Fifth and Fourteenth Amendments to the U.S. Constitution. The idea of due process is associated with the concepts of fairness, equality, rationality, regularity, and justice in both legal procedures and outcomes. Due process is universally recognized as fundamental to democratic nations that seek to protect individual rights and liberties.

DEFINITION AND DEVELOPMENT

The phrase "due process of law" developed from the provision in the Magna Carta in England during the thirteenth century stating that governments were subject to the "law of the land." This ideal of fair treatment influenced the American founding fathers, who incorporated it within the Fifth Amendment (ratified in 1791) as a limitation on actions by the national government, and the authors of the Fourteenth Amendment (ratified in 1868), who intended to extend this provision to limit arbitrary actions by the states, especially as these actions applied to racial minorities.

Initially, the U.S. Supreme Court interpreted the provisions of the first ten amendments known as the Bill of Rights—including those in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments, relating to the rights of individuals who were accused of or on trial for crimes—as applicable only to the national government. After the adoption of the Fourteenth Amendment, however, the Court came to rely upon its Due Process Clause as the primary vehicle through which the central provisions of the Bill of Rights were applied to the states, in a process known as "incorporation." (Some scholars think the Court could just as well have relied upon the Privileges or Immunities Clause of the Fourteenth Amendment.) Although the incorporation concept has not been limited to such guarantees, courts have increasingly defined due process by reference to specific provisions, especially those governing procedures in criminal courts, within the text of these amendments.

CONTEMPORARY APPLICATIONS

Thus, although the Supreme Court has often found it difficult to define the idea of "reasonableness," it has ruled that the states are bound through the Due Process Clause to abide by the provisions within the

Fourth Amendment prohibiting "unreasonable searches and seizures," requiring that police officers establish "probable cause" before obtaining search warrants, and requiring that warrants specify "the person to be searched, and the persons or things to be seized." In an attempt to give teeth to these provisions, the Court has also applied the exclusionary rule, most notably in *Mapp v. Ohio,* 367 U.S. 643 (1961), to outlaw the use at trial of illegally secured evidence by the states as well as by the national government. Subsequent exceptions to this rule—good faith, plain view, inevitable discovery, and the like—demonstrate not that the Court has abandoned the idea of due process but simply that it has attempted to apply this concept in a prudential manner.

Similarly, the Court has concluded that the states are bound by the provisions in the Fifth Amendment that prohibit double jeopardy, protect against self-incrimination, and require compensation for property expropriated for public purposes. Provisions of the Fifth Amendment, like other measures limiting police procedures, often require careful judicial line-drawing. Thus, although the Court invalidated forced verbal confessions from suspects in *Breithaupt v. Abrams,* 352 U.S. 432 (1957), and *Schmerber v. California,* 384 U.S. 757 (1966), it upheld the practice of extracting blood from individuals involved in car accidents to test their intoxication, even without their consent.

In *Gideon v. Wainwright,* 372 U.S. 335 (1963), the Supreme Court decided due process required that the right to counsel specified within the Sixth Amendment meant that state governments, like the federal government, must supply counsel for indigent individuals accused of felonies. The Court subsequently expanded this decision to cover other crimes for which an individual could be incarcerated. In a decision that it subsequently reaffirmed, the Court ruled in *Miranda v. Arizona,* 384 U.S. 436 (1966), that the Fifth Amendment right against self-incrimination and the Sixth Amendment right to an attorney were so important that police officers had a positive obligation to warn suspects of such rights before interrogating them.

Although the Court has allowed for variations in jury size and nonunanimity in state criminal trials that are not permitted at the national level, in *Duncan v. Louisiana,* 391 U.S. 145 (1968), it also used due process principles to require that states provide jury trials in criminal cases. In addition, it has extended to the states the Sixth Amendment requirement that individuals be notified of the charges against them and that they have the right to use judicial procedures to secure witnesses on their behalf. Increasingly, the Court has also used the Due Process Clause to require states to treat prisoners fairly and to abide by the Eighth Amendment prohibition on "cruel and unusual punishments."

DUE PROCESS OUTSIDE THE BILL OF RIGHTS

Although the Supreme Court has increasingly cited specific provisions within the Bill of Rights in defining due process of law, it has accepted the idea that "due process" has its own potency and it has thus chosen not to confine the notion of due process to these specific provisions. Thus, in *Rochin v. California,* 342 U.S. 165 (1952), the Court majority, led by Justice Felix Frankfurter, invalidated the conviction of a defendant after the police forcibly broke into his house and subsequently had his stomach pumped to recover drugs that he had swallowed after their entry. Frankfurter based his decision not simply on the fact that the police had violated specific provisions of the Bill of Rights (although they had) but on the fact that he thought police conduct in the case "shock[ed] the conscience" and thus violated fundamental principles of decency and fairness associated with the idea of due process.

It is possible to imagine a host of procedures not specifically covered in the Bill of Rights that nevertheless would fall short of due process. Statements indicating prejudice on the part of a judge or jury, providing inadequate time for an accused to mount a defense, allowing the courtroom to degenerate into a circus atmosphere by excessive media presence, or the like, could all constitute grounds for due process appeals.

PROCEDURAL VERSUS SUBSTANTIVE DUE PROCESS

Although the primary focus of the Due Process Clause has been on procedures, what scholars call *procedural*

due process, the Court has sometimes also given this clause a more substance-driven dimension, an idea known as *substantive* due process. In the late nineteenth and early twentieth centuries, dissenting justices and other critics of the Supreme Court claimed that it applied its own standards of justice on matters of economic theory to strike down laws of which it disapproved. A good example is *Lochner v. New York,* 198 U.S. 45 (1905), in which Justice Oliver Wendell Holmes Jr. dissented from the majority's invalidation of a New York statute limiting the working hours of bakers. The Court majority thought the statute violated freedom of contract (a favorite battle-cry of supporters of laissez-faire economics), but Justice Holmes observed that "[a] constitution is not intended to embody a particular economic theory."

With far less justification, Justice Holmes wrote the eight–one decision in *Buck v. Bell,* 274 U.S. 200 (1927), permitting state sterilization of a woman (Carrie Buck) believed to be mentally retarded despite arguments that such action was unfair and arbitrary. The Court subsequently applied a kind of substantive due process and equal protection analysis in *Skinner v. Oklahoma,* 316 U.S. 535 (1942), in invalidating a law requiring the sterilization of certain thrice-convicted felons but not others.

Scholars continue to debate whether the recognition of a right to privacy in *Griswold v. Connecticut,* 381 U.S. 479 (1965), in which the Court struck down Connecticut's birth control laws, and in *Roe v. Wade,* 410 U.S. 113 (1973), recognizing a woman's right to obtain an abortion, is a form of substantive due process. Certainly, the modern Court has applied much stricter standards of review of legislation dealing with matters of privacy (involving, for example, race, gender, minority rights, political rights like freedom of speech and press) than it has of economic legislation, which it typically subjects to only minimal, so-called rational-basis, review. This "double standard" is often traced to footnote four of *United States v. Carolene Products Co.,* 304 U.S. 144 (1938), written by Justice (later Chief Justice) Harlan Fiske Stone.

OTHER APPLICATIONS OF DUE PROCESS

The idea of due process is often tied to the idea that governmental bodies and agencies must provide adequate hearings, procedures, or forums before punishing individuals or depriving them of basic rights. Most notably, in *Goldberg v. Kelly,* 397 U.S. 254 (1970), the Court ruled that due process required the government to provide an evidentiary hearing before terminating an individual's welfare payments. By contrast, it did not require such a prior hearing in *Mathews v. Eldridge,* 424 U.S. 319 (1976), for suspension of state disability payments. Although state entities cannot act arbitrarily, courts sometimes find that schools, prisons, and administrative boards may adopt procedures that fall short of full trials or hearings and still protect the due process rights of individuals who are brought before them.

CONCLUSION

The elusiveness of the idea of due process will undoubtedly continue to be both its greatest strength and its greatest weakness. Although the term has gained specificity from its association with specific provisions of the Bill of Rights, the concept embraces a more general idea of fairness that will continue to require the application of general principles to widely varied circumstances.

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See also: Buck v. Bell; Carolene Products, Footnote 4; *Duncan v. Louisiana;* Exclusionary Rule; Fifth Amendment and Self-Incrimination; Fourteenth Amendment; *Gideon v. Wainwright; Goldberg v. Kelly; Griswold v. Connecticut;* Incorporation Doctrine; *Lochner v. New York;* Magna Carta; *Mapp v. Ohio; Miranda v. Arizona; Rochin v. California; Roe v. Wade; Skinner v. Oklahoma*.

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Duncan v. Louisiana (1968)

In *Duncan v. Louisiana,* 391 U.S. 145 (1968), the U.S. Supreme Court identified the circumstances under which states must provide a criminal defendant with a jury trial. The Sixth Amendment to the Constitution had already been interpreted to require such jury trials in federal courts.

Gary Duncan was convicted of simple battery without a jury trial. His attorney had petitioned for a jury trial, but the petition was denied because under Louisiana statutes, simple battery was considered a misdemeanor punishable by a maximum of two years' imprisonment and a fine of not more than $300. After Duncan was convicted, the judge sentenced him to a jail term of sixty days and fined him $150.

The Supreme Court of Louisiana refused to review the case, and Duncan then appealed to the U.S. Supreme Court, claiming violation of his rights under the Sixth Amendment, as applied to the states by the Due Process Clause of the Fourteenth Amendment. The U.S. Supreme Court reversed, for the following reasons.

The right to trial by jury in criminal cases is fundamental to American justice. The Fourteenth Amendment guarantees trial by jury in all criminal cases that, if tried in a federal court, would fall within the guidelines of the Sixth Amendment. The key to the Court's ruling is found in the maximum amount of jail time Duncan could have received—two years—as opposed to the sentence given, sixty days.

The majority opinion, written by Justice Hugo L. Black, reflected that two years' imprisonment did not signal a petty offense and that potential deprivation of liberty for that amount of time would require a jury trial in federal court. To comply with the Fourteenth Amendment's due process requirements, states must provide a jury trial when the maximum potential sanction exceeded eleven months, twenty-nine days—in other words, one year or more.

Justice Abe Fortas, concurring with the majority, also maintained that the Court would be wrong to impose all federal requirements pertaining to criminal trials, including unanimous verdicts and juries composed of twelve individuals, upon the states. Justice Fortas's language included comments that just because the federal standard was twelve did not reflect some magic associated with that number.

Sam W. McKinstry

See also: Jury Size; Jury Unanimity; Trial by Jury.

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E

Edmonson v. Leesville Concrete Co. (1991)

In *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991), the U.S. Supreme Court ruled that the equal protection component implicit in the Fifth Amendment's Due Process Clause required a civil litigant to provide a race-neutral reason for peremptory challenges of potential jurors in a federal trial. A peremptory challenge historically has been used by a party to reject someone as a potential juror for no reason at all. In that feature, it differs from a challenge "for cause."

This case tested the Supreme Court's commitment to race neutrality. Thaddeus Edmonson, who was suing the Leesville company for injuries suffered on a military base, claimed Leesville improperly used two of its three peremptory challenges permitted under federal law to exclude blacks from the jury. Lower courts ruled against Edmonson, holding that *Batson v. Kentucky,* 476 U.S. 79 (1986), applied only to prosecutorial peremptory challenges in criminal proceedings.

The Supreme Court disagreed. Justice Anthony M. Kennedy, who in earlier cases had used a color-blind reading of the Constitution to strike race-conscious affirmative action policies, applied that principle in *Edmonson*. A juror excluded from a civil trial on the basis of race, he wrote, would be denied the same civil rights as one excluded from a criminal trial. Although Leesville was a private actor, its challenges constituted state action because their use necessitated "the overt, significant assistance of the court", the requisite "state action" without which the Due Process Clause would not have applied.

Race-based peremptory challenges served to violate the rights of potential jurors. As Justice Kennedy explained, "to permit racial exclusion in this official capacity compounds the racial insult inherent in judging a citizen by the color of his or her skin." Furthermore, allowing such challenges "mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." There may have been legitimate reasons for the exclusion of these jurors, but those reasons "can be explored in a rational way that consists with respect for the dignity of persons."

Although some observers consider peremptory challenges essential to the adversarial system used in U.S. courts, Justice Kennedy argued that "if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution." To facilitate the perception and the reality of juries as free of "invidious" race prejudice, a litigant must have standing (the right to bring a claim) to assert the rights of the excluded juror.

The dissenting justices, who in other cases supported color blindness, found the principle inapplicable in *Edmonson*. To Justice Sandra Day O'Connor —joined by Justice Antonin Scalia and Chief Justice William H. Rehnquist—a private civil trial did not constitute state action but rather was "largely a stage on which private parties may act." In her view, "Government erects the platform [but] it does not thereby become responsible for all that occurs upon it." Although Justice O'Connor noted that racism was "particularly abhorrent when manifest in a courtroom," she concluded that "not every opprobrious and inequitable act is a constitutional violation."

Justice Scalia wrote that despite its "great symbolic value," this decision added "yet another complexity to an increasingly Byzantine system of justice." Under *Batson,* the state was already prohibited from race-based challenges; the *Edmonson* ruling now would affect defendants and private individuals. Much of the price of this victory for color blindness, Scalia concluded, "will be paid by minority litigants who use our courts."

The ruling in *Edmonson* was extended in *Georgia v. McCollum,* 505 U.S. 42 (1992), to challenges by criminal defendants; in *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127 (1994), to peremptory challenges based on gender in a civil trial; and in *Campbell v. Louisiana,*

523 U.S. 392 (1998), to the racial composition of grand jury foremen.

Frank J. Colucci

See also: Sixth Amendment; Trial by Jury.

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EDPA

See Effective Death Penalty Act of 1996

Education

Americans have a long history of supporting education for democratic purposes. Thomas Jefferson, for example, considered his founding of the University of Virginia in Charlottesville even more important than his service as the third president of the United States, and he once claimed that "the diffusion of knowledge" was the foundation for "the preservation of freedom and happiness." Thus, through education, citizens could best defend their civil liberties.

To that end, Congress passed the Northwest Ordinance of 1787 requiring new territories to provide public education; it later required members of the erstwhile Confederacy to guarantee education to all citizens. In both cases, the policies were enacted due to the importance of education in the theory of republican government.

Education has long been seen as a way not only to ensure but also to encourage democracy. Many influential American leaders followed democratic theoretical precepts stating that only an educated people can govern itself. This principle led to the early establishment of schools and was the basis for demands by excluded groups that they, too, be embraced by public education. Throughout U.S. history, access to education has been expanded to include more and more people. But even as education has remained important, people's expectations of public schools have changed dramatically. Once a place to learn to read well enough to understand the Bible, public schools are now viewed as the proper place to teach a trade, develop citizens, assimilate new immigrants, and solve a variety of social problems.

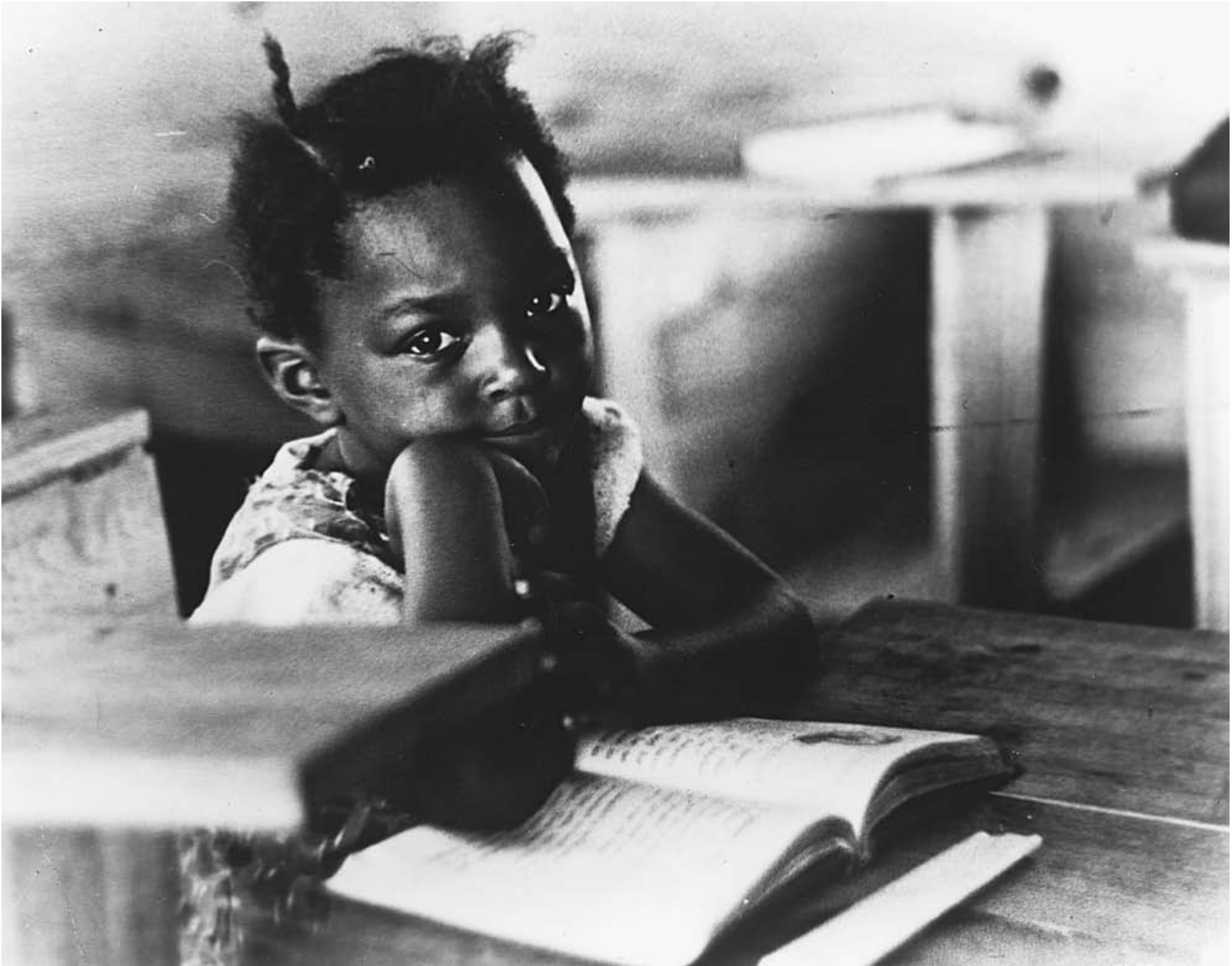
EARLY AMERICAN EDUCATION

Along with establishing a church, setting up a local school was one of the first duties performed by early American settlers and pioneers. The two objectives often were closely linked, and taxes were levied to pay for both a preacher and a teacher. These one-room schoolhouses of nostalgic fame fit well with early American Protestantism. For example, Horace Mann, an education activist and official in mid-nineteenth-century Massachusetts, said that "in receiving the Bible," the school allowed that book "to speak for itself." Protestantism's reliance on each individual to interpret scripture, rather than to depend on a priest, thus encouraged students to attend school at least until they achieved functional literacy. Schools gradually evolved in each community, and mandatory attendance laws started appearing in the mid-nineteenth century. Still, attendance was not universal, with blacks and Native Americans often excluded, and few students went beyond primary education.

EARLY TWENTIETH-CENTURY DEVELOPMENTS

Schools continued to expand during the 1900s, and attendance increased at all levels. The most important education philosopher of the twentieth century, John Dewey, argued that education in a democratic society must be universally available to all. A member of the progressive movement, Dewey believed that education could, and should, be used to break down social classes and encourage mobility. Schools, he said, must give all members of society the ability to begin their careers from an equal start.

Dewey also believed that education should be prac-



A photograph from "How About a Decent School for Me?" pamphlet (created by the NAACP) dealing with the desegregation of southern schools. *(Library of Congress)*

tical, and this led him to urge that vocational education be kept within the general school curriculum. With this expanded focus designed to provide basic training and often tightly tied to local industry, students who did not plan to attend college had more reason to complete their secondary education. This practical aspect of education was ultimately placed alongside the classical curriculum, ensuring that all students would benefit from attending public schools. The inclusion of vocational education in the high school curriculum prompted more students to continue their education beyond the primary level. Access was thus expanded to more people.

SCHOOL DESEGREGATION

The twentieth century also brought the slow process of desegregating public schools. During the nineteenth and early twentieth centuries, schools throughout the nation were segregated by race. The South, through its post–Civil War Jim Crow laws mandating separate facilities for the races, continued to require black and white children to attend separate schools until the 1954 decision in *Brown v. Board of Education,* 347 U.S. 483. In this case, a unanimous U.S. Supreme Court decided that the states could not require students to attend separate schools. Calling ed-

ucation the most important function of state and local governments and "the very foundation of good citizenship," the Court wrote that "separate educational facilities are inherently unequal" and therefore a violation of the Equal Protection Clause of the Fourteenth Amendment. The case was reheard a year later, known as *Brown II,* 349 U.S. 294 (1955), when the Court ruled that school districts must desegregate "with all deliberate speed." Although students from all backgrounds were already incorporated into the public schools, *Brown* and other cases effectively continued the expansion of educational access to ensure that students received a more meaningful education.

As for other desegregation cases heard after *Brown,* the Court ruled in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), that busing was a legitimate way to desegregate schools; in *Keyes v. Denver School District No. 1,* 413 U.S. 189 (1973), that northern cities were also subject to desegregation requirements; and in *Milliken v. Bradley,* 418 U.S. 717 (1974), that suburbs could not be made to participate in an interdistrict busing plan if they did not intentionally segregate students. In the 1990s, several cases involved districts that still had high levels of segregation; they were permitted to end their desegregation plans, as the Court ruled in *Board of Education v. Dowell,* 498 U.S. 237 (1991).

FUNDING PUBLIC SCHOOLS

Relatively little—about 7 percent—of funding for public schools comes from the federal government. Most of this is provided through policies such as Title I of the Elementary and Secondary Education Act of 1965, which was designed to provide additional resources to poor students. The great majority of public school funding is provided by the states and localities, often raised at least in part through property taxes.

Some people have argued that basing school funding on property taxes promotes a disparity of resources, because areas with greater property wealth are able to raise more money than areas with less property wealth. California was the first state to require that all schools receive substantially equal funding in the 1971 state-court case of *Serrano v. Priest,* 5 Cal. 3d 584, 96 Cal. Rptr. 601 (1971). The U.S. Supreme Court

Support rally for pilot test program for school vouchers in Texas, with legislators, parents, and students.
(© Bob Daemmrich/The Image Works)

heard a similar argument in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), but held that differential funding levels did not violate the Equal Protection Clause of the Fourteenth Amendment. Since that case, however, many states have decided that their own state constitutions require equal funding and have loosened the relationship between property taxes and school funding. Like desegregation, the movement to equalize school resources effectively expands access to equal and meaningful education.

OTHER REFORMS

Desegregation discussions dominated the education policy and academic agendas until the early 1980s. But with the 1983 congressional report titled *A Nation at Risk*, which found that public school students had low rates of academic achievement, discussions began to focus more on reforms that could raise test scores. With this came a renewal of debate about use of vouchers (or cash-equivalent certificates that allow parents to send their children to the public or private school of their choice) to encourage competition (originally suggested by Milton Friedman in 1955) and about the establishment of charter schools.

Those who support allowing families to decide which school their children should attend and funding these choices through vouchers argue that families will choose the best schools. Schools that are chosen by fewer families, they argue, will be forced to improve

in order to remain competitive. Opponents of vouchers often argue that if the best students are taken out of failing schools, these schools will be left with even fewer resources than they have now.

Charter schools are somewhat different. These schools are usually managed by an organization independent of the school district, sometimes for a profit. Charter schools often have a particular theme, such as arts or technology, and are generally allowed great leeway in their choice of curriculum and teaching methods. Charter schools are public, however, and usually receive a certain level of funding per student from either the state or a local education agency. Like previous reforms, both vouchers and charter schools are designed to improve educational quality.

CONCLUSION

Although there are still inequalities within the American education system, the trend since before the American Revolution has been to increase access to, and equality among, public schools. This has occurred through the gradual reduction of segregation in schools, the incorporation of vocational education into comprehensive high schools, and the equalization (in some states) of school funding. Even the current debate about instituting school choice is designed to make all schools competitive, thereby expanding the resources and opportunities available to the disadvantaged. Whether this will substantially improve the education of America's youth remains to be seen; what is certain, however, is that the public's commitment to education remains solid.

Ryane McAuliffe Straus

See also: Home Schooling; Right to Education; *San Antonio Independent School District v. Rodriguez.*

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Edwards v. California (1941)

In *Edwards v. California,* 314 U.S. 160 (1941), a unanimous U.S. Supreme Court reaffirmed the existence of a constitutional right to travel. The opinion was authored by Justice James F. Byrnes.

California had passed a statute in an effort to limit the competition for jobs in the aftermath of the Great Depression, when people from Oklahoma and surrounding states were moving west to escape the drought and to seek employment. This statute, commonly known as the "Okie Law," prohibited the transport into California of any indigent person who was not a citizen of the state of California. The defendant was charged and convicted under the statute for transporting his brother-in-law from Texas to California.

The issue before the Supreme Court was whether California's prohibition on the transportation of people into the state was within the state's police power. The Court held that the transportation of people across a state line constituted a type of interstate commerce subject to congressional power, and if it were to be regulated, such control "must be prescribed by a single authority." Thus, in *Edwards,* only Congress possessed the power to regulate interstate travel, and the Okie Law was beyond the scope of California's state power because it created an "unconstitutional barrier to interstate commerce." In dicta (nonbinding analysis), Justice Byrnes alluded to the fact that the Court would not accept stereotypical judgments about indigent people as a basis for laws that discriminated against the poor.

In his concurring opinion, Justice William O. Douglas—in a point upon which Justices Robert H. Jackson, Hugo L. Black, and Frank Murphy agreed—in-

sisted that the Court should hold that the right to interstate travel was a privilege of national citizenship that was protected by the Privileges and Immunities Clause of the Fourteenth Amendment.

Edwards is significant for three reasons: First, it strengthened the constitutional right to travel; second, it marked another unsuccessful attempt to broaden the application of the Privileges and Immunities Clause; and third, it foreshadowed the Supreme Court's invalidation of laws that discriminate against people on the basis of wealth.

Sean Patrick Meadows

See also: Right to Travel.

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Edwards v. South Carolina (1963)

In *Edwards v. South Carolina,* 372 U.S. 229 (1963), the U.S. Supreme Court dealt with the liberty of Americans to assemble peacefully on public property to protest government policies and to have that right protected by the national government against state and local government actions. The governing legal principles were the protections afforded by the First Amendment to the Constitution.

During the civil rights movement of the 1950s, black Americans relied on acts of nonviolent public protest to demand changes to a segregated South. After the two decisions in *Brown v. Board of Education*—the first, 347 U.S. 483 (1954), declaring that the "separate but equal" concept was unconstitutional, and the second, 349 U.S. 294 (1955), ordering school districts to integrate "with all deliberate speed"—the civil rights movement gained momentum in seeking to end racial segregation. Most white public authorities, however, were neither sympathetic nor ready to change the Jim Crow system of racial separation. As more public protests, such as sit-ins and marches, spread across the American South, officials used both legal and nonlegal means to quell the demonstrations.

In 1961 more than 180 African American high school and college students marched from a Baptist church in Columbia, South Carolina, to the state capitol building. Joined by other supporters, these students marched to protest the continued racial intolerance of the state and to demonstrate their dissatisfaction. As they reached the grounds of the statehouse, the students encountered about thirty law enforcement officers, who first informed them they could continue their protest in the public area as long as they were peaceful. The students and others continued their march and demonstration in a peaceful manner, with several hundred onlookers watching the activities. Although there were no signs of imminent violence, the police then told the marchers to leave the grounds or face arrest. Many of the marchers, including the defendant, a minister, began to sing "We Shall Overcome" and refused to leave. Fearful of the growing crowd of onlookers, police began making arrests for "breach of the peace" under a city ordinance. The city manager of Columbia later described the protesters as "loud, boisterous and flamboyant," yet in testimony at the trial, there was no evidence that "fighting words" had been spoken at the time of the dispersion order.

Convicted and fined for disturbing the peace, the protesters, led by the defendant, appealed the case, which finally reached the U.S. Supreme Court in 1963. At issue was whether the liberty to assemble and petition the government for redress, as protected by the First Amendment, was to be applied to state and local governments through the Fourteenth Amendment's Due Process Clause. South Carolina argued that every state had a right to regulate order and protect public safety. When the protesters refused to disperse after being ordered to do, the state had a duty to protect public safety. By an eight–one vote, the U.S. Supreme Court incorporated the right to "petition the Government for redress of grievances" to apply to state actions and overturned the convictions of the protesters.

In an opinion by Justice Potter Stewart, the Court held that the "function of free speech under our system of government is to invite dispute." Use of the city ordinance to arrest individuals engaged in a peace-

ful march, the Court held, showed that the ordinance was "so vague as to permit punishment of the fair use of" the freedom of speech and assembly, and the Court ruled that the Fourteenth Amendment to the U.S. Constitution applied the First Amendment's liberty of assembly and petition to state actions. Without actual or even meaningful threat of violence, and no ensuing damage to public property, the law enforcement officials had no cause to disperse the crowd, and they therefore violated the protesters' First Amendment rights.

Edwards is a key case in American civil liberties history, as it incorporated the legal protection and guarantees of the rights expressed in the First Amendment regarding assembly and petition to apply to actions of state and local government officials.

J. Michael Bitzer

See also: First Amendment; Incorporation Doctrine; Right to Petition; *Smith v. Collin.*

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Effective Death Penalty Act of 1996

The Effective Death Penalty Act of 1996 (EDPA) is a federal law that was meant to streamline the procedures used to administer the death penalty in federal and state court. The complete name of the legislation is Antiterrorism and Effective Death Penalty Act of 1996, passed by the 104th Congress January 3, 1996.

Title I of the act substantially amends federal habeas corpus law as it applies to state and federal prisoners, whether on death row or imprisoned for a term of years. Federal habeas corpus is the statutory procedure under which state and federal prisoners may petition the federal courts to review their convictions and sentences to determine whether the prisoners are being held contrary to the laws of the United States. The EDPA amends the availability of federal habeas corpus through several provisions, including

1. Barring federal habeas reconsideration of legal and factual issues ruled upon by state courts in most instances;
2. Creating a general one-year statute of limitations within which habeas petitions must be filed after the completion of direct appeal;
3. Creating a six-month statute of limitation in death penalty cases;
4. Encouraging states to appoint counsel for indigent state death row inmates during state habeas or unitary appellate proceedings; and
5. Requiring appellate-court approval for repetitious habeas petitions.

In addition to limits on habeas corpus, the EDPA recasts federal law(s) concerning restitution, expanding the circumstances under which foreign governments that support terrorism may be sued for resulting injuries, and increases the assistance and compensation available to victims of terrorism.

The legislation also introduced several provisions meant to address terrorism. Title III, International Terrorism Prohibitions, is designed to help sever international terrorists from their sources of financial and material support. Among other provisions, it authorizes the regulation of fundraising by foreign organizations associated with terrorist activities. It also adjusts the Foreign Assistance Act to help isolate countries that support terrorists and provide for counterterrorism efforts in other countries. Title IV, Terrorist and Criminal Alien Removal and Exclusion, deals with excluding and removing individuals who have been defined as alien terrorists from the United States and narrowing the asylum provisions to prevent them from being used to frustrate efforts to expel or remove undesirables.

The EDPA is a controversial piece of legislation. Some critics contend that the law tramples on many basic civil liberties, such as the right of habeas corpus, or that it so limits the appeals available to those sentenced to death that it raises due process concerns or otherwise promotes the execution of innocent individuals. Supporters of the law claim that it is a necessary tool to fight terrorism, especially since the September 11, 2001, terrorist attacks in Washington,

D.C., and New York City, and that it merely eliminates frivolous appeals.

Gladys-Louise Tyler

See also: Capital Punishment; Habeas Corpus.

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Eighth Amendment

The Eighth Amendment to the U.S. Constitution bars government from inflicting "cruel and unusual punishments." Early U.S. Supreme Court cases construing this language primarily considered the constitutionality of modes of punishment other than imprisonment. More recently, the Court has issued decisions dealing with claims that a term of years was disproportionate to the defendant's culpability. Since the mid-1970s, however, the Court's Eighth Amendment jurisprudence has focused on the death penalty.

With respect to physical punishments, the justices have always agreed that the Constitution forbids the types of torturous methods deemed cruel and unusual at the time the Bill of Rights was adopted, such as whipping, burning at the stake, breaking on the wheel, and disembowelment. Confronted with practices in use, however, the Court upheld death by shooting and electrocution in the latter part of the nineteenth century. With rare exceptions, later state and federal decisions have continued to sanction these in addition to other forms of execution—for example, lethal injection, now employed by the vast majority of death penalty jurisdictions, and lethal gas. The Court itself never again ruled on a challenge to a means of killing. Yet it did strike down a few idiosyncratic punishments, such as expatriation in *Trop v. Dulles,* 356 U.S. 86 (1958), and incarceration for narcotics addiction in *Robinson v. California,* 370 U.S. 660 (1962).

In reliance on the view that the Eighth Amendment encompasses a narrow-proportionality principle governing noncapital cases, the Court has considered several attacks on extremely long prison sentences. In the context of recidivist statutes, which are aimed at habitual criminals, the Court sustained a life sentence with possible parole for a three-time minor thief and forger in *Rummel v. Estelle,* 445 U.S. 263 (1980). In *Ewing v. California,* 538 U.S. 11 (2003), the Court upheld a twenty-five-year-to-life term for a man with a more serious record, who stole three golf clubs valued at about $400. But in *Solem v. Helm,* 463 U.S. 277 (1983), the Court invalidated a life sentence without parole for a seventh nonviolent felony. Outside the recidivist setting, the justices have sanctioned two consecutive twenty-year terms for possession and distribution of nine ounces of marijuana, and life without parole for possession of 672 ounces of cocaine. As Justice Sandra Day O'Connor conceded in *Lockyer v. Andrade,* 538 U.S. 63 (2003), "[O]ur precedents in this area have not been a model of clarity."

Capital punishment, not surprisingly, has proved the most controversial component of Eighth Amendment jurisprudence. Sentiment against the death sentence has waxed and waned over the years. Opponents have had to confront the fact that the framers of the Constitution plainly did not intend to do away with the ultimate penalty. For some justices, that might have been the end of the matter. In *Trop,* however, the Court opined that the "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In other words, changed public attitudes could be used as a basis for revising doctrines governing the penalty and, indeed, for abolishing it entirely.

The modern capital punishment era began in 1972, when the landmark five–four decision in *Furman v. Georgia,* 408 U.S. 238, invalidated all extant death penalty laws. There was no single opinion for the Court; each justice weighed in with his own views. With varying emphasis, members of the Court majority faulted defects in the penalty's administration: Two principal ones were arbitrariness and discrimination against minorities and the poor. In oft-quoted words, Justice Potter Stewart compared receiving a capital sentence to being struck by a bolt of lightning—so "wantonly" and "freakishly" was death imposed. More broadly, Justice William J. Brennan Jr. deemed the punishment innately degrading to human

dignity and, along with Justice Thurgood Marshall, would have dispatched it permanently.

Yet because the other majority justices in their opinions left open the possibility that capital punishment could be fixed, legislatures soon passed "new and improved" death penalty statutes. Five of them came before the Court a scant four years after *Furman.* Three (from Georgia, Florida, and Texas) were upheld; two (from Louisiana and North Carolina) were struck down. These cases, especially *Gregg v. Georgia,* 428 U.S. 153 (1976), and *Woodson v. North Carolina,* 428 U.S. 280 (1976), have shaped capital jurisprudence to the present day.

Without expressly deciding what was compelled to ensure constitutionality, the Court proclaimed that the so-called guided-discretion statutes, which it was sustaining, had adequately addressed the problem of arbitrariness. In most jurisdictions, prior to *Furman,* jurors had been given absolute power to impose either life or death on defendants. By contrast, the Court noted with approval, the Georgia, Florida, and Texas laws required the sentencer to find beyond a reasonable doubt—at a separate penalty trial—at least one aggravating factor. They also permitted the defendant to introduce any mitigating factors and provided for automatic appellate review. Mitigation was deemed so important, moreover, that the Court voided the remaining statutes, which mandated death for certain crimes. The *Woodson* plurality opinion stated: "[T]he fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense."

Thus, after the *Gregg* quintet, the modern capital punishment edifice rests on twin pillars: nonarbitrariness and individualization. These stand in some tension with each other, however, as justices and scholars alike have remarked. In general, over the years the Court has continued to insist that defendants be allowed to introduce, and sentencers not be barred from considering, any conceivable mitigating evidence. But it has adhered much less faithfully to the injunction against capricious imposition of death. The justices have, among other things, held that proportionality review of capital penalties (approved in *Gregg*) is not required; that a state may run a capital system demonstrated to be tainted by racial discrimination; and that the sentencer may rely on inflammatory victim-impact evidence. These rulings do not accord with the heightened need for reliability that, as the *Woodson* Court noted, is demanded because death is so different from other punishments.

Finally, using its "evolving standards" jurisprudence, the Court has created some absolute zones of immunity from death. That ultimate punishment has been deemed excessive for the mentally retarded, juvenile murderers under sixteen, rapists of an adult woman, defendants with a relatively minor role in a felony murder (murder that occurred during commission of another felony, such as arson), and those who are insane at the time of execution.

It would appear that few categorical challenges to capital punishment remain, although perhaps the Court will eventually reconsider the propriety of death for killers sixteen and seventeen years old when the crime was committed, which it has upheld. Possibly, too, sometime in the future the Court may issue a *Furman II,* embracing the Brennan and Marshall view that the death penalty inherently violates the Eighth Amendment. Meanwhile, in the apt words of Justice Harry A. Blackmun, the state will likely continue to "tinker with the machinery of death" rather than dismantle the doctrinal structure erected in the wake of *Furman.*

Vivian Berger

See also: Cruel and Unusual Punishments; Effective Death Penalty Act of 1996; Evolving Standards of Decency; *Furman v. Georgia; Gregg v. Georgia;* Proportionality of Sentences.

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Eisenstadt v. Baird (1972)

In *Eisenstadt v. Baird,* 405 U.S. 438 (1972), the U.S. Supreme Court augmented its ruling in *Griswold v. Connecticut,* 381 U.S. 479 (1965), recognizing that personal autonomy and privacy in reproduction extend beyond the marital relationship and are located in the individual. *Griswold* had overturned a Connecticut law that banned the use of contraceptives by married couples. The Court in *Eisenstadt* found a Massachusetts statute outlawing the prescription or distribution of contraceptives to nonmarried persons to be unconstitutional as well. This law made it a felony to dispense contraceptives, but it did not criminalize their use. Only registered pharmacists and physicians could legally distribute birth control to married people. Any dissemination of contraceptives to single individuals for the purpose of birth control was illegal. To challenge the constitutionality of the law, a birth control advocate, Bill Baird, arranged to be arrested after sharing contraceptive devices during his lecture on contraception and overpopulation at Boston University. Baird distributed Emko Vaginal Foam to single women in the audience.

The Supreme Court, in Justice William J. Brennan Jr.'s six–one majority opinion in *Eisenstadt,* argued that the right to make reproductive decisions belonged to individual persons and was not based in the marriage relationship. Justice Brennan found the Massachusetts statute unconstitutional because "the statute's distinction between married and unmarried people was an unconstitutional denial of equal protection of the laws." The right of privacy is rooted in the individual, not inherent in the marital state as was stated in *Griswold.*

In *Eisenstadt,* the Court connected a fundamental right to control the choice of reproduction to the right of privacy, which the Court found in *Griswold* was implicit in the Bill of Rights. *Eisenstadt* held that any distinction between married and unmarried individuals was a violation of the Equal Protection Clause of the Fourteenth Amendment. In his majority opinion, Justice Brennan stated:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

No legitimate state interest could be defended by the state of Massachusetts; it could not demonstrate how the law was either a preventive health measure or a means of discouraging extramarital sex. Therefore the law was unconstitutional, and single individuals were given the same access to birth control as married people. This right of privacy would be expanded the next year to encompass the right to have an abortion in *Roe v. Wade,* 410 U.S. 113 (1973).

Michelle Donaldson Deardorff

See also: Griswold v. Connecticut; Right to Privacy; *Roe v. Wade.*

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Electronic Eavesdropping

Electronic eavesdropping, which includes wiretapping, consists of attempts by the government to intercept private communications through any kind of electronic transmission—including telephones, cell phones, voice mail, e-mail, other computer transmissions, pagers, and the like. The controversy over electronic eavesdropping emerges at the center of the conflict between an individual's privacy, the "right to be let alone," versus the onward march of technology. Early inventions such as the telephone challenged people's conceptions of privacy and what constituted an

unreasonable search and seizure in the context of the Fourth Amendment to the Constitution. At first, the U.S. Supreme Court did not recognize this new technology as an intrusion on the individual's expectation of privacy, but it eventually ruled that the Fourth Amendment protected "people, not places."

The basic premise behind privacy and the Fourth Amendment comes from the common law tradition that a "man's home is his castle." With the advent of electronic telecommunications, the Supreme Court was left to answer the question of whether telephone communications counted as being within the castle. Were they the same as a person's physical possessions, which were protected from warrantless search and seizure under the Fourth Amendment? In its first consideration of these questions, the Supreme Court ruled in *Olmstead v. United States,* 277 U.S. 438 (1928), that a conviction obtained via wiretapping was not a violation of the Fourth Amendment, ruling narrowly that the amendment protected only a person and his or her house and personal papers and effects.

In the narrow five–four decision, written by Chief Justice William H. Taft, the majority refused to consider telephone messages as on par with the seizure of tangible items. According to Taft, "the language of the Amendment cannot be extended and expanded to include telephone wires, reaching the whole world from the defendant's house or office," and "the intervening wires are not part of his house or office, any more than are the highways along which they are stretched." Therefore, the defendant's privacy was not invaded, nor was the interception of his telephone call unreasonable.

Justice Louis D. Brandeis dissented, promising "the progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping." Brandeis envisioned possible advances that would enable the government to get to "secret papers" without having to seize them physically. In that anticipation, he asked, "Can it be that the Constitution affords no protection against such invasions of individual security?" Similarly, Justice Oliver Wendell Holmes Jr. considered electronic eavesdropping to be "dirty business," of which the government should not be part.

Taft, in his majority opinion, invited Congress to pass legislation on wiretapping, which to date was lacking. In the late 1920s and early 1930s, federal and state laws were passed to ban wiretapping by government agencies. These laws, however, merely limited the spending of revenue on wiretap operations and made certain wiretap evidence inadmissible in court. In 1934, Congress passed the Federal Communications Act, section 605 of which, though the act failed to outlaw wiretapping completely, prohibited "intercepting and divulging" telecommunications. The Court ruled in *Nardone v. United States,* 308 U.S. 338 (1939), that this provision meant the federal government could not use intercepted communications as evidence. However, the Court allowed authorities to skirt section 605 by following *Olmstead* and narrowly ruling that the following activities were not unreasonable searches: listening in on conversations going on in an adjacent office by means of a detectophone (a device that enabled law enforcement to hear between walls), as it held in *Goldman v. United States,* 316 U.S. 129 (1942); and having a third party use a "bug" to record conversations, the Court's holding in *On Lee v. United States,* 343 U.S. 747 (1952).

Further efforts to make changes to wiretapping legislation stalled until 1967. That year, the Supreme Court handed down two important decisions: First, in *Berger v. New York,* 388 U.S. 41 (1967), the Court found unconstitutional a New York statute allowing electronic eavesdropping because it did not provide judicial authorization for placing bugs or taps. Also, the statute was too vague, not listing what would be "searched," what was being sought, or for how long, and there was no notice to the subject or notification of what had been "seized." *Berger* fleshed out what was considered reasonable for electronic eavesdropping: (1) probable cause, (2) specificity of area to be wiretapped, (3) providing notice to subject of wiretapping, (4) conducting the electronic eavesdropping for a limited time, (5) and turning over to an authorizing agent the items seized.

In the second decision, *Katz v. United States,* 389 U.S. 347 (1967), the Court overturned the strict-constructionalist decision of *Olmstead* and noted that since the Fourth Amendment protected "people, not places," the bugging of a pay-phone booth to intercept the defendant's communications consisted of an illegal search and seizure. The defendant had a "reasonable

expectation of privacy," according to Justice John M. Harlan's concurrence.

But the right to privacy is not an absolute. Therefore, given a compelling governmental interest, electronic eavesdropping can be consistent with the Fourth Amendment, so long as certain procedures are followed. Just as the Communications Act of 1934 was the congressional response to *Olmstead,* in 1968 Congress responded to *Katz* and *Berger* with Title III of the Omnibus Crime Control and Safe Streets Act. Title III created a framework for reasonable use of electronic eavesdropping by

- Listing the types of crimes for which a wiretap/bug might be requested (a list of predicate offenses for which electronic eavesdropping may be permissible included sabotage, treason, espionage, kidnapping, fraud, forgery, as well as any number of offenses related to organized crime);
- Requiring a court order approving the eavesdropping;
- Requiring probable cause that a crime was being committed, and by the person who would be bugged, and establishing that other means of collecting evidence would be insufficient;
- Showing the minimal use of electronic eavesdropping; and
- Providing notice to subjects at the end of surveillance.

Implementation of the law inevitably led to constitutional challenges that reached the Supreme Court, which picked at the foundation established in *Berger* and *Katz.* For example, in *United States v. White,* 401 U.S. 745 (1971), the Court ruled that the warrant requirement did not apply to willing informers, citing the "assumption-of-risk rule" under which an individual ran the risk that a conversation might be recorded by a government informant or undercover police officer. Conversely, a unanimous Court ruled in *United States v. United States District Court,* 407 U.S. 297 (1972), that a claim of national security was insufficient to waive the warrant requirement for electronic eavesdropping.

Additional legislation was passed after 1968 to complement Title III, such as the Foreign Intelligence Surveillance Act of 1978, which created the standards for using electronic surveillance domestically for purposes of gathering foreign intelligence; the Electronic Communications Privacy Act of 1986, an extension of Title III, with restrictions on "new" technology, such as cell phones, e-mail, voice mail, pagers, and the like; and the Patriot Act of 2001, passed in the wake of the September 11 terrorist attacks in New York City and Washington, D.C. The Patriot Act expanded previous legislation on electronic eavesdropping, added terrorism and "cybercrime" offenses to the predicate-offense list, and authorized "roving" surveillance for purposes of domestically collecting foreign intelligence—that is, without having to identify the specific place where communications might be intercepted. This was a departure from Title III.

The use of electronic eavesdropping will continue to present challenges to the Fourth Amendment and people's notions of privacy as technology becomes more advanced. With it seeming inevitable that scientists will develop newer and more sophisticated methods of "overhearing" conversations, the degree to which the government can constitutionally infringe upon individual privacy will be hotly debated.

Sharon A. Manna

See also: Katz v. United States; Olmstead v. United States; Patriot Act; Wiretapping.

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Elk Grove Unified School District v. Newdow (2004)

In enforcing a state policy requiring all public elementary schools to begin each day with "appropriate patriotic exercises," the Elk Grove Unified School District in Sacramento County, California, required that each class salute the American flag and recite the Pledge of Allegiance. Since congressional action in

1954, the Pledge, which was originally formulated in 1892 by Francis Bellamy, a Baptist minister, has referred to the nation as being "under God." Michael Newdow, an atheist whose daughter was enrolled in school in this district, challenged the law as an unconstitutional violation of the Establishment Clause of the First Amendment, which the U.S. Supreme Court long applied to the states through the Due Process Clause of the Fourteenth Amendment. Under this clause, government (local, state, federal) is prohibited from engaging in action that would constitute "establishment" of religion.

A U.S. magistrate, backed by a U.S. district judge, dismissed Newdow's challenge to the law, but in *Newdow v. U.S. Congress,* 328 F.3d 466 (9th Cir. 2002), a divided U.S. Ninth Circuit Court of Appeals reversed the decision and ruled that the words "under God" constituted an impermissible establishment of religion because the requirement failed the "coercion test" that the Supreme Court had announced in striking school graduation prayers in *Lee v. Weisman,* 505 U.S. 577 (1992). In that test, the "coercion" element focused on the existence of psychological compulsion in a school setting, where students would be subject to majority behavior and peer pressure to "fit in."

In *Elk Grove Unified School District v. Newdow,* 124 S. Ct. 2301 (2004), issued on Flag Day (June 14), the U.S. Supreme Court reversed the Ninth Circuit, with all eight justices participating (Justice Antonin Scalia recused himself after having made public comments supporting the Pledge) in agreement on reversal. Justice John Paul Stevens's majority decision, in which Justices Anthony M. Kennedy, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer concurred, focused on Newdow's perceived lack of "standing," a principle of legal procedure used to determine whether a particular party is entitled to bring a lawsuit to court. Concurring opinions by Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, and Clarence Thomas would have upheld the Pledge law on the merits.

Justice Stevens distinguished two kinds of standing—standing under Article III of the Constitution (the "case and controversy" requirement) and prudential standing. He thought the latter was implicated in this case. He pointed out that although Michael Newdow and Sandra Banning shared joint custody of their daughter, courts had awarded Banning sole legal custody, and, as a Christian, she both supported the Pledge and did not want her daughter involved in the case. Stevens argued that the Court had a policy against granting standing in cases involving domestic relations.

Rehnquist, O'Connor, and Thomas thought the Court's limited standing doctrine applied only in domestic relations cases involving "divorce, alimony, and child custody" issues. They further believed the Ninth Circuit Court of Appeals was in a better position to interpret the applicability of state law to issues of standing than it was.

On the more substantive issue, Chief Justice Rehnquist pointed to a host of presidential and public acknowledgments of God. He did not consider the words "under God" to be either "a prayer" or "an endorsement of religion," which previous decisions relating to prayer in school and related matters would outlaw. Rather, the words were a simple acknowledgment of the nation's history, "a patriotic exercise, not a religious one." He opposed giving a parent of a child a " 'heckler's veto' over a patriotic ceremony willingly participated in by other students."

Justice O'Connor continued to advance her "no endorsement" test. She viewed a noncoercive pledge as a permissible act of "ceremonial deism." She cited four reasons to believe that the words "under God" were permissible: the long "history and ubiquity" of the words, which had been widely sanctioned for fifty years; the absence of "worship or prayer"; the "absence of reference to particular religion"; and the "minimal religious content" of the words.

In concurrence, Justice Thomas argued that the Establishment Clause, which he believed to have been a "federalism provision," could not be "incorporated" against the states. If the Court was correct in *Lee v. Weisman* in invalidating prayer at high school graduation exercises, Thomas believed the Court would have to invalidate the words "under God" as well. For him, however, *Lee* was incorrectly decided, because he believed the Free Exercise Clause prohibited only the kind of coercion that was accomplished "by force of law and threat of penalty," neither of which was at issue in *Elk Grove*.

Although the Court dodged the constitutional issue in this case, it is likely to recur. *Elk Grove* does not

indicate where a majority of the current Court stands in regard to the substantive issue.

John R. Vile

See also: Establishment Clause; Flag Salute; *Lee v. Weisman;* Prayer in Schools; Standing; *West Virginia Board of Education v. Barnette.*

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Elkins v. United States (1960)

The Fourth Amendment to the U.S. Constitution guarantees the right to freedom from unreasonable searches and seizures. The "exclusionary rule"—as developed through a series of U.S. Supreme Court cases, including *Elkins v. United States,* 364 U.S. 206 (1960)—is an attempt to apply that right to the practices of law enforcement and criminal procedure. It is the primary means for protecting that right, and it is often seen as the only truly effective means. The rule excludes evidence gathered in violation of the Fourth Amendment from use in trials; it thus is an attempt to remove the incentive for law enforcement and others to commit such violations. *Elkins* specifically put an end to the "silver platter" doctrine, which had allowed federal courts to make use of evidence obtained illegally by state law enforcement personnel. The Court said eliminating this doctrine was necessary to make the exclusionary rule—and therefore the Fourth Amendment—real in practice rather than merely in principle.

Under the common law, evidence was admissible regardless of origin. It was of course possible to prosecute those who obtained evidence illegally, but doing so required a separate case. This was small comfort to those convicted on the basis of such evidence, and it was (and is) often not practically possible to pursue justice against those who gathered evidence illegally—particularly not from jail.

Boyd v. United States, 116 U.S. 616 (1886), was the first important case to address this issue. E.A. Boyd was not searched, but he was compelled to provide incriminating papers at trial. If he had not produced them, this would have been treated as a confession, despite the Fifth Amendment protection against self-incrimination. The Court ruled that this forced production of papers was analogous to an unreasonable search and seizure, and it asserted a connection between the Fourth and Fifth Amendments. Similarly, in *Weeks v. United States,* 232 U.S. 383 (1914), the conviction of an individual was overturned because the evidence against him was obtained in violation of the Fourth Amendment. Permitting admission of illegal evidence encouraged illegal searches and seizures; by ending this, *Weeks* was intended to make the Fourth Amendment concrete. Although *Weeks* established the exclusionary rule, it was limited to federal officers providing evidence in federal courts, and—especially after *Wolf v. Colorado,* 338 U.S. 25 (1949), which held that state courts could determine for their trials whether to admit illegally obtained evidence—the *Weeks* case left state courts and state officers largely unrestrained in their application of Fourth Amendment protections, even when state officers were providing evidence to federal courts. In practice, this procedure often allowed unconstitutional searches and seizures to go unrestrained and unpunished.

In *Elkins,* police had obtained a warrant to search one of several defendants' homes for pornography. None was found, but there was evidence that wiretaps were being made. Individuals were indicted for this, but the Multnomah County District Court in Oregon decided that the original search warrant was invalid and suppressed the evidence. This decision was appealed, but a higher state court concurred that the evidence had been obtained unlawfully. State law enforcement officers then placed the evidence in a safety deposit box, and federal law enforcement officers retrieved it. This convenient serving up of evidence "on a silver platter" is what had given the silver-platter doctrine its name. After the state case was dropped, federal prosecutors obtained a conviction that the federal Court of Appeals for the Ninth Circuit upheld.

When the U.S. Supreme Court considered *Elkins,* the justices concluded that evidence that could not have been used if gathered by federal officers also could not be used in federal courts even if gathered by state officers, and they explicitly referred to and overruled the silver-platter doctrine. In this way, the *Elkins* decision avoided simply declaring the evidence inadmissible because, according to the Oregon courts, it was obtained unlawfully. Even if the seizure had been acceptable by state standards, the evidence would have been inadmissible in federal courts. This distinction is important because it addresses the different standards for exclusion of evidence that are possible—or had been possible—in various states.

Since *Elkins* compelled federal courts to exclude a broader range of evidence than many of the state courts would have excluded, it made the state courts' use of such evidence problematic, which set the stage for *Mapp v. Ohio,* 367 U.S. 643 (1961). The Supreme Court's decision in *Mapp,* which referred to *Elkins,* explicitly required a uniform application of the exclusionary rule, and it made evidence obtained by unconstitutional searches and seizures inadmissible even in state courts. Between them, *Elkins* and *Mapp* affected the practice of all law enforcement, regardless of jurisdiction, and brought criminal procedure in line with constitutional protections. The exclusionary rule, as shaped and broadened by these decisions, remains a distinctive and valued feature of American jurisprudence.

Victor Greeson

See also: Exclusionary Rule; Fourth Amendment; Fruits of the Poisonous Tree; *Mapp v. Ohio;* Search; *United States v. Leon; Weeks v. United States; Wolf v. Colorado.*

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Ellsworth, Oliver (1745–1807)

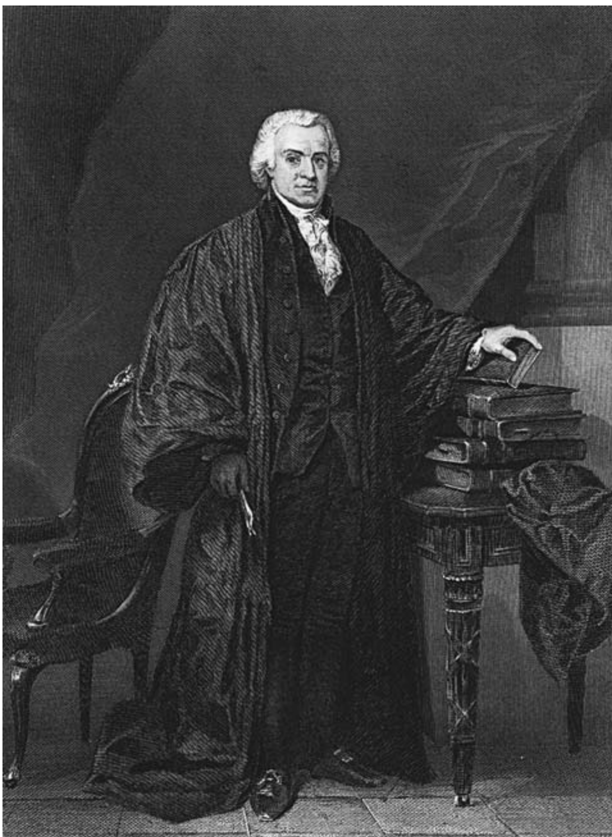
Little remembered today, Oliver Ellsworth played an extraordinarily important role in the construction of the U.S. Constitution, the U.S. Congress, and the U.S. federal court system. A gifted orator and a consummate practical politician, he moved in his political beliefs from a strong states-rights advocate, as a member of the Connecticut General Assembly, to a committed Federalist.

Born April 29, 1745, in Windsor, Connecticut, Ellsworth initially intended a career as a Calvinist minister. A 1766 graduate of the College of New Jersey (now Princeton University), he opted instead for the law. Still, his deep commitment to Calvinism informed his entire career, most particularly his views on civil governance. He held numerous important positions: Connecticut Superior Court judge (1785–1789), chief justice of the U.S. Supreme Court (1796–1800), delegate to the Continental Congress (1777–1784), delegate to the Constitutional Convention (1787), U.S. senator (1789–1796), and diplomat (1799–1800).

An important founder of the republic, Ellsworth participated in the preparation in Philadelphia of the first draft of the Constitution. He returned to Connecticut some twenty days before the historic signing, September 17, 1787, and so was not one of the signatories. His talent for compromise more than once freed a locked and threatened Constitutional Convention. As coauthor with Roger Sherman of the "Connecticut compromise," he secured his most brilliant arrangement: a bicameral federal legislature in which the people of each state were represented, according to population and by election, in a lower House of Representatives, and each state, regardless of size or population, was represented equally with all other states (two senators per state) in a Senate. Each state legislature chose its Senate representatives (a provision later altered by the Seventeenth Amendment). This compromise undoubtedly saved the convention.

A man of his day, however, Ellsworth also effected ignoble compromises on the issue of slavery. He supported the three-fifths rule, counting a slave as three-fifths of a person for the purposes of taxation and representation. He advanced the compromise forbidding Congress the power to restrict the slave trade before 1808. Although defended as an agreement necessary to secure South Carolina's and Georgia's allegiance to the new Constitution, it could also be interpreted as a collusive financial arrangement between New England shipping interests and Southern slaveholders. Historically, the fledgling republic's best opportunity to ameliorate the slave issue was lost. To emphasize the "federated" (as opposed to the "national") character of the new republic, Ellsworth also contributed the resolution naming the new government "the *United States.*"

In 1789, Ellsworth became one of Connecticut's first two senators, serving seven years. As chairman of the judiciary committee and principal author of the Judiciary Act of 1789 (the first Senate bill of the first session of the First Congress), Ellsworth, with New Jersey's William S. Paterson, created a three-tiered federal judiciary: the top tier, a Supreme Court (a chief justice and five associate justices); the bottom tier, one District Court for each state (plus one each for the not-yet states of Maine and Kentucky) presided over by a federal judge; the middle tier, three traveling Circuit Courts, each serving a distinct geographical location and each consisting of two Supreme Court justices and the local district judge. Additional provisions of the act, such as concurrent jurisdiction with state courts of many federal questions and the right to trial of defendants in the district in which they lived, did much to mollify fears that an independent federal judiciary might usurp the power of state courts or threaten established civil liberties.



Oliver Ellsworth was one of the first justices of the U.S. Supreme Court. *(Library of Congress)*

Ellsworth was cochairman of the Congressional Joint Committee of Conference, also formed in 1789, to resolve differences in the House and Senate versions of the Bill of Rights. He was the Senate floor leader for its passage, as well as the author of the final wording of the First Amendment's Establishment Clause. His support for the bill, however, was a pragmatic compromise. Privately, he was against a Bill of Rights, thinking it a delaying tactic against ratification of the Constitution designed by Antifederalists. Also, he argued, because the people themselves were the source of political power, the recurring elective process provided the best security for civil rights. Chosen leaders of virtue would be better guarantors of an individual's civil liberties than would a complicated enumeration of those liberties, which nonvirtuous leaders would, in any case, trample. In like manner, his Establishment Clause intended a prohibition against Congress establishing a single national religion. He thought that religion should be a local matter, supported and reinforced, as in Connecticut, by local laws and state taxes. Individuals, however, should always have freedom of conscience in matters of religious worship.

Sworn in on March 4, 1796, Ellsworth served as chief justice of the Supreme Court until November 1800 when he accepted a diplomatic assignment to France. His decisions were few and dealt mainly with procedural and jurisdictional questions, not civil liberties. In a Southern Circuit Court decision, however, he held that although the United States could freely

naturalize a citizen of another country on the wish of that applicant, an American's allegiance to the United States was not unilaterally dissoluble in the same manner.

Politically, he supported the Alien and Sedition Acts of 1798. Those well-intentioned but disastrous war measures of President John Adams greatly lengthened residency requirements for foreigners to gain citizenship, gave the president a right to deport "dangerous" aliens, and severely attacked the First Amendment's freedom of speech clause. Oliver Ellsworth died at home November 26, 1807, after a period of semiretirement.

Kevin Collins

See also: Alien and Sedition Acts; Establishment Clause; United States Constitution; United States Court System.

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Ely, John Hart (1938–2003)

John Hart Ely held several important positions as a legal scholar: Richard A. Hausler Professor at the University of Miami Law School; dean of Stanford Law School; and Tyler Professor of Constitutional Law at Harvard University. He perhaps became best known among American scholars for "The Wages of Crying Wolf: A Comment on *Roe v. Wade"* (1993). In that essay Ely criticized Justice Harry A. Blackmun's "right to privacy" rationale the U.S. Supreme Court used in voiding Texas's ban on most abortion procedures in *Roe v. Wade,* 410 U.S. 113 (1973).

Ely wrote three major books. *Democracy and Distrust: A Theory of Judicial Review* (1980) was a defense of judicial activism, as outlined in the famous footnote four formula of *United States v. Carolene Products, Inc.,* 304 U.S. 144 (1938), and as generally applied in the Court under Chief Justice Earl Warren. In *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (1993), Ely argued that the Vietnam War was constitutional insofar as Congress enacted the Tonkin Gulf Resolution and appropriated funds to support U.S. military troops. However, the key lesson was that leading members of Congress willingly abdicated authority to check presidential aggrandizement of power because they did not want voters to hold them accountable for war-making acts, especially mistakes. Ely's third major book, *On Common Ground* (1996), covered a variety of topics that reflected the breadth of issues Ely addressed in his writing and speaking career. In it he discussed such diverse subjects as federalism, separation of powers, freedom of expression, religious freedom, criminal procedure, and racial discrimination.

One of Ely's most provocative essays in *On Common Ground* was "Substantive Due Process." He began the chapter with a "Memorandum for Chief Justice Earl Warren Concerning *Griswold v. Connecticut* (1965)" that Ely wrote as a law clerk for Chief Justice Warren. G*riswold* concerned a ban on the use of contraception as applied to the poor clientele of Planned Parenthood clinics. Ely recommended holding against the state for its denial of equal protection of the law.

In the provocative "Wages of Crying Wolf" (1993), Ely opened his comment by pitting a woman's liberty and the right to life of a fetus as opposing interests. He took up the standard scholarly criticism of *Roe v. Wade* that the opinion was broader than necessary in restricting the state's interest in protecting fetal life during the first trimester. Ely agreed but believed this missed the real problem in the case. Furthermore, he conceded that as a legislator facing the moral quagmire of deciding between a woman's liberty and a fetus's unborn life, he would prefer a public policy reinforcing the woman's liberty. The real problem, he asserted, was that the Court had no business express-

ing judicial activism by voiding public policy, even unwise public policy, unless it was clearly unconstitutional, and that when the ordinary democratic processes discriminated against a class of people by placing unreasonable barriers in their way for changing the legislative will, this was clearly unconstitutional. The case in point was *Lochner v. New York,* 198 U.S. 45 (1905), the "wolf" Ely cited as warning against the dangers of *Roe.* In *Lochner,* the Court in a seven–two vote had used a substantive liberty "right of contract" to strike down a mandatory workday of no more than ten hours a day, a precedent that lasted until 1937.

Ely defended the Warren Court's reliance on the *Carolene Products* approach to judicial activism because he thought this approach, unlike the attempt to develop a right to privacy in *Roe*, rested on democratic values implicit within the Constitution rather than on judicially discovered rights. Even in *Griswold*, the essential holding was that a "right of privacy" was necessary to stop governmental snooping in the bedroom. However, under Chief Justice Warren E. Burger, the Court in *Roe v. Wade* for the first time in over thirty-five years found a substantive personal liberty beyond the Constitution's textual guarantees, beyond its need to ensure democratic policy-making, and beyond its need to oversee policy-making structures.

Ely believed that the feminist defense of *Roe v. Wade* was inadequate. Nonetheless, he approved the ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), which decided against overruling *Roe.* He admitted that he lacked a well-developed theory of *stare decisis* (pronounced *STAR-ry de-SI-sis*), or precedent, but he believed that the recognition of the right to an abortion was a progressive egalitarian development for women, and he also believed that too many women now relied on *Roe* to overrule the right to an abortion. Ely seemed not to care that his viewpoint could never satisfy enough political actors to gain him a seat on the Supreme Court.

Sharon G. Whitney

See also: Baker v. Carr; Constitutional Interpretation and Civil Liberties; Judicial Review.

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Emancipation Proclamation

On September 22, 1862, President Abraham Lincoln announced his intention to emancipate the slaves in those areas still in rebellion against the Union on January 1, 1863. On January 1, in the Emancipation Proclamation, he ordered that "all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free."

Historian John Hope Franklin identified the Emancipation Proclamation as among the most significant documents in the American political tradition for its revolutionary implications for civil rights and racial equality. The proclamation's stance toward civil rights is complicated, however, as it tacitly acknowledged a constitutional protection of slave property that is not lightly abridged, at the same time that it proclaimed the injustice of slavery, transformed the character of the Civil War, and foreshadowed the Thirteenth Amendment.

The proclamation further commanded that "the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of [freed slaves], and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom." Lincoln defended his action by pointing to the power "vested" in him "as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion against the authority and government of the United States." Emancipation was a "fit and necessary war measure for suppressing said rebellion." The scope of Lincoln's order and the

means he deployed to enforce it emphasized his understanding of constitutional powers, the nature of the Union, and the complexity of the constitutional mandate regarding slavery.

Lincoln defended the Emancipation Proclamation as a war measure authorized by the president's power as commander-in-chief. By summer 1862, the Union effort to suppress the Southern rebellion had suffered repeated setbacks. Discouraged by the reluctance of his generals to engage the enemy, Lincoln assumed direct control of the army and ordered it in early 1862 to confront the Southern armies. Several defeats followed, and emboldened by these victories, General Robert E. Lee actually invaded the North, crossing into Maryland west of Washington. On September 17, Union and Confederate forces met at Antietam in Maryland. The battle resulted in more casualties than from any engagement in U.S. history.

President Abraham Lincoln issued the Emancipation Proclamation in 1862, which freed all slaves in the Southern states that had seceded from the Union. The proclamation was an important first step toward granting civil liberties and basic freedoms for African Americans. *(Library of Congress)*

Lincoln's decision to emancipate the slaves was a war measure taken to salvage a Union in increasingly desperate shape. In a July 4, 1861, speech to Congress, he had already assumed and defended a vast array of questionable executive powers. Yet that power remained limited, and the Emancipation Proclamation emphasized these limits with its suggestion that the national government was prohibited from denying the constitutionally protected positive right to slave property. This is evident in the proclamation's form, its constitutional justification, its method of enforcement, and the scope of its application.

The executive order of emancipation was preceded by a 100-day warning of Lincoln's intent. Lincoln appreciated the Constitution's conventional protection of the right to property in a slave, and justice demanded that he warn those in rebellion of his intention. Moreover, his declaration of the slaves' freedom was not coupled with a promise of forced liberation. He remained formally unwilling to use the federal army to free the slaves, instead merely promising the maintenance of a freedom already earned, presumably through the slaves' own action.

Lincoln promised that after the probationary period he would evaluate which areas were still in a state of rebellion and thus subject to the proclamation. In other words, the proclamation did not serve to free all the nation's slaves but merely those in Confederate states. In the "border states" of Missouri, Kentucky, and Maryland, all of which protected the institution of slavery, citizens maintained their slave property under the proclamation. The decree's restricted scope was further emphasized by Lincoln's earlier retraction of General John C. Frémont's September 1861 order of emancipation in Missouri. Certainly, the limited reach of the Emancipation Proclamation served a political purpose, as the maintenance of border-state loyalty was integral to a war effort run from Washington, a Southern town surrounded by the Confederate-sympathizing state of Maryland.

Additional limits to the proclamation's jurisdiction suggest, however, that Lincoln was not motivated simply by politics but he recognized that slave property was constitutionally protected. In addition to the border states, Lincoln exempted portions of Virginia and

parts of southern Louisiana, which were quickly secured by the Union at the start of the war. In other words, even in otherwise rebellious states, where the war emergency had ended, Lincoln seemed unwilling to use national power for emancipation. After the criminal behavior of the rebels was subdued by the national government, it was not within the scope of executive power to strip persons of their slaves.

Still, in spite of these limits, the Emancipation Proclamation did display an American aspiration to full racial equality. In conclusion, Lincoln stated, "And upon this act, sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity, I invoke the considerate judgment of mankind, and the gracious favor of Almighty God." Former slave and statesman Frederick Douglass explained that not one word of the Constitution required amending for him to be admitted to full civil and political equality. Lincoln agreed with Douglass, challenging Chief Justice Roger B. Taney's infamous *Dred Scott* opinion in *Scott v. Sandford,* 60 U.S. 393 (1857), which claimed that the Declaration of Independence constitutionalized racial inequality and slavery.

At the same time, however, the Constitution did protect a positive right to slave property, most notably in the fugitive slave clause of Article IV. Like Justice Joseph Story in his interpretation of that clause in *Prigg v. Pennsylvania,* 41 U.S. 539 (1842), and Lord William Mansfield in the English *Somerset* case (1772), Lincoln in the Emancipation Proclamation recognized this right but emphasized its conventional character. He assumed that the right was an attack on human nature itself, and it therefore existed only with enabling legislation. Prior to the war, Lincoln repeatedly promised the South that he had neither the intention nor the power to regulate the "peculiar institution" as it existed in the states. Yet after the 100-day warning of his provisional Emancipation Proclamation, in areas where the South was still in rebellion, order had broken down. Therefore, no enabling legislation any longer existed, and the martial law of the Union armies would recognize all persons to be free persons.

Brendan Dunn

See also: Fourteenth Amendment; Lincoln, Abraham.

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Eminent Domain

The term "eminent domain" refers to the power of a government to compel the transfer of real or personal property from private owners to the government. Confiscation of property by government seemed a throwback to feudal times, when civil liberties were few. Yet Parliament in England had long used eminent domain for public projects. Similarly, the governments in colonial America compelled owners to transfer real and personal property to facilitate the construction of roadways and public buildings. Colonial governments also delegated the power of eminent domain to private parties, such as grist mill proprietors and ironwork operators, whose activities were seen as promoting economic growth.

The Constitution does not expressly confer the power of eminent domain upon Congress. As early as *Vanhorne's Lessee v. Dorrance,* 2 U.S. 304 (1795), however, a federal circuit court declared that eminent domain was an inherent power of government as an element of sovereignty. In *Kohl v. United States,* 91 U.S. 367 (1875), the U.S. Supreme Court explicitly recognized that both the state and federal governments could exercise the right of eminent domain in order to perform governmental functions.

The Fifth Amendment to the Constitution implicitly acknowledged the existence of eminent domain by placing limits on its exercise. The Takings Clause of that amendment mandated that government must take property only for "public use" and only upon the payment of "just compensation." Similar language appears in virtually every state constitution. Indeed, some state constitutions require compensation when property is "damaged" as well as taken by governmental action. In other words, the Fifth Amendment and its state counterparts closed the door on the outright confiscation of property by government.

In *Barron v. City of Baltimore,* 32 U.S. 243 (1833), the Supreme Court ruled that the Bill of Rights (the first ten amendments to the Constitution) applied only to the federal government and did not bind the states. State courts therefore initially took the lead in fashioning eminent domain law. During the antebellum era, the state governments frequently employed eminent domain to stimulate economic development through improved internal transportation. In this connection, state courts encouraged an open-ended understanding of "public use" by consistently upholding state legislative delegations of eminent domain to canal and railroad companies. Moreover, although recognizing the constitutional principle of just compensation, some state courts sought to minimize the cost of eminent domain by offsetting the loss suffered by an individual whose property was taken against the imputed benefit of a project.

In the late nineteenth century, the Supreme Court began to strengthen the protection afforded property owners under the Takings Clause. In *Pumpelly v. Green Bay Co.,* 80 U.S. 166 (1871), the justices determined that a flooding of land constituted a taking even without a formal eminent domain proceeding. This established the basis for the doctrine of "inverse condemnation," which holds that a physical invasion of land by government represents a compensable taking. Further, the Court gave a broad reading to the just-compensation requirement in *Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893), observing that the compensation paid should be a "full and perfect equivalent" for the property taken. In most instances the measure of compensation is determined by market value. Even more significant, in the seminal case of *Chicago, Burlington, and Quincy Railroad Co. v. Chicago,* 166 U.S. 226 (1897), the justices unanimously determined that the payment of just compensation for private property taken for public use was an essential element of due process of law guaranteed by the Fourteenth Amendment. By virtue of this decision, the just-compensation requirement of the Fifth Amendment was imposed on the states.

A contentious issue with regard to eminent domain is the limitation that private property must be taken for "public use." It was early settled that eminent domain did not empower government simply to take the property of one person and hand it to another, even upon the payment of compensation. The Supreme Court stressed this point in *Missouri Pacific Railway Co. v. Nebraska,* 164 U.S. 403 (1896), declaring that it was a deprivation of due process to take property for a private purpose. The public-use limitation, however, was steadily eroded by judicial deference to legislative findings that a particular appropriation of property served the public interest. Both state and federal courts treated the exercise of eminent domain as primarily a legislative matter. For example, in the early twentieth century, they upheld state laws authorizing individuals to obtain rights-of-way across the land of others for purposes of mining or irrigation.

After World War II, the Supreme Court virtually abandoned any meaningful review of "public use" as a limit on the power of eminent domain. In *Berman v. Parker,* 348 U.S. 26 (1954), the Court upheld the taking of land for redevelopment by a private agency as part of an urban renewal project and equated the public-use requirement with the police power. The justices were also highly deferential to legislative assessments about the need to use eminent domain, holding in *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984), that the state could authorize the transfer of land titles from landlords to tenants to alleviate the perceived evil of concentrated land ownership. Some state courts, however, continue to scrutinize public use and occasionally invalidate the exercise of eminent domain on grounds that the planned acquisition is primarily for private benefit.

The Supreme Court has applied the doctrine of inverse condemnation in a number of leading cases. In *United States v. Causby,* 328 U.S. 256 (1946), the Court ruled that frequent flights over a farm by military airplanes represented the taking of a flight easement for which compensation must be paid. Likewise, the Court held in *Kaiser Aetna v. United States,* 444 U.S. 164 (1979), that the opening of a privately owned pond to public navigation constituted a taking of property. The recognition of inverse condemnation actions for physical invasion has opened the door for the allied doctrine that a land use regulation may be so severe as to amount to a taking of property.

In modern practice, eminent domain is commonly asserted by a formal judicial proceeding to condemn property. This results in a decree of condemnation. It is not necessary that the just compensation be paid in

advance of the government's acquisition of title. With inverse condemnation, the property owner institutes the proceeding against the government to recover compensation.

James W. Ely Jr.

See also: Barron v. City of Baltimore; Berman v. Parker; Hawaii Housing Authority v. Midkiff; Property Rights.

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Employment Division, Department of Human Resources of Oregon v. Smith (1990)

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), was a case that raised issues of an individual's freedom to practice religion as desired, a right set forth in the Free Exercise Clause of the First Amendment to the U.S. Constitution. The clause provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. The U.S. Supreme Court, however, held in this case that the state could prohibit certain practices used in a particular religion provided the law was neutral and did not abridge any other constitutional provisions.

Alfred Smith and Galen Black worked for a private drug rehabilitation organization. When it was discovered that they had, as members of the Native American church, ingested peyote for sacramental purposes, they were fired. They applied for unemployment compensation and were found ineligible because of work-related misconduct. The Oregon Court of Appeals held that the denial of unemployment compensation violated the Free Exercise Clause of the First Amendment. The U.S. Supreme Court reversed this decision with Justice Antonin Scalia writing for the majority. Justice Sandra Day O'Connor wrote a concurring opinion, and Justice Harry A. Blackmun wrote a dissent.

Prior to this case, the Supreme Court had held that cases involving the Free Exercise Clause should be decided using the test in *Sherbert v. Verner,* 374 U.S. 398 (1963). Under the *Sherbert* test, government actions that substantially burden religious practice must be justified by a compelling government interest and must put the least possible restraint on freedom of religion. In *Employment Division v. Smith,* Justice Scalia, writing for the majority, found the *Sherbert* test unacceptable because it required judges to "weigh the social importance of all laws against the centrality of all religious beliefs." Then, he replaced the *Sherbert* test with one of neutrality: The right of free exercise does not relieve a person from complying with a valid and facially neutral law of general applicability on the ground that the law proscribes or requires behavior contrary to that person's religious practice, as long as the law does not violate any other constitutional protection. Justice Scalia understood that the Supreme Court was making free exercise of religion highly dependent on a religious community's ability to exercise leverage in the political process: "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." He termed it an "unavoidable consequence of democratic government." Applying the neutrality test to this case, Justice Scalia found that an Oregon statute of general applicability forbade the ingestion of peyote and did not make an exception for the sacramental use of it. Thus, Smith and Black could be denied unemployment compensation.

In her concurring opinion, Justice O'Connor argued that the majority should not have departed from its use of the *Sherbert* test, since it was a well-settled interpretation of the Free Exercise Clause. She also stated that the new test "appears unnecessary to resolve the question presented, and is incompatible with

our Nation's fundamental commitment to individual and religious liberty." Justice Blackmun in his dissent objected to the abandonment of the *Sherbert* test and wrote that the majority could only have effected this overturning of settled law "by mischaracterizing this Court's precedents."

This decision met with a great deal of criticism when it was announced. Most notably, the U.S. Congress attempted to reinstate the *Sherbert* test by passage of the Religious Freedom Restoration Act of 1993 (RFRA). In 1997, however, the Supreme Court invalidated most applications of RFRA in *City of Boerne v. Flores,* 521 U.S. 507 (1997), finding that in passing RFRA, Congress had trespassed on the Supreme Court's power to interpret the Constitution.

Carol Barner-Barry

See also: Establishment Clause; Free Exercise Clause; *Sherbert v. Verner.*

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Engel v. Vitale (1962)

In *Engel v. Vitale,* 370 U.S. 421 (1962), the U.S. Supreme Court held that the state of New York could not sponsor the recitation of a prayer at the start of the school day without violating the Establishment Clause of the First Amendment. The First Amendment to the U.S. Constitution forbids the establishment of any state-sponsored religion and the government's intrusion on the right of individuals to the free exercise of the religion of their choosing. The Establishment Clause was at issue in *Engel v. Vitale.* The state of New York had, through its state officials, composed an official school prayer that was to be recited at the start of each school day and was published in their "Statement on Moral and Spiritual Training in the Schools." The prayer read, "Almighty God, we acknowledge our dependence upon Thee, and we beg thy blessings upon us, our parents, our teachers and our Country." Shortly after this practice was adopted by the school district, the parents of ten school children brought the lawsuit giving rise to this judicial opinion. The parents claimed that the state law authorizing the school district to direct the use of prayer in public schools, and the school district's regulation ordering recitation of the prayer, offended the Establishment Clause.

The Establishment Clause stands to protect the citizenry against government-sponsored religion. In this case, the board of education had established "protective" procedures to ensure that students who did not want to participate in the prayer were not compelled to do so. Parents were permitted to have their children kept outside of the room entirely, or students were permitted simply to refrain from recitation of the prayer. Neither teachers nor school administrators were permitted to comment on participation or nonparticipation in the prayer. The Court held that these provisions were not protective enough of the separation of church and state. The simple fact that the prayer was state-composed violated the Constitution according to the Court, a principle supported by reviewing the long history of state-sponsored religion. Ironically, the same Puritans who sought refuge from religious persecution in England came to the colonies and established churches or religions in twelve of the thirteen colonies. It was this very danger that the people would again come under state-controlled religion that the drafters of the First Amendment sought to avoid.

Engel v. Vitale stands for the proposition that the "wall" between the federal government and the religions that operate within America's borders is a critical protector of religious liberty. The First Amendment serves as the guardian against intrusion of the state into the religious lives of American citizens. Justice Hugo L. Black closed the majority opinion by quoting James Madison:

> [I]t is proper to take alarm at the first experiment on our liberties . . . who does not see that same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority can force a citizen to contribute three

pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Laurie M. Kubicek

See also: Establishment Clause; Free Exercise Clause; Prayer in Schools.

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English Bill of Rights

The English Bill of Rights (1689) was enacted by Parliament in the wake of the "Glorious Revolution," which removed James II and brought William and Mary to power in 1688. The document provides for the defense of individual liberties by asserting the political independence of the House of Commons and limiting the arbitrary use of executive authority by the king. Along with Magna Carta (1215) and the Petition of Right (1628), the English Bill of Rights stands as the basis for individual freedoms and the legal foundation for England's unwritten constitution.

The philosophical basis for the Bill of Rights began with England's break with the Catholic Church. Because he was conscious of the political uncertainty associated with a split from Rome, King Henry VIII sought the approval of Parliament to legitimize his religious authority over the realm. This precedent of consultation with Parliament, which was later reinforced by his daughter, Queen Elizabeth I, provided Parliament with an unprecedented degree of oversight concerning foreign policy, royal expenditures, and the organization of the Anglican Church. This gradual rise of cooperative parliamentary governance came as many European sovereigns consolidated their power into absolutist political regimes.

The philosophical basis for the English Bill of Rights began with England's break with the Catholic Church when King Henry VIII sought Parliament's approval to legitimize his religious authority over the realm. *(Library of Congress)*

The Stuart line of monarchs played an important role in antagonizing Parliament by deliberately undermining many of these collaborative arrangements in an effort to assert the "divine right of kings." After deposing two sovereigns and one military dictatorship, Parliament felt it necessary to formalize its longstanding power-sharing arrangements under an English Bill of Rights.

The text of the bill can be divided into three basic

parts: an enumeration of grievances, a declaration of parliamentary prerogatives, and regulations governing future royal successions.

Under the declaration of parliamentary prerogatives, English kings were prohibited from acting unilaterally to raise a standing army, collect taxes, or rescind existing statutes. Furthermore, under the act, monarchs were prohibited from interfering with Parliament's core legislative functions. The act prohibited monarchs from manipulating the election of the House of Commons or prosecuting members for statements made during open debate.

To ensure that royal officials would never again abuse the judiciary in an effort to intimidate their political opposition, the English Bill of Rights broadly reiterates basic civil liberties that are outlined in Magna Carta. These include a prohibition on forfeitures before convictions, excessive bail, disproportionate fines, and "cruel and unusual punishments." Finally, to ensure the "redress of all grievances, and for the amending, strengthening and preserving of the laws," the Bill of Rights required that "parliaments ought to be held frequently."

Nearly a century after its enactment, the English Bill of Rights provided inspiration for American colonists who were seeking independence from Great Britain. Concerned that the crown had deprived colonial subjects of their rights under the common law, the Second Continental Congress (1775) publicly renounced its allegiance to England.

The Declaration of Independence, which provides the moral justification for a political separation from England, echoes Parliament's complaints against the Stuart monarchs. Although the purpose of the American Revolution was to terminate royal authority over the colonies, in the minds of the revolutionaries, the struggle was waged to preserve basic freedoms won in the Glorious Revolution and codified in the English Bill of Rights.

The passage of the English Bill of Rights signaled the end of the most serious conflicts over the appropriate use of executive power. English monarchs would continue to play an important role in national governance. However, never again would a sovereign nullify an existing statute or publicly champion the divine right of kings. By asserting legal prerogative to settle the question of monarchical succession, the English Bill of Rights ultimately resolved the question of political supremacy and secured the rights of its citizens under the common law.

Matthew Woessner

See also: Common Law; Declaration of Independence; English Roots of Civil Liberties; Magna Carta; Petition of Right.

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English-Only Laws

English-only laws can be either practical applications of policy or symbolic statements that are rarely enforced. When these laws affect policy, they traditionally have been met with failure in both the popular vote and in the courts. The earliest example of this was a 1919 statute mandating English-only instruction up until the eighth grade. The U.S. Supreme Court invalidated this law in 1923 in *Meyer v. Nebraska,* 262 U.S. 390. Later, the Court Interpreter's Act of 1978 arose from *United States ex rel. Negron v. New York,* 434 F.2d 386 (2d Cir. 1970), in which a non-English-speaking defendant was convicted of murder without the benefit of an interpreter during trial. The federal appellate court held that the law violated the defendant's Sixth Amendment right to a fair trial. More recent attempts to federalize an English-only philosophy have been similarly defeated.

The U.S. House of Representatives passed an "English empowerment" bill in 1996 that would have required only English to be used for all federal business, including ballots for all U.S. elections. Although the bill never became law, strong support still exists for

the English-only philosophy. Arizona's constitution contained an English-only provision similar to the House proposal, but the Arizona Supreme Court struck down the provision in *Ruiz v. Hull,* 191 Ariz. 441, 957 P.2d 984 (1998), on the basis that the law violated both free speech rights under the First Amendment and equal protection of the law under the Fourteenth Amendment. The Arizona law prohibited state workers from using any language other than English to perform any "official act," even including prohibitions on interpersonal discussions between coworkers. States have been more successful using the English-only approach for their educational policy because it does not place as severe a burden on the free speech rights of those affected by the law.

California voters enacted Proposition 227 in 1998 mandating that immigrant students receive a year of English instruction before being enrolled in mainstream bilingual classes. Supporters argue that standardized test scores would improve if children were immersed in English before entering a bilingual education program. Although bilingual programs themselves are not eliminated under the law, critics insist that such rules foster a sense of failure because students are labeled as deficient and may never achieve the skills level of majority-group classmates. Some schools have effectively avoided the law's reach by becoming charter schools. Still, parents can apply for a waiver if their child is ten years or older, knows English, or has "special needs." Teachers who refuse to abide by Proposition 227 can be fired and even sued for civil damages. So far, the courts have upheld challenges to the law.

In 2002, twenty-six states employed some official English designation. In 2000, Arizona voters adopted the California immersion approach. The southern half of the state, which holds the majority of registered Democrats and a strong teachers union, staunchly opposed the measure. Many schools there were accused of avoiding the law by improperly granting waivers. Schools in support of the program were denounced for blindly following the law and were sued after refusing to grant legitimate waivers for students. Given the controversy and difficulty in enforcing these English-only provisions, many states, such as Colorado, have been less willing to adopt an English-only approach. Recent studies there show that current bilingual programs are reaching the English-only goals without the use of immersion programs.

Patricia E. Campie

See also: Meyer v. Nebraska.

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English Roots of Civil Liberties

Given the shared history between England and the United States, it is not surprising that many of America's civil liberties had their origins in English law. From the signing of Magna Carta in 1215 until the colonies declared their independence in 1776, developments in England shaped both state and national governments in the United States.

Perhaps the most basic and oldest of all civil liberties is the right to due process. This concept, guaranteeing that people could not be punished or their property seized except through proper legal channels, first appeared in Magna Carta. Over the centuries, its value was reaffirmed as an essential protection for individuals against the abuses of royal or governmental power, including arbitrary or discretionary imprisonment. Throughout the sixteenth century, English judges repeatedly ruled that although monarchs had the power to imprison people, courts had the right to review those cases and determine whether the imprisonment was lawful. It was Charles I's claim in the "Five Knights" case that he had the right to discretionary imprisonment, free from judicial review, that prompted Parliament to issue the Petition of Right in 1628. Similarly, his seizure of the property of those

who refused to pay an assessment not authorized by Parliament was also widely viewed as a violation of due process.

Closely related to due process is habeas corpus. Though habeas corpus today is generally understood to ensure that people are not imprisoned unlawfully, it began in the Middle Ages as a way to guarantee defendants' presence in court or prison. In the sixteenth century, the Court of King's Bench developed habeas corpus as a check on unconstitutional imprisonments. In the next century, habeas corpus was extended to include those individuals who had been imprisoned by lower courts. The Habeas Corpus Act of 1679 strengthened the law's provisions by ensuring that prisoners could receive hearings when courts were in recess; it also protected jurors from imprisonment if the courts were dissatisfied with the verdict; it ensured that individuals were not wrongly committed to insane asylums; and in 1771, the court extended habeas corpus to slaves, ruling that slaves who did not wish to leave England—to return to the colonies, in this case—could not be compelled to do so. The force of this law was such that even James II, who regularly claimed powers by right of his prerogative, seems not to have ignored habeas corpus; his solution was instead to set bail higher than defendants could afford to pay.

While Magna Carta did not specify how due process was to be achieved, over the course of the Middle Ages, trial by jury came to be the accepted mechanism. Grand juries were formalized under the Assize of Clarendon in 1164, which established trial by ordeal as the measure of guilt or innocence. When the Fourth Lateran Council outlawed trial by ordeal in 1215, the English courts had to find a replacement. Within several years, the petit (trial) jury, made up of men from the vicinity, was developed; after 1351, members of the grand jury that produced the indictment could no longer serve on the petit jury that tried the case.

Defendants' rights at trial were limited, however. Until the eighteenth century, defendants did not have the right to call their own witnesses to testify under oath and could not testify under oath themselves until 1798; unlike the crown, they could not bind witnesses to appear at trial; they were not allowed to use defense attorneys in felony cases until 1730, and even then, right to counsel did not become law until 1836. Rules of evidence developed only in the eighteenth century, as well. Magna Carta established the principle that, upon conviction, punishment should be proportional to the offense committed. Provisions against cruel and unusual punishments first appeared in the English Bill of Rights of 1689, though the number of capital crimes expanded in the eighteenth century.

Several legal scholars helped defend and perpetuate civil liberties in England and, by extension, America. One of the most famous scholars was Sir Edward Coke, author of the *Institutes of the Laws of England.* (Library of Congress)

The idea that some sort of council or legislature must approve taxes also has its origins in Magna Carta. Once Parliament developed later that century, Magna Carta's provisions came to be interpreted as requiring Parliament's consent to levy taxes. In the seventeenth century, both Charles I and James II drew their subjects' ire by ignoring that principle and levying taxes not endorsed by Parliament; in both cases, they lost their throne.

Religious toleration was a relatively late addition to English civil liberties. Throughout the Middle Ages and into the sixteenth century, the punishment for heresy was burning at the stake. When Charles II was

restored to the throne in 1660, religious toleration seemed possible; within three years, however, the Test Act and the Conventicle Act denied non-Anglicans religious freedom. The Act of Toleration, passed after the Glorious Revolution of 1688, granted non-Anglicans freedom of worship but denied them political and other rights. Full rights were granted in 1829. Separation of church and state, a fundamental principle of the U.S. Constitution, still does not formally exist in England.

Several legal scholars helped defend and perpetuate civil liberties in England and, by extension, America. One of the most famous was Sir Edward Coke, author of the massive *Institutes of the Laws of England.* Coke, a former chief justice in the Courts of Common Pleas and of King's Bench, was a leader of the parliamentary opposition to Charles I in the 1620s; his conviction that Charles's actions violated fundamental rights of the English led him to propose and help draft the Petition of Right in 1628. Coke completed four volumes of the *Institutes* before he died in 1634; the last three volumes were so unpopular with Charles's government that they were suppressed and appeared in the 1640s only after civil war had weakened Charles's grasp on government.

Equally influential was Sir William Blackstone, the eighteenth-century lawyer, judge, and author of *Commentaries on the Laws of England.* Blackstone's achievement was to write a comprehensive work that could be understood by lawyers and laymen alike, including those who drafted and ratified the U.S. Constitution; several of them, including Alexander Hamilton, noted Blackstone's influence.

Although the U.S. Constitution's guarantees of civil liberties surpasses what existed in England at that time, it is clear that English history played a significant role. The emphasis on due process, trial by jury, and legislative approval of all taxes had their origins in England; the authors of the U.S. Constitution drew on principles that long predated American independence.

Carol Loar

See also: Common Law; Declaration of Independence; English Bill of Rights; Magna Carta; Petition of Right.

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Enumerated Powers

The term "enumerated powers" refers to the powers of the Congress and, by implication, the powers of the federal government specifically listed in Article I, Section 8 of the U.S. Constitution and in subsequent amendments. The powers listed in Article I, Section 8, include the power to lay and collect taxes, duties, imposts and excises and to pay (government) debts to provide for the common defense and general welfare of the United States; to borrow money on the credit of the United States; to regulate commerce between the states and with foreign nations and among Indian tribes; to establish a uniform rule of naturalization (citizenship) and uniform bankruptcy laws; to coin (print) money and fix the standard of weights and measures; to punish counterfeiting; to establish post offices and post roads; to set patent and copyright laws, thereby protecting and encouraging inventors and writers; to establish other federal courts inferior to the Supreme Court; to define and punish piracy and other offenses against the law of nations occurring beyond the boundaries of individual states; to declare war, provide funds for the military, and set rules for those in military service; to call the (state) national guard into federal service as needed; and to choose and to govern the seat of the national government, the District of Columbia.

DERIVATION OF IMPLIED POWERS

By enumerating powers, the framers of the Constitution intended to suggest that the powers of government should be limited, but how limited? In making this list, did the founding fathers intend to suggest the *categories* of powers the new national government would have, or did they intend the new national government should have *only* these specific powers? The

last clause in Article I, Section 8 gives one answer: "The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." This "necessary and proper," or "sweeping," clause supports a claim that Article I, Section 8 contains broad categories of powers, giving Congress the power to select appropriate means to carry them into effect.

Another clear but quite different answer is based on the Tenth Amendment. For the new Constitution to go into effect, nine or more state conventions had to approve the new document. Many Americans, especially those fearing that the new national government would have too much power, insisted that the first Congress propose amendments limiting the powers of the new national government. Opponents of the new Constitution were called "Antifederalists." Those favoring the new Constitution, the Federalists, agreed to add amendments limiting powers of the new government. James Madison, the father of the Constitution and a leading Federalist, proposed amendments in a speech before the House of Representatives. Congress proposed and the states quickly ratified the first ten amendments, called the Bill of Rights. Most provisions in the Bill of Rights were intended to limit action by the new national government (including the exercise of enumerated powers).

The Tenth Amendment further stated that the "powers not delegated to the United States . . . are reserved to the States . . . or the people." The "reserved powers" clause did not say that all powers not "expressly" delegated to Congress were reserved to the states, although this narrow view was championed by Thomas Jefferson and other advocates of "strict construction" of the Constitution. This strict-construction approach, which would have limited congressional powers to those specifically enumerated, was one prominent early interpretation of the Tenth Amendment.

Writing a constitution for a new government is a complex and important task, so it is not surprising that the new Constitution contained omissions and internal tensions. Relying in part on the necessary-and-proper clause, the U.S. Supreme Court in *McCulloch v. Maryland,* 17 U.S. 316 (1819), held that although the Constitution had not specifically vested the new government with the power to create a national bank, since the government had an "enumerated power" to coin and spend money, and since the Constitution did not specifically prohibit the establishment of a national bank, the federal government also had the "implied right" to create a bank in which that money might be kept.

This "implied rights" doctrine flowing from the *McCulloch* decision is the constitutional basis for many actions by the national government (such as funding school lunch programs) that are not specifically mentioned in Article I, Section 8. Congress also often accomplishes its goals by offering financial incentives to states that comply with its wishes. Today the Article I listing of powers gives only a hint of the many powers that Congress exercises.

As Chief Justice John Marshall recognized in *McCulloch,* both enumerated and implied powers remain subject to specific limitations prescribed in the Bill of Rights and elsewhere in the U.S. Constitution. Although Congress has the power to tax, it cannot apply such a tax in a manner that might discriminate among religions, hinder freedom of speech or press, or interfere with other rights in the First Amendment. Similarly, federal law enforcement activities are governed by other limitations in the Bill of Rights, and states are limited by provisions of these amendments as applied to the states via the Due Process Clause of the Fourteenth Amendment—by means of what is known as the "incorporation" doctrine.

ENUMERATED POWERS AND CIVIL LIBERTIES

The following brief review of some congressional enumerated powers reveals that many of these powers have been exercised in tension with civil liberties.

Power to Regulate Commerce

The power of the federal government "to regulate commerce . . . among Indian tribes" gave the federal government general control of Indian affairs, replacing the role previously played by individual states and colonies. Many scholars believe the forced removal westward of Indian tribes and the forced relocation of Indians onto reservations during the nineteenth cen-

tury violated the collective and individual rights and liberties of Native Americans.

Power over Naturalization and Citizenship

The power of the national government "to establish a uniform rule of naturalization" (citizenship) grants to the Congress and the president extensive power to set rules governing foreigners visiting and noncitizens living in the United States. The U.S. Immigration Service arrests and jails a portion of those who have entered the United States illegally. The civil rights due these jailed noncitizens remains a complicated and contentious area of American law.

Power to Punish Offenses Against the Law of Nations

The right of the national government "to define and punish piracy and other offenses against the law of nations" provided the constitutional basis for U.S. participation in the Nuremberg trials in Germany of alleged war criminals at the end of World War II. The same rationale justifies U.S. participation in the International Court of Justice and other international courts. These courts seek to punish those who violate the very basic human rights of the governed. In the recent past, U.S. participation in international courts has been limited due to a belief that these courts are ineffective and will not grant defendants the full panoply of civil rights that would be conferred by U.S. courts.

Power to Declare War

The power to declare war was the constitutional basis for several federal actions following the December 1941 Japanese attack on Pearl Harbor that drew the United States into World War II. Thereafter, the United States declared martial law (military government) in Hawaii. President Franklin D. Roosevelt ordered curfews for Japanese Americans on the Pacific Coast and later ordered them moved from there to detention camps in Arizona and elsewhere in western states. The Supreme Court bowed to "military necessity" in accepting forced relocations, most notably in *Korematsu v. United States,* 323 U.S. 214 (1944), and never clearly ruled detention of Japanese Americans to be unconstitutional. Only after the war did the Court declare that military government in Hawaii violated the Constitution. Many lawyers and legal scholars believe these actions violated the civil rights of these ethnic Americans. On a more positive side, President Harry Truman's 1948 executive order mandating racial integration in the U.S. armed forces also logically flowed from the enumerated power of the federal government to set rules for those in military service.

Power to Govern the District of Columbia

The power "to govern the seat of the national government" means that Congress has general authority to govern the District of Columbia subject to oversight by federal courts. National courts have exercised power over the states through the Fourteenth Amendment. The Supreme Court used this power in *Brown v. Board of Education,* 347 U.S. 483 (1954), to desegregate schools in Topeka, Kansas. In *Bolling v. Sharpe,* 347 U.S. 497 (1954), the Court proceeded under the Due Process Clause of the Fifth Amendment to apply similar standards to school districts in the District of Columbia.

Summary

It should be clear that the grant of specific powers to Congress in Article I, Section 8, and in subsequent amendments has been used both to restrict and expand civil liberties. Given the broad scope that courts have given to the exercise of implied powers, most Americans probably look more to governmental structures and to specific constitutional limitations as guarantors of individual rights than to the limited number of powers granted.

Gayle Avant

See also: United States Constitution.

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Equal-Time Rule

The "equal-time rule," or the equal-opportunity provision, of the 1935 Communications Act (section 315) was designed to open the airwaves to all qualified candidates for public office. The basic principle of the rule is that broadcasters who either give or sell airtime to one candidate must do the same for that candidate's opponent. Some critics claimed that this equal-time provision violated the free speech rights of broadcasters.

At issue, of course, are the rights of free speech and press provided in the First Amendment to the Constitution. Broadcasters with a particular political bent argued that they had the right to put anyone and anything on the airwaves. Congress, however, required that they give opposing views a hearing as well.

The government justifies this equal-time control on the broadcast industry based on scarcity in the number of broadcast frequencies that exist, and the fact that those airwaves are a public resource. In preventing a potentially biased broadcast media from neglecting the public interest and monopolizing a public resource, the government steps in for the public good. As such, the equal-time rule, along with the now-defunct fairness doctrine, which required a balanced handling of issues, was adopted to ensure candidates on both sides of an issue a balanced opportunity to communicate with citizens. Regulatory responsibility fell to the Federal Communication Commission (FCC).

Section 315 of the act states, "[i]f any licensee [station] shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." Additionally, the FCC has modified the rule to require that the same audience time be given to each candidate and at the same rate (most-favored-advertiser rate or cheapest rate). Other amendments include important exemptions that free broadcasters in certain circumstances from equal-time concerns. These exemptions include the broadcasting of bona fide newscasts, news interviews, news documentaries, or on-the-spot coverage of news events.

Some notable rulings on the equal-time provision include *Felix v. Westinghouse Radio Station,* 186 F.2d 1 (3d Cir. 1950), in which a federal court ruled that "friends of the campaign," or surrogates of the candidate, did not trigger the rule; the trigger must be the candidates themselves who are granted the airtime. Additionally, in *Farmers Educational and Cooperative Union v. WDAY, Inc.,* 360 U.S. 525 (1959), the U.S. Supreme Court ruled that stations could not edit presentations made by candidates. The result of this, for example, is that candidates have made vicious and racist statements on the air, but the editors are expressly prevented from editing the content. Political speech is indeed an exceptionally protected liberty.

In the 1960s, the FCC expanded the equal-time rule to include nationally broadcast speeches, such as the presidential state-of-the-union address. As a result, immediately after the presidential address, the opposing party would issue a response. Political debates, however, were particularly difficult events for the rule to accommodate. In the famous 1960 presidential debate between candidates John F. Kennedy and Richard M. Nixon, Congress had to suspend the rule for the event. In the presidential debates between Jimmy Carter and Gerald Ford in 1976 and between Ronald Reagan and Jimmy Carter in 1980, the FCC permitted the debates under the technicality that they were "public meetings," which under the "regular news" exemption suspends the equal-time rule. This technicality also made possible the exclusion of minor-party candidates. In 1983, the FCC clearly removed political debates from equal-time requirements, so long as candidates were chosen in a nondiscriminatory way. Those who felt discriminated against (for example, Ross Perot in 1992 and 1996, who claimed he received inadequate airtime) could appeal to the FCC.

The equal-time rule has resulted in several unintended consequences, and the scarcity principle justifying it is quickly becoming a moot point because of rapidly developing technology that increases the number of broadcast outlets. First, the rule may be having a "chilling effect" on broadcast communica-

tions. That is, broadcasters may avoid including candidates simply because when they are faced with an all-or-none proposition, they may select none and avoid an equal-time problem. Second, and relating to the first point, is the argument that the rule, in effect, is a device that protects incumbents. Challengers are in more need of media coverage in order to establish name recognition and a public presence. The purported "chilling effect," if it occurs, clearly harms them. In addition, the rule does not give candidates free airtime when their opponents had to pay for theirs. Underfunded candidates, usually challengers, can still receive much less airtime than those who are well funded.

The equal-time rule, it would seem, exists in a precarious state. The fairness doctrine, which for years was conceived of as its sister rule, died during the deregulation sweep of the 1980s. The main justification for the demise of the fairness doctrine was that the scarcity principle no longer applied, as cable and satellite communications expanded. The same principle applies to the equal-time rule. Will it follow the path of the fairness doctrine and leave stations to operate in the open market rather than under the watchful eye of the FCC? The 1980s under the deregulation-oriented Reagan administration probably would have been a propitious time for this to happen, but the equal-time rule has developed into something of a proud tradition of both broadcasters and public officials and therefore continues.

Nathan Bigelow

See also: Fairness Doctrine; Federal Communications Commission; Reply, Right to.

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Escobedo v. Illinois (1964)

Escobedo v. Illinois, 378 U.S. 478 (1964), is a landmark case establishing the legal principle that a suspect's confession is inadmissible in court if the suspect requests legal representation during questioning and is denied that opportunity by police. The circumstances of this case originated from a murder conviction obtained through the questioning of a suspect without that person's attorney being allowed access to the interrogation.

Danny Escobedo was taken into custody January 30, 1960, after being implicated in the murder of his sister's husband by a friend, Benedict DiGerlando. Although Escobedo made several requests to see his attorney, the Chicago, Illinois, police denied him access to counsel. Instead, investigators began a long, arduous process of asking questions and applying pressure on him to confess. Despite this, he continued to ask to see his attorney, Warren Wolfson. Again, Chicago police refused to honor his request to consult with his legal representative. Even more problematic, Escobedo's attorney was at the police station that evening frantically trying to see his client. Wolfson made contact with several layers of police hierarchy that evening, including the Chicago police commissioner, with whom he filed a complaint regarding police treatment of his client. Earlier in the evening, Wolfson pointedly noted that the Illinois criminal code stated that attorneys must be given access to their clients. This, too, had no effect, even though Wolfson conveyed the requirements of the Illinois statutes to a police supervisor.

This was not the first time Wolfson had encountered difficulties with the Chicago police on this case. Prior to this, Escobedo had been taken to the police station, presumably for questioning about the circumstances of his brother-in-law's murder. After similar interactions with police officers and supervisors, Wolfson petitioned an Illinois court for a writ of habeas

corpus. It was granted. Accordingly, the Chicago police had released Escobedo in this earlier incident.

However, after the arrest of January 30, 1960, Wolfson was unable to gain release of his client or to see him. This meant that Escobedo was subject to questioning without legal advice. Eventually, he made an error that resulted in his conviction. He said that DiGerlando had shot the victim. Had his attorney been present, he presumably would have prevented this damaging statement. Escobedo was unaware that under Illinois law he had implicated himself in the crime. Both men eventually received convictions in the murder case.

The Illinois Supreme Court upheld the conviction of Danny Escobedo. The U.S. Supreme Court decided to bring the case forward to the federal level. In a five–four vote, the Court overturned his conviction and established new requirements for police handling of interrogations.

In reaching its decision, the Supreme Court cited *Gideon v. Wainwright,* 372 U.S. 335 (1963), the Sixth Amendment, and the Fourteenth Amendment. In *Gideon,* the Court held that an individual facing felony charges must be provided legal representation if that person is unable to afford the cost of retaining an attorney. In *Escobedo,* the Court extended the *Gideon* argument by claiming that without legal representation during interrogation, the right to legal counsel during trial is less valuable. Instead of protecting the constitutional rights of citizens, the pre-*Escobedo* system moved the balance in favor of the prosecution.

The Sixth Amendment guarantees every person the right "to have the assistance of counsel for his defense." In examining the details of the *Escobedo* case, the Court ruled that prosecutors in Illinois had violated this amendment by purposely keeping Escobedo's attorney away during interrogation sessions. However, the Court made the important constitutional point that the Sixth Amendment was applicable to *Escobedo* through the Fourteenth Amendment, which made the Bill of Rights and other rights binding on the states. Until the Fourteenth Amendment, the restrictions on police conduct contained in the U.S. Constitution were designed for only the federal level. The Fourteenth Amendment changed this by its wording that no state may "deprive any person of life, liberty, or property without due process of law" and that the states shall not "deny to any person within its jurisdiction the equal protection of the laws." Although the language of the Fourteenth Amendment seems clear, it was not until 1925 that the Supreme Court upheld the doctrine that this amendment made other amendments binding on the states. Thus, the Fourteenth Amendment made it possible for the Supreme Court to apply the Sixth Amendment in *Escobedo*.

Escobedo is classified with cases to which the exclusionary rule also applies. In *Mapp v. Ohio,* 367 U.S. 643 (1961), the Supreme Court extended the exclusionary rule to state and local governments. As a result, today the United States is unique in its use of the exclusionary rule, under which evidence that is illegally or improperly obtained cannot be used as evidence in court. In most nation-states, the evidence may be used against an accused individual, and sanctions may be imposed on the police for violating procedure. *Mapp* marked an extension of the parameters of the exclusionary principle, and so would the Court's 1966 decision in *Miranda v. Arizona,* 384 U.S. 436 (1966).

Michael E. Meagher

See also: Exclusionary Rule; *Mapp v. Ohio; Miranda v. Arizona;* Right to Counsel.

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Espionage Act of 1917

The Espionage Act of 1917 was the second major antisedition law enacted by Congress—the first being the Sedition Act of 1798. In both instances, events of wartime led to congressional efforts to infringe on civil liberties, such as the First Amendment's rights of free speech, association, and press, especially against foreigners who might be perceived as friendly to the

country's enemies during armed conflicts such as World War I.

One of the most important parts of the Espionage Act of 1917 was section 3. Among other things, it provided penalties up to $10,000 or twenty years in prison, or both, for willfully making statements with intent to interfere with the operation or success of the military or naval forces of the United States.

A week after the United States entered the war April 6, 1917, President Woodrow Wilson established the Committee on Public Information (CPI), headed by newspaperman George Edward Creel, which in short order waged an intensive public opinion campaign that favored the war effort at the expense of anything foreign and strongly influenced the enactment of the Espionage Act on June 17, 1917. Among other things, the act outlawed all willful attempts to cause insubordination, disloyalty, mutiny, or refusal to serve in the military. In combination with the Sedition Act of 1918 enacted less than a year later, the Espionage Act of 1917 formed the basic sedition law until Congress formally repealed it in 1948. Even then, the act's provisions formed the basis of later acts scattered throughout the current code.

The portion of the act defining espionage as an act of obtaining information relating to the national defense "to be used . . . to the advantage of any foreign nation" was applied primarily to foreign-born, antiwar radicals, including Russians believed to support the Bolshevik Revolution and German Americans believed to be sympathetic to the kaiser. Major targets were anarchist groups such as the Industrial Workers of the World (IWW). Representatives of forty-three labor groups founded the IWW in Chicago in 1905. Its main goal was to fight capitalism in favor of a radical socialist system for the United States. Wobblies, as members of the IWW were called, actively opposed America's participation in World War I and engaged in violent activities to hamper the war effort, such as forcefully limiting the production of copper at some western copper mills. The government responded by prosecuting the Wobblies under the newly enacted Espionage Act.

After World War I, the U.S. Supreme Court upheld the constitutionality of the 1917 legislation in a series of cases. One of the first was *Schenck v. United States,* 249 U.S. 47 (1917), which involved the prosecution of a member of the Socialist Party for distributing antiwar literature. Justice Oliver Wendell Holmes, writing for the unanimous Court, employed his famous example of the danger in falsely shouting "fire!" in a crowded theater, and his equally famous "clear and present danger" test in upholding the constitutionality of the act's restriction of expression.

Another notable case involved the radical newspaper *The Milwaukee Leader*, whose second-class-mailing privilege was revoked on the ground that it systematically published false reports and statements with the intent to interfere with the success of the U.S. military effort, promote the success of America's enemies, and obstruct the recruitment and enlistment of military service personnel. In *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson,* 255 U.S. 407 (1921), Justice John H. Clarke, writing for the majority, with Justices Holmes and Louis D. Brandies dissenting, stated that the Espionage Act was a legitimate means of "preventing disloyalty and disunion among our people of many origins, and to the end that a united front should be presented to the enemy."

During the so-called McCarthy era of the 1950s, when Senator Joseph McCarthy (R-Wisc.) chaired congressional hearings into alleged Communist infiltration of the government, the portions of the Espionage Act that had not been repealed in 1948 were still being used to prosecute and convict persons with foreign connections. One such case involved the prosecution of the son of a Polish garment worker, Julius Rosenberg, and his wife, Ethel, both of whom were political activists and former members of the Young Communist League in New York. The Rosenbergs were accused of furnishing to the Soviet Union classified material regarding secret atomic weaponry and other military information obtained from the top-secret atomic bomb project at Los Alamos, New Mexico. The section of the Espionage Act the government used to indict and convict the Rosenbergs prohibited furnishing any foreign government with an array of documents or other information relating to national defense. Violation of this section was punishable by death. They were convicted, and the district judge on April 5, 1951, sentenced the Rosenbergs to die. During the next two years, they sought unsuccessfully to have their conviction overturned. The Rosenbergs

were executed at Sing Sing prison in New York on June 19, 1953—the day the U.S. Supreme Court refused to hear their appeal.

Although there had been no antisedition law in place between the expiration of the 1798 Sedition Act and the 1917 Espionage Act, the 1917 act was used for decades to prosecute acts of disloyalty and can still be found in the current *United States Code* at different places in somewhat updated form.

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See also: Abrams v. United States; Communists; *Gitlow v. New York*; Rosenberg, Ethel and Julius; *Schenck v. United States*; Sedition Act of 1918.

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Establishment Clause

The Establishment Clause of the First Amendment to the U.S. Constitution commands, "Congress shall make no laws respecting an establishment of religion." At a minimum, this directive prohibits the national government from providing official status or privileges to any church. Whether this clause forbids all aid to religious communities, however, has been a continuing controversy.

ESTABLISHMENT IN COLONIAL AMERICA

Colonial America was a Christian America. It was the shared assumption of almost every American colony that government and Christianity should not be separated. Indeed, every colony but one had an established church. The Anglican Church reigned supreme in seven colonies until the Revolutionary War. Massachusetts did not disestablish the Congregational Church until 1833.

"Establishment" meant the 1,400-year tradition in Western societies that assumed government should grant the dominant church special protection, privileges, and public funds, and its clergy special ceremonial status. The early Virginia colony punished attacks on orthodox Christian doctrine, required citizens to tithe to support the Anglican clergy, and permitted only Anglicans to vote.

The favored church could ignore or harass dissenters. Those who were not members of the established church might be fined or persecuted. The Dutch colony of New Netherlands (later New York) barred Jews, Lutherans, and Quakers. The New England colonies, with the lone exception of Roger Williams's Rhode Island, branded, exiled, and occasionally hanged Quakers.

A wave of revivalism swept through America in the 1740s. Enthusiastic evangelists converted thousands of colonists away from the established churches. One estimate suggests that by 1776 the majority of Virginia's churchgoers were evangelical Presbyterians or Separate Baptists, not members of the established Anglican Church.

Thomas Jefferson proposed a bill in 1779 for religious liberty that would abolish establishment in Virginia. It failed. At the end of the war, Virginia was in economic and social collapse. Patrick Henry, George Washington, and John Marshall advocated a tax for the "support of the Christian religion" to help overcome the decline of public morality. Repeating the arguments made by evangelical Christians, James Madison attacked the proposed tax and argued in his "Memorial and Remonstrance Against a Religious Assessment" (1785) that Christianity did not need government assistance to prosper. Madison organized a coalition of evangelical Christians and aristocratic landowners that defeated the tax bill. Madison then quickly resubmitted Jefferson's bill for religious freedom.

The Virginia Statute for Religious Freedom became law on January 16, 1786. The new law was a radical change in American thinking. It shattered the consensus that the church and state must work together in order to maintain an orderly and peaceful society. The Virginia statute was the first clear declaration that church and state ought to be separated.

ESTABLISHMENT CLAUSE JURISPRUDENCE

All but one American state ratified the Constitution after being assured that an amendment would be added prohibiting the establishment of a national church and the interference of government in individual religious exercise. The new Bill of Rights, eventually ratified in 1791, contained the First Amendment.

The religion clauses of the First Amendment pose two sets of problems. First is the boundary problem, later called "separation," expressed in the prohibition against a state-sponsored and -financed church. The second is a liberty problem posed by the guarantee for free exercise of religious beliefs. A potential conflict arises between the two. If the government is too zealous in its neutrality, erecting a wall too high between church and state, it may unfairly burden individuals' constitutional right to the free and unhindered exercise of their faith.

The precise meaning of the Establishment Clause is open to debate. It is clear that none of the principal leaders at the founding believed that government should ignore religious feelings. George Washington required church attendance for his soldiers, added "So help me God" to the presidential oath, and issued the first Thanksgiving Day proclamation. Thomas Jefferson encouraged religious instruction at the University of Virginia. James Madison, the primary author of the First Amendment, opposed a provision in the Northwest Ordinance of 1787 that set aside public land to support churches. Madison did so because he thought it was bad public policy, not because he thought it was unconstitutional.

There were only five U.S. Supreme Court cases involving the Establishment Clause until the 1940s. States dealt with religion on a local basis. It was not until the case of *Everson v. Board of Education,* 330 U.S. 1 (1947), that the Supreme Court used the Fourteenth Amendment's Due Process Clause to apply the Establishment Clause to state governments. Since then, the Court has heard more cases arising from religion issues than from almost any other area of constitutional law.

In *Everson,* Justice Hugo L. Black upheld a New Jersey program reimbursing parents for the costs of sending their children by public bus to private religious schools. Justice Black held that although the Establishment Clause prohibited state or national governments from favoring a church, it did not prevent an individual from receiving the benefits of a state program. There ought to be a "wall of separation," Justice Black wrote, but that wall must not deny to religious individuals the benefits granted to all citizens.

Three schools of thought have developed on the meaning of the Establishment Clause. Each accepts that the religion clauses prohibit any compulsion in matters of faith and that government should not become excessively involved in church affairs. They share little else.

An "evangelical school" sees the separation doctrine as the best protection of religion from the political strife and petty self-interest of the secular world. The school draws inspiration from the writings of Roger Williams, the seventeenth-century founder of Rhode Island and the originator of the phrase "wall of separation," a phrase found nowhere in the Constitution or the First Amendment. No Supreme Court majority has adopted the evangelical perspective. American churches with a strong separatist tradition, such as the Southern Baptist, have long endorsed this position.

A "secular school" seeks to wall religion off from politics in order to safeguard secular values against religious passions. Justice Wiley B. Rutledge, dissenting in *Everson,* offered the classic secularist argument against aid to religious groups. "Public money devoted to payment of religious costs, educational or other, brings . . . the struggle of sect against sect for the larger share or for any. . . . The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions." In the view of the secular school, aid is tantamount to establishment, and such aid is unconstitutional. Prohibited aid includes religious instruction and state-enforced prayer in public schools, state funding of school trips, and the customary benediction by clergy at the graduation ceremonies of public high schools.

An "accommodationist school" insists that government must recognize and accommodate the strong religious beliefs held by its citizens. Justice William O. Douglas's opinion in *Zorach v. Clausen,* 343 U.S. 306 (1952), is a clear statement of this position. In upholding programs permitting public school students to leave the campus during regular school hours for

religious instruction, Douglas wrote, "We are a religious people." The government would "show a callous indifference to religious groups" if it failed to accommodate to their religious sensibilities. To fail to accommodate would be to express "hostility," not neutrality, "preferring those who believe in no religion over those who do believe." Provided no one is coerced into attending religious instruction, there is no breach of the Establishment Clause.

Other cases expressing an accommodationist perspective have upheld devotional prayer in legislatures, Sunday-closing laws, state programs providing free nonsectarian textbooks to public and private high schools, and tax deductions for parents of students attending private schools. The Court has also approved state-paid interpreters for a deaf student attending a Catholic high school, tax-exempt status for church property, a manger scene as part of a larger Christmas display on public property, and government-funded buildings at private religious colleges.

The Supreme Court has developed tests to help distinguish between constitutional and unconstitutional accommodations. The so-called *Lemon* test, from *Lemon v. Kurtzman,* 403 U.S. 602 (1971), as developed in later cases such as *Lynch v. Donnelly,* 465 U.S. 668 (1984), protects the value of separatism by requiring the government to show that the primary *purpose* of a program or law is secular, neither advancing nor inhibiting religion. The test also requires that the primary *effect* is secular and that there is no excessive *entanglement,* thus keeping to a minimum any government intrusion on the affairs of a church.

FUTURE CHURCH-STATE RELATIONS IN THE UNITED STATES

The religiosity of the American people has persisted into the modern era. Of the population age eighteen and older, the proportion attending church is virtually the same today as it was in 1950 and higher than in 1850 when the first official census of religious affiliation was taken.

The vitality of religion in the United States is based on religious pluralism and the formal separation of church and state. The absence of an established church not only encourages the proliferation of denominations, because all are free to compete, but also protects churches from excessive entanglement with unpopular governments.

The history of the Establishment Clause challenges the assumption that churches and the government must inevitably conflict. Religiously devout citizens who fear the government's intrusion on their beliefs and religiously skeptical citizens who fear the church's intrusion on their beliefs might seek solace in the easy answer that one is the realm of private action and the other is the realm of public action. U.S. history and Supreme Court decisions teach a different lesson. The resolution of church-state relations may take the form of how much and what kind of religion can coexist peacefully and usefully with how much and what kind of politics.

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See also: Abington School District v. Schempp; Engel v. Vitale; Everson v. Board of Education; Free Exercise Clause; Prayer in Schools; Separation of Church and State; Virginia Statute for Religious Freedom.

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Estes v. Texas (1965)

When flamboyant Texas financier Billie Sol Estes was indicted for swindling in 1962, his celebrity status prompted intense media coverage of the case, including requests by local television stations to broadcast his trial. The media based their claim on the right to a free press as set forth in the First Amendment to the U.S. Constitution. Over Estes's objection, this request was granted, and the pretrial hearing was disrupted by the presence of several bulky and intrusive cameras (plus technicians to operate them), along with a maze of attendant wires strewed around the courtroom floor.

Ironically, the unruly pretrial hearing had the effect of foreclosing most live coverage of the trial itself.

Although the cameras were restricted to a specially constructed booth in the back of the courtroom, there was a constant need for ad hoc adjustment of the rules for broadcasting the proceedings. The end result was that the pretrial hearing was broadcast in its entirety, but at the trial only the prosecution's opening and closing arguments and the delivery of the verdict were transmitted live.

A divided U.S. Supreme Court overturned Estes's conviction in *Estes v. Texas,* 381 U.S. 532 (1965). A four-justice plurality, led by Justice Tom C. Clark, concluded that television cameras posed such overwhelming potential to distort court proceedings that broadcasting a criminal trial constituted an automatic violation of a defendant's Fourteenth Amendment due process rights, even if the defendant could not show any isolable resultant prejudice. The crucial fifth vote to reverse Estes's conviction came from Justice John M. Harlan, who agreed with the plurality that Estes was entitled to a new trial but felt that his fellow justices had gone too far in announcing a flat ban on television coverage. Although he denied he was advocating a case-by-case approach, Harlan's apparent willingness to exclude cameras from only sensationalized cases seemed case-specific.

Notwithstanding the *Estes* ruling, over the next few years several states experimented with pilot programs to televise criminal trials, and the Court evaluated one such experiment in *Chandler v. Florida,* 449 U.S. 560 (1980). A group of Miami Beach police officers convicted of burglarizing a local restaurant relied on *Estes* for their argument that they had been deprived of a fair trial when local television broadcast three minutes of testimony from the prosecution's star witness (a ham radio operator who overheard the officers communicating over their police radios during the burglary).

In a markedly odd opinion, Chief Justice Warren E. Burger upheld the officers' convictions but nevertheless contended that *Estes* had not been overturned. Instead, he claimed that Justice Harlan's concurring opinion in *Estes*, which Burger now reinterpreted as urging a "totality of the circumstances" approach, had long been considered to control the holding in *Estes*, and that Justice Clark's plurality opinion had essentially been disregarded. When a totality-of-the-circumstances approach was applied to the Miami Beach robbery, Chief Justice Burger concluded, the defendants' right to a fair trial was not compromised by the brief snippet of televised testimony.

Although Burger's reading of the facts may have been correct, his reading of the law was hopelessly disingenuous. He based his argument that Justice Harlan's concurrence controlled the holding in *Estes* on the fact that the Supreme Court had used a totality-of-the-circumstances approach in its resolution of the infamous Sam Sheppard murder trial, *Sheppard v. Maxwell,* 384 U.S. 333 (1966). However, the appearance of the "totality of the circumstances" language in *Sheppard* was a function of the fact that the Sheppard trial was not broadcast live and was not raised as a means of reevaluating *Estes.* The transparency of Burger's action was further revealed by the fact that *Estes* and *Sheppard* were written by the same man—Justice Clark. Thus, if Burger's account were true, it necessarily meant that one year after cobbling together a fragile coalition supporting a flat ban on televising criminal trials in *Estes,* Clark completely disavowed his handiwork in *Sheppard.* Burger's claim that *Estes* mandated a case-by-case approach to televising criminal trials was, to say the least, highly implausible, and it prompted a sharp response from Justice Potter Stewart, who maintained that the convictions in *Chandler* could not be sustained unless *Estes* was overruled.

To the degree that *Estes v. Texas* remains good law, it stands for the proposition that criminal trials may be closed to television without offending the First Amendment's protection for a free press, although *Chandler v. Florida* makes it clear that, in certain circumstances, criminal trials may be televised without offending the Due Process Clause of the Fourteenth Amendment.

Steven B. Lichtman

See also: Due Process of Law; First Amendment; Sixth Amendment; Totality-of-Circumstances Test.

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Eugenics

Eugenics is a philosophy that supports the improvement of the human species through human engineering and selection. Eugenics has been inextricably linked to nationalism, racism, Nazism, and white supremacy, and it attempts to use science to support claims that some peoples are naturally superior to others. This thinking, of course, leads advocates to call for the banning of civil rights for certain individuals. Eugenicists have continually used biology to substantiate their claim that social status, mental deficiencies, criminality, and other traits can be linked to heredity. Supporters of the philosophy attempt to attain racial purity by limiting social interaction and reproduction. Eugenicists' attacks have targeted the insane, the mentally and physically handicapped, criminals, homosexuals, foreigners, peoples of different color and race, and the poor.

Although eugenic theories have been associated mostly with Nazi Germany's racial purification plan, which during World War II led to the deaths of millions of Jews and other non-Aryan peoples, the eugenics movement can also be found in America's history. The U.S. eugenics movement rose with the progressive movement and peaked in the late 1920s, but it influenced thinking both before and after this time.

The American eugenics movement can be divided into three main stages. Although the term "eugenics" was not developed until 1883, precursors of the philosophy appeared in the first stage of American eugenics—the suppression of blacks. The second and third stages of America's embrace of eugenics—the fight against immigration and the use of sterilization as a method of reproductive control—occurred during the actual eugenics movement in the late 1800s and early 1900s, culminating in the late 1920s with the endorsement of the movement's ideals by the U.S. Supreme Court.

The first stage of American eugenic thought appeared during the enslavement of blacks, the Civil War, and the period of Reconstruction, to approximately 1880. Most notable from this stage in U.S. history is the invocation of science to conclude that one race was physically superior to another race, even before eugenicists embraced science decades later. Proponents of eugenics used physical measurements of slaves to conclude that they were inferior to the white race.

Alleged scientific advances led to alternative methods for determining the inferiority of certain races, and those methods were directed toward a second group in the late 1800s and the early 1900s. Americans fought to reduce the numbers of immigrants, claiming they were taking jobs from the pure races and were polluting the white race through intermarriage. In 1912, Henry Herbert Goddard began administering IQ tests to immigrants who arrived at Ellis Island, near New York City. He concluded that approximately 60–80 percent of immigrants were "feeble-minded" and would become social dependents on the state. Although Goddard never clearly defined the term "feeble-minded," his tests led to restrictive immigration legislation in 1917 and 1924 that was not overturned until 1965.

The American eugenics movement peaked in the 1920s when states began enacting legislation for the forced sterilization of the mentally ill, the physically ill, and criminals. In 1907, Indiana became the first state to pass such legislation, creating a domino effect in other states. In all, approximately thirty-three states enacted sterilization legislation, and scholars believe that over 70,000 people were sterilized in the United States as a result of the eugenics movement. In *Buck v. Bell*, 274 U.S. 200 (1927), the Supreme Court endorsed sterilization as an efficient means of racial purification.

In *Buck,* the Supreme Court reviewed Virginia's Eugenical Sterilization Act, which allowed inmates in the state's asylum to be sterilized against their will. In reviewing the state's attempt to sterilize Carrie Bell, Justice Oliver Wendell Holmes Jr. in his majority opinion incorporated eugenic views and upheld the legislation. Accepting a genetic link to "feeble-mindedness," he argued that forced sterilization would

prevent future generations of the mentally and physically deficient from burdening society.

Although the eugenics movement waned in the United States during World War II, eugenic ideologies continued. In 1942 the Supreme Court issued an opinion in *Skinner v. Oklahoma,* 316 U.S. 535. This time a unanimous Court struck down Oklahoma's Habitual Criminal Sterilization Act, holding that forced sterilization of habitual criminals violated the Equal Protection Clause of the Fourteenth Amendment. Although the case established reproduction as a fundamental right, it did not overturn *Buck.* The Court distinguished the mentally deficient from habitual criminals, concluding that although there was proof that mental deficiencies were hereditary, there was no proof that criminality was.

By the late 1970s, most U.S. sterilization laws were repealed, immigration laws became less strict, and the civil rights movement had reaffirmed equal protection for African Americans. Advances have been made in individual rights in regard to reproduction, marriage, and privacy, but effects from the eugenics movement can still be felt. Some eugenics critics argue that eugenic ideals have been aided by birth control and abortion, with the state directing advertising toward African American and Native American women and the poor. Others point to the "red scare" of the 1950s, when Communists were believed to have infiltrated government, as an extension of the eugenics movement, and they cite America's continued fear of immigrants and foreign nationals. Such influences to the contrary notwithstanding, current cases affirm that adult Americans are guaranteed a constitutional right to reproduce and to continue the human species, without judgments as to their intellect.

Virginia L. Vile

See also: Buck v. Bell; Cloning Human Beings; DNA Testing; Holmes, Oliver Wendell, Jr.

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Everson v. Board of Education (1947)

In *Everson v. Board of Education,* 330 U.S. 1 (1947), the U.S. Supreme Court held that the First Amendment protections for religion apply to actions of the states as well as the federal government, and that the amendment's Establishment Clause ("Congress shall make no law respecting an establishment of religion") was not violated by a New Jersey statute that through tax benefits reimbursed parents of parochial school children the cost of busing their children to religious schools. *Everson* is a landmark decision not so much because it gave parents a tax benefit for the expense of having their children bused to private schools, but rather because it incorporated the First Amendment's Establishment Clause as applicable against the states. This incorporation meant that states, not just the federal government, were responsible for ensuring adherence to the First Amendment's provisions.

In *Everson,* the parents of a New Jersey school pupil sued the local board of education. The father, Arch Everson, alleged that the New Jersey statute in question violated his right to due process of law and that it violated the Establishment Clause of the First Amendment. Justice Hugo L. Black, writing for the majority, engaged in a broad discussion of the history of church-state law in the United States. It should be noted that his description contrasts sharply with the overview provided by Justice Wiley B. Rutledge in the dissenting opinion. These differing characterizations of church-state history in the United States are the subject of much debate among legal historians. The Court has accepted these characterizations of U.S. history as true and has struggled with church-state law in the years since *Everson.*

The *Everson* majority first addressed the question of a whether the parents' rights suffered under the Due Process Clause of the Fourteenth Amendment.

According to the Court, the success of this claim rested on the question of whether the state statute served a public purpose. The Court held that the Due Process Clause was not violated because there was a public purpose behind the statute. The Court's discussion of the history of church-state law in America led the majority to hold that the Establishment Clause should receive the same application and broad interpretation as the Free Exercise Clause of the First Amendment did at that time. The Court held that the Establishment Clause requires that the federal and state governments shall not pass laws that aid one religion, aid all religions, or prefer one religion over another. Nor may the government force an individual to go to or to remain away from church. The Court quoted Thomas Jefferson, saying the law was intended to erect "a wall of separation between church and state." The critical characteristic of appropriate state action is that it be neutral in its relationship with groups of religious believers and nonbelievers. It does not, however, require that the state take an adversarial position against religion. Interestingly, the Court also held that New Jersey's statute permitting the use of tax-raised funds to pay for bus fares to parochial school did not violate the Establishment Clause.

Since *Everson,* the Court has grappled with that wall that has been erected between church and state. In *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the Court established a three-pronged test for determining when a statute would not violate the Establishment Clause: (1) A statute must have a valid secular purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster an excessive entanglement with religion. The *Lemon* test laid its foundation on the principles forwarded by the Court in *Everson*, but it has come under significant fire by courts and legal scholars. The critical question continues to be whether a state or federal regulation has the forbidden effect of advancing or inhibiting religion, and if so, it cannot stand.

Laurie M. Kubicek

See also: Engel v. Vitale; Establishment Clause; *Lemon v. Kurtzman;* Prayer in Schools; Religious Symbols and Displays; Separation of Church and State.

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Evolution

States and municipalities have attempted to limit the teaching of evolution based on religious objections. Such a governmental restriction raises First Amendment concerns, because it supposedly stifles free speech and dictates what speech is permissible. Evolution is a widely accepted scientific theory premised on the view that the earth and its life are the product of change over long periods of time. It posits that the higher-order species have evolved through natural selection from lower-order species. Natural selection embodies the notion of the "survival of the fittest," both within species (meaning that the fittest compete and the victors procreate) and across species (as different species compete for resources).

The father of the theory of evolution was naturalist Charles Darwin, whose writings in the mid-1800s took the scientific world by storm, especially with the publication of *On the Origin of Species* (1859). Darwin wrote in *The Descent of Man* (1871), "We thus learn that man is descended from a hairy, tailed quadruped, probably arboreal in its habits, and an inhabitant of the Old World." Most scientists initially accepted the evolutionary theory, but its ramifications for the origins of human existence led to a fiery fundamentalist Christian outrage.

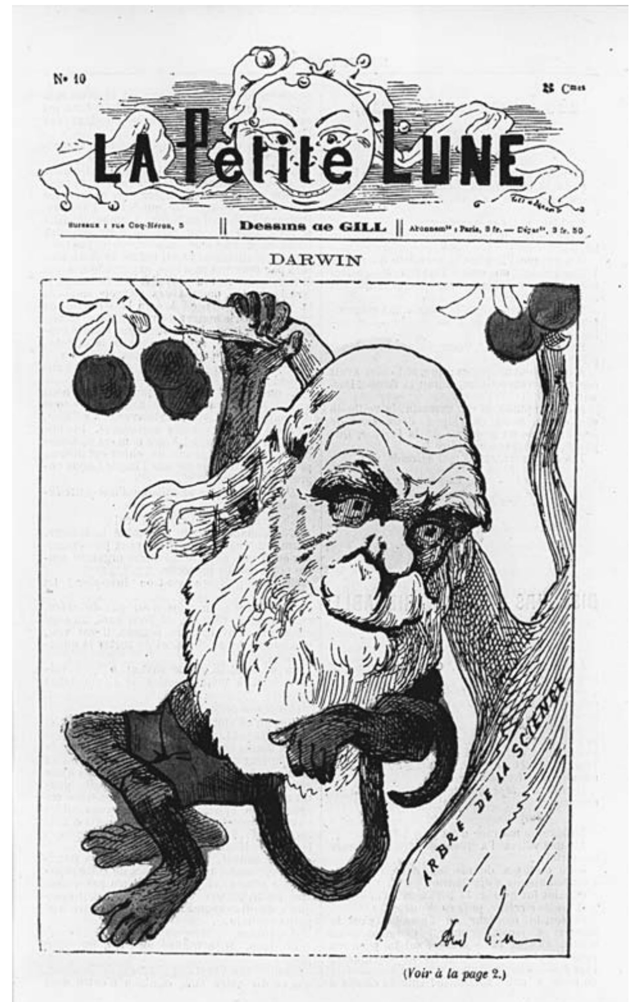
This response was based on the fact that some aspects of evolutionary theory conflicted with the creation story in the Bible. Genesis 1:27 states: "So God created man in his own image, in the image of God he created him; male and female, he created them," and Genesis 2:7 sets forth: "And the Lord God formed man of the dust in the ground, and breathed

into his nostrils the breath of life; and man became a living soul." In short, evolution seemed to call into question the validity of the biblical creation story that portrays God as the divine creator, instead arguing that the state of the human form is the result of natural forces over millions of years.

This was the context in which the Tennessee state legislature in 1925 passed an antievolution statute making it "unlawful for any teacher in any of the Universities, Normals and all other schools of the State which are supported in whole or in part by the public school funds of the State, to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." Called the Butler Act, the law led to one of the most famous court dramas in U.S. history, the *Scopes* "monkey trial." John Scopes, a public high school teacher and football coach, agreed to challenge the act in a test case arising out of Dayton, Tennessee.

Given the gravity of the question at hand, namely the origin of humankind, along with the strongly held beliefs on each side of the debate, it is not surprising that two national figures argued the case in court. William Jennings Bryan, a devout Christian and influential Democratic politician, acted as special prosecutor. Defending Scopes was Clarence Darrow, an agnostic attorney considered the greatest trial lawyer of his time, whose fees were paid by the American Civil Liberties Union. The initial trial was decided in favor of the state, and Scopes was fined $100 for violating the Butler Act. He appealed to the Tennessee Supreme Court, which in *Scopes v. State of Tennessee,* 154 Tenn. 105 (1927), overturned the lower-court conviction on a technicality (the judge had set the punishment, but the state constitution required it to be set by jury), while upholding the constitutionality of the state statute. The reversal on a technicality essentially denied Scopes and his backers the chance to appeal to the U.S. Supreme Court, and the case that held the attention of the nation faded away on a minute legal detail.

The U.S. Supreme Court finally weighed in on the issue of evolution in 1964 in *Epperson v. Arkansas,* 393 U.S. 97 (1968). On the tail of the *Scopes* decision, Arkansas passed the Rotenberry Act in 1928, which forbade teachers in any state school to teach the "theory or doctrine that mankind ascended or descended from a lower order of animals" or to use a textbook to that effect. Nearly four decades later, a biology teacher, Susan Epperson, sought a declaratory judgment (a petition to a court to declare a law unconstitutional) overturning the state law even though it was not being enforced at the time. She had been provided with a textbook that included discussion of evolution, and she thought it was her responsibility at least to acquaint her students with it.



This caricature shows English naturalist Charles Darwin as a monkey hanging from the tree of Science. The cartoon was a response to the 1871 publication of his book *The Descent of Man.* *(Library of Congress)*

Unlike *Scopes,* this case quickly moved through the state courts to the U.S. Supreme Court. The constitutional question was whether the Arkansas law con-

stituted a state establishment of religion, which is prohibited under the First Amendment to the Constitution. Justice Abe Fortas penned the majority opinion, ruling that Arkansas's statute violated the Establishment Clause since it "selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is with a particular religious interpretation of the book of Genesis by a particular religious group." Justice Hugo L. Black, concurring, raised the concern that the majority's reasoning did not actually achieve "religious neutrality" because there were strong views that evolution was actually antireligious, and forcing its inclusion improperly tipped the neutrality balance.

It was this notion of neutrality that opened the door for a law that led to *Edwards v. Aguillard,* 482 U.S. 578 (1987). Louisiana passed a law commonly called a "balanced-treatment act" mandating the equal treatment of creation science and evolution in the public schools. Creationism holds that humans were created by God in the beginning of time in accordance with a very literal understanding of the biblical story in Genesis. By mandating balanced treatment, Louisiana's law seemed to align with the notion of neutrality embodied in Justice Black's concurrence in *Epperson.* Justice William J. Brennan Jr. delivered the opinion of the Court in *Edwards,* finding that "[t]he pre-eminent purpose of the . . . legislature was clearly to advance the religious viewpoint that a supernatural being created humankind." This was, in short, a violation of one of the three prongs of the *Lemon* test, from *Lemon v. Kurtzman,* 403 U.S. 602 (1971), in that a law's primary effect must be neutral with respect to religion, and the Court therefore found the Louisiana law unconstitutional. Justices Antonin Scalia and Chief Justice William H. Rehnquist dissented, accepting the law as serving the secular state purpose of advancing academic freedom.

There is a clear tension between the Establishment Clause issue that arises from a balanced-treatment statute and the Free Exercise Clause concerns of fervent believers who sincerely judge that their rights are violated when they or their children are exposed to evolution in public schools. The strength of opinions on the question of human origin, and the ongoing tension between establishment of religion and free exercise of it, ensure that the debate will continue in the courts and perhaps in the classroom.

James F. Van Orden

See also: Bryan, William Jennings; Censorship; Creation Science; Darrow, Clarence; Establishment Clause; *Lemon v. Kurtzman.*

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Evolving Standards of Decency

The phrase "evolving standards of decency" implicates an enduring debate regarding judicial interpretation: How should the courts interpret foundational principles that the framers enshrined in the Constitution, such as the Eighth Amendment's ban on "cruel and unusual punishments" and the Fifth and Fourteenth Amendments' command to render "due process of law"? The interpretative implications for applying the "evolving standards of decency" criterion to the ban on "cruel and unusual punishments" have presented difficult issues. Defining what is a "cruel and unusual punishment," and how to recognize it, at first seems to clarify constitutional debate, but instead the debate merely shifts to another level.

A classic statement of the application of "evolving standards of decency" to the Eighth Amendment is in Justice Joseph McKenna's opinion in *Weems v. United States,* 217 U.S. 349 (1910):

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. . . . The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.

To be sure, not all Supreme Court justices agree with Justice McKennan's "living Constitution." Some would agree with Justice Antonin Scalia, who has declared that "the Constitution that I interpret and apply is not living but dead—or, as I prefer to put it, enduring." Representative of the argument against using "evolving standards of decency" is Justice Hugo L. Black's statement in *McGautha v. California,* 402 U.S. 183 (1971). Concurring in a decision that refused to invalidate capital punishment, Justice Black stated,

> The Eighth Amendment forbids "cruel and unusual punishments." In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment. Although some people have urged that this Court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never believed that lifetime judges in our system have any such legislative power.

The first case to approach a definition of "cruel and unusual punishment" was *Wilkerson v. Utah,* 99 U.S. 130 (1879), which involved a person sentenced to death under a Utah capital offense statute. Although Justice Nathan Clifford upheld the punishment by simply declaring that "punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included . . . within the meaning of the eighth amendment," he relied on the practice at common law. He stated that "difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; [but] it is safe to affirm that punishments of torture, such as those mentioned by the [common law] commentators . . . are forbidden by that amendment to the Constitution."

The "evolving standards of decency" criterion as a measure for the Court's interpretation of the "cruel and unusual" clause began to develop in earnest in 1910 with *Weems v. United States,* 217 U.S. 349, a case arising in the Philippines that involved a punishment of fifteen years' imprisonment for falsifying payments of 208 and 408 pesos to public employees. The *Weems* Court invalidated the punishment of a fine and imprisonment at hard labor for twelve to twenty years with the prisoner carrying an ankle chain. The prisoner also was perpetually barred from political rights, including holding office, and was subject to lifetime surveillance. All these punishments on one person also were invalidated. Defining "cruel and unusual punishment," the *Weems* Court outdistanced *Wilkerson v. Utah* by examining circumstances that occurred after the Constitution was adopted.

Justice White, dissenting, espoused a narrow interpretative approach that, like Justice Black's position in *McGautha v. California,* restricted the examination to penalties existing when texts were adopted. He declared that "the cruel punishments against which the bill of rights provided were the atrocious, sanguinary and inhuman punishments which had been inflicted in the past upon the persons of criminals. This being certain, the difficulty of interpretation, if any is involved, is in determining what was intended by the unusual punishments referred to and which were provided against."

The first major Supreme Court decision employing the "evolving standards of decency" concept and the phrase was *Trop v. Dulles,* 356 U.S. 86 (1958), which invalidated a statute that provided for termination of U.S. citizenship for soldiers convicted of wartime desertion. Chief Justice Earl Warren, writing for the Court and pointing to a "United Nations' survey of the nationality laws of 84 nations that revealed only two countries, the Philippines and Turkey, that impose denationalization as a penalty for desertion," forthrightly declared that the "Amendment must draw its meaning from the evolving standards of decency

that mark the progress of a maturing society." He adopted the comments from the lower-court opinion: "In my faith, the American concept of man's dignity does not comport with making even those we would punish completely 'stateless'—fair game for the despoiler at home and the oppressor abroad, if indeed there is any place which will tolerate them at all."

Justice Black in dissent, again looking to the situation existing at the time the text was adopted, argued that "to insist that denationalization is 'cruel and unusual' punishment is to stretch that concept beyond the breaking point. It seems scarcely arguable that loss of citizenship is within the Eighth Amendment's prohibition because it is disproportionate to an offense that is capital and has been so from the first year of Independence."

One of the most notable decisions to use the "evolving standards of decency" approach was *Furman v. Georgia,* 408 U.S. 238 (1972), in which the Court declared in a per curiam (by the Court) opinion without any elaboration that the imposition and carrying out of the death penalty in the two cases before the Court constituted cruel and unusual punishment violating the Eighth Amendment. The noteworthy feature of *Furman v. Georgia* is not so much that the "evolving standards of decency" concept was used as a yardstick to invalidate capital punishment in Georgia and Texas, but that both the majority and the minority applied this standard. This case represents the fact that although the Supreme Court firmly entrenched the "evolving standards of decency" criterion in U.S. constitutional law, it merely moved the argument from what existed in the eighteenth century to an equally contentious debate concerning contemporary standards.

Joining the majority in *Furman,* Justice William O. Douglas opined that the proscription of cruel and unusual punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Justice Brennan's opinion was typical of the majority. Quoting from *Trop v. Dulles,* he said the Court's decision would be "a simple task were we required merely to measure a challenged punishment against those that history has long condemned. That narrow and unwarranted view of the Clause, however, was left behind with the 19th century." Justice Harry A. Blackmun, typical of the minority position, argued that standards of decency had not evolved. He asserted that to be sure "the Court [is] evidently persuaded that somehow the passage of time has taken us to a place of greater maturity and outlook. [But] the argument, plausible and high-sounding as it may be, is not persuasive, for it is only one year since *McGautha,* only eight and one-half years since *Rudolph,* 14 years since *Trop,* and 25 years since *Francis,* and we have been presented with nothing that demonstrates a significant movement of any kind in these brief periods."

A very recent application of the "evolving standards of decency" argument is *Atkins v. Virginia,* 536 U.S. 304 (2002). A Virginia jury sentenced a defendant to death upon his conviction of first-degree murder. He maintained that the jury could not sentence him to death because he was mentally retarded. The Supreme Court in a six–three decision held that executing mentally retarded criminals violated the Eighth Amendment. Noting the significance of U.S. and state legislation on the issue, Justice John Paul Stevens stated that the "large number [eighteen] of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. . . . The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it."

The *Atkins* Court also considered additional evidence that it claimed made it clear that a much broader social and professional consensus had formed against executing mentally retarded individuals. For example, several organizations with germane expertise had adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. This included testimony by the American Psychological Association and by religious groups reflecting Christian, Jewish, Muslim, and Buddhist traditions. The Court also considered views from the world community and found that the imposition of the death penalty for crimes committed by mentally retarded offenders was overwhelmingly disapproved.

Chief Justice Rehnquist in dissent recognized that the "question presented by this case is whether a na-

tional consensus deprives Virginia of the constitutional power to impose the death penalty on capital murder defendants" that are mentally retarded. Nonetheless, citing the fact that twenty states permitted mentally retarded convicts to be executed, he argued that "in making determinations about whether a punishment is 'cruel and unusual' under the evolving standards of decency embraced by the Eighth Amendment, we have emphasized that legislation is the 'clearest and most reliable objective evidence of contemporary values.' " Rehnquist also lodged a protest against the majority's placing "weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion."

Although the "evolving standards of decency" test may have held promise as a means to make the Eighth Amendment clearer by considering not only what was, but what has been, what is, and even what might be, it appears only to have moved the debate from what was to what has been, what is, and what might be, all of which are no less problematical.

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See also: Cruel and Unusual Punishments; Death Penalty for the Mentally Retarded; Eighth Amendment; *Trop v. Dulles.*

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Ewing v. California (2003)

In *Ewing v. California,* 538 U.S. 11 (2003), the U.S. Supreme Court upheld a state law under which an individual was sentenced to twenty-five years to life for stealing three golf clubs worth $399. In ruling on this case, the Court effectively upheld what has come to be known as "three strikes and you're out" laws. At issue was whether California's mandatory sentencing law violated the Eighth Amendment to the Constitution prohibiting cruel and unusual punishment.

As a result of increased crime rates in the United States in the early 1990s, many states got tough on crime and passed laws setting out mandatory minimum sentences for individuals who were repeat felony offenders. One type of mandatory minimum law came to be known as the "three strikes" law. Generally, under a three-strikes law, a person who commits a second felony receives an enhanced punishment for the second offense, and one who commits a third offense gets an even greater punishment, perhaps even life imprisonment.

Since 1993 twenty-six states and the federal government have enacted some variation of a three-strikes law. California passed a three-strikes law in 1993 as a result of the abduction and murder of Polly Klass by Richard Davis, a repeat felon. The California three-strikes law was similar to those found in other states and included provisions for individuals convicted of a second or third felony.

In *Ewing v. California,* Gary Ewing was on parole after serving a nine-year prison term for first-degree robbery. Prior to that, he had been involved in numerous crimes, including robbery and burglary. Ewing entered the pro shop at a golf course, stole three clubs valued at $399, and later was caught and charged with grand theft. Ewing asked the trial judge to treat the grand theft as a misdemeanor and not a felony, and he also asked the judge to ignore his previous convictions, all with the purpose of avoiding being sentenced under the three-strikes law. The judge refused, counted the grand theft as a felony, and also counted Ewing's four prior felony convictions. This meant that because Ewing had at least two felonies, the judge sentenced him to jail for twenty-five years to life. A state appellate court affirmed the sentence, the California Supreme Court declined to review, and the case was accepted for review by the U.S. Supreme Court.

Ewing argued that his sentence violated the Eighth Amendment prohibition on cruel and unusual punishment in that twenty-five-years-to-life imprisonment was disproportionate to the crime. Relying upon *Solem v. Helm,* 463 U.S. 277 (1983), in which the

Court held that the Eighth Amendment prohibited "a life sentence without possibility of parole for a seventh nonviolent felony," Ewing contended that a possible life sentence for the stealing of three golf clubs worth less than $400 was unconstitutional. Justice Sandra Day O'Connor, however, writing for a split majority in a five–four opinion, rejected that argument.

First, the Court acknowledged that in addition to limiting capital cases, the Eighth Amendment did contain a narrow proportionality principle that applied to noncapital murder cases. However, the Court said that it would strike sentences only if they were grossly disproportionate to the crime. Citing *Rummel v. Estelle,* 445 U.S. 263 (1980), in which the Court held that it did not violate the Eighth Amendment for a state to sentence a three-time offender to life in prison with the possibility of parole, the O'Connor majority in *Ewing* contended that enhanced sentences under recidivist statutes like the California three-strikes law, which was aimed at deterring and incapacitating repeat offenders, served an important state interest and were therefore constitutional. Moreover, the Court noted, although there might be serious questions regarding how effective three-strikes laws were in deterring criminals, questions about effectiveness and the types of punishments enacted were matters of legislative discretion and not issues for the judiciary to address.

Justice O'Connor was joined by Justices William H. Rehnquist and Anthony M. Kennedy. Justice Antonin Scalia wrote a concurrence arguing that the Eighth Amendment banned only certain modes of punishment, not duration. Justice Clarence Thomas issued a concurrence upholding the opinion but further arguing that the Eighth Amendment contained no proportionality requirement. In dissent, Justices John Paul Stevens and Stephen G. Breyer, joined by Justices Ruth Bader Ginsburg and David H. Souter, contended that the Eighth Amendment did in fact contain a proportionality requirement and that Gary Ewing's sentence was unconstitutional.

Ewing was an important case because it effectively diminished the scope of judicial review for certain types of sentences, giving Congress and state legislatures significant ability to enact tough and lengthy punishments.

David Schultz

See also: Cruel and Unusual Punishments; Eighth Amendment; Proportionality of Sentences; Three-Strikes Laws.

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Ex Post Facto Laws

An ex post facto law is one that punishes individuals for acts that were not criminal when they were committed or that enhances penalties for crimes previously committed. This was an injustice the founding fathers of the United States associated with the government of Great Britain and hoped to prevent. The framers of the U.S. Constitution accordingly provided in Article I, Section 9 that "no bill of attainder [a legislative punishment without benefit of a trial] or ex post facto law shall be passed," a limitation on Congress that was also applied to the states in Article I, Section 10. These clauses require that legislatures must make only decisions that apply prospectively. Although the ex post facto law is clearly forbidden,

courts have been left to define the term and to determine when a law applied to past acts violates this constitutional measure.

In *Calder v. Bull,* 3 U.S. 386 (1798), the U.S. Supreme Court set out four categories of laws that would violate the Ex Post Facto Clause of the Constitution. First, if any law retroactively makes an action a crime though it was innocent when done, that law is ex post facto and unconstitutional. Second, a law that makes a crime greater than it was when it was committed is ex post facto and unconstitutional. Third, a law that increases the punishment for a past crime is ex post facto and unconstitutional. Fourth, a law that alters the rules of evidence to the detriment of the accused is ex post facto and unconstitutional. These four types of laws can be applied only to crimes or actions committed after the effective date of the law. The four categories constituted the test for ex post facto violations until the Supreme Court clarified with two later cases.

The Supreme Court set out a two-part test in *Weaver v. Graham,* 450 U.S. 24 (1981), clarifying that an ex post facto violation can exist only when the law is applied retroactively and when the change in the law has been substantive rather then procedural. Because the purpose of prohibiting ex post facto laws is to ensure that individuals have notice of the consequences of their actions before they are committed, procedural changes that do not affect the substantive rights and obligations of the individual do not trigger ex post facto review. The Supreme Court further explained its decisions on ex post facto laws in *Collins v. Youngblood,* 497 U.S. 37 (1990), stating that laws changing the definition of an offense or increasing its punishment are not defensible because they affect the substance of the law applied retrospectively and therefore create an ex post facto violation.

Because only criminal penalties can be ex post facto violations, a court must decide if a law that applies retroactively is a criminal penalty. In doing so, a court will look at more than whether the law states that it is or is not a criminal penalty. In fact, the Supreme Court has set out several factors for determining whether a law is a criminal penalty, including whether it will result in a restraint such as imprisonment and whether the goals the law seeks to accomplish by the penalty are traditional aims of punishment (such as retribution or deterrence). The intent of the legislators when they passed the bill is very important in making this determination, and a court may look at legislative history such as committee and debate records in order to identify that intent.

Courts have used these tests to examine many laws challenged as ex post facto violations. For instance, in *Beazell v. Ohio,* 269 U.S. 167 (1925), when a retroactively applied law that required defendants accused of the same crime to be tried jointly was challenged as ex post facto, the Supreme Court decided that the change in the law was procedural and therefore not an ex post facto violation. Likewise, a law that changed the location where a trial was to be held was challenged as ex post facto when applied retroactively, but the Supreme Court ruled in *Gut v. Minnesota,* 76 U.S. 35 (1869), that this, too, was a procedural change in the law rather than a change affecting the substantive rights of the defendants. Similarly, in *Smith v. Doe,* 538 U.S. 84 (2003), the Court decided that an Alaska law requiring the registration of convicted sex offenders was primarily civil and nonpunitive in purpose and was therefore constitutional.

On the other hand, courts have struck down laws when those laws satisfy the tests laid out for ex post facto violations. One example of an unconstitutional ex post facto law was a statute that denied bail to a defendant who had been convicted and was awaiting the appeal of his case. In *Cunningham v. State,* 423 So. 2d 580 (Fla. Dist. Ct. App. 2d Dist. 1982), the Florida Court of Appeals decided that because the defendant's crime took place before the law was passed, his substantive right to bail pending his appeal had been taken away and the law was therefore an ex post facto violation.

Another such violation occurred when the Utah legislature altered a law to allow uncorroborated testimony by an accomplice to be sufficient to support a conviction. The law at the time the defendant committed the crime was that a conviction could not be had on the testimony of an accomplice, unless the accomplice's testimony was corroborated by other evidence that in itself connected the defendant to the commission of the offense. In *State of Utah v. Schreuder,* 726 P.2d 1215 (Utah 1986), the court found this

to be an ex post facto violation because it lessened the amount of evidence needed to convict a defendant, thus affecting his substantive rights.

In *Lynce v. Mathis,* 519 U.S. 433 (1997), the U.S. Supreme Court found an ex post facto violation when a prisoner challenged a state statute that had retroactively canceled his provisional early release credits. The credits were awarded to alleviate prison overcrowding, and the Court held that canceling them increased the prisoner's punishment and could not be upheld.

The Ex Post Facto Clause of the Constitution preserves the separation of powers between the legislature and the judiciary by forbidding the legislature to pass laws that act in a judicial capacity to punish crimes that have already taken place. Appropriately, it has rested in the hands of the judiciary to decide when the legislature has overstepped itself in this regard and to ensure that the legislature enacts only criminal laws and penalties that affect the judicial system prospectively.

Brandi Snow Bozarth

See also: Calder v. Bull; Judicial Review.

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Exclusionary Rule

The exclusionary rule states that illegally obtained evidence may not be used at a trial to convict a person of a crime. The importance of this rule lies both in the restraints it places upon the ability of police to search individuals illegally and in its protection of privacy rights.

The constitutional origins of the exclusionary rule grow out of the Fourth Amendment to the U.S. Constitution. This amendment generally requires that searches by the government of an individual's person, home, or possessions cannot occur unless (1) there is probable cause (a good reason to suspect the individual has done something illegal) and (2) a warrant is issued to the police by a neutral magistrate.

Yet the issue underlying the exclusionary rule involves evidence: What should be done with evidence that has been illegally obtained, for example, by a warrantless search? In *Olmstead v. United States*, 277 U.S. 438 (1928), Justice Louis D. Brandeis argued in dissent that evidence obtained from an illegal wiretap should not be admitted in court because it violated the Fourth Amendment. Instead, this evidence should be excluded from the trial as a way to protect the privacy rights of the accused.

The first instance of the application of the exclusionary rule was in *Weeks v. United States*, 232 U.S. 383 (1914), in which the Supreme Court applied it against the federal government. In *Wolf v. Colorado*, 338 U.S. 25 (1949), however, although the Court held that the Fourth Amendment did apply to the states, it rejected the claim that the exclusionary rule also applied. But the Court reversed *Wolf* in the landmark case *Mapp v. Ohio*, 367 U.S. 643 (1961), and held that the exclusionary rule did apply to states such that evidence obtained in illegal searches and seizures could not be used to convict an individual.

The Supreme Court decision in *Mapp* was very controversial and remains so to this day. Some critics claim that the exclusionary rule makes it harder for police to catch and convict criminals because law enforcement authorities are limited in how they can obtain evidence. In addition, some argue that excluding evidence of a crime makes no sense. Justice Benjamin N. Cardozo once remarked that it made no sense to let the guilty go free simply because a police officer made a mistake and undertook an illegal search. Instead, opponents of the exclusionary rule contend that perhaps there are other remedies to address illegal searches besides excluding the evidence. For example, some advocate letting victims of illegal searches sue the police for violation of their privacy rights.

In response, Justice William J. Brennan Jr. and other supporters of the exclusionary rule have argued

that the only way to place limits on unconstitutional police behavior is to exclude the illegally obtained evidence. Their argument is that the exclusion of the evidence serves as a deterrent upon police and illegal searches. Moreover, civil lawsuits against the police are not effective remedies for violation of the Fourth Amendment not only because of the cost and difficulty of bring a suit against a police officer, but also because individuals who are the victims of illegal searches may be convicted for the crimes they have committed and therefore would not be viewed very sympathetically by juries.

The exclusionary rule is shrouded by two myths or misperceptions. First, opponents of the rule suggest that many guilty individuals go free because of the exclusion of certain types of evidence. There is little support for this claim, however: Few defendants ever walk away completely free as a result of the exclusionary rule.

A second misconception surrounding the exclusionary rule is that illegally obtained evidence cannot be used at all. This is not true. The rule only bars the use of illegally obtained evidence at trial, for the purpose of convicting an individual. The Supreme Court since *Mapp* has carved out several exceptions to the exclusionary rule, permitting illegally obtained evidence to be used in grand jury proceedings, to impeach those accused of crimes if they testify at trial, and to assist in making sentencing decisions. In addition, the Supreme Court has also carved out numerous exceptions to when a search warrant is required, giving police broad authority to undertake warrantless searches in many cases. Thus, the exclusionary rule, though an important tool for protecting individual liberties, is nonetheless quite restricted in its application.

To this day the exclusionary rule is still under attack. For example, after the terrorist attacks on New York City and Washington, D.C., on September 11, 2001, Congress passed the Patriot Act to make it easier for law enforcement both to get search warrants and to undertake illegal searches and use that evidence in trial. However, the Supreme Court so far has not been willing to relax the exclusionary rule in light of the war on terrorism.

David Schultz

See also: Fourth Amendment; Fruits of the Poisonous Tree; *Mapp v. Ohio;* Patriot Act; Right to Privacy.

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Executive Orders

An executive order is a document issued by the president of the United States that has the force of law. In some cases, executive orders can threaten civil liberties, as occurred during World War II when the president ordered the relocation of Japanese Americans to internment camps. All presidents have issued these orders to create and control executive branch agencies; to implement statutes, treaties, and executive agreements; and to accomplish their domestic and foreign policy objectives. No one knows how many orders have been issued. There is neither a commonly accepted definition of executive orders nor any clear distinction between them and a presidential proclamation. Some proclamations could be classified as executive orders, such as George Washington's 1793 proclamation of neutrality, Abraham Lincoln's 1863 Emancipation Proclamation, and Gerald Ford's 1975 proclamation pardoning former president Richard Nixon for any possible wrongdoing in connection with the Watergate incident (the bungled burglary of Democratic National Committee headquarters in the Watergate complex by individuals with connections to the Nixon administration and the subsequent attempted cover-up). Further confusing matters is that executive orders were not numbered until 1862, not systematically numbered until 1907, and not published in the *Federal Register* until 1935. As of April 2003, the numbered series totaled 13,290 executive orders.

Presidents have used executive orders to create task forces, commissions, and advisory committees; to implement congressional statutes creating government agencies and authorizing their reorganization; and to promulgate rules governing agency personnel and pro-

cedures and public participation in federal agency decision-making. President Ronald Reagan relied upon the orders of Presidents Gerald Ford and James

that enhanced his power as chief executive by granting the Office of Management and Budget the authority to conduct cost-benefit analyses of proposed agency rules. Presidents have also issued executive orders to limit access to government information, outlaw racial discrimination, and, during World War II, to mandate the relocation of Japanese Americans and to order government seizure of the steel mills. Such actions have raised significant questions about whether the president has the constitutional authority to issue such orders and whether they intrude upon congressional power and diminish individual freedom and equality.

Presidents have restricted public access to national defense and foreign policy information held by federal agencies through the exemption granted by express congressional authorization (Exemption 1) in the Freedom of Information Act of 1974 (FOIA) to use executive orders in establishing criteria for public access to such information. When the administration of President Richard M. Nixon denied Congress information on an underground nuclear test, even though the FOIA provides that the exemption does not apply to Congress, the U.S. Supreme Court held in *United States v. Mink,* 410 U.S. 73 (1973), that it had no

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authority to examine the documents and decide the issue of congressional access. The *Mink* decision prompted Congress to amend the FOIA in 1974 to require that agencies adopt rules to promote access and enhance judicial review. Since then, presidents have used executive orders to alter the Exemption 1 information available for disclosure. President Reagan's Executive Order 12,600 (1987) provided that information would be withheld if there was a "substantial legal basis." President William J. Clinton's Executive Order 12,598 (1995) replaced the Reagan policy with one that permitted the declassification of documents older than twenty-five years and provided a more permissive classification standard: Information would not be withheld unless there was a substantial doubt that its release would compromise national security. In 2003, President George W. Bush amended the Clinton order to delay for three years the information scheduled for release under the twenty-five-year rule and expanded federal agency authority to classify information about critical infrastructures, such as the Internet, weapons of mass destruction, and defense against transnational terrorism.

President Franklin D. Roosevelt and his successors relied upon the authority set forth in Article II of the Constitution for the chief executive to issue executive orders addressing the nation's dilemma of racial discrimination. Roosevelt's Executive Order 8802 (1941) forbade discrimination in defense industries in violation of federal contract equal employment provisions. President Harry Truman continued this policy and in Executive Order 9981 (1948) outlawed racial segregation in the armed forces services. After the passage of the Civil Rights Act of 1964, President Lyndon B. Johnson issued Executive Order 11,246 (1965) to supplement Title 7 of the 1964 Civil Rights Act by providing that government contracts with private companies would prohibit employment discrimination on the basis of race, sex, religion, or national origin and by creating an administrative apparatus to assure compliance by means of government inspections, court injunctions to enforce the nondiscrimination contractual provision, and disqualification from future contracts. In his "Philadelphia plan," President Nixon extended Johnson's order by requiring private companies to set hiring goals for minority

groups as a condition for receiving government contracts. The executive order was challenged but upheld by the Court of Appeals for the Third Circuit in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 311 F. Supp. 1002 (E.D. Pa. 1971), as a proper use of the president's implied power of economic procurement.

At the same time, one president relied upon his Article II diplomatic and military authority to engage in racial discrimination. President Roosevelt relied upon his commander-in-chief power when he issued Executive Order 9066 (1942) authorizing the secretary of war to identify military areas of the country, impose travel restrictions in these areas, and exclude Japanese persons from these areas. This executive order, quickly supported by Congress, provided the authority for the military to evacuate Japanese nationals and Japanese American citizens from West Coast military zones. In Executive Order 9066, Roosevelt also relied upon his commander-in-chief power to create the War Relocation Authority, which assisted the military evacuations and operated the relocation-detention centers. When these actions were challenged, the Supreme Court avoided the constitutional issues of racial discrimination and the detention program.

Hirabayashi v. United States, 320 U.S. 81 (1943), upheld the military curfew as a valid exercise of the presidential and congressional war powers; *Korematsu v. United States,* 323 U.S. 214 (1944), found the West Coast evacuations were a matter of military necessity; and *Ex parte Endo,* 323 U.S. 283 (1944), authorized a writ of habeas corpus only because the War Relocation Authority had detained a citizen whose loyalty had been proved. In sum, the Supreme Court's decisions authorized presidential and congressional actions that violated the constitutional guarantees of the presumption of innocence, equality, freedom of movement, and private property.

Presidents have also used their commander-in-chief authority to seize and operate private businesses. President Roosevelt used executive orders to seize shipbuilding, cable, and coal companies for which Congress later provided statutory authorization by passing the War Labor Disputes Act of 1942. President Truman relied upon the power in 1952 to avoid a strike in the steel industry and assure continued steel production for the Korean War by issuing Executive Order 10,340 (1952) authorizing the secretary of commerce to seize and operate the steel mills. Instead of invoking the Taft-Hartley Act of 1947, enacted over his veto but enabling him to forestall the strike for eighty days, he informed Congress of his seizure action and invited it to take action. In *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 (1952), the Supreme Court struck down his executive order.

Justice Hugo L. Black's majority opinion denied that the president had authority under his commander-in-chief power to take private property in order to keep a labor dispute from stopping the production of war materiel, because the seizure was too far removed from the theater of war where the president had the right to set policy. Nor could the seizure be justified under the president's executive authority, because Article II states that the president must carry out law, not make it. The Defense Production Act of 1950 governed seizure but not in these circumstances, and Congress had rejected an amendment to Taft-Hartley authorizing seizure in an emergency. In sum, the Court's decisions reminded President Truman that he did not have unrestrained discretion in domestic affairs, even to further international military policy. Without congressional consent, the president's seizure order was a usurpation of legislative power.

In *Dames & Moore v. Regan,* 453 U.S. 654 (1981), the Supreme Court was much more deferential when it examined President Reagan's Executive Order 12,294. The order implemented an executive agreement, negotiated by President Carter, to release U.S. embassy personnel held hostage in Iran, terminate all litigation involving the government of Iran, and submit the litigation to binding arbitration by an international claims tribunal. The firm of Dames & Moore, which had received a judgment against the Atomic Energy Organization of Iran, challenged the executive order. The Court limited its analysis to statutory sources for the president's power and found that even though neither the International Economic Emergency Powers Act nor the Hostage Act provided specific authorization to suspend claims against Iranian property, Congress had enacted other legislation that implicitly approved of claim settlement by executive agreement as a necessary incident to the reso-

lution of a major foreign policy dispute. As a consequence, the Court's decision created doubt as to whether *Youngstown Sheet and Tube* required the president to obtain fairly explicit legislative authorization for his actions.

Executive orders have become a necessary component and accepted practice of the modern presidency. Only a few of the more than 13,000 orders have generated intense political controversies, and even fewer have provoked constitutional challenges when they have intruded upon congressional power and diminished individual freedom and equality. The courts have been reluctant to strike them down as executive-branch law-making even when they have limited access to information, permitted racial discrimination, and authorized the seizure of private property, as long as they clearly draw upon the constitutional powers of the president or are not incompatible with the express or implied will of Congress.

William Crawford Green

See also: Korematsu v. United States; President and Civil Liberties.

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The Encyclopedia of Civil Liberties in America

Volume Two

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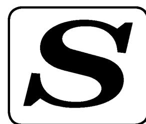

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Fairness Doctrine

In 1949 the Federal Communications Commission (FCC), acting on a mandate from Congress to provide a "public interest" standard in broadcast communications, formalized what became known as the "fairness doctrine." The fairness doctrine required that broadcasters present controversial issues of public importance and present those issues in a fair and balanced manner. In 1959 Congress passed an amendment that most scholars thought codified the FCC standards. By 1971 stations were required to keep "Ascertainment of Community Needs" records and present them for FCC consideration at the time of their license renewal. The administration of President Ronald Reagan, however, sought to abolish what it viewed as content-based regulation in the fairness doctrine, an objection that raised issues of freedom of the press as guaranteed by the First Amendment to the U.S. Constitution. In 1987 the FCC, then dominated by Reagan appointees who shared his deregulatory tendencies, ruled the fairness doctrine unconstitutional and ceased enforcing it. Congress passed legislation clearly codifying the doctrine through statute, but was unable to override President Reagan's veto, and thus the fairness doctrine ended.

The rise and fall of the fairness doctrine illustrate important issues that concern First Amendment liberties in the age of broadcast communications. Freedom of the press is of primary importance in the U.S. democratic system and is formalized by the First Amendment. Still, the press is occasionally restricted in what it can present to the public. Libel, obscenity, and unapproved reporting on national security or war maneuvers can lead to postpublication government sanction and liability. Broadcast media (radio and television operating over the airwaves, but not cable or satellite) are even more regulated than most communications media because they operate over a limited spectrum of broadcast frequencies. These broadcast frequencies are the public's domain, and because they are limited in number, the government justifies their regulation in the public interest. This regulatory responsibility falls to the FCC, which is in theory an independent regulatory body. In practice, however, the FCC is a highly political entity whose members are nominated by the president and confirmed by the Senate and whose budget is approved by Congress. In addition to the formal pressures on the FCC, its practices are under constant public scrutiny and industry pressure.

The first U.S. Supreme Court challenge to the fairness doctrine came in *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367 (1969). In this case, a broadcast station in Pennsylvania aired a "Christian Crusade" program that attacked author Fred J. Cook. Cook appealed for airtime to reply to the attack, and when the station refused, he petitioned the FCC. The FCC sided with Cook, the station appealed, and the case eventually made its way to the Supreme Court. The Court concluded that Congress, although ambivalent with some wording, had in 1959 expressly recognized the fairness doctrine in statutory law. Most important, noting the principle of the scarcity of broadcast frequencies, the Court found the fairness doctrine in compliance with the First Amendment and thus constitutional. The Court did note, however, that evidence of a "chilling effect" could render the doctrine unconstitutional. "Chilling effect" refers to the argument that specific regulations (like the fairness doctrine) could lead broadcasters to avoid controversial issues purposefully so as not to violate the regulation. If this were to happen, the fairness regulation would be, in effect, stifling speech and thus unconstitutional.

A combination of factors brought about the end of the fairness doctrine. First, television and radio journalists thought they operated under a double standard with respect to their colleagues in print media, who were not subject to fairness-doctrine requirements. A former chairman of the FCC made this point clear when he stated that "[l]imitations on broadcast content that would be unconstitutional if applied to the print press have been routinely upheld when applied to broadcasting. Although broadcasters have First Amendment rights, they are subordinate to the rights of the viewing public." Second, the 1980s brought

many advances in communications technologies. With the advent of cable and satellite communications, the "scarcity" argument lost much of its strength. Third, this was an era marked by deregulation. FCC Chairman Mark Fowler, a Reagan appointee, publicly opposed the fairness doctrine and promised its demise. All of these factors culminated in the FCC's "1985 Fairness Report," in which the agency found that the fairness doctrine was having the "chilling effect" against which the Court had warned and that the scarcity justification no longer applied. In *Meredith Corp. v. Federal Communications Commission,* 809 F.2d 863 (1987), a case the FCC argued based on the findings of its 1985 report, a district court found that Congress had never codified the doctrine and left open the option for the FCC to dissolve the doctrine, which it did. Congress then passed legislation to codify the doctrine, but failed to muster enough votes to override Reagan's veto.

With the advent of new technologies, the concern over strict regulation in broadcast journalism may be an issue of the past. Airwaves are no longer the scarce public good they once were, and the FCC has interpreted that fact as justification for making the airwaves an open marketplace, regulated by the laws of supply and demand, rather than justifying their regulation based on the common good. Today the public relies on the goodwill of journalists and their ability to present balanced coverage. Although broadcast programming is usually regarded as free to consumers, they do in fact pay; they pay with their attention and endure the advertising that buys time. The only recourse currently available to citizens, should they be sufficiently upset with unfair reporting, is to change the channel.

Nathan Bigelow

See also: Chilling Effect; Equal-Time Rule; *Red Lion Broadcasting Co. v. Federal Communications Commission;* Reply, Right to.

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Fair-Use Doctrine

The term "fair use" represents an important limitation on the exclusive legal rights that copyright law grants to protect owners of creative works and other forms of intellectual property. The concept of fair use, based in common law, developed over time in judicial doctrine as courts attempted to strike a balance between the rights of copyright owners to control their property and the greater benefit to society that these works may provide. In the United States, the doctrine of fair use was solidified in statutory language when Congress amended the Copyright Act in 1976 (Public Law 94-553).

The origins of copyright can be traced to the sixteenth century when European governments began the practice of granting patent monopolies to national printing companies. Article I, Section 8, clause 8 of the U.S. Constitution assigned Congress the power to "promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The phrase "for limited times" underscored the important concept that society benefited from the free access to ideas and technological innovation and that ownership of such copyrights should not be unlimited.

Fair use is a further recognition of a greater good accruing to society when reasonable limitations are placed on the exclusive grant of copyright. The fair-use doctrine allows for limited copying and other use of materials protected by copyright without having to secure specific permissions or pay compensation to the owner. As a judicial doctrine, fair use was first defined in a U.S. court in *Folsom v. Marsh,* 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841). In this case a charge of copyright infringement was brought when an author

of a fictional biography of George Washington used the president's private letters without securing express permission to use them. Justice Joseph Story determined that no infringement had occurred and concluded: "In short, we must often, in deciding questions of this sort, look to the nature and objects of the selection made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the objects, of the original work." This finding became the foundation of many subsequent rulings on fair use over the years.

In 1976, this body of judicial doctrine formed the basis for the fair-use statutory language now found in Section 107 of the Copyright Act (*U.S. Code,* vol. 17, sec. 107). Section 107 provides express statutory limitations on copyright based upon the fair-use doctrine and includes guidance on determining in which cases a fair-use claim can be made. The text provides that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." The fair-use doctrine would protect, for example, a reviewer quoting a short portion of a book in writing a review of the piece, a teacher using photocopied pages of a short story in a language arts class, or an individual making a copy for personal use.

Section 107 further cited the following four factors to determine whether the use of a work was a fair use:

> (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) The nature of the copyrighted work;
> (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) The effect of the use upon the potential market for or value of the copyrighted work.

In some special cases, an even greater level of free access can be provided under further extensions of the fair-use doctrine. One such extension was the basis for the 1996 Chafee Amendment to the Copyright Act (codified at *U.S. Code,* vol. 17, sec. 121). This law contains provisions allowing entities that serve blind and other reading-impaired individuals to create Braille and other specialized format versions of complete published nondramatic literary works without having first to obtain permission from the copyright owner or provide any form of compensation.

Subsequent legislation, however, may have the effect of reducing the availability of fair use in the case of electronic media. The Digital Millennium Copyright Act (DMCA) of 1998 (Public Law 105-304) includes expansive protections for copyright owners of digitally encoded intellectual property, including computer software, digital video, and e-books. The DMCA effectively criminalizes any action of circumventing encryption protection measures used by copyright owners to control access to digitally encoded copyrighted works. Since the DMCA did not invalidate the 150-year history of the fair-use doctrine, courts may once again be called upon to provide the needed balance between the rights of copyright owners and the greater benefits to society for having access to digital materials through protected fair use.

Steve Noble

See also: Copyright, Patent, and Trademark.

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Family Rights

The law has long acknowledged that the family is the fundamental unit of society. For example, the United Nations' Universal Declaration on Human Rights proclaims that the family "is the natural and fundamental group unit of society and is entitled to protection by society and the State." Similarly, the Holy See's Charter of the Rights of the Family recognizes

that "the rights of the person, even though they are expressed as rights of the individual, have a fundamental social dimension which finds an innate and vital expression in the family." Accordingly, in the United States, the family unit has been the subject of legal regulation and protection, and the existence of family relationships is relevant to many different areas of law, including constitutional law, immigration, taxation, tort law, contract law, and inheritance and property law.

Traditionally, protection of the family unit has been the province of state governments (families are thus not specifically mentioned in the U.S. Constitution), and states have normally exercised primary jurisdiction over laws regulating the family, such as those involving marriage, divorce, and child custody and support. Nevertheless, in recent years, the federal government has also promulgated a number of laws affecting the family. For example, in the Family Educational Rights and Privacy Act of 1974, Congress provided parents the right to inspect and review the educational records of their children and prohibited the distribution of funds to applicable educational agencies or programs that prevent such access. The statute also protects the student against release of educational records without the written consent of the parents, or of the student once he or she has reached age eighteen. In the Family and Medical Leave Act of 1993, in order to balance the demands of the workplace with the needs of families, Congress mandated that all eligible employees (men and women) are entitled to up to twelve weeks of unpaid leave per year to receive medical care or to care for family members who have undergone medical treatment or for the birth or adoption of a child. Congress has passed other laws affecting the family, most notably in the areas of child support and child custody.

Additionally, in a number of cases, the U.S. Supreme Court has had occasion to address constitutional rights in the specific context of family relations. These decisions recognize the fundamental right of a man and woman to marry, and to bear and raise their children, and the role of the states in regulating familial relationships. For example, in *Maynard v. Hill,* 125 U.S. 190 (1888), the Supreme Court noted that marriage, "as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." The Court has also noted, however, that in some contexts states may not regulate or prohibit the fundamental right to marry. For example, in *Loving v. Virginia,* 388 U.S. 1 (1967), the Supreme Court struck down a law prohibiting interracial marriages. In *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), the Supreme Court addressed family rights in the specific context of parental rights and held that a law requiring attendance in public school violated the "liberty of parents and guardians to direct the upbringing and education of children under their control." In *Griswold v. Connecticut,* 381 U.S. 479 (1965), in striking down a law forbidding the use of contraceptives even by married persons, the Court stated that marriage "is a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."

From these cases protecting the rights of the family, the Court has created other rights. For instance, in *Roe v. Wade,* 410 U.S. 113 (1973), the right to privacy was extended to include a "woman's decision whether to or not to terminate her pregnancy." A child's own rights have also been considered by the Supreme Court. For example, in *Santosky v. Kramer,* 455 U.S. 745 (1982), the Supreme Court stated that "until the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of the natural relationship." At times, the Court has determined that children's rights may trump those of their parents. For example, in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976), the Supreme Court struck down a law requiring parental consent for a minor to obtain an abortion; subsequent cases have allowed states to require consent of a parent, as long as there is a judicial bypass option. Finally, in *Lawrence v. Texas,* 539 U.S. 558 (2003), overturning one of its recent cases to the contrary, the Supreme Court held that a Texas statute prohibiting "deviate sexual intercourse" violated two men's due process rights. In so holding, the majority emphasized the personal liberty interests of adults to decide how to conduct their private sexual lives.

Finally, recent issues in family law involve the movement to redefine "marriage" and "family" and the accompanying legal consequences of such an effort. Some states and local governments have decided

to extend some form of legal protection to same-sex couples. For example, in 1999, in response to direction from the Vermont Supreme Court, the Vermont legislature passed the Vermont Civil Union Law effective July 1, 2000. Under that law, gay and lesbian couples became entitled to many of the benefits and protections of traditional marriage, such as the right to sue for wrongful death, the right to receive family leave benefits, the right to inherit property without a will, and the use of family law such as alimony and child custody and support. In the most sweeping decision to date, the Massachusetts Supreme Judicial Court recently held that under the state constitution, there was no rational basis to support the exclusion of same-sex couples from civil marriage and its benefits. Accordingly, on May 17, 2004, same-sex couples legally married for the first time in U.S. history. In response to the recent success of the proponents of same-sex marriage, a number of states have passed legislation protecting the traditional definition of marriage as between a man and woman and attempting to limit the forced recognition of same-sex marriages under the Full Faith and Credit Clause of the Constitution. At the federal level, there also has been discussion about seeking to amend the Constitution to prohibit same-sex marriage, but constitutional amendments are rare and difficult to pass because they require ratification by three-fourths of the states.

Elizabeth M. Rhea

See also: Griswold v. Connecticut; Lawrence v. Texas; Loving v. Virginia; Parental Rights; *Pierce v. Society of Sisters;* Right to Privacy; Rights of Minors; *Roe v. Wade.*

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FBI

See Federal Bureau of Investigation

FCC

See Federal Communications Commission

FECA

See Federal Election Campaign Act of 1971

Federal Aid to Elementary and Secondary Education Act of 1965

President Lyndon B. Johnson's highest priority in his Great Society socioeconomic programs for alleviating poverty was to broaden educational opportunities and enrich the quality of school offerings for the children of America. His vehicle to accomplish this was the Elementary and Secondary Education Act (ESEA) of 1965. The use of money pursuant to this legislation became the source of a significant amount of litigation before the U.S. Supreme Court in the area of church-state relations. The major issue became whether such federal assistance violated the Establishment Clause of the First Amendment to the U.S. Constitution. Under that clause, government cannot enact laws that would constitute "establishment of religion."

A dilemma Johnson faced in developing this legislation was the reality that many people viewed such federal aid as unconstitutional support of parochial schools. The church-state issue persisted as a stumbling block as the Johnson administration worked on formulating this policy. Johnson's approach was that the funding would constitute categorical aid—money that could be used only for narrowly defined purposes—to poor children in city slums and depressed rural areas. Motivating this approach was the Supreme Court's decision in *Everson v. Board of Education,* 330 U.S. 1 (1947), in which the Court held that federal

aid to parochial students was constitutional if it went to children rather than to schools.

Under Title I of ESEA, special restrictions applied to the money appropriated. Among these was that the school district must retain complete control over the funds; must provide the services through public employees or other persons independent of the private school and any religious institution; and must ensure that services supplement rather than displace the level of services provided by the private school. Perhaps most significant was that programs supported by this money must be "secular, neutral, and nonideological." From 1965 on, schools struggled with how to provide Title I services to private schools—especially parochial schools.

In 1985 the Supreme Court heard arguments in *Aguilar v. Felton,* 473 U.S. 402 (1985), which involved a suit by six New York City taxpayers against the school district for offering Title I services on private school premises during school hours. The Court, in a five–four decision, found the board's program unconstitutional on the basis of "excessive entanglement" of church and state in the administration of Title I benefits. In effect, this entanglement violated the Establishment Clause. On remand, the federal district court permanently prohibited Title I services to be administered on the premises of sectarian schools.

In response, the board and parents of eligible New York City parochial school students sought relief from the permanent injunction established by *Aguilar.* In turn, the Supreme Court reversed *Aguilar* in 1997 in a five–four decision in *Agostini v. Felton,* 521 U.S. 203 (1997). The Court's majority held that recent rulings had so undermined *Aguilar* that it was no longer good law.

Two of these recent rulings were *Witters v. Washington Department of Services for the Blind,* 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills School District,* 509 U.S. 1 (1993). When Larry Witters, a Christian college student suffering from a progressive visual condition that made him eligible for state vocational rehabilitation assistance to blind persons, applied to the state for financial assistance to pay his educational costs, he was denied on the ground that his training constituted religious instruction. The Court reversed the Washington State Supreme Court, holding that the granting of aid under the statute to finance Witters's training at a Christian college would not advance religion in a manner inconsistent with the Establishment Clause.

In the *Zobrest* case, James Zobrest, deaf since birth, asked his school to provide a sign-language interpreter to accompany him to classes at a Catholic high school pursuant to the Individuals with Disabilities Education Act (IDEA). The Court determined that the IDEA created a neutral government program dispensing aid not to schools but to individual children with disabilities. Thus, the Court held that the Establishment Clause did not prevent the school district from furnishing the student with a sign-language interpreter to facilitate his education at a parochial school.

One recent case, *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), involving government aid to schools although not ESEA Title I money, might augur the direction the Court under Chief Justice William H. Rehnquist may be heading in church-state issues of permitting taxpayer money to be used in parochial schools. To help students in struggling school districts, the state of Ohio established a program to provide educational choices to families residing in the Cleveland, Ohio, school district. The program provided tuition aid for students to attend a participating public or private school of their parents' choosing and tutorial aid for students who chose to remain enrolled in the public school. The Court held in *Zelman* that Ohio's "voucher" program did not violate the Establishment Clause, thus allowing tax dollars to be funneled into private schools, including the parochial schools.

Since the enactment of ESEA and the initial cases before the Supreme Court, the justices seemingly have become more open to approving the use of taxpayer money in parochial schools. Whether this trend will continue depends, in large part, on the composition of the Court and whether any changes in it may take place.

Mark Alcorn

See also: Agostini v. Felton; Aid to Parochial Schools; Establishment Clause; *Everson v. Board of Education;* Free Exercise Clause; Separation of Church and State; *Zelman v. Simmons-Harris; Zobrest v. Catalina Foothills School District.*

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Federal Bureau of Investigation

The Federal Bureau of Investigation (FBI) is a division of the U.S. Department of Justice and is its principal investigative arm charged with analyzing violations of federal laws. The FBI has the broadest investigative authority of all federal law enforcement agencies.

The agency was founded in 1908 under the guidance of then President Theodore Roosevelt and Attorney General Charles Bonaparte. President Roosevelt issued an executive order creating an investigative force within the Justice Department. In 1909 Attorney General George Wickersham named the force the Bureau of Investigation. Congress gradually added duties to its jurisdiction until in 1933 it was reorganized with wider powers as the Division of Investigation in the Department of Justice. It was renamed the Federal Bureau of Investigation in 1935.

The FBI's overall mission is to uphold the law through the investigation of violations of federal criminal statutes and to protect the United States from foreign intelligence and terrorist activities. Federal statutes authorize the attorney general to appoint officials to detect crimes against the United States and give the FBI authority and responsibility to investigate specific crimes. As of 2003 the agency had investigative jurisdiction over more than 200 categories of violations of federal law.

During its early period, the FBI investigated such areas as bankruptcy, fraud, antitrust, and neutrality violations. During World War I, it was given responsibility for espionage, sabotage, sedition, and draft violations. The passage of the National Motor Vehicle Theft Act in 1919 also broadened the agency's jurisdiction. Shortly after World War I, the FBI was the lead agency of an operation that became known as the "Palmer raids" (named after A. Mitchell Palmer, U.S. attorney general under President Woodrow Wilson); these raids were a dragnet of arrests of tens of thousands of alien radicals in thirty-three cities. In part because most of the victims were arrested without a warrant, the majority were eventually released either before or after their prosecution. One of the supervisors of the Palmer raids was a young Justice Department lawyer named J. Edgar Hoover.

After the resignation of Attorney General Harry Daugherty, J. Edgar Hoover was selected in 1924 as the agency's director, a post he held until his death in 1972. During the 1930s, the FBI gained wide support for its capture of a handful of highly publicized gangsters. Riding a wave of popularity and an aggressive public relations program, culminating in speeches, articles, and books such as Hoover's *Masters of Deceit,* the reputation of the FBI as the nation's premier enforcement agency grew. On March 14, 1950, the agency began its "Ten Most Wanted Fugitives" list.

In the wake of a 1971 theft of internal documents from an FBI office in Media, Pennsylvania, and the post-Watergate congressional investigations in the mid-1970s (stemming from a bungled burglary at Democratic National Committee headquarters by individuals connected with President Richard M. Nixon's administration), the FBI's reputation sank. The documents and investigations showed that under Hoover's direction the FBI had invested a large part of its budget and staff for political rather than enforcement purposes. The FBI's counterintelligence (COINTEL) program began as an effort to undermine the Communist Party, but eventually it extended to black political activists such as Martin Luther King Jr., members of the Black Panther Party, student protesters against the Vietnam War, some early leaders in the women's liberation movement, and the Ku Klux Klan.

Information obtained through FBI investigations is presented to U.S. attorneys or other Justice Department officials, who decide if prosecution or other action is warranted. The FBI has identified three strategic priorities: Tier 1 (national and economic security); Tier 2 (criminal enterprises and public integrity); and Tier 3 (crimes against individuals and property).

The FBI is a field-oriented organization in which nine divisions and four offices provide program direction and support services to field offices in fifty-six major cities, approximately 400 satellite offices, four specialized field installations, and twenty-three foreign liaison posts. Of the fifty-six field offices, all but one are in the United States and that one is in Puerto Rico. The locations were selected according to crime trends, the need for regional geographic centralization, and the need to manage resources.

The FBI has more than 11,000 special agents and 13,700 other employees who perform professional, administrative, technical, clerical, craft, trade, or maintenance operations. The annual budget for the FBI in 2001 was more than $1.27 billion.

The FBI's role in international investigations has expanded due to the authority granted by the congressional application of extraterritorial jurisdiction and the growth in international criminal activity. FBI investigations abroad require the approval of the host country and coordination with the U.S. Department of State and any other involved agency through the FBI's legal attaché program.

Gladys-Louise Tyler

See also: Hoover, J. Edgar; Palmer Raids.

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Federal Communications Commission

In 1934, Congress passed the Telecommunications Act establishing the Federal Communications Commission (FCC) to govern all electrically transmitted messages, which at the time included those by telephone, telegraph, and radio. The agency's jurisdiction has since expanded to cover cable and broadcast television as well as Internet and satellite transmissions. The FCC was initially created because the limited availability of broadcast spectra required regulation by some central authority. Federal regulation of railroads and telegraph set a precedent for regulating the means of communication, which posed thorny issues of freedom of speech and the press as provided in the First Amendment to the U.S. Constitution. In the twenty-first century, the concept of wires and microwaves being "carriers" is common, but to people in the 1870s a "carrier" was a railroad, a wagon, or a pack animal. By equating wires and, later, microwaves with railroads and freight companies (termed "common carriers"), the courts laid the foundation for applying the same principles of regulation and taxation to telegraph, telephone, and radio as had been applied to the common carriers of physical goods. As technology progressed, the regulatory powers of the FCC expanded to include television and then cable and satellite transmissions and now the Internet.

The roots of telecommunications law go back at least as far as the late nineteenth century when the U.S. Supreme Court indicated that telegraph companies had the same characteristics as common carriers and thus could be regulated similarly. As various administrative agencies were created in the 1930s, the courts had to determine whether agencies such as the FCC correctly applied the laws that Congress wrote when the agencies were created. Regulation of telephone and telegraph lines, as with regulation of freight carriers, dealt only with the use of physical space, but regulation of broadcast media meant limiting the number of broadcast frequencies, called spectra. To prevent frequency chaos, the FCC used the "public interest" as its guiding principle to "secure the maximum benefits of radio to all the people of the United States." The carryover to television was obvious when that medium became common, but the "public interest" rationale has not been quite so evident in the case of cable television and the Internet.

Part of the problem faced by the FCC and the courts is that a broadcast license has value and can be bought and sold, a factor that puts the idea of regulating in the public interest in conflict with the tra-

Monitoring at the Federal Communications Commission (FCC) listening post, 1944. The FCC regulates the licensing of television and radio stations. *(Library of Congress)*

ditional common law of private property. The Court in *Express Company v. Caldwell,* 88 U.S. 264 (1875), found that there was no property right in a telegraph license, and that was the starting place by which the Court sought to regulate broadcasting stations as to content. The Court came to regard the broadcast license as being a public convenience, interest, or necessity and as such was something the FCC could fairly regulate both as to content and to technology.

Using these basic concepts, the FCC primarily tried to regulate technology itself. The agency assigned frequencies and times of broadcast, such as limiting broadcasters to daylight hours only. It also regulated the power output of stations, allowing some to broadcast to a huge area and others to only a very limited range. Such parameters led to granting of multiple licenses in the same areas and, as the law developed, a growing recognition of the value of market forces and what the FCC termed "a quasi–property right in broadcast licenses." Accordingly, debate grew about which station could dominate a particular market.

Various forms of regulation were ruled to be within the authority of the agency and not to violate the basic civil rights protected by the First Amendment to the U.S. Constitution. Thus, the idea of the public interest grew to encompass the concept that the agency could regulate content. The FCC tried in the early 1950s to outlaw product-giveaway programs (stations giving away merchandise as part of promotional activities to increase listeners or viewers) by denying licenses to stations and networks. The Supreme Court ruled that action was beyond the scope of the agency's power as delegated by Congress. Content was further regulated by what words could and could not be used.

In 1978 the Supreme Court in *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726 (1978), upheld an agency ruling that George Carlin's "seven dirty words" comedy routine could not be broadcast. Rules were developed for the sake of "fairness" and were repealed when they proved unworkable.

More problematic were questions of regulating content on cable television and the Internet. Cable television has been required to carry locally broadcast programs, and attempts to regulate content on the Internet failed with *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997). Where the desire and need to regulate speech will lead to next is, as yet, unknown.

Stanley Morris

See also: Federal Communications Commission v. Pacifica Foundation; First Amendment; Internet and the World Wide Web; *Reno v. American Civil Liberties Union;* "Seven Dirty Words."

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Federal Communications Commission v. Pacifica Foundation (1978)

In *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726 (1978), the U.S. Supreme Court held that the Federal Communications Commission (FCC) could place a time-frame restriction on the radio broadcasting of nonobscene speech without violating the rights of free speech and press provided in the First Amendment to the U.S. Constitution. The case began with an afternoon broadcast of George Carlin's "seven dirty words" monologue by WBAI, a Pacifica Foundation radio station. The FCC, acting on a listener complaint, found that the monologue depicted sexual and excretory activities and organs in a patently offensive manner prohibited by federal communications law and then issued an order that did not impose any sanctions on Pacifica, but the agency included the complaint in the company's licensing file. After the federal appellate court reversed the FCC decision, a deeply divided U.S. Supreme Court upheld the agency, but its five–four decision did not present a majority on the First Amendment issue.

Justice John Paul Steven's three-justice plurality opinion concluded that the indecent speech had limited social value and for that reason was at the periphery of the First Amendment in a second constitutional tier where its protection would vary according to its context. In the broadcasting context, the FCC had the authority to impose a time regulation on indecent broadcasts. Two characteristics of the broadcast media justified regulation: the impact of the broadcast media on an adult's privacy in the home and the media's easy accessibility to children. Even though physical separation of adults and children in the broadcast audience was impossible, the FCC's action did not violate *Butler v. Michigan,* 352 U.S. 380 (1957), which held that government regulation of speech may not prevent adults from access to constitutionally protected materials and thereby limit them to reading only what is acceptable for children. Adults could hear the Carlin monologue during late-evening hours when fewer children were likely to be in the

audience. Nor did the FCC ruling restrict adult use of alternative forums: Adults could still purchase tapes and records and attend theaters and nightclubs to hear the words in the Carlin monologue.

Justices Lewis F. Powell Jr. and Harry A. Blackmun in a concurring opinion disagreed with Justice Stevens's plurality opinion that offensive nonobscene speech was less deserving of First Amendment protection than other kinds of speech. Instead, they supported the FCC order because of the unique characteristics of the broadcast medium combined with the government's interest in protecting unwilling adults and children from offensive speech. Justices William J. Brennan Jr. and Thurgood Marshall in dissent also objected to the plurality's two-tier First Amendment standard and argued that broadcasting entering the home could be turned off with minimum effort and offense and that parents, not government, were responsible for protecting children from indecent language. Justices Potter Stewart and Byron R. White also dissented, arguing that the FCC lacked the statutory authority to ban the Carlin monologue.

In sum, the *Pacifica* decision authorized the government to restrict nonobscene indecent broadcast material, but later decisions—including *Sable Communications of California, Inc. v. Federal Communications Commission,* 492 U.S. 115 (1989); *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997); and *United States v. Playboy Entertainment Group,* 529 U.S. 803 (2000)—have made clear that federal government efforts to limit indecency in phone networks, cable television, and the Internet would be strictly scrutinized by the Court.

William Crawford Green

See also: Federal Communications Commission; *Reno v. American Civil Liberties Union;* "Seven Dirty Words"; *United States v. Playboy Entertainment Group.*

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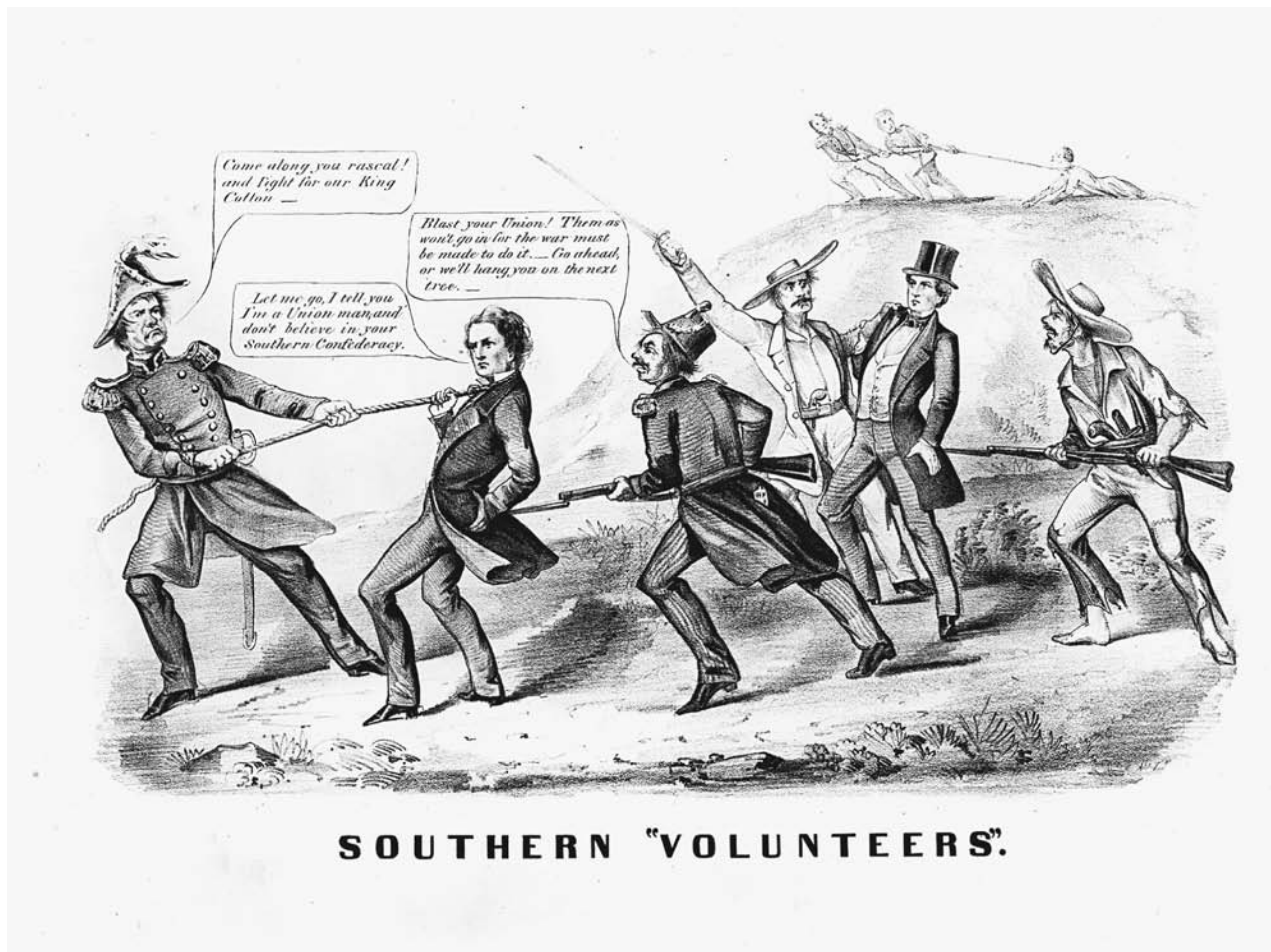
Federal Conscription Act of 1863

On March 3, 1863, the first general military draft in the history of the United States was imposed by the National Conscription Act. It authorized the federal government to draft American citizens and foreigners who had declared intentions to become citizens. Men were conscripted not only by the Union but also by the Confederacy. The reason for a draft was to ensure that the necessary military manpower for fighting the Civil War could be generated. One of the major criticisms was that the rights and civil liberties of lower-class, poorer men were violated in favor of the middle and upper classes. Military service could be avoided by paying a commutation fee of $300 or by finding a qualified substitute. Only wealthier individuals could buy their way out of the draft. A bounty fee of $100 was paid to every volunteer, draftee, or substitute.

The National Conscription Act of 1863 was passed in accordance with the provision in Article I, Section 8 of the Constitution giving Congress the power "to raise and support armies." The result was a radical departure from tradition, with the federal government replacing the states as the primary agency for generating military manpower. Under this act, the United States was divided into 185 military districts, with a military officer assigned to each district having the responsibility of registering and calling up draftees for military service. The law imposed a military obligation on able-bodied males between the ages of twenty and forty-five and on married men up to age thirty-five. Exemptions were allowed for men who were already serving in the military, men with physical disabilities, or men performing critical jobs, such as railroad engineers or postmasters. Drafted men were enlisted for three years or until the war was over, whichever came first.

Because the primary issue of the Civil War was slavery, many citizens demanded the enlistment of African Americans, since the number of white volunteers was inadequate. The U.S. War Department ordered the recruitment of free African Americans and slaves in late July 1863. Slave masters were paid $300 for each able-bodied slave enlisted in the Union military.



This 1862 print, "Southern 'Volunteers' " may have appeared soon after the Confederate Congress passed a conscription act on April 16, 1862, to strengthen its dwindling army of volunteers. Almost one year later, on March 3, 1863, the Union enacted the first national draft in American history. *(Library of Congress)*

Because the National Conscription Act was viewed as unfair by the lower classes, protests and riots broke out in the working-class sections of various cities in both the North and the South. Of particular note were the draft riots in New York City. On July 13, 1863, many laborers, mostly poor and unskilled, expressed their outrage at the new draft law by attacking and setting the draft office in New York City on fire. Violent attacks on wealthy people and institutions escalated over the next three days. Rioters also beat and killed many African American citizens, viewing them as the cause for the war and the draft. Although peace was finally restored by the arrival of federal troops on July 16, opposition to the military draft produced by the inequalities of federal conscription, as well as racism, led to the loss of almost 100 lives.

Alvin K. Benson

See also: Civil War and Civil Liberties; Fundamental Rights; President and Civil Liberties.

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Federal Death Penalty Act

Since the very first Congress, the United States has had a federal death penalty law. Although the text of the Constitution does not expressly mention the death penalty, death for serious crimes was a common punishment in the eighteenth century. The framers at the 1787 Constitutional Convention accepted the death penalty and provided for its existence by imposing limits on the prosecution in capital cases. For example, the Fifth Amendment mention of "capital" crimes suggests that government can deprive a citizen of "life" if that person is provided due process of law. Moreover, treason, widely recognized as a capital offense, is mentioned in Article III, and Congress is authorized to "declare the punishment of treason."

In 1790 Congress enacted the first federal death penalty statute. The law defined the federal offenses of treason, murder, piracy, counterfeiting, and forgery and provided a mandatory penalty of death upon conviction. For the next century there were no major changes to the federal death penalty. Congress passed a bill in 1897 entitled "An Act to Reduce the Cases in Which the Death Penalty May Be Inflicted." The law abolished the death penalty for all but five federal offenses and effectively made all federal capital punishment discretionary by allowing the jury to decide the propriety of the death penalty.

In *Furman v. Georgia,* 408 U.S. 238 (1972), a majority of justices on the U.S. Supreme Court voted to strike down state death penalty laws that gave a jury unguided discretion in deciding whether to impose a sentence of death. A few years later, however, the Court in *Gregg v. Georgia,* 428 U.S. 153 (1976), upheld revised state death penalty statutes and provided standards to govern application of the death penalty.

The first post-*Gregg* attempt by Congress to reformulate the federal death penalty scheme was the Drug Kingpin Act of 1988. The law authorizes the death penalty for certain drug-related murders. One section of the law specifically targets the leaders (kingpins) of drug-related criminal enterprises. The law, however, fails to mention anything about the method, manner, or place for carrying out federal death sentences.

Under the Federal Death Penalty Act of 1994, Congress expanded the federal death penalty to almost sixty different offenses. Except in two areas, the super-drug-kingpin provision and the nonhomicidal espionage provision, the new offenses limit the availability of the death penalty to crimes in which death results. People in any state or territory can receive a death sentence for a wide variety of crimes, including the murder of certain government officials, kidnapping resulting in death, murder for hire, sexual abuse crimes resulting in death, car jacking resulting in death, and the use of a weapon of mass destruction against a U.S. citizen or on U.S. property.

Unlike the Drug Kingpin Act, the 1994 law attempts to comply with the constitutional requirements set forth in *Gregg* and details the manner in which the federal death sentence is to be administered. For example, the law mandates that a U.S. marshal supervise the implementation of the sentence in the manner established by the law of the state in which the sentence is imposed. If the law of the state where an individual is convicted of a federal crime does not allow for the death penalty, the court is responsible for designating another state in which the sentence will be carried out.

There are several civil rights and liberties problems surrounding the Federal Death Penalty Act. A Justice Department study found racial and geographic disparities in the application of the federal death penalty. A couple of federal courts have declared the law unconstitutional on the grounds that it does not adequately protect a defendant's rights to a fair trial and to due process of law. One federal judge argued that the risk of executing an innocent person was too great. These decisions have been reversed on appeal, but the Death Penalty Act will continue to be litigated in the courts for years.

John Fliter

See also: Capital Punishment; Drug Kingpin Act; *Furman v. Georgia; Gregg v. Georgia.*

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Federal Election Campaign Act of 1971

The Federal Election Campaign Act of 1971 (FECA) was the third major regulatory scheme to address the effects of money in electoral politics, following the Tillman Act (1907) and the Federal Corrupt Practices Act (1925). Yet it replicated many of the flaws of its predecessors, such as the conspicuous absence of any meaningful system of enforcement.

Then in 1974, the Watergate scandal (the bungled 1972 burglary of Democratic National Committee headquarters in the Watergate apartment complex in Washington, D.C., by individuals connected to President Richard Nixon's reelection campaign and the ensuing attempted cover-up, all of which ultimately led to the president's 1974 resignation) prompted Congress to strengthen the new legislation with a series of major amendments. The new provisions included a cap on contributions to candidates for federal office: Individuals or groups were limited to $1,000 gifts to individual candidates per election and a total of $25,000; political action committees (PACs) were limited to $5,000 gifts to individual candidates per election (though these figures were not indexed to inflation). The new rules also capped individual or group expenditures of money not given directly to a candidate but spent "relative to a clearly identifiable candidate" at $1,000 per candidate per election. Limits on the total amount of money a candidate could spend in a federal election campaign were established, as were limits on candidates' ability to spend money from their own personal fortunes to further their campaigns (both of these limits were based on the office sought). A system of federal matching funds in presidential elections, to be funded by a checkoff on individual tax returns, was introduced. Perhaps most important, the 1974 amendments created a new independent agency—the Federal Election Commission (FEC)—that would oversee the campaign finance system and enforce its regulations, and concomitantly created additional filing requirements designed to track contributions and expenditures.

Within weeks of President Ford's reluctant signature, an ideologically varied group of plaintiffs banded together to challenge the new amendments. Included in this group were conservative New York Senator James Buckley, liberal Wisconsin Senator Eugene McCarthy, the American Civil Liberties Union, the American Conservative Union, and other groups.

In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Supreme Court was split. Interpreting a limitation on the amount of money that could be spent on speech as a direct limitation on speech itself, contrary to the First Amendment to the Constitution (noting that "being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline"), the Court invalidated the limitations on candidates' expenditures. But the Court upheld the caps on campaign contributions, in the name of preventing the appearance of quid pro quo corruption, and further held that certain purportedly "independent" expenditures by individuals and groups could be tantamount to campaign contributions and thus also could be limited without offending the First Amendment.

The Court's evisceration of the 1974 amendments in *Buckley*—and thus its rejection of congressional rationale for limiting the flow of money into electoral politics—precipitated three decades of circumvention. In 2002, Congress passed replacement legislation—the Bipartisan Campaign Reform Act—attempting to plug the loopholes that were created. To the surprise of many observers, the Court narrowly upheld the legislation in *McConnell v. Federal Election Commission* 124 S. Ct. 619 (2003).

Steven B. Lichtman

See also: Buckley v. Valeo; Colorado Republican Federal Campaign Committee v. Federal Election Commission; Corrupt Practices Act of 1925; Tillman Act of 1907.

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Federal Election Commission v. Colorado Republican Federal Campaign Committee (2001)

Answering the question that was left conspicuously unresolved in *Colorado Republican Federal Campaign Committee v. Federal Election Commission,* 518 U.S. 604 (1996) (Colorado I), the U.S. Supreme Court in *Federal Election Commission v. Colorado Republican Federal Campaign Committee,* 533 U.S. 431 (2001) (Colorado II), determined that the provision of the Federal Election Campaign Act (FECA) pertaining to "party-coordinated spending" did not unconstitutionally deprive political parties of their First Amendment right to support candidates. Whereas the Court in Colorado I found the FECA provision limiting a party's "independent" expenditures to be unconstitutional, this follow-up case involved only those party expenditures made in "coordination" with a candidate.

Accepting the government's argument that expenditures coordinated between parties and candidates were effectively "contributions"—allowing for increased regulation within the framework established by *Buckley v. Valeo,* 424 U.S. 1 (1976)—the majority (the plurality and dissenters from Colorado I) upheld the FECA provision. Writing for the Court, Justice David H. Souter emphasized the "reality" of the world of campaign finance, asserting that without restrictions of this sort, donors could and would use the parties as a conduit to funnel contributions to particular candidates, thereby increasing the potential for corruption and inappropriate influence in the political system. Restrictions on the financial ties among donors, parties, and candidates were therefore essential to preserve the spirit of the *Buckley* decision and maintain the integrity of the political process.

Writing with the customary vigor he has brought to campaign finance cases, Justice Clarence Thomas, expressing the frustrations of the dissenters, chastised the majority on several grounds. In his view, the Court not only had failed to apply strict scrutiny, but it also was essentially punishing political parties for doing their job. Candidates and parties had to be "inextricably intertwined," in other words, and the institutional structure and resources of these associations were *designed* to influence campaigns and underwrite individuals running for election. Absent any evidence of actual harm or corruption (beyond the conjecture and assumptions accepted by the majority), Justice Thomas urged, parties should be free to spend (or "speak") as they see fit. Moreover, he offered, though joined by only two of the three other dissenters on this particular point, the time had come to revisit and overrule the "contribution" and "expenditure" distinction at the heart of *Buckley* itself.

What made Colorado II such an interesting case was that the sentiments expressed by the majority and dissenters depicted competing theoretical expectations of the political process and captured the complexity of the larger campaign finance debate. At the heart of the reasoning on both sides was serious division as to the place and purpose of party organizations in the U.S. political system, as well as differences over such intangibles as public perceptions and human nature. Justice Souter's "corruption-by-conduit" argument, for example, emphasized the systemic and imprecise nature of such abuse, while underscoring the inherently evasive, "nudge, nudge, wink, wink" nature of "coordinated" expenditures, whereas Justice Thomas's dissent portrayed a scenario wherein the vast sums of money exchanged between, and expended by, parties and candidates implied nothing more than a healthy and right-functioning political process. Which vision will ultimately prevail? With three dissenters willing to overrule *Buckley,* and with multiple Supreme Court vacancies likely in the near future, the debate in Colorado II could forecast major changes in the U.S. system of financing election campaigns.

Brian K. Pinaire

See also: Buckley v. Valeo; McConnell v. Federal Election Commission.

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Federalism

Federalism can be generally described as a form of government in which powers are divided by a written constitution between the central government and its member units. There are about a dozen federal systems in the world today. Most call their member units *states,* and a few use *provinces* (Canada and Argentina). Germany uses *Lander,* and Switzerland uses *canton*.

Federalism in its American form was the invention of the authors of the current Constitution of the United States. Drawing upon ancient alliances, the Swiss confederation, colonial experience, and the Articles of Confederation (the predecessor to the Constitution), they crafted a form of government that combined features from a unitary system and a confederation. The federal union was a union of the national government and the states. The goal of the union was a system of ordered liberty.

POWERS

The Constitution of the United States divides powers between the national government and states in such a way that each level has exclusive functions and concurrent functions. The Constitution grants enumerated powers to the national government, such as taxation, regulation of commerce, the military, and other functions that are national in scope or that deal with foreign relations (Article I, Section 8). In addition, it has powers that are logically derived from the expressly delegated powers (implied powers). The national government also has powers that are resultant from its inherent nature as a government. For example, setting up a government of military occupation is not explicitly stated in the Constitution, but explicit authority is unnecessary because this is what governments have always done.

The powers of the states when all else is assigned are a considerable block of unspecified powers termed "reserved powers" (Tenth Amendment). There are also explicit powers or rights that are reserved to the people. These rights are listed in the Bill of Rights, which is composed of the first ten amendments to the Constitution. These rights were listed to protect the people from abuse by the national government.

In the nineteenth century, advocates of states' rights were heartened by the U.S. Supreme Court's refusal to apply the Bill of Rights to the states in the cases of *Barron v. City of Baltimore,* 32 U.S. 243 (1833), and, following the passage of the Fourteenth Amendment, the *Slaughterhouse Cases,* 83 U.S. 36 (1873). States and many people far from the national government viewed the attempt as a threat to civil liberties. In the twentieth century, most provisions in the Bill of Rights were applied to the states (incorporated) through the Due Process Clause of the Fourteenth Amendment. The Second Amendment, the amendment dealing with the right to "keep and bear arms," was the notable exception. In addition, the Ninth Amendment specified that the previous eight amendments were not an exhaustive list. Thus, the first Congress in drafting the Bill of Rights fashioned an incomplete listing, believing it to be certain that other rights, unknown at the time, would be discovered in years to come. One such right discovered in recent years was the right of privacy, which became the legal ground for abortions.

CIVIL LIBERTIES

The federal system protects civil liberties in a variety of ways. Under Article I, Sections 9 and 10 of the Constitution, both the national and state governments are prohibited from taking a number of actions, including issuing bills of attainder, passing ex post facto laws, or creating titles of nobility. These prohibitions protect citizens.

Another protection is the right of habeas corpus (a petition seeking release from illegal confinement). The right may be suspended but only in extreme circumstances.

Two important clauses that protect civil liberties are the Due Process Clause of the Fifth and Fourteenth Amendments and the Privileges and Immunities

Clause in Article IV, Section 2 of the Constitution. Both of these clauses protect individuals from unequal treatment by the state governments.

The U.S. federal system is by intention decentralized. There are many positive benefits generated by the system. It permits unity and diversity. Local control of a multitude of decisions means that the people directly participate in governing themselves in many areas of life. Unity occurs despite the vast heterogeneity of the millions of Americans spread across the continent. This enables people to be free to make numerous decisions affecting their lives. It also makes local government an important fact of political life.

Inefficiency is a negative consequence arising from the federal system. The U.S. federal system is fragmented into one national government, fifty states, over three thousand counties, plus thousands of cities, towns, special districts, school districts and other units numbering at least 87,000. This system does not promote efficiency, of course, but the efficiency of tyranny is not the goal.

Some critics of the federal system note that the states vary in their treatment of prohibited behaviors (for example, illegal drug use) or restrictions on obscene materials. There is a lack of uniformity in sentencing or great variance in the provisions of welfare for the poor. In other cases businesses complain of the enormous variations in state laws governing contracts, torts, or other areas of the law. Movements for creating uniform codes of business law have had some success. However, uniform codes then receive conflicting interpretations by judges in different states, and the result is conflict in case law.

Some advocates of reform would replace the states with more "administratively logical" units. Others would also consolidate education policy or other policies in the national bureaucracy. Advocates of such changes reject concerns about the dangers of abuse of civil liberties, with little fear that a centralized government will emerge such as the one the colonies revolted against in 1776.

A.J.L. Waskey

See also: Fourteenth Amendment; Incorporation Doctrine; United States Constitution.

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Federalists

The supporters of the U.S. Constitution chose the name "Federalists" to designate themselves. Fifty-five men from twelve states (all but Rhode Island) formulated the document at the Constitutional Convention that met in Philadelphia during the summer of 1787. Although the convention had been called to revise and enlarge the government as it existed under the Articles of Confederation, the delegates generally agreed not only that the single branch of this government (a unicameral Congress) lacked adequate powers over the states but also that it would be imprudent to grant additional powers to an Articles-configured government.

The Virginia delegation took the lead when Governor Edmund Randolph introduced a plan at the beginning of the convention that proposed adding to the powers of Congress, dividing Congress into two houses, and creating separate legislative and executive branches. This plan became the basis for early discussion in the convention. Although delegates rejected many aspects of the Virginia plan and added many others, the plan succeeded in introducing the idea of both a bicameral Congress and three independent branches of the national government. Delegates entrusted increased powers to the national government but did not eliminate the states.

Many of the delegates who gathered in Philadelphia had fought in the American Revolution against Great Britain. They were clearly interested in seeing that the liberties won from Britain remained secure against the government in America. The supporters of

the Constitution accordingly provided for a number of specific limitations within the document. Congress was prohibited in Article I, Section 9, for example, from suspending the writ of habeas corpus (a petition seeking release from unlawful confinement) except in times of rebellion or invasion. Similarly, Article I, Section 9 restrained Congress from enacting bills of attainder (legislative punishments without trials) or ex post facto laws (retroactive criminal laws). Congress was prohibited from interfering with state importations of slaves for twenty years, from preferring ports in one state to those of another, or from granting titles of nobility. Similarly, Article I, Section 10 not only prohibited states from exercising powers entrusted exclusively to the national government, such as entering into treaties and coining money, but also prohibited them from passing bills of attainder, ex post facto laws, or laws impairing the obligation of contracts.

Despite such explicit limitations, the framers of the Constitution relied chiefly upon the structure of the new government to protect individuals from the deprivation of their civil rights and liberties. By separating and dividing powers among three branches, the framers intended to provide checks and balances against such abuses. Some Federalists also thought that the state and national governments would check one another. In *The Federalist No. 10,* a key essay designed to defend the new Constitution, James Madison argued that the sheer size of the new government would secure liberty. He theorized that government over this large area would embrace so many factions, or interests, that no one would be able to dominate over the others. He also believed that representative government would seek to refine public views.

Toward the end of the convention, Virginia's George Mason proposed adding a bill of rights to address civil liberties, but few thought that such a bill was necessary. As they envisioned the new government, it would exercise only limited powers, and these would not threaten civil rights or liberties.

When state conventions debated ratifying the new Constitution, Antifederalist opponents of it focused on the omission of a bill of rights. The Federalists originally argued that such a bill was not only unnecessary but could even prove dangerous. They reasoned that if certain rights were not included in such a bill, either intentionally or by oversight, the government might assume that it could infringe on them. Antifederalists remained unconvinced and threatened either not to ratify the Constitution or to call yet another convention. Fearing that a second convention might undo the work of the first, key Federalists agreed that they would work for the addition of a bill of rights once the Constitution was adopted.

James Madison took the lead in the first Congress to accomplish this, carefully working to see that rights were protected without destroying the power that he thought the new government needed to exercise. The proposed amendments were presented in 1789, and by 1791 the necessary number of states (eleven) ratified what became the Bill of Rights (the first ten amendments to the Constitution). Madison had hoped to add at least one amendment that would limit the states, which he thought would pose the greater threat to liberty, but he did not succeed in this endeavor, and in *Barron v. City of Baltimore,* 32 U.S. 243 (1833), the U.S. Supreme Court ruled that the Bill of Rights applied only to the national government. The Supreme Court decided relatively few cases on the basis of the Bill of Rights during the nation's first century, but it became increasingly important in the twentieth century when the Court, using a legal doctrine called "incorporation," decided that the Due Process Clause of the Fourteenth Amendment applied the major provisions in the Bill of Rights to the states.

John R. Vile

See also: Barron v. City of Baltimore; Bill of Rights; Incorporation Doctrine; Madison, James; United States Constitution.

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Felon Disenfranchisement

Criminal disenfranchisement laws restrict the voting rights of criminal offenders. In those states that prohibit voting by convicts, criminal offenders (along with the institutionalized mentally ill) are now the only U.S. adults legally barred from the polls. The right to vote, of course, is a fundamental liberty necessary to an open, democratic society such as the United States.

"When a nation begins to modify the elective qualification," French author and aristocrat Alexis de Tocqueville observed about 1830s America in *Democracy in America,* "it may easily be foreseen that, sooner or later, that qualification will be entirely abolished." In the United States, Tocqueville's "invariable rule" of franchise expansion has mostly held, although progress toward universal suffrage has been unsteady. Almost all voter qualifications (restrictions) common in the United States during the early nineteenth century—groups prevented from voting by state laws included women, men with too little property, blacks, native peoples, illiterates, and those without extended residency, including many soldiers and students—have been abolished. Criminal disenfranchisement policies—sometimes called "felony disenfranchisement" laws, because felony conviction is the most common cutoff point—have deep roots in ancient and medieval Western thought and practice, but have been sharply criticized in recent decades by advocates of voting rights, better government, and criminal justice reform.

Experts estimate that almost 4.7 million U.S. adults are now barred from voting because of a criminal conviction, the majority of whom are not incarcerated, and over a million of whom have completed their sentences entirely. Disenfranchisement laws vary so widely across states that the Department of Justice has described current law as "a national crazy-quilt of disqualifications and restoration procedures." Thirteen states bar felons from voting even after their sentences have been completed; fifteen disenfranchise during incarceration, probation, and parole; four bar the vote during incarceration and parole but not probation; sixteen states and the District of Columbia bar offenders from voting only during incarceration; and two states do not strip voting rights from convicts at all. Several states disenfranchise more than 100,000 ex-offenders. For example, over 600,000 Floridians have lost their voting rights as the result of a criminal conviction, more than 400,000 of whom have completed their sentences. Each indefinite-disenfranchisement state has some procedure by which ex-convicts may petition to return to the franchise, but restoration requirements—which range from administrative procedures to full gubernatorial pardon—make regaining the vote difficult.

The diversity among state laws has confusing effects. A former inmate may vote in one state, but his former cell-mate may not in a neighboring state; an ex-convict who moves across state lines may gain or lose the right to vote. The voting rights of former felons, therefore, depend "solely on where a person lives," as a 2001 bill before the U.S. Congress put it. The vast majority of crimes punished by disenfranchisement, meanwhile, are not related to voting or to the electoral process. The United States is the only democracy that indefinitely bars so many offenders from voting, and it may be the only country with such sweeping disenfranchisement policies.

Because disenfranchisement laws are located in state constitutions and suffrage statutes instead of the penal code, the loss of the vote is legally not part of an offender's sentence; instead, it is a "collateral consequence" of conviction. Indeed, U.S. courts have disagreed over whether disenfranchisement is properly understood as a punishment or as "a nonpenal exercise of the power to regulate the franchise," as the U.S. Supreme Court described the policy in *Trop v. Dulles,* 356 U.S. 86 (1958). Historical and contemporary sources, however, strongly suggest that U.S. disenfranchisement laws were designed with punitive purposes, from the colonial period through the nineteenth century and into the present.

Many modern proponents of disenfranchisement define the sanction as a punishment and contend that barring convicts from voting is an effective penalty. A second argument claims that the restriction is not a punishment, because it aims only to protect the polity from the corruption of voters lacking civic virtue. As the Alabama Supreme Court famously ruled in *Washington v. State,* 75 Ala. 582 (1884), the purpose of denying suffrage to ex-convicts is "to preserve the pu-

rity of the ballot box, which is the only sure foundation of republican liberty." A person "rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude," the court held, "is unfit to exercise the privilege of suffrage." Adherents of this view sometimes contend that felons are more likely than others to commit vote fraud.

A third common defense of disenfranchisement emphasizes the terms of the "social contract" (a view of society as a contract between government and the people intended to promote the social good, a theory proposed in the 1600s by English philosopher John Locke) and declares that those who break society's rules forfeit the right to make those rules. In *Green v. Board of Elections,* 380 F.2d 445 (2d Cir. 1967), an influential ruling upholding indefinite disenfranchisement, federal Judge Henry Friendly quoted directly from Locke and held that "[a] man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administration of the compact." Proponents of the social-contract view sometimes also argue that convicts must be kept from the polls because they might vote to weaken the criminal law.

Racial discrimination has also played an important role in U.S. criminal disenfranchisement. After the Civil War, some southern lawmakers openly employed disenfranchisement law exactly as they used the literacy test and the poll tax: as a policy neutral on its face but with the intent and effect of barring blacks, though not whites, from the polls. Previous policies disenfranchising all those subject to incarceration in the state penitentiary were replaced with new laws targeting only offenses of which blacks were more likely than whites to be convicted, including many nonprison offenses. In 1896, the Mississippi Supreme Court articulated the discriminatory nature of these policies. The 1890 constitution, the court observed in *Ratliff v. Beale,* 20 So. 865 (Miss. 1896), "swept the circle of expedients to obstruct the exercise of the franchise by the negro race." That race was composed of "a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites." Those "furtive offenses"—including burglary, theft, and obtaining money under false pretenses—were now grounds for disqualification, whereas "robust crimes" such as robbery and murder were not.

The most explicit and egregiously racist laws have been altered. But as critics of the policy observe, disenfranchisement today falls disproportionately on African Americans and other people of color in the United States, owing in large part to the "war on drugs" and systemic discrimination in the criminal justice system. Studies estimate that in a few states, almost one-third of black men are indefinitely disenfranchised. Together with the racist history of the laws, foes of disenfranchisement argue, such heavy impacts should compel legislatures and judges to be deeply skeptical of the policy. Although this argument has not yet succeeded in the federal courts, some advocates contend that the disparate impacts of disenfranchisement violate the Voting Rights Act of 1965 (VRA).

In addition to the VRA critique, opponents of disenfranchisement today make three broad claims. First, they contend that none of the central purposes of punishment—rehabilitation, deterrence, incapacitation, or retribution—is achieved by barring offenders from voting, particularly given the universal, invisible "collateral" way U.S. law does it. Second, they point out that vague notions of a "social contract" were long ago superseded in U.S. courts by the clear and direct language of rights. Pointing to numerous Supreme Court decisions, these critics maintain that because the right to vote is fundamental, restrictions can be justified only by a specific, compelling state interest—an interest that defenders of disenfranchisement have failed to identify. Finally, they contend that allowing and even encouraging convicts to vote would strengthen the U.S. polity by helping to rehabilitate offenders and by illustrating the public's faith in the robust character of U.S. elections.

Alec C. Ewald

See also: Hunter v. Underwood; Richardson v. Ramirez; Right to Vote.

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Ferguson v. Skrupta (1963)

Ferguson v. Skrupta, 372 U.S. 726 (1963), is the most direct demonstration of the extent to which the U.S. Supreme Court deferred to legislatures on economic matters in the late twentieth century. The case repudiated the dominant judicial philosophy of the early part of the twentieth century, which had given significant protection to economic liberties.

Frank Skrupta challenged a Kansas law restricting the business of debt adjusting to licensed attorneys. Debt adjusting permits people facing financial problems to consolidate their debts and have an adjuster reimburse their creditors. Skrupta, who was not a lawyer, argued that lawyers dominated the state legislature and that their self-interests as lawyers affected their decision as to who was best equipped to settle debt problems. The Supreme Court had no problem rejecting Skrupta's attack. Reflecting the judicial doctrine that it was not the task of courts to second-guess the wisdom of the legislature in its regulation of economic matters, Justice Hugo L. Black argued that "courts should not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected" to make laws.

Ferguson v. Skrupta rejected the line of Supreme Court cases imposing the doctrine of substantive due process onto the state and later the national governments. In cases such as *Lochner v. New York,* 198 U.S. 45 (1905), the Court had read specific limitations into the Due Process Clauses of the Fifth and Fourteenth Amendments on the government's power to regulate economic activity. Unlike procedural due process, which requires only that the government pass and enforce laws by agreed-upon rules, substantive due process is used by courts to examine the wisdom, need, or appropriateness of legislation. The Supreme Court used substantive due process to strike down 184 state laws from 1899 to 1937.

Nebbia v. New York, 291 U.S. 502 (1934), ended this judicial activism and demanded judicial deference to the legislature on economic matters. Thereafter, the challenger of an economic regulation had the burden of proving that the legislature acted irrationally or that the goal was not constitutionally permitted. Judicial restraint would respect that the legislative process could correct its own errors. "[J]udicial intervention is generally unwarranted no matter how unwisely [judges] think a political branch has acted," the Court noted in *Vance v. Bradley,* 440 U.S. 93 (1979). This hands-off policy does not apply, however, when fundamental personal rights are at stake, such as the freedom of speech, the right to vote, or the right to travel. In these and similar cases, courts are obligated to give strict scrutiny to regulations that attempt to restrict fundamental freedoms.

Ferguson v. Skrupta did not kill the doctrine of substantive due process. As Justice Potter Stewart pointed out in his concurring opinion in *Roe v. Wade,* 410 U.S. 113 (1973), "*Ferguson v. Skrupta* . . . purported to sound the death knell for the doctrine of substantive due process, [but] barely two years later, . . . *Griswold v. Connecticut,* 381 U.S. 479 (1965), [joined] . . . a long line of pre-*Skrupta* cases decided under the doctrine of substantive due process."

The "new" substantive due process cases established a constitutional right to certain forms of expressive individualism. The cases protected the right of married couples to obtain and use contraception (*Griswold*) and a woman's right to make the choice about carrying a pregnancy to term (*Roe*). The broad deference the Court has given to legislative judgments on

economic matters may also be changing. In *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), for example, the Supreme Court rejected South Carolina's effort to preserve the coast environment by harshly restricting property development. The case not only implicated economic issues because property development was so restricted but also raised due process concerns because it infringed on the owner's property rights.

Timothy J. O'Neill

See also: Carolene Products, Footnote 4; Substantive Due Process.

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Fifteenth Amendment

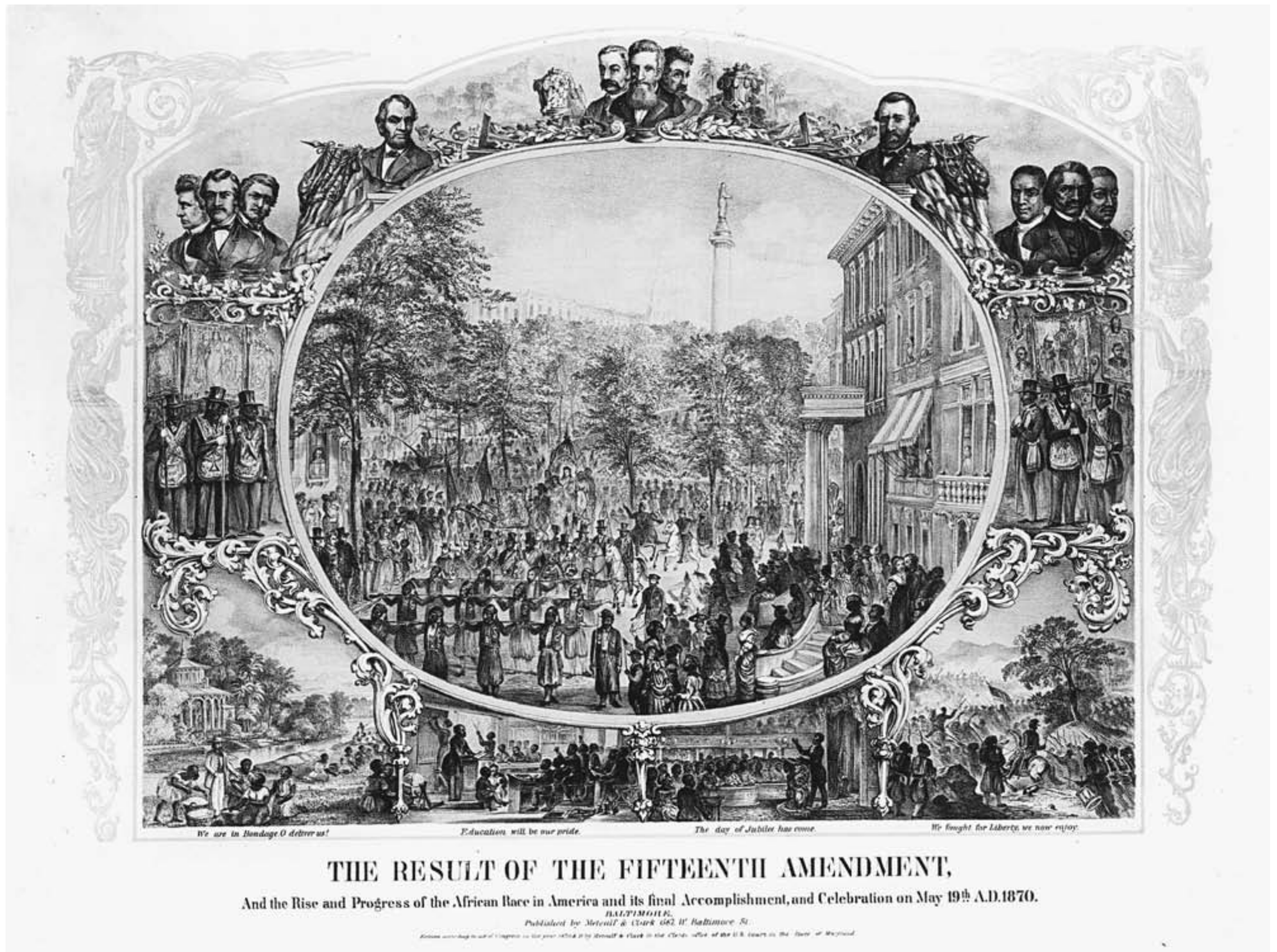
The Fifteenth Amendment of the Constitution provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." In the post–Civil War period, the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted in order to eradicate slavery and provide African Americans with constitutionally protected civil rights, including the right to vote. The Fifteenth Amendment was ratified in 1870.

Although the Fifteenth Amendment forbade the denial of suffrage on the basis of race, it took many decades before full black enfranchisement became a reality. After the Civil War, southern states engaged in a wholesale effort to disenfranchise blacks by first extralegal and then legal means. White supremacist groups, most notably the Ku Klux Klan, mounted violent campaigns against African Americans in a successful effort to stifle political participation. In 1870 alone, the year the Fifteenth Amendment was ratified, the Ku Klux Klan terrorized and killed hundreds of blacks who tried to vote or hold office. The use of widespread political fraud, such as stuffing ballot boxes and closing poll stations, further undermined black participation in elections.

In response to the violence of white southern resistance, Congress passed the Enforcement Act of 1870 and the Enforcement Act of 1871, which prohibited interference with the right to vote by means of intimidation, threats, or official discrimination in the application of the election laws. This legislation proved inadequate, however, particularly after northern Republicans withdrew federal troops from the South in the wake of the Compromise of 1877, which was an effort to resolve the disputed presidential election of 1876.

In the 1890s, southern states passed legislation and amended their constitutions to further reduce black enfranchisement without directly violating the Fifteenth Amendment. Numerous tactics were adopted, including literacy tests, constitutional interpretation tests, good character tests, poll taxes, white primaries, and property qualifications. These laws and regulations were phrased in neutral terms, but were expressly designed to prevent blacks from voting. In addition, local officials administered the disenfranchising laws in a discriminatory fashion so that blacks, but not whites, were barred from voting. By 1910 almost no African Americans were able to vote.

The Supreme Court did little to protect the black franchise; indeed, it upheld the constitutionality of the white primary in *Grovey v. Townsend,* 295 U.S. 45 (1935); the poll tax in *Breedlove v. Suttles,* 302 U.S. 277 (1937); and the literacy test in *Lassiter v. Northhampton County Board of Elections,* 360 U.S. 45 (1959). It was only in 1944 that the Supreme Court decided in *Smith v. Allwright,* 321 U.S. 649, that because the Democratic primary was integral to the election process, limiting participation in the primary to whites violated the Fifteenth Amendment. The tide began to turn slowly once the federal government adopted the Civil Rights Acts of 1957, 1960, and 1964, which provided federal court judges and federal officials the authority to monitor voting practices in the South and intervene when necessary. These acts were ultimately unsuccessful in improving black enfranchisement, however, because the states merely evaded court decisions or switched to other disenfranchising tactics.



This drawing commemorates the enactment of the Fifteenth Amendment, which prohibited the denial of suffrage on grounds of race, and its celebration in Boston, May 19, 1870. *(Library of Congress)*

The adoption of the Voting Rights Act of 1965 was a watershed event in the history of voting rights. Section 2(a) of the Voting Rights Act prohibits any voting qualification, standard, practice, or procedure that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." In effect, the legislation automatically disallowed the use of literacy tests, good character tests, and other devices that were used to disenfranchise African Americans. In addition, it authorized the attorney general to enroll voters in the South. To prevent the emergence of new disenfranchising laws, the law also required certain states to seek approval from the Justice Department before changing any of their electoral procedures. In 1966 the Supreme Court upheld the constitutionality of the Voting Rights Act in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). The right to vote as guaranteed by the Fifteenth Amendment was finally protected and enforced.

Yasmin A. Dawood

See also: Right to Vote.

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Fifth Amendment and Self-Incrimination

Added to the U.S. Constitution as part of the original Bill of Rights in 1791, the Fifth Amendment is a collection of rights. Most govern the circumstances under which someone can be made to stand trial in a criminal case. Every criminally accused person is entitled to the benefits of grand jury indictment (except in certain military cases), may not be subjected to double jeopardy (being tried twice for the same offense), is guaranteed due process of law, and cannot be compelled "to be a witness against himself." Somewhat incongruously placed with these criminal matters is a clause in the amendment that guarantees that private property cannot be taken for public use without compensation—called the Takings Clause—presumably in a civil eminent domain proceeding.

Like all of the original Bill of Rights (the first ten amendments to the Constitution), the Fifth Amendment was intended to bind only the federal government. State governments were presumed to have their own bills of rights. But after the adoption of the Fourteenth Amendment in 1866, the U.S. Supreme Court gradually included most of the Fifth Amendment among those liberties that state governments must also provide. Only the right to grand jury indictment has not been "incorporated" in this way and made binding on the states.

SELF-INCRIMINATION

The Supreme Court has applied a process of definition and elaboration of the four incorporated rights and has developed their protections far beyond what was intended in 1791. The privilege against compulsory self-incrimination has benefited the most from this extension and elaboration.

Origins and Purpose

The right against self-incrimination developed out of legal battles fought in British history. During the religious wars of the sixteenth and seventeenth centuries, certain courts, such as Britain's Star Chamber, used procedures under which defendants could be compelled to answer truthfully all questions they were asked, even when the answers doomed them to conviction and execution. If they refused, torture was sometimes used to force them to answer. A long political struggle against these courts followed. The value of protecting defendants against compulsory self-incrimination was recognized, and the right was effectively secured by the time of the American Revolution. In 1769 the famous British jurist William Blackstone wrote that the common law of England was that no man was required to betray himself.

Some of this struggle went on in Britain's American colonies as well. A protection against compulsory self-incrimination was written into the Massachusetts Body of Liberties in 1641. A Virginia statute of 1677, after court abuses surfaced in that colony, guaranteed that "noe man shall compell a man to sweare against himself in any matter wherein he is lyable to corporal punishment." Bills of rights adopted by Virginia, Pennsylvania, Vermont, and North Carolina on the eve of the revolution guaranteed that no defendant could be compelled to give evidence against himself. It is clear that the framers of the Fifth Amendment were familiar with the long historical struggle and the valuable fundamental right that emerged from it.

Scope

Although the protection against compulsory self-incrimination was originally intended only to protect criminal defendants from being compelled to testify during their own trials, the Supreme Court gradually extended it to other witnesses, reasoning that it was unjust to compel testimony that would be written down and preserved forever and that could be used against the witnesses in some potential future trial. Using the same reasoning, the Court extended the right to witnesses called by grand juries, congressional investigating committees, and even some (but not all)

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administrative bodies. Even the most preliminary and informal police interrogations must cease as soon as the witness expresses a desire to end the questioning.

Courts have further held that if a defendant exercises this right to remain silent, prosecutors and other officials cannot comment on this refusal to speak or otherwise use it to convince the jury that guilt should be inferred. Common sense might suggest that an innocent defendant should have no objection to speaking out. But the Supreme Court concluded that there may be many reasons why an innocent person may want to preserve silence.

The right to remain silent is critical to any criminal investigation. Because it exists, police can presume—and juries can conclude—that statements defendants make are not coerced, are truthful, and are made in each defendant's strategic interest. But if defendants don't know that they can remain silent and that their silence cannot be used to prejudice the proceedings against them, they may conclude it is necessary to lie or otherwise dissemble to prevent police abuse. In the 1950s and 1960s, the Supreme Court dealt with several cases in which defendants did not seem to know they had the right to remain silent. Some individuals were of low intelligence, and others did not speak English. Others were described as emotionally unstable or feeble-minded. Still others were interrogated in unusual ways. In *Spano v. New York,* 360 U.S. 315 (1959), for example, an emotionally unstable suspect, after being questioned for three days without relief, was manipulated by an acquaintance, a rookie police officer who pretended to be a friend. In *Leyra v. Denno,* 347 U.S. 556 (1954), an emotionally exhausted suspect who had been questioned for three days confessed to a psychiatrist who was trained in hypnosis. The Court found in both cases that the questioning violated the defendants' right against self-incrimination.

Some interrogation techniques bordered on torture. The Supreme Court overturned convictions based on confessions obtained with the assistance of truth serums, or after prolonged periods during which suspects were held incommunicado, denied sleep, or otherwise mistreated. In the famous *Miranda v. Arizona,* 384 U.S. 436 (1966), the Court created a "prophylactic rule": Before police can seriously question any criminal suspect, they must make sure the suspect understands the right to remain silent and the related right to consult with a lawyer. Since *Miranda,* police abuses have dramatically declined.

Broad as the right against self-incrimination is, and as well protected as it is, it does not cover all circumstances. Because it is a personal right, it cannot be invoked to protect corporations or other business entities. Furthermore, U.S. legal tradition generally extends the right only to testamentary evidence; that is, a witness cannot be compelled to utter words or to write them down. In contrast, the Fifth Amendment traditionally has not been extended to such nontestamentary evidence as fingerprints; blood, hair, saliva, or semen samples that will be subjected to forensic testing; and even voice or handwriting specimens that will be subjected to forensic examination. Witnesses can be compelled to be photographed for identification purposes, to stand or walk in a police lineup, and to model particular clothing or headgear. Witnesses can also usually be compelled to produce documentary evidence. This can take the form of business records, letters, e-mails, and even diaries. As a rule, persons and businesses can be compelled to produce records that the law requires them to keep, such as

income records required by the tax laws, even when the records suggest such crimes as income tax evasion.

Nor can the right be claimed by someone who is not subject to incrimination—that is, who cannot be put on trial and, on conviction, subjected to criminal punishment. In a few cases, courts have held that the privilege can be claimed by persons who can be subjected to noncriminal but government-imposed penalties such as loss of government employment or disbarment. But the privilege cannot be invoked to protect a person from private reprisal, such as loss of private employment, or from social disgrace, disapproval, or ridicule.

DOUBLE JEOPARDY

A person who has been tried and acquitted for a crime, or who has been pardoned, is protected by the prohibition against double jeopardy. Because such a person can never again be a defendant in a trial for that crime, the person cannot ever be incriminated and thus cannot refuse to answer questions about the crime in a subsequent court proceeding. Nevertheless, a defendant who has been acquitted of a crime may still be sued by the victim for civil damages arising from that crime and may be compelled to testify during the civil trial.

For this reason, prosecutors sometimes extend an offer of immunity to critical witnesses. They may promise not to prosecute witnesses for crimes about which they testify. If there is no prosecution, there can be no incrimination. Alternatively, prosecutors may promise not to use the information witnesses supply in the event the case is not prosecuted. If the prosecutor does not use witnesses' words or information derived from them at trial, there can be no self-incrimination. Finally, a properly made grant of immunity cannot be refused by a witness, but if prosecutors violate the agreement, an appeals court will set aside any conviction obtained using the self-incriminating information.

Paul Lermack

See also: Double Jeopardy; Due Process of Law; Grand Jury; Immunity; Incorporation Doctrine; *Miranda v. Arizona;* Takings Clause.

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Fighting Words

Fighting words are words that, when used in a specific context and directed against specific individuals, would have the tendency to cause a breach of peace or harm to the persons to whom they are directed. Such words (and in many cases, symbols treated as expression) are generally not considered protected speech under the free speech provision in the First Amendment to the U.S. Constitution. They may include personal epithets and words that cause harm. The question of what expression will constitute fighting words is highly controversial because of the diverse nature of U.S. society and because political speech traditionally has been the most protected type of speech—in terms not only of the right of a speaker to speak and the right of a listener to hear but also of society's need for robust discussions of timely political issues. Therefore, forceful speech is generally protected, even when it is potentially insulting, and particularly when it constitutes political speech.

In *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), the U.S. Supreme Court upheld under a fighting-words statute the conviction of an individual who, while lecturing on a public street, called a police officer a fascist and a racketeer. Although the statements were not necessarily a direct threat, the Court considered them to be impermissible fighting words. Today, insulting, nonthreatening words directed to police and other public officials would not likely be labeled illegal fighting words, as indicated by *Gooding v. Wilson,* 405 U.S. 518 (1972).

Even when speech is directed at specific groups, the government may not regulate fighting words when the law in question targets a particular content or viewpoint. In *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992), the Supreme Court considered the constitutionality of an antibias law that outlawed cross burn-

ing and the use of other symbols that might be considered fighting words or expression, such as the Nazi swastika. The Court ruled that because the ordinance banned the offensive symbols only when used by the proponents of racial and religious hatred and not by advocates of intolerance, it was unconstitutional. If speakers had other intentions, such as opposing intolerance, they could use the symbols as they pleased. The St. Paul ordinance prevented the use of these fighting words and symbols only by particular groups, therefore constituting an impermissible viewpoint-based restriction by government.

In *Virginia v. Black,* 538 U.S. 343 (2003), the Court upheld laws banning cross burning provided the action was carried out with an attempt to intimidate. This is the classic Court definition of what constitutes fighting words. The Court has found that there are no fighting words per se—that is, words that are offensive by their very nature. This decision was also consistent with *R.A.V. v. City of St. Paul* (1992), because it ruled that cross burning was a particular act that had a long history in the United States and that the law could be applied only in circumstances indicating a direct intent to intimidate specific individuals, no matter what the content of the words. When burning a cross becomes a truly threatening act directed at specific individuals, it no longer is simply speech.

In *Cohen v. California,* 403 U.S. 15 (1971), the Court overturned the conviction of a California man who entered a public courthouse wearing a jacket displaying the words "fuck the draft." In overturning his conviction, the Court said that the "emotive force" of the words justified their use. In some contexts, however, offensive words might constitute fighting words—for example, epithets yelled at a specific person on the street.

Flag burning has also been viewed by some as constituting per se fighting words or expression—an act so offensive that it should not receive constitutional protection. However, the Court ruled in *Texas v. Johnson,* 491 U.S. 397 (1989), that laws prohibiting flag burning and desecration were inherently content-based and thus constitutionally invalid. They constituted illegal government suppression of free expression and political speech based on content.

Today, fighting words remain a highly controversial aspect of First Amendment law, particularly when they involve hate groups. In 1977 a group of neo-Nazis decided to protest in Skokie, Illinois, a Chicago suburb with a large Jewish population, including approximately 5,000 concentration camp survivors. The protesters intended to wear Nazi uniforms and swastika armbands. In an effort to protect town citizens from harmful effects of the march, city officials attempted to prohibit the wearing of Nazi uniforms, the displaying of swastikas, and the distribution of anti-Jewish literature. The Court refused to view these actions as fighting words just because some people might be offended or become violent or upset upon hearing and seeing such expression. Although the protesters voluntarily canceled the march, the free speech doctrine articulated in this case remains viable today.

Ronald Kahn

See also: Chaplinsky v. New Hampshire; Cohen v. California; First Amendment; Flag Burning; Hate Speech; *R.A.V. v. City of St. Paul;* Symbolic Speech; *Texas v. Johnson; Virginia v. Black.*

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Fingerprinting

Despite a 100-year history, the use of fingerprints to prove identity continues to generate controversy. Courts and commentators question not only the conventional wisdom that fingerprint analysis provides a fail-safe method of identification but also the methods by which law enforcement agencies acquire and organize fingerprint databases. In the context of civil liberties, fingerprinting raises important issues of privacy rights and due process protections.

HISTORY

In the early 1900s, courts began to allow testimony of fingerprint examiners to aid in the analysis of whether a "latent print" (one left at the crime scene) matched the fingerprint of the criminal defendant. As fingerprint analysis gained acceptance, its proponents made great efforts to repudiate reports that fingerprints held additional information, for example, a propensity for deviant behavior. Otherwise, identification would be corrupted by any conclusion that the fingerprint contained "criminal attributes." Proponents were successful in their efforts to persuade skeptics that fingerprinting was error-free and that it should be limited to one use—achieving a positive identification. Soon courts around the country embraced the theory that a proper comparison of prints conclusively determined identity.

Recognizing the trend of accepting fingerprint analysis in the courtroom, law enforcement agencies started to compile databases containing fingerprints for future analysis. Constitutional challenges to this development were largely unsuccessful. Requiring a suspect's fingerprints has failed to trigger the Fourth Amendment's "unreasonable search and seizure" concerns raised by the retention of DNA samples, retrieval of which requires more intrusive procedures to obtain blood, saliva, skin, semen, or hair. Though courts generally hold that individuals have little to no reasonable expectation of privacy in their fingerprints, a governmental agency must demonstrate a minimal level of individualized suspicion to justify the forced retrieval of prints for law enforcement purposes. Police may not, therefore, without probable cause, force a person to provide fingerprints, as the U.S. Supreme Court held in *Davis v. Mississippi,* 394 U.S. 721 (1969).

CHALLENGES TO USE AND COLLECTION

Henry Faulds (1843–1930), a medical scientist who helped create the first fingerprint comparison techniques, warned that although a set of ten fingerprints may provide the basis for a definitive match, the same could not be said for a solitary print fragment. Contemporaries dismissed his apprehension, but recent scholarship and court decisions are raising concerns that echo Faulds's warnings.

Recent challenges have targeted the reliability of fingerprint examiners. No uniform standards govern their certification. The Federal Bureau of Investigation (FBI) internally conducted proficiency tests suggesting that a false negative (missing a match) may occur only 1 percent of the time and that a false positive (finding a match were there is none) occurred less often. In 1995, however, an external proficiency test of other laboratories revealed that only 44 percent of the examiners scored perfectly, and 22 percent reported a false positive.

In addition, examiners commonly must evaluate a latent print that is somehow compromised. For example, a fingerprint left at a crime scene is contaminated or is only a partial print. Surveys suggest that examiners vary in determining whether a print is too compromised to be compared. A print may be distorted due to differences in pressure and temperature or the shape of the surface on which the print is deposited. The Department of Justice estimated the average size of a latent fingerprint fragment to be only one-fifth the size of a full fingerprint—and from this an examiner must determine if there is a match. No study has been conducted to determine the frequency with which such distortions occur.

A more fundamental challenge to fingerprint analysis is whether fingerprints are indeed unique to each individual. Although examiners will attest that a fingerprint fragment is unique to one finger in the world, that premise has never been scientifically established but is instead based on anecdotal evidence and experience. Indeed, no testing has been conducted to determine the probability of two different people having the same fingerprint.

Criticism is also aimed at the collection and use of fingerprints by government agencies. Under J. Edgar Hoover's leadership of the FBI, in addition to obtaining fingerprints from arrested or convicted individuals, the agency procured prints from other federal, state, and local agencies as well as through volunteer drives. In addition, Hoover did not restrict use of the database to criminal identification but intended that it also be used to monitor associations of citizens. Collecting fingerprints from individuals lacking any connection to the commission of a crime and permitting broader

Rosa Parks being fingerprinted soon after refusing to move to the back of a bus, 1956. Her defiance touched off an extended bus boycott in Montgomery, Alabama. *(AP/Wide World Photos)*

use of the database raised the ire of civil liberties organizations.

Law enforcement agencies have been known to organize their databases by race or ethnicity. In addition, when police target a certain area, the resulting database overrepresents that area in relation to less policed areas. Some police cruisers are now outfitted with onboard digital scanners that can automatically read an arrestee's fingerprints and immediately scan existing databases for a match. This contributes to the creation of databases that are skewed by factors such as race and class.

As law enforcement agencies come to rely more heavily on DNA samples positively to identify suspects of crimes, controversy over these procedures may overshadow the current debates surrounding fingerprint analysis. Nevertheless, fingerprint evidence will continue to be used, and its ramifications for privacy rights and civil liberties will persist. Since the September 11, 2001, terrorist attacks on New York City and

Washington, D.C., the United States has adopted a policy of fingerprinting foreign travelers to the country, raising further concerns about civil liberties and discrimination.

Ion B. Meyn

See also: Exclusionary Rule; Fourth Amendment.

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First Amendment

The First Amendment to the U.S. Constitution is the first of the ten amendments collectively known as the Bill of Rights. The First Amendment guarantees such basic rights as freedom of speech, freedom of the press, freedom of religion, and freedom of association by prohibiting government interference with these civil liberties. At first glance, the guarantees of the First Amendment seem simple and uncontroversial. However, when these guarantees are applied to real-life situations, the issue that inevitably arises is how these guarantees function when the freedoms of two or more individuals or groups conflict or when these freedoms conflict with important governmental interests. Perhaps because the rights guaranteed by this amendment are so fundamental and encompass activities engaged in by virtually every individual, interpretations of the First Amendment have led to significant debate and controversy throughout this country's history and continue to do so today. Because the U.S. Supreme Court is the ultimate arbiter of the Constitution, the justices' interpretations of its provisions carry immense weight in all constitutional matters, but especially in First Amendment cases.

SPEECH

By definition, freedom of speech implies that people can say anything at anytime and at anyplace they please. However, that is obviously not the case in practice. For example, imagine the chaos that would occur if individuals were free to shout "bomb" in a crowded airport whenever they pleased even though no bomb was present. Similarly, imagine the disruption to learning if schoolchildren could talk about anything they wished at anytime so that math class was transformed into a discussion about popular television shows. Because of the potential problems caused by totally unregulated speech in scenarios such as these, the U.S. Supreme Court has permitted certain restrictions on freedom of speech and even exempted some speech from First Amendment protection. Because of the importance of freedom of speech in U.S. society, however, such restrictions and exemptions have been as limited as possible.

Some of the first challenges to the First Amendment's free speech guarantee came during World War I when the government enacted laws to prohibit acts such as espionage that could undermine the U.S. war effort. In *Schenck v. United States,* 249 U.S. 47 (1919), the Supreme Court developed the "clear and present danger" test for determining when the state could legitimately regulate speech that advocated criminal, treasonous, or dangerous actions. Under this test, speech could be prohibited when the nature of the speech and the circumstances in which such speech was used created a clear and present danger that an illegal or harmful act would occur.

In *Brandenburg v. Ohio,* 395 U.S. 444 (1969), the Supreme Court abandoned the clear-and-present-danger test in favor of an "incitement" test, holding that the government may not prohibit protected speech unless such speech is "directed to inciting or producing imminent lawless action *and* is likely to incite such action" (emphasis added). So, for example, the government cannot prohibit individuals from speaking about the merits of overthrowing the government, but can prohibit individuals from speaking about such a topic when they are advocating action

American statesman and journalist Benjamin Franklin, apprehended by two policemen who have just served him a "Notice of Arrest," in his printing shop. Franklin was an influential pamphleteer and propagandist before and during the Revolutionary War. This 1970s cartoon may have been a commentary on how authoritarian curbs on freedom of the press violate the First Amendment. *(Library of Congress)*

on the part of their listeners and those listeners are likely to carry out such action whether now or in the future.

In contrast to the speech just discussed, some speech is so devoid of ideas as to be unprotected by the First Amendment. For example, it is permissible for the government to prohibit shouting "bomb" in a crowded airport, since that act of speech conveys no ideas and would likely lead to panic and possible injury. Similarly, the Supreme Court developed a "fighting words" test in *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), to exempt from First Amendment protection any speech likely to cause immediate violent retaliation. For example, the government can theoretically prohibit one individual from verbally assaulting another with foul and offensive names face to face, since that behavior will likely result in violence. However, because the Court has not upheld a fighting-words law since it first articulated the doctrine in *Chaplinsky,* some scholars question whether the fighting-words exception remains valid.

One of the broadest restrictions the Supreme Court has allowed the government to place on speech covered by the First Amendment is the time, place, or manner restriction. As long as a governmental regulation is content-neutral, then restrictions as to time, place, and manner are permissible. For example, it is permissible for a public school to prohibit students from discussing any subject other than math during their math class. Such a restriction is content-neutral and simply operates to regulate students' speech at a particular time and in a particular place. However, it would not be permissible for a public school to prohibit students from discussing only Judaism, for example, in their math class or to prohibit students from ever discussing any topic besides math even outside of school.

In addition to protecting pure speech, the right of free speech also protects symbolic actions that convey a message, such as saluting the flag or burning the flag. In *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), the Supreme Court held that because black armbands that school students wore to protest the Vietnam War constituted speech (expression) protected under the First Amendment, the school could not suspend the students for engaging in such activity. One logical extension of the First Amendment's free speech protection is that the government cannot force individuals to speak or engage in symbolic actions. For example, in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), the Court ruled that public schools could not force students to pledge allegiance to the flag.

The Supreme Court has historically held that the First Amendment protects even the most repugnant symbolic speech such as cross burning, which has a long history of association with the Ku Klux Klan's violence against African Americans. However, the Court recently revised that position in *Virginia v. Black,* 538 U.S. 343 (2003), holding that a state can ban cross burning when that activity is intended to intimidate. The Court's decision in *Black* has confused many civil libertarians, who on the one hand despise acts of racial intimidation but on the other

hand believe that all thoughts should constitute protected speech.

RELIGION

The plain language of the First Amendment's two religion clauses makes clear that the framers of the Constitution were concerned with assuring that individuals would be free to practice whatever, if any, religion they desired, pursuant to the Free Exercise Clause, and that in order to assure that freedom, it would be necessary to prevent the government from becoming involved in any or all religions, pursuant to the Establishment Clause, by trying to pass religion-oriented laws.

When applying the Establishment Clause, the Supreme Court has historically talked about the framer's intent, which the Court described in *Everson v. Board of Education,* 330 U.S. 1 (1947), as the effort to "erect a wall of separation between church and state." Yet several instances of religious symbolism or expression have a prominent place in government. For example, the country's money contains the words "In God We Trust," and the president of the United States is traditionally sworn in on the Bible. Although such vestiges of tradition have been permitted to remain as harmless civil religion, the Supreme Court has vigilantly struck down laws that amount to more than a purely symbolic union of church and state. Accordingly, in *Abington School District v. Schempp,* 374 U.S. 203 (1963), the Court held that the Establishment Clause was violated by laws requiring public school students to participate in Bible readings and prayer recitations.

Relying on its holding in *Schempp* and similar cases, the Court has unwaveringly made clear that the Establishment Clause will be violated when any religious activity, no matter how nonsectarian, is sponsored or sanctioned by a public school. For example, in *Lee v. Weisman,* 505 U.S. 577 (1992), the Court held that the Establishment Clause was violated by nonsectarian prayer at a public school's graduation ceremony.

The Supreme Court's decisions on school prayer have led many conservative religious groups to denounce the Court and proclaim that God is no longer allowed in schools. Unfortunately, some school officials have fed into this misperception by refusing to allow any religious activity on school grounds instead of taking the time to understand what activities are and are not permissible under the First Amendment. These individuals fail to realize that students are as free to pray in school or read their Bible, Koran, or other religious text as they have ever been. The Court's prayer decisions simply mean that no students can be coerced by public school or other government officials to participate in religious activities against their will.

As for the Free Exercise Clause, it obviously prohibits the government from passing laws that directly target religious beliefs or practices, but the issue becomes more complicated when a law that is neutral toward religious beliefs or practices inadvertently has an impact on them. For example, in *Sherbert v. Verner,* 374 U.S. 398 (1963), the Supreme Court held that it was impermissible for South Carolina to deny unemployment benefits for a Seventh-day Adventist who refused to accept suitable work without cause since she could not work Saturday because it was her religion's Sabbath. However, in *Employment Division, Department of Human Resources v. Smith,* 494 U.S. 872 (1990), the Supreme Court held that a neutral state law prohibiting the use of peyote could be applied in order to deny unemployment benefits to Native Americans who used peyote solely for religious purposes.

PRESS

Scholars are not entirely clear what reference the framers intended when they provided the guarantee of "freedom of the press." There has long been debate as to whether this freedom is simply an explicit extension of the First Amendment's free speech guarantee or whether "the press" as an institution has been given special constitutional protection. Cases dealing with freedom of the press have typically focused on two main issues: the extent to which the government can protect information from disclosure by members of the press and the extent to which members of the press can decline to share information, such as the identity of a source, with the government.

Historically, the Supreme Court has not looked favorably upon the press's attempt to gain access to in-

formation or proceedings that the government wishes to remain confidential. For example, in *Pell v. Procunier,* 417 U.S. 817 (1974), the Court upheld a California law that prohibited the press from interviewing individual inmates. However, in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), the Court appeared to depart from that position, holding that criminal trials must be open to the public unless the trial court could articulate an "overriding interest" to the contrary.

Although the Court refused to allow members of the press to shield themselves from being called to testify before a grand jury in *Branzburg v. Hayes,* 408 U.S. 665 (1972), Justice Lewis F. Powell Jr. in his concurrence stated that members of the press did have "constitutional rights with respect to the gathering of the news." Accordingly, Powell noted that members of the press could petition the trial court for a protective order when they felt they were being improperly called to testify. Because a majority of lower federal courts have followed Powell's concurrence rather than the *Branzburg* majority decision, and because many states have passed laws giving the press limited immunity with regard to revealing their sources, it is relatively rare that members of the press are subpoenaed to testify today.

ASSOCIATION

As an extension of the enumerated right of the people to assemble to address their grievances to the government and the individual's right to free speech, the Supreme Court first articulated the "right to associate" with its decision in *National Association for the Advancement of Colored People v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958). In that case, the Court stated that it would be a violation of the right to associate if Alabama required the NAACP to publicly disclose its membership list. In subsequent decisions involving the disclosure of membership information, one of which was *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539 (1963), the Court made clear that such disclosure would impermissibly infringe on the right to associate unless the state had a compelling interest and there was a "substantial relation" between that interest and the information sought.

Martha M. Lafferty

See also: Abington School District v. Schempp; Brandenburg v. Ohio; Branzburg v. Hayes; Chaplinsky v. New Hampshire; Employment Division, Department of Human Resources of Oregon v. Smith; Establishment Clause; *Everson v. Board of Education;* Free Exercise Clause; Hate Crimes; *Lee v. Weisman; National Association for the Advancement of Colored People v. Alabama ex rel. Patterson;* Right to Petition; *Schenck v. United States;* Separation of Church and State; *Sherbert v. Verner;* Time, Place, and Manner Restrictions; *Tinker v. Des Moines Independent Community School District; Virginia v. Black; West Virginia Board of Education v. Barnette.*

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First National Bank of Boston v. Bellotti (1978)

In a holding that preserved a place for corporate speech in political debate, the U.S. Supreme Court in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), found unconstitutional a Massachusetts criminal statute that prohibited corporate contributions and expenditures designed to influence or affect the vote on questions submitted to the voters, unless the political issue materially affected the property, business, or assets of the corporation. First National Bank of Boston and others desired to "speak" (spend) in opposition to a proposed state constitutional amendment authorizing a graduated individual income tax and thus alleged a violation of its political speech rights under the First Amendment to the U.S. Con-

stitution. In defense of the restriction, the state argued that the significance of the context justified the regulation of certain "speakers" in the interest of preventing distortion, corruption, and the drowning out of citizens' voices in the electoral process.

Writing for a five–four majority, Justice Lewis F. Powell Jr. focused less on the messenger—essentially avoiding the question of whether corporations have certain rights—and more on the message, reasoning that the bank's contributions were essential to a diverse and vibrant exchange of ideas. What mattered most, in other words, was the political *speech* at stake, not the political *speaker,* because the general public was capable of sifting through the input and arguments proffered by a vast array of contributors. Justice Powell did not summarily reject the notion that corporate "speech" could overwhelm the electoral process—accepting that, with sufficient evidence, such a restriction could be constitutional—but he explained that the state had failed to provide proof justifying such a prohibition.

In separate dissents, Justices Byron R. White and William H. Rehnquist emphasized the particular nature and power of the corporate form. To varying degrees, each conceded that corporations may have a legitimate voice in the political arena, but made the important point that because corporate bodies are created by the state, they may legitimately be subject to various restrictions on expression not imposed upon individuals. In particular, the state had the obligation to prevent institutions enjoying state-conferred advantages from dominating or compromising the integrity of the electoral process.

Although state restrictions on corporate speech and state concerns for relative parity and equality of opportunity for political speakers would not garner majority support until *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), in many ways *Bellotti* anticipated the debate that ensued over campaign finance issues throughout the 1980s and 1990s. The *Bellotti* majority, following the logic of *Buckley v. Valeo,* 424 U.S. 1 (1976), criticized the state for its paternalistic regulation of the "marketplace of ideas," but the dissenters recognized the inherently problematic nature of certain speakers and certain forms of speech—acceding to the state the power to supervise such forms of expression in the service of larger public or societal interests. A significant comment, however, was that although the evidentiary burden was not satisfied in *Bellotti,* the Court did concede that the state assumes an important regulatory role during campaigns and elections.

Brian K. Pinaire

See also: Buckley v. Valeo; Corporate Speech.

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Flag Burning

Perhaps nothing more symbolizes America's commitment to civil liberties than the constitutional status of the U.S. flag. A revered symbol of national unity, it flies in front of every public building, is mounted in almost every classroom in the country, and is witness to thousands of schoolchildren daily pledging allegiance to it and to the nation for which it stands. Boy and Girl Scouts through the decades have learned the proper way to display the flag, to fold it, and to dispose of flags that have worn out. One of the most famous monuments in the country stands in Arlington National Cemetery in Virginia and commemorates U.S. Marines raising the flag on the Japanese island of Iwo Jima after winning a bitter World War II battle. Yet the nation protects the right of people to desecrate its flag, the very symbol of its commitment to freedom. How did this happen?

During the Vietnam War years, antiwar protesters looked for ways to persuade citizens and lawmakers to end the war. They discovered that news media were more likely to broadcast dramatic events and developed a number of tactics to get their protests on the

evening news programs, including marching in demonstrations, burning draft cards, pouring blood on draft records, and wearing provocative T-shirts and armbands. These activities confronted the courts with a newly developing type of communication called "symbolic speech." But it was the civil rights movement rather than the Vietnam War that first gave the courts an opportunity to deal with the issue of flag desecration.

After a newscaster in New York City announced that civil rights leader James Meredith had been shot in Mississippi, a Korean War veteran became upset, took his personal flag into the street, and set it on fire, saying to passersby, "If they can let this happen to James Meredith, we don't need no flag." The man was arrested for defaming the flag and given a $100 fine that was promptly suspended. Nonetheless, he sued as a matter of principle, arguing violation of his free speech rights under the First Amendment to the U.S. Constitution.

When *Street v. New York,* 394 U.S. 576 (1969), made its way to the U.S. Supreme Court, the justices were divided. They agreed the defendant's words were protected but were unable to agree on whether his act of burning the flag was similarly protected as symbolic speech. They were given a second chance to consider the issue five years later in *Spence v. Washington,* 418 U.S. 405 (1974). The case involved an antiwar protester who had taped a large peace symbol on each side of a flag, which he then publicly displayed. The Court ruled that this was indeed symbolic speech and therefore protected against government interference.

The Supreme Court confronted the issue of flag burning head-on in *Texas v. Johnson,* 491 U.S. 397 (1989). Gregory Johnson was among a group of protesters outside the Republican Party's national convention in 1984. After a march through the city to protest President Ronald Reagan's nomination for a second term, Johnson unfurled an American flag and set it on fire while other protesters shouted anti-American slogans. He was arrested and charged with violating the Texas law prohibiting flag desecration. Upon his conviction he was sentenced to a year in prison and a $2,000 fine. His appeal eventually reached the Supreme Court.

In one of his last opinions before retiring, Justice William J. Brennan Jr., presenting the five–four majority holding, first asked whether Johnson's actions could be considered "expressive conduct" intended to send a message, and whether it was likely to be understood as such by those who observed his actions. Asserting that the flag burning was indeed expressive conduct, he then asked whether Texas had any interest in supporting Johnson's conviction that was not related to suppressing his expression. Because there was no incitement to violence or actual breach of the peace connected to the demonstration, he concluded that Texas's only interest was to preserve the flag as a symbol of nationhood and national unity. That interest, however, was overridden by the protection of speech

The American flag-burning issue comes to a Fourth of July parade. Burning the flag remains repugnant to the great majority of Americans, but most understand and appreciate the depth of commitment to civil liberties that drives a nation to protect even those who find its policies abhorrent. *(© Bob Daemmrich/The Image Works)*

guaranteed by the First Amendment. Justice Brennan concluded that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

An interesting aspect of *Texas v. Johnson* was the concurring opinion by Justice Anthony M. Kennedy, who wrote separately to point out that sometimes justices must make decisions they find personally repugnant because of their commitment to constitutional principles. He pointed out, "[T]he flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt."

Not surprisingly, a national uproar followed the Court's ruling, and numerous members of Congress proposed a constitutional amendment to prohibit flag desecration. Met with opposition from civil liberties groups and many of its own members, Congress instead passed the Flag Protection Act of 1989. This law differed from the Texas law at issue in *Texas v. Johnson* because it prohibited all mutilating, defacing, burning, or trampling on the flag without inquiring into the motives of the people involved. Many people hoped this difference would pass constitutional muster, but the Court struck the law down in *United States v. Eichman,* 496 U.S. 310 (1990), for the same reasons as prevailed in *Texas v. Johnson.*

Burning or otherwise desecrating the flag remains repugnant to the great majority of Americans, but most people understand and appreciate the depth of commitment to civil liberties that drives a nation to protect even those who find its policies repugnant.

Paul J. Weber

See also: First Amendment; Symbolic Speech; *Texas v. Johnson; United States v. Eichman.*

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Flag Salute

In *Minersville School District v. Gobitis,* 310 U.S. 586 (1940), the U.S. Supreme Court ruled constitutional a law mandating the flag salute and recitation of the Pledge of Allegiance in public schools, but just three years later, in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), the Court overruled *Gobitis* and held a West Virginia flag-salute statute unconstitutional. The cases involved issues pertaining not only to the Free Exercise Clause of the First Amendment to the Constitution (prohibiting government from interfering with an individual's right to free exercise of religion) but also to the right to free speech that is guaranteed under the First Amendment.

America's most common form of paying respect to a national emblem or symbol, the flag salute, started as part of a nationwide public school observance in 1892 honoring the 400-year anniversary of Columbus's discovery of America. Immediately it became popular and was widely used in schools in every state. By 1935 twenty-four states had statutes requiring instruction in flag respect; nine specifically required that the flag-salute ceremony be conducted regularly in all public schools. None explicitly demanded pupils participate in the ceremony because at the time it seemed inconceivable that anyone might refuse.

As early as 1918, Mennonites, among others, refused the salute and Pledge, and for the most part, school officials chose to grant exemptions. This indulgence continued until the Jehovah's Witnesses objected in the 1930s and 1940s.

During this period, Jehovah's Witnesses were decidedly unpopular due to their peculiar views, methods of aggressive proselytizing, and repeated and severe condemnations of other religions. Many local governments sought to curb the Witnesses with antipeddling ordinances, which usually were successfully challenged in court. For example, in *Lovell v. City of Griffin,* 303 U.S. 444 (1938), the Supreme Court

struck down a local permit ordinance granting blanket discretion to the licensing authority, and in *Schneider v. State,* 308 U.S. 147 (1939), the Court held that pamphleteering on the public streets could not be prohibited altogether, even for the ostensible purpose of preventing littering.

In the mid-1930s a Witnesses leader endorsed refusal to salute and sparked a wave of refusals just as the flag salute became an issue again as war began raging in Europe. School officials reacted with disciplinary action. In Pennsylvania and Massachusetts alone, more than 200 Jehovah's Witness children were expelled from school. In most instances these children still faced compulsory education laws and thus had to enroll in private schools or risk prosecution.

The best hope for the Witnesses was litigation in the courts. They brought suits in six states to compel readmission of their children but lost each time. On four occasions in the 1930s, the Supreme Court refused petitions for certiorari from these rulings but finally heard such a case in April 1940.

Walter Gobitis had brought suit before a federal district judge in Philadelphia for an injunction compelling the readmission of his two expelled children to the Minersville, Pennsylvania, public schools. The court held that the compulsory flag salute violated the Free Exercise Clause of the First Amendment when the salute was enforced against Jehovah's Witnesses, and the federal appellate court affirmed this decision. The school board appealed to the Supreme Court, which, to the surprise of many, reversed the lower courts in an eight–one opinion written by Justice Felix Frankfurter. Justice Harlan F. Stone dissented. He thought it was shocking that a child could constitutionally be expelled from public school for refusing to participate in the daily flag-salute ceremony even though it violated the child's religious beliefs. The Court's majority believed that the need to promote national unity could justify overriding the Free Exercise Clause.

Within two years *Gobitis* was under fire from all sides. The decision ushered in a bad period for Jehovah's Witnesses, who became targets of violence. In one week the Department of Justice received reports of hundreds of physical assaults on Jehovah's Witnesses by citizens and public officials. As the violence grew, so did unfavorable reaction to *Gobitis.* Further complicating the situation was congressional passage of a joint resolution codifying the rules of flag etiquette. A hint of the eventual reversal came in *Jones v. Opelika,* 316 U.S. 584 (1942), in a dissenting opinion, in which Justices Hugo L. Black, William O. Douglas, Frank Murphy, and Harlan F. Stone expressed their belief that *Gobitis* had been wrongly decided.

The Jehovah's Witnesses filed a class action lawsuit in Charleston, West Virginia, in August 1942, and the case was heard by a three-judge panel. Walter Barnette's children, among others, had been expelled from school for insubordination (for refusing to salute) and could not afford private schooling. They faced potential fines or imprisonment for failing to adhere to compulsory education laws. The three-judge panel decided unanimously in favor of the children, who were readmitted to school promptly. *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), reached the Supreme Court in March 1943, and the decision upholding the lower court's ruling was announced June 14 (Flag Day), 1943. Justice Robert H. Jackson wrote the eloquent *Barnette* opinion, deciding the case on free speech grounds rather than freedom of religion. The Court held that the government could not compel citizens to express beliefs without violating freedom of speech, regardless of whether the objections to saluting the flag were religiously based. Freedom of speech had to be respected. As Jackson put it, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodoxy in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The Pledge of Allegiance drew even more potential controversy in 1954 when, in an attempt to distinguish U.S. democracy from "godless" communism, Congress added the words "under God." The Supreme Court occasionally, particularly in concurring opinions, stated in dicta (nonbinding analysis) that the presence of "one nation under God" in the Pledge would be constitutional. In March 2004, however, the Court heard arguments in *Elk Grove Unified School District v. Newdow,* No. 02-1624, in which an atheist father in California demanded that "under God" be removed from the Pledge on the grounds that it was

unconstitutional to force his daughter to recite it at her elementary school. The Court of Appeals for the Ninth Circuit had agreed with the father in *Newdow v. U.S. Congress,* 328 F.3d 466 (9th Cir. 2002), holding that including the words "under God" made the Pledge "a profession of religious belief" that violated the First Amendment.

A future Court opinion may change what is constitutionally permissible in certain circumstances, such as when teachers lead schoolchildren in the Pledge and salute. Unlikely to be changed, however, is the Court's continuing prohibition of the compulsory flag salute.

Mark Alcorn

See also: Elk Grove Unified School District v. Newdow; Minersville School District v. Gobitis; West Virginia Board of Education v. Barnette.

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Flast v. Cohen (1968)

In *Flast v. Cohen,* 392 U.S. 83 (1968), the U.S. Supreme Court established guidelines for determining when individuals, in their capacity as taxpayers, may challenge the constitutionality of taxing and spending programs. The civil liberties issue not only was one of congressional taxation and spending within constitutional parameters but also was related to whether individuals had the right to bring a case to court in the first place, a requirement called "standing."

Litigants traditionally have had standing to sue when they could demonstrate that the policy at issue had harmed them personally in some direct fashion. But could individuals claim standing simply by virtue of being taxpayers whose contributions funded an allegedly unconstitutional policy? In its first look at the issue, in *Frothingham v. Mellon,* 262 U.S. 447 (1923), the Supreme Court set stringent limits on taxpayer standing by requiring that claimants show that the challenged policy caused, or was about to cause, them some particularized harm. To rule otherwise, said the Court, would cause federal courts to be inundated with lawsuits from parties seeking to challenge the constitutionality of programs they opposed on policy grounds. The Court under Chief Justice Earl Warren, believing that the assumptions underpinning *Frothingham* had become less compelling, sought to reconsider in *Flast v. Cohen* the Court's long-standing position on taxpayer standing.

Flast featured a challenge to disbursements made under the 1965 Elementary and Secondary Education Act, which provided federal funding to educate children from low-income families. The seven appellants claimed that federal funds were being used to provide instruction, textbooks, and library materials to religious schools, and in their view, such disbursements violated the Establishment Clause and the Free Exercise Clause of the First Amendment to the U.S. Constitution. The Free Exercise Clause prohibits government interference with an individual's right to free exercise of religion; the Establishment Clause prohibits government from engaging in activity that would constitute establishment of religion. The appellants argued that they had standing because, as taxpayers, they suffered the harm of being forced to subsidize religious expression.

The Supreme Court, by an eight–one margin, held that *Frothingham* established no blanket rule against taxpayer lawsuits. Such lawsuits, said Chief Justice Warren, were consistent with traditional notions of standing, provided that the taxpayers could sufficiently establish their personal stake in the dispute to guarantee that proceedings would indeed be adversarial. More specifically, taxpayers, in their capacity as taxpayers, wishing to challenge the constitutionality of federal taxing and spending programs would have to meet two criteria. First, they would have to show a "logical link" between their taxpayer status and the type of legislative policy being challenged. This restriction limits taxpayer suits to challenges to congressional authority to regulate under the taxing-and-spending clause of Article I of the Constitution. Second, they would have to show a connection between their taxpayer status and the particular alleged constitutional infringement. It is not enough to argue that Congress has gone beyond the scope of its dele-

gated powers; the taxpayer must show that Congress has violated specific constitutional provisions.

In *Flast,* the appellants had standing because they were able to demonstrate that substantial amounts of tax revenue were supporting the challenged program, and that the Establishment Clause of the First Amendment specifically constrains congressional power to tax and spend. Chief Justice Warren argued that *Frothingham*'s outcome was consistent with the test set forth in *Flast,* as the appellant there had challenged a federal spending program but had not claimed that the congressional enactment had run afoul of a specific constitutional constraint.

Flast promised a substantial expansion of access to federal courts for parties seeking judicial remedies for allegedly unconstitutional spending programs. This promise, however, has not been met, as the Court under Chief Justice Warren E. Burger and subsequently under Chief Justice William H. Rehnquist has, on balance, interpreted *Flast* restrictively by requiring that plaintiffs demonstrate more direct and personal harms than *Flast* appeared to require.

Jeremy Buchman

See also: Standing; United States Constitution.

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Fletcher v. Peck (1810)

In *Fletcher v. Peck,* 10 U.S. 87 (1810), involving one of the earliest cases of political corruption in the United States, the U.S. Supreme Court held that the Georgia legislature's repeal of an earlier land grant violated the Contracts Clause of the Constitution. That clause prohibits states from passing laws that would be injurious to contractual obligations. The case was an early test of the extent to which states could disrupt contracts between private parties.

In 1795 the Georgia legislature sold 35 million acres of public lands, an area near the Yazoo River that included what is now Alabama and Mississippi, to four land companies. Almost all of the legislators had received bribes in return for their votes. Georgia citizens, disgusted by their legislators' actions, voted most of them out of office. In 1796 the new legislature repealed the 1795 law and nullified the original land deal. This created a problem because between the time of the initial land grant and the repeal, the four companies had sold much of it to other parties, who then sold it to additional purchasers. One of those involved was John Peck, a citizen of Massachusetts, who had bought 600,000 acres from one of the four land companies and later sold 15,000 acres to Robert Fletcher, a New Hampshire resident. In 1803, Fletcher sued Peck to recover the money he had paid, claiming that Peck sold him land that he did not actually own. The case was brought in federal circuit court under a constitutional provision that permits federal courts to hear suits between citizens of different states. After the federal circuit court ruled in favor of Peck, Fletcher appealed to the U.S. Supreme Court.

When the case reached the Supreme Court, the justices had to decide whether the new legislature could rescind the original land grant without violating the Contracts Clause of the Constitution. This clause, found in Article I, Section 10, provides that no state shall pass any law "impairing the obligation of contracts." The Supreme Court held that Georgia's new legislature had in fact violated this constitutional provision. In the majority opinion, Chief Justice John Marshall asserted that since the initial land sale was not prohibited by the state constitution, it was a valid act of the legislature. Although conceding that the land grant was tainted by corruption, he concluded that it was not the Court's role to examine the legislature's motives. Furthermore, he maintained that the litigants in this case were not parties to the original fraudulent transactions but both were "innocent" purchasers who had rights to their property. Chief Justice Marshall said that a new legislature certainly had authority to repeal legislation passed by a previous legislative body, but it could not undo actions that were taken under the earlier law. In his view, these property rights had been "vested" (fixed) and could not sub-

sequently be annulled. Finally, he concluded that the term "contracts" in the Contracts Clause referred not only to agreements made between private parties but also to public grants, including grants of land. Therefore, the sale of lands by the Georgia legislature to the four land companies was a valid contract that could not be repealed by a new legislature.

Fletcher v. Peck was the first case addressing the Contracts Clause and was the first time the Court used its power of judicial review to strike down a state law because it violated the Constitution. Most significant, this case became an important precedent for the protection of property rights in the United States. Chief Justice Marshall's interpretation in *Fletcher v. Peck* was extended to later cases, and the Contracts Clause became the primary vehicle used to protect businesses from state regulation from that point until the late 1800s.

Joyce A. Baugh

See also: Contracts Clause; Property Rights.

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Florida v. J.L. (2000)

In *Florida v. J.L.,* 529 U.S. 266 (2000), the U.S. Supreme Court examined the legal boundaries of the police practice of having officers publicly stop and frisk individuals they suspect may be involved in a crime. The case raised issues under the Fourth Amendment to the U.S. Constitution pertaining to search and seizure and the language of the amendment regarding "unreasonable" and "probable cause."

In *J.L.* (the initials indicate the party is a minor), an anonymous phone caller told Miami police that a young black male standing at a particular bus stop, wearing a plaid shirt, was carrying a gun. Officers went to the bus stop and found three black males, including one, J.L., who was wearing a plaid shirt. Aside from the tip, the officers had no reason to suspect any of the young men of criminal conduct. An officer frisked J.L. and found a gun in his pocket.

J.L. was charged with carrying a concealed weapon and possessing a firearm while under age eighteen. His attorney moved to suppress the introduction of the gun into evidence because the discovery of the gun resulted from an illegal search. The trial court granted the motion, but the appellate court reversed, and then the Florida Supreme Court reversed the state appellate court, finding the search unconstitutional under the Fourth Amendment's prohibition of unreasonable searches. The U.S. Supreme Court agreed to review the decision.

A unanimous Supreme Court affirmed the Florida Supreme Court decision and ruled in favor of the minor, J.L. The Court held that an anonymous tip, absent any additional evidence of wrongdoing, could not justify the police conduct of stopping and frisking someone. Justice Ruth Bader Ginsburg, writing the opinion for the Court, reasoned that tips from unknown callers from unknown locations were too unreliable to justify stop-and-frisk searches. Specifically, the tip leading to the arrest of J.L. was unreliable because it gave no predictive information to allow police to test the informant's knowledge or credibility. The vague description of J.L.'s appearance did not make the tip reliable, Justice Ginsburg asserted, because a tip must be reliable in its claim of illegality, not just in its tendency to identify someone. Furthermore, Justice Ginsburg rejected the government's contention that a special exception should be made for anonymous tips regarding illegal possession of firearms.

Justice Anthony M. Kennedy, joined by Chief Justice William H. Rehnquist, wrote a concurring opinion stating that although the anonymous tip in *J.L.* was unreliable, some anonymous tips, if specific enough, could provide a lawful basis for stop-and-frisk searches. Justice Kennedy suggested that a tip might be deemed reliable if it predicted future conduct of the suspect, or if an unnamed caller with a familiar voice predicted criminal behavior two nights previously in a row.

The *J.L.* case was significant in that it set limits to the circumstances under which police can perform a stop-and-frisk. This type of pat-down search is known in legal circles as a "*Terry* stop," named after the case

Terry v. Ohio, 392 U.S. 1 (1968), that legalized the common police practice of pat-down searches if police have a "reasonable suspicion" of criminal behavior. The *Terry* decision was noteworthy because it represented the first time the Court approved searches under a standard lesser than "probable cause," the usual constitutional requirement. Decided during the tenure of Chief Justice Earl Warren, *Terry* represented a departure from the typically liberal decisions made by the Warren Court in the area of criminal procedure. The majority decision in *J.L.* suggested that in order for police to conduct a *Terry* stop lawfully, the justification of "reasonable suspicion" must arise from the actions of the suspect. Decided by a Court staffed with strong conservative justices such as Chief Justice Rehnquist and Justices Antonin Scalia and Clarence Thomas, the unanimous outcome in favor of the criminal defendant may have come as a surprise to a number of Supreme Court watchers.

Keith Rollin Eakins

See also: Fourth Amendment; Stop-and-Frisk; *Terry v. Ohio.*

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Ford, Gerald R. (b. 1913)

Gerald R. Ford served as president of the United States from August 9, 1974, to January 20, 1977, and lost the 1976 election to Jimmy Carter. A longtime member of the U.S. House of Representatives from Michigan, Ford entered the executive branch through the provisions of the Constitution's Twenty-fifth Amendment, which sets out the selection process for vacancies in the presidency and vice presidency. He became vice president in 1973 after Spiro Agnew's resignation and was elevated to the presidency when Richard Nixon resigned the following year in the wake of the Watergate scandal (a bungled burglary of Democratic National Headquarters at the Watergate hotel in Washington, D.C., by individuals with political connections to Nixon). As president, Ford issued the controversial pardon exonerating Nixon of all crimes he might have committed as president, and he oversaw the withdrawal of the United States from Vietnam in 1975. Ford also grappled with the controversy that erupted after the public learned of improper domestic surveillance and operations conducted by the Central Intelligence Agency (CIA) during the Nixon administration. In taking those actions, the agency had violated the civil liberties of many Americans.

The CIA was created in 1947 to gather and analyze information or intelligence affecting U.S. national security. Because some members of Congress feared that such an agency could be used to spy on Americans at home, the CIA's charter included strict limitations on its domestic role. Yet in December 1974, a *New York Times* report alleged that the CIA had for years spied on U.S. citizens and groups it deemed subversive—including protesters of the Vietnam War, civil rights activists, and political foes of President Nixon.

Surprised and alarmed by the charges, and mindful of the upcoming 1976 presidential election, President Ford acted quickly. On January 4, 1975, he created the President's Commission on CIA Activities to inquire into such activities taking place within the United States. Ford hoped that establishing the commission, to be headed by Vice President Nelson Rockefeller, would avert a congressional inquiry into the CIA. Ford worried that an investigation by Congress would be hard to control and might result in the unnecessary disclosure of sensitive information that could damage the CIA's ability to function. Nevertheless, both houses of Congress launched their own investigations.

In its final report, released on June 10, 1975, the Rockefeller Commission contended that most of the CIA's domestic activities had complied with the agency's statutory authority. The report did acknowledge that the CIA had sometimes overstepped its bounds and described some of the transgressions, including illegal mail openings and wiretaps, attempts to infiltrate dissident groups, and other instances of

As president, Gerald R. Ford grappled with the controversy that erupted after the public learned of improper domestic surveillance and operations conducted by the Central Intelligence Agency during the Nixon administration. In taking those actions, the agency violated the civil liberties of many Americans. *(National Archives)*

improper domestic spying. Yet the commission report omitted information about the CIA's plots to assassinate Fidel Castro and other foreign leaders. Senator Frank Church (D-Idaho), chair of the Senate investigative committee, soon made that material public and emerged as a leading critic of the CIA. Church compared the agency to "a rogue elephant on the rampage" and called for greater congressional oversight of the nation's intelligence operations.

Ford, who viewed the Church Committee as reckless and politically motivated, realized that he had to respond to the political storm. On February 18, 1976, he issued Executive Order No. 11,905, which established a new structure for the control and oversight of the CIA and imposed restrictions on its domestic activities. In announcing the order, Ford stressed the vital work done by the CIA and other intelligence agencies but also emphasized that those agencies must "conform to the standards set out in the Constitution to preserve and respect the privacy and civil liberties of American citizens."

Mark E. Byrnes

See also: Central Intelligence Agency; Clemency.

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Forsyth County, Georgia v. The Nationalist Movement (1992)

In *Forsyth County, Georgia v. The Nationalist Movement,* 505 U.S. 123 (1992), the U.S. Supreme Court

considered whether an ordinance that required a permit for parades and demonstrations was constitutional. The case raised difficult issues of free speech rights pursuant to the First Amendment to the U.S. Constitution. In a five–four decision, the Court held that the Forsyth County ordinance violated the First Amendment.

The ordinance at issue in the case stemmed from two marches held in 1987 in Cummings, Georgia, the county seat of Forsyth County. In the first march, Hosea Williams, a city councilman from Atlanta, led ninety demonstrators in a "March Against Fear and Intimidation." About 400 counterdemonstrators, including members of the Ku Klux Klan, lined the parade route, shouting racial epithets and throwing rocks and beer bottles. These counterdemonstrators so outnumbered police that organizers stopped the parade.

Undaunted, Williams returned the following weekend—this time with more than 20,000 marchers, including prominent civil rights leaders and politicians. Although about 1,000 counterdemonstrators once again confronted the marchers, the more than 3,000 law enforcement officers hired to protect the demonstrators successfully contained the counterprotesters but at a cost to the government of $670,000.

In response, Forsyth County adopted an ordinance that required those wishing to hold a parade first to obtain a permit from the county's administrator. The ordinance also authorized the administrator to charge a fee, up to $1,000, for costs related to the parade, including police protection. After Forsyth County adopted this ordinance, an organization called The Nationalist Movement decided to hold a rally at the county courthouse. The county imposed a $100 fee for the permit, but rather than pay the fee, the organization sued the county in federal court, claiming that the ordinance violated the First Amendment.

The case was eventually appealed to the U.S. Supreme Court. A closely divided Court held that the ordinance violated the First Amendment for two reasons. First, the Court concluded that the ordinance unconstitutionally granted the county administrator absolute control over the amount charged as a permit fee. The Court stated that "[t]he First Amendment prohibits vesting such unbridled discretion in a governmental official," because of the risk that the official would use that discretion to censor unpopular views—in short, to suppress speech. In other words, the Court feared that the administrator would charge higher permit fees for speech the government did not like. Second, the Court held that the ordinance violated the First Amendment because it allowed the administrator to charge marchers whose speech may trigger violence a higher fee to cover the cost of increased police protection. This was unconstitutional, in the Court's view, because the First Amendment prohibits speech from being treated differently because of its content.

Four justices dissented from the majority's holding. Relying on previous Supreme Court precedent, the dissent argued that the government could vary the amount charged for a permit without violating the First Amendment. Additionally, the dissenters argued that the Court should not have declared the ordinance unconstitutional because there was no evidence that the county administrator actually discriminated against applicants based on the content of the proposed speech.

Of course, the dissenters' view did not carry the day. Rather, the majority opinion in *Forsyth County* made clear that the First Amendment requires any permit system to include clear and definitive standards for determining whether permits shall be granted, and prohibits government officials from exercising too much discretion in the decision process. Additionally, the government may not charge applicants higher fees based on the content of the organization's speech. After *Forsyth County,* other plaintiffs challenged the constitutionality of permit and licensing ordinances, with varying outcomes based on the language of the specific ordinances at issue.

Margot O'Brien

See also: First Amendment.

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Fortas, Abe (1910–1982)

On October 4, 1965, Abe Fortas was sworn in as an associate justice of the U.S. Supreme Court. Born in Memphis, Tennessee, on June 19, 1910, Fortas earned a bachelor's degree at Southwestern College and his law degree at Yale Law School. Prior to his ascension to the Court, Fortas taught at Yale Law School, held several posts in administrative agencies, and maintained a successful private law practice in Washington, D.C. On May 14, 1969, Justice Fortas resigned from the Court and returned to private practice. He died April 5, 1982.

During his four-term tenure on the Supreme Court, Justice Fortas routinely aligned himself with the liberal bloc of justices on questions involving civil liberties, although his dependability on these doctrinal questions was not absolute. Mindful that judicial decisions were not divorced from society, he tempered liberal ideals with pragmatism, exercising judicial restraint not to attenuate constitutional principles to their outermost edges.

In the area of criminal defendants' rights, Justice Fortas voted consistently in favor of individuals challenging the criminal justice system. Although he was a zealous defender of the Fourth Amendment's protection against unreasonable searches and seizures, he was not an absolutist; pragmatism necessitated an exception in matters of national security. Fortas was an absolutist, however, in his interpretation of the Fifth Amendment's protection against self-incrimination as an important safeguard against unchecked governmental authority. He also believed that the right to counsel guaranteed under the Sixth Amendment was fundamental to the rule of law. Indeed, before he became a justice, he presented oral argument in *Gideon v. Wainwright,* 372 U.S. 335 (1963), in which he successfully argued that, consistent with the Sixth Amendment, indigent criminal defendants must be afforded counsel at public expense.

Justice Fortas made significant contributions regarding the rights of juvenile defendants. His majority opinion in *In re Gault,* 387 U.S. 1 (1966), gave juveniles facing court proceedings the same rights to due process, to assistance of counsel, and against self-incrimination as afforded to similarly situated adults. Justice Fortas was unequivocal in his belief that due process requirements leveled the playing field between the prosecution and defense. Constitutional protections guaranteed to criminal defendants were not automatically minimized merely because defendants were minors.

Also a strong defender of the First Amendment's free speech guarantee, Justice Fortas spoke for the Court majority in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), upholding students' right to wear armbands in silent, passive protest of the Vietnam War. This conduct, he reasoned, was nondisruptive to the school environment and was akin to pure speech enjoying the full protection of the First Amendment. The Constitution did not permit the suspension of civil liberties during the school day to promote order and discipline.

Justice Fortas championed peaceful, nonviolent civil disobedience. He maintained that disobeying unconstitutional or immoral laws (such as laws imposing racial segregation) was permissible. Protesting valid laws, however, was unjustifiable; such conduct constituted rebellion because all individuals were obligated to obey just laws. The Constitution's protection of even vociferous, harshly expressed disagreement with the government's actions did not extend to subversive conduct such as espionage or sabotage. Protest was not an absolute constitutional protection: Deliberately violating the law was permissible only if the protest targets the law being disobeyed; breaking one law as a means of protesting another law constituted an impermissible act of rebellion.

Justice Fortas's judicial decisions reflected his commitment to strengthening civil liberties for all individuals. With pragmatic restraint, he balanced promotion of constitutional protections for those least equipped to defend themselves effectively against abuses of governmental authority.

Melanie K. Morris

See also: Warren, Earl.

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Four Freedoms

In an effort to move Congress from an isolationist to internationalist outlook in matters of government policy, Franklin D. Roosevelt delivered his famous "four freedoms" speech and in the process stated a philosophy that precipitated a watershed shift in citizens' perception of the proper role of federal government in a democratic society. Roosevelt defined the "four essential freedoms" as freedom of speech and religion and freedom from fear and want. That presidential speech on January 6, 1941, planted the seed of public expectation about federal government involvement that eschewed the prevailing Jeffersonian concept of negative government—minimal involvement—to the new positive view that expected government intervention to prevent fear and want. The term "four freedoms" became popular shorthand to express U.S. war aims during World War II and to serve as a charter for the New Deal itself. Its immediate effect was to help secure passage of the Lend-Lease Act, legislation designed to get military supplies to European allies during the war before the United States entered the war officially.

As early as his first presidential inaugural address on March 4, 1933, Roosevelt broached the concept

No government censor rules on what may appear in these publications. Crowded newsstands such as this one, with newspapers and magazines representing every political party and every social theory, are possible only in a democracy, where there is freedom of speech and of the press. *(Library of Congress)*

of freedom from fear as he assured an apprehensive nation that "the only thing we have to fear is fear itself." He continued to build on that theme as domestic New Deal legislation to combat the Great Depression was refocused toward World War II and the international stage as means to combat fascism and Japanese militarism and to set the stage for ending colonialism. He pursued these aims even while working with his Communist ally, the Soviet Union, as well as with the colonial British and French.

Roosevelt used his first formal meeting with Winston Churchill, held off the coast of Newfoundland on August 14, 1941, for a joint announcement from the United States and Great Britain of a post–World War II order that guaranteed the principles of self-determination, free trade, freedom of the seas, and nonaggression. It also hinted at a postwar international organization to guarantee global security. These principles were aimed at assuring Americans that democratic ideals would unite the Allies despite the fact that Joseph Stalin was a Communist and Winston Churchill was a traditional democrat who favored colonialism.

During the 1944 presidential election campaign, Roosevelt called for an "Economic Bill of Rights" for postwar America to sustain prosperity after the war. In his final State of the Union message, Roosevelt outlined measures to perpetuate full employment and proposed a permanent Fair Employment Practices Commission to assure minority jobs. These provisions became building blocks for President Harry Truman's Fair Deal and the work of Eleanor Roosevelt at the United Nations. The modern concern for human rights grew from Roosevelt's four-freedoms speech to set a standard for both U.S. government and international organizations.

William D. Pederson

See also: Carolene Products, Footnote 4; President and Civil Liberties.

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Fourteenth Amendment

The Fourteenth Amendment to the U.S. Constitution was proposed June 13, 1866, and declared ratified July 28, 1868. Together with the Thirteenth Amendment (abolishing slavery) and the Fifteenth Amendment (extending suffrage to black males), it was one of the amendments designed to address the political and legal aftermath of the Civil War. Although the Fourteenth Amendment was designed broadly to ensure the fair treatment of newly free blacks in the South, it later would become one of the most litigated sections of the Constitution with its interpretation both narrowed and expanded frequently by the U.S. Supreme Court.

Because of the historical circumstances surrounding its ratification, the issue at the heart of most debates over the Fourteenth Amendment has been the Court's interpretation of the limits of the power of state governments under the U.S. Constitution. More specifically, the leading cases interpreting the meaning of the amendment have dealt with the extent to which it was intended to apply some or all of the ideas of the Bill of Rights (the first ten constitutional amendments) to the states.

The Fourteenth Amendment contains five sections, but the first one has been the most important for understanding the protection of civil liberties from state action. In grand but broad language, Section 1 spelled out three distinct limitations on state behavior: (1) "No state shall make or enforce any law which abridges the privileges or immunities of citizens of the United States" (Privileges or Immunities Clause); (2) "no state shall deprive any person of life, liberty, or property without due process of law" (Due Process Clause); and (3) no state shall "deny to any person

within its jurisdiction the equal protection of the laws" (Equal Protection Clause).

Initially, many believed that the first limitation, the Privileges or Immunities Clause, was intended to ensure that state laws complied with the federal Bill of Rights. In the *Slaughterhouse Cases,* 83 U.S. 36 (1873), however, the Supreme Court read the clause narrowly to apply it only to rights of national citizenship, and only one case since has been decided under this clause. One historical effect of this narrow, initial interpretation of the Privileges or Immunities Clause was practically to read it out of the Constitution; however, because of the general disarray of its Fourteenth Amendment jurisprudence, the Court in *Saenz v. Roe,* 526 U.S. 489 (1999), recently hinted at a desire to revisit its interpretation of this clause.

Another effect of the *Slaughterhouse Cases* was to shunt the legal debate over the application of the Bill of Rights to the states onto the second limitation listed in Section 1, resulting in a great deal of confusion and debate among the Court's opinions regarding the extent of due process protections under the Fourteenth Amendment. Nonetheless, the Due Process Clause has now become the primary lever for applying the libertarian protections in the Bill of Rights to the states. Drawing upon the ideas of laissez-faire constitutionalist thinkers in the late nineteenth century, the Supreme Court began to consider an expansive meaning of due process in order to limit state interference with economic liberties and property rights. Finally, in *Chicago, Burlington, and Quincy Railroad Co. v. Chicago,* 166 U.S. 226 (1897), the Court held that "just compensation" for a taking of private property was an element of due process protected by the Fourteenth Amendment as applied to the states, although it did not explicitly apply the just-compensation language of the Fifth Amendment to the states in order to reach this conclusion. Rather, it used an embryonic conception of "fundamental fairness" (the idea that due process encompasses principles of justice so rooted in tradition as to be fundamental, or even indispensable) in order to justify its decision. Later, in *Twining v. New Jersey,* 211 U.S. 78 (1908), the Court again refused explicitly to apply a portion of the Bill of Rights to the states, but it did acknowledge that some rights contained in the Bill of Rights could be applied to state action because they were part of due process under the Fourteenth Amendment.

During the first part of the twentieth century, the Court continued to use the Due Process Clause of the Fourteenth Amendment to apply selected protections of the Bill of Rights to state action, even though it relied only upon the "fundamental fairness" notion of due process and refused to apply explicit language. Finally, after years of debate and a growing concern over the definitional slipperiness of due process, the Court in *Duncan v. Louisiana,* 391 U.S. 145 (1968), identified explicit language from a section of the Bill of Rights (the Sixth Amendment language concerning the right to a jury trial) as being applicable to the states. In all subsequent decisions applying sections of the Bill of Rights to the states, the Court has used the explicit language of the section in its application as satisfying the meaning of due process.

The process of applying the explicit language of a particular section of the Bill of Rights to state action through the Fourteenth Amendment became known as "incorporation," but because of the history of the amendment itself, the extent of incorporation remains subject to debate. Some historical evidence suggests that the framers of the Fourteenth Amendment intended to incorporate the entire Bill of Rights as applicable to the states (total incorporation), and several eminent legal scholars and jurists—most notably former Supreme Court Justice Hugo L. Black—have also called for this approach. The Supreme Court, however, has so far taken a piecemeal approach and chosen only selected portions of the Bill of Rights for incorporation (selective incorporation). Nonetheless, the Due Process Clause of the Fourteenth Amendment remains the strongest constitutional check on potential state encroachments on civil liberties.

The Equal Protection Clause of the Fourteenth Amendment did for civil rights what the Due Process Clause did for civil liberties. The Equal Protection Clause became especially important in the aftermath of the Supreme Court decision in *Brown v. Board of Education,* 347 U.S. 483 (1954), declaring that the doctrine of racial separation in the public schools, at the time called "separate but equal" schooling that the Court once had upheld, must come to an end. Later issues such as school busing and affirmative action ar-

guably proved to be more difficult than earlier issues of invidious segregation and discrimination.

Although Section 1 of the Fourteenth Amendment is the most frequent subject of both judicial litigation and scholarly analysis, the other four sections contain important provisions relevant to the recovery of the country following the Civil War, a period called Reconstruction. Section 2 amended the original constitutional calculation of a state's representation in Congress to include the "whole number of persons" within a state, and it prescribed representational penalties for states that restricted the right to vote, as several states in the South attempted to do during Reconstruction. Section 3 disqualified from public office any former public official who supported a rebellion or insurrection against the United States. Section 4 upheld the validity of the national debt but denied the validity of any debt incurred in aid of a rebellion or insurrection against the United States.

Finally, the seemingly innocuous language of Section 5 giving Congress the legislative power to enforce the provisions of the Fourteenth Amendment became the subject of much debate and confusion in the latter part of the twentieth century. The Court tried to carve out the extent of that power, namely by placing limits on how Congress could use its Fourteenth Amendment power to abrogate state sovereign immunity in federal court, despite the apparent prohibition on such an ability under the Eleventh Amendment. In sum, although the jurisprudence on Section 5 is in even more disarray than the jurisprudence on Section 1, all five sections of the Fourteenth Amendment taken together represent the strongest constitutional check on state power to interfere arbitrarily or unjustly in the lives of its citizens.

James McHenry

See also: Bill of Rights; Due Process of Law; *Duncan v. Louisiana*; Incorporation Doctrine; Selective Incorporation; *Slaughterhouse Cases.*

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Fourth Amendment

As one of the first ten amendments (the Bill of Rights) to the U.S. Constitution, the Fourth Amendment protects individuals from unreasonable government searches and seizures and governs requirements for arrest: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fourth Amendment was written over two centuries ago to preserve Americans' freedoms to be private and left alone. The substance of these rights, however, varies with the latest interpretation of the Supreme Court. The meanings of the amendment's terms, the relationship of its clauses, and its very power are living questions continually being reconsidered.

Interpretation of the Fourth Amendment has fallen to the U.S. Supreme Court as the ultimate arbiter of the Constitution. Therefore, in a practical sense, the rights and remedies of the Fourth Amendment are essentially what the Supreme Court says they are. Supreme Court Justice Louis D. Brandeis, in *Olmstead v. United States,* 277 U.S. 438 (1928), considered the Fourth Amendment's "right to be let alone" to be one of the most "valued" and "comprehensive" of rights. Further, in *Mapp v. Ohio,* 367 U.S. 643 (1961), the Supreme Court deemed Fourth Amendment rights of security and privacy "against arbitrary invasion by police" to be so important that they were "implicit in the concept of ordered liberty." The Court's view of the power of the Fourth Amendment, however, has tended to ebb and flow over time.

ORIGIN AND CREATION

The Fourth Amendment is part of the Bill of Rights, the ten amendments crafted largely by James Madison in response to Antifederalist concerns about overbearing federal power. Although the Fourth Amendment came into effect in 1791, its origins can be traced back at least to the English notion that "a man's home is his castle." The right to be free from unlawful search and seizure, however, has been called a "made in America" freedom, for it grew out of the colonists' abhorrence of the crown's use of general searches, known as writs of assistance, to enforce laws against smuggling.

STRUCTURE AND MEANING

The Fourth Amendment consists of two clauses, the Reasonableness Clause, which forbids the government from performing any unreasonable search or seizure, and the Warrant Clause, which describes the necessary ingredients for an arrest or search warrant. The two clauses are connected by the ambiguous word "and." Consequently, the Supreme Court has spent most of the twentieth century debating the relationship of the two clauses. One view, favored by the Court under both Chief Justices Earl Warren (1953–1969) and Warren E. Burger (1969–1986), interpreted the "reasonableness" required in the first clause as measured by the existence of a warrant described in the second clause. In this approach, Fourth Amendment reasonableness mandated that police seek a warrant before intruding on privacy or else provide a reason for failing to do so. This created the "warrant preference" whereby only police action previously sanctioned by a magistrate would be presumed reasonable. Any actions taken without a warrant had to be defended as falling within an exception to the warrant requirement. This approach had the benefit of restricting government power to limits specifically laid out in the text of the Fourth Amendment and therefore fulfilled the purpose underlying the written Constitution. The warrant preference, however, also created an awkward road map for police to follow, for officials had to consider a list of exceptions that became increasingly cumbersome as it grew seemingly with each new case.

A competing view, which began to gain ascendancy on the Court when William H. Rehnquist became chief justice (1986), interpreted the Reasonableness and Warrant Clauses as independent of each other. Here, reasonableness was what the Court said it was in a particular case, regardless of whether police procured a warrant. Thus, reasonableness was not given meaning from the Warrant Clause. This approach avoided the problem of having a warrant requirement with ever-increasing numbers of exceptions, as the Court tended to craft new warrant exceptions each term to deal with new situations of exigent circumstances. On the other hand, members of the Court worried in *Chimel v. California,* 395 U.S. 752 (1969), that such an "unconfined" reasonableness analysis could cause Fourth Amendment protection "to approach the evaporation point."

APPLICATION: WHAT IS A "SEARCH" AND A "SEIZURE"?

As with any other law, the Fourth Amendment can be violated only if it applies in the first place. Therefore, the Burger and Rehnquist Courts have prevented exclusion of evidence due to Fourth Amendment violations by limiting Fourth Amendment application. Since the Fourth Amendment mentions only "searches" and "seizures," Fourth Amendment application turns on whether the government action falls within the definition of either a "search" or "seizure." When it first considered "search," the Court crafted a tangibly exact definition. In *Olmstead* and two other cases, *Goldman v. United States,* 316 U.S. 129 (1942), and *Silverman v. United States,* 365 U.S. 505 (1961), the Court honed the definition of a Fourth Amendment search into "a physical encroachment within a constitutionally protected area." This meant a search occurred whenever police physically trespassed onto an individual's property.

A dramatic change in what a "search" meant came in *Katz v. United States,* 389 U.S. 347, (1967), in which the Court overturned its *Olmstead* decision and extended the warrant requirement to electronic surveillance. In his concurring opinion in *Katz,* Justice John M. Harlan defined a search as essentially a government intrusion on an individual's actual and rea-

sonable expectation of privacy. For instance, the government would be committing a Fourth Amendment search if it viewed a person bathing in a shower at home, but not if it viewed a person bathing in the sun at a public beach. Similarly, students might expect to have less privacy in a public school setting, where they are subject to teachers and principals, than elsewhere. Justice Harlan's definition still remains the definitive statement of a Fourth Amendment search. Recently, however, in *Kyllo v. United States,* 533 U.S. 27 (2001), the Court once again returned to the *Silverman* test of "constitutionally protected area" in deciding what was a search. Thus, Fourth Amendment interpretation is such a dynamic exercise that what is old becomes new again.

In contrast to searches, the definitions for seizures vary with whether the government is seizing a "person" or a "thing." In *California v. Hodari D.,* 499 U.S. 624 (1991), the Court defined an officer's seizure of a person on the street as involving either application of "physical force," such as grabbing or tackling a person, or an officer's "show of authority" along with an individual's "submission" to the show of authority. This latter case would occur, for example, when police shouted "Halt in the name of the law" and a person, upon hearing this, stopped. The Court further refined its definition of seizure of a person in *Florida v. Bostick,* 501 U.S. 429 (1991), which involved police who approached a man sitting on a bus. Because a reasonable person would not feel "free to leave" when seated on a bus as police approached, the correct definition for seizure of a person in these circumstances would be "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." Thus, if police merely approach and ask a few questions or otherwise fall short of this definition, the Fourth Amendment does not apply as far as seizures are concerned.

The definition for seizure of a "thing" is much more straightforward. In *United States v. Jacobsen,* 466 U.S. 109 (1984), the Court merely analyzed whether the government made a "meaningful interference with the suspect's possessory interests," as in grabbing or destroying property. Therefore, merely looking at or even tracking an object does not constitute a seizure and is not subject to Fourth Amendment constraints.

REACH AND POWER

As originally crafted, the Fourth Amendment, as well as the rest of the Bill of Rights, limited only federal government officials. However, after adoption of the Fourteenth Amendment in 1868, the amendment's reach became a new question. The scope of Fourth Amendment protections was decided in a series of cases beginning with *Weeks v. United States,* 232 U.S. 383 (1914). In *Weeks,* the Court determined that the Fourth Amendment was enforceable against federal officials by use of the exclusionary rule, a court-created remedy used to suppress illegally obtained evidence from use in criminal trials. Next, the Court extended Fourth Amendment application, though not the exclusionary remedy, to the states in *Wolf v. Colorado,* 338 U.S. 25 (1949). Finally, in the seminal case *Mapp v. Ohio,* 367 U.S. 643 (1961), the Court extended the exclusionary rule to discourage state breaches of the Fourth Amendment.

This consistent expansion was then followed by a pendulum swing toward contraction of the Fourth Amendment. The Court carved a series of exceptions to the exclusionary rule, including allowing admission of illegally obtained evidence in grand jury proceedings, in trials for impeachment purposes, and to prove guilt at trial if the evidence were cleansed of taint. Perhaps the most dramatic retreat of Fourth Amendment coverage occurred in *United States v. Leon,* 468 U.S. 897 (1984), in which the Court permitted the entry of evidence when officers acted in objective good faith reliance on a defective search warrant. The good faith doctrine was further extended in *Arizona v. Evans,* 514 U.S. 1 (1995), with the Court upholding a conviction in which officers relied on only an erroneous computer entry signaling the existence of a warrant. Thus, the scope of the Fourth Amendment waxes and wanes with each new Supreme Court interpretation, as does application of the exclusionary rule to exclude tainted evidence from trial.

NONCRIMINAL SETTINGS: "SPECIAL NEEDS"

Traditionally, the Fourth Amendment has limited police in their pursuit of criminal investigations. Recently, however, Fourth Amendment litigation has

entered noncriminal enforcement areas, such as inspections of housing, railroads, and schools. Because these new contexts involve government interests beyond conventional law enforcement, the Court has labeled these concerns "special needs." The special-needs doctrine empowers government officials to perform arguably intrusive searches, such as in the case of routine airport inspections, without the traditional Fourth Amendment requirements of a warrant, probable cause, or individualized suspicion. Instead, government officials are required to determine the reasonableness of their actions by balancing the government's interests against those of the individual.

George M. Dery III

See also: Exclusionary Rule; Good Faith Exception; Incorporation Doctrine; *Katz v. United States; Mapp v. Ohio;* Search; Seizure; *United States v. Leon; Weeks v. United States.*

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Frankfurter, Felix (1882–1965)

Although consistently ranked among the twelve great justices of the Supreme Court of the United States, Felix Frankfurter rates more toward the bottom than the top of the "greats" list. Ironically, his tenure on the Supreme Court from January 5, 1939, to August 28, 1962, diminished the stellar reputation he had enjoyed at the time Franklin Roosevelt appointed him to replace the distinguished Benjamin Cardozo.

ORIGINS

Frankfurter, a Jewish immigrant, was one of the most psychologically marginal justices ever to sit on the high bench, as he never stopped trying to compensate for his background. He was born November 15, 1882, to Jewish parents in Vienna, Austria, but his Jewish heritage was a minimal influence on his life. He married a Congregational minister's daughter. "Reason" became his religion, but it was Frankfurter's own extremist version of reason that he developed while a very serious student struggling not for grades but for acceptance. It was a personal ideology he used to transform himself from an outsider immigrant into an unduly conforming citizen of his adopted country. He was the ultimate assimilationist with a deep-seated need to become a part of the Brahmin establishment, which he overidealized first at Harvard Law School and later on the Court.

His family immigrated to New York City's impoverished Lower East Side in 1894, when he was twelve. Frankfurter could not speak English when he arrived. His extraordinary energy to achieve, a by-product of his marginal status, pushed the bright immigrant to finish third in his 1901 graduating class at City College of New York. Forever after, he retained a nearly mystical faith that public education, with its American melting pot values of energy, talent, and brains instead of Old World emphasis on class, religion, and race, could transform individuals.

He entered Harvard Law School in 1902 and met Roscoe Pound, a faculty member who was a founder of sociological jurisprudence and who became one of Frankfurter's several mentors. Frankfurter graduated first in the class of 1906 and in 1912 joined the Har-

Felix Frankfurter (left) with Eleanor Roosevelt and Franklin D. Roosevelt Jr. in Hyde Park, New York, May 1956. Frankfurter was one of the Supreme Court justices who supported the constitutionality of the New Deal. *(National Archives)*

vard Law School faculty, continuing to serve as a law professor until 1939 at what he considered the ideal institution as long as he was among its philosopher kings.

As a political liberal, he mixed academics with government service and political causes. Both before and during World War I, he became a protégé of Henry L. Stimson, a Bull Moose Republican who shared Frankfurter's work ethic and became Woodrow Wilson's secretary of war. Wilson appointed Frankfurter the chairman of the Labor Department's War Labor Policies Board where he became acquainted with Franklin D. Roosevelt, who served on the board as secretary of the navy. During the interwar period, he developed close ties to Louis D. Brandeis and Oliver Wendell Holmes Jr. while helping to found both the *New Republic* and the American Civil Liberties Union. The magazine and the ACLU championed the case of gaining a new trial for immigrants Nicola Sacco and Bartolomeo Vanzetti, radical Italian aliens who were sentenced to death for murder in a tainted trial.

Frankfurter held no position in the Roosevelt administration, yet he helped draft some of its legislation and introduced British economist John Maynard Keynes to FDR. Frankfurter helped influence the leftward drift of the Roosevelt administration. Perhaps most important, he acted as a one-man employment service for the administration, supplying a steady stream of his Harvard law students, dubbed "Felix's Happy Hotdogs," to it. It came as no surprise that

Frankfurter was Roosevelt's third nominee to the Supreme Court, since Frankfurter actively campaigned to fill the slots formerly occupied by Holmes and Cardozo, who had presided at his 1919 wedding.

FRANKFURTER'S JURISPRUDENCE

At a time when he had the opportunity to solidify his legacy by leading his brethren on the Court, Frankfurter managed to undercut his legacy and diminish his own reputation. He earned the dubious title as the second most divisive personality on the Court during the twentieth century behind James C. McReynolds, a racial bigot. Frankfurter became an "intellectual bigot," trying repeatedly to turn the Court into an idealized Harvard graduate seminar. Those who refused to accept his legal reasoning, even after he gave them the benefit of fifty-minute lectures on his rationale, became his enemies. Unlike his brethren Hugo L. Black, who developed his own unique "absolutist doctrine" of the First Amendment, and William O. Douglas, who embraced legal realism, Frankfurter's overconformity led him to accept the dominant jurisprudence of the Court and stunted his legal growth. His subjective "balancing approach" translated his political liberalism into judicial conservatism on the Court. The psychological outsider had become a superpatriot about his adopted country and religion—"the law" as he defined it. He believed that judges should show deference to the elected branches of government just as firmly as he believed that his brethren should defer to his superior legal scholarship in the same way he had deferred to his Harvard mentors in recognition of their greater wisdom. Duties and obligations became more important than rights under his skewed jurisprudence.

This perspective allowed the one-time civil libertarian to join the government's side in *Korematsu v. United States,* 323 U.S. 214 (1944), accepting the need to relocate Japanese Americans during World War II for security reasons; but he dissented in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1944), supporting a mandatory Pledge of Allegiance in schools; in *Mapp v. Ohio,* 367 U.S. 643 (1961), maintaining the exclusionary rule did not apply to the states; and in *Baker v. Carr,* 369 U.S. 186 (1962), stating that legislative redistricting matters should not be heard by the courts. If his civil liberties legacy is of minimal importance, his record on civil rights is better. In 1948 he became the first justice to hire a black law clerk, and he helped Chief Justice Earl Warren strike down segregation in public schools in *Brown v. Board of Education,* 347 U.S. 483 (1954), as well as in other areas of the law.

Nonetheless, Frankfurter's contribution to the law was greater before his Supreme Court service. His prima donna personality caused self-inflicted damage to his legacy, and his ideal of equality regressed into patriotic paternalism.

William D. Pederson

See also: Baker v. Carr; Korematsu v. United States; West Virginia Board of Education v. Barnette.

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Free Exercise Clause

The Free Exercise Clause is the portion of the First Amendment to the U.S. Constitution that protects the right of individuals to practice their religion without interference from government. The issues the clause has raised since the amendment was added to the Constitution in 1791 include the meaning of "free exercise," the definition of religion, the level of government being addressed, and the problems that arise when this clause appears to conflict with other constitutional and legal protections. The First Amendment reads in part: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The Free Exercise Clause encompasses the last five words.

When the first Congress debated the addition of a

Bill of Rights to the Constitution, James Madison proposed language protecting freedom of conscience as well as freedom of religious belief and worship. Moreover, he wanted these protections to apply to the states as well as the national government. The language adopted was more narrow than he wished and did not mention the states, but its placement at the beginning of the First Amendment still made a powerful statement. It also presented a challenge. Most state constitutions at that time already contained guarantees of "free exercise." Some added limitations such as "free exercise of religious worship," and others expanded the protection to include, for example, "the dictates of conscience." Since the First Amendment did neither, its words remained open to interpretation. They could mean merely freedom to think or speak about religion, freedom to act on one's religion in ways that did not involve illegal behavior, or even freedom to engage in activities forbidden by law to other individuals.

The courts, which are the major arbiters of the Establishment Clause, not only must choose among these possible meanings from their own perspectives but also must place themselves on the spectrum of views in the "original intent" debate. Under the original-intent doctrine, their task is to interpret the Constitution based on what its creators intended. In contrast, advocates of the "living Constitution" interpret it in a way that makes sense in a modern, religiously pluralistic society, arguing that the framers were well aware that economic and social change would occur and that the document needed to accommodate such change. Yet another recurring issue is whether a generous reading of the Free Exercise Clause on behalf of a particular religion runs the risk of violating the neutrality required of government by the Establishment Clause. Thus, the history of the Free Exercise Clause is best understood as a process not just of application but also of discernment of its meaning and determination of its place in the larger framework of the First Amendment.

Because free exercise rights of majority religions are rarely threatened, litigation involving the Free Exercise Clause has frequently involved minority and often unpopular religious groups. The Jehovah's Witnesses, for example, have been credited as major players in securing and expanding free exercise rights. Even so, spokespersons for majority faiths often recognize that a threat to the rights of any religion is potentially a threat to the rights of all. Thus, especially in recent decades, both liberal and conservative religious groups, which are typically on opposite sides of Establishment Clause issues, have frequently been on the same side in free exercise disputes.

Free exercise issues span a wide spectrum, reflecting the diversity of America's religious landscape. These have ranged from animal sacrifices, conscientious-objector status, and abortion rights to wearing religious apparel while in military uniform, protecting the privacy of confessions to clergy, and payment of Social Security tax, to name just a few.

FROM SECULAR REGULATION TO COMPELLING INTEREST

The first major U.S. Supreme Court effort to define the Free Exercise Clause came in 1879 in *Reynolds v. United States,* 98 U.S. 145, a case involving polygamy as practiced at that time among Mormons in pre-statehood Utah. The Court held that Mormons could believe in and even speak favorably of polygamous relationships, but the Free Exercise Clause did not protect their right to act on this belief because they were part of a larger population covered by the territory's antipolygamy law that Congress had enacted as a legitimate use of its power. This interpretation of the Free Exercise Clause is often referred to as the "secular regulation" rule, meaning that a religious group is not exempt from legislation that is valid for society at large.

Such an interpretation, however, seemed little more than a restatement of the Free Speech Clause. Perhaps the framers of the Constitution intended free exercise of religion to mean more. The Supreme Court started to gravitate toward that line of thought in *Cantwell v. Connecticut,* 310 U.S. 296 (1940), the landmark case that also "incorporated" the Free Exercise Clause to apply to the states via the Fourteenth Amendment. *Cantwell* upheld the rights of Jehovah's Witnesses to proselytize door-to-door and on the streets. The Court reiterated its position that the freedom to believe is absolute, but the freedom to act is not. The Court

also instructed state governments to avoid imposing regulations that would unnecessarily limit religious freedom.

Further attempts to find a workable meaning for free exercise were reflected in two flag-salute cases. In *Minersville School District v. Gobitis,* 310 U.S. 586 (1940), the Court deferred to state legislative judgment to decide whether requiring Jehovah's Witnesses to salute the flag promoted patriotism. Four years later, in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), the Court reversed itself, saying that the state could not require the flag salute of anyone whether for religious or other reasons. Although this was a landmark case for freedom of expression, its extension beyond the realm of religion left the meaning of the Free Exercise Clause still ambiguous.

After other attempts to balance belief and action, the Court reached its most sweeping interpretation of the Free Exercise Clause in 1963 in *Sherbert v. Verner,* 374 U.S. 398, involving a Seventh-day Adventist who was denied unemployment compensation when she refused to take a job requiring her to work Saturday because that day was the Sabbath in her religion. In this case and in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), involving Amish families who wanted to remove their children from compulsory education, the Court ruled that the government must be able to show a "compelling interest" when interfering with freedom of religion. This meant that even in situations where a law applied to the general public, exceptions must be made to protect religious liberty unless the government could demonstrate that limits on religious practice were absolutely essential to achieving the compelling interest of government, and that these concerns could be met in no other way. Thus the Court ruled that providing unemployment benefits for one Seventh-day Adventist would not cause a major burden for the state, and that Amish children were part of a self-sufficient agricultural community, so the usual arguments for requiring secondary education simply did not apply to them.

END OF COMPELLING INTEREST

The compelling-interest test remained the standard for applying the Free Exercise Clause until 1990. Like other such tests, it was not foolproof; there could be and were disagreements about when a compelling government interest existed, but it was generally regarded as providing wide latitude for religious liberty. This approach changed sharply with the landmark case of *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990). *Smith* involved a Klamath Indian who was refused unemployment compensation after losing his job in an Oregon drug rehabilitation program because he had ingested peyote, an illegal substance in the state, in a Native American religious ritual. The Court, in a six–three decision with an opinion written by Justice Antonin Scalia, abandoned the compelling-interest test and returned to the reasoning in *Reynolds* and *Gobitis*. Justice Scalia concluded that Oregon could make an exception for sacramental use of peyote if it wished, but it was not required to do so under the Free Exercise Clause.

This decision met with approval in some circles. Many law enforcement officials welcomed it, for example, because of the nature and extent of religious rights demanded by prisoners under the compelling-interest standard. However, it was unpopular across the religious spectrum, and a large coalition of religious organizations successfully lobbied Congress to pass the Religious Freedom Restoration Act (RFRA) in 1993, restoring "compelling interest" as the proper standard for applying the Free Exercise Clause. The Court reacted by striking down RFRA in *City of Boerne v. Flores,* 521 U.S. 507 (1997), in which a Roman Catholic church sought to alter and enlarge its building in violation of local provisions governing the historic district in which it was located. RFRA was found by the Supreme Court to violate not only the constitutionally mandated division of powers between federal and state governments but also the separation of powers between the legislative and judicial branches of government.

Thus, at the start of the twenty-first century, the Court appeared to have returned to the secular-regulation rule of the nineteenth-century *Reynolds* case. On the one hand, it is too soon after *Smith* to predict what line of development the Court will follow in Free Exercise Clause rulings. On the other, it is possible, based on a network of pre- and post-*Smith*

federal and state judicial decisions and legislative actions, to state with some specificity what is and is not encompassed in a contemporary understanding of the Free Exercise Clause.

First, the Free Exercise Clause applies to all branches and levels of government. States may choose to afford more protection to religious practice than does the Free Exercise Clause; they may not provide less.

In addressing the Free Exercise Clause, courts have sought to avoid providing an authoritative definition of religion or ruling on the validity or lack thereof of a given faith. Over time, however, the Supreme Court has expanded its working definition of religion to include the religious beliefs and practices of individuals who are not part of an organized religion, individuals who may differ from the tenets of the organized religion to which they belong, or even individuals who do not believe in a deity but follow a belief system similar to that of a deistic religion. Likewise, persons who choose to disbelieve in religion are protected in this right by the Free Exercise Clause.

As to the meaning of free exercise, freedom of religious worship has extensive protection, as does religious speech, including proselytization and solicitation. Any restrictive laws aimed specifically at a religion violate the Free Exercise Clause, as the Court affirmed unanimously in the post-*Smith* era in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993), in which it struck down a city ordinance forbidding animal sacrifice for religious purposes.

Free-exercise conflicts sometimes arise over health and safety issues, such as refusal to receive blood transfusions. The tendency has been to consider this a legitimate form of "free exercise" for adults but not when applied to children. When more generally applicable public health or welfare matters are at stake, they have often taken precedence over free exercise claims. Examples include child labor laws or vaccination requirements.

The right of conscientious objection to military service has long been granted by Congress; and the Supreme Court has enhanced this protection by expanding the grounds for exemption from a military draft to the point that conscience as well as religion may be a valid basis. However, a right to object to service in some wars rather than all wars for reasons of religion or conscience has never been recognized.

In some instances, when the Establishment Clause and Free Exercise Clause appear to conflict, government support of religion is permitted in order to facilitate free exercise. Examples include providing chaplains in the armed forces and in prisons. In public schools and universities, religious organizations are entitled to access to campus facilities equal to that granted to nonreligious organizations.

The Free Exercise Clause protects only from government intrusion and does not apply to the private sector, but civil rights legislation protects a person from discrimination in employment based on religion or lack thereof. However, religious organizations acting on their religious beliefs may discriminate in hiring or may impose religiously based requirements, such as required chapel attendance in church-affiliated colleges. Private organizations that wish to receive federal funding may have to agree to limit their imposition of religiously based rules of behavior.

Still, because of the many variables in both the law and the courts, it is impossible to predict how the Free Exercise Clause might apply in any given situation. Because the Supreme Court does not rule until a case is brought to it and may even decline to hear that case, the Court has not addressed all potential free exercise issues. Further, cases may end within a state court system or at the federal district or appeals court level, a procedure that may cause similar cases to be handled in inconsistent ways. The Supreme Court itself is not always consistent in its rulings, and as the personnel of the Court changes, there may well be further alterations in its treatment of free exercise claims. Moreover, some of its decisions, such as *Smith,* have hinged more on its attitude toward the power of states and of elected legislatures than on the merits of the free exercise claims themselves; a Court with different attitudes on these topics might produce decisions expanding or restricting free exercise protections.

The Free Exercise Clause is certain to continue to challenge the courts and other parts of government for three basic reasons. First, the number and variety of religions in the United States with diverse and sometimes controversial practices continue to grow. Second, since *Smith,* even some major Christian denominations have seen their free exercise rights chal-

lenged over such issues as operating soup kitchens or homeless shelters in violation of zoning laws. Finally, because of widespread unhappiness about the *Smith* decision, many denominations and religious organizations spanning a wide spectrum of beliefs, practices, and political views are committed to working together to achieve greater protection for religious liberty through a more expansive interpretation of the Free Exercise Clause in courts and legislatures at both the national and state levels.

Jane G. Rainey

See also: Cantwell v. Connecticut; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah; Employment Division, Department of Human Resources of Oregon v. Smith; Establishment Clause; First Amendment; *Sherbert v. Verner;* Strict Scrutiny; *Wisconsin v. Yoder.*

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Fricke v. Lynch (1980)

In *Fricke v. Lynch,* 491 F. Supp. 381 (D.R.I. 1980), a federal district court in Rhode Island addressed the issue of whether the right to free expression provided by the First Amendment to the U.S. Constitution should be extended to minors, in this case a high school student who identified himself as homosexual and who wished to bring his male date to the senior prom.

The *Fricke* case became a well-publicized call for greater rights for homosexual minors. In 1980, Aaron Fricke wanted to take Paul Guilbert to the senior prom at Cumberland High School in Rhode Island. After failing to gain permission from school authorities, he took his case to the U.S. District Court for Rhode Island, where Judge Raymond Pettine found in his favor. His prom became a cause célèbre and his case an important precedent for broadening the rights of homosexual youth to self-expression.

In 1979, Guilbert had attempted to take a same-sex date to the junior prom. That request was denied by principal Richard Lynch, who had concerns about safety—concerns justified by the harassment Guilbert later received, which required Lynch or other school personnel to escort him around campus. That incident received some publicity, which drew negative attention to the school and to Guilbert. A year later, Fricke was undeterred in his similar quest. He had just "come out" and already faced the threat of violence. Other students were aware of his sexuality, and he felt that his integrity, and his ability to face his peers with self-respect, would be damaged by the obvious fiction of going to the prom with a girl—or by the outcast status that not attending would imply. Pursuing his case would also allow him to contribute to the well-being of other gay students and of homosexuals generally. Fricke's position reflected the mood of the gay liberation movement, which during this period emphasized that safety, in the long term, was best served by seeking acceptance through visibility. This premise added weight to Fricke's claim that going to the prom was an expressive act with political import and thus a protected First Amendment right.

After principal Lynch's initial verbal denial, Fricke continued seeking permission, and eventually Lynch wrote a letter explaining his refusal. He wanted to prevent assaults on Fricke and Guilbert and to shield the school, its students, and the town from negative reactions; furthermore, he felt unable to protect property and persons at the prom, which was being held out-of-state. Fricke followed the school district's appeal process, unsuccessfully. He then filed suit in the U.S. District Court for Rhode Island, naming principal Lynch as defendant. Shortly after this, another student assaulted Fricke, who required five stitches near his right eye. Lynch thereafter provided Fricke with a safer parking spot and, as with Guilbert, a protective escort. The assailant was suspended, and no further incidents occurred.

Though other arguments were available (for example, that a person has a right to be homosexual), Fricke's case was based on the First and Fourteenth

Amendments: on his rights to free speech and association and to equal protection. Judge Pettine supported the claim based solely on speech, finding communicative intent in Fricke's attending the prom. There was a precedent in *Gay Students Organization v. Bonner,* 509 F.2d 652 (1st Cir. 1974), in which a court had ruled that a University of New Hampshire regulation preventing a gay student group from holding social events on campus violated the First Amendment.

In the school's defense, principal Lynch consistently appealed to safety and never objected to homosexuality per se. Judge Pettine agreed that the school had legitimate concerns and the authority to act on them, but that "the school's interest is in suppressing certain speech activity because of the reaction its message may engender. Surely," he concluded, "this is still suppression of free expression." He agreed with Fricke that the school could realistically provide adequate security, asking, "May the school prohibit the speech, or must it protect the speaker?" Normally, danger of reprisal is not grounds for prohibiting expression.

Fricke is significant in part because it applied this reprisal principle to high school students, whose status and rights are often unclear. Judge Pettine cited *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), which involved students who wore armbands to school to protest the Vietnam War. In *Tinker,* the U.S. Supreme Court limited interference with student expression to what was necessary to maintain safety and stability and explicitly denied that "discomfort and unpleasantness" were grounds for suppressing expression. By extending *Tinker* to the self-expression of openly gay and lesbian high school students, *Fricke* became central to the application of First Amendment protections to homosexuals and to youth.

Victor Greeson

See also: First Amendment; Fourteenth Amendment; *Tinker v. Des Moines Independent Community School District.*

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Friend of the Court

See Amicus Curiae

Frontiero v. Richardson (1973)

The U.S. Supreme Court's decision in *Frontiero v. Richardson,* 411 U.S. 677 (1973), helped establish gender equality as a constitutional right. The holding was grounded in analysis of the Due Process Clause of the Fifth Amendment to the U.S. Constitution, the clause that implicitly guarantees all individuals equal protection of the law.

Sharron Frontiero was a first lieutenant in the United States Air Force. Her husband was attending college on the GI bill (the Servicemen's Readjustment Act of 1944, which Congress passed to give returning World War II veterans benefits to reenter private life), receiving a stipend of only $205 a month. Lieutenant Frontiero put in a request for the increased quarters allowances and the housing and medical benefits for her husband that were routinely awarded to dependents of male officers. The Air Force, however, refused to recognize Joseph Frontiero as his wife's dependent because she had failed to demonstrate that she was supplying more than one-half of the family's income. Only female officers were required to meet that evidentiary burden; the Air Force simply assumed that wives of officers were economically dependent on their

husbands. Sharron Frontiero sued, claiming that she was being discriminated against on the basis of her sex.

The Defense Department maintained that requiring proof of spousal dependency from servicemen would be an intolerable administrative burden, and that it was more cost-effective to assume that all wives were dependent and all husbands were not. Frontiero replied that almost 60 percent of all married women were employed outside the home and could not be assumed to be dependent upon their husbands. Because she was denied benefits that male military personnel received, she added, she was effectively receiving less pay than male officers.

Frontiero was represented in part by attorney Ruth Bader Ginsburg, who made her first oral argument before the U.S. Supreme Court when it heard the case in 1973 (and who became an associate justice on the Court in 1993). Ginsburg sought to convince the Court that the guarantee of equal protection implicit in the Due Process Clause of the Fifth Amendment required the justices to view all classifications based on sex, like those based on race, with suspicion and to subject them to "strict scrutiny"—meaning that they had to assume the classifications were unconstitutional and that the difficult burden of proving validity of the classifications fell on the government. Justice William J. Brennan Jr.'s opinion for himself and three other justices agreed, and Frontiero won her case.

"There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination," Justice Brennan wrote. "Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." He viewed the Air Force's assumption of female economic dependence as a constitutionally impermissible continuation of such paternalism and discrimination.

Three other justices agreed that the Air Force's policy was unconstitutional, because the Court had held in *Reed v. Reed,* 404 U.S. 71 (1971), that administrative convenience did not justify discriminating on the basis of sex. They rejected the strict-scrutiny argument, however. The eighth justice concurred with the ruling but did not mention strict scrutiny, and the ninth dissented. Because five of the nine justices did not accept the high standard for which Ginsburg argued, the decision left lower courts free to uphold gender-based classifications without subjecting them to the same strict scrutiny accorded to classifications based on race. *Frontiero* would prove to be as close as the Court would come to extending the strict-scrutiny test to gender classifications.

Philippa Strum

See also: Incorporation Doctrine; Selective Incorporation; Strict Scrutiny; Suspect Classifications.

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Fruits of the Poisonous Tree

The "fruits of the poisonous tree" doctrine prohibits law enforcement from using evidence or information derived from illegal police conduct. The doctrine is not articulated in the U.S. Constitution but rather evolved through case law by which the U.S. Supreme Court undertook to rein in unconstitutional police conduct, specifically conduct that violated criminal defendants' rights such as protection against illegal search and seizure. The doctrine interacts with the exclusionary rule, which draws on the fruits-of-the-poisonous-tree principle to exclude from trial or certain other uses any evidence obtained by impermissible police conduct. In short, the initial wrongful police action is the "poisonous tree"; any additional information and evidence derived from that "tree" are "poisonous fruits." Both types of evidence are subject to exclusion.

In *Weeks v. United States,* 232 U.S. 383 (1914), the U.S. Supreme Court held that evidence obtained in violation of a suspect's constitutional rights was in-

admissible in a federal court. Six years later, in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), the Court extended the exclusionary rule to the *indirect* use of illegally obtained evidence. The government had subpoenaed documents from the Silverthorne Lumber Company on the basis of information it had secured in violation of the Fourth Amendment prohibition against unreasonable search and seizure. Holding that the government could neither use documents unlawfully seized nor avail itself of information acquired from them, Justice Oliver Wendell Holmes Jr. emphasized that allowing such indirect use would permit the government to profit from its illegal actions and would "reduce . . . the Fourth Amendment to a form of words."

This extension of the exclusionary rule to evidence derived from unconstitutional police methods came to be known as the "fruits of the poisonous tree" doctrine after Justice Felix Frankfurter used the metaphorical phrase in *Nardone v. United States,* 308 U.S. 338 (1939). In that case, Frankfurter said the government's use of derivative evidence would create a rule "inconsistent with ethical standards and destructive of personal liberty."

Exceptions to the fruits-of-the-poisonous-tree doctrine followed close upon the development of the legal principle itself. One exception, in fact, was mentioned in dictum (nonbinding analysis) in the *Silverthorne* case: The "independent source" rule holds that if a particular piece of evidence, discoverable as a result of illegal police conduct, was independently obtained in a lawful manner, the evidence will not be suppressed as "poisoned fruit." Thus, in *Murray v. United States,* 487 U.S. 533 (1988), the Court allowed the use of evidence obtained through execution of a search warrant. Prior to requesting the warrant, government agents illegally entered the suspect's warehouse and observed suspicious bales believed to be marijuana. The illegal entry was not mentioned in the affidavit supporting the warrant. Because the warrant was supported by other competent evidence not connected with the illegal entry, the Court upheld the search and allowed use of the evidence.

A second exception, the "attenuation" or "dissipation of taint" doctrine, was first articulated in *Nardone* and more fully developed in *Wong Sun v. United States,* 371 U.S. 471 (1963), and *United States v. Ceccolini,* 435 U.S. 268 (1984). This exception provides that when the nexus between the illegal conduct and the challenged evidence has become weakened by virtue of circumstances such as passage of time or intervening forces—for example, a defendant's voluntary confession—the taint may be purged and the evidence admissible.

A third exception, the "inevitable discovery" rule, permits the use of otherwise tainted evidence if the prosecution can prove by a preponderance of the evidence that the information would have inevitably been discovered without the benefit of the unlawful police behavior. This exception was established in *Nix v. Williams,* 467 U.S. 431 (1984). The Court decided that officers had illegally interrogated a murder suspect while they were transporting him (they had appealed to the need to give the girl he had murdered a "Christian burial"), and the interrogation led to his disclosure of the location of her body. At the time of the disclosure, a search party was within two and a half miles of the body and was conducting a systematic search, which soon would have covered the place where the body was located. The Court therefore allowed introduction of the body and its location in the defendant's retrial because it would inevitably have been discovered regardless of the constitutional violation.

The Court's gradual erosion of the fruits-of-the-poisonous-tree doctrine and the exclusionary rule itself reflects its shift in emphasis regarding the purpose of the two principles. The Court retreated from such rationales as preservation of the integrity of criminal proceedings or reparation for violations of individual rights; subsequent decisions have relied primarily on deterrence and the removal of incentives for police misconduct as justifications for the rules. Consequently, cost-benefit analyses have replaced much of the righteous indignation expressed by Justice Holmes in *Silverthorne.*

Virginia Mellema and Barry R. Langford

See also: Exclusionary Rule; Inevitable-Discovery Doctrine; *Mapp v. Ohio; Weeks v. United States.*

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Fuller, Melville W. (1833–1910)

Melville W. Fuller was chief justice of the U.S. Supreme Court from 1888 to his death in 1910, a twenty-two-year period that spanned a pivotal era in American history. The Supreme Court during Fuller's tenure grappled with novel issues arising from rapid industrialization, the emergence of large-scale business enterprise and a national market, and the acquisition of overseas territories.

Born in Augusta, Maine, in 1833, Fuller graduated from Bowdoin College, studied law as an office apprentice, and attended classes at Harvard Law School. He moved to Chicago in 1856, established a thriving law practice, and became active in Democratic Party politics. Fuller became a close friend of President Grover Cleveland, and Cleveland appointed Fuller chief justice in 1888. The core values of Fuller's jurisprudence, derived from the political tradition of Andrew Jackson, were a commitment to limited government, state autonomy, private property, and individual liberty.

Fuller was a skillful social leader of the Court rather than a dominant intellectual force. He was an excellent judicial administrator, who expedited the Court's handling of cases and helped secure passage of the Evarts Act in 1891 to establish federal circuit courts of appeals. Yet Fuller also orchestrated a conservative coalition on the Court that reflected his views and guided the Court to a more active role in American society. Under Fuller's leadership, the Supreme Court vigorously defended property rights and contractual freedom as means to restrict the reach of government and thus safeguard liberty. It looked skeptically at laws

Melville W. Fuller was chief justice of the U.S. Supreme Court from 1888 to his death in 1910. Under Fuller's leadership, the Supreme Court vigorously defended property rights and contractual freedom as a means to restrict government's reach and thus safeguard liberty. *(Library of Congress)*

that infringed upon the workings of the free market or attempted to redistribute wealth. In addition, the Fuller Court was anxious to preserve the traditional distribution of power between the national and state governments, and it rejected an expansive application of the Bill of Rights to the states. Fuller and his colleagues usually deferred to state governance of social issues and criminal justice and upheld most state health and safety regulations. Nonetheless, the Fuller Court frequently relied upon the dormant commerce power (in the Commerce Clause) to prevent the states from interfering with the movement of goods in the national market.

Although primarily a consensus builder, Fuller wrote some of the leading opinions of the era. In *United States* v. *E.C. Knight Co.,* 156 U.S. 1 (1895), he concluded that manufacturing was local in nature

and not part of interstate commerce. This decision restricted the power of Congress to apply the Sherman Antitrust Act to manufacturing monopolies. Moreover, Fuller struck down the 1894 federal income tax as an unconstitutional direct tax in *Pollock v. Farmers Loan and Trust Co.,* 157 U.S. 429 (1895). Fuller generally voted with the majority, and so he joined such important opinions as *Lochner v. New York,* 198 U.S. 45 (1905), which invoked the liberty-of-contract doctrine to invalidate a statute limiting the hours of work in bakeries. In more than a dozen decisions between 1901 and 1904 called the Insular Cases, however, Fuller was unable to persuade the majority that the Constitution and Bill of Rights applied to the nation's newly acquired overseas territories, such as Puerto Rico.

Much of the jurisprudence of the Fuller Court was eclipsed by the New Deal of President Franklin D. Roosevelt and the constitutional revolution of 1937. Still, the themes of federalism and property rights, which were so prominent in Fuller's thinking, again have become lively topics of constitutional dialogue.

James W. Ely Jr.

See also: Federalism; Fourteenth Amendment; Substantive Due Process.

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Fundamental Rights

Fundamental rights are the most highly valued rights in civil society. The definition of these rights varies greatly across the international spectrum. In the United States, fundamental rights are thought to be implicit in the founding documents of the Constitution and Bill of Rights (the first ten amendments to the Constitution). The judicial branch, typically the U.S. Supreme Court, gives effect to these "rights" when cases arise that challenge one of their core values. These rights are deemed fundamental because without them the basis for a free, democratic society would not exist. A narrow class of fundamental rights preserves more state power, whereas a broad class of these rights weakens state power. Scholars of jurisprudence suggest different methods of determining whether a right is, indeed, fundamental.

A *judge's values* can be used as one way to measure whether a value is fundamental according to the constitutional design. This practice is typically viewed as undemocratic because it seems to replace the people's vote with the single vote of an unelected judge. Principles of *natural law* can be used as an alternate way to decide which values are most honored. These principles typically divine themselves from a higher moral authority. Opponents of this approach are disturbed by the moral necessity of these values, especially when religious freedom is involved.

Other approaches use a *neutral-principle* method, which treats all like cases alike in order to preserve the overarching principle or value controlling the case. Critics would say this approach is much too vague and often sacrifices the right result to preserve law for its own sake. *Reason, tradition,* and *consensus* are three other ways judges determine whether a right is fundamental. *Moral-reasoning* approaches suffer from the misconception that individual decision-makers will ineluctably reach the same conclusion when confronted with the same case. But this is rarely true in practice when difficult constitutional issues are at odds. *Traditional values* have often been used to invoke the claim that a right is fundamental. But in a democratic society, tradition usually rests on the shoulders of a temporary majority who often falls out of favor at some point during the ebb and flow of electoral cycles. Thus, a purely traditional approach could be used illegitimately to supplant current values with outdated preferences from the past. In a *consensus* approach, sometimes described as the most democratic way of determining fundamental values, society's widely shared values would form the basis for a determination. This, too, is fraught with trouble, however, since a value that is currently important might simply be a

product of unique circumstances rather than a lasting value implicit in the larger constitutional framework.

Typically, the four values held to be fundamental, and worthy of the strictest judicial scrutiny, are the freedoms of religion, press, assembly, and speech. These First Amendment protections were among the first provisions of the Bill of Rights that the U.S. Supreme Court applied to the states as well as the national government. When these rights are involved, the government must show a compelling interest to justify any abridgment. Since these rights were the most debated during the formation of the Constitution and Bill of Rights, they are often viewed as the most fundamental.

In addition, other highly valued rights are implied throughout the Constitution, and the courts have struggled with determining which, if any, of these deserve the entitlement of being "fundamental" and the legal power that term restricts. One such value is privacy. Throughout the Constitution are references to behaviors that are seen as bars to liberty, and many of these involve the concept of privacy (but not the word itself). The Second Amendment speaks of not quartering soldiers in homes. The Fourth Amendment warns against unlawful searches and seizures of personal papers. The Fifth Amendment protects against self-incrimination. The Sixth Amendment makes sacred the attorney-client privilege. And the Fourteenth Amendment makes a broad guarantee of personal liberty. Additionally, rights not mentioned explicitly in the other amendments are reserved to the people according to the Ninth Amendment. Using rationales from many of these amendments, the Supreme Court used privacy, as a fundamental right, in *Roe v. Wade,* 410 U.S. 113 (1973), to bar most governmental (federal, state, and local) prohibitions against abortion, despite later public opposition that no such right existed in the Constitution.

One of the least disputed examples of a fundamental right would be found in the many nuances of the First Amendment to the Constitution. In a landmark case, *New York Times Co. v. United States,* 403 U.S. 713 (1971)—often referred to as the *Pentagon Papers* case—the U.S. Supreme Court turned back government attempts to censure printed material in the *New York Times.* The *Times* was trying to print a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." In allowing publication to proceed, Justice Hugo L. Black argued that "[t]he word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."

More recently, the U.S. Court of Appeals for the Sixth Circuit in *Detroit Free Press v. Ashcroft,* 303 F.3d 681 (6th Cir. 2002), confronted the First Amendment issue of post–September 11, 2001, detention hearings for nonresident aliens who had overstayed their visas or who were undocumented entirely. Ruling less than a year after the September 11, 2001, terrorist attacks in New York City and Washington, D.C., the court reversed one of its earlier rulings from the late 1970s and found that the press and the public, including family members, had a right to access deportation hearings even in cases where "special interests" like terrorism were suspected. The Sixth Circuit opinion balanced the needs of national security against the needs of an informed society, concluding that freedom must trump, or outweigh, fear when it comes to the exercise of First Amendment rights. Specifically, the court found that even in "troubling times. . . . A true democracy is one that operates on faith that government officials are forthcoming and honest, and faith that informed citizens will arrive at logical conclusions."

Patricia E. Campie

See also: Bill of Rights; Civil Liberties; Declaration of Independence; Due Process of Law; First Amendment; Natural Law; Natural Rights; Pure-Speech Doctrine; Strict Scrutiny; United States Constitution.

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Furman v. Georgia (1972)

In *Furman v. Georgia,* 408 U.S. 238 (1972), the U.S. Supreme Court held that Georgia's imposition of the death penalty violated the Eighth and Fourteenth Amendments of the U.S. Constitution because it was administered in an arbitrary and capricious fashion. In this case, Justices William O. Douglas, William J. Brennan Jr., Potter Stewart, Byron R. White, and Thurgood Marshall filed separate opinions in support of their judgments. Chief Justice Warren E. Burger and Justices Harry A. Blackmun, Lewis F. Powell Jr., and William H. Rehnquist filed separate dissenting opinions. *Furman* was highly significant because it invalidated nearly every death penalty statute in the United States, bringing a halt to executions for several years.

Furman was a consolidated case that also involved other defendants. In all three cases, the defendants were African Americans who had been sentenced to death for murder or rape. William Henry Furman's conviction was for murder in Georgia. In the sentencing, the jurors were not provided with any guidelines regarding when death or life imprisonment should be imposed. Instead, they were left to their own discretion whether to impose the death penalty.

In overturning Furman's sentence, a five–four majority of the Supreme Court reached different conclusions regarding why the Georgia capital punishment law was unconstitutional. Justices Douglas, Stewart, and White ruled that the application of the Georgia death penalty statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment in that death was more likely to be imposed on the poor and African Americans than on others. Justice Stewart drew a parallel between the death penalty and being struck by lightning, seeing both as highly random; therefore the death penalty violated the Eighth Amendment's ban on "unusual" punishments. Justice White saw the rarity of the imposition of the death penalty as undermining its value, thereby also making the punishment a violation of the Due Process Clause. Finally, both Justices Marshall and Brennan ruled that the imposition of the death penalty was in itself cruel and unusual punishment, no matter how administered, and therefore was unconstitutional.

The dissenters in the case drew upon a variety of arguments to uphold Furman's conviction and the Georgia death penalty statute. Chief Justice Burger, for example, contended that the Eighth Amendment's original purpose was to ban torture and that it was up to legislators to decide if they wanted to outlaw the death penalty. Justices Powell and Blackmun—the latter eventually came to agree with Brennan and Marshall that the death penalty was unconstitutional—concurred with Burger's claim that it was up to Congress and state legislatures to eliminate capital punishment.

As a result of *Furman v. Georgia,* death penalty statutes across the United States were declared unconstitutional. Hundreds of individuals on death row had their sentences commuted to life in prison, such as Charles Manson in California, who had led a gang of young people on a murder spree during which they killed movie star Sharon Tate and others. No individuals would be executed in the United States for several years after *Furman,* and it was not until *Gregg v. Georgia,* 428 U.S. 153 (1976), involving a statute requiring that juries be given guidance to determine when the death penalty was an appropriate punishment, that the Supreme Court would uphold new death penalty statutes and allow executions to resume.

Gladys-Louise Tyler and David Schultz

See also: Cruel and Unusual Punishments; Eighth Amendment; *Gregg v. Georgia*.

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G

Garcia v. San Antonio Metropolitan Transit Authority (1985)

In *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), the U.S. Supreme Court upheld the regulation of state employees under 1974 amendments to the federal Fair Labor Standards Act of 1938 as a valid exercise of the power granted to Congress under the Commerce Clause of the U.S. Constitution. The decision reversed the Court's holding in *National League of Cities v. Usery,* 426 U.S. 833 (1976), which had exempted "traditional governmental functions" of states from federal regulation. Court decisions involving the extent of power the Commerce Clause grants have shifted with changing times, but they usually have had in common a debate between advocates of broad congressional power and supporters of states' rights.

The San Antonio Metropolitan Transit Authority (SAMTA) of San Antonio, Texas, argued that as a state agency undertaking local government activities, it qualified for an exemption from the minimum-wage and overtime requirements of the federal act. A transit employee named Joe Garcia sought the protection of the federal legislation and challenged the exemption. The U.S. District Court of Western Texas exempted SAMTA, citing *National League of Cities* in support. The Supreme Court reversed the Texas ruling.

Garcia is also a landmark in the jurisprudence of federalism. The Constitution divides the task of governance between the states and the federal government. The Supreme Court is called on to serve as the umpire of disputes between governments over the scope of their powers. During the New Deal presidency of Franklin D. Roosevelt, the Supreme Court found many of the administration's efforts to regulate the national economy unconstitutional on federalism grounds. The Court eventually became more sympathetic to national regulation and oversaw an expansion of federal activity largely under the auspices of the Commerce Clause power granted to Congress. A wide-ranging commerce power gave Congress the ability to legislate in many areas traditionally assumed to be the sphere of the states. Congress went one step further and began to regulate the states in their employment activities. *Garcia* was the zenith of the Supreme Court's permissibility with the Commerce Clause and federal regulation of state activities. In recent years, however, the Court has reinvigorated limits on the commerce power in cases such as *United States v. Lopez,* 514 U.S. 549 (1995), in which it struck down the Gun-Free School Zones Act of 1990, banning gun possession in school zones, as exceeding congressional authority under the Commerce Clause. The Court also revived state immunity in cases such as *Alden v. Maine,* 527 U.S. 706 (1999).

Given the exemption states could receive from federal labor standards under *National League of Cities,* the states had been understandably keen to ensure that a broad definition of such functions was formulated by the courts. Writing for the majority in *Garcia,* Justice Harry A. Blackmun found that the search for such a core of traditional responsibility conducted in the interim between *National League of Cities* and *Garcia* had been unfruitful. Of the fifteen lower-court decisions Blackmun cited as relevant, five had exempted states or their agencies, and ten had not. Regardless of the results, Blackmun wrote, it was "difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side."

Justice Blackmun's opinion in *Garcia* was the embodiment of a "functionalist" approach to federalism. Federalism, he argued, required flexibility more than formalism or rigidity of categories. For a federation to endure and for the units in a federation to flourish, he claimed, they must be allowed to experiment and work outside the bounds of rigid structures. A judiciary patrolling the border between federal and state power ultimately would be hostile to such practices. Blackmun encouraged the judiciary to thin out its patrols and allow governments to blur the lines.

The major question was how the courts were to provide flexibility for evolving federal arrangements

yet avoid judicial subjectivity. Blackmun argued that it could not be done—that subjectivity was inevitable. Thus, questions that had once received judicial resolution were better served by political processes. The majority claimed that state interests were protected through the institutions of national government, namely, the electoral college and the Senate. "The principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through State participation in federal governmental action." Since one chamber of Congress was composed of the nominal representatives of the states, such representation should ensure that federalism was respected. According to the Court's ruling in *Garcia,* if the federal legislation at hand had made it through the national political process, that meant state concerns had been heeded. It therefore became unnecessary for the Court to consider state sovereignty or any other limit that might be argued to overrule congressional action. Nevertheless, this perspective had come under increasing fire by the late 1990s into the early twenty-first century.

Gerald Baier

See also: Federalism.

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Gault, In re (1967)

The inception of the modern juvenile justice system began in 1967 with the U.S. Supreme Court's decision in *In re Gault,* 387 U.S. 1 (1967). The decision had a tremendous impact on the juvenile justice process, creating a framework that still exists today. Prior to 1967 the focus of the system was on ensuring the social welfare of the juvenile. The system focused on the child's right to custody and not on the child's right to liberty.

Fifteen-year-old Gerald Gault had been found delinquent by the Juvenile Court of Gila County, Arizona, for making lewd telephone calls to a neighbor. At the time he made the prank calls, Gault was on probation for being present when another boy stole a wallet. As punishment for making the prank calls, Gault was sentenced to the State Industrial School until the age of twenty-one, a period of six years. In an eight–one decision, the U.S. Supreme Court found the Arizona Juvenile Code violated the Due Process Clause of the Fourteenth Amendment, since it denied juveniles several procedural due process rights. Gerald Gault had been denied adequate written notice of charges, the right to counsel, the privilege against self-incrimination, and the right to confront and to cross-examine witnesses.

Justice Abe Fortas delivered the Supreme Court's opinion. He noted that the juvenile justice system was created in order to protect children from the harsh realities of the adult criminal justice system. It was an attempt by states to protect, care for, and rehabilitate juveniles. Fortas pointed out that the results of the system had not been entirely acceptable. Had the fifteen-year-old Gault been over age eighteen, he would not have been tried in juvenile court and would have been entitled to rights under the Constitution. The law he violated was a misdemeanor. As an adult, he would have received a $5 to $50 fine or been incarcerated for up to two months. Since he was a minor, he was denied procedural rights guaranteed to adults and received a six-year sentence. Thus, minors were often left without both the procedural safeguards guaranteed to adults and rehabilitative treatment. Since a gap existed between the benevolent intent and the practice in reality, Justice Fortas stated, procedural safeguards were required. The Fourteenth Amendment and the Bill of Rights were not created only for adults. Children also had the right to liberty.

This emphasis on procedural rights as outlined in *Gault* dominated the juvenile justice system for two decades. During the 1980s the view began to change. A rapid increase in juvenile crime occurred from 1985 to the mid-1990s (though it decreased thereafter). During this time the focus shifted from ensuring the fairness of the system to considering the offenses committed. The media increased their coverage of juvenile crime, and state legislatures reexamined their statutes and began to emphasize deterrence and punishment.

Today, juveniles who commit serious crimes are often tried in adult court.

Carrie A. Schneider

See also: Juvenile Justice System; *New Jersey v. T.L.O.*

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Gay Rights

See Transgender Legal Issues in the United States

Gideon v. Wainwright (1963)

In the landmark case *Gideon v. Wainwright,* 372 U.S. 335 (1963), the U.S. Supreme Court held that the right of an indigent defendant in a criminal trial to have the assistance of counsel was a fundamental right essential to a fair trial and due process under the Fourteenth Amendment to the U.S. Constitution. The *Gideon* decision reversed the Court's previous position in *Betts v. Brady,* 316 U.S. 455 (1942), and changed the operation of criminal procedure throughout the nation.

The case arose in Florida when the petitioner, Clarence Earl Gideon, was charged with breaking into and entering a poolroom with intent to commit a crime. This offense constituted a felony under Florida law. Gideon appeared in court without funds and without a lawyer and asked the court to appoint counsel for him. The judge denied the request, citing the Florida legal requirement that counsel would be appointed only for defendants charged with a capital offense. Gideon then conducted his own defense and was convicted by a jury and sentenced to serve five years in state prison. After the Florida Supreme Court denied his appeal, Gideon filed a handwritten petition with the U.S. Supreme Court.

The issue before the Court was whether it should interpret the Fourteenth Amendment to incorporate a requirement that indigent defendants have the right to counsel. In *Johnson v. Zerbst,* 304 U.S. 458 (1938), the Court had already held that the Sixth Amendment applied in federal court to require that counsel be provided for indigent defendants unless they competently and intelligently waived that right. But the Court had previously rejected the argument that the Fourteenth Amendment required states to do the same. In *Betts v. Brady,* the Court held that only the Bill of Rights provisions deemed fundamental and essential to a fair trial were made obligatory upon the states by the Fourteenth Amendment and that the appointment of counsel was not essential to a fair trial.

In *Gideon,* the Court simply reversed itself, holding that certain fundamental rights found in the first eight amendments to the Constitution were applicable to the states through the Due Process Clause of the Fourteenth Amendment, a legal concept known as the incorporation doctrine. The fundamental right of the accused to the aid of counsel in a criminal prosecution was one such right. More directly, the Court asserted, "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

Kevin M. Wagner

See also: Betts v. Brady; Incorporation Doctrine; *Miranda v. Arizona;* Sixth Amendment.

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Ginsburg, Ruth Bader (b. 1933)

Ruth Bader Ginsburg was born in 1933 and has served on the Supreme Court since 1993. As a professor at Columbia University Law School and director of the American Civil Liberties Union's Women's Rights Project in the 1970s, she argued six gender-equality cases before the Supreme Court and won five. In the process, she played the leading role in estab-

Ruth Bader Ginsburg, Supreme Court nominee, at Senate confirmation hearings. In her career as a lawyer and an associate justice, Justice Ginsburg has been noted for her defense of women's rights. *(© Rob Crandall/The Image Works)*

lishing the constitutional right of women to equal treatment.

Ginsburg's particular contribution lay in part in her insistence that each law challenged as discriminatory to women be understood in the context of their historical marginalization. In *Edwards v. Healy,* 421 U.S. 772 (1975), for example, she argued that laws requiring men but not women to serve on juries seemed generous, but they exacerbated the societal belief that women did not perform equal citizenship responsibilities and therefore could be denied equal societal benefits. Another pertinent case was *Duren v. Missouri,* 439 U.S. 357 (1979), which struck down a Missouri law giving women automatic exclusion from jury duty. Because the justices listening to her pleas were all men, she brought gender-equality cases on behalf of men who were harmed by gender-specific laws, as she did in *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975), in which she challenged the Social Security Act's provision of survivors' benefits for widows but not widowers.

President Jimmy Carter appointed Ginsburg to the federal Court of Appeals for the District of Columbia in 1981, and President Bill Clinton elevated her to the U.S. Supreme Court in 1993, by which time she had earned praise as a nonideological judge who emphasized procedure and objectivity. As reflected in her Supreme Court opinions, her judicial philosophy is based on a firm commitment to popular democracy and protection of individual rights.

Ginsburg dissented, for example, when the Court in *Board of Trustees v. Garrett,* 531 U.S. 356 (2001), held that Congress had no authority to give legal recourse to state employees who alleged discrimination on the basis of disability; in *Kimel v. Board of Regents,* 528 U.S. 62 (2000), which held similarly as to age; and in *United States v. Morrison,* 529 U.S. 598 (2000), which held likewise for women victimized by sexual violence. Her dissent in *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200 (1995), chastised the majority for not recognizing both the reality of persistent racial inequality and the authority of Congress to enact remedial affirmative action programs. In *Florida v. J.L.,* 529 U.S. 266 (2000), she wrote for a unanimous Supreme Court that police could not constitutionally stop and search people on the basis of anonymous tips. She dissented in *Arizona v. Evans,* 514 U.S. 1 (1995), when the Court upheld a conviction based on a warrantless search resulting from inaccurate state computer records, and in *Board of Education v. Earls,* 536 U.S. 822 (2002), when the Court upheld the power of school districts to test students in extracurricular activities for drugs.

A high point of Ginsburg's judicial career came in *United States v. Virginia,* 518 U.S. 515 (1996), when she wrote for the Court that the Virginia Military Institute, a publicly funded college, could not constitutionally refuse to admit women. Her opinion, which held that the Constitution required courts to examine gender-specific governmental policies with "skeptical scrutiny" and to uphold them only if the government presented an "exceedingly persuasive justification" that did not rely upon outmoded stereotypes, drew upon the precedents that Ginsburg herself had established as an attorney in the 1970s.

Philippa Strum

See also: Frontiero v. Richardson.

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Gitlow v. New York (1925)

In *Gitlow v. New York,* 268 U.S. 652 (1925), the U.S. Supreme Court faced the issue of whether the free speech provision of the First Amendment to the U.S. Constitution applied to the states. The Court concluded that free speech was a fundamental personal liberty and as such was subject to the Due Process Clause of the Fourteenth Amendment by which fundamental rights were to be protected from infringement by the states.

Benjamin Gitlow, a former Socialist assemblyman and a participant in the founding of the American Communist Party, was convicted of violating New York's Criminal Anarchy Act, a state version of national sedition legislation. The New York statute, enacted in 1902, made it a crime to advocate the violent overthrow of the government. Gitlow and several other Communist Party members were charged with violating the law by publishing subversive materials. Gitlow admitted he was a Communist and that he published the *Revolutionary Age* newspaper and a pamphlet entitled *Left Wing Manifesto.* His primary objective in distributing these materials was the "destruction, conquest and the annihilation of the government of the United States," but he denied that these materials amounted to an actual call for violent revolution. Clarence Darrow, Gitlow's attorney, argued that although the Communists perhaps were wrong and badly misguided, they were entitled to express their views.

The jury convicted Gitlow and the others after fewer than three hours of deliberation. Gitlow was sentenced to a minimum of five years in prison, but he and the others had their convictions overturned in the New York appellate courts or received pardons from Governor Alfred E. Smith. Smith postponed his pardon of Gitlow to give time for the appeal of his case to the Supreme Court. On June 8, 1925, the Supreme Court found New York's anarchy statute constitutional and upheld Gitlow's conviction by a seven–two vote.

Although Gitlow lost, free speech did not fare quite so badly. Before ruling on the New York law and Gitlow's conviction, the Court first had to determine whether the free speech provision of the First Amendment even applied to the states. The Court concluded that free speech was a fundamental personal liberty protected by the Fourteenth Amendment from impairment by the states. This aspect of the *Gitlow* decision was crucial to the nationalization (incorporation) of the Bill of Rights (the first ten amendments to the Constitution)—the extension of most of the Bill of Rights to actions of the states by means of the Due Process Clause of the Fourteenth Amendment.

Justice Edward T. Sanford said for the Court that New York's statute was constitutional because it penalized only expression that incited violence—it prohibited advocacy of government overthrow by unlawful means. The Constitution neither conferred an "absolute right to speak or publish" whatever one may choose nor provided "immunity for every possible use of language and prevents the punishment of those who abuse this freedom." Without reasonable restrictions, utterances that incited violence would "imperil [the nation's] existence as a constitutional State." The First Amendment, Justice Sanford suggested, did not deprive a state of the "primary and essential right of self-preservation."

New York's law reflected the legislative judgment that such expression could be prohibited because it represented a sufficient danger of "substantive evil." The danger was no less real or substantial because the "effect of a given utterance cannot be accurately foreseen." Advocacy of the objectives contained in the *Manifesto* could provide the "spark" that caused a "smoldering fire" to "burst into a sweeping and destructive conflagration," and a state was not unreasonable if it sought to "extinguish the spark without waiting until it has enkindled the flame." A state cannot be required to postpone adoption of protective measures until the revolutionary utterances had led to "imminent or immediate danger." In other words, a state may "suppress the threatened danger in its incipiency." Sanford's reference to anticipated danger prompted the characterization of the *Gitlow* ruling as enabling the "killing of the serpent in the egg."

Justice Oliver Wendell Holmes Jr., writing for Justice Louis D. Brandeis and himself, disagreed that the *Manifesto* was an unlawful incitement. "Every idea," Holmes said, "is an incitement," and in his judgment there was no real and present danger of forceful overthrow of the government by the small group who

shared Gitlow's views; the "redundant discourse" contained in the *Manifesto* had "no chance of starting a present conflagration." Gitlow later was pardoned by Governor Smith and resumed active participation in the Communist Party.

Peter G. Renstrom

See also: Bill of Rights; First Amendment; Selective Incorporation.

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Globe Newspaper Co. v. Superior Court (1982)

In *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982), the U.S. Supreme Court struck down a Massachusetts law that denied the public and press access to a courtroom during the testimony of an underage victim of a sexual offense. The case raised issues of the right to a free press as provided in the First Amendment to the U.S. Constitution.

In accordance with the General Laws of Massachusetts, the Superior Court of Norfolk County closed its proceedings to public observers when three teenage girls took the stand to testify against the man accused of raping them. The Globe Newspaper Company challenged the action, claiming the law infringed on the rights of a free press as protected by the First Amendment. Lawyers for the Superior Court argued the Massachusetts law encouraged young witnesses to testify truthfully and protected underage victims of sexual assault from additional unnecessary humiliation.

The Supreme Court sided with Globe and overturned the Massachusetts law. Justice William J. Brennan Jr., writing for the six–three majority, found the law in violation of the First Amendment, arguing it was necessary for courtrooms to remain open to the press and public in order to subject the proceedings to public scrutiny and to lend the air of fairness to the judicial process. Although the state may have an interest in protecting minors from further trauma stemming from the crime, this interest did not outweigh the First Amendment. The Court allowed for the possibility that a state could bar the public from attending a criminal trial if the state demonstrated a compelling government interest, but the broad scope of the Massachusetts law (which applied to all cases involving a minor and not just to those involving a state interest) did not meet this standard.

Chief Justice Warren E. Burger argued in a dissent that the majority's decision interfered with the state's responsibility to protect its citizens. He found it bizarre that states could still protect the interests of a minor standing trial for rape by closing the courtroom to the public but could not do the same in order to protect an innocent underage rape victim.

Jason Stonerook

See also: First Amendment.

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Goldberg v. Kelly (1970)

In *Goldberg v. Kelly,* 397 U.S. 254 (1970), the U.S. Supreme Court in a six–three vote invalidated a New York procedure for terminating welfare payments. The New York practice did not provide welfare recipients sufficient opportunity to present evidence challenging termination of their benefits; it thus deprived them of their rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Residents of New York who received financial aid

under the federal program Aid to Families with Dependent Children (AFDC) and had that aid terminated filed suit on the grounds that the procedure used in New York violated their right to due process. New York, when terminating benefits for AFDC and the state-administered Home Relief program, gave affected recipients a seven-day notice and the right to submit a written statement of protest. The terminated recipients were not allowed an evidentiary hearing prior to termination, but were required to wait until after it was an accomplished fact.

The district court held that only a pretermination evidentiary hearing would satisfy constitutional due process and rejected the argument of the welfare officials that the combination of the existing posttermination hearing and the informal pretermination review was sufficient.

The Supreme Court, through Justice William J. Brennan Jr.'s opinion for the majority, held that giving recipients the right only to submit a written statement prior to termination and affording only a posttermination hearing did not meet the requirements of procedural due process under the Fourteenth Amendment. The recipients had to be given an opportunity to retain an attorney if they wished to present in person their argument why their benefits should not be terminated. The Court recognized that the state had an interest in conserving resources, but that this interest was outweighed by the interests of the welfare recipients in receiving uninterrupted public assistance, which among other things promoted the general welfare. Justice Brennan further concluded that welfare benefits were a matter of statutory entitlement for persons qualified to receive them, and procedural due process was applicable to their termination.

Mark Alcorn

See also: Due Process of Law; Hearing.

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Goldberg, Arthur J. (1908–1990)

In his service to the nation as a labor lawyer, secretary of labor, associate justice of the Supreme Court, and ambassador to the United Nations, Arthur J. Goldberg consistently fought for the rights and liberties of workers and the disadvantaged.

Born in Chicago's west side in 1908, Goldberg was the last of eight children of Ukrainian Jewish immigrants and grew up in poverty. His father drove a horse and wagon through the streets of Chicago selling food and vegetables to support his large family. Upon his death at age fifty-one, the Goldberg children went to work. Young Arthur's jobs included wrapping fish, selling shoes, and selling coffee at Wrigley Field during Cubs games—all while excelling in the public schools. He graduated high school at age sixteen and then attended Crane Junior College and DePaul University, taking night classes while continuing to work during the day. At age eighteen, he enrolled in Northwestern Law School and in 1929 graduated first in his class.

Goldberg left his first job at a top Chicago law firm after he was asked to foreclose mortgages during the depression. He opened his own practice and began representing workers and the oppressed. He first gained national attention as counsel for the Chicago Newspaper Guild in its 1938 strike against the William Randolph Hearst newspapers in Chicago. Working without pay, Goldberg spent hour after hour in courtrooms defending picketers. Hearst eventually recognized the union. During World War II, Goldberg served as a captain and then major in the army. After the war, Goldberg returned to private practice, represented the United Steelworkers, and was instrumental in the 1955 merger of the American Federation of Labor with the Congress of Industrial Organizations (AFL-CIO). He became the group's chief counsel, brokering agreements and filing amicus briefs in support of civil rights cases at the U.S. Supreme Court. In 1961, President John F. Kennedy appointed him U.S. secretary of labor.

But only one year later, Kennedy tapped Goldberg for a seat on the Supreme Court. Goldberg immediately provided a key fifth liberal vote and joined Court

Arthur Goldberg receiving the Presidential Medal of Freedom from President Jimmy Carter, July 26, 1978. Justice Goldberg was a defender of individual rights on the Supreme Court under Chief Justice Earl Warren. *(Courtesy Jimmy Carter Library)*

majorities in such landmark cases as *Gideon v. Wainwright,* 372 U.S. 335 (1963), establishing a constitutional right to counsel; *Escobedo v. Illinois,* 378 U.S. 478 (1964), ruling that the Sixth Amendment provides an "absolute right to remain silent"; *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), holding that the First Amendment protects the publication of statements about public figures; and *Griswold v. Connecticut,* 381 U.S. 479 (1965), determining that the Constitution contains a right to privacy that includes the use of contraception by married couples.

Convinced by President Lyndon Johnson that he could play a major role in ending the war in Vietnam, Goldberg resigned from the Court in 1965 to serve as U.S. ambassador to the United Nations. Goldberg's efforts to end the war, however, were futile, as the Johnson administration continued to escalate the conflict. When Johnson's nomination of Abe Fortas to be chief justice encountered Senate opposition, the president briefly considered Goldberg. But the Senate would not act on any nomination by the lame-duck president, and Johnson never submitted Goldberg's name. The ambassador left his post in 1968 and ran unsuccessfully for governor of New York in 1970. He served President Jimmy Carter as ambassador-at-large, focusing on human rights issues. He received the Presidential Medal of Freedom in 1978 and practiced law until his death in 1990 at the age of eighty-one.

Artemus Ward

See also: Brennan, William J., Jr.; *Gideon v. Wainwright.*

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Good Faith Exception

The good faith exception is an exception to the general requirement that a warrant is required for most searches and seizures. The Fourth Amendment to the Constitution guarantees the right of people to be secure in their persons, homes, papers, and effects against unreasonable search and seizure. One of the most important practical questions for the courts was how this amendment would be enforced if the government conducted an illegal search. In its decision in *Weeks v. United States,* 232 U.S. 383 (1914), the U.S. Supreme Court created the "exclusionary rule" to deal with the effects of an illegal search. Under this rule, the fruits of any search that violated the Fourth Amendment could not be used in court against the accused.

The exclusionary rule has been controversial. In a series of decisions, the Court, under the leadership of Chief Justice Warren E. Burger, began to create exceptions to the exclusionary rule. For example, the Court decided that illegally seized evidence did not have to be excluded from grand jury proceedings, that the exclusionary rule did not apply to civil trials, and that state prisoners could no longer petition for a writ of habeas corpus (petition for release from illegal confinement) to review their convictions on Fourth Amendment grounds involving violation of the exclusionary rule. For the most part, these exceptions involved peripheral matters and were more symbolic than practical.

In a pair of companion cases, *United States v. Leon,* 468 U.S. 897 (1984), and *Massachusetts v. Sheppard,* 468 U.S. 981 (1984), the Burger Court created the good faith exception to the exclusionary rule. In each of these cases, the police applied for a warrant despite procedural flaws, and a magistrate issued the warrant. Lower courts excluded the evidence in each case. The Burger Court reversed in both cases, creating the good faith exception. The Court ruled that the exclusionary rule was primarily designed to deter illegal police behavior. The Court, in an opinion authored by Justice Byron R. White, held that the exclusionary rule should not be applied to circumstances when officers acted in a reasonable fashion and when it was not designed to deter illegal police behavior. The Court ruled that the problems were caused by the magistrate's error and the police had acted in good faith.

The Rehnquist Court continued to extend the good faith exception, though most opinions created only peripheral extensions. Thus, the Court expanded the doctrine to include situations involving police reliance upon flawed court records, as in *Arizona v. Evans,* 514 U.S. 1 (1995), and on state statutes, as in *Illinois v. Krull,* 480 U.S. 340 (1987). Such decisions limited application of the doctrine to instances in which police rely upon a government document (warrant, court record, statute) that they have no reason to believe is flawed. The bottom line as a result of *Leon* and *Sheppard* is that evidence will rarely be suppressed when a judge issues a warrant. But some state supreme courts have found a legitimate means to extend procedural rights by declaring that rights denied by the Supreme Court under the U.S. Constitution are protected independently under state constitutions; those courts have held that there is no good faith exception to the rules of search and seizure in their constitutions.

Richard L. Pacelle Jr. and Barry R. Langford

See also: Exclusionary Rule; Fourth Amendment; Fruits of the Poisonous Tree; *Mapp v. Ohio; United States v. Leon.*

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Good News Club v. Milford Central School (2001)

Good News Club v. Milford Central School, 533 U.S. 98 (2001), pitted a public school's obligation to avoid endorsement of religion against the school's obligation to offer facilities to the public on an evenhanded basis. The case involved distinct issues arising under the Establishment Clause of the First Amendment to the U.S. Constitution and free speech rights in a public forum, also interpreted as arising under the First Amendment. In a divided opinion, a majority of the Court ruled in favor of granting open access in a case involving an evangelical Christian organization for grade school children that wished to meet in classrooms immediately after school.

Milford is a village in upstate New York with a single school for kindergarten through twelfth grade. School district policy allowed rooms to be used by nonschool groups for educational, social, civic, or recreational meetings and entertainment events, but in an effort to avoid unconstitutional establishment of religion (the Establishment Clause prohibits government actions what would constitute establishment of religion), the policy did not allow school premises to be used for "religious purposes."

The Good News Club was an evangelical Christian group that held meetings for elementary school children that were similar to church Sunday school sessions. Club meetings featured prayers, religious songs, and memorization and discussion of Bible verses. The centerpiece of each meeting was a "challenge" in which children who considered themselves saved would declare loyalty to "Jesus as Savior," and children who were "unsaved" would be invited by the teacher to receive Jesus as "your Savior from sin." In 1996 the Milford school board decided that club meetings were a "religious purpose" under its policy and so denied use of the school building.

The Second Circuit Court of Appeals held that the exclusion of the Good News Club was within the school's authority to reserve designated public-forum spaces for certain groups or for the discussion of certain topics. In a strongly worded decision, a majority of the U.S. Supreme Court ruled that the school's policy did not designate among subject matters (which would have been acceptable) but instead discriminated among viewpoints (which was not). Six members of the Court ruled that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." In so holding, the majority rejected the notion that speech consisting of prayer, religious exercise, evangelism, or religious indoctrination constituted a distinct category requiring separate constitutional analysis. "What matters for purposes of the Free Speech Clause," said the majority, "is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations [like the Boy Scouts] to provide a foundation for their lessons." On this point, Justice David H. Souter and other dissenters argued that "an evangelical service of worship calling children to commit themselves in an act of Christian conversion" was different in kind from a "discussion of a subject from a particular, Christian point of view." The dissenters objected that the Constitution did not require "that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque."

The majority then considered whether the school's obligations under the Establishment Clause might outweigh the viewpoint-neutrality doctrine. Five members concluded that it could not: When school facilities are being used for a nonschool function without direct government sponsorship, the cases forbidding school-sponsored prayer are inapposite. Although many earlier cases accepted that the danger of state endorsement of religion was stronger the younger the audience, the *Good News* majority said that the Establishment Clause did not "foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present." One dissenter objected that the majority's Establishment Clause discussion was unnecessary; three other justices argued that trial was needed to determine whether club meetings after school would amount to an unconstitutional message of official endorsement of the club's religion.

Although *Good News Club* was a controversial case with twenty friend-of-the-court briefs (amici curiae) filed on behalf of over fifty-five different parties, its

result was consistent with earlier decisions involving older students that favored equal access to educational facilities for religious groups. For example, *Widmar v. Vincent,* 454 U.S. 263 (1981), and *Rosenberger v. University of Virginia,* 515 U.S. 819 (1995), required university facilities to be made available for religious groups. *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993), required high schools making rooms available to community groups to allow religious presentations. *Westside Community Schools v. Mergens,* 496 U.S. 226 (1990), upheld the constitutionality of a provision of the Equal Access Act requiring secondary schools receiving federal funds to allow meetings of religious clubs in any "limited open forum" operated by the school. The novelty of *Good News Club* was its extension of the doctrine to elementary schools.

Aaron H. Caplan

See also: Establishment Clause; Free Exercise Clause; *Lemon v. Kurtzman*.

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Grand Jury

A grand jury consists of a group of individuals summoned and sworn in by a court and charged with the responsibility to ascertain if there is sufficient evidence to justify going forward with a criminal trial. Grand juries are distinct from petit juries in that the former determine if charges are warranted, whereas the latter determine if a criminal defendant is guilty. If a grand jury determines that the prosecutor has presented enough evidence to warrant a trial, it issues an indictment, also referred to as a true bill. An alternative to a grand jury in some states is a preliminary hearing at which a judge evaluates the evidence presented by the prosecutor and decides if a trial should take place. At the federal level, the Sixth Amendment requires the use of a grand jury for the indictment of an individual "for a capital or otherwise infamous crime."

Members of grand juries are generally selected from the same pool of individuals and by the same means as members of petit juries. In most jurisdictions, this means that grand jurors are selected from lists of registered voters or licensed drivers. The number of grand jurors varies depending upon the jurisdiction, with the number of jurors serving on state grand juries ranging from five to twenty-three and the number serving on federal grand juries ranging from sixteen to twenty-three. Unlike petit juries, which sit to dispose of a single case, grand juries sit for varying terms of service and may hear evidence regarding any number of potential crimes. Grand juries may also conduct investigations separately from the process of deciding on an indictment in a particular case or cases, with few if any formal restraints on the scope of such investigations. In *United States v. Morton Salt Co.,* 338 U.S. 632 (1950), the U.S. Supreme Court thus observed that a grand jury may "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."

The antecedent of the grand jury was the jury of inquest, which originated in English law during the tenth and eleventh centuries. Over time, grand juries evolved from accusatory bodies into institutions intended to protect citizens from politically motivated or otherwise unwarranted criminal prosecutions. In colonial America, a 1735 case involving John Peter Zenger perhaps best illustrates that point. New York Governor William Cosby sought to have Zenger—the publisher of the *New York Weekly Journal,* a paper highly critical of the governor and his administration—indicted by a grand jury for publishing seditious libels. When the first grand jury declined to indict Zenger, a second grand jury was summoned. Though the second grand jury did find that two items published in the *Journal* were libelous, a petit jury subsequently accepted the truthfulness of the items and refused to convict Zenger. More recently, in *Wood v. Georgia,* 370 U.S. 375 (1962), the Supreme Court asserted that grand juries "served the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a

charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

Individuals may be compelled to testify before a grand jury through a subpoena. Such persons may be summoned as witnesses or as subjects of investigation. In either case, individuals testifying before a grand jury do not enjoy the same protections afforded criminal suspects subject to police questioning as required by *Miranda v. Arizona,* 384 U.S. 436 (1966). In particular, no one is obligated to advise those testifying before a grand jury about their constitutional protections against self-incrimination, as the Court held in *United States v. Wong,* 431 U.S. 174 (1977). Individuals who do attempt to exercise their privilege against self-incrimination under the Fifth Amendment may find themselves required to testify anyway if the government grants immunity. Immunity may be granted to cover prosecution based on an individual's compelled testimony (known as *use* or *testimonial immunity*) or more broadly to cover prosecution for anything the grand jury is investigating (known as *transactional immunity*). In either case, the person called to testify does not have the right to decline immunity, as the Court held in *Brown v. Walker,* 161 U.S. 591 (1896), involving testimony about railroad freight charges; and in *Kastigar v. United States,* 406 U.S. 441 (1972), involving testimony about organized crime.

Individuals appearing before a grand jury also do not enjoy the right to legal representation. Typically, the only people present at grand jury proceedings are the jurors, the prosecutor, and the individual testifying, though the individual providing testimony is usually permitted to consult with his or her attorney (who remains outside the grand jury room) according to the Court's ruling in *United States v. Mandujano,* 425 U.S. 564 (1976). The rationale is that the Sixth Amendment right to counsel applies to individuals who have already been indicted for a crime, whereas grand jury proceedings (by definition) precede an indictment.

President William Clinton's videotaped grand jury testimony, September 1998. President Clinton was accused of sexual harassment by Paula Jones, accused of perjury by a special prosecutor, and impeached by the House of Representatives, although the Senate did not convict.
(© Bob Daemmrich/The Image Works)

Critics charge that contrary to the idealized version of the grand jury as a protector defending individuals against wayward prosecutors, grand juries are, in practice, dominated by prosecutors. Prosecutors are largely responsible for initiating and guiding grand jury proceedings. Further, since the prosecutor is the individual with the most legal training and experience as well as the individual with whom jurors interact the most consistently, jurors may be consciously or unconsciously prone to accede to the prosecutor's wishes. Other critics charge that prosecutors can further enhance their influence over grand jurors by withholding exculpatory evidence, which they are permitted to do. Prosecutors are further advantaged by the fact that they may use evidence obtained in violation of Fourth Amendment protections against unreasonable searches and seizures to secure an indictment, even if that evidence cannot be used subsequently at trial, as the Court ruled was permissible in *United States v. Calandra,* 414 U.S. 338 (1974).

One of the most controversial powers of grand juries is their authority to compel reporters to provide confidential information. In 1972 the Court in three companion cases—*Branzburg v. Hays, In re Pappas,* and *United States v. Caldwell,* all found at 408 U.S. 665 (1972)—firmly declined to exempt reporters from providing compelled testimony before grand juries under the First Amendment. In each of these three cases, reporters had reported on criminal activity that they were allowed to observe only upon the condition that they not reveal their sources. In refusing to afford reporters this exemption, the Court majority argued that very few confidential news sources would be affected, an assertion sharply disputed by Justice Potter Stewart, who had experience as a newspaper

reporter in his life prior to the bench. The majority further argued that it was preposterous to "seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his sources, or evidence thereof, on the theory that it is better to write about crime than to do something about it." In reaction to the ruling in these cases, many states passed shield laws offering reporters some protections for declining to provide such information.

Wendy L. Martinek

See also: Branzburg v. Hayes; Immunity; Trial by Jury; Zenger, John Peter.

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Gravity-of-the-Evil Test

"Gravity of the evil," a phrase adopted as a test in free speech cases in *Dennis v. United States,* 341 U.S. 494 (1951), was the U.S. Supreme Court's attempt to reconcile the clear-and-present-danger test then in use with the anti-Communist mood of the country during the early 1950s McCarthy era, when Senator Joseph McCarthy (R-WI) launched his notorious investigations of alleged Communists in government. The Court-created tests were used to determine when government could permissibly regulate speech and not be in violation of the First Amendment to the U.S. Constitution.

Under the clear-and-present-danger test, the Court would permit suppression of speech only when the danger was both serious and immediate. This posed a problem in *Dennis,* a case involving eleven New York Communist leaders charged under the Smith Act, which made it illegal to teach or advocate the overthrow of the government by force or violence, because the defendants did not advocate immediate violence. If the Court applied the clear-and-present-danger test strictly, it would have to strike down the Smith Act as applied, because the threat posed by the defendants, if "clear," was not "present."

To remedy this situation, the Court devised a new test. Instead of looking for a clear and present danger, the Court asked "whether the gravity of the evil, discounted by its improbability," justified the prosecutions. The new test had the advantage of allowing the government to respond to grave but improbable threats. At the same time, the new test worried civil libertarians, who wondered if the new test marked the return to the days of *Gitlow v. New York,* 268 U.S. 652 (1925), and *Whitney v. California,* 274 U.S. 357 (1927), when the Court relied on the bad-tendency test, which allowed the state to punish all seditious speech, even if it posed no threat at all.

These worries were unfounded. The Smith Act did unleash a slew of anti-Communist prosecutions, but the bad-tendency test remained on the shelf. In fact, only six years later, in *Yates v. United States,* 354 U.S. 298 (1957), the tide began to turn. In *Yates* the Court interpreted the Smith Act narrowly and held that it did not cover the "advocacy of ideas." Then in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), the Court held that the state now had to show that the speaker incited "imminent lawless action" and that the speaker's words would produce such action.

The gravity-of-the-evil test faded from view. So, too, did the clear-and-present-danger test. In both *Yates* and *Brandenburg,* the Court preferred bright-line standards to the abstract terms of "clear and present danger"—terms that, in times of crisis, could be expanded to justify increasing restrictions of speech. If the gravity-of-the-evil test did not protect speech itself, it did clear away the undergrowth of the clear-and-present-danger test, thus paving the way for the

expansion of speech protection in the late 1950s and 1960s.

Robert A. Kahn

See also: Bad-Tendency Test; *Brandenburg v. Ohio;* Clear and Present Danger; First Amendment; Smith Act Cases.

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Greek Roots of Civil Liberties

Many of the civil liberties people enjoy in the United States were initiated in Athens, Greece. There is little evidence of meaningful civil liberties in other Greek city-states. Athenian civil liberties grew concomitantly with democracy.

Solon (circa [c.] 630–561 B.C.E.) turned Athens from an aristocracy into an oligarchy (c. 594 B.C.E.). Cleisthenes (c. 560–500 B.C.E.) was the first leader to implement democracy by making the Assembly (*ekklēsia*) sovereign (508 B.C.E.). Participation in the Assembly was open to all citizens. The Assembly functioned broadly, legislating and adjudicating laws, declaring wars, and making peace. Pericles (c. 495–429 B.C.E.) initiated a radical democracy. He was the first to pay wages for public service in the Assembly (c. 457 B.C.E.); Cleon (?–422 B.C.E.), his successor, later increased such pay (c. 423 B.C.E.). There were two short-lived oligarchic revolutions, one in 411 B.C.E., the other in 404 B.C.E. (the Thirty Tyrants).

Civil liberties were delimited differently through different administrations. Such liberties were various and variable. Only adult males who were born of two Athenians could be citizens (*politai*), though prior to Pericles they required only one parent (the father). A legal guardian usually represented female city-members (*astai*), resident foreigners (*metoikoi*), and slaves (*douloi*) in court. Citizens had certain liberties. They could draft indictments (*graphai*) against anyone and on behalf of anyone. If charged with a crime in the company of others, they were given a separate trial. Citizens could associate freely. They could speak freely, as demonstrated by their philosophy, sophistry, and drama. Citizens could not become enslaved through debt, could not be tried twice for the same offense, and their punishment could not extend to their families.

In Athens, citizens were obliged to participate in civil and religious functions, on penalty of losing their civil rights (*atimia*). Citizens could also lose their rights by refusing to perform military service, by refusing to take sides during civil strife, or by violating the ten-year banishment of ostracism (so called for the pot-shards [o*straka*] on which an unfortunate candidate was listed). If a citizen caught his wife having sex with another man, the husband had to divorce her to retain his civil rights.

To prevent frivolous lawsuits, a citizen who brought an indictment had to win at least one-fifth

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of the jury or pay a large fine (1,000 drachmas, about $50,000 in today's dollars). To protect against unconstitutional laws, a citizen could be charged with making an illegal proposal to the Assembly, even when the Assembly approved the measure. After 411 B.C.E., the Athenians outlawed any activity against democracy. Previously, a little-known diviner named Diopeithes successfully sponsored a motion to outlaw teaching astronomy or denying the existence of the supernatural (c. 432–429 B.C.E.). There were at least three famous prosecutions under the law: Anaxagoras of Clazomenae (c. 500–428 B.C.E.) was the first person indicted under the law (c. 450 B.C.E.); Aristophanes (c. 450–385 B.C.E.) was indicted in 426 B.C.E.; and Socrates (c. 469–399 B.C.E.) was indicted in 399 B.C.E. Anaxagoras left the city; Aristophanes successfully defended himself; Socrates was convicted and sentenced to death.

Thucydides (c. 450–400 B.C.E.) reported Pericles as eloquently espousing the Athenian values of freedom (*eleutheria*), equality (*isonomia*), justice (*dike*), and freedom of speech (*parrhesia*). Athenians valued freedom in their person and their associations, equality under the law, justice through jury-courts, and freedom to speak authentically.

Civil liberties for U.S. citizens are contained in the Bill of Rights (the first ten amendments to the Constitution) and in subsequent constitutional amendments. Such civil liberties include the freedom of speech, of religion, and of the press. Athens did not have a Bill of Rights as such. Still, in the United States, as in Athens, the actual scope of any civil liberty is determined in practice as new cases arise.

Kirk Fitzpatrick

See also: Bill of Rights.

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Gregg v. Georgia (1976)

In *Gregg v. Georgia,* 428 U.S. 153 (1976), the U.S. Supreme Court upheld the constitutionality of a Georgia death penalty statute that provided for a two-stage process: the first to determine guilt, the second, the punishment. In this case the Court effectively overturned its four-year-old decision in *Furman v. Georgia,* 408 U.S. 238 (1972), in which the Court had halted executions in the United States because of due process concerns about the fairness of the death penalty.

In *Furman,* the Supreme Court's concern in 1972 was that the death penalty was being applied in an arbitrary and capricious manner because applicable statutes gave juries too much discretion in deciding what sentence to impose. This decision led to the invalidation of all death penalty statutes in the country and the commutation of sentences of all individuals on death row to life imprisonment. The *Furman* decision also led to efforts to craft new death penalty statutes that the Supreme Court would uphold. Georgia was one state that enacted a new death penalty statute.

Georgia's new statute provided for guided discretion when the jury was to make a decision regarding what sentence to impose in a capital murder case. After a person was convicted of murder, there would then be a second hearing or trial to determine the penalty. Juries would have to weigh a list of statutorily defined aggravating and mitigating factors against one another to decide whether execution was an appropriate penalty. Aggravating factors could include the heinousness of the crime, for example; mitigating factors might include the upbringing of the defendant. If the jurors decided aggravating factors outweighed mitigating ones, they could impose the death penalty. Finally, the state law provided for automatic review of all death sentences.

In *Gregg,* Troy Gregg challenged the imposition of the death penalty after being found guilty and condemned to death for killing two men after they had picked him up hitchhiking. Gregg claimed self-defense. The Georgia Supreme Court upheld the death sentences for the murders, concluding that they

had not resulted from prejudice or any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases. Gregg appealed to the Supreme Court.

In a seven–two opinion written by Justice Potter Stewart, the Court upheld the Georgia statute. The majority ruled that the new provision giving the jury guided discretion did not violate either the Eighth Amendment prohibition on cruel and unusual punishments or the Due Process Clause of the Fourteenth Amendment. Instead, Georgia had addressed the concerns the Court articulated in *Furman* and had provided ample limits upon juror discretion when death could be a punishment. Justices William J. Brennan Jr. and Thurgood Marshall dissented in *Gregg,* arguing as they had in *Furman* that the death penalty was unconstitutional because it violated the Eighth Amendment ban on cruel and unusual punishments.

As a result of *Gregg,* states were again free to enact death penalty statutes and execute individuals so long as they created the two-stage, or bifurcated, process Georgia had enacted; limited juror discretion with a list of aggravating and mitigating factors; and provided for mandatory appeals if death was imposed as a sentence. Although the Court in *Gregg* upheld the death penalty, controversy persists regarding both its effectiveness and fairness as a deterrence or punishment for murder as well as its use in a racially arbitrary manner.

David Schultz and Gladys-Louise Tyler

See also: Aggravating and Mitigating Factors in Death Penalty Cases; Capital Punishment; Cruel and Unusual Punishments; *Furman v. Georgia*.

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Griswold v. Connecticut (1965)

Griswold v. Connecticut, 381 U.S. 479, decided in 1965, formally established the constitutional right to privacy. The case became even more important constitutionally when it became the precedent for the famous *Roe v. Wade,* 410 U.S. 113 (1973), the case that legalized abortion in the United States. Even though elements of the right to privacy had received constitutional recognition dating to the early days of the republic, there was no general right to privacy in U.S. law prior to *Griswold.* Specifically, the Third Amendment prohibition against the quartering of troops in citizens' homes, the Fourth Amendment ban on unreasonable searches and seizures, and the Fifth Amendment right against self-incrimination all gave limited recognition to the right in the sense that each assumed a narrow dimension of privacy.

Griswold involved an 1879 Connecticut law that forbade the use of contraceptive devices to prevent conception or give information about their use. Intriguingly, no one had ever been prosecuted under this law until Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut, opened a birth control clinic in New Haven, Connecticut, for the express purpose of challenging the law. After her arrest and conviction, she was fined $100. The state appellate courts sustained her conviction, and she appealed to the U.S. Supreme Court.

Griswold was decided by a seven–two vote in an opinion written by Justice William O. Douglas in which he argued the theory that "penumbras" (shadows) evolving from the guarantees of the Third, Fourth, and Fifth Amendments gave "life and substance" to a broad right of privacy. Justices Hugo L. Black and Potter Stewart dissented on the grounds that the majority had simply created a right to support their own judgments about the wisdom of the Connecticut law. Justices Black and Stewart conceded it was "an uncommonly silly law," but they argued it wasn't the proper role of the Court to judge the wisdom of the law, only its constitutionality. They maintained that if Connecticut wanted to pass such a law, it was that state's choice. They argued it was not the Court's prerogative to determine the wisdom of a law in the absence of a specific provision in the Constitution that was violated.

The impact of *Griswold* in Connecticut in 1965 was extremely minimal due to the nonenforcement of the law it overruled, but the right-to-privacy principle it established became crucial to both sides in the bitter

debates over abortion that followed (and continue) since *Roe v. Wade* was decided. The debate in *Griswold* over wisdom versus constitutionality underscored the larger debate between the opposing judicial philosophies of judicial activism versus judicial restraint seen in most of the Supreme Court civil liberties decisions in the last quarter of the twentieth century and beyond.

Warren R. Wade

See also: Right to Privacy; *Roe v. Wade.*

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Grosjean v. American Press Co. (1936)

Grosjean v. American Press Co., 297 U.S. 233 (1936), was a crucial U.S. Supreme Court decision concerning the protection for freedom of the press as provided in the First Amendment to the U.S. Constitution. In *Grosjean* the Court unanimously declared unconstitutional a Louisiana law that sought to punish critics of the administration of Governor Huey P. Long through a license tax on the gross income of newspapers in the state with a circulation of more than 20,000 copies weekly. The law, enacted in 1934 at a time in Louisiana politics when "loyal opposition" was an oxymoron, was struck down initially by a lower federal court.

Writing for the unanimous Court, in a decision coming a mere five years after the famous free press case of *Near v. Minnesota,* 283 U.S. 697 (1931), Justice George Sutherland found the disingenuous Louisiana law to be an impermissible restriction on the dissemination of information in violation of the First Amendment as applied against the states through the Due Process Clause of the Fourteenth Amendment under the "incorporation" doctrine. In the eyes of the Court, the statute was simply a thinly veiled censorship tactic seeking to impose a prior restraint on certain newspapers critical of the politics and policies of the Long administration. Given the nation's commitment to self-rule, consent of the governed, and governmental accountability, it was essential, argued Sutherland, that the fundamental freedom of the press be exercised as freely as possible without unwarranted invasion by the government. A critical component of Sutherland's opinion for the Court was his focus on fundamental constitutional and First Amendment principles underlying freedom of the press rather than on the English common law; Sutherland fully recognized that the needs of and expectations on the press were different in the U.S. polity than in the seventeenth or eighteenth centuries in England.

Especially noteworthy in *Grosjean* was the vision Justice Sutherland offered concerning the role of the press in a constitutional democracy. In arguing for freedom of the press as a fundamental First Amendment freedom, Sutherland focused on both the need of the press to report information on public matters and for citizens to acquire information in order to keep the government accountable and to protect their common interests as an engaged, informed people. According to Sutherland, the framers of the First Amendment were well aware of struggles against censorial powers in England throughout the seventeenth and eighteenth centuries; they thus sought to provide more than mere protection against censorship. Rather, the First Amendment's protection for a free press, in the Court's opinion, was meant "to preserve an untrammeled press as a vital source of public information." According to Sutherland, "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

Stephen K. Shaw

See also: Censorship; First Amendment; Incorporation Doctrine; *Near v. Minnesota*.

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Group Libel

Laws prohibiting group libel extend the protection against individual defamation of character to defamation based on group status. (Defamation is generally defined as written or oral communication that damages an individual's reputation or otherwise holds the individual up to contempt.) The idea animating group-libel laws is that a democracy relies upon both the political equality of all citizens and the peaceful coexistence among different races, ethnicities, and religious faiths. These relationships are at the foundation of civil liberties in a democracy. Public attacks designed to defame well-defined groups (especially minority groups) and bring them into low estimation leads, with the accumulation of time, to breaches of the peace, disharmony, and injuries to individual members of the defamed group. Nevertheless, group-libel laws, which were typically criminal, not civil, wrongs, allow the government to monitor, restrict, and punish a wide range of racist speech. Of course, these laws raise issues of free speech rights under the First Amendment to the U.S. Constitution.

Most group-defamation laws arose as a response to the techniques the Nazis used during the late 1930s and the 1940s to bring about nearly total contempt, hatred, and ostracism of the Jews in Central Europe. Nazi anti-Semitism was not the result of mere random or individual expressions of racism. Rather, the Nazis used sophisticated, systematic techniques to control and shape mass public opinion. Social scientists, who were beginning to study public opinion during this era, were aware of how easily it could be both shaped and distorted within a mass democracy. Sociologists were also studying the degree to which an individual's reputation and interests were tied to the respect granted to the social groups to which the person involuntarily belonged, such as racial or ethnic groups. A typical group-libel law would make it a crime to spread material that condemned a racial or ethnic group's virtue or that would bring a group into public ridicule.

These group-libel laws focused on a newly defined danger of speech, one that did not have any precise analogy to then-existing legal doctrines of free speech as it was understood under the First Amendment. The problem of group defamation was not a problem of "clear and present danger"—the test at the time for constitutionally permissible restrictions on speech—since no single speech act alone would necessarily be the incitement to violence or illegality. Nor was the problem one of seditious libel or obscenity. The goal was to find a legal device to prevent the race-driven anger and conflict that established the environment for regular breaches of the peace and even all-out race riots. Another goal was to protect a tolerant liberal democracy from those who would subvert it through the very doctrines of toleration and free speech itself. Thus, group-libel laws, by targeting intolerance, would make democratic liberalism a fighting faith.

In *Beauharnais v. Illinois,* 343 U.S. 250 (1952), a five–four decision, the U.S. Supreme Court upheld the constitutionality of an Illinois criminal group-libel law. Key to the Court's defense of the statute was a two-tiered approach to free speech that held libel, along with fighting words and obscenity, as unworthy of First Amendment protection.

The ruling would turn out to be a hollow victory for supporters of group-libel laws. First, many of the interest groups that had defended and promoted group-libel laws abandoned them as a weapon against intolerance. Black leaders did not employ the laws in the civil rights struggle, largely because anti–free speech measures were used to harass groups like the National Association for the Advancement of Colored People and its members. Civil rights organizations focused instead on discriminatory behaviors and laws rather than on defamatory words. Second, the ruling in *Beauharnais,* though never formally overturned, was superseded by subsequent Supreme Court cases. Libelous statements regarding public figures or concerning topics of public concern are now protected by the First Amendment. Speech of an offensive nature has been granted increased protection as well, in order to allow for vigorous, if often hateful, public discussions.

In the late 1980s and early 1990s, many municipalities and universities established restrictions on hate speech. Both hate-speech and group-libel laws share the recognition that insults and defamation based on differences of race, sex, ethnicity, or religion tend to injure the self-esteem and social regard of the victim. Hate speech also may lead to a disruption in public harmony and harm the democratic sphere. Some hate-speech ordinances recognized, in a way that went beyond the scope of older group-libel laws, that certain symbols, such as burning crosses, swastikas, and hangman's nooses, too easily blurred the distinction between speech and conduct because they contained the historical references to violence and threats. Advocates of hate-speech codes, taking note of the changes in constitutional doctrine since *Beauharnais,* were reluctant to define such laws as a form of criminal group libel. Rather, they often defended these laws as a ban on fighting words. The Supreme Court, however, rejected this alternative defense in *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992). Most remaining hate-speech codes are restricted to special contexts such as schools and universities.

Douglas C. Dow

See also: First Amendment; Hate Speech; *R.A.V. v. City of St. Paul.*

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H

Habeas Corpus

Article I, Section 9, clause 2 of the U.S. Constitution sets forth the privilege of the writ of habeas corpus. This writ is basically a prisoner's petition to the appropriate federal court requesting release from unlawful confinement. Habeas corpus is a fundamental federal right that can be suspended only in times of war, rebellion, or invasion. The concept was taken from Parliament's Habeas Corpus Act of 1679. When first enunciated at the Constitutional Convention in 1787, the writ was seen as an integral part of the new government's promise of liberty and freedom from wanton displays of governmental authority; some states had similar provisions within their own constitutions.

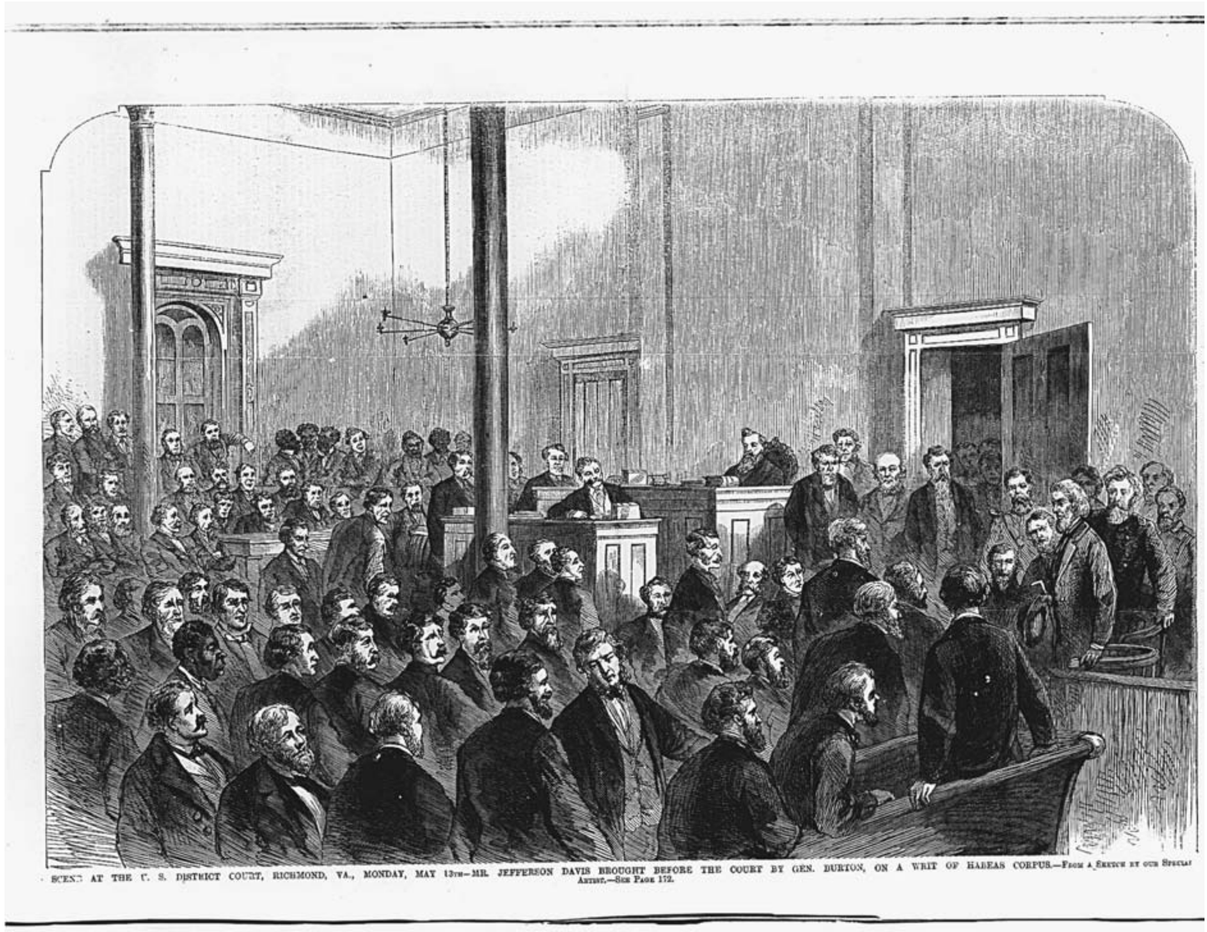
The practical effect of the writ of habeas corpus is to allow a person to challenge confinement based on any number of claims that a federal constitutional violation invalidates the case verdict or sentence. The request is made to a federal court, whether the complainant is in state or federal custody. Habeas relief may be requested at several different points in the process of a criminal conviction. For example, if an arrest is made in violation of an individual's Fourth Amendment right against unreasonable search and seizure, such a person can petition the court for release under a habeas corpus remedy. More commonly, the writ is used for postconviction relief as a cause for appeal to a higher court. It is a collateral, or additional, means used to challenge an unjust conviction solely on grounds of constitutional error. Defects involving judicial error, for example, do not typically fall under a habeas corpus claim.

Although theoretically a broad concept, habeas corpus practice has changed substantially since its inception. Initially, habeas relief could be entertained only if the question under consideration concerned a jurisdictional defect in state court. In *Fay v. Noia,* 372 U.S. 391 (1963), the U.S. Supreme Court extended the use of the writ to all constitutional controversies. In piecemeal fashion, constitutional challenges became so scrutinized under habeas corpus law that the cases showed little uniformity in the application of the privilege. In *Stone v. Powell,* 428 U.S. 494 (1976), the Court attempted to restrict such widespread review by holding that for matters involving trial-related defects, such as those occurring under the Fourth and Sixth Amendments most notably, habeas relief was unavailable unless the state had not provided a full and fair review of the constitutional defects enumerated. In other claims, such as an Eighth Amendment defect, habeas review could be granted even if the state court conducted a full and fair review of the complaint.

In order to effect a legitimate habeas petition, a prisoner must first exhaust all remedies available within the state, including appeal to that state's highest court, if applicable. There are timelines that also must be followed within the state-court systems to ensure that a prisoner has taken every course of remedy available before bringing a federal claim of habeas corpus. Only in rare instances, such as when a fundamental liberty is at stake or an egregious error has occurred, will a federal claim be entertained if the petitioner did not follow proper state procedures.

Public perceptions of habeas corpus have suffered since the late 1980s from many well-publicized cases in which prisoners were petitioning federal courts for relief based on what critics construed as flimsy reasons, such as menu choices and access to men's magazines. At the time, the courts were so overwhelmed with these filings and other legitimate cases that it could take years or even more than a decade to resolve a case completely. Victims' rights advocates felt that the laws protected the guilty more than the victims and were frustrated with the lack of final justice in their cases, especially when the convicted individual was awaiting death. In addition, levels of gun violence had continued to rise, especially among youth, and the death penalty was being used more frequently in states all across the United States.

In response to the perception that habeas was being abused and that crime was not being properly deterred, the Supreme Court imposed additional limitations on use of the writ. Social discontent rose to such a degree that habeas relief became a central feature of the Antiterrorism and Effective Death Penalty



Scene at the U.S. District Court in Richmond, Virginia, on May 13, 1867, when Jefferson Davis was brought before the court on a writ of habeas corpus. A writ of habeas corpus requires that the government bring confined individuals before judges to explain why they are being detained. *(Library of Congress)*

Act (AEDPA) of 1996. Under this legislation, a state prisoner must petition for habeas relief within one year after the prisoner's state conviction becomes final. This short one-year deadline led one former Supreme Court justice, Harry A. Blackmun, to conclude that the death penalty could never be imposed in a manner that ensured fairness.

Recently, public opinion toward habeas relief has again begun to shift in light of the research in Illinois through which more than a dozen death-row inmates were released after a thorough review of their cases by independent legal investigators. In 2003 outgoing Illinois governor George Ryan commuted the sentences of all remaining death-row prisoners in light of the procedural defects that had accompanied so many convictions during his tenure in office. Although there is still strong support for the get-tough-on-crime approach in general and the death penalty specifically, the use of habeas corpus is starting to reemerge as a means to ensure that fundamental constitutional guarantees are protected.

Patricia E. Campie

See also: Capital Punishment.

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Hamdi v. Rumsfeld (2004)

The reaction to the September 11, 2001, terrorist attacks on the World Trade Center in New York City and the Pentagon in Washington, D.C., has generated a number of legal questions. Among the most important is the status of designated "enemy combatants" and their rights versus the president's power to wage war. On the same day the U.S. Supreme Court upheld jurisdiction of federal courts to hear habeas corpus appeals by foreign nationals being held at Guantanamo Bay, Cuba, in *Rasul v. Bush,* 124 S. Ct. 2686 (2004), and ruled in *Rumsfeld v. Padilla,* 124 S. Ct. 2711 (2004), that Jose Padilla, a U.S. citizen arrested in New York in connection with terrorist attacks, had brought his appeal through the wrong court, the Court also handed down its decision in *Hamdi v. Rumsfeld,* 124 S. Ct. 2633 (2004). In *Hamdi,* the Court ruled that a U.S. citizen being held in a naval brig in Charleston, South Carolina, was legally detained but that he had a due process right to contest his detention before a neutral magistrate.

Yaser Esam Hamdi was born in Louisiana in 1980, spent much of his youth in Saudi Arabia, and was captured in Afghanistan in 2001 by U.S. forces fighting against the Taliban. The U.S. government claimed he was an "enemy combatant" who had been captured with a rifle in his possession; his father claimed his son had gone to Afghanistan shortly before the Iraq war started in March 2003 to do "relief work" and had been trapped once the war began. After his father filed an appeal on his behalf, a U.S. district court found that Hamdi's incarceration was not justified, and it ordered the government to turn over materials for its review. The Fourth Circuit Court of Appeals reversed the district court's decision that the incarceration was unjustified and reversed a habeas corpus petition requesting legal counsel for Hamdi on the basis that the government had established reason to believe Hamdi had been captured as an enemy combatant and that such a decision, implicating war powers, should be given judicial deference.

Five justices upheld the government's right to incarcerate Hamdi, but eight rejected the government's contention that he could not seek legal remedy. Justice Sandra Day O'Connor authored the Court's plurality decision, which Chief Justice William H. Rehnquist and Justices Anthony M. Kennedy and Stephen G. Breyer joined. They decided the president had authority to detain enemy combatants under the Authorization for Use of Military Force (AUMF), which Congress adopted after September 11, 2001, authorizing the president to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with those attacks. The plurality argued that detention of combatants to keep them from returning to the battlefield was "a fundamental incident of waging war" that might last as long as the conflict continued. In contrast to the situation in *Ex parte Milligan,* 71 U.S. 2 (1866), invalidating the military conviction of a civilian during the Civil War, the plurality pointed out that Hamdi was a prisoner of war who had been captured in combat. These justices found further support in the Court's decision in *Ex parte Quirin,* 317 U.S. 1 (1942), involving the trial of German saboteurs during World War II.

The acknowledgment that Hamdi was legally detained did not, however, preclude him from relief. Justice O'Connor pointed out that Congress had not suspended the writ of habeas corpus, which requires the government to justify continued incarceration. In seeking to ascertain the contours of this right, the Court examined criteria established in *Mathews v. Eldridge,* 424 U.S. 319 (1976), a case dealing with suspension of welfare payments. These criteria required weighing Hamdi's "liberty interest," as guaranteed by the Fifth Amendment, against the government's interest in seeing that combatants do not return to combat against the United States. Whereas the Court of Appeals was willing to defer to the government's claim of a continuing need to incarcerate Hamdi, Justice O'Connor said that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertion before a neutral decisionmaker." However, unlike the district court, O'Connor believed that the government could rely in part on hearsay evidence and that there should be "a presumption in favor of the Government's evidence."

Rejecting arguments that her decision interfered with the doctrine of separation of powers, Justice O'Connor said that "a state of war is not a blank

check for the President when it comes to the rights of the Nation's citizens." She further argued that "it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge." She left open the possibility that the government might meet the standards she outlined through an appropriately constituted military tribunal.

Justice David H. Souter authored a concurring opinion, joined by Justice Ruth Bader Ginsburg, denying that AUMF was intended to justify the detention of U.S. citizens. Souter argued that a section of a federal statute, designed to forestall such incarcerations as the World War II internment of Japanese Americans that the Court approved in *Korematsu v. United States,* 323 U.S. 214 (1944), prohibited such incarceration without more specific language. He suggested that the United States might be violating the Third Geneva Convention in regard to the treatment of Hamdi. Justice Souter also argued that the president had no inherent authority to incarcerate Hamdi. Pointing to the Court's decision voiding the presidential seizure of domestic steel mills in time of war in *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 (1952), Souter pointed out that "the President is not Commander in Chief of the country, only of the military." He nonetheless joined the majority in recognizing that Hamdi was entitled to habeas corpus relief.

Justice Antonin Scalia authored a dissent joined by Justice John Paul Stevens. Pointing to a long Anglo-Saxon history opposing imprisonment by executive authority as being contrary to due process, Scalia distinguished the status of enemy aliens and U.S. citizens. In his view, Congress should suspend the writ of habeas corpus, the executive should charge Hamdi with an offense, or the government should set him free. Scalia observed that "[a] view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust" that led to constitutional restrictions. Scalia further called into question the application of *Ex parte Quirin,* observing that it "was not this Court's finest hour." He thought the plurality's standards for justifying the government's continuing incarceration of Hamdi were too loose. Scalia observed that the habeas corpus provision "merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed." He did make it clear, however, that his decision applied only to U.S. citizens.

Justice Clarence Thomas's dissent indicated that he was the only justice willing both to justify Hamdi's incarceration under federal war powers and to find the governmental interest in national security important enough to override Hamdi's plea for habeas corpus review. Thomas emphasized the role of the two elected branches, and especially of the unitary executive, in foreign affairs and said the Court should be deferential to this power. He believed that in such a context, "due process requires nothing more than a good-faith executive determination" that Hamdi's continued incarceration was desirable. He did not believe the majority had adequately weighed the government's interest in national security in coming to its decision.

John R. Vile

See also: English Roots of Civil Liberties; Habeas Corpus; *Korematsu v. United States;* President and Civil Liberties; *Rasul v. Bush.*

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Hand, Learned (1872–1961)

Learned Hand was the longest-serving federal judge in the history of the United States and the most prominent judge who never sat on the U.S. Supreme Court. He was responsible for writing a number of landmark opinions in the field of civil liberties. In fact, many of his opinions are still cited by courts because of their lucidity and foundation upon many of the basic rights that Americans hold so dear. As Hand stated, "If we are to keep our democracy, there

must be one commandment: Thou shalt not ration justice."

Billings Learned Hand was born January 20, 1872, into a family that could trace its commitment to the law back three generations. In fact, the death of his father Samuel, when Hand was still quite young, all but preordained that young Learned would dedicate his life to the law. After studying at the Albany Academy in New York, Hand continued his studies at Harvard, where he pursued philosophy under William James and George Santayana. His excellence as a student was clear. Hand received the gold key of Phi Beta Kappa and served as the class orator when he graduated in 1893 summa cum laude. Also remarkable was that during his undergraduate study, he received his master's degree in philosophy.

Though he dreamed of a career as a philosopher, Hand knew that it was his duty to pursue a life in the law, which he did at Harvard Law School. There Hand was exposed to the great legal thinkers of the day, and it was their teachings that would form the foundation of Hand's lifelong commitment to civil liberties.

The longest-serving federal judge in U.S. history, Learned Hand was responsible for writing a number of landmark opinions in the field of civil liberties. *(Library of Congress)*

At age thirty-seven, Hand was appointed as a district court judge for the U.S. District Court for the Southern District of New York. On this bench, and later on the bench for the U.S. Court of Appeals for the Second Circuit, he made his mark on civil liberties.

Scholars studying Hand's storied career have always had trouble coming to terms with the seeming dichotomy in Hand's opinions and pronouncements concerning civil liberties. They ask, how could the author of *Masses Publishing Co. v. Patten,* 244 F. 535 (S.D.N.Y. 1917), which protected the distribution of antiwar materials by a left-wing magazine, also write *United States v. Dennis,* 183 F.2d 201 (2d Cir. 1950), which upheld the conviction of individuals who had helped organized the U.S. Communist Party? How could somebody who so vociferously opposed the U.S. Supreme Court's opinion in *Lochner v. New York,* 198 U.S. 45 (1905)—because it crippled progressive legislation designed to regulate the hours of workers—deride that same Court's decision in *Brown v. Board of Education,* 347 U.S. 483 (1954)—which ended segregation in the South? How could a judge who denounced the government's conduct during searches and seizures state that the prosecution should be given latitude at trial? The answer, though seemingly inapposite, is found in Hand's lifelong consistency of opinion regarding civil liberties.

Even before reaching the federal bench, Hand strongly disagreed when a court interposed its beliefs and declared a statute enacted by the state legislature unconstitutional. In *Lochner v. New York,* the U.S. Supreme Court did just that in invalidating New York's minimum-wage-and-hour law. Hand, as a young lawyer, wrote repeated articles stating that it was improper for the Court to invalidate the will of the people because a law might interfere with the goals of big business. He felt strongly that substantive due process should not be used to stymie progressive legislation. Deference must be given to the legislature because its members were elected to mirror the interests of their

constituency. So it should not have come as a surprise, almost fifty years later, that Hand would oppose the Court's desegregation decision in *Brown v. Board of Education.* In his book *The Bill of Rights,* which was based on the Oliver Wendell Holmes lectures Hand gave in 1958 at Harvard Law School, he restated his belief that courts should not interpose their will over the will of the state legislature. It was not that Hand did not despise racism, for he did; it was that he still felt substantive due process should not be used to interfere with what was an issue for the state legislature and the public will. This belief may not have been popular, but it was consistent.

This belief also was apparent in how Hand was able to change the law in naturalization cases from application of the highly individualistic moral-turpitude standard to the standard of the community, as he discussed in *Posusta v. United States,* 285 F.2d 533 (2d Cir. 1961). Hand felt that a judge should not be able to impose his personal beliefs upon an alien. Rather, he preferred that the courts follow the community's mores and beliefs. Hand believed a man was evil only when his peers believed him to be so. Again, Hand felt that the public's will should be preserved as long as it did not directly interfere with rights guaranteed by the Constitution.

Hand revealed these beliefs also in his treatment of obscenity cases. For him, the issue was not what the judge found evil but what the community found evil. Hand stated in *United States v. Kennerley,* 209 F. 119 (S.D.N.Y. 1913), "I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses." Later, Hand's analysis in *United States v. Levine,* 83 F.2d 156 (2d Cir. 1936), in which he stated that the court should look to the standards of the community to identify obscenity, was the same type of analysis that the U.S. Supreme Court would adopt in *Jacobellis v. Ohio,* 378 U.S. 184 (1964), and later in *Miller v. California,* 413 U.S. 15 (1973). Material was obscene when an average member of the community said it was obscene.

Hand's criminal procedure cases, likewise, reflect the reverence he had for the Constitution in specific and civil liberties in general. When faced with an improper search in *United States v. Kirschenblatt,* 16 F.2d 202 (2d Cir. 1926), Hand stated that, "[a]fter arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant. . . . Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." This is not to suggest that Hand favored the rights of the defendant over those of the prosecutor, as can be seen in his remark in *United States v. Sherman,* 171 F.2d 619 (2d Cir. 1948): "No prosecution is tried with flawless perfection; if every slip is to result in reversal, we shall never succeed in enforcing the criminal law at all." The ultimate question for Hand was one of fairness, as he showed in *United States v. Wexler,* 79 F.2d 526 (2d Cir. 1935), in which he ruled that tying the prosecutor's hands during closing argument yet giving the defense freedom to do as it wished was not equitable; therefore, the prosecutor should be allowed to show a proper amount of passion. In the end, Hand's criminal decisions show a judge who inherently respected the Bill of Rights but who also understood the importance of fundamental fairness to all involved.

Hand probably is most revered for his opinions in free speech cases, especially as the right pertains to the concept of incitement. The opinion that catapulted Hand into renown in legal circles, and later among the public at large, was *Masses Publishing Co. v. Patten,* 244 F. 535 (S.D.N.Y. 1917). *Masses* concerned the postmaster of New York City not circulating into the mails a magazine that spoke out against the government, especially about conscription. Hand ruled that not distributing the magazine was improper, and to suppress speech, the speaker must be advocating immediate unlawful action: "Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state." Over three de-

cades later, in *United States v. Dennis,* 183 F.2d 201 (2d Cir. 1950), Hand again was forced to set forth the test for incitement, particularly given how much the fears of World War II and the spread of Communism had gripped the American psyche. "In each case [the courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." This holding seems strange compared with his less stringent test in *Masses.* But again, Hand was consistent. He followed the precedent of the U.S. Supreme Court, which time and again had limited the "clear and present danger" test—at the time the test of constitutionally permissible restrictions on speech. Ironically, less than a decade after his death, the Supreme Court adopted Hand's *Masses* imminent lawless action test for incitement in *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

At the end of Hand's career, the American public started to have a regard for Hand similar to that which the legal community had held him in for years. In retirement, Hand spoke more freely than he felt he could as a judge. Returning to his free speech roots, he spoke out against the tactics of Senator Joseph McCarthy (R-WI) and the "red scare" McCarthy created with allegations that Communists were infiltrating government at all levels. Before Hand's death on August 18, 1961, newspaper editor Irving Dillard published selections of Hand's writings called *The Spirit of Liberty,* the name of a speech Hand had given at a naturalization ceremony in New York City during the height of World War II. His words at that gathering in 1944 were a proper ending to an article reviewing Hand's impact on civil liberties: "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."

David T. Harold

See also: Dennis v. United States; First Amendment; *Masses Publishing Co. v. Patten;* Obscenity.

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Harlan, John Marshall (1833–1911)

John Marshall Harlan served as a justice of the U.S. Supreme Court 1877–1911. A native Kentuckian, he was born into a family of slave owners and vigorously advocated the property rights of slave owners even to the point of opposing the passage of the Thirteenth Amendment prohibiting slavery. He received his undergraduate degree at Centre College in Danville, Kentucky, known by some as the Harvard of the South.

Justice Harlan was a man who was not afraid to speak his mind even when eight other Supreme Court justices disagreed with him. Despite his past history as a slave owner and his opposition to the Thirteenth Amendment, Justice Harlan was often the lone voice advocating equal treatment of the races during his term of service on the Supreme Court. He also became an advocate for civil liberties outside the arena of race with his dual contentions that the guarantee of due process applied to the states through incorporation in the Fourteenth Amendment and that the Fourteenth Amendment's equal protection guarantees were applicable to both states and individuals.

In *Lochner v. New York,* 198 U.S. 45 (1905), Justice Harlan stood up for the rights of workers when the Court's majority ruled unconstitutional a New York law making it illegal for bakers to work more

Despite his past history as a slave owner and his opposition to the passage of the Thirteenth Amendment prohibiting slavery, Justice Harlan was often the lone voice advocating equal treatment of the races during his tenure on the Supreme Court. *(Library of Congress)*

than ten hours per day or sixty hours per week. In his opinion, it was absurd for the majority to rule that such a law violated the Fourteenth Amendment by restricting the liberty of workers to work as many hours as they pleased without regard for any possible health effect.

When, in *Patterson v. Colorado,* 205 U.S. 454 (1907), a majority of the Court upheld conviction under the Colorado libel law of a Denver publisher for writing an article criticizing state judges, Justice Harlan maintained that the publisher's speech was protected by the First Amendment. Unlike the majority, he strongly believed that the First Amendment was incorporated in the Fourteenth Amendment and therefore that its free speech guarantee applied to the states.

Justice Harlan was the only dissenter in the *Civil Rights Cases,* 109 U.S. 3 (1883), in which the Court's majority held unconstitutional the Civil Rights Act of 1875 that mandated equal treatment for all races. In his dissent, he voiced his contention that the Thirteenth Amendment gave Congress the power not only to abolish slavery but also to pass laws prohibiting racial discrimination. Harlan also voiced his disagreement with the majority's view that the Fourteenth Amendment was applicable only to the states and not to private individuals.

Justice Harlan's most famous dissent occurred in *Plessy v. Ferguson,* 163 U.S. 537 (1896), in which the Supreme Court was called upon to consider the constitutionality of a Louisiana law that required railroads to provide "separate but equal accommodations" for white and black passengers. In order to help an attorney test the constitutionality of the Louisiana law, Homer Plessy, who was one-eighth African American, entered a whites-only railroad car and refused to leave. Plessy was subsequently arrested. With one justice abstaining, the Supreme Court held that Louisiana's law requiring separate but equal accommodations was constitutional. However, Justice Harlan dissented from that opinion, stating, "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."

Justice Harlan's dissent in *Plessy* provided the framework for the Supreme Court's unanimous decision fifty-eight years later in *Brown v. Board of Education,* 347 U.S. 483 (1954). In *Brown,* the Court overruled *Plessy* to hold that the doctrine of "separate but equal" was impermissible regarding the public education system and that such a doctrine violated the equal protection guarantee of the Fourteenth Amendment.

Even while Harlan was still a justice, there were some indications his ideas were going to help change the Court's position on civil rights issues. For example, in *Bailey v. Alabama,* 219 U.S. 219 (1911), the Court held that it was an unconstitutional violation of the Thirteenth Amendment for Alabama to imprison an African American for failure to carry out a work contract.

Since Justice Harlan's death, it has become obvious that his opinions were ahead of his time, as the nation came to espouse individual rights and equality of all

races as fundamental ideas and continued to strive toward ensuring those ideals.

Martha M. Lafferty

See also: Incorporation Doctrine; *Lochner v. New York.*

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Harmless Error

The phrase "harmless error" refers to an error by a judge in the conduct of a trial that an appellate court finds is not sufficient for it to reverse or modify the lower court's judgment at trial. It is both a product of judicial review as well as a legislative result. Harmless error is defined in Rule 160 of the *Federal Rules of Criminal Procedure* (all rules cited hereafter refer to these procedural rules) as follows: "No error in either the admission or exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties, is ground for granting a new trial or for vacating, modifying, or otherwise disturbing a decision or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of a case will disregard any error or defect which does not affect the substantial rights of the parties."

All properly preserved (noted for the record in the trial court, usually by attorneys raising objections) errors of law may be brought up on appeal, and the appellate court may then make a determination as to which ones, if any, are "harmless." There are three types of error: *Structural* error undermines the integrity of the entire judicial proceeding and requires automatic reversal; *harmless* error under Rule 52(a) involves an objection made by defendant at trial; *plain* error under Rule 52(b) involves instances where the defendant did not raise an objection at trial. The *Federal Rules of Criminal Procedure* govern the issue of harmless error (only at the federal level, but states have similar rules of criminal procedure), but the U.S. Supreme Court has established and modified its own parameters for harmless error.

In 1967 the Court in *Chapman v. California,* 386 U.S. 18, further narrowed its interpretation of the harmless-error standard designed to protect a defendant's constitutional rights. *Chapman* involved a defendant convicted of robbery, kidnapping, and murder. At trial, Ruth Elizabeth Chapman (along with her accomplice) chose to exercise her Fifth Amendment right against self-incrimination and did not testify. The state's attorney made numerous references to Chapman's silence and drew inferences of her guilt as a result of it. On appeal, Chapman argued that the error was so egregious that it required reversal. The Court agreed.

Justice Hugo L. Black wrote the majority opinion requiring reversal:

> We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the parties." We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

Justice Black's opinion in *Chapman* was an example of the Court's practical approach to appeals. Justice Black understood that allowing all errors to be classified as reversible would result in unrealistic goals on the part of trial courts. Errors that affected the substance of the case and/or trial, however, were deemed to be worthy of being the catalyst for reversal.

The Court in *Chapman* set forth the test for determining whether a constitutional error is harmless. That test is whether it appears "beyond a reasonable

doubt that the error complained of did not contribute to the verdict obtained." In some sense, this is coded language from the Court that really means the Court will decide later if the appealing party could not have won at trial in any event. The harmless-error test from *Chapman,* as well as state and federal codes, remains in effect.

Aaron R. S. Lorenz

See also: Beyond a Reasonable Doubt; Due Process of Law.

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Harris v. Forklift Systems, Inc. (1993)

In *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986), the U.S. Supreme Court declared that the creation of a "hostile work environment" constituted sexual harassment, a form of discrimination on the basis of sex prohibited by Title VII of the Civil Rights Act of 1964. In *Meritor,* the Court made it clear that the sexual conduct in question must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment." The unanswered question was, What did "severe" mean? Did an employee have to suffer psychological injury as well as impaired work performance? In 1993 the Court attempted to answer this question in *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993).

Teresa Harris was a manager at Forklift Systems, Inc., an equipment rental firm, from April 1985 to October 1987. The company's president, Charles Hardy, frequently and publicly made derogatory, gender-based comments to Harris and other female employees. Hardy referred to Harris as a "dumb ass woman," told her "you're a woman, what do you know" and "we need a man as the rental manager," made sexually suggestive comments about her clothing, asked her to retrieve coins from his front pants pockets, and suggested that they go to the Holiday Inn to negotiate her raise. After enduring this for some time, Harris complained to Hardy about his behavior in August 1987; he claimed to be joking, apologized, and promised to stop. However, in September, when Harris was arranging a deal with a Forklift customer, Hardy asked her, "What did you do, promise the guy . . . some [sex] Saturday night?" She then quit and filed suit against the company.

Overruling both the district and the appeals courts, the Supreme Court upheld Harris's claim of sexual harassment. Writing for a unanimous Court, Justice Sandra Day O'Connor said that an establishment of psychological injury was not required for a claim of sexual harassment. O'Connor noted that "Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."

Referring to *Meritor,* the Court stressed that sexual speech, even if offensive, is not necessarily harassment. The Court said that an "abusive environment" can be determined only by looking at the totality of circumstances. It pointed specifically to four factors: the frequency of the conduct; whether it is physically threatening or humiliating; its severity; and if it "unreasonably interferes" with an employee's work performance. The Court admitted that these standards were somewhat imprecise, but could find "no test more faithful to the inherently vague" language of Title VII (as Justice Antonin Scalia wrote in a concurring opinion).

Harris v. Forklift Systems is a major step in defining sexual harassment and enabling victims to seek redress through the judicial process. As such, it also represents a significant effort by the Court to define the limits of legally acceptable speech and behavior in the workplace.

Stephen L. Robertson

See also: Sexual Harassment.

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Hatch Act

The Hatch Act of 1939 attempted to curtail political corruption and intimidation among federal workers by restricting some free speech and freedom of association activities of all but the highest levels of the executive branch. It thus raised the issue of whether government workers had fewer constitutional rights than private citizens, such as speech and association rights protected by the First Amendment to the U.S. Constitution.

The Hatch Act arose from allegations of electioneering and worker coercion among New Deal–related federal agencies, but it was arguably an extension of civil service reforms begun in the late nineteenth century. The act was amended in 1993, and thereafter many federal agencies and civil service associations provided employees with guidelines on their Web sites regarding such behaviors as raising campaign funds, wearing political buttons, running for office, and engaging in campaign activity while wearing government uniforms.

Although the law always protected the rights of federal employees to vote and express political opinions, some critics argued that other restrictions were necessary to protect federal workers from being subjected to political or supervisory pressure to serve or contribute to campaigns as well as to limit federal government influences upon electoral activity. Opponents of such regulations argued they violated workers' First Amendment rights.

Under the original legislation, most federal government employees were prohibited from being active in congressional and presidential campaigns as well as from soliciting and/or receiving contributions to such campaigns. The act said "it shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof . . . [and] take any active part in political management or in political campaigns." But top elected and appointed officials of the executive branch were exempted, such as the president, vice president, and cabinet secretaries.

In 1940, Congress amended the Hatch Act in order to prohibit similar activities by state and local workers employed by agencies and programs funded by the federal government. This amendment also placed a $3 million limit on annual spending by political parties and limited individual campaign contributions to $5,000 annually, but these policies were not enforced and were ultimately replaced by the Federal Election Campaign Acts of the 1970s.

RELATED COURT CASES

The first Hatch Act case to reach the U.S. Supreme Court was *United Public Workers v. Mitchell,* 330 U.S. 75 (1947). Members of several executive agencies argued the law was an unconstitutional violation of their freedom of speech under the First Amendment. Writing for the Court, Justice Stanley F. Reed cited judicial and legislative precedent surrounding the regulation of civil service employees during the 1880s and added that "[i]t is accepted constitutional doctrine that these fundamental human rights are not absolute." In separate dissents, Justice William O. Douglas argued the ban was too broadly drawn, and Justice Hugo L. Black, considered a First Amendment "purist," said the Hatch Act deprived millions of federal workers of their rights of expression and political participation. This precedent was largely upheld in a later case on the Hatch Act, *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548 (1974).

THE HATCH ACT TODAY

In 1993, Congress significantly amended the Hatch Act to redefine the scope of permissible political activities of state and federal workers. According to the U.S. Office of Special Counsel Web site, "under the amendments most federal and [District of Columbia] employees are now permitted to take an active part in

political management and political campaigns. A small group of federal employees are subject to greater restrictions and continue to be prohibited from engaging in partisan political management and partisan political campaigns." For many employees, prohibited activities include participating in partisan elections as a candidate or organizer, making campaign speeches, distributing campaign material in partisan elections, organizing political rallies or meetings, holding office in political clubs or parties, circulating nomination petitions, and working to register voters for one party only, among others. Various civil service organizations have also posted new guidelines for their members. For example, the Web site of the National Association of Letter Carriers offers the following advice at the end of its "dos" and "don'ts" list for political activity: "Bottom Line: Be off the clock, out of the uniform (and government vehicles), and away from the work place."

Although President Bill Clinton attempted to clarify the law with these changes, people associated with the White House were dogged by allegations of improper fundraising and politicking surrounding the 1996 election, including Vice President Al Gore (despite being exempt from the letter of the law), Secretary of Labor Alexis Herman, and Democratic fundraiser John Huang, among others.

Jasmine Farrier

See also: First Amendment; Political Parties.

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Hate Crimes

Hate crimes are acts that are already defined as crimes but in addition are motivated by bias against an individual or group due to protected characteristics such as race, gender, national origin, color, and sexual orientation. Accordingly, an act that is not already a crime does not become a crime simply because it is directed toward someone who has a protected characteristic.

For example, if X refuses to speak to Y because Y is Hispanic, X has not committed a hate crime, because snubbing someone is not a crime. Rather, in order for a hate crime to occur, a criminal act must also occur. Likewise, in order for a hate crime to occur, the perpetrator must be motivated by protected characteristics of a group or individual. Thus, if X murders Y in the course of a bank robbery or because of a personal grudge, the murder is not a hate crime. In contrast, if X, a male, murders Y, a female, because X hates women and considers them inferior, the murder is a hate crime if gender is a protected class in the jurisdiction where the crime occurred.

One of the difficulties in determining whether a hate crime has occurred is that perpetrators of such crimes are not generally open about hating and/or selecting victims because they are part of targeted groups. For example, just because Q, a heterosexual, assaults Z, a gay man, does not automatically mean that a hate crime has occurred. Rather, it is necessary to determine whether Q targeted Z *because* Z is gay. One factor that may help in making such a determination is that, unlike in crimes of passion, perpetrators of hate crimes rarely know their victims prior to committing the criminal act.

There are currently three federal hate-crime laws: the Hate Crimes Statistics Act of 1990 (HCSA), the Violence Against Women Act of 1994 (VAWA), and the Hate Crimes Sentencing Enhancement Act of 1994 (HCSEA). The Hate Crimes Statistics Act mandates that the federal government collect statistical information about crimes that occur due to a victim's race, religion, disability, sexual orientation, or ethnicity. The HCSA is the first federal law to recognize sexual orientation as a class, but conservatives in Congress allowed passage of the law only after inclusion of a subsection noting that the law was not intended to "promote or encourage homosexuality."

The law does not provide the federal government with any new law enforcement powers, only data collection powers. Since the HCSA does not itself create new categories of crime, the federal government is unable to collect the mandated statistics in locations where state or local governments do not define such

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crimes or fail to keep such statistics themselves. The Violence Against Women Act, which was reauthorized in 2000, sets aside money for states, tribal governments, and local governments to fight violent crimes against women and to bolster services for women who are victims of such crimes. In addition, VAWA makes it a federal crime for an individual to cross state lines to continue to abuse or harass an intimate partner. Since, by and large, VAWA does not create a new category of crime, its enforcement is dependent on state or local definitions of hate crimes. In contrast to HCSA and VAWA, the Hate Crimes Sentencing Enhancement Act is not as focused on state or local action but rather provides for the U.S. Sentencing Commission to increase the penalties for crimes due to the "actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." Nevertheless, because the HCSEA does not apply to criminal acts unless they are federal crimes, such as crimes committed on federal property or in national parks, most criminal acts are not subject to enhanced sentencing under the HCSEA.

Due to the significant limitations on these three federal hate-crimes laws, states and municipalities continue to pass their own hate-crimes laws. Such laws differ regarding not only the classes protected but also the effect of classifying a crime as a hate crime. For example, some states and municipalities do not consider it enough that the perpetrator selected the victim due to the individual's membership in a protected class but rather require a determination that the perpetrator is prejudiced against members of that class before classifying the crime as a hate crime. That is, under some state or local laws, it would be enough to show that X selected Y because Y is black, but under the laws of other states or municipalities, a prosecutor would also need to show that X harbors hostility toward blacks as a group. In addition, different laws set out different protected classes; for example, state A might protect "gender, race, and national origin," whereas state B might protect only "race and national origin."

Many people consider hate crimes objectively worse than "ordinary" crimes because such crimes often send a message to other members of the victim's group regardless of whether the perpetrator intended to send such a message. Although many civil libertarians favor protecting minority groups who are targeted due to innate characteristics, there is significant tension between that goal and potential encroachment on the First Amendment by enhancing punishment based on the thoughts of perpetrators. Unfortunately, it seems doubtful that sending the message that society disapproves even more strongly of hate crimes than other crimes will have any deterrent effect on hate crimes. At the same time, sending such a message likely may start society on a slippery slope toward regulating which thoughts are permissible and which are not.

Until recently the U.S. Supreme Court appeared to disfavor hate-crimes laws. For example, in *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992), the Court held that a hate-crimes ordinance (Bias-Motivated Crime Ordinance) adopted by Saint Paul, Minnesota, vio-

lated the right of free speech provided by the First Amendment to the U.S. Constitution. The Court also stated that the city had means to regulate crimes such as cross burning other than to target the motivations for such actions. For example, the city could have enacted a law prohibiting all burning of wooden objects on the property of another, but instead it chose to target the placing of objects known or reasonably known to cause anger and similar emotions due to "race, color, creed, religion, or gender." In *R.A.V.,* the Court held that such a content-based prohibition on symbolic action could not stand.

The Court's position on hate-crimes laws seemed to shift substantially with the decision issued in *Virginia v. Black,* 538 U.S. 343 (2003), in which the Court held that a state could ban cross burning when the act was engaged in with an intent to intimidate. The Court attempted to distinguish its holding in *R.A.V.* from its holding in *Black* by stating that under *R.A.V.,* it was permissible for a state to ban an entire class of speech as long as the reason was due wholly to the content of the speech itself and the ban was not directed toward one of a class of "specified disfavored topics." Accordingly, the Supreme Court argued in *Black* that it was upholding Virginia's law banning cross burning that was performed with an "intent to intimidate" because of cross burning's history and because, unlike the law at issue in *R.A.V.,* the Virginia law did not distinguish between targets of intimidation.

Virtually all civil libertarians deplore burning a cross to intimidate someone, but they argue that states could regulate such a practice in many ways other than by banning a category of expressive speech. For example, a law simply banning the burning of a cross on the property of another should be just as effective to stop the offensive practice without involving free speech concerns. Despite the Court's attempt to characterize *Black* as consistent with *R.A.V.,* the *Black* opinion marked a significant departure from the Court's history of interpreting the First Amendment to forbid content-based restrictions on symbolic speech. Although the Court attempted to limit its decision in *Black* by citing the long history of cross burning, the singling out of a category of symbolic speech could signal the beginning of an erosion of First Amendment protection for such speech. Whether that will be the trend must await future Court decisions.

Government officials likely will continue to use hate-crimes laws in an effort to curb illegal behavior motivated by prejudice. If such laws ultimately deter perpetrators from committing crimes due to bias against protected characteristics, society may determine that some encroachment on the First Amendment is justified. On the other hand, if no deterrence is shown, such laws may be overturned in favor of providing symbolic speech with the broadest First Amendment protection available.

Martha M. Lafferty

See also: First Amendment; Hate Speech; *R.A.V. v. City of St. Paul;* Violence Against Women Act; *Virginia v. Black.*

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Hate Speech

Hate-speech laws are highly controversial because the diverse nature of the United States often produces sharp divisions among different groups, sometimes resulting in highly offensive and hateful speech. The two sides of the debate about what constitutes hate speech view the Constitution in very different ways. Proponents of these laws argue that the Fourteenth Amendment guarantees every citizen equal citizenship. They claim that members of minority groups cannot become truly equal citizens unless they are

protected from purely bias-motivated hate. Opponents counter that the First Amendment was designed to protect speech even when it is highly offensive to most listeners; if bias-motivated speech is prohibited, soon other forms of offensive speech will come under fire. Thus, the courts must weigh the right of citizens to speak, even when their words are hateful, against the right of other citizens to live their lives unharassed by such speech.

The first U.S. Supreme Court case to address a hate-speech law was *Beauharnais v. Illinois,* 343 U.S. 250 (1952). Joseph Beauharnais was arrested under an Illinois law prohibiting the distribution of materials portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion." As the president of the White Circle League, Beauharnais had handed out racist leaflets. The Supreme Court said that libel against groups (group libel) was little different from libel against individuals and upheld his conviction. Although *Beauharnais* was never explicitly overturned, later decisions rendered it invalid. Now, criminal libel consists only of false statements of fact about private, individual citizens; these laws do not apply to groups and public figures, such as elected officials (although such individuals can win civil libel judgments when they show that information was published about them with the knowledge that it was false or with reckless disregard for its truth or falsity).

Forty years later, the Court addressed hate speech in *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992). In this case, the Supreme Court invalidated the Saint Paul, Minnesota, Bias-Motivated Crime Ordinance, which banned the use of swastikas, burning crosses, and similar symbols to arouse fear or anger on the basis of race, color, creed, religion, or gender. A group of white teenagers had burned a cross on the lawn of a black neighbor and were arrested under this ordinance. The city argued that the law did no more than prohibit fighting words, words likely to bring about a breach of peace and therefore unprotected under the First Amendment. The Supreme Court disagreed, ruling that the ordinance represented "viewpoint discrimination"; that is, it allowed fighting words for the tolerant but did not allow them for the intolerant. The Court emphasized that the First Amendment was intended to protect speech even if the ideas it contained would be offensive to most listeners. The ordinance also banned offensive symbols such as swastikas and burning crosses only when used by the proponents of racial and religious hatred. A protester could, for example, display a swastika as part of a protest against Nazism. The ordinance was unconstitutional because the symbols and offensive speech that were banned were based on the viewpoint of the speaker; therefore the law violated a long-standing First Amendment speech principle—that the government cannot limit speech based on content of the speech. Furthermore, the ordinance was considered content-based because it did not prohibit speech biased in regard to characteristics other than race, color, creed, religion, or gender. For example, symbols meant to arouse fear on the basis of sexual orientation would not be prohibited.

Although the Court's decision was unanimous, a concurring opinion signed by four justices cited very different reasons for invalidating the Saint Paul anti-bias law. These justices emphasized that the law was too broad. It did not specify that for fighting words to be unconstitutional, they must communicate ideas in a threatening rather than simply an obnoxious manner. It banned all use of the symbols when used in a bias-motivated manner, even if the particular situation was not specifically threatening. Therefore, officials could have used the ordinance to restrict speech that would otherwise be protected.

The Court recently again dealt with cross burning in *Virginia v. Black,* 538 U.S. 343 (2003), in which it allowed laws banning cross burning but only when the action was carried out with an attempt to intimidate. The ruling was consistent with *R.A.V.* because it ruled specifically on cross burning, noting that this particular act had a long history in the United States and that in certain circumstances burning a cross would become truly threatening action rather than being simply speech. When a perpetrator used the symbol to cause fear and intimidation, the state could regulate the action because it would be a "true threat," a threat in which the speaker would be communicating a serious intent to commit an act of unlawful violence to a particular individual or group of individuals. Because the Ku Klux Klan often used the

burning of crosses to relay this message, the action still carries the same threat today and is therefore not protected when used to intimidate in this manner. A burning cross symbolizes violent, hate-filled times in American history and as such is a particularly dangerous form of intimidation. These factors make it legal for the state to single out the action for prohibition in cases when it is used to intimidate.

The Court has also permitted states to punish crimes motivated by racial hatred more harshly than other crimes. In *Wisconsin v. Mitchell,* 508 U.S. 476 (1993), the Court considered a Wisconsin hate-crime law that allowed for stricter punishments if a crime was motivated by bias. Although many of the same problems of the ordinance in *R.A.V.* remained—Wisconsin opted to punish racially motivated crimes while not punishing, for example, crimes motivated by bias against the poor—the Court upheld the Wisconsin law as constitutional because it was tied to conduct instead of speech. Just as employers may be punished for discriminatory hiring practices, crimes motivated by bias go beyond speech and therefore lose First Amendment protection.

Many other nations, including Canada and Germany, do permit laws against speech that is biased against racial, ethnic, and religious groups, even if no specific intimidation is demonstrated. Free speech principles in the United States require far more neutral standards in their application. They do not allow government to limit speech based only on content of the speech. They can limit speech in a context that directly intimidates specific individuals.

Douglas Clouatre

See also: Beauharnais v. Illinois; Hate Crimes; *R.A.V. v. City of St. Paul; Virginia v. Black; Wisconsin v. Mitchell.*

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Hawaii Housing Authority v. Midkiff (1984)

Under the Takings Clause of the Fifth Amendment to the U.S. Constitution, government must provide "just compensation" to a property owner when it takes the owner's property for "public use." Most disputes involving the Takings Clause center on whether compensation is required or the amount that is required, but in a growing number of cases, the government's definition of "public use" has been challenged. One such case was *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984).

In *Midkiff,* the U.S. Supreme Court took a step toward defining public use and how far the courts could be involved in determining it. The case was prompted by a 1967 Hawaii law that condemned the property of large landowners and forced them to sell the land to people who were leasing it at the time. The condemnation portion of the law was enacted to force the owners to sell and also to reduce their tax burden. The state sought to move ownership of scarce land on the islands from a few large landowners to many smaller landowners.

When the condemnation and sales began, a group of property owners challenged the power of the state to take their land. According to them, the Hawaii law was not taking land for public use but rather was seizing the land in order to redistribute ownership to other private parties. In the owners' view, this violated the "public use" provision of the Takings Clause and therefore was unconstitutional.

The Supreme Court disagreed with those arguments. Justice Sandra Day O'Connor wrote for a unanimous Court in upholding the Hawaii law as a constitutional taking of private land for public use, stating that the courts had little authority to overturn a government's judgment that property was taken for a public use. In this case, the legislature determined the Hawaii law would aid the public by distribution of land among many owners. This would increase private property ownership while lowering the price of land on the market, in turn improving the lives of ordinary Hawaiians and compensating the original landowners. The Court found that there was a rational basis for the state's action and that the law was

linked to the goal of lowering the cost of buying property.

The result in *Midkiff* represented a retreat from some of the Court's previous rulings requiring compensation for taking of property. The Court decided that the Constitution entrusted legislatures with the power to determine the meaning of public use. With this power in hand, many local governments have begun seizing private property and selling it to private developers. As this practice has continued, the courts have become more involved in defining public use and forcing government to show it was acting for the public in seizing land.

Douglas Clouatre

See also: Property Rights; Takings Clause.

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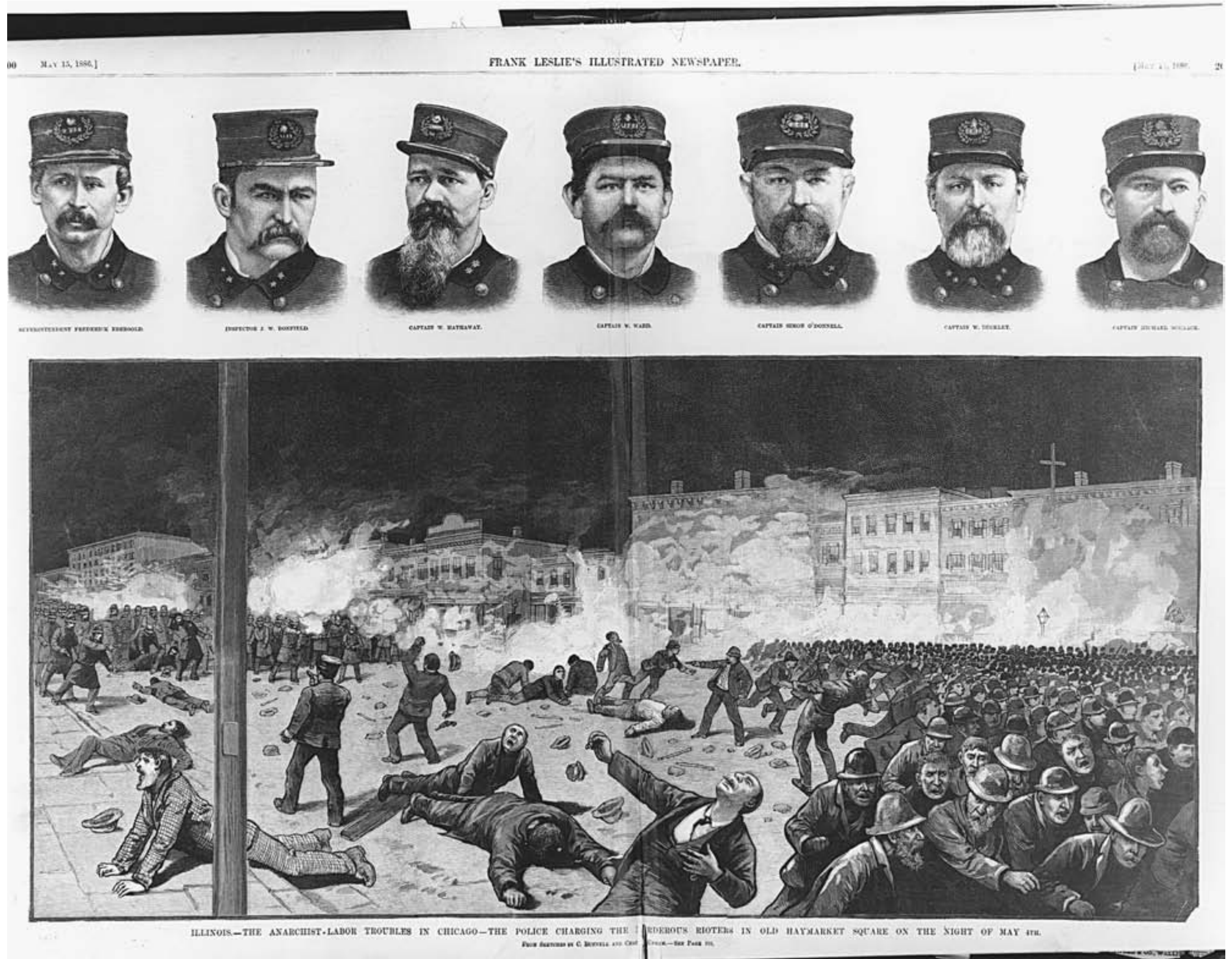
Haymarket Affair

The Haymarket affair was a series of events that occurred in conjunction with a labor rally in Chicago's Haymarket Square on May 4, 1886. The day before, violence had erupted during an assembly of striking workers at the McCormick Reaper Works plant, and several workers were killed. The workers had been on strike since May 1 as part of a nationwide strike in support of the eight-hour workday. During this period, workers had few legally recognized rights and little power to bargain with large industrialist employers, and labor violence was not uncommon.

The rally at the Haymarket was planned as a response to the police violence during the McCormick incident. The rally began at 8:30 at night in Chicago but, because of poor attendance, shortly thereafter was moved one block to the Haymarket at Des Plaines Street and Randolph Street. At about ten o'clock that night, as the rally wound down, 176 policemen, led by Police Inspector John Bonfield, marched on the crowd of approximately 200 people. The police demanded an immediate dispersal of the crowd and an end to the public display. As the police made their way into the crowd, a bomb exploded and killed one police officer. The explosion caused the police and the workers to panic. In the chaos that followed, the police, and possibly some workers, fired their guns. This event became known as the Haymarket riot. Six more police officers died of injuries suffered primarily from police weapons. Over sixty officers were injured, but worker injuries were not recorded because other workers at the rally removed those who were injured or killed.

In the immediate aftermath of the Haymarket riot, Chicago police and prosecutors indicted and arrested at least thirty well-known anarchists and socialists in the community. Of those indicted, eight were held for trial on charges of conspiracy to commit murder. Although no evidence was ever presented as to the identity of the bomb thrower, all eight men were convicted. Seven of the men were sentenced to death. On November 11, 1887, August Spies, George Engel, Adolph Fischer, and Albert Parsons were hanged. The words of August Spies as he prepared to die have been widely quoted. His words also appear at the base of a monument erected to commemorate the event located in the German Waldheim Cemetery of Forest Park, Illinois: "There will come a time when our silence will be more powerful than the voices you strangle today."

Louis Lingg committed suicide in prison to deprive the state of the opportunity to kill him. He killed himself when he placed a smuggled stick of dynamite in his mouth and lit it. Governor Richard Ogelsby, who privately stated his belief that all the men were innocent, commuted the sentences of Samuel Fielden and Michael Schwab to life sentences. The eighth man, Oscar Neebe, was sentenced to fifteen years in prison, in part because even the prosecution thought he was not guilty. The jailed men remained incarcerated for seven years until Governor John Peter Altgeld became the first Democratic governor in Illinois since the 1850s. Shortly after Altgeld became governor in 1893, he revisited the Haymarket affair. The pardons



Police charging rioters on May 4, 1886, in Haymarket Square, Chicago. The Haymarket affair was one of a number of violent attempts by management and government forces to subvert organized labor. *(Library of Congress)*

he issued for the three surviving men were bolstered by depositions from witnesses and a substantial amount of documentary evidence to show none of the men should have been convicted. The Haymarket affair is remembered as one of the more unjust and wrongful attempts by management and government forces to subvert the organization of labor.

Charles Anthony Smith

See also: Labor Union Rights.

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Hazelwood School District v. Kuhlmeier (1988)

In *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988), the U.S. Supreme Court held that minors in the United States could not claim identical rights and privileges as their adult counterparts. This fundamental principle is true both in the public school

setting and in parent–child relationships. The disparate treatment results from the special obligations that schools and parents have in educating students in appropriate behavior and from the assumption that minors are not yet adults. A major collision point involves the free speech rights guaranteed by the First Amendment to the U.S. Constitution.

In *Hazelwood* the Court was faced with a difficult combination of issues. The lawsuit was brought by former high school students who had served on the staff of their high school newspaper. This newspaper was produced as part of the school's journalism class; the class instructor supervised its production. The students claimed a violation of their First Amendment rights when the high school's principal decided to remove two articles from the final issue of the newspaper to be published that school year. One article dealt with teenage pregnancy, and the principal removed it because he feared members of the student body would be able to determine the identity of the girls written about in the article. The second article related to issues facing students of divorced parents. This article included information about a student's father whose name the journalism teacher had removed. The principal was concerned that this parent had not been given time to respond or an opportunity to consent to publication of the article. These concerns led the principal to order the paper published without two pages (which also meant other nonoffending articles were excluded from publication).

The Court recalled its holding in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), that students maintained their rights to freedom of speech and expression while in the public school setting. The Court also explained that this right to freedom of speech and expression was not absolute. The majority in *Hazelwood* cited *Bethel School District v. Fraser,* 478 U.S. 675 (1986), which held that a student could not use explicit language in a school assembly, and *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), which held that students did not enjoy identical privacy rights and Fourth Amendment protections in the school setting as they would outside school or as adults do generally. The Court held that the school newspaper in *Hazelwood* was not a "public forum" for constitutional purposes and that school officials had always conducted the journalism class like an academic course; as a result, school officials had the right to regulate the contents of the newspaper in any reasonable manner. In *Hazelwood* the Court held that the regulation the school's principal applied was in fact reasonable. The Court characterized the facts of this case as posing a different situation from when a school might attempt to chill an individual student's speech expressed on school premises, and held that this situation was different because it was a school-sponsored activity.

It is important to recognize the difference between the speech in question in *Hazelwood* and other forms of student speech and expression. In *Hazelwood* the Court noted the distinction between this and another Missouri case in which regulation was improper because the newspaper in question was an off-campus underground publication that was permitted to be sold on a state university campus but was not a university-sponsored publication. This distinction between requiring a school to tolerate particular student speech is different from the issue of whether a school must affirmatively promote particular student speech. The former was the question at issue in *Tinker,* in which the Court held that the wearing of black armbands in protest of the Vietnam War was constitutionally protected symbolic speech. In contrast, *Hazelwood* held that a school does have authority to place reasonable regulations on student speech in a school-sponsored program.

Laurie M. Kubicek

See also: Student Rights; *Tinker v. Des Moines Independent Community School District.*

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Hearing

A central feature of due process, a hearing is the means by which a person singled out by the state or by others can protest deprivation of or interference with life, physical integrity, liberty, property, or other entitlements. The right to due process is articulated in the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution and in state constitutions as well, and the hearing is a means to guarantee that right. As a procedural device, the hearing helps minimize arbitrary and capricious governmental behavior and provides an avenue of redress for harms committed. Determining the extent and nature of the right to a hearing requires the answer to four questions.

WHEN REQUIRED

Crimes for which the deprivation may be a fine, a jail sentence, or loss of life itself cannot be prosecuted without providing at least one hearing and, usually, several hearings of different sorts. These may include hearing at arraignment, before a grand jury (if one is required), and eventually either before a judge if a plea is entered, or at a trial, which is a specialized form of hearing with elaborate procedural rules.

In civil matters, it is more difficult to generalize about the need for a hearing. Generally, a hearing is required only when the government singles out a particular individual. Thus, when a legislature enacts a statute or an administrative agency promulgates a general regulation aimed at a large body of people, not usually selected or known by name, no hearing is constitutionally required (although most legislative enactments and administrative rule-making are preceded by legislative or administrative hearings). But when the state aims at a particular individual, whether on its own account or on behalf of another person (for example, by entertaining private lawsuits in court), it must provide a forum in which the individual may be heard. For example, the legislature may enact an income tax law without having to hold a hearing, but it must provide hearings for protesting taxpayers who insist the tax law is being unlawfully applied to them.

There are two major exceptions to this generalization. First, an alien may be excluded at the border without any sort of a hearing, even if the alien has long resided in the United States and is returning from a sojourn abroad. Second, individuals may be deprived of certain sorts of entitlements or benefits created by the state without necessarily being provided a forum to protest—for example, a government employee may be fired from an "at-will" job without being provided a hearing. But the U.S. Supreme Court has ruled that certain benefits are sufficiently important that they may not be revoked or terminated without a prior hearing. These include welfare benefits and natural parents' custody of their children.

WHERE HELD

Criminal prosecutions must be heard in court, as must most claims between individuals for money damages arising from accidents, contract breach, and the like. However, there is no general constitutional principle that every civil hearing must be in court. In the modern state, administrative boards or agencies conduct many hearings crucial to the rights of individuals. For example, parole boards determine whether to release prisoners from jail, and public school authorities may suspend a student after an informal hearing with the student to determine whether there is reason to doubt the facts that gave rise to the decision to suspend.

TIMING

The timing of hearings depends on the circumstances. There is no general rule that a hearing must be held before the deprivation, but when the burden on the individual will be particularly severe, a hearing must be held first. Criminal defendants must be tried before they can be sentenced. Likewise, the state must provide a hearing before it terminates welfare benefits, garnishees wages, summarily suspends a driver's license following an accident, or obtains a court injunction against a particular course of conduct. Under some circumstances, when public harm would result from delay, the government may act first and hold a hearing

later. For example, the government may seize adulterated food and drugs without providing notice or a hearing in advance. In some cases, a judicial hearing held after an administrative action may provide sufficient protection; thus the Supreme Court has ruled that the Social Security Administration may discontinue disability checks as long as the claimant later has an opportunity to contest the withdrawal of benefits in court.

PROCEDURAL REQUIREMENTS FOR FAIR HEARING

Like timing, fairness depends on context. The greatest panoply of procedural rights is reserved for criminal prosecutions, both federal and state. Such prosecutions must observe procedural protections for the defendant spelled out in the Bill of Rights to the U.S. Constitution (its first ten amendments). These rights, which have been elaborated in thousands of court cases, include, crucially, the right to counsel, to cross-examine witnesses in open court, and to be free of any obligation to testify against oneself. Civil trials require the right to appear with one's own lawyer before a neutral judge bound by the known rules of evidence. Judges with a personal stake in the outcome of a case may not constitutionally hear it. In a 1927 case, the Supreme Court struck down as violating due process an Ohio law that permitted a justice of the peace personally to pocket a portion of the fines he assessed in traffic cases; a judge with a personal stake in the outcome has an incentive to bias the hearing and decision. Administrative hearings must likewise be held before unbiased decision-makers. Although the agency itself might have some stake in the recovery of fines (for example, to pay its expenses), the actual administrative judge or hearing officer may not be personally biased.

Jethro K. Lieberman

See also: Due Process of Law; *Goldberg v. Kelly.*

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Hearsay

The rule of evidence pertaining to inadmissibility of hearsay is designed to protect the right of cross-examination in order to preserve the fairness of a hearing or trial. The rule requires that the actual witness to a statement or event be present at trial, either in person or by deposition (out-of-court questioning answered under oath), so that the opposing attorney may test the witness's truthfulness, perception, and memory. The hearsay rule has its basis in common law and in the right of criminal defendants to confront the witnesses against them (the Confrontation Clause) as guaranteed by the Sixth Amendment to the U.S. Constitution.

The classic, common law definition of inadmissible hearsay states that evidence that rests in part on the truthfulness of an out-of-court assertion made by someone other than the witness is inadmissible to prove the truth of the matter asserted.

The *Federal Rules of Evidence* define nonadmissible hearsay as statements or nonverbal assertive conduct made by one other than the witness testifying at trial offered to prove the truth of the matter asserted.

Examples illustrate hearsay and the civil liberties, constitutional, and testimonial dangers of admitting it as evidence in a trial. Assume the court must decide "Who was driving the car at the time of the collision?" Olive testifies, "Bill told me he saw Hal driving the car when it pulled out of the gas station." Olive's testimony constitutes inadmissible hearsay because Bill is not testifying. Bill is the real witness, and his credibility, perception, and memory should be subject to cross-examination.

The identity of the person who committed a crime may be a major issue in a criminal prosecution. Velma may not testify that Serena told her she saw Angela kill Boyd. Velma's testimony would be hearsay because Serena actually witnessed the criminal act, and the attorneys for defendant Boyd need to test her testimony by cross-examination.

Classic hearsay evaluation requires an analysis to

determine whether the trial witness, or some other witness, should be the one cross-examined about the statement offered, and whether certain exceptions to the hearsay rule may apply. Some exceptions depend on whether the person who originally made the statement is available but not on the witness stand at trial, and some depend on whether the person who originally made the statement is unavailable to testify (for example, has since died). All exceptions to the hearsay rule depend upon whether the circumstances under which the out-of-court statement was made were such that there is little likelihood for falsity and the testimony need not be tested by further cross-examination.

Hearsay exceptions recognized when the availability of the original witness is immaterial include a statement made during the course of a verbal act, such as an excited utterance or spontaneous declaration; a statement of existing mental, emotional, or physical condition; a statement made for purposes of medical diagnosis or treatment; a properly identified business record; past recollection recorded (the person wrote a summary of what was witnessed near that time); certain public records or reports; and admissions by a party-opponent. Exceptions that depend upon the unavailability of the out-of-court witness include testimony at an earlier hearing or trial; a "dying declaration" (deathbed statement); a statement against interest (prejudicial to oneself); or a statement about personal or family history. The federal rules provide a residual exception that permits a court to admit evidence possessing circumstantial guarantees of trustworthiness. In that situation the party offering the evidence must notify the other party of its intent to offer the statement, along with the name and address of the person originally making the statement.

Patrick K. Roberts

See also: Fifth Amendment and Self-Incrimination; Right of Confrontation; Trial by Jury.

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Graham, Michael H. *Handbook of Federal Evidence.* 5th ed. Vol. 3, secs. 801–807.1. St. Paul, MN: West Group, 2001.

Herrera v. Collins (1993)

In 1982, Leonel Herrera was convicted and sentenced to death in Texas for shooting and killing a police officer. Ten years later, after exhausting his direct appeals and one round of habeas corpus (petition for release from unlawful confinement) without success, he again collaterally attacked the judgment, arguing for the first time that new evidence revealed him to be factually innocent of the crime, which had been committed solely by his deceased brother, Raul. Herrera lost in state court; Texas law barred claims of this nature raised more than a month after sentence. He fared no better in federal court. Ultimately, the U.S. Supreme Court granted Herrera's petition for review. It presented two questions: (1) whether the Constitution's Eighth Amendment (barring cruel and unusual punishment) and Fourteenth Amendment (applying due process protections against the states) permitted a state to execute a guiltless person and (2), if not, what postconviction procedures were needed to guard against this dire result.

In *Herrera v. Collins,* 506 U.S. 390 (1993), five justices explicitly answered the first question in the negative; not surprisingly, no one stated a contrary view. The second question posed greater problems. Once found guilty, a criminal defendant no longer enjoys a presumption of innocence. Thus, to assess Herrera's claim, the habeas court would likely have to hear his witnesses—the new ones as well as, perhaps, the ones who had previously testified. But what should be the petitioner's remedy, if the judge believed him innocent? Although Herrera was asking only that the Court vacate his sentence (strategically, he may have been trying to make his argument seem less radical), logically he ought to be freed or, at least, receive a new trial.

Declining to enter this legal thicket, the Court, endorsing dicta (nonbinding analysis) from an old decision, *Townsend v. Sain,* 372 U.S. 293 (1963), ruled six–three that a free-standing claim of actual innocence, based on newly discovered evidence, was not grounds for "habeas relief absent an independent constitutional violation"—for example, admission at trial of a coerced confession.

The majority opinion, authored by Chief Justice

William H. Rehnquist, distinguished a line of precedent in which the petitioner, by making a colorable show of actual innocence, could overcome certain procedural barriers to having his constitutional claim considered on the merits by the habeas court. In addition, the Court distinguished *Jackson v. Virginia,* 443 U.S. 307 (1979), which did authorize federal courts to overturn a state conviction on purely evidentiary grounds but only if the proof was so inadequate that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt—a standard required by due process, as explained in *In re Winship,* 397 U.S. 358 (1970). By contrast to Herrera's, this type of claim rested on evidence in the record, did not invite the court to make its own determination of guilt or innocence (an incursion on principles of federalism), and asserted an independent constitutional violation.

The majority, however, did leave open the possibility that a death-sentenced prisoner who, unlike Herrera, made "a truly persuasive demonstration of 'actual innocence' " after trial might obtain federal relief if no state forum would process his claim. But the majority posited that "the threshold for such an assumed right . . . would be extraordinarily high." In dissent, Justice Harry A. Blackmun, who believed Herrera deserved a hearing, wrote that it ought to suffice for the claimant to show that he was "probably" innocent. To execute someone who meets this test, the justice opined, "comes perilously close to simple murder."

It bears emphasis that the issues treated in *Herrera* are by no means academic. As of May 2003, 108 death-row inmates had been released on grounds of innocence since 1973; fifty-seven of these exonerations occurred after 1992. It is not known how many less fortunate prisoners may have been put to death despite being innocent.

Vivian Berger

See also: Capital Punishment; Cruel and Unusual Punishments.

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Hicklin Test

The *Hicklin* test, a narrowly drawn inquiry for determining obscenity that derived from the British case of *Regina v. Hicklin,* L.R. 3 Q.B. 360 (Eng. 1868), was widely used in the United States for much of the late nineteenth and early twentieth centuries. As the twentieth century (and notions of morality) progressed, courts increasingly rejected the test as too narrow, and it was formally repudiated by the U.S. Supreme Court in 1957.

The *Hicklin* test had its origins in the British Obscene Publications Act of 1857, sponsored by the Lord Chief Justice John Campbell. The act authorized the police to seize published material they deemed obscene and to have that material destroyed unless its owner appeared before a court and disproved the charge. Under the act, authorities seized copies of "The Confession Unmasked," a political pamphlet that opposed the election of Catholics to the Parliament by purporting to recount in lurid detail "the depravity of Romish priests" and the "questions put to females in confession." Judge Benjamin Hicklin agreed with the pamphlet's owner that the tract could not be held obscene given the legitimate political purpose of its producers. (The slanderous anticlericism of the tract was not then considered to stain its legitimacy as political speech.)

On appeal to the Court of the Queen's Bench, Chief Justice Alexander Cockburn reversed Judge Hicklin's holding on the ground that a legitimate political purpose was not a proper defense under the act. Instead, the chief justice wrote, the question was simply "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." This tract, like medical treatises and other specialized literature, perhaps contained material legitimate and appropriate for certain professional audiences, but it

should not be "exhibited for any one, boys and girls, to see as they pass." Thus, under the *Hicklin* test, a determination of obscenity could be made based on the impact that selected, decontextualized elements of the publication might have on particularly susceptible individuals. Under this test, British authorities banned the literature of French writers Émile Zola, Gustave Flaubert, and Guy de Maupassant, as well as scientific and medical materials on human and animal sexuality.

The *Hicklin* test was imported almost immediately into the United States; an early application came in *Commonwealth v. Landis,* 8 Phila. Rep. 453 (1870). The test was a favorite of turn-of-the-century moral crusader Anthony Comstock and was used by various U.S. authorities in often successful efforts to ban works by feminist authors as well as several texts on medicine and hygiene. The test also caught up the literature of novelists, including Theodore Dreiser's *An American Tragedy* in *Commonwealth v. Friede,* 171 N.E. 472 (Mass. 1930); D. H. Lawrence's *Lady Chatterley's Lover* in *Commonwealth v. Delacey,* 171 N.E. 455 (Mass. 1930); James Joyce's *Ulysses* in *United States v. One Book Entitled "Ulysses,"* 72 F.2d. 705 (2d Cir. 1934); and Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn* in *Besig v. United States,* 208 F.2d 142 (9th Cir. 1953).

In the United States, Judge Learned Hand was among the earliest to question the *Hicklin* test in *United States v. Kennerley,* 209 F. 119 (S.D.N.Y. 1913), a case against the publisher of the novel *Hagar Revelly,* which told of the hard life of an impoverished woman on the streets of New York, written by a social hygienist hoping to warn youths of the dangers of vice. Judge Hand worried that testing literature from the perspective of the most susceptible individual would "reduce our treatment of sex to the standards of a child's library in the supposed interest of a salacious few." He also complained that the test allowed a work to be labeled obscene based on selected passages taken out of context rather than on an assessment of the work as a whole. Nevertheless, feeling constrained by precedent, Hand put aside his qualms and relied on the *Hicklin* test when he assessed the book.

However, Judge John M. Woolsey took the matter a step further, ruling in *United States v. One Book Entitled "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), that whether a work was obscene hinged on its effect not on a particularly susceptible person but rather on one with "average sex instincts, . . . who plays . . . the same role of hypothetical reagent as does the 'reasonable man' in the law of torts." Having read *Ulysses* as a whole, Judge Woolsey concluded that it was not obscene. Learned Hand, by then on the Second Circuit Court of Appeals, joined in an opinion written by his cousin Augustus Hand affirming that conclusion in *United States v. One Book Entitled "Ulysses,"* 72 F.2d 705 (2d Cir. 1934). Over time, more courts began to follow this line of reasoning, creating a split in First Amendment jurisprudence.

The Supreme Court's first indication of dissatisfaction with the *Hicklin* test came in *Butler v. Michigan,* 352 U.S. 380 (1957). Echoing the earlier concerns of Learned Hand, Justice Felix Frankfurter for a unanimous Court commented that a Michigan state law codifying the *Hicklin* test effectively "reduc[ed] the adult population of Michigan to reading only what [was] fit for children." Shortly thereafter, in *Roth v. United States,* 354 U.S. 476 (1957), the Supreme Court expressly rejected the *Hicklin* test as "unconstitutionally restrictive of the freedoms of speech and press." In an opinion by Justice William J. Brennan Jr., the Court mandated that obscenity was to be determined with regard to the sensibilities of "the average person, applying contemporary community standards," rather than of the most susceptible individual, and in terms of "the dominant theme of the material taken as a whole" rather than decontextualized excerpts and selected passages.

Ronald Steiner

See also: Brennan, William J., Jr.; First Amendment; Hand, Learned; *Lady Chatterley's Lover;* Obscenity; Pornography; *Roth* Test.

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Hiibel v. Nevada (2004)

Since its decision in *Terry v. Ohio,* 392 U.S. 1 (1968), the U.S. Supreme Court has recognized the right of police officers briefly to "stop and frisk" individuals they reasonably suspect might be engaged in criminal activity. Statements that justices made in dicta (comments not directly bearing on a particular case decision and nonbinding for future cases) in *Terry* and subsequent cases had indicated that individuals being stopped and frisked had the right not to answer questions directed to them by police officers. That right was limited, however, the Court said in *Hiibel v. Nevada,* 124 S. Ct. 2451 (2004), which implicated Fourth, Fifth, and Fourteenth Amendment provisions and the broader right of privacy: The Court modified this understanding to the extent that it allows police officers, acting under state law, to arrest individuals about whom they have a reasonable suspicion of criminal activity but who refuse to give their names.

A police officer in Humboldt County, Nevada, had questioned Larry "Dudley" Hiibel after the officer received a report that a man in a truck had assaulted a woman passenger. The officer approached the suspect who was standing outside his truck with his daughter inside. The officer believed the man was intoxicated and made eleven separate requests for him to identify himself. When he refused, the officer arrested him. He was identified as Hiibel and was fined $250 under the state's "stop and identify" statute. A state district court affirmed the fine, which the Nevada Supreme Court upheld. Hiibel did not believe that providing his name would be incriminating; he simply believed that the police officer did not have the right to require him to provide it.

The Supreme Court upheld this conviction against Fourth and Fifth Amendment challenges in a five–four decision authored by Justice Anthony M. Kennedy and joined by Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas. The majority distinguished the Nevada law from traditional vagrancy laws, which it often had invalidated for vagueness. By contrast, the Nevada statute required only that individuals identify themselves by name, which the majority believed could be particularly important information in cases where domestic assault was suspected or where the safety of officers might be involved. The majority further rejected the idea that such a law violated the Fifth Amendment provision against self-incrimination (as with Fourth Amendment provisions, applied to the states via the Due Process Clause of the Fourteenth Amendment). The majority observed that the Fifth Amendment protected only communications that were "testimonial, incriminating, and compelled." Although the justices accepted the idea that providing one's name could be "testimonial," they did not believe it was either compelled or incriminating. The justices conceded there might be circumstances in which providing a name would be incriminating, but they did not believe this case represented such an instance. They observed that even individuals who invoke the Fifth Amendment in criminal cases "answer when their names are called to take the stand."

In dissent, Justice John Paul Stevens argued that the Nevada law violated the provision against self-incrimination. He pointed out that "a name can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases." Justice Stephen G. Breyer's dissent, joined by Justices David H. Souter and Ruth Bader Ginsburg, pointed to dicta in previous cases limiting the individual's obligation to respond to questioning during *Terry*-type searches.

John R. Vile

See also: Fifth Amendment and Self-Incrimination; Stop-and-Frisk; *Terry v. Ohio.*

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Hill v. Colorado (2000)

In *Hill v. Colorado,* 530 U.S. 703 (2000), the U.S. Supreme Court upheld a Colorado "bubble" law that made it a crime for anyone within 100 feet of the entrance of any health care facility to "knowingly approach" within eight feet of an unconsenting person "for the purpose of passing a handbill to, displaying a sign to, or engaging in oral protest, education or counseling." The Colorado legislature had enacted the law as a means of protecting women visiting health clinics to obtain counseling on abortion or birth control from being harassed and insulted by antiabortion protesters. Leila Jeanne Hill claimed that this law restricted her rights to protest peacefully and distribute leaflets on a public sidewalk. Although she was joined by such diverse bedfellows as the American Civil Liberties Union, the AFL-CIO, and the People for the Ethical Treatment of Animals, the Colorado Supreme Court upheld the law as a neutral "time, place, and manner" regulation.

The Supreme Court affirmed in a six–three vote, distinguishing *Hill* from an earlier decision in *Schenck v. Pro-Choice Network of Western New York,* 519 U.S. 537 (1997), in which it had invalidated a requirement for a floating bubble around persons seeking to enter or exit a clinic. Justice Stevens's majority opinion found the Colorado statute narrowly tailored to protect the significant state interest of safeguarding "the recognizable privacy interest in avoiding unwanted communication." This interest is greatest in the home, but it "can also be protected in confrontational settings," such as the entries of medical facilities, where there is a high degree of unwelcome contact from which escape is difficult. Colorado's regulation passed constitutional scrutiny because it applied only to certain places, was content- and viewpoint-neutral, and provided police with clear guidelines that protected this right to privacy while allowing the expression of dissenting messages.

Justice David H. Souter's concurrence—joined by Justices Sandra Day O'Connor, Ruth Bader Ginsburg, and Stephen G. Breyer—emphasized that the law "simply does not forbid the statement of any position on any subject." It only prohibited "approaching another person closer than eight feet (absent permission) to deliver the message." From that distance, the message on any sign would remain visible, and the content of any speech still audible.

Justices Antonin Scalia (joined by Clarence Thomas) and Anthony M. Kennedy passionately dissented. To Justice Scalia, the majority's decision "enjoys the benefit of the 'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of law stand in the way of that highly favored practice." He found the Colorado statute to be content-based on its face against antiabortion speakers, and he feared the implications of the majority's reasoning on labor pickets and other public protests.

Justice Kennedy argued that the Court "delivers a grave wound to the First Amendment." Other parts of Colorado's law—and other state and federal laws—would punish those who block access, trespass, or attempt to harass or assault individuals attempting to enter medical clinics. But in upholding this law, he wrote, "the Court approves a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk."

Kennedy concluded that the majority also "strikes at the heart of the reasoned careful balance" he believed to be "the basis for the joint opinion in *Casey*"—a reference to *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992). In his view, abortion is a moral and personal choice—one the state cannot compel but one that others can use their liberty to attempt to influence. In "a cruel way," Kennedy wrote, "the Court today turns its back on that balance" as it "tears away from the protesters the guarantee of the First Amendment when they most need it."

The Court's decision was announced the same day as *Stenberg v. Carhart,* 530 U.S. 914 (2000), which struck down a Nebraska law banning partial-birth abortion. Justices Scalia and Kennedy read substantial portions of their dissents in *Hill* from the bench.

Frank J. Colucci and Tim Hundsdorfer

See also: First Amendment; Time, Place, and Manner Restrictions.

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Hodgson v. Minnesota (1990)

The U.S. Supreme Court in *Hodgson v. Minnesota,* 497 U.S. 417 (1990), determined that a Minnesota statute requiring a minor to notify both parents before having an abortion was constitutional because it provided a judicial process by which exceptions could be granted under limited circumstances (judicial bypass). On June 25, 1990, the Supreme Court issued two decisions about the powers of the states to regulate the availability of abortions for minors. Both *Hodgson* and *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502 (1990), which upheld a state requirement to notify one parent or get a judicial bypass, examined the constitutionality of state parental notification requirements such that doctors must ensure parents are alerted to their child's desire to abort. In these decisions, the Court built upon an intricate construction of previous Supreme Court decisions.

All abortion decisions inevitably cite the watershed case of *Roe v. Wade,* 410 U.S. 113 (1973), in which the Court held that an adult woman had a fundamental constitutional right to terminate her pregnancy under certain delineated circumstances. The Court later expanded this fundamental right in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976), to minors who were deemed mature; the justices noted "constitutional rights do not mature and come magically into being only when one attains the state-defined age of majority." In 1979 the Court in *Bellotti v. Baird,* 443 U.S. 622 (1979) (*Bellotti II*), determined that a state could require parental consent prior to a minor's termination of her pregnancy, but it must give minors the option to judicially bypass this requirement. The mature minor must be given a means of exercising her fundamental right to abort.

The *Hodgson* Court ruled that certain minors must have a way to avoid parental involvement: These exceptions would include a minor who was mature enough to make the decision without parental consultation; a minor for whom the notification of her parents could be psychologically or physically dangerous; or a minor for whom the abortion definitely would be in her best interest. The Minnesota statute required the notification of both biological parents, and the Ohio law required notification of only one parent, but both states provided a version of the *Bellotti II* judicial bypass procedure. The issue in both cases was whether the two notification statutes were constitutional under such previous cases as *Bellotti II* and *Danforth.*

The statute applicable in *Hodgson* required that minors give notice to both biological parents at least forty-eight hours prior to the abortion, with two exceptions: (1) for a minor who declared she was the victim of neglect or when parental abuse information was given to the proper juvenile authorities and (2) if the minor could convince the proper court that she was "mature and capable of giving informed consent" or that an abortion, without notifying both of her parents, would be in her best interest.

The Supreme Court determined that although Minnesota's provision for a two-parent notification clause was unconstitutional, the bypass procedure protected the statute as a whole. The majority opinion observed, "Minnesota has offered no sufficient justification for its interface with the family's decision making process created by . . . two-parent notification. [This] is the most stringent notification statute in the country . . . Minnesota's two-parent notice requirement is all the more unreasonable when one considers that only half of the minors in the state of Minnesota reside with both biological parents. A third live with only one parent."

Although the majority of the Court found this two-parent notification provision unconstitutional, Justice Sandra Day O'Connor provided the vote determining that the judicial bypass procedure rendered the entire statute constitutional. This second majority argued that the minor had the alternative of going to court

through the bypass procedure in order to avoid the notification of one or both parents; therefore, the law was constitutional.

Michelle Donaldson Deardorff

See also: Right to Privacy; *Roe v. Wade.*

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Holmes, Oliver Wendell, Jr. (1841–1935)

Oliver Wendell Holmes Jr. joined the U.S. Supreme Court in 1902, beginning a twenty-nine-year period of service that, arguably, was bested only by John Marshall in its impact on how judicial scholars conceive of the role of law in American life and study its creation by judges and justices. Prolific by the standards of even the most erudite justices, Holmes made intellectual contributions to legal and judicial studies ranging from his late-nineteenth-century lectures at the Lowell Institute in Boston, Massachusetts, to the written opinions he produced during his final years on the Court.

Holmes was the son of a Boston writer and physician, and his upbringing is best characterized as a mixture of Protestant austerity and family membership in the New England intellectual community. Holmes's account of his childhood revealed that Ralph Waldo Emerson was among the frequent dinner guests at what was a distinctly literary home.

Holmes served two years in the Twentieth Regiment of the Massachusetts Volunteer Infantry during the Civil War, suffering three wounds, the second of which was a nearly fatal bullet to the neck at Antietam, Maryland. After a lengthy recovery in Boston, Holmes returned to his post as a senior infantry officer and ultimately completed military duties in 1864. Historians debate the impact of Holmes's Civil War experiences on his legal philosophy. Whatever the linkages between his life as a soldier and his perspectives on the law, Holmes apparently encountered little difficulty in the transition to the civilian world, matriculating at Harvard College less than three months after leaving military service. Holmes completed his formal education at Harvard in 1866 well prepared for entry into both Boston society and legal practice. In 1867 he began practicing in Boston and, in 1870, assumed lecturing duties at Harvard Law School.

By 1881, as indicated by the content of his lectures at the Lowell Institute, Holmes had established the foundations of what ultimately became his mature perspectives on the sources of legal principles and role of law in society. In the same year, he published *The Common Law,* a remarkably comprehensive yet, in parts, elliptically related account of these foundations. Holmes's ascent in the American legal hierarchy had only begun, however. In 1881 he accepted an appointment to the Massachusetts Supreme Judicial Court, and by the early 1890s, Holmes was issuing opinions consistent with his later preference for judicial restraint in reviewing the constitutionality of legislative acts. Thus, Holmes's chief jurisprudential orientations were in place prior to his nomination to the Supreme Court.

The first of President Theodore Roosevelt's three nominations to the Court, Holmes took the oath of office December 8, 1902, and remained on the high bench until his retirement January 12, 1932. Inasmuch as his jurisprudential contributions are known, his productivity, in terms of sheer opinion-writing activity, was unprecedented for his time on the Court. During his twenty-nine-year tenure, Holmes produced some 873 written opinions for the Court, more than any other justice in Supreme Court history. In addition, his seventy-three written dissents, unremarkable by today's standards, were exceeded in the nineteenth- and early twentieth-century Courts only by Justices Stephen J. Field and John Marshall Harlan.

Holmes's stature on the Court as a prolific writer is eclipsed, however, by the weight of his substantive impact on the law. A close reading of Holmes's opinions reveals the two fundamental characteristics of his

jurisprudence. First, Holmes conceived of law not as a body of fixed principles but rather as a malleable instrument for solving human problems. Furthermore, Holmes is regarded as a consummate legal realist; he viewed law as a product of the values and policy preferences of judges and justices, a view consistent with his categorical rejection of what would later be called mechanical jurisprudence. The dual foci of his thought appeared most succinctly in the opening paragraph of *The Common Law*: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed."

The second and equally important quality of Holmes's thought concerns his view of the proper station—or what political scientists refer to as role orientation—of the Supreme Court in U.S. politics. In brief, Holmes embraced the principle of legislative supremacy and a related preference for judicial self-restraint. Moreover, in a series of masterfully crafted dissents, Holmes confronted the conservative, activist Courts of the first two decades of the twentieth century, often lecturing his colleagues on their misapprehensions of the proper role of the courts in U.S. constitutional government. Furthermore, Holmes railed against the Court's majority for overstepping the boundaries of legitimate judicial authority and ruling unconstitutional legislation regulating working conditions of American laborers. Herein lies a key explanation for Holmes's stature in Supreme Court history: His impact on constitutional thinking resulted chiefly from his willingness to violate what was at the turn of the century an institutional norm of consensus.

In a way quite distinct from John Marshall, Holmes made his mark on U.S. constitutional history initially in the vessel of the dissenting opinion. His most famous dissent, occurring in response to Justice Rufus Peckham's majority opinion in *Lochner v. New York,* 198 U.S. 45 (1905), reveals the essence of Holmes's view of judicial forbearance. There, he wrote in support of a New York statute regulating the maximum hours a person was allowed to labor in the dank cloisters of the city's bakeries. Chastising his brethren for using both the Fourteenth Amendment and, relatedly, the theory of liberty of contract as a justification for their economic theories, he stated: "The 14th Amendment does not embody Mr. Herbert Spencer's Social Statics. [Some] of these laws embody convictions or prejudices which men are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relations of citizens to the state or laissez faire."

Holmes further argued that the Court majority had understated the scope of legislative power: "[I] think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and the law."

At bottom, Holmes linked to his preference for judicial restraint a mode of constitutional interpretation commonly labeled "rational-basis" review. More specifically, Holmes advocated the use of the Court's power to strike down laws only when a clear constitutional violation was afoot and when it could be shown that the statute was not a reasonable legislative response to a perceived public problem. Holmes's application of the rational-basis test became the standard employed by the Court in reviewing the constitutionality of congressional or state legislation in areas where nonfundamental liberties are concerned.

In contradistinction to his perspectives on government regulation of economic liberties, Holmes drafted a key dissent in 1919 that would notably shape constitutional thinking about the role of free of speech in American democracy. In *Abrams v. United States,* 250 U.S. 616 (1919), Holmes said that the clear-and-present-danger doctrine he adopted just months prior in *Schenck v. United States,* 249 U.S. 47 (1919), failed to capture the protections afforded to persons by the First Amendment. In *Abrams,* Holmes observed that the communication of an idea could be prohibited and punished only when the expression posed an imminent threat of lawlessness and, correspondingly, an imminent threat to the success of a lawful government activity.

The distinction between Holmes's reasoning in *Schenck* and *Abrams* is of no small importance: In *Abrams* he markedly expanded the scope of lawful communicative activity, shrinking the zone of expression subject to government regulation. The theoretical perspective he adopted in *Abrams* reflected a general defense of free expression as necessary for sound policy making. Holmes explained 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." Holmes concluded in *Abrams* that the First Amendment did not allow prosecution under the Sedition Act of 1918 of a group of Russian immigrants who distributed printed materials critical of U.S. involvement in World War I.

The impact of Holmes's position in *Abrams* reached deep into the twentieth century. The Court's per curiam opinion in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), embraced the view, adopted by Holmes in *Abrams,* that advocacy of imminent lawless action marked the boundary between protected speech and expression subject to government limitation. In *Brandenburg,* the Court reversed the conviction under an Ohio criminal syndicalism law of a Ku Klux Klan member who encouraged the view that hostile encounters with federal government organizations might, in the future, be necessary to achieve the Klan's purposes. Reversing the Ohio Supreme Court's order dismissing Brandenburg's appeal, the justices distinguished advocacy of some future lawless activity from advocacy of lawless action that was likely to occur in immediate proximity to the expression. Echoing Holmes's opinion in *Abrams,* the Court explained that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action."

Confounding Holmes's apparent dedication to individual liberty was his opinion in *Buck v. Bell,* 274 U.S. 200 (1927)—a decision that ranks among the more regrettable episodes in Supreme Court history. In *Buck,* Holmes extended his restraintist orientation to uphold a Virginia statute allowing court-approved sterilization of mentally disabled persons. Rejecting the idea that forced sterilization impinged on personal privacy, Holmes defended the state's practices, in part, on utilitarian grounds. Writing for an eight-justice majority, Holmes seemed to call upon a combination of personal experiences in war and the most callous use of analogy:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.

At bottom, his majority opinion in *Buck v. Bell* encapsulates one of the more intriguing questions about Holmes's jurisprudential perspectives. Considering that *Buck* came late in his judicial career, nearly a decade after his most important opinions in free speech cases, what are historians and social scientists to conclude about Holmes's conception of the scope of constitutionally protected personal and political freedoms? Did Holmes apprehend a principle that protected expression of what he would label offensive and potentially dangerous ideas yet simultaneously denied basic forms of personal privacy on the basis of serving a more important public good? Perhaps his thinking on the subject of personal privacy, a subject not directly explored by the Court until more than thirty years after Holmes retired, reflected a combination of a fundamental commitment to judicial restraint and the strictures of early twentieth-century discourse on the matter of individual autonomy. Strikingly, however, Holmes had dissented in *Olmstead v. United States,* 277 U.S. 438 (1928), the wiretapping case in which fellow justice Louis D. Brandeis (with whom Holmes was often allied) in his dissenting opinion had articulated a right to privacy.

Arguably, the confluence of these two streams in Holmes's thought—the idea that law exists to respond to human needs and that judicial decisions are principally a creature of the judicial mind—accounts for

Holmes's place in the history of American jurisprudence. In addition, social scientific analysis points to a probable linkage between the circumstances of his young adulthood, the length of his service on the Court, and the enduring impact of his legal scholarship.

Bradley J. Best

See also: Abrams v. United States; Brandenburg v. Ohio; Buck v. Bell; Clear and Present Danger; *Schenck v. United States.*

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Home Building and Loan Association v. Blaisdell (1934)

In *Home Building and Loan Association v. Blaisdell,* 290 U.S. 398 (1934), the U.S. Supreme Court held that a Minnesota law aimed at alleviating the effects of the Great Depression did not violate the Contracts Clause of the Constitution. This clause, found in Article I, Section 10, provides that no state shall pass any law "impairing the obligation of contracts."

Following the 1929 stock market crash, the U.S. economy collapsed and the nation was in financial ruin. As President Franklin D. Roosevelt and Congress worked at the national level on legislation to stimulate economic recovery, provide relief to those in need, and return the nation to economic health, a number of state legislatures also took action to deal with the crisis. One of the main problems faced by farmers, homeowners, and owners of small businesses was mortgage foreclosure. Because of high unemployment, low prices for farm goods, and other financial difficulties, these people could not meet their mortgage payments, and many lost their property. As a result, more than a dozen states were persuaded to pass laws to assist others in danger of mortgage foreclosure.

One of these statutes, the Minnesota Mortgage Moratorium Act of 1933, faced a legal challenge in the U.S. Supreme Court. The Minnesota law permitted debtors to petition a state trial court to postpone foreclosure of their mortgages for up to two years, with the stipulation that they pay monthly installments. John and Rosella Blaisdell, residents of Minneapolis, fell behind on their regular mortgage payments, and they applied for such an extension. The trial court agreed and ordered the Blaisdells to pay monthly installments of $40. Over the objections of the Home Building and Loan Association, the Minnesota Supreme Court upheld the lower court's decision. The company then appealed to the U.S. Supreme Court, claiming that the Minnesota law violated the Contracts Clause of the Constitution.

By a five–four vote, the Supreme Court affirmed the ruling of the state high court. Chief Justice Charles Evans Hughes wrote the majority opinion, holding that there was no Contracts Clause violation. He said that although the Minnesota law modified the contract contained in the mortgage, it was a temporary measure enacted to deal with an emergency situation—the economic crisis gripping the state and nation. Hughes argued that the Contracts Clause should not be interpreted to prevent the state from using its police power—its power to protect public health, safety, welfare, and morals—to respond to that crisis. The four dissenters, led by Justice George Sutherland, criticized the majority for ignoring what they saw as a clear violation of the Contracts Clause. Justice Sutherland asserted that the moratorium law impaired contractual obligations, and by upholding it, the Court was opening the door to even greater invasions of the "sanctity of public and private contracts."

Blaisdell was decided before the Court heard cases involving the New Deal legislation enacted by President Roosevelt and Congress. Some supporters of the New Deal hoped that the *Blaisdell* ruling was a signal that the Court would also look favorably on the federal legislation, but they were initially wrong. In several key cases decided in 1935 and 1936, the Court struck down major portions of President Roosevelt's New Deal program before reversing course and largely leaving social and economic matters to legislative dis-

cretion. Since *Blaisdell,* the Court has rarely interpreted the Contracts Clause to prohibit states from enacting economic regulations designed to protect the public welfare.

Joyce A. Baugh

See also: Contracts Clause; Hughes, Charles Evans; Property Rights; *Trustees of Dartmouth College v. Woodward.*

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Home Schooling

In modern times, the concept of teaching children at home may seem to be a strange practice employed by an eccentric few. In reality, it is the concept of modern public schooling that is new. Most of the nation's founding fathers, including George Washington and James Madison, were tutored at home. Additional such notables were Benjamin Franklin, Thomas Edison, Alexander Graham Bell, Abraham Lincoln, Franklin D. Roosevelt, Albert Einstein, Winston Churchill, John Marshall, Mark Twain, John Stuart Mill, and Clara Barton. With the rise of free public education and widespread compulsory education laws in the eighteenth and nineteenth centuries, however, the number of families choosing to school children at home radically declined. In the past few decades, home schooling has seen a revival, and recent estimates put the number of home-schooled children in kindergarten through twelfth grade at 1.725 to 2.185 million, with a growth rate of 7–15 percent per year. In a few instances, home schooling has pitted the interests of parents in educating their children as they see fit against the interests of the state in ensuring a literate, responsible community.

Parents' motivations for home schooling their children vary widely and include both conservative and liberal ideologies. For example, parents may choose to home school based on religious reasons, on pedagogical reasons, on the special needs of the child, or on dissatisfaction with academic quality and lack of discipline in public schools. Styles of home schooling are limited only by the creativity of parents and the flexibility of state laws. Some parents follow accredited curricula, which are designed and supervised by licensed education professionals. Other parents do not follow any set curriculum and allow their children to self-guide their own studies.

With the recent renewed interest in home schooling came legal challenges, most of them based on state compulsory education or truancy laws. For example, in 1985, the Texas Education Agency (TEA) declared that home schooling was illegal and prosecuted over eighty families for truancy. Home-schooling parents filed a class-action lawsuit, and on appeal the Texas Court of Appeals held in *Texas Education Agency v. Leeper,* 843 S.W.2d 41 (Tex. Ct. App. 1991), a decision subsequently upheld on other grounds, that the TEA had "deprived the home school parents of equal protection under the law." In 1989 the Texas legislature exempted private and parochial schools from many of the public school requirements and clarified that a private or parochial school included home schools.

In addition to legal challenges to home schooling, many critics claim the practice has sociological and pedagogical problems as well. Complaints include the claim that students taught at home lack socialization

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skills, that they do not receive a diverse education, and that parents are woefully unprepared to be teachers. Home-schooling parents respond that there are adequate opportunities for extracurricular activities, that private tutoring allows them to suit the particularized needs of their children better, and that home-schooled children often academically outperform children from traditional school environments.

Although the U.S. Supreme Court has yet to address a parent's right to home school, it has held that parents have a fundamental right to direct the upbringing and education of their children. The right is not without limits, and the Court has made clear that states have a strong interest in regulating education. Two Supreme Court cases, both involving compulsory education laws, established that parents have a fundamental right to educate their children, but that the state can regulate this right. In *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), the Court addressed whether an Oregon compulsory attendance law requiring all children age eight to sixteen to attend public school violated the Fourteenth Amendment. Both private and parochial schools challenged the law. In finding the statute unconstitutional, the Supreme Court stated that it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Nevertheless, the Supreme Court affirmed that states have the power "to require that all children of proper age attend some school."

In *Wisconsin v. Yoder,* 406 U.S. 205 (1972), the Supreme Court again emphasized the state's interest in the education of children by noting that "there is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." In *Yoder,* the Court addressed the constitutionality of Wisconsin's compulsory attendance law when members of the Amish community were arrested for failing to send their children to any school (public or private) after the eighth grade. The Amish objected to formal schooling based largely on their religious beliefs, and they therefore challenged the Wisconsin law based on both the Free Exercise Clause of the First Amendment and the Fourteenth Amendment's Due Process Clause, which they claimed protected parental rights. Acknowledging that the state had a strong interest in the education of children, the Court noted that the state's interest "is not totally free from a balancing process when it impinges on fundamental rights and interests." On the facts of the case before it, the Court concluded that the Amish had presented enough evidence to overcome the state's interest in requiring a formal high school education. Of course, *Yoder* was based heavily on the constitutional principle of free exercise of religion, which would not apply to all parents who chose to home school their children.

Home-schooling regulations vary from state to state. Some states have minimal requirements for home-schooling parents and do not require parents to notify the state of their intent to home school or to receive permission to do so. Other states require that students spend a certain amount of time doing studies, parents comply with certain licensing requirements, the home-school curricula cover certain prescribed subjects, or home-schooled students take and achieve a certain level on standardized tests. On the national level, the No Child Left Behind Act of 2001 exempts home-schooled students from certain required standardized tests. Although litigation based on parents' rights to home school their children is decreasing, other issues remain. For example, pending cases include home-schooling participants seeking access to community centers or eligibility to compete on public school athletic teams. Pending legislation includes the effort to protect the privacy of home-schooling records on a par with the privacy accorded other educational records.

Elizabeth M. Rhea

See also: Meyer v. Nebraska; Parental Rights; *Pierce v. Society of Sisters.*

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Homeland Security Act

In November 2002, the Homeland Security Act was passed overwhelmingly by both the House and Senate and signed into law by President George W. Bush. The main purpose of the act was to establish the framework for the Department of Homeland Security (DHS), the agency intended to coordinate domestic detection and prevention of terrorism. The 500-plus-page law also included language on a wide variety of issues affecting civil liberties. The law was viewed by many observers as the next step in the Bush administration's domestic war on terrorism, which had previously included the interrogation of many people of Middle Eastern descent, the establishment of military tribunals to hear terrorism cases, and the October 1991 passage of the Patriot Act, which granted the government extensive new powers of investigation.

The Homeland Security Act raised questions about the balance of national security versus civil liberties, how to shape the domestic response to an open-ended war against new foes, and whether too much authority was shifting to the executive branch without congressional or legal constraint. More specifically, civil liberties groups questioned broad new rules for evidence sharing among government agencies, new regulations on Internet security and information, and new restrictions on the Freedom of Information Act (FOIA). Other sections of the legislation, however, pleased civil liberties groups, since they limited introduction of a national identity card, stopped implementation of the controversial Operation Terrorism Information and Prevention System (TIPS), and established an Officer of Civil Rights and Civil Liberties within the DHS.

The line between legitimate government action to guarantee national security and unconstitutional regulation of civil liberties has always been hotly contested, especially in times of war. Throughout its history, the United States has tried to preserve liberties, but also has allowed restrictions such as the Alien and Sedition Acts, internment of Japanese citizens during World War II, regulation of the media during almost every war, and investigations of antiwar protest groups. The terrorist attacks of September 11, 2001, in New York City and Washington, D.C., reignited this basic controversy. Many key government officials, including President Bush and especially Attorney General John Ashcroft, argued that national security considerations were now paramount, although civil liberties remained important. Others countered that the war on terrorism did not justify major shifts in domestic practice and that the war itself was about preserving American freedom; thus the government should not overly restrict freedom in order to defend it.

The war on terrorism also created new wrinkles in the long-standing debate. First, the enemy was not solely an outside power but included people working within the United States. Second, the war had no clear end point, so the time frame for removal of restrictions justified as "wartime necessities" was uncertain. In the first year after September 11, the administration argued that to protect the country from the new threat, law enforcement agencies needed new investigative power and flexibility, such as the ability to monitor Internet communications, financial transactions, and records of private religious and political organizations. Extensive detention and deportation of suspects were also deemed necessary. Many in Congress and civil liberties groups questioned these specific policies and the overall trend of shifting authority to the executive branch with limited congressional or judicial review of actions. Opposing the administration without looking unpatriotic or weak on terrorism, though, became difficult.

In 2002 several key members of Congress began pushing for the statutory establishment of the DHS, which was initially established by presidential directive. They felt this action would help unify antiterrorism efforts and reassert congressional oversight of executive activity. At first Bush opposed the idea, but then he reversed course and submitted his own preferred plan for the legislation. Notwithstanding the

complexity of creating a new department by combining twenty-two existing federal agencies with at least 170,000 employees and a budget close to $40 billion, the legislation moved quite quickly. It was slowed by some debates on exactly which agencies should be merged. Progress was further slowed by debates about the administration's insistence on a personnel system for the department that would give managers extensive authority and weaken the collective bargaining power of unions and, later, additions of numerous protections for special interest groups. Floor debate on the bill was postponed until after the November elections, thereby shielding members from potential political fallout from their votes. The House approved the bill 299 to 121, in large part because of Republican support. The Senate vote was 90 to 9 with unanimous Republican support.

As passed, the legislation included several sections affecting civil liberties. In response to the view that September 11 might have been prevented had there been more coordination among intelligence gathering and law enforcement agencies, the act greatly increased the information to be shared among the DHS, the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), local police forces, and even foreign law enforcement agencies. In some early versions of the legislation, such sharing of information was tied closely to terrorism investigations, but the final version was broader in sweep.

The legislation also addressed issues relating to Internet security and privacy. The maximum criminal penalty for hackers who knowingly cause, or attempt to cause, death from an electronic attack was increased. The new law also modified language in the Patriot Act to protect Internet service providers from penalties for disclosing private electronic communications to law enforcement if they, "in good faith," felt an emergency involving possible death or serious physical injury was involved. This "good faith" standard replaced more limiting "reasonable belief" language. Prior to recent antiterrorism laws, government officials had to get a warrant, subpoena, or court order to receive electronic information, but now the government can conduct surveillance of any computer anytime there is "an immediate threat to a national security interest." Critics worry that this will allow the government to use data-mining software to collect huge amounts of information on average citizens.

The new legislation also modified rules for Freedom of Information Act (FOIA) requests. In what was seen as corporate-friendly language, the FOIA exempted from disclosure "any critical infrastructure information" that was voluntarily submitted by a company to a federal agency for use in security planning. For example, a software company might submit information about a known bug in its software that could allow hackers to penetrate a system. Once that information was submitted to the government, it would be protected for national security reasons so that terrorists could not request the information and then use it to their advantage. This provision, however, could potentially allow companies to hide known safety or other flaws from consumers.

Supporters of civil liberties, such as the American Civil Liberties Union (ACLU), were pleased that government power became subject to some limitations, including some that directly countered administration ideas. Soon after September 11, officials floated the idea of a national identification card, but this was opposed by those who felt it would give government too much power to trace and monitor citizens. Section 1514 of the Homeland Security Act says that it should not be construed as authorizing a card. Another controversy centered on the proposed TIPS program, which would encourage citizens to report unusual or suspicious behavior of other citizens; section 880 prohibits implementation of TIPS. Civil liberties groups also hope that the Civil Liberties Officer will become an important position.

The bill's strong support in Congress reflected general public support for new measures. ABCNews/*Washington Post* polls showed that 79 percent of those questioned felt it was important to investigate terrorism, even if such an investigation required an intrusion on personal privacy. Close to two-thirds polled supported expanded FBI surveillance, even though an almost equally large number saw such surveillance as an encroachment on individual privacy. The legislation, along with other new laws and administration actions, has led over sixty cities and towns to pass resolutions urging federal authorities to respect civil liberties or calling on local authorities not to cooperate with federal investigations that threaten civil rights.

Long-term views will likely be shaped by the extent of future terrorism, since future acts would prolong and perhaps expand the new investigations but also would call into question whether sacrifices of liberty are being rewarded with increased security.

John Dietrich

See also: Airport Searches; Border Searches; Bus Searches; Civil Liberties; Due Process of Law; *Hamdi v. Rumsfeld; Rasul v. Bush;* Rights of Aliens.

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Hoover, J. Edgar (1895–1972)

Few individuals had a more visible, or controversial, persona in the twentieth century than did J. Edgar Hoover, the longtime director of the Federal Bureau of Investigation (FBI) who served as head of an executive agency under eight successive presidents. A skillful administrator and publicist who helped establish his agency and who successfully adapted to the perceived security risks of several different eras, Hoover possessed secret files and was willing to provide them to presidents in power. These activities posed unique threats to civil liberties.

Born to the family of a civil servant in the nation's capital in 1895, Hoover graduated from the National University Law School (later combined with George Washington University) and was hired in 1917 by the Alien Enemy Bureau of the Department of Justice. Put in charge of a Radical Division within the department, Hoover was responsible for coordinating and directing the controversial Palmer Raids, named after Attorney General A. Mitchell Palmer and conducted during the first "red scare," 1919–1920, that targeted Communists and anarchists but that paid little attention to individual rights.

In 1921 Hoover was elevated to the assistant directorship and in 1924 to the directorship of the agency that in 1935 was renamed the Federal Bureau of Investigation. Hoover focused on professionalizing the agency by developing scientific law enforcement techniques, including fingerprinting, as well as issuing annual reports on crime in the United States. The FBI also battled prominent gangsters that brought it increasingly into the public eye (although Hoover, perhaps hoping to conserve agency resources, would later deny that the Mafia existed).

During World War II, Hoover worked closely with President Franklin D. Roosevelt, and the agency was involved in counterintelligence against the Nazis (including saboteurs who had landed in the United States). After the war, it focused on the threat of domestic communism, eventually distancing itself from the Truman administration by cooperating with Richard Nixon and the House Un-American Activities Committee in investigations that led to successful prosecutions against Alger Hiss and Julius and Ethel Rosenberg. Hoover stayed in the good graces of President Dwight D. Eisenhower's administration by eventually breaking with Republican Senator Joseph McCarthy of Wisconsin when his anti-Communist campaign went too far.

Hoover developed a "Counter Intelligence Program," first against Communists and later against the Ku Klux Klan, the Black Panthers, and the new Left. Although Hoover began enforcing civil rights initiatives during the administration of President Lyndon B. Johnson, in one of the more disgraceful chapters in Hoover's career, he taped Dr. Martin Luther King Jr.'s sexual activities and sent them to King and his wife.

A defender of middle-class values who was militantly anti-Communist, Hoover wrote a popular book entitled *Masters of Deceit,* which exposed the Com-

munist threat to the American way of life. Because Hoover suspected that some of the leaders of the antiwar and civil rights movements were sympathetic to the Communist Party, he was willing to bend the rules to engage in surveillance of these organizations. A Select Committee to Study Government Operations with Respect to Intelligence Activities, led by Idaho's Democratic Senator Frank Church, concluded that Hoover had "conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of freedom of speech and association."

Today, Hoover is often mentioned in connection with a longtime relationship with his associate director, Clyde Tolson, believed by some Washington observers to have been homosexual. Hoover died of a heart attack during the Nixon administration in 1972. The Washington, D.C., headquarters of the FBI that he did so much to shape was subsequently named in his honor.

John R. Vile

See also: Communists; Federal Bureau of Investigation; Fingerprinting; Palmer Raids; Red Scare; Rosenberg, Ethel and Julius.

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Hostile Audience

The term "hostile audience" refers to situations in which speech provokes unsympathetic listeners to violence or threats of violence. The provocation can come from either the form of speech or the message itself. The advocacy of unpopular causes or the use of unpopular forms of speech tests the essence of the free speech guarantee of the First Amendment to the Constitution. Free speech advocates would permit such expressions to be used in what Justice Oliver Wendell Holmes Jr. called the "marketplace of ideas," where they may change opinions in the long run. Those more concerned with preserving the public peace would restrict use of these words. The U.S. Supreme Court has tried to balance these competing interests.

The seminal case in this area—although perhaps now honored more in the breach—is *Feiner v. New York,* 340 U.S. 315 (1951). Irving Feiner addressed an open-air meeting in Syracuse, New York, in 1949, urging his listeners to attend a pro-civil-rights meeting that evening. In the course of his talk, Feiner made what the Court characterized as derogatory remarks concerning President Harry Truman and the mayor of Syracuse (he called them both "bums") and the American Legion (a "Nazi Gestapo"). He also said, "The Negroes don't have equal rights; they should rise up in arms and fight for them." An audience member said to the arresting police officer, "If you don't get that son-of-a-bitch off, I will go over and get him off there myself," and the officer stepped in to prevent a fight. After Feiner ignored two requests by police to stop speaking, they arrested him. He was charged and convicted of breach of the peace and failing to obey police instructions.

In upholding the New York conviction, the U.S. Supreme Court found that "not only violent acts, but acts and words likely to promote violence in others" constituted a genuine breach of the peace, quoting *Cantwell v. Connecticut,* 310 U.S. 296 (1940). Further, the Court held that prevention of such a breach was a legitimate governmental interest, even as it acknowledged that a state may not "unduly suppress free communication of views . . . under the guise of conserving desirable conditions."

Justice Felix Frankfurter's dissent would ultimately prove more persuasive to later Courts. Frankfurter argued that Feiner, in essence, was sentenced for the unpopularity of his views, noting that it was rare for a crowd to hear unpopular views without some tumult ensuing.

Subsequent Court decisions never actually overturned *Feiner,* but have made clear that a hostile audience per se is no basis for punishment of speech. Modern jurisprudence has drawn the distinction between restrictions on the time, place, and manner of speech, which are generally permissible, and content-based restrictions, which are not permissible absent a showing of a compelling governmental interest. Re-

cent Court decisions have generally held that a restriction on speech based on a hostile audience is, in fact, a content-based restriction.

In *Edwards v. South Carolina,* 372 U.S. 229 (1963), the Court reversed the conviction of black students who demonstrated in front of the South Carolina State House to protest their lack of civil rights. When a large crowd of onlookers gathered, the police told the black students to disperse, then arrested them when they refused. Noting that states were bound to honor First Amendment rights, which were incorporated into the Due Process Clause of the Fourteenth Amendment and made applicable to the states, the Court held South Carolina was barred from criminalizing the peaceful expression of unpopular views because the right to such discussion is "a fundamental principle of our constitutional system." In distinguishing this case from *Feiner,* the Court found no evidence of hostile reaction from the crowd or any element of breach of the peace. This decision raises other questions: For example, does the First Amendment require police to restrain hostile audiences? Does a heckler have the authority to silence a provocative speaker?

In *Gregory v. Chicago,* 394 U.S. 111 (1969), the Court broke *Feiner*'s link between crowd conduct and speech. *Gregory* involved eighty-five demonstrators, accompanied by 100 police, who peacefully marched from city hall to the mayor's residence to support the desegregation of the public schools. When some of the more than 1,000 bystanders began shouting threats and racial epithets at the demonstrators, the Chicago police, in order to avert civil disorder, ordered the demonstrators to disperse. They refused and were arrested. The U.S. Supreme Court overturned the defendants' convictions for disorderly conduct, noting that restrictions based on audience conduct could not be upheld when the speaker did not commit any breach of the peace. In his concurring opinion, Justice Hugo L. Black observed that the Chicago disorderly-conduct statute was impermissibly vague, calling it a "meat-ax ordinance" that attempted to prohibit activity specifically permitted by the First Amendment.

In his concurring opinion in *Gregory,* joined by Justice William O. Douglas, Justice Black indicated that under narrowly drawn statutes, the state may still retain the power to put an end to a speech if the best efforts of the police cannot avert civil disorder that erupts from the clashing views of individuals in public spaces exercising their rights of free speech and assembly.

In light of *National Socialist Party of America v. Village of Skokie,* 432 U.S. 43 (1977), it is unclear whether the hostile-audience doctrine remains intact. In this case, the Nazi Party wanted to march through Skokie, Illinois, a predominantly Jewish neighborhood with a large number of Holocaust survivors, "wearing their uniforms, displaying swastikas, and handing out pamphlets that promoted the hatred of Jews, among others." The city obtained an injunction stopping the Nazi Party from demonstrating. The U.S. Supreme Court reversed on procedural grounds, and later the Illinois Supreme Court ruled that the anticipation of a hostile audience did not justify the city's attempt at prior restraint.

In a case arising out of the same incident, *Collin v. Smith,* 578 F.2d 1197 (7th Cir. 1978), certiorari denied, 439 U.S. 916 (1978), in which the Nazi Party successfully challenged Skokie city ordinances restricting the message and costumes of demonstrators, the U.S. District Court questioned the constitutional validity of restricting speech on the basis of its tendency to induce violence, a decision the Seventh Circuit Court of Appeals affirmed.

Although it remains unknown whether these lower-court decisions presage a U.S. Supreme Court viewpoint, it is difficult to imagine a more clear-cut example of hostile audience and civil disorder than the Skokie experience presented.

John C. Knechtle

See also: Cantwell v. Connecticut; Clear and Present Danger; Fighting Words; First Amendment; Gravity-of-the-Evil Test; Hate Speech; Time, Place, and Manner Restrictions.

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Hot Pursuit

"Hot pursuit" is one of the exceptions to the requirement that government agents need a warrant to conduct a search or seizure, pursuant to the Fourth Amendment to the U.S. Constitution.

The Fourth Amendment specifies that in order to conduct a search or seizure there must be two elements present: probable cause and a warrant. Although the application of the warrant requirement appears rather simple, there are circumstances in which the "exigencies of the situation" permit a search and seizure without the presence of a warrant. Hot pursuit is one such exception to this requirement. The hot-pursuit exception, though mentioned in *Johnson v. United States,* 333 U.S. 68 (1947), was first applied in *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294 (1967), in which the Court created the principle that police chasing a fleeing suspect, for example, or coming upon evidence of a just-completed crime, are faced with such extreme circumstances (suspect escaping, evidence disappearing) that it would be unreasonable to expect police to stand down from the situation and take the time to apply to a court for a warrant. From these cases it is evident that the goal of this exception is to recognize that there are certain situations in which it is not feasible for the police to obtain a warrant. The U.S. Supreme Court has recognized the hot-pursuit exception, as well as other exceptions, but such exceptions are not limitless. Central to determining whether an exception applies is an examination of the exigency of the situation and the gravity of the circumstances.

Johnson v. United States did not involve hot pursuit of a suspect but rather the search of a hotel room where there was alleged drug use. The Court addressed what types of circumstances would qualify for exemption from the warrant requirement. The Supreme Court acknowledged that a warrant was necessary in *Johnson,* but noted there indeed could be "exceptional circumstances" in which a warrant would not be required. Such circumstances include instances where a suspect was fleeing or likely to take flight; when the search is of a movable vehicle; or when there is potential for evidence being removed or destroyed. Without the presence of such exceptional circumstances, a search without a warrant cannot be justified.

In *Hayden,* the Court applied the hot-pursuit exception but simultaneously placed limits on its use. This 1967 case involved the armed robbery of a Baltimore cab company after which the perpetrator fled. Upon witnessing the incident, two cab drivers followed him, whereupon the perpetrator entered a house. The cab drivers notified the police of the location of the individual. The police arrived immediately and entered the house without a warrant. They searched the house and apprehended the individual as well as weapons and clothing belonging to him. He later challenged the search of his home and the admissibility of the evidence obtained from it.

The Court ruled that the search was valid even though a warrant was absent, because the "exigencies" of the situation deemed it necessary for the police to act quickly: "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others" and could potentially result in a loss of evidence. Although the Court acknowledged and applied the hot-pursuit exception, the decision cannot be interpreted as granting the police carte blanche to conduct searches in light of such exigent circumstances. The Court specifically noted that in order for a warrantless search to be justified on the grounds of hot pursuit, probable cause must also be present, and there must be relatively little time between the crime and the warrantless search.

The *Hayden* decision was subsequently upheld in *United States v. Santana,* 427 U.S. 38 (1976), a case involving an undercover drug operation. When law enforcement attempted to apprehend "Mom" Santana, who had been suspected of selling drugs, she quickly retreated into her home. Citing *Hayden,* the Court concluded this was a "true hot pursuit," for there was a need to act quickly in order to prevent the destruction of evidence. In rendering this decision, however, the Court slightly amended the definition of hot pursuit. The police initially sought to apprehend Santana in public, but she *quickly* retreated to her home, a private area where there would be a greater expectation of privacy. Although the Court recognized that the term "hot pursuit" definitely implied some sort of chase, the pursuit "need not be an extended hue and cry 'in and about the public streets.' "

Although exigent circumstances are certainly grounds for the application of the hot-pursuit exception, the Court in *Welsh v. Wisconsin,* 466 U.S. 740 (1984), pointed out that other elements also must be considered. On a rainy evening in 1978, Randy Jablonic witnessed a car being driven rather erratically. Eventually the car swerved off the road, whereupon the driver, Edward Welsh, exited the vehicle and asked Jablonic for a ride home. Jablonic advised Welsh to remain there until the police arrived, but Welsh decided to leave the scene. Moments later the police arrived, and Jablonic informed them that the driver was either ill or inebriated. The police then searched for the vehicle registration in order to obtain Welsh's address and search his home. Without a warrant the police entered the home and found Welsh lying naked in bed, then placed him under arrest for driving while intoxicated. Taken to the police station, he refused to take a breath-analysis test. Welsh later challenged the entry of the police into his home, arguing that the police could not make a warrantless entry into his home for a nonjailable traffic offense. The state argued that the entry occurred during a hot pursuit in which they were seeking to prevent a loss of evidence (the results of the breath-analysis test) and seeking to protect the public from drunk drivers.

The Supreme Court rejected the state's contention, stating that before government agents enter a home without a warrant, they must demonstrate exigent circumstances. In order to make such a showing, however, the gravity of the underlying offense must also be considered. The *Welsh* case involved no serious crime but only a traffic offense in which "there was no immediate or continuous pursuit of the petitioner." Although the Court found no hot pursuit involved, the justices noted that in instances of minor offenses, such as Welsh's traffic violation, the application of the hot-pursuit exception should "rarely be sanctioned."

The Supreme Court has consistently noted that under the Fourth Amendment, searches and seizures within a person's home, absent a warrant, are "presumptively unreasonable." This underlying principle is one reason the Court has applied warrant exceptions sparingly. Exceptions to the warrant requirement, especially the hot-pursuit exception, are "few in number and carefully delineated," the Court noted in *Welsh.*

Sheryl D. Fisch

See also: Exclusionary Rule; Search; Search Warrants.

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House Un-American Activities Committee

During the height of Cold War fears about subversive activities of Communists in the United States, the House Un-American Activities Committee (HUAC) conducted highly publicized hearings to expose the Communist ties of individuals in public employment, education, labor unions, and other influential fields. For individuals brought before the committee, the hearings sometimes led to ostracism, loss of employment, and even criminal prosecution. The activities of HUAC raised serious civil liberties issues because they damaged the lives and careers of individuals based on their political associations and beliefs, fundamental liberties pursuant to the First Amendment to the U.S. Constitution.

By House resolution in 1938, Congress established the Special Committee on Un-American Activities under the leadership of Rep. Martin Dies Jr. (D-TX). (The committee's name was later changed to produce the more easily pronounced acronym HUAC.) After repeatedly renewing HUAC, the House finally converted it to a standing (permanent) committee in 1945. Although HUAC's creation was motivated largely by concerns over subversive activities in support of the Nazis, the focus shifted to anticommunism in the wake of World War II and the emergence of the Cold War. Based on fear that numerous Ameri-

Hollywood screenwriters and directors enter federal court in Washington, D.C., to face trial on charges of contempt of Congress for their defiance of the House Un-American Activities Committee, 1950. *(AP/Wide World Photos)*

cans were working on behalf of international forces of communism to overthrow the U.S. government, the HUAC hearings sought to expose individuals with ties to the Communist Party.

HUAC's best-known activities took place during a time when anticommunism was a dominant concern in U.S. politics. With the defeat of the Axis powers in 1945, the wartime alliance with the Soviet Union gave way to tension and hostility between what had become the world's only two superpowers. Communists had been feared even before the Bolshevik Revolution of 1917 in Russia, but events in the years following World War II raised the stakes dramatically. Stalin's Soviet Union imposed police states throughout Eastern Europe, including Poland, Czechoslovakia, and East Germany, and supported Communist forces in the Greek Civil War. When the USSR demonstrated its nuclear capacity in 1949, far earlier than U.S. intelligence had anticipated, the revelation heightened concerns over Soviet military designs, and the impression grew that American spies had betrayed U.S. nuclear secrets. Chinese intervention in the Korean War on the side of the North in 1950 furthered the sense that a far-reaching international Communist coalition sought to overrun democratic societies around the world. There was also a belief among many Americans that Communists within the United States posed a severe threat to national security. This belief was reinforced by the high-profile conviction of Alger Hiss for perjuring himself before HUAC while answering questions about his alleged espionage and by the convictions of Ethel and Julius Rosenberg for conspiring to pass U.S. atomic secrets to the Soviet Union.

In this political context, a number of policies were developed, at both the state and federal levels, to combat the threat of domestic communism, including the requirement of loyalty oaths for positions in public employment and some professions, which required individuals to swear that they had never been members of a Communist organization. In addition, the Smith Act of 1940 was employed to prosecute leaders of the Communist Party for advocating the violent overthrow of the U.S. government, and Congress passed new anti-Communist legislation, including the McCarran Internal Security Act of 1950, which required Communist organizations to register the names of members and contributors with the Subversive Activities Control Board.

Enlisting legislative committees to conduct investigative hearings was another element of the governmental strategy to root out domestic communism, and HUAC was not the only committee active in this regard. Senator Joseph McCarthy (R-WI), for example, used his chairmanship of the Senate Permanent Subcommittee on Investigations, of the Senate Committee on Governmental Operations, to make accusations of Communist influence in the executive branch and the U.S. Army. Relying on its subpoena power, HUAC compelled suspected Communists to appear and interrogated them about their ties to Communist organizations and about the political activities of their friends and acquaintances. Witnesses before the committee were faced with several alternatives, each raising moral and legal dilemmas. An admission of membership, past or present, in Communist organizations could lead to ostracism and blacklisting, which effectively blocked employment in certain professions. The mechanism by which HUAC permitted witnesses to demonstrate remorse was for them to provide the names of others involved in Communist activities, which some critics viewed as an unconscionable act of collaboration. Witnesses who refused to testify on the grounds of the Fifth Amendment privilege against self-incrimination avoided legal censure, but because this was widely perceived as a tacit admission of guilt, these individuals subjected themselves to the label of "Fifth Amendment Communist" and to many of the same reprisals visited upon those who openly confessed Communist activity. On the other hand, witnesses who claimed First Amendment protection, or who refused entirely to cooperate, could be criminally charged with contempt of Congress. Indeed, this was the fate of the so-called Hollywood Ten, notable actors, writers, and directors who refused on First Amendment grounds to cooperate with HUAC's investigation of Communist ties of their Hollywood colleagues.

HUAC's activities were challenged as violations of civil liberties on a number of grounds. The committee's mandate was to consider legislation addressing the Communist menace, but its hearings took on aspects of court proceedings, yet without affording all of the rights guaranteed to the accused in criminal trials. The committee, for example, could make vague accusations, based on past or former political associations, without allowing witnesses the opportunity to offer evidence on their own behalf or to cross-examine the witnesses against them.

In its earliest reviews of HUAC's activities and other Cold War–era policies targeting individuals for Communist associations, the Supreme Court generally upheld the government's actions. In *Dennis v. United States,* 341 U.S. 494 (1951), for example, the Court left undisturbed the Smith Act convictions of eleven Communist Party leaders, and in *Barsky v. Board of Regents,* 347 U.S. 442 (1954), it upheld New York's termination of a college professor who had refused to cooperate with HUAC. In a series of cases in 1956 and 1957, culminating in four decisions issued June 17, 1957 (referred to by opponents as "Red Monday"), however, the Court sided with parties challenging anti-Communist policies. Thus, for the first time, in *Watkins v. United States,* 354 U.S. 178 (1957), the Court questioned the scope of HUAC's investigative power, overturning the contempt conviction of a recalcitrant HUAC witness. The Court's interference was heavily criticized, and the justices retreated for some time, upholding the prison sentence of a Smith Act defendant as late as 1961. After 1962, however, the Court indicated in a series of cases that it would no longer tolerate prosecutions based on individuals' refusal to testify to legislative committees about Communist associations. In *Brandenburg v. Ohio,* 395 U.S. 444 (1969), the Court unanimously adopted an understanding of the First Amendment

that clearly protected the advocacy of political ideas, sharply distinguishing mere advocacy from the incitement of imminent lawless activity.

Although the House, after changing HUAC's name to the Committee on Internal Security in 1969, abolished it in 1975, the committee's activities remain controversial today, as highlighted by the dispute over Elia Kazan's lifetime achievement award at the 1999 Academy Awards ceremony. Unlike many of his colleagues during HUAC's heyday, Kazan chose to cooperate with the committee, providing the names of other Hollywood figures who had been members of the Communist Party. Hundreds staged demonstrations against the award, protesting the honoring of a man who had turned on his friends rather than stand up for artistic freedom. The activities of HUAC are sometimes cited as an example of the danger posed to civil liberties by overly aggressive governmental reactions to security threats. In the midst of the U.S. response to the September 11, 2001, terrorist attacks on New York City and Washington, D.C., the anti-Communist policies of the Cold War era stood as a historical reminder of the challenges involved in seeking to protect national security while also continuing to protect cherished individual freedoms.

Stephen A. Simon

See also: Brandenburg v. Ohio; Congress and Civil Liberties; Congressional Investigations; *Dennis v. United States;* Fifth Amendment and Self-Incrimination; First Amendment; Loyalty Oaths; McCarran Act; McCarthy, Joseph; McCarthyism; Red Scare; Smith Act Cases; Subversive Speech.

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Hughes, Charles Evans (1862–1948)

Charles Evans Hughes had a long career that included service both in elected office and as a U.S. Supreme Court justice. A man of great probity, who was often called upon to deal with issues related to civil rights and liberties, Hughes has the distinction of being the only member of the Court to serve two separate terms as a justice.

Born in New York in 1862, Hughes was a precocious child who graduated from Brown University and was first in his class at Columbia Law School. After work in private practice and as a law professor at Cornell, Hughes conducted highly successful investigations of gas and electricity pricing and of the insurance industry in New York.

Hughes's political career began when he was elected the Republican governor of New York in 1906, defeating William Randolph Hearst, and became a close friend of President Theodore Roosevelt. The popular Hughes was a progressive Republican at the time, seen as more liberal during his two terms as governor than the then-sitting president, William Howard Taft. Concerned that Hughes was a potential Republican challenger for the presidency, Taft appointed Hughes to be an associate justice of the Supreme Court in 1910. Hughes's first term on the Court lasted six years. His most important decision of this period was about transportation pricing in the *Shreveport Rate Cases,* 234 U.S. 342 (1914), covering the companion cases of *Houston, East and West Texas Railway Co. v. United States* and *Texas and Pacific Railway Co. v. United States.* In *Shreveport,* Hughes ruled that the federal government could use the Commerce Clause to regulate intrastate commerce—commerce within a state—if that intrastate commerce had an effect on interstate commerce. This case opened the door to greater federal regulation of railroads by the federal Interstate Commerce Commission.

Hughes resigned from the Court in summer 1916 to accept the Republican presidential nomination. He was the only sitting justice ever to be nominated for president. After losing a close election to Woodrow Wilson in November 1916, Hughes was out of office

Chief Justice Charles Evans Hughes with his wife and daughter. During Hughes's tenure as chief justice, the Supreme Court had a mixed record in the protection of individual rights. *(Library of Congress)*

for four years. But in 1921 he was appointed secretary of state by President Warren Harding. In this capacity, he negotiated the terms of the 1922 Washington Naval Conference that limited the navies of the United States, Japan, and Great Britain. After resigning in 1925, he returned to private legal practice.

In 1930, Chief Justice William Howard Taft resigned, and President Herbert Hoover appointed Hughes to the vacancy. Hughes took over a Court divided by both ideology and personal disagreements. In addition, he faced a constitutional crisis in 1936 and 1937 when President Franklin D. Roosevelt sought to pack the Court by increasing its size. It was during his term as chief justice that Hughes wrote his most important decisions and likely saved the Supreme Court from destruction by an angry president.

The conflict between the justices and the president centered on Roosevelt's New Deal and the programs he created to end the Great Depression. The New Deal was the first time the federal government attempted to run the economy using its powers to regulate interstate commerce, tax, spend, and coin money. Congress passed these laws swiftly, but they ran afoul of the justices' interpretation of congressional powers.

Hughes was seen as a swing justice on the Court, moving between the three more liberal justices, Louis D. Brandeis, Benjamin N. Cardozo, and Harlan F. Stone, and the four more conservative justices, Pierce Butler, James C. McReynolds, George Sutherland, and Willis Van DeVanter. Hughes's vote usually determined which side won. In 1935 he wrote the opinion in the *Gold Clause Cases*—the combined cases of *Norman v. Baltimore and Ohio Railroad Co.,* 294 U.S. 240 (1935), and *Perry v. United States,* 294 U.S. 330 (1935)—that upheld the right of the government to take the United States off the gold standard and made it illegal for people to own gold. In 1936, Hughes authored the opinion in *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 (1936), upholding that agency as constitutional.

At the same time, Hughes wrote opinions striking down New Deal laws. In *A. L. A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935), Hughes struck down the National Recovery Administration's (NRA) attempt to regulate the buying and selling of chickens. He ruled that such activities fell outside the power of Congress to regulate commerce or trade between or among the states. In addition, he ruled that the NRA delegated too much congressional power to the president without proper standards. Hughes wrote the opinion in *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935), which also struck down part of the NRA allowing the president to determine the amount of gasoline and oil transported across state lines.

These decisions rejecting major portions of the New Deal brought down the wrath of the president on the justices. After his reelection in 1936, Roosevelt offered a "Court reform" bill, which would have increased the size of the Supreme Court to fifteen in a supposed effort to make the Court more efficient. Hughes and others saw it as a Court-packing plan, intended to fill the Court with Roosevelt supporters who would rubber-stamp the president's policies.

Working with the president's opponents in Congress, Hughes presented evidence that the Court was deciding cases at a rapid pace and that additional justices would only slow the Court's work. He also produced a letter signed by the most liberal and the most conservative members of the Court disagreeing with the president's Court "reform" plans. These arguments were used by opponents of the plan in Congress to hand Roosevelt a defeat. Yet in the long term Roosevelt won, and between 1937 and 1941, he was able to replace six justices because of retirement or death.

But even with these new justices who disagreed with Hughes's politics, the chief justice remained the dominant figure on the Court. He controlled the justices' weekly conferences, ensuring that all members were able to state their opinion without interruption and then make a decision without unnecessary rancor among them. Hughes was able to influence the more liberal Roosevelt appointees in their votes. Thus, in *Stromberg v. California,* 283 U.S. 359 (1931), the Court struck down a conviction for displaying a red flag; in *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337 (1938), Hughes mandated that Missouri provide law school education for its African American citizens; in *Near v. Minnesota,* 283 U.S. 697 (1931), he authored a decision establishing a strong presumption against prior restraint of a scurrilous state newspaper; and in *Lovell v. City of Griffin,* 303 U.S. 444 (1938), he overturned a city ordinance that required Jehovah's Witnesses to obtain a permit before they distributed literature. In one of the last decisions in which he participated, *Minersville School District v. Gobitis,* 310 U.S. 586 (1940), Hughes joined the Court in upholding a state requirement that students salute the flag. After he left the Court, however, that decision was overturned under his successor, Chief Justice Harlan Fiske Stone.

Chief Justice Hughes retired in spring 1941 and lived the remainder of his life quietly, remaining out of politics until he died in 1948.

Douglas Clouatre

See also: Court-Packing Plan; *Near v. Minnesota; Stromberg v. California.*

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Hunter v. Underwood (1985)

In *Hunter v. Underwood,* 471 U.S. 222 (1985), the U.S. Supreme Court held that laws barring convicts from voting, if the laws were enacted with clear discriminatory intent, may violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution. Beyond its significance in voting rights law, *Hunter* illustrates that the Court will sometimes find that what appear to be racially neutral laws instead violate the Constitution's ban on discrimination.

In *Hunter* the Court reviewed the permanent disenfranchisement of two Alabama men convicted of writing bad checks. The state considered that to be a crime of "moral turpitude" and therefore subject to loss of voting rights under section 182 of the Alabama Constitution of 1901. Alabama's 1875 constitution had barred from voting those convicted of any crime punishable by incarceration, but the 1901 constitution replaced that provision with a list of specific infractions. Moreover, any offense betraying "moral turpitude"—even if not punishable by jail time—would bring about disenfranchisement. The Court found explicitly discriminatory purposes behind that phrase.

After Reconstruction (1865–1877), the post–Civil War program that was intended to rebuild the South and bring it back into the Union, southern whites used a variety of schemes to prevent blacks from voting—grandfather clauses, literacy tests, poll taxes, white primaries—effectively circumventing the Fifteenth Amendment that prohibited voting discrimination on the basis of race. This obstructionist list is familiar to many Americans. What is less well known is that changes to laws disenfranchising criminals were also prominent features of the post-Reconstruction backlash, as new constitutions targeted infractions that whites believed blacks were more likely to commit. Previous suffrage laws excluding all felons, for exam-

ple, were sometimes narrowed to disenfranchise only those convicted of specified crimes such as vagrancy and bigamy—offenses made more common among blacks because of the dislocations of slavery.

The Court found that in Alabama, legislators had made their goals clear. "What is it we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State," said John B. Knox, president of the 1901 Alabama constitutional convention. The "moral turpitude" clause, the Court held, was adopted intentionally to disenfranchise blacks, would not have been included without that discriminatory purpose, and had achieved its intended effect. Indeed, a historian later hired by Alabama state registrars found that by January 1903, the revised constitution had disenfranchised about ten times as many blacks as whites.

A decade earlier, in *Richardson v. Ramirez,* 418 U.S. 24 (1974), the Court had held that laws barring convicts from voting were constitutional, and the *Hunter* Court explicitly declined to reconsider *Richardson.* Moreover, by striking down only that narrow portion of the Alabama law traceable to explicit racist intent, the Court allowed more broadly written provisions to stand, despite evidence that the sanction continued to have disproportionate impact on blacks in many states. Therefore, although *Hunter* did invalidate part of Alabama's disenfranchisement law, the ruling overall may further strengthen the policy against constitutional challenges. Nevertheless, *Hunter* held disenfranchisement law to the standards of the Equal Protection Clause—which the *Richardson* majority had conspicuously refused to do—and ruled that at least some forms of criminal disenfranchisement do violate the Constitution.

Alec C. Ewald

See also: Right to Vote.

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Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc. (1995)

In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.,* 515 U.S. 557 (1995), the U.S. Supreme Court grappled with a public-accommodations statute that, as applied by a court, pitted the right of free speech protected by the First Amendment to the U.S. Constitution against the right to equal protection under the Fourteenth Amendment.

John Hurley and the South Boston Allied War Veterans Council (Council) appealed the Supreme Judicial Court of Massachusetts ruling that their city-permitted Saint Patrick's Day Parade had no expressive purpose sufficient to justify a First Amendment exclusion of the Gay, Lesbian, and Bisexual Group (GLBG) members from marching to express their Irish heritage in pride as being openly gay, lesbian, or bisexual. At issue was the state supreme court's application of the state's public-accommodations law. The court order required private citizens who organized a parade to include among the marchers a group imparting a message that the organizers did not wish to impart. The U.S. Supreme Court ruled unanimously to reverse the state supreme court.

Justice David H. Souter wrote the Court's opinion. He explained that as a general matter the state law itself did not violate the First and Fourteenth Amendments. The state law prohibited "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." The Council claimed it did not intend to discriminate against homosexuals per se, but it opposed being coerced to include GLBG as a parade unit carrying a banner announcing gay pride as its message. The state supreme court applied the public-accommodations law in a peculiar way. It had the effect of declaring the organizers' speech itself to be the public accommodation, forcing them to alter the parade's expressive content and thereby violating the First Amendment rule that a speaker has the autonomy to choose the content of the message and decide what not to say.

Hurley is intriguing because no other gay-rights claim decided on its merits by the Court was unanimous. In *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), the justices cast a five–four vote in reversing a similar public-accommodations law applied by the New Jersey Supreme Court to prohibit the Boy Scouts from excluding a gay Eagle Scout. The dissenting opinion written by Justice John Paul Stevens, joined by Justices Souter, Ruth Bader Ginsburg, and Stephen G. Breyer, explained that *Hurley* was distinguishable from *Dale,* since the Boy Scouts conceded they were excluding James Dale, who had been a Scout since he was eight, because of his gay sexual orientation, and Dale was not seeking to express himself in the Scouts as gay-identified per se.

Hurley was the first gay-rights case the Court decided after *Bowers v. Hardwick,* 478 U.S. 186 (1986). In *Hardwick*—a decision subsequently reversed in *Lawrence v. Texas,* 539 U.S. 558 (2003)—the Court held five–four that a federal right of privacy did not void Georgia's felony ban on sodomy as applied against consenting adult homosexual partners in the home. The Court composition had changed significantly by the time it decided *Hurley.* The three holdovers were Chief Justice William H. Rehnquist and Justices Stevens and Sandra Day O'Connor. The newcomers were Justices Souter, Ginsburg, Breyer, Anthony M. Kennedy, Clarence Thomas, and Antonin Scalia.

Sharon G. Whitney

See also: Bowers v. Hardwick; Boy Scouts of America v. Dale; First Amendment.

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Hurtado v. California (1884)

In *Hurtado v. California,* 110 U.S. 516 (1884), the U.S. Supreme Court dealt with the issue of whether indictment by a grand jury, as provided in the Fifth Amendment to the U.S. Constitution, was a provision that should be applied to the states as well as the federal government. Some states adopted alternative measures for bringing criminal charges against individuals. In *Hurtado,* California had a procedure under which the prosecutor brought charges by means of an "information."

Joseph Hurtado and wife Susie lived in Sacramento, California. Susie and Jose Estuardo began an affair that Joseph quickly discovered. Hurtado acted to end the affair, but Estuardo persisted in his pursuit of Susie. In light of this, Hurtado approached Estuardo in the street and shot him three times at close range. Hurtado was charged with murder. It was common practice in several states at the time to use a grand jury hearing before the accused was sent to trial, but under the California constitution of 1879, Hurtado's trial was initiated via an "information" (a document issued by a prosecutor that officially charges an individual with a crime).

Based on the information document, Hurtado was tried, convicted, and sentenced to death. He appealed to the California Supreme Court, which affirmed his sentence. Hurtado's counsel later argued that either the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment should be interpreted so as to apply (incorporate) to the states the Fifth Amendment protection of a grand jury hearing. Upon losing this argument at California's high court, he appealed to the U.S. Supreme Court.

At the Supreme Court, Hurtado's counsel abandoned the argument for incorporation through the Privileges or Immunities Clause, because it was established precedent that this clause failed to apply the Bill of Rights to the states, as the Court had held in the *Slaughterhouse Cases,* 83 U.S. 36 (1873). In *Hurtado,* decided March 3, 1884, the Court continued its refusal to nationalize the Bill of Rights via the Fourteenth Amendment. In an opinion penned by Justice Stanley Matthews, the Court argued that the two Due Process Clauses in the Fifth and Fourteenth Amendments had the same meaning. This precluded the possibility that the Fourteenth Amendment clause could include the right to indictment by a grand jury. Moreover, the Supreme Court held that the Constitution

could not be understood to freeze all traditional common law procedures (including the right to trial by jury) and force the states to adopt these traditions. However, the Court did recognize that certain rights could be so fundamental to a democracy that they should be placed beyond incursion by the states.

The setback for incorporation of the Bill of Rights should not be understated. The Court's decision in *Hurtado* seemed to sound the death knell for incorporation of the Bill of Rights via the Fourteenth Amendment's Due Process Clause, just as the *Slaughterhouse Cases* had terminated the viability of the Privileges or Immunities Clause. Indeed, it took the Court another thirteen years to incorporate any of the Bill of Rights to the states, when the Court in *Chicago, Burlington, and Quincy Railroad Co. v. Chicago,* 166 U.S. 226 (1897), applied against the states the Fifth Amendment protection of compensation for taking of private property. Moreover, it was not until 1925 that any traditional civil liberties, such as freedom of speech and press, were incorporated to apply to the states.

Perhaps the most important protection of civil liberties to stem from *Hurtado* was Justice John Marshall Harlan's assertion that all of the rights protected in the first eight amendments should have been incorporated via the Due Process Clause. This doctrine, which became known as "total incorporation," was prescient in that most of the Bill of Rights subsequently was incorporated to apply to the states through the Fourteenth Amendment's Due Process Clause.

Tobias T. Gibson

See also: Grand Jury; Incorporation Doctrine; Selective Incorporation; *Slaughterhouse Cases.*

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Hustler Magazine, Inc. v. Falwell (1988)

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), arose after *Hustler* magazine ran an advertising parody that featured the likeness of the Reverend Jerry Falwell, although the U.S. Supreme Court ultimately ruled such a parody was protected by the First Amendment to the Constitution. At issue in the case were free speech rights as provided in that amendment.

A typical *Hustler* issue featured provocative photographs of nude women as well as adult-oriented jokes, articles, and stories. Falwell was a nationally known and politically active conservative. A frequent political commentator, he founded the Moral Majority, a political action committee. The advertising parody imitated an ad campaign of Campari, an Italian apertif. The genuine Campari ad campaign featured celebrities discussing their "first time" in a double-entendre-filled interview, with the "first time" ultimately revealed as being their first drink of Campari. The parody was a mock interview of Falwell in which he disclosed he lost his virginity to his mother in an outhouse while both were drunk on Campari and that he always got drunk before he preached.

Falwell sued both the *Hustler* magazine corporation and its publisher, Larry Flynt, for $45 million in federal district court, alleging libel and intentional infliction of emotional distress. Using an edited version of the ad, Falwell solicited and received over $700,000 for his legal fund. Interestingly, Falwell hired as his attorney Norman Ray Grutman, who was most well known at the time for his representation of *Penthouse* magazine and its publisher, Bob Guccione. The jury held against Falwell on the libel charge, finding the ad could not be reasonably believed as describing actual events, but found for Falwell on the claim for intentional infliction of emotional distress. Falwell was awarded $200,000 evenly split between compensatory and punitive damages.

The federal appellate court affirmed the trial court's judgment, rejecting the contention of *Hustler* and Flynt that Falwell would have to meet the "actual malice" standard of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), before he could recover for emo-

tional distress. The appellate court also discounted as irrelevant the argument that because the jury determined the ad did not describe actual events, it was an opinion protected by the First Amendment to the U.S. Constitution.

At oral arguments, the U.S. Supreme Court had only eight sitting justices, as Anthony M. Kennedy was still in the confirmation process. Allan Isaacman, the attorney for *Hustler* and Flynt, stressed to the Court that there was a public interest in allowing the parody of public figures. Isaacman argued that politicians in the United States, from George Washington forward, had always been subjected to vigorous satire, ridicule, and parody. The eight-member Court ruled unanimously that the ad parody could not be the basis of an award for damages arising out of emotional distress. The Court grounded its decision in the First Amendment to the Constitution as incorporated to apply to the states through the Fourteenth Amendment. In essence, the Court determined that whatever interest the state had in protecting public figures from emotional distress was not sufficient to deny the protection of freedom of expression even when the expression was intended to cause distress. Since nothing in the ad parody reasonably could be construed as true, or even possibly true, it could not be the basis for an award of damages.

Charles Anthony Smith

See also: First Amendment; Libel; *New York Times Co. v. Sullivan;* Right to Privacy.

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I

Illinois v. Gates (1983)

The Fourth Amendment to the U.S. Constitution requires that no search or arrest warrants be issued without "probable cause"—anything causing a reasonable and prudent person to believe a criminal act has been, is being, or is about to be committed. Ordinarily, two persons are required to verify probable cause, a law enforcement officer and a neutral, detached magistrate who will issue the warrants. When officers gain information visually or directly from an informant, probable cause is much easier to establish. An anonymous tip, however, must meet the two-pronged test under *Aguilar v. Texas,* 378 U.S. 108 (1964), as further developed in *Spinelli v. United States,* 393 U.S. 410 (1969), which requires that the tip provide an adequate basis for the tipster's knowledge and either the truthfulness of the tipster or the reliability of the information provided by the informant. The U.S. Supreme Court further developed the issue of anonymity in *Illinois v. Gates,* 462 U.S. 213 (1983).

Illinois v. Gates began when Bloomington, Illinois, police received an anonymous letter containing detailed information about the interstate drug trafficking enterprise of Susan and Lance Gates. The letter stated that a one-way ticket was purchased between Chicago and West Palm Beach, Florida. One spouse would be met by the other, drugs loaded, and the contraband driven to Bloomington for resale. Anonymity made it impossible to fulfill either prong of the *Aguilar-Spinelli* test.

Officers received corroborating information, however, from a security guard at O'Hare airport that Lance Gates had booked a one-way flight to West Palm Beach. Furthermore, O'Hare security informed the officers that Gates did board the flight, and federal officers in Florida confirmed that Gates had been seen deplaning in West Palm Beach and taking a taxi to a motel, where a room was registered in the name of Susan Gates. The next morning, Lance and Susan Gates left in a vehicle bearing Illinois plates assigned to another vehicle, driving north on the route typically used by travelers to the Chicago area. Based upon this information, the Bloomington police obtained search warrants for the couple's house and vehicle. When the couple arrived, they were served with the warrants; officers searched the car and house and recovered large quantities of contraband from each.

The U.S. Supreme Court agreed with the Illinois Supreme Court's ruling that the anonymous letter alone provided no basis for a magistrate to find probable cause. However, when the veracity and reliability of the information contained in the tip were corroborated by the observing security officer at O'Hare and the federal officers in Florida, the totality of the circumstances made the warrants valid, thereby making the contraband fully admissible as evidence. The court stated, "[T]he deficiency in one prong may be offset by a stronger than usual set of information in the other prong, thereby meeting the Fourth Amendment requirements."

Gates created an exception to the *Aguilar-Spinelli* test when anonymous tips are involved and when a magistrate uses common sense in reviewing the application and accompanying affidavits prior to issuing the warrant. If the magistrate can determine that the officers acted upon a sound factual basis, then it is prudent to allow the totality of the circumstances to establish probable cause.

Sam W. McKinstry

See also: Aguilar v. Texas; Search Warrants; Totality-of-Circumstances Test.

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U.S. Constitution, Fourth Amendment.

Immigration Law

Immigration law refers to the rules that determine who may enter the United States, when and under

what conditions, and for what purposes, such as to visit, to work, or to become a citizen. Immigration law has a significant impact upon the individual rights of aliens (resident noncitizens in the United States).

The United States is a nation of immigrants. Except for native American Indians, people in the United States can trace their ancestry to immigrants who left another country to come to America. Like every other country in the world, the United States does not simply let people cross its borders. Rather, the federal government establishes rules regarding who may enter, when, and for what purposes. These same rules also determine under what circumstances individuals may become citizens, and generally what rights immigrants have in the United States prior to gaining citizenship status.

The Constitution reserves immigration policy solely to the province of Congress and the federal government. Throughout history, Congress has adopted a variety of rules regarding who could enter the country. Early laws denied entrance to criminals, prostitutes, those with infectious diseases, and some poor individuals. Later, the Chinese Exclusion Act of 1882 discriminated against people from China, making it difficult for them to gain entry. The Immigration Act of 1924 created a permanent quota system that aimed to reduce immigration to the United States by placing limits on the number of people from each country who could enter. Quotas remained a central feature of U.S. immigration policy until the mid-1960s.

The 1952 Immigration and Nationality Act (INA), as amended in 1965, abolished the national-origin provisions and quota system, replacing it with a worldwide quota system intended to be "blind" to the national origin of the applicant. Yet tensions and anti-immigrant sentiments in the 1970s and 1980s led Congress to enact the Immigration Reform and Control Act of 1986 (IRCA). The IRCA strengthened sanctions for employers of those who entered the United States illegally (thus the name "illegal aliens"). Subsequent to IRCA, additional legislation in 1986, 1990, 2000, and after the terrorist attacks of September 11, 2001, sought to restrict or refine who may enter the country.

In general, individuals who wish to visit the United States but not emigrate or permanently move to the country need only to obtain a visa from a U.S. embassy. There are eighteen classes of nonimmigrant visas, such as for students, the media, and ambassadors. In contrast, obtaining immigration visas is more difficult and a lengthier process, years in some cases. Individuals seeking immigration visas and entry into the United States may be accepted if they have relatives in the country or, more narrowly, if they wish to secure employment. Finally, there is a classification that grants people the right to move to the United States for humanitarian reasons. War refugees, or those seeking political asylum because of a well-founded fear of political persecution, may also be granted visas and the right to emigrate to the United States.

Immigrants who arrive in the United States do not become citizens immediately. Thus, they do not enjoy the full spectrum of constitutional rights that benefit citizens, and they are subject to a host of restrictions regarding employment and other activities. For example, although they are not required to do so, most communities deny voting rights to those who are not yet citizens. In addition, immigrants who violate the terms of their visa are subject to deportation.

Immigrants are often persecuted or discriminated against for numerous reasons. During the 1930s and 1940s, immigrants suspected of being Communists either were prevented from entering the country or were persecuted if they were already in the United States. For example, Charlie Chaplin, the great silent-movie star who was an immigrant, was subject to investigation by the House Un-American Activities Committee during the 1930s because he was suspected of being a Communist sympathizer. When he left the United States temporarily, he was subsequently denied a reentry visa. During World War II, Japanese Americans were suspected of being disloyal to the nation, and over 125,000 of them were forcibly relocated to detention camps around the country. This practice was upheld in *Korematsu v. United States,* 323 U.S. 214 (1944), although many scholars contend that such a practice would not be considered constitutional if done today.

In some cases, immigrants or aliens are also easy to exploit, especially if they do not know their rights, do not speak English, or are in the United States illegally. For example, in *Plyler v. Doe,* 457 U.S. 202 (1982), the U.S. Supreme Court struck down a Texas law that denied public education for children of illegal or un-

documented aliens. The Court ruled that the Equal Protection Clause of the Fourteenth Amendment extended its protections to any person and not only to citizens. In *Zadvydas v. Davis,* 533 U.S. 678 (2001), the Court also extended habeas corpus review (petition for unlawful confinement) to individuals being held in custody awaiting deportation from the United States. Cases such as *Plyler* and *Zadvydas* indicate that even though immigrants are not full citizens, they are entitled to most of the protections of the Constitution and the Bill of Rights that citizens enjoy.

Dale Mineshima and David Schultz

See also: Rights of Aliens; United States Constitution; *Zadvydas v. Davis.*

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Immunity

The right of immunity exempts a U.S. citizen from liability imposed by criminal or civil law. Immunity is most often cited as a Fifth Amendment protection against being compelled to be a witness against oneself in a criminal case. In addition, Article IV of the Constitution provides that each state's citizens are "entitled to all privileges and immunities of citizens in the several states," and the Fourteenth Amendment prohibits states from abridging the "privileges or immunities of citizens of the United States."

In some criminal proceedings, plea bargains may be negotiated between a defendant and the prosecution in return for the defendant's testimony; indeed, defendants who are immunized and still refuse to testify can be found in contempt of court. The prosecution may grant either "transactional" immunity or "use" immunity. The first is broader and is sometimes called "complete immunity." If transactional immunity is awarded, the defendant cannot be prosecuted for any aspect of the claimed criminal act. By contrast, when use immunity is invoked in return for the testimony of the defendant or a witness, that testimony cannot be used against that individual or any accomplice for a criminal act that was unknown to the prosecutor prior to immunity being granted.

"Images Removed Due to Copyright Issues"

In *Counselman v. Hitchcock,* 142 U.S. 547 (1892), the U.S. Supreme Court insisted that the privilege against self-incrimination must be interpreted broadly. Accordingly, no immunity statute could survive a constitutional challenge unless the government guaranteed the witness a blanket immunity from prosecution concerning the entire transaction. In requiring this transactional immunity, the Court said: "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect."

In the 1960s Congress adopted a new immunity statute (*U.S. Code,* Vol. 18, sec. 6003) that allowed the government to grant use immunity without forgoing all future prosecutions against immunized witnesses. In *Kastigar v. United States,* 406 U.S. 441 (1972), Justice Lewis F. Powell Jr. gave approval to the more limited use immunity. Arguing that the protection against prosecution should be commensurate with but no greater than the privilege against self-

incrimination, he ruled that an individual "is not constitutionally entitled to protection from prosecution for everything arising from the illegal transactions which his testimony concerns." Some states, however, continue to insist on the older, higher standard of transactional immunity.

In addition to the right of immunity available to citizens, immunity may also be extended to individuals because of their official status. Protection of government officials from lawsuits is known as "sovereign immunity." The concept was originally based on the claim that kings were immune to legal action. Thus, government officials and others in important positions should also be immune. U.S. senators and representatives enjoy the right of immunity during their attendance at legislative sessions. Legislators are immune from criminal arrest as well as from civil liability for statements made during legislative speeches and debate. Similarly, presiding judges cannot be charged with civil or criminal libel for judgments rendered in court cases. Finally, officials of other governments are extended immunity for their actions in the United States under a doctrine known as "diplomatic immunity."

Many people strongly oppose the right of sovereign immunity, believing that it shifts the responsibility for unlawful actions from government officials or special groups to ordinary citizens and taxpayers and thus constitutes a direct violation of their civil liberties. Government officials refute this idea by claiming that whenever a taxpayer sues a government official, it is actually the general taxpayers who are being sued. Among special groups, the gun lobby in the United States has tried to obtain legal immunity from civil liability for the firearms industry, including gun makers and gun dealers. Many legislators, however, believe that gun manufacturers and sellers must be liable for their actions in order to protect the liberties of the innocent victims of firearms abuse.

Alvin K. Benson and David T. Harold

See also: Contempt Powers; Fifth Amendment and Self-Incrimination; Fundamental Rights; Plea Bargaining; Trial by Jury; Victims' Rights.

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Implied Powers

In addition to express powers, the federal government has implied powers that provide it with the potential to intrude upon individual civil liberties. This system stems from the Constitution, which created a federal government designed to be strong enough to govern as necessary, something the Articles of Confederation could not do, but to have limited powers so that it would be no stronger than necessary. By separating powers into three distinct branches of government and providing for checks and balances among them, the framers of the Constitution thus limited the government's power in order to prevent tyranny from developing. Although the Constitution was limiting in nature, it also expressly granted the federal government powers. Those specified in the Constitution are known as "enumerated" powers, because they are an express conferral of power to the government. Powers neither explicitly delegated nor precluded by the Constitution fall within the government's "implied" powers.

Whether the federal government should have implied powers continues to be debated. For instance, in *United States v. Lopez,* 514 U.S. 549 (1995), Chief Justice William H. Rehnquist stated for the majority that "We start with first principles. The Constitution creates a government of enumerated powers." Notwithstanding, it seems that the framers intended the government to have more than only the powers enumerated in the Constitution. In *Federalist No. 44,* James Madison was explicit that the federal govern-

ment had implied powers, since the 1787 Constitutional Convention specifically excluded the provision from the Articles of Confederation that prohibited the exercise of federal power not expressly granted. "[T]here can be no doubt that all the particular powers, requisite as means of executing the general powers . . . resulted to the government by unavoidable implication." Chief Justice John Marshall upheld the idea that Congress had the implied power to establish a national bank in *McCulloch v. Maryland,* 17 U.S. 316 (1819). He ruled that the bank was a "necessary and proper" means to the implementation of other designated governmental powers.

The issue of implied powers can also be applied to the chief executive's broad authority in foreign affairs. The U.S. Supreme Court observed in *United States v. Curtiss-Wright Corp.,* 299 U.S. 304 (1936), that in matters involving international relations, the president has broad discretionary authority, such that his powers are not limited to those enumerated in the Constitution. That is, unless the president is precluded from exercising certain power, he has extensive implied, or inherent, power in foreign affairs.

The seminal *Curtiss-Wright* decision highlighted that the president's implied powers are particularly forceful when the country is at war, but it is during times of war that protection of civil liberties is most precarious. This became evident during World War II, when President Franklin D. Roosevelt issued an executive order shortly after the 1941 attack on Pearl Harbor that commanded anyone of Japanese ancestry within the United States to enter what have been variously referred to as "relocation camps," "exclusion camps," or "concentration camps" (hereafter, the "camps"). Consequently, all individuals of Japanese lineage, including U.S. citizens, were forced to abandon their homes to be confined in one of the camps. Interestingly, the president did not issue a similar order against people of German and Italian ancestry, although the United States also had declared war against their countries of origin. Thus, if the president had authority to deny citizens their liberty and property because the United States was at war with the nation of their forebears, if such authority existed it necessarily had to derive from his implied powers, because no such enumerated power exists.

The constitutionality of President Roosevelt's executive order also excluding Japanese Americans from certain designated zones was tested in the Supreme Court's infamous decision in *Korematsu v. United States,* 323 U.S. 214 (1944). Fred Korematsu, a U.S. citizen of Japanese ancestry, was convicted for not complying with the directive excluding him from the area of California where he lived. He argued that the presidential order was unconstitutional as being beyond the implied powers of the office, but the Court held that it was within the legitimate power of the president during times of war. Thus, any imposition on civil liberties was part of the hardships of war and the burden of citizenship. Justice Hugo L. Black's decision further asserted this was "nothing but an exclusion order" that had nothing to do with racial prejudice, even though he acknowledged that the order infringed the individual rights of one particular racial group.

The Supreme Court's decision in *Korematsu* came under criticism on both legal and moral grounds. As Justice Frank Murphy stated in dissent: "Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." The U.S. Supreme Court has refused to review, and has thus left in place, lower-court rulings that the decision in *Korematsu* was based on bad evidence, and Congress adopted legislation during President Ronald Reagan's administration compensating Japanese American victims of the incarceration order.

Like the powers of the president, any implied powers of Congress are limited by explicit constitutional prohibitions. Congress may still have broad authority to pass legislation that potentially limits individual liberties. That potential infringement was amply demonstrated by its passage of the Patriot Act shortly after the September 11, 2001, terrorist attacks in New York City and Washington, D.C., and the failed attempt in Pennsylvania. Whether the experiences of Japanese Americans during World War II will be repeated for Muslims or Arab Americans during the war on terrorism remains to be determined.

Mark S. Hurwitz

See also: Congress and Civil Liberties; *Korematsu v. United States;* President and Civil Liberties.

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In Forma Pauperis Petition

In forma pauperis is literally translated as "in the manner of a pauper." An *in forma pauperis* petition is used by indigent persons to bypass usual court protocol and fees, allowing them to appear in court, with or without an attorney, without having to pay court fees. The procedure and requirements for the petition are governed by federal (and in some cases state) statute (the pertinent federal law is *U.S. Code,* vol. 28, sec. 1915a). Currently, persons who have no tangible assets and have an income at or less than 125 percent of the poverty level are eligible to proceed *in forma pauperis.*

The basis for *in forma pauperis* proceedings is the idea of equality before the law. Because legal proceedings are a formal, complex, and highly specialized endeavor, legal representation is a great advantage when a person is involved in a case. In many ways, execution of a case is impossible without a lawyer. The disadvantage of being financially incapable of hiring a lawyer is therefore considered to be too great to overcome. The Sixth Amendment requires that defendants have a right to legal counsel and, in combination with the Fourteenth Amendment (which provides equal protection to all persons), provides the constitutional basis for ensuring that indigent individuals have access to a lawyer regardless of their ability to pay for representation. Congress and the courts have always supported this interpretation, though questions have arisen over the legal cases to which it applies.

In forma pauperis petitions are governed by U.S. Supreme Court Rule 53. This rule allows an impoverished person to file just one copy of the appeal. It instructs court staff to make allowances for minor errors as long as the substance of the appeal complies with court rules. In most cases, *in forma pauperis* petitions may also be handwritten.

Supreme Court Rule 53 and *in forma pauperis* petitions are almost always associated with the case of *Gideon v. Wainwright,* 372 U.S. 335 (1963). Clarence Earl Gideon not only managed a successful appeal to the Supreme Court through an *in forma pauperis* petition, but also changed the very definition of the term, greatly expanding the instances in which a person could proceed in such fashion and extending the procedure to all felony trials.

Today, legal assistance is extended in many civil cases as well as for serious criminal charges. Although federal funding for legal assistance is under tight budgetary constraints, the right to proceed *in forma pauperis* is not questioned.

Tim Hundsdorfer

See also: Gideon v. Wainwright; Movie Treatments of Civil Liberties.

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In God We Trust

Does use of "In God we trust" as the official motto of the United States violate the Establishment Clause of the First Amendment to the Constitution? Under that clause, the government cannot engage in any action that would constitute establishment of religion. Yet the reference to "God" in the motto raises issues of whether government is edging toward a religion-oriented credo.

The original national motto, *"E pluribus unum"* (From many one), was clearly secular. An act of Congress in 1837 had specified that the mottoes be placed on U.S. coins. In the 1860s, however, eleven Protes-

President Theodore Roosevelt disapproved of having the motto "In God we trust" on coins and similar displays. He felt it was irreverent and came dangerously close to sacrilege. *(National Archives)*

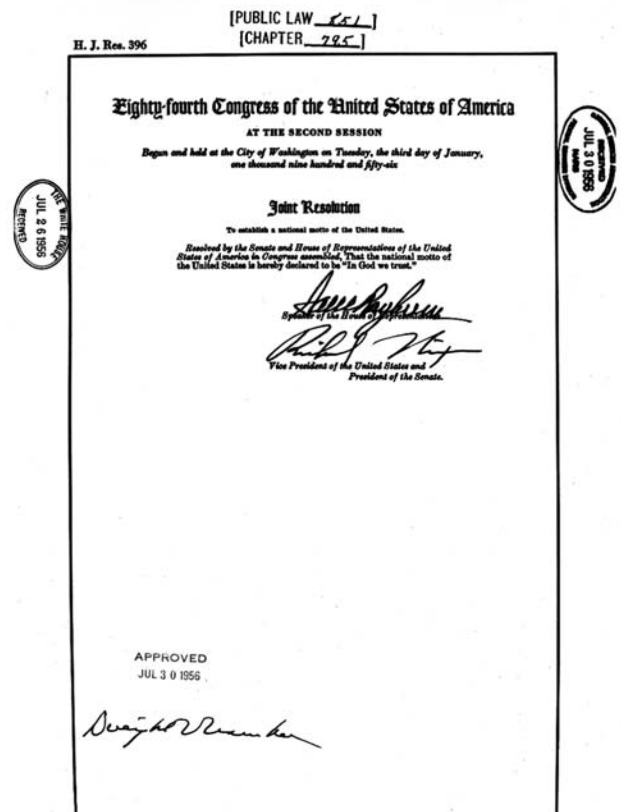
tant denominations under the umbrella of the National Reform Association (NRA) mounted a campaign to add references to God to the U.S. Constitution and other federal documents. Secretary of Treasury Salmon P. Chase was contacted. Former Pennsylvania governor James Pollock, one of the NRA leaders, was Chase's director of the Mint. Pollock made wording suggestions to Chase, who decided on "In God we trust." Congress in 1864 authorized this new motto for coins.

President Theodore Roosevelt disapproved of having such a motto on coins and similar displays. He felt it was irreverent and came dangerously close to sacrilege. His efforts to remove the motto from coins resulted in arousing the religious community, however, and Congress passed another resolution in 1908.

During the Cold War era of the 1950s, the federal government's references to God multiplied. "So help me God" was added to the oaths of federal judges, and the phrase "under God" was added to the Pledge of Allegiance. Senator Lyndon B. Johnson (D-TX) authored a 1955 bill to put "In God we trust" on all U.S. currency. Congress enacted the proposal in 1956, and it was put on all money starting in 1957.

Periodically there were constitutional challenges, but the courts found that the motto did not endorse religion. A federal court in *Aronow v. United States,* 432 F.2d 243 (1970), said it was of a patriotic or ceremonial character (part of a civic religion). In *O'Hair v. Blumenthal,* 588 F.2nd 1144 (1979), a court ruled that the motto had a ceremonial purpose in the secular function of providing a medium of exchange. A 1994 lawsuit brought by the Freedom from Religion Foundation was dismissed without trial on the grounds that "In God we trust" was not a religious phrase.

The reasoning in these cases was not always consistent. After all, Justice William O. Douglas in *Zorach*



[PUBLIC LAW 851]
[CHAPTER 795]

H. J. Res. 396

Eighty-fourth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the third day of January, one thousand nine hundred and fifty-six

RECEIVED THE WHITE HOUSE JUL 26 1956

RECEIVED JUL 30 1956

Joint Resolution

To establish a national motto of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the national motto of the United States is hereby declared to be "In God we trust."

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

APPROVED
JUL 30 1956

The Joint Resolution passed in July 1956, Public Law 84–851, which established the national motto of the United States to be "In God we trust." *(National Archives)*

v. Clauson, 343 U.S. 306 (1952), had stated that "We are a religious people, whose institutions presuppose a Supreme Being." Sessions of the Supreme Court started "God save the United States and this honorable court." The Star Spangled Banner intoned "and this be our motto, in God is our trust." The Pledge and oaths for officeholders were also examples. (A 2002 federal court of appeals ruling that barred students from including the phrase "One nation under God" in the Pledge of Allegiance was dismissed for lack of standing in *Elk Grove v. Newdow*.

In 1999 some atheists crossed out the motto from paper money or used rubber stamps to insert "Keep church and state separate." This recalled the controversy over New Hampshire's placing its motto, "Live free or die," on license plates. A Jehovah's Witness couple taped over the motto on their plates and were charged with defacing state property. George Maynard was convicted and jailed. Afterward he sought and received a federal court injunction against further state prosecution. New Hampshire appealed to the U.S. Supreme Court, which in *Wooley v. Maynard,* 430 U.S. 705 (1977), backed the Maynards by a six–three vote.

In 2002 the American Family Association, taking advantage of the post–September 11 climate, launched a national campaign to place a copy of the motto "In God we trust" in every school classroom and public building in America.

Martin Gruberg

See also: Establishment Clause; Flag Salute.

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Incorporation Doctrine

When the Bill of Rights (the first ten amendments to the U.S. Constitution) was originally ratified in 1791, it protected citizens only against actions by the federal government. Absent limitations within their own constitutions, state governments were free to pass or retain laws that would be clearly unconstitutional if enacted by Congress. Only after passage of the Fourteenth Amendment did the U.S. Supreme Court apply the limitations of the Bill of Rights to state and local units of government. This application of the Bill of Rights to all levels of nonfederal government was called *incorporation,* because the fundamental liberties protected by the Bill of Rights were deemed to have been incorporated into the Fourteenth Amendment.

In 1833, before the passage of the Thirteenth Amendment, which abolished slavery, or the Fourteenth, which forbade states to deny their citizens the "privileges or immunities" or the "due process" rights of citizenship, the Supreme Court had determined that the Bill of Rights was not applicable to the states. *Barron v. City of Baltimore,* 32 U.S. 243 (1833), raised the issue of whether a state government was bound by the Fifth Amendment's Takings Clause, which required the government to compensate a property owner whose property was taken for public use. The Court in *Barron* held that the Bill of Rights applied only to the federal government and thus offered no remedy to citizens whose arguments were with their states. The case caused much debate, and there was substantial disagreement with the Court's conclusion. In 1866, when the Fourteenth Amendment was drafted, it specifically addressed the issue with the following language: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Congressman John Bingham, who authored the language, later explained that it was intended to be a direct repudiation of the decision in *Barron.*

Before the House voted on the amendment, Thad-

deus Stevens of Pennsylvania, a strong voice for abolition, explained the intent of the language: "[T]he Constitution limits only the action of Congress, and is not a limitation on the States. This Amendment supplies that defect." In the Senate, Jacob Howard made a similar speech, noting that the objective of the Fourteenth Amendment was to "restrain the power of the States and compel them at all times to respect these great fundamental guarantees."

Despite the evident intent of at least some of those who drafted and subsequently proposed and ratified the amendment, the Supreme Court did not immediately apply the Bill of Rights to state governments. Instead, over a period of years, beginning chiefly with *Gitlow v. New York,* 268 U.S. 652 (1925), it selectively applied to the states those elements of the first eight Amendments it determined to be "essential to ordered liberty" and "fundamental." The proper approach to incorporation was the subject of significant disagreement among justices of the Court, with Justice Hugo L. Black (1886–1971) arguing for total incorporation and Justices Felix Frankfurter (1882–1965) and William J. Brennan Jr. (1906–1997) urging the selective approach that ultimately prevailed.

Thus far, only four constitutional provisions in the Bill of Rights remain unincorporated: the right to keep and bear arms; the prohibition against quartering soldiers in private homes; and the dual rights to grand and civil juries.

Sheila Suess Kennedy

See also: Adamson v. California; Barron v. City of Baltimore; Bill of Rights; *Duncan v. Louisiana; Hurtado v. California; Palko v. Connecticut;* Selective Incorporation.

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Independent Expenditures

Political parties, advocacy groups, corporations, unions, and individuals spend large sums of money to communicate their views on candidates and policies to the electorate. Such expenditures are "independent" when they occur without prior consultation or coordination with the candidate. The constitutionality of regulating these independent expenditures implicates a classic conflict in U.S. politics between civil liberties and governmental interests. Although independent expenditures enable the free speech rights protected under the First Amendment to the Constitution, they may also undermine the public's faith in American democracy.

Limits on independent expenditures are generally unconstitutional. In the landmark campaign finance case, *Buckley v. Valeo,* 424 U.S. 1 (1976), the U.S. Supreme Court struck down a $1,000 limit on independent expenditures. In 1976 the cost of placing just one advertisement in a major metropolitan newspaper was seven times greater than the independent-expenditure ceiling. Thus, the challenged limit would have excluded the speech of these outside groups and individuals from political campaigns. The Court also held that the independent-expenditure limit did not serve the government's interest in preventing corruption. The absence of contact between the spender and the candidate eliminated the threat of quid pro quo corruption and minimized the value of the expenditure to the candidate.

But the Court has not rejected all regulations on independent expenditures. First, the government can require the disclosure of the amount and source of the independent expenditure, regardless of the speaker's identity. Second, in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), the Supreme Court upheld a ban on independent expenditures by corporations. In contrast to independent expenditures by groups and individuals, corporate independent expenditures pose a risk of corruption because of "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."

There is yet another complication in the Supreme Court's independent-expenditure doctrine. Currently, only independent expenditures containing express words of advocacy, such as "vote for," "vote against," "elect," or "defeat," can be constitutionally regulated. The Court fears that broader regulations would create significant uncertainty for spenders and would chill

speech about public policy issues and pending legislation. Thus, so long as a spender avoids using the magic words of express advocacy, the expenditure is not subject to disclosure laws, and even corporations and unions are free to spend unlimited amounts. Corporations and unions, as well as groups and individuals hoping to stay hidden from public scrutiny, increasingly exploit this loophole for issue advocacy—not to discuss issues but to influence candidate elections.

To address this loophole, Congress in the Bipartisan Campaign Reform Act of 2002 (the McCain-Feingold law) redrew the line between regulated political advocacy and constitutionally protected issue advocacy. The Supreme Court upheld this law in *McConnell v. Federal Election Commission,* 124 S. Ct. 619 (2003). Congress and the Court will continue their struggle to balance the civil liberties of those who wish to engage in genuine issue advocacy with the public's interest in regulating independent expenditures that impact public elections.

Grant Davis-Denny

See also: First Amendment; *McConnell v. Federal Election Commission.*

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Indian Appropriations Act of 1871

In 1871 Congress, in an obscure rider attached to the Indian Appropriations Act, unilaterally brought to an end the practice of treating any group of indigenous peoples "as an independent nation, tribe, or power with whom the United States may contract by treaty." The U.S. government, reversing more than 260 years of precedent, no longer recognized American Indian sovereignty. Native Americans were now to become subject to acts of Congress, presidential orders, and the general umbrella of U.S. law. Sovereignty would give way to federal guardianship. Treaties would become "agreements." Congressional acts of "extraconstitutionality," such as the Major Crimes Act of 1885, further brought traditional tribal autonomy under the jurisdiction of U.S. courts.

PRIOR STATUS OF AMERICAN INDIANS

American Indians have always had an ambiguous and tenuous status in U.S. constitutional law. The Constitution, for example, treated them as "tribes" or "Indians not taxed," despite their long history of being treated as sovereign nations. During America's colonial period, approximately 1607–1776, Great Britain and the colonies negotiated some 175 formal treaties with native groups. These treaties recognized tribal entities as sovereign powers, a paradigm continued by the new republic.

The significance of the Indian Appropriations Act can be measured by the fact that by 1868, the U.S. government had made some 370 treaties with American Indians, all in accordance with Article I, Section 8, and Article II, Section 2, of the Constitution. Approximately two-thirds (245) of these treaties involved land transfer. For about twenty cents an acre and other considerations, the United States acquired 450 million acres of land. Often these "other considerations," usually promises to supply protection or provisions or services, were not honored. Contrary to common belief, European governments, such as France during the time of the $15 million Louisiana Purchase, did not sell or convey real estate to the United States. Rather, they conveyed only the right to govern and the power to tax a region of land. Since Native American "ownership-by-use" was acknowledged, only conquest or purchase could unequivocally convey clear land title. Treaties with the native peoples became the mechanism by which most of the U.S. land mass was purchased.

The recognition of an American Indian entity as a sovereign power had been motivated by self-interest, not altruism. Colonial-period treaties secured strategic military alliances with strong native leagues or tribes. Later, as the white population expanded exponentially, the Native Americans' position was dramatically weakened. Land treaties were negotiated by vastly unequal sovereign powers. The Indian Appropriations Act did nothing to alter the transfers of land the United States had obtained from the native peoples,

but it gave the tribes less sovereignty than they had previously exercised over what was left. The effects of this were magnified by adoption of the General Allotment Act of 1887.

GENERAL ALLOTMENT ACT OF 1887

Congress adopted this law, often known as the Dawes Act, with the purpose of making farmers out of subsistence hunters and gatherers, changing a land system based on communal use to that of individual ownership, and further of assimilating natives into white society. Under this act, the United States would grant citizenship to those natives who, as the law specified, "adopted the habits of civilized life."

Although motivated by sincere and earnest humanitarian concern for the plight of a people overwhelmed by the unchecked and ruthless expansion of an alien society, these two policies were made with no reference to Native American wishes, and they contributed to the dissolution of native culture and identity. Total assimilation to "Americanness" was the answer to the "Indian problem." This meant altering the American Indians' understanding of property, allowing them to become citizens protected by U.S. laws, and educating them in English and Christian-American values—a policy detailed in the 1899 *Supplemental Report on Indian Education.* These efforts all came, however, at the price of tribal sovereignty.

CRITIQUE AND REVERSAL

Some forty years after the General Allotment Act, *The Merriam Report of 1928,* an exhaustive study of American Indian social and economic conditions requested by the secretary of the Interior Department, cited this legislation as the principle cause of the failure of U.S. Indian policy. The report's recommendation became a blueprint for redressing the dangerous condition of Native Americans. Finally, in 1934, the Wheeler-Howard Act reversed the policy of allotment, provided some funds for economic recovery, sanctioned tribal ownership of land, and promoted self-government.

Kevin Collins

See also: United States Constitution.

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Inffective Assistance of Counsel

The U.S. Supreme Court has long acknowledged that the Sixth Amendment right to an attorney in criminal cases, which the landmark decision in *Gideon v. Wainwright,* 372 U.S. 335 (1963), afforded to state as well as federal defendants, subsumes the right to *effective* assistance, whether the attorney be hired or assigned by the court. The mere presence of someone with a law degree next to the defendant does not suffice: As early as *Powell v. Alabama,* 287 U.S. 45 (1932), the Court stated that the accused must have "the guiding hand of counsel at every step in the proceedings against him." Sadly, however, the promise of cases like *Powell* and *Gideon* has often been honored in the breach.

It is important to distinguish between two lines of precedent in this area. The first deals with situations in which government interferes with counsel in some respect, such as when a judge forbids attorney-client consultation during an overnight recess at trial or prevents the attorney from making a closing argument. In these cases, the Court has reversed convictions automatically, without forcing defendants to prove that the state's action caused them harm. The second group of decisions involves claimed ineffective assistance of counsel in the absence of governmental obstruction; a subset of these decisions concern attorneys laboring under a conflict of interest. The Court has been much less indulgent with defendants who attack their lawyers, not the state—and has made relief much harder to obtain. Notably, this has been true even when the client has received a sentence of death.

For a long time, prevailing doctrine dictated that an accused could not obtain redress unless the indi-

vidual was able to show that the trial had been rendered a farce or mockery of justice because of mistakes or omissions made by counsel. In the 1970s, a majority of the federal courts of appeal replaced this embarrassingly toothless standard with a test that looked to whether counsel had demonstrated "reasonable," "normal," or "customary" competence. But the Court, of course, would have the last word on the matter, and it did not speak for another decade.

In 1984, in *Strickland v. Washington,* 466 U.S. 668, a capital case in which the defendant pleaded guilty to murder and agreed to be sentenced by the trial judge without a jury, the justices issued the long-sought pronouncement. Although predictably approving the "reasonableness" measure of attorney performance, in other respects they gravely disappointed the defense community by making clear that only in the most egregious instances would a conviction be reversed on the ground of ineffective assistance.

For one thing, *Strickland* imposed no specific duties on counsel. In addition, it instructed the lower courts to review the quality of the representations with a high degree of deference: It mandated "a strong presumption" that counsel had acted on the basis of "sound trial strategy," even if that plan misfired.

But yet more onerous was *Strickland*'s requirement that the defendant demonstrate more than just the lawyer's deficient performance. In order to prevail, a defendant also needed to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," thereby undermining confidence in the outcome of the trial. The Court had already announced a somewhat less burdensome prejudice standard in matters involving conflict of interest: In *Cuyler v. Sullivan,* 446 U.S. 335 (1980), the Court held that except where the trial court forces counsel, over objection, to continue despite a potential conflict, a defendant cannot obtain relief unless it is established after the fact that an actual conflict "adversely affected his lawyer's performance."

The *Strickland* Court made clear that the newly stated test governed capital as well as regular proceedings. Applying it to the facts at hand, the majority rebuffed the defendant's challenge to his death sentence notwithstanding counsel's almost total failure to do investigation for the penalty trial or to adduce mitigating evidence that might lessen the sentence. Indeed, it was not until 2000 that the justices vacated a capital sentence on the basis of inadequate assistance in *Williams v. Taylor,* 529 U.S. 362 (2000). State courts and lower federal courts have not displayed much more generosity toward prisoners claiming ineffectiveness of counsel.

Critics believe the present state of affairs is unconscionable, given the shockingly high incidence of major derelictions by lawyers—especially those representing the indigent, who comprise about 80 percent of defendants. Whereas some attorneys commit blatant acts of misconduct, such as appearing drunk or falling asleep in court, or simply do not prepare properly, like the lawyer in *Strickland,* others fall prey to "no-fault" ineffectiveness caused by insufficient funding (for defense experts and investigators as well as counsel), lack of good training, or unmanageable caseloads.

The situation is especially dire in capital cases, which demand the utmost effort and knowledge from counsel but often receive the worst lawyering. To illustrate: One study conducted in four states showed that nearly a third of death-row inmates were defended by counsel who were later disbarred, suspended from practice, or convicted of crimes.

Three decades after *Gideon,* the U.S. justice system arguably has a long way to go if it truly intends to realize the lofty ideal of counsel's role.

Vivian Berger

See also: Gideon v. Wainwright; Powell v. Alabama; Right to Counsel.

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Inevitable-Discovery Doctrine

The doctrine of "inevitable discovery" is one of several exceptions to the exclusionary rule, a broader doctrine providing that evidence obtained in violation of a defendant's constitutional rights is inadmissible at trial. For example, if after an arrest the suspect requests a lawyer, but the police nonetheless continue questioning, the officers violate the suspect's constitutional right to an attorney under the Sixth Amendment. If the suspect confesses to the crime during that questioning, that direct evidence is inadmissible. Additionally, if in confessing the suspect also directs the police to the location of other evidence, such as the gun used in the crime, that indirect evidence (called "fruits of the poisonous tree") is also considered tainted by the officers' unconstitutional actions and is inadmissible based on the exclusionary rule.

Over time, the U.S. Supreme Court has adopted several exceptions to the exclusionary rule. These exceptions allow evidence obtained in violation of a defendant's constitutional rights nonetheless to be admissible in court. The Supreme Court defined one such exception, the inevitable-discovery doctrine, in *Nix v. Williams,* 467 U.S. 431 (1984). In that case, a jury convicted the defendant, Robert Williams, of the first-degree murder of ten-year-old Pamela Powers. Williams challenged his conviction, arguing that the state trial court erred in admitting evidence concerning the location and condition of Pamela's body because the police found the body only after illegally questioning Williams. The Supreme Court held that because the police were already searching the area in which Pamela's body was found, they would have inevitably discovered her body. Accordingly, the Court concluded that the evidence was admissible and upheld Williams's conviction.

From *Williams,* then, flows the inevitable-discovery doctrine: "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means," the evidence will be admissible. On its face this rule seems clear enough, but since *Williams,* lower courts have struggled to define the scope of the inevitable-discovery doctrine. Some lower courts have held that this doctrine allows only for the admissibility of direct evidence (the confession in the example at the beginning of this discussion), and that indirect evidence (the gun in the example) obtained in violation of the defendant's constitutional rights is still barred by the exclusionary rule. Other courts have held that this exception applies only if the police were already actively pursuing the evidence in an alternative way at the time of the violation. The Supreme Court has yet to weigh in on these various issues, and until it does, the exact meaning and scope of the inevitable discovery doctrine remain unclear.

Margot O'Brien

See also: Exclusionary Rule; Fruits of the Poisonous Tree; Right to Counsel.

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Initiatives and Referenda

Initiatives and referenda are mechanisms that allow voters to decide governmental policies directly rather than to depend solely on their elected state and local officials to act. Advocates of these mechanisms hail them as facilitating direct participatory democracy, but critics fear that such mechanisms can suppress minority rights. State and local governments have employed sixteen different types of referenda, but the statutory, advisory, and constitutional referenda are most common. Available in twenty-four states, a *statutory referendum* allows voters to reject a law passed by the state legislature before it takes effect, whereas

the *advisory referendum* allows the legislature to refer proposed legislation to voters to obtain their views on the measure. Still other states have the *constitutional referendum,* which permits voters to approve of or reject amendments to their state constitutions.

Most referenda are not initiated by voters, and most occur at the local level of government rather than statewide. Some questions appear automatically on the ballot at regular, specified intervals, such as the mechanism in fourteen states calling for a state constitutional convention to redress any problems the electorate might have with the constitution. Bond referenda are among the most common. Many states require that voters approve full-faith-and-credit bonds (bonds guaranteed by the government issuer) before they can be issued. Similarly, many states require that voters be allowed to vote on proposed tax increases. Another subset of states, through statutes or state constitutions, allow the electorate to decide issues such as opening gambling casinos, sponsoring lotteries, regulating sale of liquor, and determining Sunday sales policies.

The *initiative* generally allows voters to petition to place issues on the ballot. Through the *statutory initiative,* voters in twenty-one states may propose legislation; with the *constitutional initiative,* voters in seventeen states may propose state constitutional amendments. Both types are created through a petition of registered voters. In total, twenty-four states have some type of initiative process. The local initiative is used by thousands of counties, cities, and towns across the United States and is by far more prevalent than the referendum. To put forward a proposition through initiative, voters must engage in petition drives. These drives usually require 5–15 percent of registered voters as signatories, with greater numbers of signatures needed to propose a state constitutional amendment. Usually the number of signatures required to place an issue—often called a "proposition"—on the ballot is based on a percentage of votes cast at the most recent general election or a percentage of votes cast to elect the state governor. Besides statutory and constitutional initiatives, another distinction can be drawn between direct and indirect initiatives. The *direct initiative* allows the people to vote on a ballot issue that qualifies through the petition process, whereas the *indirect initiative* provides that the proposal, upon being filed, will be sent to the legislature; if the legislature disapproves of the proposal, the issue is subject to a ballot vote and goes before the voters. Like referenda, initiatives may be advisory, as when voters circulate petitions and place nonbinding measures on the ballot to pressure the legislature to address a specific problem or enact a particular law.

Historically, referenda and initiatives have existed in some form in the United States since the 1600s. As early as 1775, Thomas Jefferson suggested that voters approve the Virginia state constitution before it took effect. The first state to hold a statewide legislative referendum was Massachusetts in 1792. As of 2004, every state but Delaware required that voters approve amendments to their constitutions. In 1897, Nebraska became the first state to allow cities to use initiatives and popular referenda; close behind in 1898, South Dakota was the first state to adopt statewide initiatives and referenda. Now, almost half of all states have the referendum, the initiative, or both.

A landmark use of the initiative occurred in California in 1978 with the passage of Proposition 13, which resulted in a property tax cut from 2.5 percent to 1.0 percent. At the end of a two-year period, forty-three other states put forward and implemented this type of measure, and fifteen states lowered their income tax rates. The National Taxpayers Union, which advocated Proposition 13 in the 1970s, said it could not have gotten the tax revolt off the ground without the initiative. In recent years, the initiative process, in particular, has become an extremely important device for influencing and changing public policy at all levels of government. From 1992 through 2002 alone, it was used to address affirmative action, tax reform, campaign finance reform, environmental issues, gay rights, school choice, congressional and state legislative term limits, mail-in voting for the 2000 elections, use of blanket primaries, use of marijuana for medicinal purposes, and efforts to end bilingual education.

These direct-democracy devices have enhanced the ability of citizens to become involved in public policymaking. Historically, referenda and initiatives have been viewed as a means of checking and controlling the government. Arguments for referenda and initiatives generally hold that the ultimate source of governmental power is the people, and the people should

have ultimate authority to determine public policy outcomes. The referendum prevents the government from ignoring the will of the people and allows them to express their displeasure with certain governmental policies. Furthermore, supporters of referenda argue that they make lawmakers more responsible and lead to more informed public debate and discussion. On the other hand, opponents of referenda argue that the citizens' veto undermines representative government and innovative leadership and results in legislative buck-passing, allowing the electorate to make the tough decisions for legislators through referenda. Critics also believe that ordinary citizens may not be sophisticated enough to analyze highly complex issues, such as tax reform, and may be swayed easily by demagoguery. Relying on referenda may result in unnecessary delays in lawmaking, and because of small voter turnout, the result would not necessarily be more democratic.

Initiatives also have generated many supporters and detractors. Supporters of initiatives argue that this process has been used to facilitate important reforms, that it improves governmental responsiveness, and that it encourages citizen participation, especially when the proposition is highly controversial. Initiative supporters also believe that campaigns waged for and against initiative proposals result in a more educated citizenry. Furthermore, they argue that the initiative provides a way to enact reforms when the legislature is unwilling or unable to do so. Critics of initiatives claim that citizen-drafted legislation is often poorly written and creates more problems than it solves. Like opponents of referenda, they argue that issues frequently are oversimplified or that misleading campaigns are waged to sway unknowledgeable or unsuspecting voters. Ballot clutter occurs as numerous propositions are placed on the ballot, requiring an intensive time investment on the part of voters who read the propositions and attempt to understand their implications. Too many ballot issues produce voter fatigue, contributing to low voter turnout and greater apathy and frustration. Initiatives can both promote and threaten civil liberties, as demonstrated by some state ballot issues aimed at denying or curbing the rights of minorities such as homosexuals and African Americans. Not surprisingly, after they are passed, many propositions are challenged in court and create yet another unintended consequence—court congestion.

Although fraught with advantages and disadvantages, initiatives and referendums will continue as part of an effort to provide for more citizen involvement in public policy-making. More open and ethical governmental leaders and institutions could reduce the demand for use of these devices.

Ruth Ann Strickland

See also: Democracy and Civil Liberties.

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Interest Groups

At the most basic level, interest groups are nothing more than organizations that seek to influence government. Despite the sometimes negative connotation, especially when the term "special" is used to preface certain interest groups, group politics has historically been a useful means by which to extol the virtues of the U.S. system of government. In *Federalist No. 10,* James Madison argued that a large republic, such as was being established by the U.S. Constitution, would embrace many groups (what he called "factions"), thus making it less likely that any single faction could dominate. Alexis de Tocqueville, who visited the United States in the 1830s and authored *Democracy in America,* observed that citizens had a high sense of political efficacy and that they exhibited such power by forming groups to advance their views on matters as diverse as religion, issues of public policy, issues related to particular occupations, and the like.

Early scholars presumed that the best outcomes were the result of pluralism or were produced through group conflict during which ideas and policies were debated and decided. Free and active groups became one of the foundations for a working representative

democracy. Yet even at its height, this approach was at best descriptive, and at worst more normative and idealistic than representative of American politics.

The notion that all interests are represented by groups is misleading and inaccurate. It has become increasingly difficult to argue that there is balanced competition among small groups when large and powerful interests can, and do, occupy the entire universe of an issue. There is a cost to enter into this "pressure system," and many interests are without the price of admission. Put more succinctly, "The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent."

Contrary to the pluralistic notion, empirical research illustrates that Americans are not joiners by nature. In *The Logic of Collective Action,* Mancur Olson rejected the pluralistic model and formulation that presumed people gravitate to interest groups based on human nature. Using an economic model, Olson proposed that rational people will not expend the costs to participate in groups that produce public benefits, since individuals will benefit from the group's activities whether they participate or not. Instead, rational people will be motivated to "free ride"—to let others bear the costs of membership.

Other scholars expanded Olson's notions to explain the considerable increase in the size and influence of interest groups, as in the case of Common Cause—a public interest group seeking collective benefits for society—which grew to 230,000 members in one year. Robert Salisbury argued for an "exchange theory" and asserted that groups are formed through the actions of group entrepreneurs who create the groups for their personal (economic) benefit—often a staff job. Terry Moe noted that many people feel their contribution is more significant than an objective view might illustrate, and this leads to economic models overestimating the free-rider phenomenon. Additionally, Moe contended that the benefits from group membership include those derived from solidarity (friendship, status) and purpose (ideology, morality).

The power of these groups to influence the development of civil rights is mixed. Although groups can certainly influence the elected branches of government, their effectiveness before the judicial branch is debatable at best. Gerald Rosenberg effectively argued that even the U.S. Supreme Court is largely ineffective in forcing social change without additional support from Congress or the president. Alternately, Charles Epp argued that the success of rights litigation is largely the product of structures such as interest groups that allow advocates to develop the resources necessary to make use of the judicial system, which largely was once the province of moneyed interests such as big business.

Nonetheless, the direct evidence on the role of interest groups before the U.S. Supreme Court suggests their impact is limited. Research indicates that a larger resource base is not a predictor of success before the Court, nor are interest groups more likely than nongroups to win in federal district courts. Interest groups cannot be dismissed, but their formation and maintenance as well as their larger role in civil rights and the judicial forum still are being debated and studied.

Kevin M. Wagner

See also: First Amendment.

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Intermediate-Level Scrutiny

The U.S. Supreme Court has used an intermediate level of scrutiny to determine when state laws that make gender distinctions, such as a male-only draft, violate constitutional protections and are therefore invalid. By requiring that "no state shall deny to any person within its jurisdiction the equal protection of the laws," the Equal Protection Clause of the Fourteenth Amendment to the Constitution forces courts to determine when state (including local) laws that distinguish between classes of people violate the rights of individuals. This constitutional amendment states that all people are equal in the eyes of the law, and it has been interpreted to mean that such characteristics as race, gender, age, or wealth can rarely enter into the determinations of the law. Yet laws do not and cannot treat people identically; consequently, certain types of classifications are considered legal under the Equal Protection Clause. For example, trucks often must observe a lower speed limit because trucks are heavier and need longer stopping distances than cars. However, because trucks are not protected by the Constitution, states can easily make this legal distinction.

Over the years, the Supreme Court has developed three different standards to help determine the constitutionality of state laws under the Equal Protection Clause. The highest standard is called "strict scrutiny" and applies to laws that violate fundamental freedoms (such as religion, speech, and press) or that pertain to "suspect" classifications, such as racial distinctions. This standard requires the state to demonstrate to the Court that the classification is necessary to achieve a compelling state objective and that the law is narrowly tailored to that end. Although gender fits many of the attributes inherent to suspect classification—immutable characteristics and a history of "invidious" discrimination or an emotionally based antagonism toward a group—the Supreme Court has not held that gender meets the criteria required for suspect classification.

The lowest standard, "minimal rationality," applies to most other forms of classification, for example, age or sexual preference. To meet this standard of ordinary scrutiny, the state must simply demonstrate that there is a rational basis for the discriminatory law. If the state can show that there is a rational relationship between the distinction of groups under the contested law and a legitimate objective of the state, the law is not deemed to be in violation of the Fourteenth Amendment. If the state is unable to demonstrate such a relationship, then the Court will strike the law down as a violation of the Equal Protection Clause.

Historically, gender fell under ordinary scrutiny. The last Court decision applying ordinary scrutiny to a gender-based law was *Hoyt v. Florida,* 368 U.S. 57 (1961), in which the Court had upheld a Florida statute requiring only women to register specifically for jury service, finding it constitutional under the Fourteenth Amendment's Equal Protection Clause. Not until *Reed v. Reed,* 404 U.S. 71 (1971), a case in which a male was automatically preferred over a female in the administration of an estate, would gender discrimination be found unconstitutional under the Equal Protection Clause. During the 1970s, the Court, still using the label of "ordinary scrutiny" and guided by the briefs of American Civil Liberties Union (ACLU) attorney Ruth Bader Ginsburg (later a Court justice), began creating a new test for gender. This stricter standard asked if the questioned classification was "really reasonable"—did it serve an important governmental objective and was it substantially related to those ends? Despite this new standard, not until five years later, in *Craig v. Boren,* 429 U.S. 190 (1976), invalidating a state law that provided for differing drinking ages for males and females, did the Court recognize it had been using this new standard of "semistrict" classification—an intermediate level of scrutiny—since *Reed v. Reed.*

In *Frontiero v. Richardson,* 411 U.S. 677 (1973), in which the Court invalidated different standards used by the military in determining dependency for males and females, the Court implied that gender could be considered a suspect classification if the states ratified the proposed Equal Rights Amendment (ERA) to the Constitution. Section one of the ERA stated, "Equal-

ity of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Because the ERA was not ratified, the Supreme Court continued developing a semisuspect approach, and by 1976 the Court in *Craig* strengthened the Fourteenth Amendment's protection of gender without making it as rigorous as suspect classification.

Although the Supreme Court has never applied strict scrutiny to a gender discrimination case, the Court has been slowly heightening the intermediate standard of scrutiny. In *United States v. Virginia,* 518 U.S. 515 (1996), the Court examined the male-only admissions policy of the Virginia Military Institute (VMI). In her majority opinion, Justice Ruth Bader Ginsburg argued that the state must show "exceedingly persuasive justification" for differential treatment, in this case the exclusion of women from VMI, which the Court invalidated. This is a higher requirement for the state than originally articulated in *Craig* and gives stronger constitutional protection against gender discrimination.

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See also: Compelling Governmental Interest; Rational-Basis Test; Strict Scrutiny; Suspect Classifications.

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Internal Revenue Service

The Internal Revenue Service is a federal agency assigned the duty to collect taxes and enforce the U.S. Tax Code.

The roots of the Internal Revenue Service (IRS) date to 1862 when President Abraham Lincoln and the U.S. Congress established the position of Commissioner of Internal Revenue with the authority to collect an income tax to help cover Civil War expenses. A fundamental question since that time has been whether income taxes constitute a violation of the fundamental rights and civil liberties of the American people. The original income tax expired in 1872. Congress reenacted the income tax in 1894, but it was declared unconstitutional by the U.S. Supreme Court in *Pollock v. Farmers Loan and Trust Co.,* 158 U.S. 601 (1895). The states ratified the Sixteenth Amendment in 1913, giving Congress the official right to levy a federal income tax. In 1943 the "pay-as-you-go" system was instituted, and payroll withholding of income taxes began. The IRS was officially established in 1953 when the Department of Treasury reorganized the Bureau of Internal Revenue. The primary functions of the IRS are to collect income tax payments, check federal income tax returns, and issue tax refunds.

A variety of individuals and organizations still claim that the collection of income taxes by the IRS is an abuse of the civil liberties of Americans. They argue the federal income tax system is unconstitutional, stating that it had an unlawful origin, that powers given only to Congress were unlawfully delegated to the executive branch and the IRS, and that graduated income taxes based on amount of income favor the rich, discriminate against the poor, and violate the uniformity clauses of the U.S. Constitution found in Article 1, Section 8, clause 1. Another argument is that income taxes force human beings to work part of their time for free, which is a form of involuntary servitude or slavery, putting the IRS in violation of the Thirteenth Amendment.

To better serve taxpayers and protect their constitutional rights, Congress has frequently restructured income tax laws since 1953. The Tax Reform Act of 1969 was designed to help stop corporations and the very rich from avoiding the payment of income taxes. The Tax Reform Act of 1986 reduced the number and level of tax rates, and the Taxpayer Relief Act of 1997 produced more than 800 changes to the existing income tax code. In 1998, Congress passed the IRS Restructuring and Reform Act, which significantly expanded the rights of taxpayers. It created the Taxpayer

People filling out tax forms in Internal Revenue office, circa 1920. Presidents at times have been accused of using the IRS to harass political enemies. *(Library of Congress)*

Advocate Service within the IRS to protect the rights and civil liberties of taxpayers. Any problems or violations of rights that are not resolved through normal channels within the IRS are handled by the Taxpayer Advocate Service.

When required, each income earner in the United States is responsible for filing an income tax return and for determining and paying the correct amount of tax. The vast majority of Americans comply with this responsibility. To protect the voluntary tax compliance system and the American economy, the Internal Revenue Service Criminal Investigation was established under the direction of the IRS to investigate any taxpayers who willfully and intentionally violate their known legal responsibility to comply with established income tax laws.

Alvin K. Benson

See also: Fundamental Rights; President and Civil Liberties.

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Internal Security Act of 1950

See McCarran Act

International Society for Krishna Consciousness v. Lee (1992)

The U.S. Supreme Court in *International Society for Krishna Consciousness v. Lee,* 505 U.S. 672 (1992), held that publicly owned airport terminals were not free speech forums under the Free Speech Clause of the First Amendment to the U.S. Constitution. In the case, a not-for-profit religious group called the International Society for Krishna Consciousness (ISKCON) wanted to distribute leaflets and solicit monetary donations inside several major public airports within the New York City area. The Port Authority of New York and New Jersey, which owned the airports, adopted a regulation forbidding these actions. ISKCON eventually appealed this ban to the U.S. Supreme Court.

The Court first determined that publicly owned airport terminals were unlike traditional government-owned forums, such as parks, streets, and sidewalks, historically used for public gatherings and discussions. In those more traditional public forums, government must show a strong justification for limiting free speech activities. However, because airport terminals were not traditional public forums, government could enact greater restrictions on speech as long as those restrictions were reasonable. The Court concluded that a ban on solicitation of money was reasonable. Stopping people and asking them for money would delay not only them but also other people trying to avoid the solicitation or whose paths were blocked by the pedestrian congestion caused by stopping people. In addition, there would be the possibility that the people asking for money would be lying about the reasons the money was needed. Busy airport customers, however, were unlikely to take the time to report this fraud. For these reasons, the Court concluded a complete ban on the solicitation of money inside a publicly owned airport terminal was reasonable.

In a companion case, *Lee v. International Society for Krishna Consciousness,* 505 U.S. 830 (1992), the Court held that although public airport terminals were not public forums, individuals had a right to distribute leaflets inside them. This was because the distribution of leaflets would be less disruptive to the functioning of an airport, particularly pedestrian traffic flow, than was the solicitation of money. Therefore, a complete ban on leafleting inside a public airport terminal was unreasonable and violated the Free Speech Clause of the First Amendment.

Rick A. Swanson

See also: First Amendment.

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Internet and the World Wide Web

The use of the Internet or the World Wide Web for communication, research, and commercial sales implicates several important questions for civil liberties. Most specifically, the use of the Web raises free speech issues under the First Amendment to the U.S. Constitution, especially with respect to the display of pornographic and obscene images, the use of intellectual property, and government efforts to regulate these images as well as other information available through the Web.

The Internet originally began as a Department of Defense project that was to serve as a communications tool for the military. By the mid-1990s, however, the Internet became subject to civilian control, and with the passage of the Telecommunications Act of 1996, the use of the Web dramatically expanded. Many different vendors, both commercial and government, began hosting access to it. In addition, since the mid-1990s, the Web has become increasingly popular as a source for information, research, communication, and for the transaction of business, otherwise known as e-commerce.

One of the first issues regarding the Web is to ask what type of communications tool it is. Specifically, does it serve more as radio and television or more as a newspaper? The answer raises significant questions about the scope of government regulation regarding the content of the Web.

The Communications Act of 1934 declared radio and subsequently television air frequencies to be owned by the public, subject to government regulation. This means that the government can subject television and radio to some restrictions. This regulatory authority was given to the Federal Communications Commission (FCC). For example, in *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367 (1969), the U.S. Supreme Court upheld the fairness doctrine, a rule requiring broadcasters to provide equal time to competing candidates or political positions. In contrast, in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), the Court rejected on First Amendment grounds a claim that a newspaper had an obligation to print rebuttals or letters in opposition to its editorials. Moreover, in *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726 (1978), the Court upheld a ruling that prevented the airing of George Carlin's "Seven Dirty Words," a satire on words the FCC had deemed inappropriate for broadcast.

The point is that the Supreme Court has upheld restrictions on what can be broadcast on the airwaves, whereas it has not similarly supported limitations for other forms of communication, seeing these limits instead as a form of censorship. Thus, if the Web is likened to a radio or television broadcast rather than to a newspaper, it will be subject to more restrictions. Although generally the Court seems to be willing to give broad First Amendment protection to the Web, there are limits.

The information available over the Web has made it an important research tool that is used in libraries alongside more conventional ways to gather information, such as from hardbound encyclopedias and books. However, notwithstanding all the valuable information found on the Web, information objectionable to many people is also available there. It includes material that is considered sexually explicit, pornographic, or obscene.

To regulate this material, Congress passed the Communications Decency Act in 1996, which tried to limit the distribution of obscene and pornographic images on the Web that can be accessed by minors. However, in *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997), the Supreme Court struck down the law as unconstitutionally vague. Congress then tried to address the Court's concerns in 1998 with the Child Online Protection Act (COPA). COPA narrowed the definition of obscenity to that found in *Miller v. California,* 413 U.S. 15 (1973). In *Ashcroft v. American Civil Liberties Union,* 535 U.S. 564 (2002), the Court upheld the new law to the extent that it complied with the definition of obscenity found in *Miller.* Yet the Court remanded the case for the lower courts to determine whether the law was the least restrictive means by which the government could prevent minors from accessing harmful materials from the Internet. Then in *Ashcroft v. American Civil Liberties Union,* 535 U.S. 564 (2004), the Court ruled for a third time, holding that COPA likely violated the First Amendment by burdening the ability of adults to access some protected speech.

Regardless of whether COPA ultimately would be upheld, many people were still concerned about children accessing or seeing this material, especially in libraries. First, children may be able to access this material on library terminals; second, adult patrons may wish to view such material there and this viewing could be visible to minors. In an effort to prevent minors from accessing sexually explicit material on the Web in libraries, Congress passed in 1999 the Children's Internet Protection Act (CIPA), which barred libraries from receiving federal money unless they installed filters on their computer terminals that blocked obscenity or child pornography. Several libraries objected to CIPA, arguing that it was a form of censorship, and a three-judge district court ruled the filtering requirement unconstitutional in that it was a content-based restriction of the First Amendment.

In *United States v. American Library Association, Inc.,* 539 U.S. 194 (2003), the Supreme Court upheld CIPA, rejecting arguments that requiring libraries to install the filters was a form of censorship and a violation of the First Amendment free speech clause. Chief Justice William H. Rehnquist acknowledged the important role libraries played in American society in facilitating learning and sharing knowledge. He de-

scribed libraries as a traditional public forum, meaning that they enjoyed broad First Amendment protection. Rehnquist argued, however, that the Internet was not a traditional public forum but merely an extension of libraries' more traditional resources. Libraries may decide to permit patrons the use of computer terminals and the Internet much in the way they determine through the books they purchase which books patrons can use. Thus, in not buying certain books, the library is not violating the First Amendment rights of its patrons; likewise, in not allowing access to certain Web sites, it is similarly not infringing on the rights of its users.

In dissent, Justices John Paul Stevens, David H. Souter, and Ruth Bader Ginsburg contended that CIPA did violate the First Amendment. They saw the law as compromising the traditional role of libraries in providing public access to information and ideas that are constitutionally protected. Thus, the law was overbroad and content-specific in its application.

As a result of these decisions, it appears that the Supreme Court is willing to give Congress some authority to regulate the content of the Web, especially when it comes to protecting children.

A second issue of concern for free speech advocates is the use of Web-accessed intellectual property or items that are copyrighted. Here the question involves what control artists, writers, and others have over works of theirs that are posted on the Web. For many, the most famous example has involved Web sites such as Napster that made it possible for individuals to download and swap music over the Web. Some critics argue that information posted on the Web should be subject to different rules from those that apply elsewhere in society, thereby making dissemination easier. Despite these appeals, there is no indication that the courts are willing to grant less protection to intellectual property displayed on the Internet than to property appearing in another forum.

Overall, the Web challenges the First Amendment and free speech in many ways. To determine what is considered obscene, courts use the test in *Miller v. California,* which applies local community standards. For the Web, however, an issue is whether the applicable standards are those where the site broadcasts from or those where it is viewed. Second, how far can the government go to limit children from seeing obscene or offensive images? Third, when can the government monitor the Web for possible illegal activities, and does it need a warrant to do that? Can the government force Internet providers to provide unscramblers that would allow the government to read encrypted messages? Finally, what rules regarding libel and slander apply to the Web, especially in regard to blogs (private Web pages that provide news and commentary) or e-mail messages? These are just some of the legal issues yet to be sorted out about the Web.

David Schultz

See also: Ashcroft v. American Civil Liberties Union; Censorship; *Federal Communications Commission v. Pacifica Foundation;* First Amendment; *Miller v. California;* Music Censorship; *Reno v. American Civil Liberties Union.*

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IRS

See Internal Revenue Service

J

Jackson, Robert H. (1892–1954)

Robert H. Jackson served as an associate justice on the U.S. Supreme Court from 1941 until his death in late 1954. After working his way up through President Franklin D. Roosevelt's administration to become solicitor general and then attorney general, Jackson became the seventh of Roosevelt's eight appointees to the Court. During his Court tenure, Jackson also stepped onto the international stage by leading the prosecution in the Nuremberg war crimes trials in post–World War II Germany.

Jackson completed only a year at New York's Albany Law School, and he was the last justice appointed to the Court with no law degree. Prior to joining the Roosevelt administration, Jackson worked in private law practice in upstate New York.

Jackson's judicial philosophy is difficult to categorize as liberal or conservative, as activist or as a voice of restraint. Scholars have labeled him " 'pragmatic,' " " 'middle-of-the-road,' " and even " 'erratic.' " With respect to civil liberties, he showed the idiosyncratic nature of his judicial philosophy in his support for the cautious approach of a selective incorporation of the Bill of Rights protections against the states.

Although Justice Jackson's singular pattern of decision-making placed him in the shadow of colleagues Justices Hugo L. Black and Felix Frankfurter and likely limited his influence on the development of constitutional interpretation, scholars take special note of the literary style of Jackson's opinions. His majority opinion in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), is one of his most celebrated. In striking down the compulsory flag salute in public schools, Jackson wrote, "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Justice Jackson's proudest achievement, though his most controversial, was his service as the lead prosecutor at the war crimes trials in Nuremberg, Germany. At Nuremberg, Jackson hoped to put his stamp on international law: Nuremberg was to be the first time that surviving leaders of a defeated aggressive nation would be held legally responsible for their actions. He hoped to develop international legal precedent for outlawing aggressive war-making.

Yet criticisms of the tribunal, and of Jackson, abounded. Some critics opposed the concept of trying military leaders for decisions made by political leaders. Others opposed the ex post facto nature of the charges against the defendants: The Nazis had committed

Associate Justice Robert H. Jackson became the seventh of President Franklin Roosevelt's eight appointees to the Supreme Court. During his Court tenure, Jackson also stepped onto the international stage by leading the prosecution in the Nuremberg war crimes trials in post–World War II Germany. *(Library of Congress)*

atrocities, but they were not, in technical terms, in violation of laws then in effect. Still other critics preferred to pass over trials completely and simply summarily execute the defendants. Jackson worked to ensure that the defendants received some measure of due process, stating his desire for just punishment rather than simple revenge.

Jackson may have paid a personal price for his work at Nuremberg. His controversial work there and his lengthy absence from the Court, which left his frustrated colleagues deadlocked in several cases, likely cost him any ambitions he harbored for either the presidency or the chief justiceship.

Scholars have debated the extent to which Jackson's experiences at the war crimes trials pushed him toward greater conservatism in both economic and civil liberties cases upon his return to the Court in 1947. He came to criticize harshly such civil libertarians as Justices Hugo L. Black and William O. Douglas, perhaps out of a belief that an excess of liberty had contributed to the rise of fascism in Nazi Germany. The justice who in 1943 in *Barnette* wrote, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials," would later caution in his dissent in *Terminiello v. Chicago,* 337 U.S. 1 (1949), that the Court should "temper its doctrinaire logic with a little practical wisdom" to keep the Court from "convert[ing] the constitutional Bill of Rights into a suicide pact."

Justice Jackson's record remains one of contradictions, and his legacy will long be a subject of some disagreement among Court observers.

Staci L. Beavers

See also: Black, Hugo L.; Douglas, William O.; Frankfurter, Felix.

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Jacobson v. United States (1992)

In *Jacobson v. United States,* 503 U.S. 540 (1992), the U.S. Supreme Court voted five–four that the federal government failed to prove Keith Jacobson was predisposed to violate the Child Protection Act. The Court therefore overturned his conviction, finding that the government had entrapped Jacobson. As highlighted in Justice Sandra Day O'Connor's dissent, the Court's decision may have fundamentally altered the course of criminal entrapment law.

In 1984, Keith Jacobson purchased copies of *Bare Boys I* and *II,* magazines depicting young teenage boys in nude poses. Later that same year, after Congress passed the Child Protection Act of 1984 making it illegal to knowingly receive child pornography through the mail, federal postal inspectors began investigating Jacobson. After two and a half years of investigation, he was arrested when he finally responded to the sixth governmental appeal through fake magazines, newsletters, and a pen pal, ordering a copy of the magazine *Boys Who Love Boys.*

A jury found Jacobson guilty of violating the federal law. He appealed unsuccessfully to the appellate court, then took his case to the U.S. Supreme Court, which heard arguments in the case in November 1991.

After its first decision regarding entrapment law in *Sorrells v. United States,* 287 U.S. 435 (1932), the Court continued to reaffirm its use of a subjective test to determine culpability. Under this test, the Court focused on the mental state of the defendant and asked whether the defendant was predisposed to commit the crime, and whether the crime was induced by the government's actions. In narrow five–four decisions in *Sherman v. United States,* 356 U.S. 369 (1958), and *United States v. Russell,* 411 U.S. 423 (1973), the four dissenters made similar findings as the majority but advocated an objective approach, focusing on the government's actions and whether those actions violated public policy.

Against this background, Justice Byron R. White's majority opinion in *Jacobson* focused on Jacobson's predisposition. Justice White ruled that although the government may have proved that Jacobson was predisposed to enjoy preteen sexuality, the government

failed to prove that he was predisposed to break the law. He also strongly admonished the government against misbehavior.

Led by Justice O'Connor, the dissenters accused the majority of abandoning precedent, which had required the Court to review a defendant's predisposition at the time of the government's conduct rather than, as Justice O'Connor believed the majority was advocating, before initiation of the government's investigation. The dissenters further argued within the context of the subjective standard that a jury could have found Jacobson was predisposed to commit the crime.

Among the Court's entrapment cases that address only the defendant's predisposition to commit the crime, this was the first case in which both the five-member majority and the four-member dissent purported to use the subjective standard of review for predisposition claims. Some critics believe, however, that despite the majority's claims, the Court actually moved closer to the objective test because of the strong views it expressed against the government's conduct. The implications of this case remain to be worked out in subsequent decisions.

Virginia L. Vile

See also: Child Pornography.

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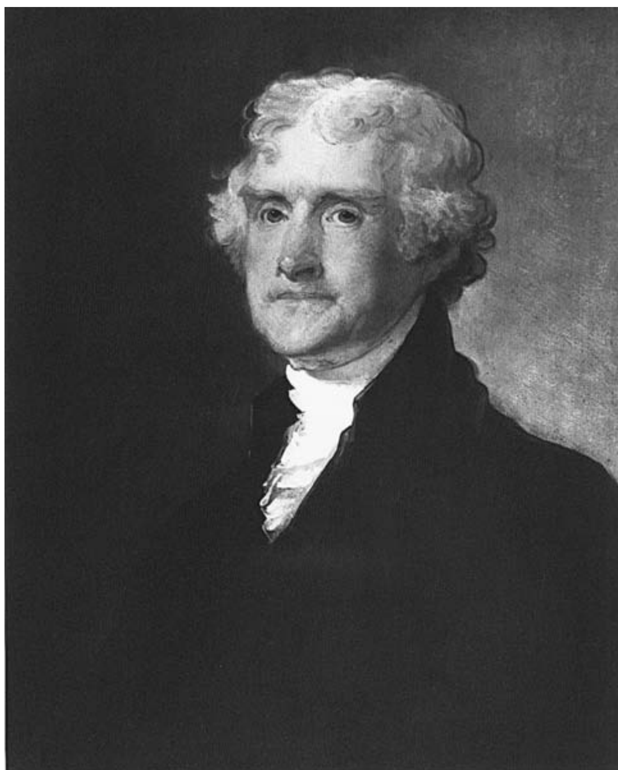
Jefferson, Thomas (1743–1826)

Thomas Jefferson, the third president of the United States, primary author of the Declaration of Independence, and the founder of the Democratic-Republican Party (the precursor to today's Democratic Party), was a staunch defender of civil liberties. Jefferson believed that democracy could not survive, much less thrive, without freedom of belief, conscience, and expression. To Jefferson, this freedom was protected in large part through the First Amendment to the United States Constitution, which stated: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." The wording of the First Amendment owed a good deal to Jefferson's proposal to the Virginia legislature in 1779, which prohibited government interference in the basic tenets of individual thought and expression.

Although some scholars have identified Jefferson as an Antifederalist, he was not opposed to the Constitution. He did, however, believe that without a Bill of Rights the document was flawed. "Government," Jefferson wrote to James Madison (1751–1836) on December 20, 1789, should not be allowed to infringe on the people's right to "freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by juries." It was in large part due to Jefferson's urging that Madison introduced twelve amendments during the first Congress, ten of which became the Bill of Rights to the Constitution.

Freedom of religion, in Jefferson's view, was the foundation on which all expressive liberty stood. "The constitutional freedom of religion," Jefferson told the Virginia Board of Visitors in 1819, was "the most sacred of all human rights." He argued that it was the right of all individuals to worship according to the dictates of their individual conscience. Jefferson, very much a product of the eighteenth-century Enlightenment, contended that no religion had a right to force its doctrines on others or to mandate attendance at any church. Jefferson believed that the only way to protect this absolute freedom of belief and conscience was to build a "wall of separation" between the church and state. In a letter to the Danbury Baptist Church written in 1802, Jefferson explained his position by maintaining that "religion is a matter which lies solely between man and his God, that he owes account to



Thomas Jefferson was the primary author of the Declaration of Independence, advocate of the Bill of Rights, and third president of the United States. *(National Archives)*

none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions." Jefferson's hostility was never aimed at religious thought. His hostility was always directed at what he saw as the tyranny of some religions over the freedom of belief and conscience of others.

In theory, Jefferson's wall of separation, articulated through the Establishment and Free Exercise Clauses of the First Amendment, has meant that no one religion has been given preference over another and that the U.S. government was prohibited from establishing a state religion as England had done. Along with Adam Smith (1723–1790), Jefferson maintained that when a government tried to enforce uniformity of religious beliefs, the result was "intolerance" and "oppression." In historical practice, the wall of separation has been interpreted by the U.S. Supreme Court as banning everything from the posting of the Ten Commandments in schools and government buildings to government support of parochial schools to permission for Jewish soldiers to wear yarmulkes while in dress uniform.

Throughout most of the Court's history, the justices have accepted Jefferson's wall of separation. However, when Chief Justice William H. Rehnquist first joined the Court in 1972 as an associate justice, he rejected the wall of separation, arguing that government should be allowed to support religion under limited circumstances. For instance, in his dissent to *Wallace v. Jaffree,* 472 U.S. 38 (1985), in which the Court overturned Alabama's "moment of silent prayer," Rehnquist told his colleagues: "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."

Speech, in Jefferson's view, was simply an extension of what an individual thought. Therefore, government had no right to limit this expression: "I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man." When the Federalist-dominated Congress passed the Sedition Act of 1798 with the approval of President John Adams (1735–1826), Jefferson (then serving as vice president) was appalled. This law was one of the most serious restrictions on the freedoms of speech and press in the history of the United States. The Sedition Act established severe penalties for "false, scandalous, or malicious" statements about the president, Congress, or the U.S. government in general out of fear that such statements would encourage people to overthrow the government or stir up enmity among foreign governments. Adams felt the United States was particularly vulnerable to sedition because of the large numbers of immigrants who made America their home. Of the twenty-five people arrested under the Sedition Act, only ten were convicted. Jefferson pardoned all of them after he became president in 1801.

To Jefferson, the printed word was of extreme value on both a personal and political level. In a letter to John Adams in 1815, Jefferson wrote, "I cannot live without books." If the authors of those cherished books were stifled, freedom was sure to suffer. In 1814, Jefferson ordered a scientific book about the creation of the world written by Frenchman M. de

Beaucourt, only to be told that the book had been banned. He wrote the bookseller that he was "mortified to be told that, in the *United States of America,* a science book can become a subject . . . of criminal inquiry." Jefferson later received the book directly from the author. According to Jefferson, a free press served to protect democracy, and he believed that if the right to a free press was limited, democracy would cease to exist. Jefferson argued that it was better to have newspapers without government than to have government without newspapers.

Before his death, Thomas Jefferson wrote the epitaph that appears on his tombstone in the family burial ground at Monticello, identifying what he believed was his legacy to the state of Virginia and to the United States: "Here was buried Thomas Jefferson, author of the Declaration of American Independence, of the statute of Virginia for religious freedom, and founder of the University of Virginia." The tombstone includes no reference to his eight years as president of the United States (1801–1809).

Elizabeth Purdy

See also: Alien and Sedition Acts; Declaration of Independence; First Amendment; Madison, James; Separation of Church and State; Virginia Statute for Religious Freedom.

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Jehovah's Witnesses

Jehovah's Witnesses are an anti-Trinitarian, separatist, apocalyptic, indigenous religious sect whose members have been parties in many civil liberties cases. The most common issue around which the cases turn involves the Free Exercise Clause of the First Amendment to the U.S. Constitution, under which individuals are free to exercise their religious belief in keeping with their faith.

Jehovah's Witnesses accept the virgin birth of Jesus Christ but deny that he has two natures (divine and human), declaring instead that he is the first creation. They also teach that the Holy Spirit is not a third person of the Trinity but no more than the power of God at work. They reject creeds and claim to base all faith and practice on the Bible. However, their guidance from the Bible is supplemented by the teachings of their leaders.

Jehovah's Witnesses believe the end of history is near. They meet in kingdom halls, not only expecting the Second Advent of Jesus but also predicting it on a number of occasions.

Jehovah's Witnesses were organized by Charles Taze Russell. He was deeply influenced by the Adventist movement begun by William Miller, and in 1884 Russell incorporated the Watchtower Bible and Tract Society. The organization has been variously known as Russellites, Millennial Dawnists, Rutherfordites (after "Judge" Joseph Franklin Rutherford, the successor to Russell), and International Bible Students. Since 1931 the official name has been Jehovah's Witnesses.

Jehovah's Witnesses have separated themselves into what they believe is the only group that has the truth necessary for salvation. They reject the term "church." They teach that big business, the churches, and civil government are part of the kingdom of Satan.

Based on their belief that the civil government is under the control of Satan, Jehovah's Witnesses refuse to engage in patriotic acts of civil worship. They claim that reciting the Pledge of Allegiance to the flag and saluting the flag are acts of idolatry forbidden by conscience. In *Minersville School District v. Gobitis,* 310 U.S. 586 (1940), the U.S. Supreme Court upheld a

Jehovah's Witnesses at the Eight-Day World Assembly, Yankee Stadium, New York City, 1963. Jehovah's Witnesses are a religious organization whose members have been parties to many civil liberties cases involving freedom of religion and speech, as well as conscientious objection to military service and refusals to accept blood transfusions. *(AP/Wide World Photos)*

Pennsylvania law requiring the salute, but in the middle of World War II reversed that decision in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), holding that the Free Exercise Clause prohibited compelling Jehovah's Witnesses to salute the flag.

In other cases the courts have held that children in public school who are Jehovah's Witnesses may not be compelled to stand for the Pledge to the flag or to participate in other patriotic observances, such as marching in patriotic parades or singing patriotic or school songs, or to engage in school politics. Jehovah's Witnesses schoolchildren can refuse to observe holidays (national, religious, or local), celebrate birthdays, or participate in extracurricular activities—including sports, cheerleading, and homecoming activities. Nor may they be forced to participate in martial arts (boxing and wrestling), lotteries, games of chance or gambling, school clubs, or school plays.

This renunciation of patriotic expression on religious grounds has been extended to automobile license plates. In *Wooley v. Maynard,* 430 U.S. 705 (1977), the Court held that New Hampshire could not require individuals to display a statement on an automobile license plate—the state's motto, "Live free or die"—that violated religious beliefs.

Jehovah's Witnesses believe they have a religious duty to "witness." To aid them in their proselytizing work, they produce prodigious amounts of literature, some of which is used in door-to-door ministries. In *Cantwell v. Connecticut,* 310 U.S. 296 (1940), the Supreme Court ruled that religiously neutral laws requiring prior approval to solicit funds could not burden the free exercise of religion. Also, in *Murdock*

v. Pennsylvania, 319 U.S. 105 (1943), the Court held invalid laws levying license taxes on peddlers of religious tracts, as it did laws prohibiting door-to-door distribution of religious handbills in *Martin v. Struthers,* 319 U.S. 14 (1943).

The Jehovah's Witnesses have been given protection for public preaching without official approval in public parks, as the Court held in *Niemotko v. Maryland,* 340 U.S. 268 (1951). Prior approval is not required even if the streets become littered with literature or participants use unlicensed sound trucks or insult other religions.

On the other hand, in *Cox v. New Hampshire,* 312 U.S. 569 (1941), the Court held the Jehovah's Witnesses could not hold a parade without permission, and it ruled in *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), they could not create a breach of peace in the course of a public meeting. Nor may they use religion as a reason to violate state child welfare laws by allowing a young child to sell magazines on a street corner late at night, as the Court held in *Prince v. Massachusetts,* 321 U.S. 158 (1944).

Jehovah's Witnesses are not pacifists, but they do reject military service. They could participate in a holy war (a war commanded by God), but they do not believe God has commanded any such war since Old Testament times. In a number of cases, the Court has rejected claims that all Jehovah's Witnesses are ministers and therefore exempt from military service. Continued refusal in some cases has meant imprisonment for disobeying the military service laws.

Conscientious objection to engaging in arms production has been the subject of court action. In *Thomas v. Review Board, Indiana Employment Security Division,* 450 U.S. 707 (1981), the Supreme Court ruled that a Jehovah's Witness who left his job at an armaments plant because of conscientious belief could not be denied unemployment benefits.

Jehovah's Witnesses reject blood transfusions even when the patient will die without receiving one. They base this ethic upon Leviticus 17:10 and Acts 15:20, which they interpret to require abstention from receiving blood in any fashion. In some instances when minors are involved, the courts have ruled that a blood transfusion should be given despite the parents' refusal to authorize it.

The many cases involving Jehovah's Witnesses have allowed the courts to consider the scope and limitations of the free exercise of religion. In general, unless the activity seriously counters reasonable protection of the public welfare, the Court has allowed it.

A.J.L. Waskey

See also: First Amendment; Flag Salute; Free Exercise Clause.

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Jim Crow Laws

See Civil Rights Cases

Johnson v. Louisiana (1972)

In *Johnson v. Louisiana,* 406 U.S. 356 (1972), the U.S. Supreme Court ruled that it was not mandatory for a jury verdict to be unanimous. The Sixth Amendment to the Constitution guarantees an impartial jury and, following English tradition, the framers intended juries should reach unanimous verdicts or none at all. For the sake of efficient justice, however, some states altered the unanimity rule for twelve-person juries, requiring instead the agreement of either nine or ten of the twelve. Louisiana was one such state that authorized a verdict by nine of twelve jurors in criminal cases in which the punishment was hard labor. The issue

for the Court in *Johnson* and its companion case, *Apodaca v. Oregon,* 406 U.S. 404 (1972), was whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment required states to observe jury unanimity in criminal cases as required in the federal courts.

The defendant was convicted of robbery by a nine–three jury verdict in the Criminal District Court of the Parish of Orleans. The Louisiana Supreme Court upheld the conviction, and the defendant appealed to the U.S. Supreme Court. He argued that a unanimous jury verdict was required under the Due Process Clause in order to give substance to the reasonable-doubt standard of proof.

Justice Byron R. White, in the five-four majority opinion, wrote that it was an unsupported assumption that the jury majority would not weigh carefully the arguments of dissenting jurors. The state had satisfied its burden of proving guilt beyond any reasonable doubt by obtaining nine votes to convict versus three votes to acquit. Johnson contended that the less-than-unanimous verdict was also a violation of the Equal Protection Clause because Louisiana required a unanimous verdict in capital cases and by five-person juries in other serious crimes. White's opinion held it was a reasonable legislative judgment to require the number of jurors who must be convinced beyond a reasonable doubt to increase with the seriousness of the crime and the severity of the punishment.

The dissenters argued that a unanimous jury was a constitutional standard in criminal cases, basic to the accusatorial system. They further argued that the requirements of a unanimous jury verdict and of proof of guilt beyond reasonable doubt were so important that they should be changed only by constitutional amendment.

Mark Alcorn

See also: Beyond a Reasonable Doubt; Jury Unanimity; Trial by Jury.

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Johnson, Frank M., Jr. (1918–1999)

Although U.S. Supreme Court justices typically garner far more attention, lower federal and state judges, who also exercise the power of judicial review (the power to invalidate unconstitutional legislation), also play important roles in shaping American jurisprudence. Few such judges in the twentieth century played a more important or visible role than Alabama's Frank M. Johnson Jr.

Born in Alabama in 1918, Johnson graduated first in his class at the University of Alabama Law School. A Republican in a predominantly Democratic state, Johnson made friends with Herbert Brownell, who became President Dwight D. Eisenhower's attorney general. After Eisenhower's election in 1952, Johnson was named as a U.S. attorney for the Middle District of Alabama. Eisenhower subsequently appointed him to a U.S. District Court judgeship in 1955, at which time Johnson, at thirty-seven, was the youngest such federal judge in the nation.

Johnson's appointment came on the heels of the U.S. Supreme Court's historic decision in *Brown v. Board of Education,* 347 U.S. 483 (1954), which declared an end to the doctrine of "separate but equal" and to the Jim Crow segregation laws by which this doctrine had been enforced. Johnson played an important role in enforcing this decision in Alabama, joining two other federal district judges, whom he would join in other cases, in *Browder v. Gayle,* 142 F. Supp. 707 (M.D. Ala. 1956), striking down state and municipal laws requiring segregation in Montgomery's public transportation system.

As one-time fellow law student George C. Wallace rose to prominence as Alabama's race-baiting governor, Johnson had numerous clashes with him. Wallace often derided Johnson in public, calling him on one occasion an "integrating, scalawaging, carpet-bagging, race-mixing, bald-faced liar" who was destroying Alabama, and once saying that Johnson needed a "barbed-wire enema." As occurred for other federal judges of the period, Johnson's former friends and neighbors often ostracized him. Johnson nonetheless fearlessly continued to uphold civil rights and liber-

ties, issuing an injunction in *Williams v. Wallace,* 240 F. Supp. 100 (M.D. Ala. 1965), that permitted the historic civil rights march from Selma to Montgomery, Alabama.

Johnson managed the Montgomery school system for over a decade in carrying out desegregation in *Carr v. Montgomery County Board of Education,* 289 F. Supp. 647 (M.D. Ala. 1968), work that Justice Hugo L. Black, also of Alabama, later specifically commended in a Supreme Court decision. Johnson subsequently issued orders requiring reform of the state's mental health facilities, highway patrol, prisons, and other institutions. His detailed orders and continuing oversight of these institutions pushed traditional understandings of the role of judges to their limits.

In 1979, President Jimmy Carter elevated Johnson to the U.S. Court of Appeals for the Eleventh Circuit. In this position, Johnson issued opinions that were often more liberal than those of the U.S. Supreme Court. Most notably, in *Hardwick v. Bowers,* 760 F.2d 1202 (1985), Johnson favored striking down the Georgia state sodomy law that the U.S. Supreme Court later upheld in *Bowers v. Hardwick,* 478 U.S. 186 (1986)—a decision that it later overturned in *Lawrence v. Texas,* 539 U.S. 558 (2003).

Johnson retired from the federal bench in 1996 and died in 1999. Although praised and criticized as a proponent of judicial activism, Johnson regarded his decisions as simply fulfilling his constitutional obligations.

John R. Vile

See also: Judicial Review.

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Johnson, Lyndon Baines (1908–1973)

Lyndon Baines Johnson was president of the United States from the death of John F. Kennedy in 1963 until the inauguration of Richard M. Nixon in 1969. It is ironic that the president most responsible for civil rights and social welfare legislation was a southerner and onetime segregationist who initially rose to power as the choice of the southern wing of the Democratic Party. But Johnson had also been a follower of Franklin D. Roosevelt and wanted to be remembered as the president responsible for the continuation of Roosevelt's New Deal policies. Instead, Johnson is most remembered for the Vietnam War. Tragically, Johnson wanted to focus on important domestic policies, but he felt trapped by the need to respond to communism in Southeast Asia. In the midst of the Cold War, Johnson saw no way out of a war that ultimately was his downfall.

Before the presidency, Johnson had been elected to the U.S. House of Representatives from the Austin, Texas, area in 1937. A pro-Roosevelt candidate, he was elected in 1948 to the U.S. Senate from Texas and shifted to the right. In 1953, backed by key southern segregationist senators such as Richard Russell of Georgia, he was elected Senate minority leader, and in 1954 he became majority leader. Johnson proved to be one of the most able and successful Senate leaders in history.

This individual who can legitimately be characterized as larger than life was described by one biographer as "rude, intelligent, shrewd, charming, compassionate, vindictive, maudlin, selfish, passionate, volcanic and cold, vicious, and generous." He was an ideal Senate insider who could compromise, persuade, and cajole other senators so effectively that his legislative efforts evoked considerable awe. Johnson had higher ambitions than the Senate, however; he wanted to be president.

In 1957 he was largely responsible for the passage of a relatively weak civil rights act, but it was the first such legislation that had been passed since the end of Reconstruction. Passage of the 1957 act also positioned Johnson as more than simply a southern poli-

President Lyndon B. Johnson, seated and surrounded by members of Congress, signs the 1968 Civil Rights Act prohibiting discrimination in the sale and rental of housing. *(Library of Congress)*

tician but as a serious prospect for the White House. Running for president in 1960, Johnson had to content himself with the vice presidential nomination on the Democratic ticket with John F. Kennedy. With Kennedy's assassination in 1963, Johnson was thrust into the presidency and immediately moved to pass civil rights and social welfare legislation. Johnson's efforts led to the passage of the War on Poverty, Medicare, and the Civil Rights Acts of 1964, 1965, and 1968. The 1964 act contained a number of important provisions: Three of the most important provided for desegregation of places of public accommodation, denial of federal funds to schools that did not desegregate, and prohibition on many forms of employment discrimination. The 1965 act proved remarkably effective in ending the exclusion of blacks from voting in the South. The 1968 act was a fair housing law passed in the wake of Martin Luther King's assassination. But at the same time Johnson was achieving domestic policy successes that had not been seen since the early days of the New Deal, the conflict in Vietnam was becoming more heated. Although Johnson won an overwhelming victory in the 1964 election by portraying himself as the "peace candidate" against Republican Barry Goldwater, it was not long until the Vietnam conflict underwent significant escalation. As it did, the cities and universities of America rioted over poverty, racism, and rising frustrations about the war.

Johnson was labeled a "warmonger" and "baby killer," and he was incapable of effectively convincing much of America of the need for continued escalation of the war. His remarkable political skills as a Senate insider did not translate into success in communicating with and in persuading the American public. Instead of convincing, he was perceived as secretive and deceitful. The most successful president in achieving his domestic policy goals since Roosevelt was increasingly isolated, maligned, and ineffectual. Minorities

and students—the very groups who had benefited most from his civil rights and education programs—were his harshest critics. The result was that Johnson chose not to run for reelection in 1968, although he had sufficient control over Democratic Party machinery to obtain the Democratic nomination for his vice president, Hubert H. Humphrey. A tumultuous Democratic convention, however, helped ensure the election of Richard Nixon in 1968.

In the summer of 1968, Johnson was given one last opportunity to influence domestic policy. Chief Justice Earl Warren met with Johnson and announced his retirement plans. Johnson immediately knew he would nominate his old lawyer and ally, Abe Fortas, as Warren's replacement. Johnson had named only two justices to the Court—Abe Fortas and Thurgood Marshall. Both were certain votes in favor of civil rights and civil liberties claims. Fortas, in particular, was very close to Johnson and had remained an adviser to him even while on the Court. Johnson nominated Fortas for the chief justiceship and Homer Thornberry—a court of appeals judge, former Texas congressman, and Johnson political crony—to replace Fortas as associate justice. It was too late, however. Republicans were smelling victory in November and wanted the chief justice to be named by Nixon. Johnson was politically weak by that point. Fortas was attacked for his liberalism, for his close relationship with Johnson, and for perceived conflicts of interest. Thus, Johnson failed in his last major chance to influence the future of domestic policy and civil rights and liberties in America.

Johnson retired to his Texas ranch a broken man. One of the century's most effective presidents in achieving domestic policy goals and the strongest and most effective president in support of civil rights legislation, Johnson failed in foreign policy, proving unable to hold the country together in the face of an unpopular war.

Anthony Champagne

See also: Nixon, Richard M.; Warren, Earl.

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Judicial Review

Judicial review occurs whenever a court considers the compatibility of, most typically, a legislative or executive action with the provisions of a constitution. Judicial review is an essential feature of U.S. constitutional government, under which fundamental principles limit the scope of public authorities. In the U.S. judicial system, courts of various descriptions exercise the power of judicial review. Many courts at the municipal, county, state, and federal levels have authority to determine the constitutionality of the actions of coordinate branches of government. For example, a municipal court may decide that an ordinance passed by a city council is inconsistent with the terms of the state's constitution. Similarly, a state court of last resort, such as a state supreme court, might declare an action taken by the state's governor to be a violation of the state or federal constitution. Regardless of the setting, instances of judicial review signal a government of limited powers and the presence of the rule of law.

Although exercised by courts at various levels of government, the subject of judicial review arises most often in discussions about the behavior of the U.S. Supreme Court. The Court first exercised the power of judicial review in *Marbury v. Madison,* 5 U.S. 137 (1803). In his famous opinion in *Marbury,* Chief Justice John Marshall announced that an act of Congress—specifically, a provision of the Judiciary Act of 1789—violated the principles embodied in Article III of the U.S. Constitution. As a result, Marshall explained, the statute passed by Congress was void. The effect of this decision was to establish that the justices of the Supreme Court possessed the authority to consider the constitutionality of actions taken by the national legislature. Perhaps most important, the decision in this case affirmed the idea that the Court

was uniquely situated to serve as final arbiter of the meaning of constitutional language and federal laws. On this matter, Marshall's intentions were especially clear: "It is emphatically the province and duty of the judicial department to say what the law is."

It is important to note that the practice of judicial review was known to American jurists long before Chief Justice Marshall issued his famous opinion in *Marbury.* The 1610 decision in *Bonham's Case,* 8 Coke's Reports 114, commonly regarded as the first recorded reference to judicial review in the Anglo-American legal tradition, is a common starting point for examinations of judicial power. In this decision, British Chief Justice Edward Coke stated, "When an Act of Parliament is against common right and reason, the common law will control it and adjudge such Act to be void." Furthermore, eighteenth-century court records from the American colonies, as well as those compiled during the Constitutional Convention of 1787, reveal a general awareness and endorsement of the legitimacy of judicial review.

However fundamental to the practice of limited government, judicial review is not universally regarded as consistent with legislative authority and the basic theory of representative democracy. Arguably the best known of nineteenth-century opponents of judicial review, Judge John B. Gibson of the Supreme Court of Pennsylvania issued what is commonly regarded as the classic "usurpation" argument critical of the exercise of judicial review. Judge Gibson, in his 1825 opinion in *Eakin v. Raub,* 12 Sergeant and Rawle 330 (Pa. 1825), indicated that for a court to nullify an act of a legislature was tantamount to a judicial usurpation—an extralegal assumption—of the legislature's constitutional authority.

In 1788, immediately before ratification of the Constitution, Judge Robert Yates argued that the practice of judicial review was, in its essence, antidemocratic. Judge Yates, a member of the New York Supreme Court and disaffected former delegate to the Constitutional Convention of 1787, published the earliest statement of what is often labeled the "democratic incompatibility" argument against the U.S. Supreme Court's exercise of judicial review. Yates observed that if the unelected justices of the Court were to serve as the final arbiter of the constitutionality of congressional acts, they were, in effect, serving as an unchecked superlegislature. In short, Yates argued that the act of legislating was one properly reserved to the people and their elected representatives. Judicial review, he insisted, was inconsistent with the tenets of representative democracy.

In recent years, several scholars have suggested that modern justices have badly misunderstood Chief Justice Marshall's opinion in *Marbury.* For example, one observer presented evidence consistent with the view that justices during the early to mid-nineteenth century interpreted Marshall's opinion to mean that the only legislative acts subject to Supreme Court review were those directly implicating the power of the federal judiciary. Among the support for this proposition was the fact that after the 1803 decision in *Marbury,* a case directly implicating the powers of the judiciary, the Supreme Court did not refer to that case as precedent for the exercise of judicial review until the late 1800s. In this view, most twentieth-century instances of judicial activism, by which the justices struck down legislative and executive actions of many descriptions, would be deemed inconsistent with the earliest interpretations of the Court's powers outlined in Article III of the Constitution. In short, scholarly examinations of judicial review inevitably generate questions regarding the proper scope of judicial authority vis-à-vis the other branches of government in the U.S. constitutional system.

Discussions about the powers of judicial review as exercised by the U.S. Supreme Court are equally discussions about the appropriate divisions of power between state and federal authorities. Issues regarding the scope of federal authority in the early nineteenth century were resolved primarily in the context of Supreme Court decisions on the power of judicial review. Beginning with *Fletcher v. Peck,* 10 U.S. 87 (1810), the justices established that it was within the province of the Court to review the constitutionality of the actions of state legislatures. Furthermore, *Peck* set the stage for what is historically regarded as the Court's most important statement on the matter of federalism—the 1819 decision in *McCulloch v. Maryland,* 17 U.S. 316, in which the Court struck down a Maryland state law that placed a tax on the notes of the Bank of the United States. In effect, Chief Justice John Marshall's opinion announced that Congress enjoyed vast legislative authorities granted under Ar-

ticle I of the Constitution and that the Supremacy Clause in Article VI prohibited states from legislatively hindering federal initiatives.

Questions concerning the power of the Court to review the decisions of state judiciaries were answered in two early landmark decisions. In *Martin v. Hunter's Lessee,* 14 U.S. 304 (1816), and *Cohens v. Virginia,* 19 U.S. 264 (1921), Chief Justice Marshall announced that the Constitution granted the Court authority to review state-court decisions in both civil and criminal cases, respectively, that implicated provisions of federal law. As in instances where the Supreme Court strikes down an act of a state legislature, the power to overturn the decisions of state courts of last resort derives from Article VI of the U.S. Constitution.

Today, most judicial scholars accept the practice of judicial review as a legitimate extension of the power conferred on the Supreme Court by Article III of the Constitution. In addition, justices of all ideological descriptions demonstrate a willingness to strike down legislative and administrative actions found to be inconsistent with constitutional principles. Most important, in recent decades the justices have dedicated increasing proportions of the Court's plenary docket to constitutional decision-making. In sum, the expanse of U.S. Supreme Court history reflects the importance of judicial review as both a principal vehicle for judicial policy-making and a guarantor of bounded government authority.

Bradley J. Best

See also: Marshall, John; United States Constitution; United States Supreme Court.

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Jury Nullification

Jury nullification occurs when jurors, based on their own sense of justice, fairness, or prejudice, refuse to uphold the law as explained to them by a judge and acquit defendants who are obviously guilty of violating the law. In short, jurors nullify that law. In a 1670 English trial, the jury issued a verdict inconsistent with the law in the renowned *Bushell's Case,* 1 State Trials 869 (1670). The defendants, Quakers William Penn and William Mead, were charged with unlawful assembly and disturbing the peace. Despite the evidence supporting these charges, the jurors acquitted. Much later in colonial America, a jury nullified the seditious libel law when a newspaper publisher, John Peter Zenger, was charged with publishing remarks critical of a British-appointed governor.

Jurors appear to nullify the law more often in cases involving (1) defendants facing sentences that jurors believe are too harsh, (2) laws that jurors feel should not be applied to a particular defendant, (3) racially charged cases in which jurors feel racial sympathy or animus toward particular defendants, (4) victims whom jurors view unsympathetically and as undeserving of the state's protection, and (5) instances of governmental intervention in a public policy or realm that jurors view as illegitimate, unjustified, or trivial.

Jurors may have both good and bad motives for nullifying or ignoring laws. Whatever their reasons, nullification makes the administration of justice highly subjective. One example of jury nullification occurred when Michigan juries refused to convict Dr. Jack Kevorkian four times despite the fact that he had clearly engaged and admitted to engaging in unlawful doctor-assisted suicides. Infamous examples of jury nullification involved southern juries in the 1950s and 1960s refusing to convict Ku Klux Klan defendants of harassing and murdering African Americans. Juries have often refused to convict defendants charged with drug offenses, believing that the mandatory sentences are too harsh. Jurors may think the government is wasting their time by sending them cases that are triv-

ial or involve less serious offenses; to send a message, they may nullify the law. Other jurors view nullification as a form of civil disobedience, as a means of expressing outrage at a law they believe is morally wrong, such as when various northern juries refused to uphold the Fugitive Slave Act of 1793. The federal courts and state appellate courts, however, in case after case, have maintained unanimously that judges may not inform jurors about their power to nullify the law.

In 1989 a group called the Fully Informed Jury Association (FIJA) strongly began advocating that judges should inform juries of an inherent right to place their conscience above the law and, in essence, give juries the power to nullify the law. Advocates for jury-nullification instructions argue that juries in a democratic society serve as the conscience of the community and provide a mechanism for checking the power of governmental officials. Juries through nullification may make the administration of justice more fair and may compel legislatures to enact laws that are more in line with societal values.

Traditionally, judges and legal scholars have opposed the concept of jury nullification. They see jury nullification as undemocratic, claiming that juries are not always representatives of the community, are ridden with local biases, and subvert the legislative process. Critics further claim that juries are not sufficiently well informed to make policy decisions, and because they are not elected, they should not be policy-makers. When laws are not applied to particular defendants, racial or ethnic bias may be a factor. In addition, when some juries uphold the law and others do not, the result is uneven enforcement of the law. Whether jury nullification is truly a democratic or an antidemocratic practice will be subject to debate for years to come.

Ruth Ann Strickland

See also: Zenger, John Peter.

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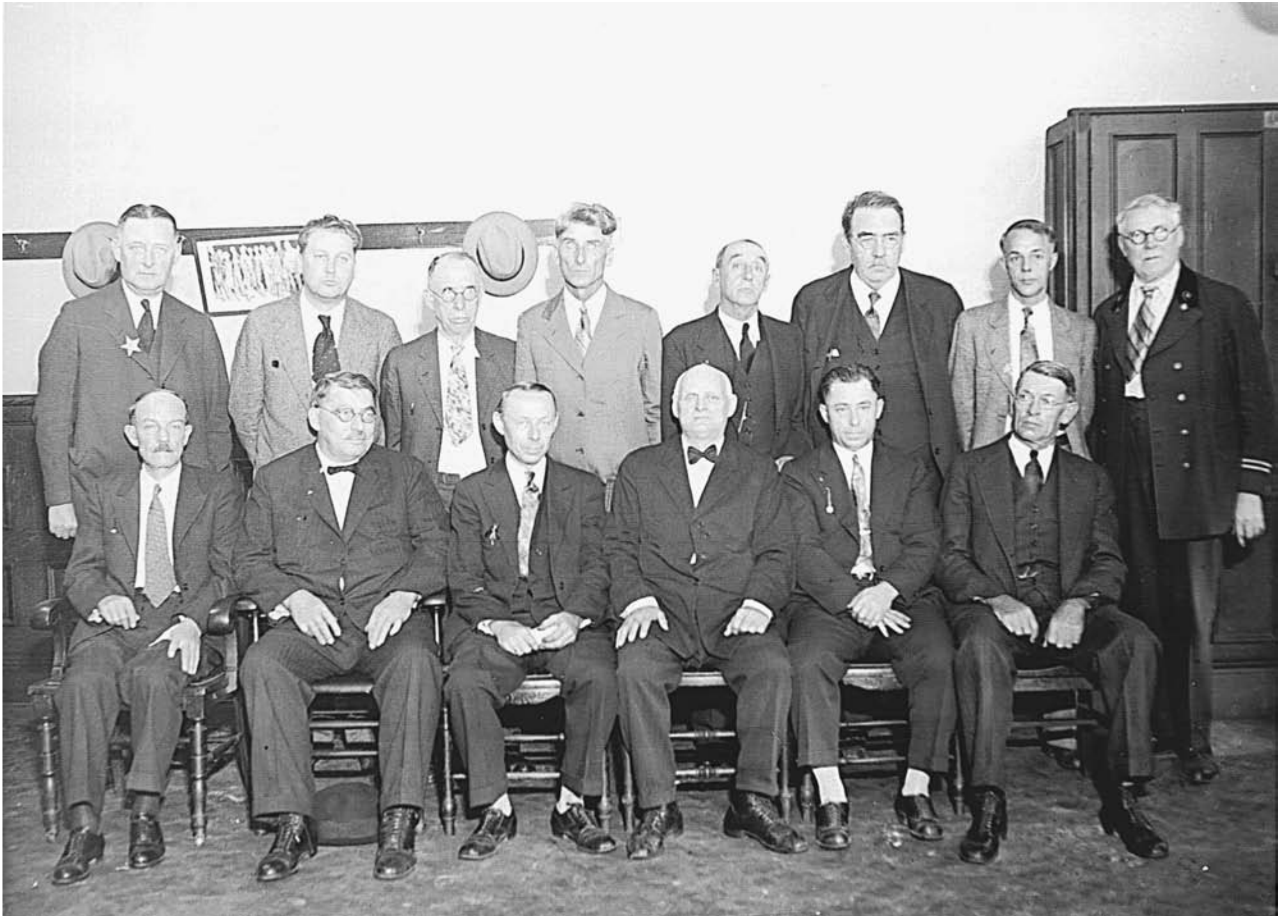
Jury Size

The U.S. Constitution safeguards the right to a jury trial in three separate provisions. Article III and the Sixth Amendment guarantee the right to a jury trial in criminal cases, and the Seventh Amendment guarantees the same right in civil cases. None of these provisions, however, specifies how many members the jury must have. Although the twelve-member jury is so familiar as to seem universal, the number of jurors necessary for a "trial by jury" has been the subject of several Supreme Court rulings and much debate.

In *Thompson v. Utah,* 170 U.S. 343 (1898), the Court ruled that in a federal criminal case, the Sixth Amendment required a twelve-member jury. The decision was based largely on historical tradition; the twelve-member jury had been a feature of the British and American legal systems for hundreds of years. This decision remains the rule governing federal criminal cases. In *Williams v. Florida,* 399 U.S. 78 (1970), however, the Court refused to apply the same requirement to trials in state courts and upheld a six-person jury for criminal trials in noncapital cases. Writing for the majority, Justice Byron R. White said that "[t]he fact that the jury at common law was composed of precisely twelve is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance." The Court argued that essential functions of the jury—accurately finding facts, deliberating the guilt of the accused, and fairly representing the community—could be performed as effectively by six citizens as by twelve.

Advocates of smaller juries also argue that they save



Group portrait including two officials and the twelve-person jury selected for the income tax evasion trial of Al Capone, 1931. The jury is an important element in the U.S. justice system. *(AP/Wide World Photos)*

time and money. Fewer citizens need to be called to serve, and less time is needed to select and seat smaller juries. Cases can be decided more quickly by a smaller group, since fewer people are involved in the discussion.

Opponents of smaller juries argue they are less likely to include a wide variety of viewpoints and less likely to contain members of minority groups. Thus, they are less likely to fairly represent the community and are potentially biased against minority defendants. Because larger groups are more likely to engage in longer, more thorough discussions of the facts, and because they also have more people available to remember crucial facts from the trial, they are more likely to reach accurate verdicts. In *Ballew v. Georgia,* 135 U.S. 223 (1978), the Supreme Court acknowledged some of these arguments, holding that a five-member jury was too small to foster effective group deliberation and violated the Sixth and Fourteenth Amendments.

Many of the same arguments apply to civil as well as criminal trials. The Supreme Court held in *Colgrove v. Battin,* 413 U.S. 149 (1973), that a six-person jury was allowed under the Seventh Amendment, and Rule 48 of the *Federal Rules of Civil Procedure* permits juries of between six and twelve in federal cases. Because the Supreme Court has never ruled that the Seventh Amendment is applicable to the states, the *Battin* decision does not apply to state civil trials, where a jury trial can be denied entirely unless required by state law. Currently, only ten states require unanimous, twelve-member civil juries.

Thomas A. Schmeling

See also: Jury Unanimity; Movie Treatments of Civil Liberties; Seventh Amendment; Sixth Amendment.

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Jury Unanimity

Most people assume that a person cannot be convicted of a crime except by a unanimous jury. Although federal courts and most states do require unanimity in criminal cases, the U.S. Supreme Court has ruled that the Sixth Amendment guarantee of trial by jury allows convictions by less than a unanimous vote in state courts. The Court has also ruled that the Seventh Amendment allows nonunanimous verdicts in civil cases.

HISTORY AND SUPREME COURT RULINGS

The unanimous verdict was a feature of the English common law and was widely accepted in North America at the time of the framing of the Constitution. In writing the Sixth Amendment's guarantee of trial by jury, James Madison included a requirement of unanimous verdicts, but this provision was deleted before the amendment was sent to the states for ratification. The tradition of unanimous verdicts inherited from England was strong enough, though, that the Supreme Court has consistently held that the Sixth Amendment guarantee of trial by jury requires that a verdict of guilt be unanimous in cases tried in federal courts. On the other hand, the Court held in *Apodaca v. Oregon,* 406 U.S. 404 (1972), and *Johnson v. Louisiana,* 406 U.S. 356 (1972), that unanimity was not required for trials in state courts. In *Apodaca,* the Court upheld a conviction reached by a vote of ten–two, and in *Johnson* the Court sustained a conviction based on a nine–three vote. In considering the question with regard to state courts, the Supreme Court did not base its decision on history. Rather, the court engaged in a "functional analysis" of the purpose and essential characteristics of the criminal jury.

MAJORITY VERDICTS: PRO AND CON

Proponents of majority verdicts argue for them largely on grounds of efficiency. Without the requirement of unanimity, juries reach verdicts more quickly, saving time for both the jurors and the court. Because they allow a guilty verdict to be reached even if a few jurors hold out, nonunanimous verdicts also reduce the number of hung or deadlocked juries, thus lowering the number of costly retrials.

Research on juries supports the argument that unanimous-verdict requirements do increase both the time it takes the jury to reach a decision and the frequency of hung juries. Kalven and Zeisel found that under a unanimity rule, juries hung at rates of 5–6 percent, but if nonunanimous verdicts were allowed, the rate of hung juries was just over 3 percent. Thus, requiring unanimity nearly doubled the rate of hung juries.

Critics of nonunanimous verdicts argue that since hung juries are very rare to begin with, any savings from eliminating the unanimity requirement would be very small. More important, the savings in retrials would come at significant costs to justice. If two of twelve jurors cannot support a guilty verdict, there would appear to have been some doubts as to guilt. To ignore these doubts threatens the defendant's right, implicitly protected under the Fifth Amendment, to be convicted only after proof of guilt beyond a reasonable doubt. In the famous film *Twelve Angry Men,* Henry Fonda's character holds out for the innocence of the defendant until he is able to convince all of the other jurors that he is correct. Under a majority-verdict rule, the other eleven jurors could simply ignore him and convict the defendant. Critics of nonunanimous verdicts argue that they increase the chances of falsely convicting the innocent, and research on juries seems to support this argument: Kalven and Zeisel found that when juries hung by one or two votes, it was most often the case that the holdouts favored acquittal.

Finally, although research does show that juries in nonunanimous cases do reach verdicts more quickly

than do unanimous juries, the danger is that jurors who can simply ignore dissenters will rush to judgment and not fully deliberate the defendant's guilt. This also implicates the function of the jury in representing the community. If minority viewpoints can be ignored by a majority of the jury, the result is the same as if the minority members had been excluded from the jury altogether.

Possibly because of these arguments, the movement for nonunanimous verdicts in criminal cases has not been very successful to date. First, the Supreme Court refused to allow a nonunanimous verdict (five–one) in a criminal case involving a jury of six in *Burch v. Louisiana,* 441 U.S. 130 (1979), holding that it violated the Sixth Amendment. Second, Oregon and Louisiana remain the only two states that allow nonunanimous verdicts in serious criminal cases, and as noted previously, unanimity is still required in federal criminal cases. On the other hand, more than thirty states allow nonunanimous verdicts in civil cases.

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See also: Beyond a Reasonable Doubt; *Johnson v. Louisiana;* Jury Size; Movie Treatments of Civil Liberties; Seventh Amendment; Sixth Amendment.

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Just Compensation

The Fifth Amendment to the U.S. Constitution requires payment of just (fair) compensation when private property is taken for a public purpose. That requirement, called the Takings Clause, has been applied to the states through the Due Process Clause of the Fourteenth Amendment. Therefore, in the United States, whenever the national government or the government of a state exercises its power of eminent domain to take private property for a public purpose, the owner of the property has the constitutional right to payment of just compensation. This requirement applies when the owner's entire interest in the property is taken, when only a partial interest is taken, or when the taking is temporary.

The goal of the just-compensation clause is to ensure that the taking of the property does not financially harm the owner of the property. The U.S. Supreme Court decided in *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1 (1984), that the Constitution required that the owner be paid fair market value for the property taken. That amount is based on the value of the property at the time it is taken by the government. The time of the taking is determined by the date on which the government gives the owner formal notice of the taking. Fair market value is what a willing buyer would pay a willing seller in a free market transaction. If the taking is only temporary, this amount will be based on what the property owner could have gotten for rent of the property for the period of the taking. The government taking the property makes an offer of what it has determined to be just compensation based on the evidence available. If the owner of the property rejects that offer and contests the taking, the case goes to court. The determination of fair market value is an issue of fact usually decided by a jury. Both parties to the case present expert testimony on the value of the property based on evidence from the sale of similar pieces of property in the area in recent times.

The U.S. Supreme Court has elaborated on the concept of fair market value to explain what factors may be considered in its determination. The definition of fair market value does not take into account the unique value placed on the property by the current owner who may have individual reasons for placing greater value on the property than what would be seen by another person in a free market transaction. It also does not take into account the impact of the taking on the value of the property. Therefore, if the property has a higher market value as private property before the taking than it has as public property after the taking, the property owner would be paid the higher value based on market value before the taking.

Furthermore, fair market value does not have to be based solely on the current use of the property if that property could have other uses. The assessment of fair market value can take into account other available uses for the property. However, the owner will not be compensated for future uses that the court considers only speculative. Also, in *United States v. Miller,* 317 U.S. 369 (1943), the Court decided that if the government takes a portion of a larger piece of property and the taking of the portion reduces the value of the land retained by the owner, the calculation of just compensation will include what is called "severance damage," an amount reflecting the loss of value to the owner's remaining property. Similarly, if the government's taking of a portion of the property increases the value of the property the owner retains, that value will be deducted from the amount owed by the government for the portion taken.

In recent years, the issues of whether property has been "taken" by government and whether it has been taken for "public use" are much more controversial than the issues surrounding determination of fair market value for the property taken. This is partly due to the fact that the determination of fair market value is considered an issue of fact for a jury. If the case is appealed, the appellate court usually defers to the jury's decisions on issues of fact unless the trial-court judge made a legal error in instructing the jury.

Pinky S. Wassenberg

See also: Property Rights; Takings Clause.

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Juvenile Curfews

Many U.S. communities have enacted local ordinances making it illegal for minors to be outdoors during specified hours, a trend that increased markedly during the early 1990s. Proponents of juvenile curfews believe these measures reduce youth crime, protect juveniles from victimization, and help parents assert control over difficult children. Opponents claim there is no evidence that curfews provide any of the promised benefits, and that even if there were, the benefits are outweighed by the curfew's infringements on liberty. The U.S. Supreme Court has never ruled on the legality of juvenile curfews, and lower courts are divided on their constitutionality.

The legal challenges most often raised against juvenile curfew ordinances are that they violate minors' right to freedom of movement; that they are overbroad; that they are unconstitutionally vague; and that they violate the right of parents to direct the upbringing of their children.

MINORS' FREEDOM OF MOVEMENT

The right to move about is not enumerated in the Constitution, but a right to travel and to movement has been recognized as arising as a corollary of the First, Fourth, Fifth, Ninth, or Fourteenth Amendments. As the Supreme Court said when striking down a vagrancy statute in *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972), the right to walk, stroll, loiter, and loaf as one pleases is "historically part of the amenities of life as we have known them," and denial of this right would result in communities marked by "hushed, suffocating silence." A permanent, nonemergency curfew would therefore violate the constitutional freedom of adults, even if it were shown that the curfew reduced adult crime or prevented victimization of vulnerable adults. Courts have differed over whether the right applies with equal force to minors.

Courts and commentators considering the equal protection aspects of the different treatment of adults and minors have wrestled over whether laws impacting juveniles should be examined under the strict scrutiny given to laws based on race, the intermediate scrutiny given to laws based on sex, or the rational-basis scrutiny given to other classifications. None of these approaches fits classifications based on youth, because age is not an immutable characteristic like race or sex; all minors who live long enough will become adults. Instead, laws applying solely to minors

should be viewed with an eye toward the factors identified in *Bellotti v. Baird,* 443 U.S. 622 (1979), which struck down a parental-consent law for minors seeking abortions. Under *Bellotti,* activity that is lawful for adults may be restricted for children only when doing so is justified by the particular vulnerability of children, their inability to make crucial decisions by themselves, or the need for state assistance to parents in child rearing.

OVERBREADTH

Even if a law permissibly regulates some area of wrongful conduct, it will be struck down as overbroad if it is so sweeping that it impinges upon a real and substantial amount of constitutionally protected activity. Some courts have relied upon the overbreadth doctrine to invalidate juvenile curfews that fail to allow necessary exceptions for participating in activities protected by the First Amendment, such as attending after-hours meetings or rallies. In response to overbreadth concerns, drafters of curfew ordinances that have survived judicial scrutiny have included exceptions for various situations. The most typical exceptions allow minors to be outdoors while in the presence of an adult escort; while engaged in activity protected by the federal Constitution such as First Amendment expression or interstate travel; while commuting to and from work or an activity sponsored by a school, church, or other adult community group; in response to emergency or necessity; or on streets immediately surrounding the home.

Opponents of curfews argue that they are overbroad in another sense, namely that they require all minors to remain indoors against their will based only on evidence that some subset of minors have in the past violated the law or were victimized while outdoors at night.

VAGUENESS

The need for various exceptions to a blanket curfew generates the related problem of vagueness. A law violates due process if it is drafted in terms so vague that it does not give adequate notice of what conduct is prohibited, or if it gives excessive discretion to police to enforce it at will. The latter concern is most important in curfew litigation, since opponents point to patterns of selective or arbitrary enforcement of curfew laws, frequently based on race or socioeconomic status. The power a vague ordinance gives to police to roust the usual suspects was the basis for striking down a "gang loitering" law in *City of Chicago v. Morales,* 527 U.S. 41 (1999), a case that also spoke about the right of persons who are otherwise breaking no laws to be present in a public place. Curfew ordinances that fail to give adequate guidance to police about when a person has "remained," "loitered," or "stayed" in a location for too long have been invalidated as unconstitutionally vague.

RIGHTS OF PARENTS

Although some parents appreciate the added authority of the government in setting curfews for their children, others resent the loss of their right as parents to establish family rules. A line of cases catalogued in *Troxel v. Granville,* 530 U.S. 57 (2000), highlighted the right of parents to control family life with a minimum of governmental interference. To date, no court has relied on the parental-rights theory to invalidate a curfew law, but legal analysts have begun to explore the theory in the context of curfew laws containing "parental responsibility" provisions that allow police to ticket parents whose children violate curfew.

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See also: Overbreadth Doctrine; Right to Travel; Rights of Minors; Vagueness.

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Juvenile Death Penalty

The juvenile death penalty is the imposition of capital punishment upon offenders who were under age eighteen when they committed the crime. Whether youths should be treated the same as adults for purposes of punishment by death is a very controversial issue. Juveniles have been treated differently from adults since the early common law period. The law early on recognized that juveniles were not as mentally or emotionally developed as adults and thus should be judged differently. This led to the development of the *parens patriae* doctrine, in which the state was seen as a quasi-parent charged with protecting children as well as holding them accountable for their actions. It also led to the development of the *infancy defense,* which held that youths under age fourteen were presumed incompetent and thus not criminally liable for their misdeeds. This differential treatment of juveniles and the focus on their rehabilitation rather than punishment reached its zenith with the creation of the juvenile court system in the early part of the twentieth century.

Notwithstanding the consistent effort over time to recognize the reduced liability of juveniles, there has been a steady effort to hold the most serious juvenile offenders accountable in a meaningful fashion. This call for accountability has taken several forms, including allowing juveniles charged with serious crimes to be transferred or waived to adult criminal court. Another form has been the imposition of the death penalty. One of the first executions in the colonies was of a juvenile, in 1642. Approximately 365 juvenile offenders have been executed in the 360 years since. Twenty-one juvenile offenders have been executed since the U.S. Supreme Court upheld the constitutionality of the death penalty in 1976. Of the forty states that currently allow the death penalty, eighteen have a minimum age of eighteen, five have a minimum age of seventeen, and seventeen have a minimum age of sixteen.

The Supreme Court has determined that some (but not all) juveniles may be given the death penalty. In *Thompson v. Oklahoma,* 487 U.S. 815 (1988), the Court held that it was unconstitutional to execute juveniles who committed their crime at age fifteen or younger. The Court applied the "evolving standards of decency" test to a state death penalty statute that authorized the execution of fifteen-year-old offenders and determined the statute was unconstitutional. The Court noted that a national review of state legislation showed "complete or near unanimity among all 50 states . . . in treating a person under 16 as a minor" and that this showed that "the normal 15-year-old is not prepared to assume the full responsibilities of an adult."

The following year, in *Stanford v. Kentucky,* 492 U.S. 361 (1989), the Supreme Court held that the evolving-standards-of-decency test did not bar the execution of juveniles who were sixteen or seventeen when they committed their crime. The Court noted that a majority of states that allowed the imposition of the death penalty allowed sixteen-year-olds to be executed. This demonstrated to the Court that there was no national consensus against executing sixteen-year-olds, unlike the consensus that existed against executing fifteen-year-olds.

The rate at which juvenile death sentences have been handed out has remained constant at about 2 percent of all death penalty sentences. This rate has remained constant in the face of both increases and decreases in juvenile violence and homicide rates, which suggests its imposition is not related to the incidence of homicide. More than two-thirds of the juveniles executed have been African American. This suggests race may play a factor in the sentencing decision, a charge frequently leveled at the death penalty in adult criminal cases as well. Of the 139 juvenile death sentences that have been resolved since 1976 (either by reversal or execution), 118, or 85 percent, have been reversed on appeal. This suggests the juvenile death penalty is often improperly imposed. All these issues raise serious questions about the constitutionality of the juvenile death penalty.

There now exists a clear demarcation regarding who may be executed (sixteen and older at the time of the crime), but the debate over the appropriateness of executing young offenders rages on. Opponents of the death penalty for juveniles continue to argue that

younger offenders are both less culpable and more amenable to rehabilitation, thus making them poor candidates for capital punishment. Supporters of the death penalty for juveniles stress the importance of providing a punishment that "fits the crime" and note the supposed deterrent effect of capital punishment. In *Patterson v. Texas,* 536 U.S. 984 (2002), three Supreme Court justices took the relatively unusual step of dissenting from a denial of certiorari (refusal to hear the appeal) in a case involving an application for a stay of execution of a juvenile death sentence. The justices argued the Court should reconsider its ruling in *Stanford v. Kentucky* in light of its recent ruling in *Atkins v. Virginia,* 536 U.S. 304 (2002), in which the high court applied the evolving-standards-of-decency test and held it was unconstitutional to execute the mentally retarded. Applying this same standard of review to the juvenile death penalty, the dissenters argued, might lead to a similar ruling with regard to it. Although this argument was unsuccessful in the Supreme Court, it highlights the growing trend toward abolition or at least restriction of the juvenile death penalty at the state level. Several state legislatures have recently raised the minimum age for death penalty eligibility to eighteen, and several state courts have interpreted their own constitutions to limit the applicability of the death penalty to persons under eighteen. It remains to be seen whether a societal consensus in favor of abolishing the juvenile death penalty will develop.

Craig Hemmens

See also: Atkins v. Virginia; Capital Punishment; Evolving Standards of Decency; Juvenile Justice System.

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Juvenile Justice System

The system of justice for juvenile offenders in the United States differs from the system for adult offenders. The juvenile justice system was created to deal with delinquency outside of the adult justice system. Its primary focus is to turn juvenile offenders into productive citizens through treatment and rehabilitation rather than punishment.

Prior to 1900, juveniles were treated much like adults. The court system did not generally use either age or the ability to commit a crime to distinguish punishment. Children as young as seven years old could be tried and sentenced in adult court. Of course, society was also very different. Many children did not attend school, and those that did usually continued only until they finished elementary school. Child labor was also common, both in factories and on family farms. Over time, the government began to view its role toward children differently. Government programs aimed at protecting children began to be implemented.

As society's view toward children began to change, the justice system followed suit. Juvenile courts and the juvenile justice system were products of the progressive movement of the early twentieth century. Progressives were reformers who were concerned with growing urbanization and the children of poor immigrants. These reformers wanted to save children from a life of crime and founded a justice system that was meant to be more flexible than the normal justice system. The hope was that this system would be able to deal with the particular problems brought by youthful offenders.

By 1925 nearly all states had separate juvenile justice systems in place. As a consequence of the progressives' original emphasis on saving children from a life of crime, the juvenile justice system was based on prevention and rehabilitation rather than punishment. The courts in the juvenile justice system treated juveniles differently from adults. This distinction was based on the philosophy of *parens patriae,* or the state as parent. Essentially, juvenile courts were to be more

Juvenile offenders work with severely disabled children at the El Camino School in Los Angeles, California, as part of their jail time and rehabilitation program, April 1994. *(© Tony Savino/The Image Works)*

personal and were to treat juveniles as children who had erred rather than as hardened criminals.

Originally, however, treating juveniles differently did not always mean treating them better. Between 1900 and 1960, children were rarely given the procedural protections that adults received. For example, the right to counsel during a criminal proceeding was not originally extended to children, nor was the right against self-incrimination. In addition, juvenile criminal cases were often evaluated using the preponderance-of-evidence standard rather than the guilty-beyond-reasonable-doubt standard used in the adult system.

The Supreme Court at first held that the extended benefits juveniles received from the juvenile justice system compensated them for the loss of some due process rights. Because juvenile courts considered extralegal factors in making decisions and often dealt with juvenile cases outside of the judicial system, the Court reasoned that juveniles occupied a special place in the justice system and did not necessarily warrant the same due process protections found in the adult system.

Between 1960 and 1980, the juvenile justice system both improved and began to deteriorate. Rehabilitation of juveniles came under fire as studies began to show that the juvenile justice system was failing to prevent delinquency. At the same time, due process protections were introduced into the juvenile justice system, and children began to enjoy the same procedural protections as adults.

In *In re Gault,* 387 U.S. 1 (1967), the Supreme Court held that children were to be given the same rights as adults. The Court held that "under our Constitution the condition of being a boy does not justify a kangaroo court." In *Kent v. United States,* 383 U.S. 541 (1966), the Court questioned the notion of *parens patriae,* holding that juveniles might be getting the worst of both worlds and receiving "neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children." In a series of cases, the Court extended to children the right to an attorney, the right to notice of the charges against them, the right to confront witnesses, and the privilege against self-incrimination.

As a result of the perceived failure of the rehabilitation philosophy and the introduction of due process rights, the juvenile system of today often closely resembles its counterpart for adults rather than the more flexible system of its origins. Nevertheless, it is important to understand that the United States has no one juvenile justice system but rather multiple systems. Although all states have juvenile courts, each state's juvenile justice system differs somewhat.

Since each state varies in the purpose of its juvenile justice system, state procedures for trying and punishing juveniles also differ. Some states put an emphasis on rehabilitation and having the court give a child the care of a parent; others focus on deterrence and punishment. The setup of the court system also varies by state. Some states have juvenile courts that are entirely separate from the other court system. Other states have juvenile courts that are attached to the general court system with rotating judges. Other states have combinations of these two approaches.

Although the juvenile justice system somewhat mirrors the adult justice system, it uses different terminology. What would be called a "crime" in the adult system is a "delinquent act" in the juvenile system. A "trial" is generally called an "adjudication hearing." A juvenile found "delinquent" after the hearing equates to an adult being found "guilty." "Detention" in the juvenile system is basically the same as "jail" in the adult system.

One feature most juvenile justice systems have in common is that they are bound by age. States vary as to who is considered a "juvenile." Some states deem anyone past age fifteen an adult. Other states put the age limit between sixteen and eighteen. But even age is not a definite indication that a minor will be handled in juvenile court rather than the regular court system.

All states allow juvenile offenders to be tried as adults under some circumstances. Many states have statutes that exclude certain serious, violent crimes from the juvenile court system. These states define certain crimes as adult and further consider anyone who commits these crimes to be an adult. Other states give sole discretion to the prosecutor to decide whether to file a case in juvenile or adult court for serious crimes. Still other states allow the court to determine whether a defendant should be tried in adult or juvenile court.

Although it is usually the violence associated with a crime that moves a minor from the juvenile justice system into the adult system, some states authorize adult criminal prosecution for nonviolent offenses. These offenses include drug activity, treason, escape, arson, and burglary. The current trend in the states has been to allow more and more juveniles to be tried as adults.

In general, juvenile offenders can be brought into the juvenile justice system for two reasons—delinquency or status offenses. Delinquency is a violation of criminal law. In other words, if an adult had committed the violation, it would be considered a crime. Status offenses are acts that are illegal only for juveniles, such as possession of alcohol, truancy, or curfew violations.

First, the prosecutor and law enforcement must decide whether to send the matter into the formal juvenile justice system or to divert the case into an alternative program or court. Some cases may also be sent out of juvenile court into adult court. In cases that are referred to juvenile court, children found guilty may be placed on probation or sent to a juvenile institution.

When determining a sentence, juvenile court judges often must consider competing standards. They must look at the best interests of the child, the best interests of the community, and what is fair to the victim. These judges often have more discretion than their adult-court counterparts. In addition, probation officers help judges make sentencing decisions by writing detailed reports about the child's background and the availability of support systems and programs. Judges may order psychological counseling, drug testing, drug counseling, detention, community restitution, victim restitution, or community counseling.

This discretion is motivated by the state's desire to allow the judge to determine what actions are most likely to rehabilitate the child. Sensitivity to a child's age can also be seen in state statutes that provide for the expungement of juvenile records once the child reaches a certain age. This policy, however, is changing as well to track the adult system more closely. Many states now make available formerly confidential juvenile court records.

Joy A. Willis

See also: Gault, In re; Juvenile Death Penalty; Rights of Minors.

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Katz v. United States (1967)

In *Katz v. United States,* 389 U.S. 347 (1967), the U.S. Supreme Court voted seven–one (Justice Thurgood Marshall not participating) that an illegal search existed under the Fourth Amendment's prohibition against unreasonable searches and seizures when law enforcement agents placed a wiretap without first obtaining a search warrant.

The *Katz* decision marked a move away from *Olmstead v. United States,* 277 U.S. 438 (1928), in which the Court held that placing a warrantless tap on telephone wires and eavesdropping on defendant's conversations did not constitute a search in the absence of a physical trespass or intrusion. *Katz* also expanded on *Silverman v. United States,* 365 U.S. 505 (1961), in which the Court held that a search existed when law enforcement unreasonably intruded into a defendant's home, with the *Katz* Court modifying *Silverman* and establishing the reasonable-expectation-of-privacy test.

The petitioner in *Katz* was convicted of transmitting wagering information by telephone from Los Angeles to Miami and Boston. Over his objection, the government introduced evidence of his conversations recorded by FBI agents who had attached listening devices to the outside of a public telephone booth from which the petitioner placed the calls. The federal appellate court affirmed the conviction, finding no Fourth Amendment violation, since there was "no physical entrance into the area [the petitioner] occupied."

The Supreme Court reversed. Justice John M. Harlan's concurring opinion, which encapsulated the meaning of *Katz,* held that "(a) an enclosed telephone booth is an area where, like a home, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant." Harlan added "that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " Harlan thus established a two-part test to determine when an individual has a "reasonable expectation of privacy." One, has government action violated an individual's subjective expectation of privacy? Two, was that expectation of privacy reasonable (an objective test)?

Justice Harlan's pronouncement in *Katz,* though valuable to Fourth Amendment case law and right-to-privacy cases before the Court, has not been followed as strictly as many legal scholars might have wished. The Court under both Chief Justice Warren E. Burger and Chief Justice William H. Rehnquist has not interpreted *Katz* in the same manner as Harlan or the others in the *Katz* majority. In *Smith v. Maryland,* 442 U.S. 735 (1979), the Court, citing *Katz,* addressed the issue of whether it was a permissible search if police, with the assistance of the phone company, tracked the telephone numbers dialed from a person's home. The Court affirmed the decisions by the court of appeals, which held that "there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system and hence no search within the Fourth Amendment is implicated by the use of a pen register installed at the central offices of the telephone company. Because there was no 'search,' . . . no warrant was needed." The crux is that the Court apparently has moved away from what Court observers would recognize as "reasonable." It seems the Court disregarded Justice Thurgood Marshall's dissent in *Smith* that "[p]rivacy is not a discrete commodity, possessed absolutely or not at all."

Aaron R. S. Lorenz

See also: Olmstead v. United States; Search; Wiretapping.

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Katzenbach v. Morgan (1966)

In *Katzenbach v. Morgan,* 384 U.S. 641 (1966), the U.S. Supreme Court upheld the power of Congress to forbid state English-language literacy tests for voting. In *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45 (1959), in contrast, the Court had held that a fairly applied literacy test did not violate the Constitution. In the Voting Rights Act of 1965, however, Congress banned literacy and related voter tests in states and counties with a history of voting discrimination, based on ample evidence that such requirements had often been used for discriminatory purposes rather than to assure a literate electorate. Section 4(e) of the legislation, added to the statute during congressional floor debate, further provided that persons who had successfully completed the sixth grade in a Puerto Rican public or accredited private school in which the language of instruction was not English could not be denied the right to vote because of their inability to read and write English.

Registered voters in New York City, which had a large Puerto Rican population, brought suit challenging section 4(e), and a federal district court declared the statute an unconstitutional usurpation of powers reserved to the states under the Tenth Amendment. By a seven–two vote in *Katzenbach v. Morgan,* the Supreme Court reversed.

Writing for the majority, Justice William J. Brennan Jr. emphasized the broad scope of congressional authority under Section 5 of the Fourteenth Amendment to enforce its provisions, including its equal protection guarantee, through "appropriate legislation." Citing *Lassiter,* New York's attorney general had contended Congress had no power to prevent state action, such as a literacy requirement for voting, that the courts had held to be consistent with the Fourteenth Amendment. Rejecting this argument, Justice Brennan held for the Court that Congress was not limited to enforcing judicial constructions of the Fourteenth Amendment, but instead possessed independent power to enact whatever laws were rationally related to enforcement of its provisions. Congress, he observed, could have reasonably concluded that increased voting power would improve the chances of Puerto Rican citizens to gain nondiscriminatory access to public services. In view of the many exceptions allowed under New York's English-literacy requirement, as well as some evidence indicating that prejudice played a prominent role in its enactment, Congress might also have questioned whether the test was actually designed to serve legitimate state interests. Finally, Congress might well have concluded that fluency in Spanish was as effective in helping to assure an informed electorate as an ability to read and write English, given the availability in New York of Spanish-language publications and broadcasts.

Justice John Marshall Harlan, joined by Justice Potter Stewart, dissented. Justice Harlan had joined the Court in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), upholding other provisions of the Voting Rights Act. He also agreed that congressional judgments regarding constitutional meaning were entitled to great respect in the courts. He contended, however, that under *Marbury v. Madison,* 5 U.S. 137 (1803), the substantive meaning of constitutional provisions lay ultimately with the judiciary, not Congress, which had authority only to "enforce," not determine, the Fourteenth Amendment's meaning. Section 4(e), unlike provisions of the Voting Rights Act upheld in *South Carolina v. Katzenbach,* had been added to the legislation during congressional floor debate. It thus rested on no extensive congressional findings of fact but only on assumptions regarding the discriminatory uses to which an English-only literacy requirement might be put. Section 4(e), unlike the statute's other provisions, thus exceeded the enforcement powers of Congress.

Tinsley E. Yarbrough

See also: Congress and Civil Liberties.

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Kennedy, Anthony M. (b. 1936)

Anthony M. Kennedy has been a pivotal yet overlooked justice since replacing Lewis F. Powell Jr. on the U.S. Supreme Court in 1988. Like Justice Sandra Day O'Connor, Kennedy has assumed a powerful role at the middle of a sharply divided Court under Chief Justice William H. Rehnquist. Although Justice Kennedy has been a fairly consistent conservative in areas of criminal law and federalism, he has written important opinions in significant cases involving civil rights and civil liberties that have displeased originalists (advocates of interpreting the Constitution in accord with the framers' "original intent"). Notwithstanding his conservative leanings, he has voted to invalidate laws that he considers to strike at the heart of personal liberty.

Justice Kennedy has been a key vote in the areas of religion and abortion. In cases involving the Establishment Clause of the First Amendment to the Constitution, he has in general upheld government funding of religious groups, as in *Bowen v. Kendrick,* 487 U.S. 589 (1988), and *Rosenberger v. University of Virginia,* 515 U.S. 819 (1995); and governmental recognition of religion, as in *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573 (1989); but he voted to strike attempts at government-endorsed prayer in public schools as being coercive in *Lee v. Weisman,* 505 U.S. 577 (1992). He has engaged in what he considers a "careful, reasoned balance" regarding the constitutionality of abortion legislation. He upheld some state restrictions early in his career, as shown by his vote in *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989), and in his opinions in *Hodgson v. Minnesota,* 497 U.S. 417 (1990), and *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502 (1990). Still, he cast the deciding vote in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), to reaffirm the "central holding" of *Roe v. Wade,* 410 U.S. 113 (1973), yet he subsequently attempted to limit the reach of *Casey* in his dissent in *Stenberg v. Carhart,* 530 U.S. 914 (2000).

In cases involving equal protection, Justice Kennedy has also been a pivotal justice. He has joined a majority of the Court in requiring race-neutrality in cases involving affirmative action and majority-minority legislative districts; pertinent cases are *City of Richmond v. J. A. Croson Co.,* 488 U.S. 469 (1989), *Metro Broadcasting Co. v. Federal Communications Commission,* 497 U.S. 547 (1990), and *Bush v. Vera,* 517 U.S. 952 (1996). But he has broken with these justices by expanding those principles of neutrality to strike peremptory challenges based on race, as in *Powers v. Ohio,* 499 U.S. 400 (1991), *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991), and *Campbell v. Louisiana,* 523 U.S. 392 (1998). In addition, he extended those principles of neutral individualism to government policies that classify citizens by sex in *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127 (1994); by religion in *Board of Education v. Grumet,* 512 U.S. 687 (1994); and by sexual orientation in *Romer v. Evans,* 517 U.S. 620 (1996). He also joined the per curiam opinion in *Bush v. Gore,* 531 U.S. 98 (2000), that found the 2000 presidential election recount ordered by the Florida Supreme Court to be inconsistent with equal protection and due process.

Regarded as the justice most likely to vote to accept claims based on freedom of speech, Kennedy characteristically struck government policies that restricted political protest, as shown in his concurring opinion on flag burning in *Texas v. Johnson,* 491 U.S. 397 (1989), and his dissent in *Hill v. Colorado,* 530 U.S. 703 (2000), involving abortion protests. He also supported the expansion of the public-forum doctrine (granting greater speech rights on public property) in *International Society for Krishna Consciousness v. Lee,* 505 U.S. 672 (1992), and *United States v. Kokinda,* 497 U.S. 720 (1990). Further, he has used a categorical approach against government restrictions on speech based on the content or viewpoint expressed or on the identity of the speaker. Under this approach, he upheld under free speech claims the rights of religious groups, as in *Rosenberger*; of sexually oriented speakers, as in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002), and his concurring opinion in *Ashcroft v. American Civil Liberties Union,* 535 U.S. 564

(2002); of commercial groups, as in *United States Department of Agriculture v. United Foods, Inc.,* 533 U.S. 405 (2001); and of political groups, as in *Colorado Republican Federal Campaign Committee v. Federal Election Commission,* 518 U.S. 604 (1996), and his dissent in *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377 (2000).

Kennedy has assumed the balance on the current Court because he has rejected the originalist jurisprudence of text and specific tradition advocated by Justices Antonin Scalia and Clarence Thomas and by Robert Bork, who was President Ronald Reagan's first choice to replace Powell. Instead, Justice Kennedy is willing to use judicial power to enforce his individualistic conception of the full and necessary meaning of liberty.

Frank J. Colucci

See also: O'Connor, Sandra Day; Rehnquist, William Hubbs.

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Kevorkian, Jack (b. 1928)

During the 1990s, some civil rights activists enlarged the issue of bodily autonomy from the right-to-die issues raised in *In re Quinlan,* 70 N.J. 10, 355 A.2d 647 (1976), and *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261 (1990), to question whether the right to die also encompassed affirmative actions to shorten life by means other than natural death. Jack Kevorkian, the former Michigan pathologist and self-styled "Dr. Death," essentially created the concept and phrase "physician-assisted suicide" during the 1990s.

Euthanasia has been debated throughout the ages, but Dr. Kevorkian initiated the controversy regarding the new-age, new-wave idea of physician-assisted suicide. This, in turn, raised the question of whether there were civil rights ensuring the right of individuals (usually terminally or chronically ill ones) to determine the time and manner of their death. In *Washington v. Glucksberg,* 521 U.S. 702 (1997), the U.S. Supreme Court upheld a Washington state law banning assisted suicide. Michigan adopted such a law in 1998, after which Kevorkian assisted in the death of Tom Youk, who had Lou Gehrig's disease, an event that was broadcast on the television newsmagazine *60 Minutes.* Kevorkian was convicted of illegal use of a controlled substance and of second-degree murder and began serving an indeterminate sentence of ten to twenty-five years. The Court of Appeals of Michigan in *People v. Kevorkian,* 248 Mich. App. 373, 639 N.W.2d 291 (Mich. App. 2001), affirmed Dr. Kevorkian's conviction for providing such assistance. The Michigan Supreme Court declined to review the case, thus signaling silent assent to the holding, and Kevorkian remained in prison.

Jack Kevorkian is believed to have been involved in "assisting" in the deaths of over 130 individuals. Depending upon one's viewpoint, he engaged in either a highly methodically performed service, at the request of those who died, or he was a highly organized serial killer. In either event, Kevorkian and his former attorney, Geoffrey Feiger (they parted in the Youk case), called press conferences, precipitated legislation regarding assisted death (both pro and con), affected ballot initiatives in other states with regard to whether there should be a right to assisted suicide by the terminally and/or chronically ill, and engaged in conduct that in any other realm would have been deemed unlawful.

The Court of Appeals of Michigan, in affirming the sole case in which Kevorkian was convicted (four previous trials had resulted in acquittals or mistrials), wryly observed that without the euthanasia issue at the heart of the case and Kevorkian's mission regarding assisted suicide and euthanasia, there would not have been much to discuss. The court further noted that there would have been little attention given to

the death of Tom Youk in 1998 but for the euthanasia issue. Kevorkian sought to have the court reverse his conviction on constitutional grounds and to rule that euthanasia was legal. The court refused to do so.

Kevorkian made two distinct, though perhaps related, claims. First, he claimed that the Ninth Amendment (and the relevant Michigan counterpart) protected his and his patient's unenumerated rights insofar as individuals had a right to be free from unbearable pain, suffering, and distress. Kevorkian also claimed that the Fourteenth Amendment (and again, the relevant Michigan state constitutional counterpart) should prohibit the state from depriving him of his liberty without due process of law, as per the constitutional rights relating to privacy or as relating to the concept that people should not be forced to live with unbearable suffering. Kevorkian's arguments that he was assisting Tom Youk in asserting his (that is, Youk's own) constitutional rights to be free from intolerable pain and suffering did not impress the Michigan courts (nor did they impress the U.S. Supreme Court, which by refusing to grant a writ of certiorari October 7, 2002, allowed the state-court decision to stand).

The remaining issues were, to use the words of the Michigan Court of Appeals, "more mundane." That said, there were claims of constitutional violations common to many trials. Kevorkian contended that he was denied his constitutional right to effective representation by his trial attorney, David Gorosh (Kevorkian was acquitted in each case of physician-assisted suicide and homicide while represented by Geoffrey Feiger). However, Kevorkian acted as his own attorney for much of the Youk trial (repeatedly, vigorously, and knowingly waiving the right to an attorney), with Gorosh merely as a stand-by lawyer.

Kevorkian also claimed that his right to remain silent was violated by the prosecutor's reference to his decision not to testify, thereby violating his rights against self-incrimination under the Fifth Amendment. However, the Court of Appeals determined that the prosecutor's comments were in response to Kevorkian's repeated attempts during his summation to place facts in evidence (rather than testifying to them, and then having them available to comment upon in the summation or closing remarks to the jury). Because the court concluded the prosecutor's remarks were not direct references to Kevorkian's failure to testify, the court determined they were not statements amounting to prosecutorial misconduct abridging Kevorkian's Fifth Amendment rights.

Ironically, Jack Kevorkian spent much of the 1990s raising the legal, medical, cultural, and popular awareness of euthanasia and physician-assisted suicide as issues of civil rights and liberties, but his own case was a simple two-day trial of basic facts and strategies that did not raise constitutional issues much battled over in Kevorkian's name and as a result of his actions. Nonetheless, he did raise the level of the debate about the issue of assisted death, and he brought a new vocabulary into homes across America and around the world and along with it a struggle to define civil rights and liberties that crossed from one millennium into the next.

Demetra M. Pappas

See also: Physician-Assisted Suicide; Right to Die; *Washington v. Glucksberg.*

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Kimel v. Board of Regents (2000)

In *Kimel v. Board of Regents,* 528 U.S. 62 (2000), the U.S. Supreme Court made it extremely difficult for individuals who have been the subject of age discrimination at the hands of a state to seek redress by suing for monetary damages. The Court considered the constitutionality of the 1974 amendments to the Age Discrimination in Employment Act (ADEA). The original ADEA that Congress passed in 1967 made it illegal for private employers to discriminate against an individual in hiring or firing decisions based on the person's age. Congress had the authority to pass that legislation pursuant to its Article I Commerce Clause

powers, based upon the Supreme Court's reasoning in its decisions upholding the Civil Rights Act of 1964 banning private race discrimination, as, for example, in *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964). The 1974 amendments extended the ADEA's reach to preclude age discrimination when the employer was the state. The issue in *Kimel* was whether Congress had the authority under the Commerce Clause or the Fourteenth Amendment to subject states to suits for monetary damages by private parties. The Supreme Court held that Congress exceeded its constitutional power by bringing the states under federal jurisdiction; thus the Court held the 1974 ADEA amendments unconstitutional.

This case arose when several individuals claimed they were discriminated against by their state employers. The petitioners separately sued in federal court, each alleging age discrimination based on the ADEA. In each case, the state employer claimed that the Eleventh Amendment's protection of sovereign immunity precluded such suits. The Eleventh Amendment specifically provides that federal courts do not have jurisdiction over suits in which a citizen of one state sues another state. That is, a state cannot be sued in federal court by citizens of different states unless it waives its sovereign immunity. Yet these federal suits were brought by citizens suing their own states. Why should the Eleventh Amendment preclude this type of suit? As Justice Sandra Day O'Connor broadly stated for the majority: "Although today's cases concern suits brought by citizens against their own States, this Court has long understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States."

Because the Supreme Court refused to construe the Eleventh Amendment strictly, if a state does not consent to being sued by private parties for monetary damages by waiving its sovereign immunity, the Eleventh Amendment precludes such suits, even those brought by a state's own citizens. This was true even though Congress specifically intended to subject states to the jurisdiction of federal courts and thus abrogate (revoke) state immunity when it passed the ADEA amendments. Accordingly, Congress lacked the constitutional authority to subject states to suits for monetary damages by private parties.

The *Kimel* case is typical of Supreme Court decisions during this time period regarding issues of federalism, in which a five–four majority (including Chief Justice William H. Rehnquist and Justices O'Connor, Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas) generally have held that the federal government could not usurp the states' authority. The Court's current majority has contended that the Constitution requires a clear distinction between national and local control under the system of dual sovereignty in the United States, which is diametrically opposed to the more protective stance generally taken after the Supreme Court's New Deal transition. The consequence of the Supreme Court's current approach to federalism is that Congress is less able to protect individual rights and liberties, since the Court seems intent on limiting federal power over the states, as represented by the *Kimel* decision.

Mark S. Hurwitz

See also: Federalism.

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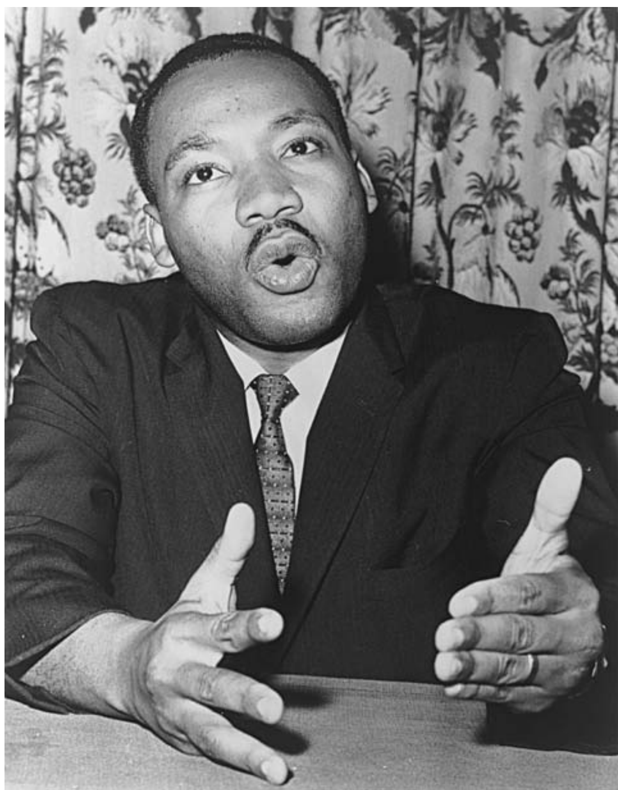
King, Martin Luther, Jr. (1929–1968)

Dr. Martin Luther King Jr. dedicated his life to seeking equality and civil rights for African Americans and the poor of all races.

Historically, the lack of civil rights for black Americans is well documented. Beginning with slavery, blacks were viewed as property. Even following eman-



At a press conference on June 5, 1961, Rev. Martin Luther King Jr. asks that President John F. Kennedy declare all forms of racial segregation illegal. *(Library of Congress)*

cipation in 1865, blacks were subject to many discriminatory practices and demeaning laws, including disenfranchisement, unfair employment practices, and forced segregation (Jim Crow laws). The doctrine of "separate but equal" affirmed by the U.S. Supreme Court in *Plessy v. Ferguson,* 163 U.S. 537 (1896), legitimized racial segregation in the United States and created a substandard quality of life for black Americans. Signs throughout various establishments stating "for whites only" were legal until 1954. The U.S. Supreme Court's decision in *Brown v. Board of Education,* 347 U.S. 483 (1954), ruled school segregation illegal. However, the quest for full civil rights for black Americans had only just begun, and Dr. King spearheaded the effort.

BACKGROUND

Martin Luther King Jr., one of his parents' three children, was born to Martin Sr. and Alberta King in Atlanta, Georgia, on January 15, 1929. His father was the pastor of a church in Atlanta, and his mother worked as a schoolteacher. King received a bachelor's degree from Morehouse College (Atlanta) in 1948, graduated from Crozer Theological Seminary (Pennsylvania) in 1951, and later earned a Ph.D. in theology from Boston University in 1955. After marrying Coretta Scott in 1953, he became the pastor of Dexter Avenue Baptist Church in Montgomery, Alabama. He and his wife had four children: Yolanda, Martin III, Dexter, and Bernice.

King learned about racial discrimination early in life. With his religious training in Christian doctrine and his attraction to Henry David Thoreau's theory of civil disobedience and the teachings of India's Mahatma Mohandas K. Gandhi, King forged a powerful strategy to fight against discrimination—nonviolent direct action. King used such action in the form of planned civil disobedience to confront conventional practices of racial discrimination. For his efforts he won the Nobel Peace Prize in 1964.

CONTRIBUTIONS TO THE CIVIL RIGHTS MOVEMENT

Until 1956, black bus passengers in Montgomery, Alabama, were required to pay their fare to the driver, get off the bus, and then reenter through the back doors to sit in the "colored" section. In addition, the law required them to give their seats to white passengers. But Rosa Parks's refusal to give her seat to a white passenger led to the Montgomery bus boycott in 1955 under Dr. King's leadership. Subsequently, the U.S. Supreme Court struck down all bus segregation laws in 1956.

Following the success of the Montgomery bus boycott, Dr. King founded the Southern Christian Leadership Conference (SCLC) in 1957. It was Dr. King's vision that the struggle for civil rights could be effectively waged by peaceful demonstrations. The SCLC brought this strategy of nonviolent civil disobedience to the civil rights movement.

One of the most famous speeches made by Dr. King, "I Have a Dream," was delivered during the civil rights march on Washington, D.C., on August 28, 1963, at the Lincoln Memorial. Although federal civil rights legislation guaranteeing equal access to

housing and education was enacted in 1957, those who resisted black equality created many obstacles and loopholes. The federal government needed to enhance federal protections. The 1964 Civil Rights Act, which passed one year after the march on Washington, banned racially segregated public accommodations and also addressed employment discrimination due to race or gender by establishing the Equal Employment Opportunity Commission (EEOC).

Dr. King was greatly disturbed by the level of poverty experienced not only by blacks in northern ghettos but by all poor people in America. To call attention to their plight, he organized the Poor People's Campaign, which was planned at the nation's capital in 1968. Prior to this march, Dr. King journeyed to Memphis, Tennessee, to support striking sanitation workers. While there he gave another powerful though prophetic speech on April 3, 1968, in which he said, "I've been to the mountaintop and seen the Promised Land." James Earl Ray assassinated Dr. King the very next day while King was standing on the balcony of the Lorraine Motel. Dr. Ralph Abernathy later led the Poor People's Campaign.

KING'S LEGACY

Dr. King was pivotal to the civil rights movement. His work contributed to the dismantling of unfair laws and practices enabling black equality to become a greater reality. He authored numerous papers and monographs, including *Stride Toward Freedom: The Montgomery Story* (1958); *Strength to Love* (1963); *Why We Can't Wait* (1964); and *Where Do We Go from Here: Chaos or Community?* (1967). In honor of the great civil rights leader, President Ronald Reagan signed into law the federal holiday of Dr. Martin Luther King Jr. Day, first celebrated January 20, 1986.

Carolyn Turpin-Petrosino

See also: Boycott; Civil Disobedience.

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Klopfer v. North Carolina (1967)

In *Klopfer v. North Carolina,* 386 U.S. 213 (1967), the U.S. Supreme Court considered whether the indefinite suspension of state prosecutorial proceedings, without justification, against a defendant resulted in a violation of the defendant's right to a speedy trial under the Sixth Amendment to the U.S. Constitution. The Court ruled in *Klopfer* that it did.

The petitioner was charged with misdemeanor criminal trespass for refusing to leave private property after being so ordered. At a trial by jury in March 1964, the trial court called a mistrial after the jury could not reach a verdict in the case. The prosecutor set the case for retrial at the April 1965 session of court. Several weeks before then, the prosecutor informed the defendant that he was going to file a motion for *nolle prosequi* (abandonment of prosecution) with leave (the right to refile at any time). At the April session, the defendant opposed entry of such an order, contending that the Civil Rights Act of 1964 abated the trespass charge. Despite the defendant's argument, the court indicated it would approve the prosecutor's request for a *nolle prosequi* with leave. The prosecutor made no such motion, however, instead moving to continue the case for another term, which was granted. The August 1965 calendar did not list the defendant's case. The defendant then filed a motion asking that the court either dismiss the charges against him or have the case tried immediately, contending that having the criminal charge indefinitely pending was hindering his professional activities as a Duke University professor. On August 9, 1965, the prosecutor, stating no justification for such an action, moved the court to allow the state to take a *nolle prosequi* with leave. This motion was granted, though

the trial court made no supporting findings of fact or conclusions of law.

On appeal the Supreme Court of North Carolina held that the defendant did indeed have a right to a speedy trial, but that he could not compel the state to prosecute him if the prosecutor, "in his discretion and with the court's approval," took a *nolle prosequi.* The U.S. Supreme Court, however, pointed out that every state that had addressed the contention that the right to a speedy trial did not afford affirmative protection against unjustified postponement had rejected it. The Court also noted that the only other states that permitted dropping a case with leave to reinstate at an indefinite later date did so in cases in which the defendant could not be located for trial. The Court found that the right to a speedy trial in the Sixth Amendment was a fundamental right, with its roots dating back to the Magna Carta, and should therefore be applied to the states via the Fourteenth Amendment. In overturning the North Carolina court, the Supreme Court held that the indefinite postponement of proceedings, without justification, was a clear violation of the defendant's fundamental right to a speedy trial.

John L. Roberts

See also: Sixth Amendment; Speedy Trial, Right to.

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Korematsu v. United States (1944)

In *Korematsu v. United States,* 323 U.S. 214 (1944), the U.S. Supreme Court upheld the constitutionality of the federal government's decision to exclude 110,000 U.S. citizens and aliens of Japanese descent from the West Coast of the United States during World War II. On December 7, 1941, Japanese forces executed a surprise attack on U.S. forces in Hawaii, disabling or destroying much of the Pacific fleet and leading to fears of a West Coast invasion. On February 19, 1942, acting under the advice of Secretary of War Henry L. Stimson, President Franklin D. Roosevelt issued Executive Order 9066 authorizing military commanders to exclude from the areas of their command any and all persons they deemed necessary to prevent sabotage or espionage. On March 21, Congress passed a statute making violations of such military orders a misdemeanor punishable by up to a year in jail.

Acting under this authority, Lieutenant General John L. Dewitt, the military commander of the Western Defense Command, which encompassed the West Coast and inland mountain states, issued a series of orders in spring 1942 first prohibiting all citizens and aliens of Japanese descent living on the West Coast from departing the area and then, in May 1942, ordering their exclusion. Initially there had been no plan to detain loyal Japanese; however, acting under pressure from governors of the inland mountain states who did not want ethnic Japanese resettling in their states, the government decided to detain the 110,000 West Coast Japanese in "relocation centers"—internment camps surrounded by barbed wired and guarded by armed military police. Although some 30,000 persons of Japanese descent were eventually released for military service, for work in the interior, and to attend college, the majority remained interned until December 1944.

On June 12, 1942, Fred Korematsu, a native-born U.S. citizen of Japanese descent, was charged with violation of federal law for refusing to leave his home in San Leandro, California, pursuant to military order. Following his conviction and an unsuccessful appeal to the Court of Appeals for the Ninth Circuit, Korematsu brought his case to the Supreme Court, arguing, among other things, that the exclusion order violated his rights of due process and equal protection under the Constitution. Writing for a six-member majority, Justice Hugo L. Black began his opinion by noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and must be subjected to "the most rigid scrutiny." These two concepts, "strict scrutiny" and membership in a "suspect class," articulated for the first time in *Korematsu,* would prove instrumental in the develop-

ment of the Court's future civil liberties and civil rights jurisprudence.

Nonetheless, in *Korematsu* Justice Black asserted that the deference accorded to the president and Congress in a time of war did not permit the Court to second-guess the decision to exclude Korematsu and others like him. Black based his opinion in part on the Court's earlier decision in *Hirabayashi v. United States,* 320 U.S. 81 (1943), which had upheld a curfew imposed on persons of Japanese descent. In his short concurrence in *Korematsu,* Justice Felix Frankfurter noted that the Constitution lodged in Congress and the president the power to make war. If their decisions made during wartime were flawed, according to Frankfurter, "[t]hat is their business, not ours."

Justices Owen J. Roberts, Robert H. Jackson, and Frank Murphy filed separate dissents. Justice Roberts criticized the majority for focusing solely on the exclusion order rather than recognizing the reality of the situation facing Korematsu: He could not leave San Leandro, nor could he remain there; his only legal alternative was to submit himself to an assembly center for internment without any finding of disloyalty—a clear constitutional violation, according to Roberts. Justice Murphy, though recognizing the deference due to the military in time of war, asserted that the justifications for the mass exclusions were based on little more than racial animus, and thus he dissented from the majority's "legalization of racism." Justice Jackson refused to question the expedience of General Dewitt's exclusion orders or the decision to detain. But he objected to the Court's placing its seal of constitutional approval on them after the fact. Military commanders might not be expected to comply with constitutional niceties during wartime, according to Justice Jackson, but the Court's approval wrote such discrimination into the "doctrine of the Constitution" where it "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

The same day the Court upheld the constitutionality of the exclusion orders, it decided in *Ex parte Endo,* 323 U.S. 283 (1944), that neither the president's executive orders nor the act of March 21, 1942, authorized the government to hold admittedly loyal Japanese Americans in internment camps solely to protect them from community violence. The camps were emptied shortly thereafter.

Historians have identified several explanations for the unprecedented racially based mass exclusion and detention of U.S. citizens and legal aliens. These include the panic following the attack on Pearl Harbor, a long history of racial hatred directed toward the Japanese that was reinforced by legal restrictions against them at the state and federal level, and pressure from local, state, and federal officials. Evidence that the overwhelming majority of ethnic Japanese were loyal, that none had participated in espionage, and that there was no chance of a Japanese invasion of the West Coast was discounted or ignored by officials at all levels up to and including President Roosevelt.

The forced internments cost the victims hundreds of millions of dollars in lost property and were an enormous insult to the dignity of loyal Americans. Recognizing this, in 1988 Congress passed and President Ronald Reagan signed into law an act officially apologizing to the internees on behalf of the American people and authorizing payments of $20,000 to each internee. In *Korematsu v. United States,* 584 F. Supp. 1406 (N.D. Cal. 1984), a U.S. District Court reversed Fred Korematsu's 1942 conviction on grounds of prosecutorial misconduct. In 1998 he was awarded the Presidential Medal of Freedom by President William Clinton. To date, the *Korematsu* precedent upholding the constitutionality of the racial exclusion orders has never been explicitly overruled.

Hal Goldman

See also: Black, Hugo L.; President and Civil Liberties; Strict Scrutiny; Suspect Classifications.

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Kunstler, William (1919–1995)

William Kunstler was known as "America's radical lawyer" and the "most hated lawyer in America," but these titles could not have pleased him more. He dedicated his entire legal career to fighting for the civil rights and civil liberties of the American people, no matter if these rights and liberties were unpopular at the time. As he stated, "You do not need me to remind you that the struggle to attain and maintain liberty and to resist oppression and tyranny is the perennial obligation of all who understand its necessity."

William Moses Kunstler was born July 7, 1919, in New York City. He was active in both academics and athletics; in fact, he spent summers in upstate New York as a camp counselor. While an undergraduate at Yale, he took an avid interest in journalism and literature, graduating Phi Beta Kappa. After college, he served in the Pacific Theater during World War II, rising to the rank of major and receiving the Bronze Star. Upon his return home, Kunstler attended Columbia Law School and became a lawyer in New York City. But it was a telephone call asking him to help defend "freedom riders" (individuals riding through the South to challenge racial segregation laws) during the 1960s civil rights protests that would help shape his legal career.

Kunstler had always been an advocate for civil rights and civil liberties; in fact, he assisted a city program in summer 1954 by hosting a visitor from the inner city. The negative reaction of his Westchester County neighbors was an awakening. But when he had a chance to see the rampant racism in the South firsthand, his future legal career became clear. His advocacy for civil rights and civil liberties never waned.

Fame, however, would not come to Kunstler until the late 1960s. The war in Vietnam had never been popular, but the political climate by 1967 was becoming particularly antiwar, especially among the young. Many young men were being sent to fight in a war they did not believe in, and a movement grew in the counterculture to take actions to frustrate the U.S. war effort. Two such activists were Catholic priests, the Berrigan brothers, Daniel and Philip, who in 1968 with a group of others entered the Customs House in Baltimore, Maryland, and stole and burned over 400 draft records. The Berrigans were quickly arrested. Their choice of Kunstler as their lawyer, however, was a masterstroke, because their trial became the first "antiestablishment" trial, and it set the tone for later such trials. Kunstler put the Vietnam War itself on trial. The priests gave impassioned speeches as to why the war was wrong and what they did, though legally improper, was the morally correct thing to do. The judge was sympathetic, but he stated that the propriety of the war was not on trial. The jury convicted the Berrigans, and Kunstler appealed. He argued for the concept of jury nullification (asking a jury to reject a legally correct verdict and substitute a moral holding), but his argument fell on deaf ears.

The Berrigans, however, were just the start of this type of advocacy for Kunstler. The 1968 Democratic National Convention in Chicago turned into a melee as counterculture leaders battled Chicago police over control of a park near the political convention. The violent clashes led to the trial of the "Chicago Seven," seven well-known activists charged with crossing state lines to incite a riot. The judge in that trial, however, was not sympathetic to the antiwar cause, and he even had one of the defendants, Bobby Seale, bound and gagged in the courtroom. Amid the constant media attention, Kunstler realized that this was his greatest opportunity to try his case before the American public. His witness list read like a veritable "who's-who" of the counterculture. Psychedelic guru Timothy Leary testified, as did folk singer Arlo Guthrie. The beat poet Allen Ginsburg even recited his poetry on the stand to the astonishment of the judge and others. The testimony from the defendants was likewise sensational, especially that of Abbie Hoffman. Although convictions were garnered for five of the seven, Kunstler had put the Vietnam War on trial and showed the country the feelings of many in its younger generation. Interestingly, the judge also found Kunstler in contempt and sentenced him to prison, which was overturned on appeal.

After the Chicago Seven trial, Kunstler represented many other counterculture figures who were prosecuted, in part, for what the establishment deemed aberrant political beliefs. The Black Panthers and others looked to him for help. For example, when an uprising erupted at Attica prison in New York, the inmates requested only one lawyer to argue for their cause—

William Kunstler. The standoff ended with bloodshed, although Kunstler worked tirelessly to try to gain a peaceful solution. The deaths at Attica and the actions that led to the uprising brought heightened public awareness of the state of America's prisons and inmates' living conditions. Kunstler was at the forefront of prison reforms that expanded the civil rights and civil liberties of countless numbers of inmates.

By this time, Kunstler had become a much sought-after speaker as well. He spoke primarily at college campuses about the need to become active in defending the rights and liberties that all Americans should enjoy. He also highlighted what he saw as governmental abuses, especially of African Americans. His 1962 book *The Case for Courage,* which had profiled leading legal figures who fought for justice, remained popular, as did many of his other works. His speaking and writing brought him into contact with many famous activists (especially from Hollywood) who assisted him in his efforts, including the fight for Native American rights.

During the early 1970s, Kunstler became involved with defending members of the American Indian Movement (AIM). He was a key figure in the trials that arose after the second siege at Wounded Knee in South Dakota, a violent confrontation in which two federal agents died. Three Native Americans were put on trial for the deaths, and Kunstler gained acquittals for the two men he represented. The third man, Leonard Peltier, was convicted; Kunstler worked on his appeals but to no avail. For his actions, he received many awards from Native American groups as well as from the National Lawyers Guild, which celebrated his lifelong commitment to civil rights and civil liberties.

Kunstler remained active in defending those who had unpopular political beliefs during the 1980s and 1990s and sustained a busy criminal defense practice as well. As a defense attorney, he was one of the first to gain an acquittal with the "black rage" defense (seeking to mitigate criminal activity by African Americans by explaining it as a response to racism). As a constitutional lawyer, he took Gregory Johnson's case to the U.S. Supreme Court and persuaded it to recognize the constitutionality of burning the flag as a method of political protest protected by the First Amendment. Finally, he continued to speak to audiences across the nation, bringing his message of protecting and expanding people's civil rights and civil liberties to a new audience of young adults. By the time he died September 4, 1995, his reputation as a fierce trial and appellate advocate and his commitment to social justice were well-known features of his legacy.

David T. Harold

See also: Prisoners' Rights; *Texas v. Johnson;* Vietnam War.

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Kyllo v. United States (2001)

In *Kyllo v. United States,* 533 U.S. 27 (2001), the U.S. Supreme Court ruled that the use from the street of a heat-seeking device to search the interior of a private residence for illegal drugs without first obtaining a search warrant was a violation of the prohibition on illegal searches and seizures as set forth in the Fourth Amendment to the U.S. Constitution.

Government agents suspected Danny Kyllo of growing marijuana in his apartment. To substantiate this suspicion, the federal agents obtained a thermal-scanning device that would detect large amounts of heat emanating from the triplex where Kyllo lived. Large concentrations of heat emanating from his apartment could be indicative of the use of high-intensity lamps, often employed for the growing of marijuana. When the agents scanned his apartment from the street, his apartment and garage registered hotter than other units in the building. The agents used this information to obtain a warrant to search Kyllo's home, where they found marijuana growing.

At a suppression hearing, Kyllo sought to have this evidence thrown out, but eventually the district court and the Ninth Circuit Court of Appeals upheld the admission of the evidence. The Ninth Circuit claimed

that because the thermal imaging showed only heat emanating from the external walls and did not reveal any details regarding the activities taking place within the house, no warrant was needed to do this search.

In a surprising reversal, the Supreme Court held five–four that the agents needed a warrant before conducting the thermal imaging. Justice Antonin Scalia issued the Court's opinion, joined by Justices David H. Souter, Stephen G. Breyer, Ruth Bader Ginsburg, and Clarence Thomas. Oddly, Justice John Paul Stevens, often considered the most liberal justice on the Court during the tenure of Chief Justice William H. Rehnquist, dissented along with him and Justices Sandra Day O'Connor and Anthony M. Kennedy. In arguing that the use of the thermal-imaging device was a search necessitating a warrant, Justice Scalia contended that the core of the Fourth Amendment resided in the protection for "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." In determining what constituted an unreasonable search, Scalia also stated that new technologies created the potential for new intrusions into one's private life, but that the Fourth Amendment had to be cognizant of these changes.

Drawing upon *Katz v. United States,* 389 U.S. 347 (1967), in which the Court developed a two-part test to determine whether an individual had a privacy interest in a certain location or activity, Scalia found that individuals retained an expectation of privacy in their home, even if a search or inspection did not physically invade one's residence. Disagreeing with the dissenters who argued that new technologies could be used to conduct warrantless searches if they did not create the same physical presence as in an actual search, the majority in *Kyllo* held that the Fourth Amendment drew "a firm line at the entrance to the house." When the police used a device not generally available to the general public to search the interior of a home, the use of that device necessitated that the government first obtain a warrant.

Kyllo is an important search and seizure case. It stands for the proposition that police and the government cannot generally search the interior of a person's residence without a warrant. More significant, the case is an important defense of the Fourth Amendment, stating that as new information technologies are developed, the Court will continue to protect the privacy of homes against these new intrusions.

David Schultz

See also: Electronic Eavesdropping; *Katz v. United States;* Search; Search Warrants; Wiretapping.

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L

Labor Union Rights

The term "union rights" refers to the ability of workers to organize and engage in bargaining with employers. Often, these negotiations involve controversies over working conditions, benefits, and compensation. Workers in the United States acquired these rights only after a long struggle with businesses that were reluctant to negotiate with employees on such matters.

As an agrarian nation until the latter half of the nineteenth century, the United States lagged behind other nations in the development of effective labor unions. A primary explanation for this state of affairs is that the United States, with its emphasis on an agricultural economy combined with a relative absence of aristocracy, never developed an awareness of the differences between workers and the affluent. Whereas labor unions developed more rapidly in Europe and even formed their own political parties, American unions faced hostility from politicians and business leaders. Military force was frequently employed against strikers by both Republican and Democratic administrations. President Grover Cleveland, a nineteenth-century Democrat, called out federal troops to crush a strike by railway employees in 1894 that affected trains from Chicago to the West Coast.

In 1926, Congress passed the Railway Labor Act. Because it established work rules, the law had the intended effect of reducing the impact of damaging railroad strikes in the United States. Some of the work rules were restrictive, but the law was unique in that it predated the prolabor legislation of the New Deal years of the 1930s. The legislation gave railway employees the right to strike, a result of the strength of the rail union movement, which in the early 1920s supported nationalization of the rail industry. For most American workers, however, the right to union representation did not appear until Congress passed the Wagner Act of 1936 under President Franklin D. Roosevelt's New Deal.

Until the passage of the Wagner Act, American workers did not have a right to organize and engage in collective bargaining with their employers. Regarded as the most prolabor legislation enacted by a U.S. Congress, the Wagner Act not only recognized the right of workers to collective bargaining, but also established an oversight board, the National Labor Relations Board (NLRB), to manage relations between labor and management in the United States. The Wagner Act was an important element of President Roosevelt's New Deal programs of the 1930s.

Although passage of the Wagner Act was a clear victory for the trade union movement, it by no means ended the conflicts between business and unions. Nevertheless, America's entry into World War II helped ensure greater labor-management cooperation in turning out equipment and materials for the war effort. Despite this, the underlying tensions remained in place, and after the war, the stage was set for a new round of conflicts between the two sides. This continuing tension would lead to the enactment of new labor legislation limiting the ability of trade unions to use the right to strike against employers.

During 1945 and 1946, a series of labor disruptions caused harm to the U.S. economy, then in the process of adjusting to peacetime conditions. In November 1946 the United Mine Workers union announced a nationwide strike that threatened the ability of the nation to meet its energy needs during the winter months. The administration of President Harry Truman dealt successfully with the mine workers, but the labor movement's tactics created a backlash in U.S. politics. After the November 1946 congressional elections, President Truman, a Democrat, faced a Republican-controlled House of Representatives and Senate. Congress was determined to deal with the issue of labor rights in a manner that would weaken the U.S. trade union movement.

In April 1947 the House of Representatives passed legislation sponsored by Fred Hartley Jr. (R-NJ) that threatened key rights of labor. Among its provisions were bans on strikes against an entire industry, strikes for fringe benefits, and picketing. Meanwhile, the Senate adopted a more moderate bill named after the influential Ohio senator and Republican presidential

A meeting of the International Ladies' Garment Workers' Union, circa 1940–1950. *(Library of Congress)*

aspirant Robert A. Taft. The Taft legislation formed the basis for a compromise reached in summer 1947. The resulting Taft-Hartley Act banned union contributions to campaigns, required annual financial disclosure statements from unions, and provided for the president to call for an eighty-day "cooling off" period via a court injunction; during this time, labor and management would work to avert a strike. Indicative of the beginning years of the Cold War, Taft-Hartley mandated that labor union leaders had to indicate annually their anticommunism; otherwise union rights would be taken away. Although President Truman vetoed the legislation, the Republican-controlled Congress decided to override his veto. The Taft-Hartley Act of 1947 and the Wagner Act of 1936 remain important markers of labor union rights in the United States.

The labor battles of the immediate post–World War II period continued throughout much of Truman's presidency. At one point during the Korean War, a threatened strike by the steelworkers prompted the president to seize the industry. Other industries had given their employees pay increases, but U.S. steel producers had not. Although industry profits were up substantially, the major steel companies were unwilling to reach an agreement with their unions. When the Truman administration seized the industry, the secretary of commerce became the manager of the nation's steel mills. Naturally, the steel companies filed suit against the president, alleging an abuse of power.

A U.S. District Court judge and later the U.S. Supreme Court agreed in *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 (1952), that the president had overstepped his powers in taking the action. The steelworkers went on strike in summer 1952 for several weeks, a stoppage that did have a deleterious effect on steel production for the war effort. Ironically, the eventual settlement was the same as had been offered to the steel companies before the presidential seizure of control and the steelworkers' strike. That the plan was not accepted originally is indicative of the unwillingness of U.S. business to acknowledge the legitimacy of the trade union movement in the United States.

The rise of labor corresponds to the dominance of the Democratic Party in U.S. politics following the New Deal. The Democratic Party has been more supportive of labor union issues than has the Republican Party. The National Labor Relations Board still exists, and during times of Democratic control of the White House, its decisions tend to be more favorable to labor. However, U.S. unions have been losing members for several decades, and with the decline of labor has come a weakening of the political base of the Democratic Party.

Michael E. Meagher

See also: Strikes and Arbitration.

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Lady Chatterley's Lover

Although D. H. Lawrence completed the third manuscript of *Lady Chatterley's Lover* in the hills of Tuscany, Italy, in 1928, readers had to wait until 1960 for distribution of the uncensored version. The third manuscript version, known as the "Orioli edition," quickly became one of the most controversial works of English fiction ever published and was banned as pornography in the United States and England. The book shocked the world with its vivid and open portrayal of the sensual extramarital affair of Connie, a lonely woman married to a crippled husband, with her husband's gamekeeper. In the United States it joined other noted works of literature involved in obscenity cases, including *Tropic of Cancer* by Henry Miller and *Fanny Hill* by John Cleland. Over a fifteen-year period beginning in 1957, as the U.S. Supreme Court heard these First Amendment cases, it struck down many obscenity statutes and formed more relaxed standards on obscenity as judged under the First Amendment to the U.S. Constitution.

The ban on the distribution of the text version of *Lady Chatterley* and the refusal to grant a license for distribution of the film adaptation brought to the fore the controversy over cultural censorship in the United States. "Obscene" material has historically been excluded from First Amendment protection. U.S. Supreme Court consideration of obscenity began in *Roth v. United States,* 354 U.S. 476 (1957), in which Justice William J. Brennan Jr. settled that the First Amendment did not protect every utterance, and that obscenity was outside the protection intended for speech and press.

The trials of *Lady Chatterley* began in 1959 when Grove Press, often at the forefront of publishing contentious or avant-garde literature in America, published the third manuscript in its uncensored form, which was, at the time, banned in the United States. The edition had never before been legally published, although it had been frequently pirated, and Knopf had published an abridged edition in 1930. Before World War I, vigilante attacks against obscene literature led to the expansion of the U.S. Post Office ban on the shipment of obscene literature and art under the Comstock Act of 1873, but after World War I, public controversy over censorship escalated even more. Until the Tariff Act was amended in 1930, many literary classics were denied entry into the United States on grounds of obscenity. U.S. postal authorities stopped shipment of copies of *Lady Chat-*

terley sold via the Readers Subscription Book Club under the nineteenth-century Comstock Act as amended in 1958.

Lawyer Charles Rembar, the attorney revered for successfully altering a century of court-approved censorship, defended the publisher of *Lady Chatterley's Lover.* He argued that the artistic merit of the book outweighed any possible obscenity and should be protected by the First Amendment to the U.S. Constitution. By the time of the suit, the book was already a classic. After arguing their case within the Post Office's own judiciary system—and losing—Rembar and Grove filed a suit against Robert Christenberry, the New York City postmaster. The New York courts found in favor of Grove Press, and an appeal brought by the federal government affirmed the decision.

The appellate court relied on the recent Supreme Court review of the banning of the movie *Lady Chatterley* on the ground that it dealt too sympathetically with adultery. In *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684 (1959), the Court considered the impact of New York's motion picture licensing law upon First Amendment liberties, which are protected by the Fourteenth Amendment from infringement by the states. The New York law required a license from the education department and provided that a license would not be issued for obscene material. The U.S. Supreme Court decided that the New York Education Law under which the movie was denied a license was invalid.

Citing the Supreme Court's ruling in a footnote, the appeals court considered the artistic worth of the novel in *Grove Press, Inc. v. Christenberry,* 276 F.2d 433 (1960). The court decided that "examined with care and 'considered as a whole,' the predominant appeal of *Lady Chatterley's Lover* . . . is demonstrably not to 'prurient interest,' as thus defined." In discussing the thesis of the book, the court stated that the book was "a polemic against three things which Lawrence hated: the crass industrialization of the English Midlands, the British caste system, and the inhibited sex relations between man and woman." The court added that "once our agelong inhibitions against sex revelations in print have passed," the book would prove a powerful, tender, and compelling depiction of the heroine's achievement of fulfillment and naturalness in her life. In England, Penguin Books followed Grove's lead and, in 1960, successfully defended *Lady Chatterley's Lover* in one of Britain's most celebrated court cases.

Galya Benarieh Ruffer

See also: Miller v. California; Obscenity; *Roth* Test.

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Lamb's Chapel v. Center Moriches Union Free School District (1993)

In *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993), the U.S. Supreme Court was presented with a case involving a New York state law that banned the use of public school facilities for any religious purpose, even during after-school hours. The case raised issues not only of free speech but also of government establishment of religion, both of which were applicable under the First and Fourteenth Amendments to the U.S. Constitution. The decision ultimately turned on free speech rights.

Lamb's Chapel, a nondenominational evangelical church, sued the school district in 1990 after the district refused to grant two requests to allow the church to use school facilities to show a six-part film series produced by Christian psychologist Dr. James Dobson of Focus on the Family, a conservative, Christian, grassroots organization that sponsored radio broadcasts dealing with Christianity and family issues. The film series presented topics on family life and child rearing from a Christian perspective. The district refused to allow the church access to show the films even though other community groups were permitted to use school facilities after school hours. After a federal district court ruled in favor of the school district, the appellate court affirmed that ruling, stating that the New York law drew a constitutional boundary between religious and nonreligious uses of public property.

The U.S. Supreme Court reversed the lower courts

in a unanimous decision. Writing for the Court, Justice Byron R. White said that the district's refusal to grant the church access to school facilities violated its free speech rights under the First Amendment. Other nonreligious groups were allowed to present programs on family life and child rearing on school property after school hours. Justice White wrote that the district could not deny Lamb's Chapel a public forum solely because the church addressed the topics from a religious viewpoint. As long as New York school districts allowed groups to discuss topics from a nonreligious point of view, groups also had to be permitted to present the same topics from a religious perspective.

The Court avoided directly addressing the question of whether school districts must allow religious worship on school property. Justice White's opinion reviewed the Court's precedents on the separation of church and state. Joined by five justices, White determined that Lamb's Chapel's use of school facilities to show the films did not violate the three-prong test developed in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the Court's pronouncement on when government action was prohibited under the Establishment Clause because it constituted "establishment of religion." Justice Antonin Scalia did not sign the majority opinion in *Lamb's Chapel* because of the application of the *Lemon* test. Joined by Justice Clarence Thomas, Scalia wrote a concurring opinion in which he criticized the *Lemon* test: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave . . . after being repeatedly killed or buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening little children and school attorneys." Justice Anthony M. Kennedy also wrote a brief concurring opinion.

John David Rausch Jr.

See also: Establishment Clause; *Lemon v. Kurtzman;* Scalia, Antonin G.; Separation of Church and State.

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Land Use

The term "land use" implies the notion that land is an inherently productive commodity, as it can grow crops, serve as the site for a home or business, and provide valuable natural resources such as oil, lumber, or coal, among numerous other uses. Governmental control of land use has evolved since America's founding, although the basic rule that has persisted is that land's productive capacities should be freely expended so long as the costs of the particular use to society are minimal and the use does not run against the will of the majority. There are many examples of governmental control over land use at the federal level, including the Clean Air Act, the Clean Water Act, the Coastal Zone Management Act, and the Endangered Species Act, and at the local level in the form of building codes and zoning ordinances.

PRIVATE PROPERTY AND COMMON LAW

The roots of land use in the United States lie in the notion of property. Arguably, all land-use conflicts that arise in U.S. law can be framed within the larger question of where the limits of property rights should be drawn. America inherited from Britain a strong sense of property rights, as embodied by the English philosopher John Locke (1632–1704), who argued that clearly defined property rights not only were socially efficient but were part of natural law. This was the founding notion of capitalist society—namely, that individuals were entitled to the just rewards of their work, which were best realized through the ownership of land. A primary role of law was to ensure these rights were safeguarded, which, in the American context, paved the way for the ensuing commercialization of land.

America also inherited from the English the common law concepts that protect property. Common law is a centuries-old judge-made law that is constantly evolving with each new case. It is primarily focused on protecting property rights between individuals through the adjudication of disputes. The common law notion of "nuisance" is such a form of protection of property. A nuisance arises when one person's actions adversely affect the enjoyment of someone else's

property. Judges must balance the societal good from the activity against its harm based on precedent and the case at hand. It was generally believed initially that property owners could use their land in any way so long as it did not constitute a nuisance. If a land use went too far in causing a nuisance to someone else, the harmed party would have his day in court. Adversely, if it did not go too far, it was assumed valid and permissible. This black-and-white picture has since become gray as the various levels of government have introduced additional restrictions on top of common law, the better to balance outright use with societal efficiency and well-being.

THE POLICE POWER AND LAND-USE REGULATION

The police power grants to local and state governments the ability to pass regulations protecting public health, safety, welfare, and morals. It was with these protections in mind that cities and towns began to enact zoning regulations, by which different land uses were separated into distinct zones (such as, in general, residential, and industrial). Whereas nuisance law settled land-use disputes after harms had occurred, zoning instead aimed to prevent such situations from happening in the first place by separating incompatible land uses.

The landmark case of *Euclid v. Amber Realty Co.,* 272 U.S. 365 (1926), concerned the widespread practice of zoning, whereby different land uses were separated into distinct zones. The *Euclid* case upheld zoning as a valid exercise of the police power negating compensation. Justice George Sutherland penned, "[A] nuisance may be merely the right thing in the wrong place, like a pig in the parlor instead of the barnyard." *Euclid* in turn provided the legal foundation for preemptive zoning. Municipalities and states could constitutionally take proactive steps to ensure that certain incompatible land uses were separated under the police power. This decision established zoning as "the broadest of land use control techniques, applying to virtually any private use of land and many public uses within zoned jurisdictions."

The Takings Doctrine

The property owner has many rights in the American system, but the government maintains some key rights of its own, including taxation and the taking of land for public use. The founding fathers added a key property protection to the Constitution, not one concerning disputes between citizens but rather one limiting the government's power. Under the Fifth Amendment of the Constitution, "nor shall private property be taken for public use, without just compensation." This Takings Clause was later incorporated in the Due Process Clause of the Fourteenth Amendment and applied to the states. Government can take private land for public use through eminent domain, an inherent power. The Takings Clause requires that the government must provide just [fair] compensation, typically defined as fair market value, to the owner of the property.

The Supreme Court in *Berman v. Parker,* 348 U.S. 26 (1954), considered an urban renewal measure undertaken by Washington, D.C., whereby the city condemned land and resold it to private developers in order to revitalize degraded areas of the inner city. The Court upheld the statute, effectively broadening the notion of "public use" to mean public *purpose,* since the government would in no way be making "use" of the land. In *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984), the Court further ruled that the state of Hawaii could use eminent domain to condemn privately owned land on behalf of land tenants so that these tenants could purchase the land. Furthering *Berman,* the Court ruled that this was a valid governmental purpose, even though the land would immediately be turned over to private parties, further ensuring that *actual* public use was not a limit on the takings power.

The use of the police power to regulate land use gave rise to the concept of "regulatory taking," meaning that a regulation was so burdensome to land use that it effectively constituted a taking of private property. In *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922), Justice Oliver Wendell Holmes Jr. set out the notion of a regulatory taking: "[W]hile property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." At the same

time, he argued that nearly everything the government did in some way affected the financial value of property; should compensation be required for practically all governmental actions, "[g]overnment could hardly go on." What had been squarely the right of regulators now became a matter of degree. Courts would use a balancing test, weighing the social good being protected by a regulation against the ensuing harm done to property owners, potentially limiting the purview of permissible regulation.

Government's regulatory role subsequently was limited. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987), set forth that government was liable to pay just compensation for a "temporary taking," meaning that even if the government withdrew the statute that constituted a taking, it would still have to compensate property owners for value lost in the interim. This added a new financial risk, because social planners enact regulations that might later be judged unconstitutional takings.

Next, in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), Justice Antonin Scalia argued for the Court that there had to be an "essential nexus" between the public interest the government sought to protect and the actions it took to achieve those ends. In *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), Justice Scalia ruled that the state's Beachfront Management Act was not a regulatory taking since it furthered the state's "background principles of nuisance and property law," although he set forth that when a regulation effectively constituted a "total taking" of the value of an individual's property, it would merit compensation by the government.

In *Dolan v. City of Tigard,* 512 U.S. 374 (1994), the Court tightened further the "essential nexus" standard set forth in *Nollan.* There would have to be "rough proportionality" between the benefit to the public and the burden on the property owner. Justice John Paul Stevens argued in dissent that this decision reversed the long-standing "presumption of validity" of regulatory actions and instead placed the burden of proof on regulators.

Property rights are ultimately subject to the greater good of society. Regulations, such as zoning, can shape land use to foster greater societal benefits, although there are constitutional limits to such actions. The ensuing debate represents the constant redefinition of boundaries to ensure that land-use regulations best meet the needs of society but minimize the detriment to property rights, which are a founding principle upon which America's economy is built.

James F. Van Orden

See also: Berman v. Parker; Hawaii Housing Authority v. Midkiff; Locke, John; *Lucas v. South Carolina Coastal Council;* Property Rights; Takings Clause; Zoning.

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Lawn Signs

Signs posted on residential property (lawn signs) are a form of expression protected by the First Amendment to the Constitution. This fundamental right also has been incorporated in the Due Process Clause of the Fourteenth Amendment and made applicable to the states. The right to post lawn signs is not absolute, however, and municipalities often pass ordinances regulating their display. Courts generally determine the constitutionality of a sign ordinance by balancing a municipal interest in controlling the physical impact of signs on a community, on the one hand, with the constitutional interest in ensuring that lawn signs remain available as an effective medium of expression, on the other.

Only two U.S. Supreme Court decisions, *Lindmark Associates, Inc. v. Willingboro,* 431 U.S. 85 (1977), and *City of Ladue v. Gilleo,* 512 U.S. 43 (1994), have di-

rectly ruled on the municipal regulation of residential signs. Lower courts, therefore, have not had a great deal of specific guidance on how to resolve sign issues. Still, the *Lindmark* and *Gilleo* decisions, along with Supreme Court decisions discussing other types of sign regulations, reveal four general principles.

First, lawn signs may be subject to "time, place, and manner" regulations. This type of regulation attempts to mitigate problems caused by the posting of signs of a particular design, the posting of signs in a certain place, or the posting of signs during a certain time period. Municipalities often cite a concern for preserving the aesthetic character of a neighborhood, or for promoting traffic safety, in regulating sign design and placement, as the Court recognized in *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789 (1984). Time, place, and manner regulations are "content-neutral": They attempt to solve a problem unrelated to the substance of the sign's message or image. If a time, place, or manner ordinance is not unnecessarily or excessively restrictive, it stands a fair chance of being held constitutional.

Second, ordinances that restrict or ban signs based on subject matter (allowing religious but not politically oriented signs, for example) or the particular viewpoint taken in a sign (for example, allowing prowar but not antiwar sentiments) are more constitutionally suspect. With exceptions, regulations that are content-based or viewpoint-based are presumptively unconstitutional in modern law regarding free expression, as the Court ruled in a flag-burning case in *Texas v. Johnson,* 491 U.S. 397 (1989), and this is true for sign ordinances as well.

Third, signs that convey a "commercial" (advertising) message are, all other things being equal, given less constitutional protection than "noncommercial" signs. Ordinances regulating commercially oriented lawn signs are subject to a "midlevel" form of review, something between presumptive constitutionality and presumptive unconstitutionality, an analysis the Court made in *Central Hudson Gas and Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980). Ordinances that restrict or ban commercial lawn signs as a means of depressing consumer demand for a product, however, are unconstitutional. For example, the unconstitutional sign ordinance in *Lindmark* prohibited the posting of "For Sale" or "Sold" signs on residential property in order to preserve the character and stability of racially integrated neighborhoods. The Court struck down the ordinance because it prevented residents from conveying truthful information about their property.

Fourth, the Supreme Court in *Gilleo* implied that the right to post a sign on one's own property is stronger than the right to post signs elsewhere, especially if the sign's message is political in nature. In addition, the *Gilleo* Court held that lawn signs have unique value in public discourse; no medium of expression serves as an adequate substitute for them. Therefore, an ordinance that effectively bans the posting of politically oriented lawn signs, even a content-neutral time, place, or manner regulation, is unconstitutional.

The Court in *Gilleo* described the unique value of lawn signs as a form of expression. Signs placed on a person's lawn tie the sign's message to the resident, and vice versa, in a way that an anonymous sign posted off-property cannot. For this reason, a lawn sign concretely communicates local public opinion and may be the most effective and even provocative way to convey a message to one's neighbors. In addition, the identity of the speaker often adds to, or detracts from, the credibility of the message conveyed. Signs are also convenient and inexpensive to design, post, and maintain. Alternative methods of expression, such as newspaper advertisements, handheld signs, or phone calls, often require more effort and expense.

A contemporary issue involves municipal ordinances that mandate time limits for the posting of election-campaign signs on private property. Campaign-sign regulations are content-based (regulating signs with a particular subject matter), yet they are regulated not because of their subject but because their proliferation creates time, place, and manner problems. Lower courts examining these time-limit ordinances have upheld some of these ordinances and struck down others.

James Daniel Fisher

See also: City of Ladue v. Gilleo; First Amendment; Land Use; Time, Place, and Manner Restrictions.

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Lawrence v. Texas (2003)

In *Lawrence v. Texas,* 539 U.S. 558 (2003), a gay-rights case, the U.S. Supreme Court overruled *Bowers v. Hardwick,* 478 U.S. 186 (1986). The Court reversed convictions based on laws making private same-sex sodomy illegal, holding that such laws violated the rights and liberties protected by the Fourteenth Amendment to the U.S. Constitution.

Justice Anthony M. Kennedy wrote the Court's majority opinion. Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Steven G. Breyer joined it. The majority concluded that applying antisodomy statutes to consenting adults on private premises violated the liberty and privacy rights protected by the Due Process Clause of the Fourteenth Amendment. Justice Sandra Day O'Connor voted with the majority against Texas, but said in her concurring opinion it was unnecessary to overrule *Bowers* and that it was sufficient to overrule statutes that targeted homosexuals as a class because the laws violated the Equal Protection Clause of the Fourteenth Amendment. Justice Antonin Scalia wrote a dissenting opinion, joined by Chief Justice William H. Rehnquist and Justice Clarence Thomas.

Lawrence arose from these facts: Houston police responded to a reported weapons disturbance in John Lawrence's apartment but instead found Lawrence and his homosexual partner engaged in sodomy, a misdemeanor, and arrested them. The two men pleaded no contest to their prosecution but alleged the statute violated their Fourteenth Amendment rights guaranteed by the Due Process and Equal Protection Clauses and infringed a similar equal protection provision of the Texas constitution. They lost their case in the Texas court system, and the Supreme Court accepted review.

The Court considered three questions: (1) whether the Texas statute violated the Equal Protection Clause of the Fourteenth Amendment; (2) whether the criminal convictions based on the statute violated the liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment; and (3) whether *Bowers* should be overruled.

Justice Kennedy's first paragraph set a broad libertarian theme:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

He applied this extended scope of liberty to the inquiry over *Bowers* and found adherence to *Bowers* lacking sufficient logic. In his analysis of *Bowers,* Justice Kennedy admitted the moral/religious tradition of disapproval against homosexuality, but asserted a per-

"Images Removed Due to Copyright Issues"

son's privacy was more fundamental and complex in the traditional legal culture of Western civilization and the United States than what the *Bowers* Court acknowledged. He relied on two kinds of evidence available in 1986 not acknowledged in *Bowers.* Most unusual was his citation as legal authority of a 1981 decision by the European Court of Human Rights granting a right of privacy for a gay person against Northern Ireland, a decision that also bound all member nations of the Council of Europe through the European Convention on Human Rights (twenty-one nations at the time, forty-five today). Less controversial was his observation that early American statutes banned all nonprocreative sex, even between married individuals. Such laws apparently were enforced against rapists and pedophiles and to punish bestiality and the like. True, in 1986, about half of the states had antisodomy statutes, but it was not until the 1970s that states began specifically to discriminate against homosexual sodomy.

Justice Kennedy's second-prong invalidation of *Bowers* considered the weight of liberty over morality in the post-*Bowers* era. He cited *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), which reaffirmed *Roe,* quoting a line from Justice O'Connor's *Casey* opinion for the Court: "Our obligation is to define the liberty of all, not to mandate our own moral code." In addition, in the post-*Bowers* era, the number of states to criminalize sodomy dropped; in 2003, only thirteen states did, of which only four targeted same-sex sodomy. Last, he cited *Romer v. Evans,* 517 U.S. 620 (1996), in which the Court used the Equal Protection Clause to invalidate Colorado's Amendment 2, which was directed against homosexuals as a class. Justice Kennedy wrote that six–three majority opinion, joined by the same five justices to vote against Texas in *Lawrence.*

He admitted Justice O'Connor's equal protection logic had merit against Texas and the other three states that criminalized homosexual sodomy. He concluded it might be too narrow to stop more states from criminalizing partner-neutral sodomy. O'Connor claimed that was not a practical conclusion; it was more practical to conclude that a movement in the states would invalidate all partner-neutral antisodomy bans.

Justice Scalia wrote an angry dissent supporting the precedent of *Bowers* and castigating the majority opinion as the "product of a law-profession culture that has largely signed on to the so-called homosexual agenda." He further argued that the Court had "taken sides in the culture war" and that states should be able to criminalize activities that a majority of their citizens deemed immoral. He made three main points. First, if societal changes were positive for overruling *Bowers,* then increased opposition to legalized abortion meant the Court should overrule *Roe.* Second, if the majority decision were correct, then other criminal statutes, such as those against bigamy, were unconstitutional, since they also had a public-morality rational-basis purpose in discriminating against the individual who was the partner. Third, the door would be open to legalizing same-sex marriage, since public morality was the rational basis that defined marriage as a union between one man and one woman. Justice Scalia further observed that the majority decision was inconsistent with *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), which invalidated, on First Amendment grounds, a New Jersey statute prohibiting sexual orientation discrimination as applied to the Boy Scouts.

Justice Thomas's separate dissent said such statutes were an unworthy way to expend valuable enforcement resources. If he were a legislator, he would vote to repeal them because they were "uncommonly silly," but he did not think the U.S. Constitution contained a general right to privacy.

Sharon G. Whitney and Martin Dupuis

See also: Bowers v. Hardwick; *Boy Scouts of America v. Dale*; Right to Privacy; *Romer v. Evans.*

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Lawyer Advertising

Lawyer advertising raises important issues under the First Amendment to the U.S. Constitution. As a form of commercial speech, such advertising enjoys limited constitutional protection. On the one hand, lawyer advertising serves the public by educating accident victims, who are often unaware of their legal rights and vulnerable to pressure from insurance adjusters. It allows lawyers without long-standing community ties to enter the market, and it exerts downward pressure on the cost of legal services. On the other hand, many lawyers wince at the undignified pitches that undercut the image of the law as a learned profession. Furthermore, lawyer advertising increases the volume of claims, lawsuits, and settlements. Consequently, insurance companies, often portrayed as villainous in the ads and usually responsible for paying damage awards, have seen their costs rise and their profits diminish. They have lobbied for limits on lawyer advertising.

Before 1977 every state barred lawyer advertising. In that year the U.S. Supreme Court decided *Bates v. State Bar of Arizona,* 433 U.S. 350, the first case holding that the First Amendment protected a lawyer's right to advertise—in that case, fees for routine legal services.

Subsequently, a series of cases clarified the parameters of permissible advertising. In *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978), the Court approved a prohibition on in-person solicitations of accident victims. Soon thereafter, the Court limited the ban on such solicitation to the hospital itself. In *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985), the Court struck down a rule against use of newspaper ads to solicit clients who had been injured by the Dalkon Shield, an intrauterine birth control device. Neither the state's interest in preventing undue influence on vulnerable clients nor its concern that the ads might be offensive was enough to overcome the presumption of constitutionality. In *Shapero v. Kentucky Bar Association,* 486 U.S. 466 (1988), the Court declared that targeted mailings were acceptable—though in a 1995 case, *Florida State Bar v. Went For It,* 515 U.S. 618, the Court deferred to a state's interest in shielding accident victims from such letters for thirty days.

The Court has given strong constitutional backing to lawyers who solicit clients to promote political or ideological goals. In *In re Primus,* 436 U.S. 412 (1978), the Court supported a volunteer American Civil Liberties Union lawyer who had written to a woman asking her to become a plaintiff in a lawsuit against a doctor. The doctor had sterilized her as a condition of the continuation of Medicare benefits. The Court found that the attorney's letter was core First Amendment speech.

Since those Court decisions that broke new First Amendment ground, lawyers now have multiple options for communicating. They advertise in telephone books and newspapers, on television, billboards, and the Internet, through mass mailings, and even on T-shirts, matchbook covers, and condom packages.

Each state promulgates its own code of professional responsibility—a set of rules governing members of its bar. Typically, states regulate three aspects of advertising—its substance, its format, and the media through which information is communicated.

Each state prohibits false or misleading advertising content, including material misrepresentations of facts or of the law, omissions of pertinent information, the creation of unjustified expectations about what a lawyer can do, and unsubstantiated comparisons with the competence of other lawyers. If an advertisement implies that a lawyer can exercise improper influence over a government agency, the lawyer has violated the standard. Ads must be truthful. For example, if a firm always settles cases rather than taking them to trial, that firm may not run an ad portraying lawyers in a courtroom. Likewise, most states consider it misleading to run a commercial in which a professional actor is not identified as such. And a firm that describes its work as "the best" must be prepared to support its claim.

In terms of format, many states require the insertion of simple disclaimers, such as statements that recovery cannot be guaranteed or that what is portrayed on the screen is a dramatization. Other states require that spokespersons for a firm must be members of the firm. Some states prohibit the broadcast of jingles or

dramatic music. Because the Supreme Court has been narrowing states' discretion in regulating advertising format, most of these rules are vulnerable to constitutional challenges.

Lawyer advertising appears in most mass media, although the Telephone Consumer Protection Act of 1991 prohibits the uninvited transmission of "junk faxes." Lawyer advertising on the Internet, which reaches potential clients beyond a state's borders, has become a matter of concern to state officials.

Because of the growth of constitutional barriers to mandatory standards for ads, some states have begun to develop voluntary guidelines. For example, although appeals to fear, greed, and the desire for revenge probably cannot be prohibited without running afoul of the First Amendment, such ads are less common in states that adopt and publicize aspirational standards.

The American Bar Association has been influential in promoting national standards for lawyers. It has proposed a model rule to govern lawyer advertising. The rule leaves questions of taste up to the individual lawyer and prohibits only communications that are false or misleading. Similarly, the bar associations of individual states often have advertising guidelines.

In sum, lawyer advertising enjoys a good deal of constitutional protection, though not as much as "pure" (noncommercial) speech. It performs a public service by helping people who otherwise would silently suffer a wrong to become aware of legal remedies. It reaches people without a network of family, friends, or business associates who could refer them to an attorney. Advertising also serves to break up informal cartels of legal providers. Nevertheless, lawyer advertising is controversial because it cheapens the image of the legal profession and increases the costs of doing business for insurance companies and for professionals, such as physicians, who may become targets for lawsuits.

As the Supreme Court has moved toward giving advertising the kind of constitutional protection afforded to literary, artistic, political, and scientific speech, the permissible range of state regulation has narrowed. In the future, many states are likely to adopt aspirational standards in lieu of mandatory rules.

William H. Coogan

See also: Bates v. State Bar of Arizona; Commercial Speech; First Amendment.

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Lawyers Defending Civil Liberties

The use of law, courts, and attorneys to defend and expand civil liberties has sometimes been referred to as "cause" lawyering. The practice itself has been questioned for both its effectiveness and for the implications of using the legal system as a means to force social or political change.

Much of the dispute is dependent upon an underlying view of the role of the judiciary in the conflict over civil liberties. Judicial scholars have two alternate views of the judiciary in the United States based on its role in government. A limited view of the role of the courts is based on understanding that a combination of factors—the bounded nature of constitutional rights, the lack of judicial independence, the dearth of enforcement mechanisms—makes the courts ineffective policy-makers. This view is drawn from Alexander Hamilton's assertion that the judiciary is the least dangerous, or weakest, branch because it lacks both the power of the purse and the power of the sword. Further, courts exercise their authority through the issuance of opinions that often are vague or difficult to implement, even when the authority of a particular court, such as the U.S. Supreme Court, is prominent.

One scholar effectively demonstrated this position through a careful examination of some of the U.S.

Thurgood Marshall (right) and Spottswood W. Robinson III met in 1955 in Washington, D.C., to ask the Supreme Court to end school segregation promptly. *(AP/Wide World Photos)*

Supreme Court's more prominent decisions on civil liberties. In reviewing the Court's decision in the landmark civil rights case *Brown v. Board of Education,* 347 U.S. 483 (1954), he demonstrated that the Court was not as effective in forcing desegregation as many observers had believed. The effect of Congress and the Civil Rights Act of 1964 proved to be more significant in his data.

Alternatively, some scholars hold a view less limited than is shown in the measurement of individual decisions. One individual argues that despite a movement's mixed results in court, legal mobilization has supplied resources and helped shape the political landscape upon which the rights conflicts are conducted. A legal strategy can provide an increased level of activism for participants and, despite a short-term loss, may still provide for long-term victory by undermining the status quo. This strategy can be effective at mobilizing support and providing momentum for the movement to be successful over time. Further, a movement's support structure may be effective in changing the nature of a court's docket.

Individually, lawyers can, and do, contribute both resources and skills to the advancement of civil liberties and other causes. The ability of attorneys to see the limitations of the litigation strategy allows them to be cautious and sophisticated in the use of the law and results in a more balanced strategy of which the

law and litigation may be only a small part. The leveraging ability of the law can be an important strategic tool, especially for movements that have less political clout than high-profile causes. The use of a legal strategy is context-specific, and, as a result, its impact is often difficult to measure in more limited empirical studies. Lawyers themselves are only a portion of the movement, and they can advocate for legal strategies when they are appropriate or argue against them when the situation calls for a different approach.

Beyond their effectiveness, the placement of lawyers in the role of advocates for particular social interests presents a professional dilemma. Cause lawyering raises a moral and professional quagmire for lawyers in that it allows them to contribute to society, but it damages the underlying logic of the system in which lawyers are seen as neutral and the law as unbiased. Cause lawyering brings legitimacy to the profession by demonstrating that its contribution is more than the technical, hired-gun imagery that often defines the profession in the modern media. Nonetheless, the process threatens the attorney/client relationship, since the representation of a cause can be in conflict with the interests of the client or even in competition with the client.

This is not a conflict that will quickly fade. Many social or political conflicts are increasingly being decided in judicial forums. As courts become more involved in the mediation of rights disputes, the role of lawyers in this process is certain to increase. Practitioners will be forced to balance professional responsibilities with personal or ideological ones.

Kevin M. Wagner

See also: American Civil Liberties Union; Movie Treatments of Civil Liberties; Public Defenders.

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Least-Restrictive-Means Test

The least-restrictive-means (or least-drastic-means) test is a standard developed by the courts to determine whether legislation violates fundamental rights, especially freedom of speech and press, as guaranteed by the U.S. Constitution and as applied to the states through the Due Process Clause of the Fourteenth Amendment.

The employment of the least-restrictive-means test is an attempt to respect the imposition of valid governmental interests but to prevent undue intrusion on individual liberties. The test assesses the manner in which restrictions on expression are fashioned. It ad-

dresses whether the government's application of a law goes further than necessary to assert the government's interest. If the government seeks to limit a fundamental constitutional right, it must do so in the least drastic manner available. If less drastic alternatives exist, the government must employ them. The test is an important component of the attempt to strike a balance between individual liberties and society's interest in regulating the harm that might arise from exercise of those liberties. The U.S. Supreme Court typically attaches this prong to its tests designed to balance individual rights with the government's need to protect society.

The least-restrictive-means test is closely related to the void-for-vagueness test and the overbreadth doctrine, the latter in particular. All three were developed to deal with the question of whether legislation unnecessarily impinges on constitutional rights. The overbreadth doctrine and least-restrictive-means test seek to ensure that regulations come as close as possible to meeting government's objectives while exerting the minimum impact on the constitutional right in question. Overbreadth, least restrictive means, and void for vagueness are concepts that the Court began to apply to civil liberties cases, particularly those involving freedom of speech, in the wake of the preferred-position doctrine suggested in footnote four of *United States v. Carolene Products Co.,* 304 U.S. 144 (1938). Each of these tests is designed to further constitutional protections for expression by requiring that statutes be clearly and narrowly constructed. The least-restrictive-means test has been applied primarily to First Amendment–related concerns, but the Court has used it in assessing regulations that might impinge on interstate commerce as well.

Many of the tests the Supreme Court has devised to strike a balance between individual rights and the state's authority have a least-restrictive-means prong. The judicial test for symbolic speech, created in *United States v. O'Brien,* 391 U.S. 367 (1968), and the test for commercial speech, created in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980), require the government to demonstrate that its restrictions are the least restrictive—the least drastic—means possible. Judicial decisions limiting time, place, and manner restrictions are also designed to ensure that such regulations are narrowly tailored.

An early application of the test to civil liberties (although it was more implied than explicit) came in *Schneider v. State,* 308 U.S. 147 (1939), in which the Court ruled that prevention of littering was not a sufficiently important governmental interest to merit restraints on expression. There were less drastic means of preventing littering. Similarly, in *Shelton v. Tucker,* 364 U.S. 479 (1960), an Arkansas statute designed to assess teacher competence required teachers to list the organizations they had joined and how much money they had contributed to those organizations. The Court recognized that ensuring teacher competence was a significant state interest, but ruled that this requirement went well beyond the legitimate purpose and was not the least restrictive means of ensuring teacher competence.

Critics argue that the least-restrictive-means test is highly subjective and open to an arbitrary, unstructured imposition of personal values. The test was adopted as a means of limiting the government's ability to restrict expression, but justices so inclined can circumvent the least-restrictive prong without much difficulty. There has also been concern that the Supreme Court has been inconsistent in enforcing the requirements attendant to the least-restrictive-means test. Critics have charged that the Court has not been rigorous in applying the test, arguing that the Court under Chief Justice William H. Rehnquist has been too willing to consult legislative history and too deferential to the legislature's declaration that the statute in question represents the least restrictive means of handling a particular issue.

Richard L. Pacelle Jr.

See also: First Amendment; Lawn Signs; Overbreadth Doctrine; Preferred-Freedoms Doctrine; Time, Place, and Manner Restrictions; *United States v. O'Brien;* Vagueness.

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Lee v. Weisman (1992)

Lee v. Weisman, 505 U.S. 577 (1992), is one of a long line of cases in which the U.S. Supreme Court held that state-sponsored prayer violated the Establishment Clause of the First Amendment to the U.S. Constitution. Under that clause, government is prohibited from engaging in activity that would constitute establishment of religion. *Weisman* reaffirmed the principle first established in *Engel v. Vitale,* 370 U.S. 421 (1962), in which the Court emphasized that allowing students in public schools to be excused from school prayers at their request did not render such prayers noncoercive.

At issue in *Weisman* was the constitutionality of a Rhode Island graduation ceremony that included invocation and benediction prayers by a member of the clergy who was invited by school officials. A student, Deborah Weisman, challenged this practice. The Court agreed with her challenge, holding that the prayers constituted an organization of religious activities by state officials at an event that was essentially mandatory, even though students were not required to attend in order to receive their diplomas.

The Court emphasized that the school principal was primarily responsible for deciding to hold prayers and then selecting and inviting a member of the clergy in any given year to give them. The school official would instruct the member of the clergy that the prayers should be nonsectarian. Although the school argued that this attempt to make prayers as nonsectarian as possible was an attempt not to offend those with different beliefs, the Court questioned the school's right to direct such prayers at all, since the school (and, by extension, the state) was in charge of organizing every aspect of prayers at an event that students were essentially required to attend. This violated the Establishment Clause of the First Amendment, under which the government "shall make no law respecting an establishment of religion." To the nonbeliever, the Court wrote, the prayers would signify "an attempt to employ the machinery of the State to enforce a religious orthodoxy." The public and peer pressure felt by these nonreligious students would be equivalent to direct coercion.

Justice Antonin Scalia dissented, joined in his opinion by Chief Justice William H. Rehnquist and Justices Byron R. White and Clarence Thomas. Justice Scalia highlighted the religious tradition in the United States of engaging in public nonsectarian prayer, as was the case in Congress. He did not believe the prayer in question was coercive, since students could turn their heads away or even choose not to attend graduation ceremonies when public prayer was scheduled.

Lee v. Weisman continues to be important in U.S. constitutional law. In *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), the Supreme Court struck down a school policy that allowed students to vote on whether they wanted prayer at football games and to lead the prayers themselves if a majority of students wanted them. Although the students had voted on the question of whether to hold prayers and chose who would recite them, the Court decided that this practice still violated the Establishment Clause, because the majority had no right to endorse practices that violated First Amendment principles. Additionally, the Court found a coercive element, since certain students (players and cheerleaders) were required to attend games, but others might be compelled to choose whether to attend or not based on whether such prayers violated their religious beliefs and views antagonistic to traditional Judeo-Christian religions or to religion itself.

Ronald Kahn

See also: Abington School District v. Schempp; Engel v. Vitale; Establishment Clause; Prayer in Schools; *Santa Fe Independent School District v. Doe.*

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Legal Basis of Public Health

The powers associated with the public health system in the United States are broadly based on the concept of "police powers," a term coined in 1824 by Chief Justice John Marshall of the U.S. Supreme Court. This regulation of health, welfare, and safety has wide impact in many aspects of citizens' lives, including requirements for the registration of births, for food and water safety, and for control of disease.

These police powers fall in direct opposition to privacy rights and personal liberties because the former necessarily encroach on the latter. In order to combat the spread of sexually transmitted diseases, for example, states inquire about all sexual contacts, discuss high-risk behaviors, and contact other individuals exposed. Federal statutes (*U.S. Code,* Title 42) allow for inspections and destruction of contaminated animals or property and permit the apprehension and detention of a person to prevent the spread of disease.

The issues of public health can have a significant impact on a population. In 1854, Doctor John Snow was confronted with a cholera epidemic in London. His epidemiological investigation of two water companies demonstrated that many sick individuals were getting drinking water from a specific pump located on Broad Street. The doctor removed the pump handle and halted the epidemic, but as a consequence some of the population was forced to seek water elsewhere.

The application of police power in the guise of public health statutes and regulations must be a balance between protecting the public good and minimizing intrusion on personal liberty. Although currently smallpox is of concern only as a possible biological weapon, a century ago the disease was a real threat in the United States. In 1902 a smallpox outbreak occurred in Cambridge, Massachusetts. The city's board of health implemented a regulation for the vaccination of all persons. Henning Jacobson, a citizen of that city, refused to be vaccinated, and charges were brought against him. In 1905, *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11, reached the U.S. Supreme Court, which held Jacobson could not enjoy the benefits of society without being vaccinated, and the state's obligation to the general welfare of the population provided grounds for the enforcement power. Jacobson could not enjoy the protection from disease offered by virtue of his vaccinated neighbors without taking the risk of vaccination himself.

Today smallpox is only a potential problem, and small numbers of public health workers, researchers, and military personnel are being vaccinated voluntarily. In the event of an intentional epidemic, this "balance" would have to shift to protect the population in general at the expense of some individuals. This shift from a request for volunteers to be vaccinated to mandated vaccination would be a clear example of public health application of police power.

The public health may be protected via police powers in another manner. California health and safety codes were challenged in 1966 when tuberculosis patient Eric Halko was restricted to a secured side of Mira Loma Hospital. Halko had left the hospital in spite of his disease communicability. He was arrested, returned to the hospital, and isolated there by successive orders of the county public health officer. The restriction of personal liberty was upheld by the District Court of Appeal of California in *In re Halko,* 246 Cal. App. 2d 553 (1966).

The effects of public health regulations typically go unnoticed by most people. Society enjoys the benefits of restaurant and water inspections, and officials have power to regulate restaurant workers and conditions if a worker develops hepatitis or shigella. Public health is first and foremost a matter of protecting the population.

The courts have differentiated the relative value of these police powers over time. In *Wisconsin v. Yoder,* 406 U.S. 205 (1972), the Supreme Court established a boundary where religious practice outweighed the safety and welfare laws of a state, at least when compulsory education beyond eighth grade was in conflict. On the other hand, when religious practice places an individual in potential danger, the religious practice can be curtailed. The state's power to regulate child labor was upheld in *Prince v. Massachusetts,* 321 U.S. 158 (1944), restricting a child's right to distribute religious materials.

Privacy rights have accounted for police power

challenges that have had the greatest impact on public health issues in recent years. In *Griswold v. Connecticut,* 381 U.S. 479 (1965), the Supreme Court determined that a Connecticut law prohibiting the prescription use of contraceptives was unconstitutional. *Griswold* prepared the legal landscape for limitation of state interference in the private lives of individuals. Still, privacy rights did not prevail over a New York law requiring the identification of patients receiving controlled medications (for example, morphine); the Supreme Court upheld the law in *Whalen, Commissioner of Health of New York v. Roe,* 429 U.S. 589 (1977).

The boundaries of the state's police powers will be challenged in a variety of circumstances. Current public health mandates allow for the direct reporting of certain diseases, including the private information of the patient, for contact and surveillance purposes. Other statutes specify the behavior of certain businesses that could have an impact on the health and safety of the public. These statutes are often supported by inspection and subpoena powers.

In Virginia, there are seventy-six diseases or classes of disease that must be reported to the state health department by health care providers or laboratories, each with different control measures based on communicability, morbidity, and mortality. Although chickenpox is reported, the young patients stay home to be cared for by family members, and only good hygiene is required. In contrast, a patient with a viral hemorrhagic fever such as Ebola or Lassa would be restricted to the hospital in full isolation. Cancers are also reportable diseases in Virginia, and cancer patients are tracked by the state's cancer registry for at least five years after treatment.

The current environment of concern over terrorism and world politics has resulted in the increase in both funding and power for public health programs. Potentially, a biological assault on a free society could be more devastating than a nuclear weapon. To recognize a bioterror incident, public health practitioners review hospital-visit records for trend analyses, interview patients to clarify the illness and path of exposure, and interview contacts. These invasions of privacy would serve the greater good if they could limit a communicable disease to a small area and a few patients.

All citizens have the expectation of safe food and water, the containment of disease, and the desire for a safe environment—instances of use of the police power—as well as the desire for protected civil liberties. In circumstances when public health is at risk, however, the individual's liberties must give way for the public good.

Kevin G. Pearce

See also: Griswold v. Connecticut; Jacobson v. United States; Police Power; Quarantines.

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Legal Services Corporation v. Velazquez (2001)

In *Legal Services Corporation v. Velazquez,* 531 U.S. 533 (2001), the U.S. Supreme Court struck down a 1996 law restricting the Legal Services Corporation from representing clients seeking to change existing welfare laws, even if this meant their attorneys had to terminate cases already in progress when the law was adopted. The Court primarily focused on the right to free speech protected by the First Amendment to the U.S. Constitution.

Congress had created the Legal Services Corporation (LSC) as a nonprofit corporation in 1974 "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." One of the primary functions of the LSC, which the

1996 law seemed to call into question, was to help indigent clients obtain welfare benefits.

Lawyers funded by the LSC brought suit challenging the law, known as the 1996 Omnibus Consolidated Rescissions and Appropriations Act. The district court denied a preliminary injunction, but the appellate court ruled in their clients' favor. The case went to the Supreme Court, which faced the question of whether the funding restriction on LSC attorneys attempting to represent clients challenging the validity of a law or statute violated the First Amendment right to free speech. In a five–four decision written by Justice Anthony M. Kennedy, the Court ruled that it did.

In *Rust v. Sullivan,* 500 U.S. 173 (1991), the Court ruled that physicians in federally funded health clinics could not advise their clients about abortion options. In that case, the Court explained that the physicians were speaking for the government, and the government therefore had the right to control the speech that went out under its name. By contrast, in the LSC's case, Justice Kennedy argued, attorneys were engaging in private speech that was merely funded by the government. The government was speaking through the state and federal attorneys defending the laws. Although Congress was perfectly within its limits to regulate the latter group, they could not regulate the former. The government could not restrict private speech merely because the government was funding it.

The majority also sought to protect the role of the judiciary in assessing the constitutionality of laws and statutes. "An informed, independent judiciary presumes an informed, independent bar," Justice Kennedy noted, and the restrictions placed on the LSC threatened the ability of the bar to perform its function. Congress cannot insulate its laws from judicial scrutiny, and the Court explained that this ruling was intended to protect the separation of powers so that each branch could function effectively. If these restrictions held, LSC attorneys—often the only ones available to indigent clients—would be limited not only in the cases they could bring but also in the arguments they could make, which could cast doubt upon the entire legal process.

The dissent, written by Justice Antonin Scalia and joined by Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor and Clarence Thomas, argued that the 1996 legislation "does not directly regulate speech, and it neither establishes a public forum nor discriminates on the basis of viewpoint."

Brian J. Glenn

See also: First Amendment; *Rust v. Sullivan.*

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Lehnert v. Ferris Faculty Association (1991)

Michigan's "agency shop" law required nonunion employees working for a unionized public entity to pay a "service fee" to the union for benefits received from collective bargaining. Some employees objected that the union used some of the fees for activities other than administration. In this respect, these nonunion employees were being forced to support positions on which they did not agree, and this infringed on their rights of free speech under the First Amendment to the U.S. Constitution as applied to the states through the Due Process Clause of the Fourteenth Amendment.

The Ferris Faculty Association (FFA) was the exclusive bargaining agent representing Michigan's Ferris State College faculty members and was affiliated with the Michigan Education Association (MEA) and the National Education Association (NEA). In a series of earlier cases, the U.S. Supreme Court had decided that there were some limits on compelled association in the workplace. The Supreme Court's decision about freedom of association in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), however, had not completely clarified which payments to such groups could be compelled and which ones could not.

That was the issue the Court addressed in *Lehnert v. Ferris Faculty Association,* 500 U.S. 507 (1991). James P. Lehnert, a Ferris State College faculty member who did not subscribe to certain political views,

sued along with others as the plaintiffs, alleging certain violations of their civil rights because the fees they paid were being used for activities other than collective bargaining. They also sought a review of parts of the lower courts' decisions concerning payments to the MEA for collective bargaining costs. One portion of the complaint was that the service fees were assessed at the same figure as union dues.

Specifically, the lawsuit contended that these activities violated their rights under the First and Fourteenth Amendments to the U.S. Constitution, claiming that union actions attacked the plaintiffs' rights to free speech. They argued that because their service fees were used to support positions with which they did not agree, they were forced into "compelled speech." The trial court awarded some damages for the service fees but not other requested relief. The Sixth Circuit Court of Appeals affirmed the lower court's ruling.

The Supreme Court, in its opinion by Justice Harry A. Blackmun, ruled that employees could be charged a pro rata share of costs associated with activities of state and national union affiliates even if those activities did not directly benefit the objecting employees' bargaining unit. However, the union could not charge objecting employees for expenses of lobbying, costs for publicity of union activities, and other costs unrelated to collective bargaining.

The Court's ruling was based on the *Abood* holding that established that compulsory membership in an organization did not violate the First Amendment rights of nonmembers. However, public employees cannot be required to make payment to promote causes they do not believe in or they oppose. The main thrust of the Court's opinion, which was decided by a plurality, was that the agency-shop rules could be justified only if they discouraged "free riders" (those who accept benefits without making payment) and if the coercion was "not a significant burden on free speech."

Citing a previous case, the Court pointed out that if the union were allowed to use the dissenters' money to gain support for its purposes, "the union would use each dissenter as 'an instrument for fostering public adherence to an ideological point of view he finds unacceptable.' " The First Amendment protects the individual's rights from this type of invasion.

Stanley Morris

See also: First Amendment; Labor Union Rights.

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Lemon v. Kurtzman (1971)

Lemon v. Kurtzman, 403 U.S. 602 (1971), is a case that grew in stature through the years, far more than its facts would have predicted. It is one case in a string of challenges to government funding of religious education, but it set a precedent and laid out a rule, a three-pronged "test," that has endured through the years as the measure to determine whether government aid to religious schools is constitutional. The issue stems from the First Amendment to the U.S. Constitution, in particular the Establishment Clause, which mandates that "Congress shall make no law respecting an establishment of religion" and which has been applied to the states via the Due Process Clause of the Fourteenth Amendment.

The facts are easily summarized. The U.S. Supreme Court actually combined a second case in its *Lemon* decision, *Earley v. DiCenso.* The *Lemon* case involved a challenge of a Pennsylvania law that authorized the state superintendent of schools to purchase secular services and materials for use within nonpublic schools. Provided the schools separated their secular and religious teaching and kept separate records, the state would reimburse the schools for some of their secular teaching, including some teacher salaries and books. The *DiCenso* case, from Rhode Island, was about a salary supplement program. Teachers of secular subjects in private elementary schools could get supplements of up to 15 percent of their salaries if they agreed in writing not to teach religious subjects, provided their supplemented salaries did not exceed

those of public school teachers. A variety of groups alleging that such tax-supported programs in religious schools violated the Establishment Clause of the First Amendment challenged both programs.

Why were state legislators willing to direct tax-raised funds to religious schools? It was not simply that Pennsylvania legislators were predominantly Catholic; they were not. Nor did all Catholics favor tax support of religious schools. For many legislators such aid was a way to keep taxes lower than they would otherwise have been. At the time of *Lemon,* approximately 500,000 Pennsylvania students were in parochial schools (95 percent of which were Catholic). When the Supreme Court heard the case, the state was spending $5 million annually on the program and had reimbursed expenses at 1,181 schools. Many of these schools were having financial difficulties and were in danger of closing, after which many of their students would then attend public schools. In 1971 the average cost of educating a student in the public schools was approximately $3,000. If only 20 percent of students, or 100,000, switched from parochial to public schools, the cost to the state would have been an additional $300 million. Given that possibility, the $5 million for secular educational expenses represented an excellent bargain to state legislators, no matter what their religious affiliation. The Supreme Court does not exist to make economic or public policy decisions, however, but to determine the constitutionality of state and federal laws.

Writing for a unanimous eight-member Court in *Lemon* (Justice Thurgood Marshall did not participate in *Lemon,* and the vote was eight–one in *DiCenso,* with Justice Byron R. White dissenting), Chief Justice Warren E. Burger began by stating that the language of the religion clauses was opaque and therefore must be interpreted in light of the three main evils the authors of the First Amendment were trying to prevent: sponsorship of religion by the state, financial support, and active involvement of the sovereign in religious activity. In pulling together rules from previous cases, and especially from *Abington School District v. Schempp,* 374 U.S. 203 (1963), which had dealt with the constitutionality of prayer and Bible reading in public schools, the chief justice articulated a rule that was to endure for more than thirty years: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.' " This became known as the three-pronged "*Lemon* test." The Court invalidated both statutes on the basis that the oversight required to ensure the first and second prongs of the test were met inevitably led to excessive entanglement between church and state.

Any state or federal law designed to aid religious schools has to pass muster on all three counts. A law could be declared unconstitutional if it did not satisfy any one of the prongs. Although the *Lemon* test has been used consistently since 1971, the results have been anything but consistent. In fact, in the same session in which the Court struck down aid to religious primary and secondary schools, it upheld aid to religious colleges and universities in *Tilton v. Richardson,* 403 U.S. 672 (1971); the Court, by a five–four vote, found that funding building programs on college campuses was constitutional. Plausible explanations for this different result could have been that college students were less susceptible to religious indoctrination, and therefore assistance in building college facilities would be less likely to result in proselytizing them, or possibly there were many more Protestant and Jewish colleges and universities than elementary and secondary schools, and therefore aid would be more evenly distributed among religious groups. In any event, the Court never adequately explained the differences.

Numerous attempts have been made to supplement or supplant the *Lemon* test through the years. An effort to add a fourth prong, "political divisiveness," failed to gain support on the Court, although it was strenuously pushed in two 1973 cases, *Levitt v. Committee for Public Education and Religious Liberty,* 413 U.S. 472, and *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756. The justices objected that opponents of aid could sue and then claim their own lawsuits proved that aid caused divisiveness.

Justice William H. Rehnquist would have replaced the *Lemon* test with a standard called "nonpreferentialism," meaning that government could aid religions as long as it did not single out one denomination over others, as he explained in his dissent in *Wallace v. Jaffree,* 472 U.S. 38 (1985). Justice Anthony M. Ken-

nedy would have supplemented the *Lemon* test with a "no coercion" test, as he outlined in his concurring and dissenting opinion in *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573 (1989). Justice Sandra Day O'Connor would have added a "no endorsement or disapproval" test, as she noted also in *Allegheny.* None of these alternatives has swayed a majority of the Court. Nevertheless, in the Court's 2002 decision in *Zelman v. Simmons-Harris,* 536 U.S. 639, Justice O'Connor emphasized both nonendorsement and private choice as critical to upholding the constitutionality of an Ohio law providing tax-funded vouchers that parents could use to send their children to religious schools.

Although the *Lemon* test survives as the primary precedent in Establishment Clause cases, there are occasions when the Court ignores the test to focus largely on historical precedent. For example, in *Marsh v. Chambers,* 463 U.S. 783 (1983), the Court upheld the practice of the Nebraska state legislature to pay a chaplain to deliver prayers. It remains to be seen whether *Lemon* will be supplanted in future cases by a test based on nonendorsement and private choice.

Paul J. Weber

See also: County of Allegheny v. American Civil Liberties Union; Establishment Clause; *Wallace v. Jaffree.*

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Lemon Test

See Lemon v. Kurtzman

Libel

Libel consists of false statements, in written or broadcast form, made about an individual to a third party that harm the individual's personal or business reputation and go beyond being offensive, objectionable, or insulting. Libel is not a protected form of speech, but the task of identifying it and defining it raises a number of questions under the First Amendment to the Constitution. For example, Larry Flynt, owner of *Hustler* magazine, depicted Reverend Jerry Falwell in a parody of an advertisement for Campari liqueur as experiencing sex for the first time with his mother in an outhouse. Falwell sued for libel, invasion of privacy, and intentional infliction of emotional distress. The U.S. Supreme Court in *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46 (1988), ruled against Falwell on the libel claim, holding that the cartoon was a parody that was not reasonably believable and that public officials could not claim libel based purely on outrage.

Another standard for libel cases deals with libelous statements made about the dead. Only living persons can be libeled. As a result, almost anything can be written or broadcast about a dead person provided the statements do not involve a living person. For example, a statement about the dead that could lead to defamation of the living, such as that a descendant of the deceased was born out of wedlock, could lead to a libel suit.

Although the First Amendment to the U.S. Constitution provides for the right of free speech and a free press, it does not guarantee the right of people to say anything they please or for newspapers and broadcast media to publish or broadcast anything they wish. The landmark case of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), clearly defines libelous statements.

New York Times Co. v. Sullivan and subsequent case law established two different standards of proof in a libel suit—one for ordinary "private citizens" and another for "public figures," such as government officials, well-known athletes, celebrities, and others voluntarily involved in widely discussed public disputes. In both instances—public figures and private citizens—one must offer clear and convincing evidence for proving libel. This is a more stringent

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burden of proof than the typical "preponderance of the evidence" (or slight majority of the evidence) rule employed in civil cases.

For a private individual, the false statements must be defamatory, causing actual harm to the plaintiff's reputation, and the plaintiff must show that the defendant was negligent or did not act with sufficient due care in making the statements. To win a libel suit in the case of a media defendant, ordinary citizens must not only show negligence but also demonstrate that the statements issued were false. Under these circumstances, an ordinary citizen can recover damages in a civil action only for actual harm suffered and are not eligible for punitive damages. For private individuals, the standard for proving libel is less stringent. Unlike public figures, ordinary citizens have a greater expectation of privacy. For example, Richard Jewell, whose name was leaked by the press as a suspect in the bombing in Atlanta's Centennial Olympic Park in 1996 and whose character would later come under close public scrutiny, charged NBC Nightly News with libel. NBC later settled, claiming the network wanted to protect confidential sources. If Jewell had been classified as a public figure, however, his chances for a settlement or a court victory would have been less likely given the standard of proof for libelous statements that must be met by public figures.

In seventeenth-century England, seditious libel was used to prevent criticism of the king and his ministers. Criminal in nature, these libel prosecutions perpetrated by the government were generally used to suppress discussion of public issues. In the United States, libel is a civil action, and public officials are held to a higher standard of proof (clear and convincing evidence) when trying to bring a suit for libel. A public figure includes anyone who (1) has or appears to have substantial responsibility for or control of public policy-making or a government function, (2) holds a position of importance such that the person's qualifications and performance are of general interest to the public, or (3) holds a position that invites public scrutiny. There are two types of public figures—those who occupy positions of power and have a pervasive involvement in public affairs and those who have engaged voluntarily in a public controversy in an effort to influence public outcomes. Under democratic theory, citizens and the media must be allowed to critically appraise people in the public eye without being suppressed or subjected to a libel suit.

To prove libel, public-figure plaintiffs must show that the statements were false and defamatory. In addition, they must demonstrate that the statements were made with "actual malice," meaning the defendant either knew the statements were false at the time they were made or had serious doubts about the truth of the statements and recklessly disregarded the truth. Actual malice is not demonstrated simply by asserting that the publisher or reporter had ill intent or disliked the plaintiff. When the media are sued, courts must balance the individual's right against harm to reputation versus the First Amendment right of a free press.

State libel laws and standards of proof differ. Libel suits are expensive because defendants must pay all their own legal fees whether they win or lose. Most libel awards consist of compensatory awards for emotional distress, humiliation, grief, and so on. Because no uniform guidelines exist to set parameters on these awards, they vary widely, but may exceed $1 million. Still, libel defendants tend to win more often than they lose.

The Internet and the ability to broadcast libelous statements in a worldwide forum present the latest

challenges in libel law. In 2003, the U.S. Supreme Court refused to hear a Minnesota Internet libel case filed by Katherine Griffis of Alabama who claimed she was defamed by an Internet Egyptology news group that had made light of her academic credentials. As of yet, no guidelines exist on how to address libel on the Internet in terms of which courts have jurisdiction over the World Wide Web and the standards that might be applied to it.

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See also: First Amendment; *New York Times Co. v. Sullivan;* Slander.

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Liberalism

Liberalism is neither a coherent ideology nor a systematic doctrine. Rather, it best resembles a constellation of ideals and values, not always consistent and often conflicting, anchored in a commitment to the protection of individuality and equality for all. These values are also enshrined in the institutions and procedures of government. Thus the term “liberal” may also describe the governments or institutions that embody these values. The development of liberalism has its own complex history and evolution, made all the more complicated by the fact that the ideas change as the institutions do.

It was not until the beginning of the nineteenth century that the word “liberal” was used to refer to a political viewpoint, as opposed to the virtue of generosity. Nevertheless, the origins of liberalism can be discerned throughout Western Europe in the seventeenth and eighteenth centuries. Several historical events are key to understanding these origins. First, liberalism arose as a reaction against the violence caused by religious intolerance, especially between Protestants and Catholics, during the Reformation (beginning c. 1517). Liberal theory arose to protect the free exercise of religion and the limitation of civil liabilities attached to one’s faith. Second, liberalism challenged the social, political, and legal inequalities that the European aristocracy had established for its benefit. Most aristocrats had legal privileges and social opportunities closed off to others. Liberals fought for political equality and the spread of citizenship. This conflict between liberalism and aristocracy reached its apex in the French Revolution of 1789. Third, the development of a commercial system, based in free contract and exchange, transformed more than the economic landscape. It changed the way in which individuals viewed their relationship with each other, reorienting them toward formal equality, free movement, and social hierarchies based in wealth rather than birth. Out of these three historically varied contexts are three identifiable sets of concern that serve to mark the core set of liberal values: (1) equality under law; (2) liberty of the individual; and (3) commitment to limited government.

The origins of the liberal ideal of legal equality are found in the theories of natural law that view all human beings as equal in the eyes of God. This theological root was given a political slant in the social-contract theory of such early liberals as John Locke and Immanuel Kant. The social-contract ideal is that a just political regime, and the only type of regime to which individuals would give their consent, is one that treats each individual as having the same political and social rights. Within the U.S. Constitution, subsequent amendments have served to make the structure of government more egalitarian than it was when it was first drafted in 1787. These include the Reconstruction-era amendments (the Thirteenth through Fifteenth) and the lifting of gender barriers to the right to vote. At the heart of modern constitutional law lies the Fourteenth Amendment, which grants citizenship to individuals born or naturalized in the United States and protects the right of due process and equal protection of the laws to all persons, whether or not they are citizens.

The dimensions of individual liberty that concern liberals revolve around the degree to which liberty is best understood as a negative right to be left alone,

The origins of the liberal ideal of legal equality are found in natural-law theories that view all individuals as equal in the eyes of God. This theological root was given a political slant in the social-contract theory of such early liberals as Immanuel Kant (pictured). *(Library of Congress)*

or whether society has any positive obligations for establishing some material preconditions that allow people to realize their potential liberty and individuality. The heart of this debate is found in John Stuart Mill's *On Liberty* (1859). In this work he announced the "harm principle," stating that everyone should possess as much liberty as possible to the extent of not injuring the freedom of others. Mill warned that the pressures of social conformity could be as threatening as government censure.

Many within the libertarian wing of liberalism take Mill's argument to mean that individual liberty requires that persons be "left alone," free to make their own way to the best of their abilities, with neither help nor interference from government. These libertarian positions remain key faiths of liberalism, but they have often conflicted with the arguments that the government and social groups have responsibilities to others that go beyond leaving them alone.

Limited government, enshrined in the structure of the Constitution, arises from a fear of an overly powerful and intrusive state. There are a number of devices by which the powers of political institutions are checked. Formal devices, such as the separation of powers and federalism, are designed to pit the self-interest of one part of government against the others, so that political power will be more widely distributed and thus weaker. These ideas gained popularity through Charles-Louis Montesquieu's *Spirit of the Laws* (1748), a work that was highly influential on the Constitution's framers. Individual rights and liberties also put limits on how the government can treat individuals. This is an important constraint, not just on strong governments, but it also limits the majority's treatment of minorities. These rights and liberties are found in the British Bill of Rights, the American Declaration of Independence, and the bills of rights found in the federal and state constitutions.

These three principles are often mutually reinforcing, but in practice they often clash with each other. Many of the conflicts that are commonly described as liberal-versus-conservative are better understood as arguments internal to the philosophy of liberalism itself. For example, some liberals have argued that the principle of limited government and the protection of individual property are challenged by the growth of state regulation of the economy and the proliferation of social aid programs. Other liberals have countered that these programs, such as those developed during Franklin D. Roosevelt's New Deal in the 1930s and Lyndon B. Johnson's Great Society of the 1960s, are necessary to ensure that political equality is more than just a hollow shell, and to allow citizens to participate as equals in the political process.

As liberalism continues to develop, newer debates have emerged. Two important new questions concern the strength of liberal communities and the relationship between liberalism and personal virtues. Do liberal societies require individuals to be committed to certain virtues and values? Some scholars have argued that liberal societies presume that a person's behavior is self-interested, and that the values of liberalism are represented by the rules of liberal institutions, such as due process and equality of law, but are not embodied by individuals themselves. Others argue that liberal societies are marked by personal commitments to con-

crete values, such as toleration, cosmopolitanism, and fairness. Similarly, some communitarians argue that liberalism cannot form a community of shared values and may be threatened by nationalist and religious movements that value the group over the individual.

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See also: Declaration of Independence; Locke, John; Mill, John Stuart; Natural Law; Natural Rights.

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Libertarianism

Libertarianism is a political philosophy that advocates maximum individual rights and minimum government. Libertarians believe that all people have the right to live their lives as they choose, to own and exchange property, and to be free from governmental interference in their decisions and actions as long as they respect the equal rights of all other people. More simply stated, libertarians believe that all people have equal rights to life, property, and liberty. Libertarians accept constitutional restraints as means to limit popular democratic will.

To libertarians, the right to life means that each person has the absolute right to govern his or her mind, body, and actions. Murray Rothbard and David Boaz described the right to life as the right to "self-ownership." All people are free to consider the options available, make choices, learn from experiences, and put individual knowledge to use in the pursuit of survival and prosperity. For example, all people are free to choose any vocation, practice any religion, or adopt any set of values to govern their actions. Thus, the right to life means all people are free to define their own existence rather than have this existence defined for them. But this freedom does not come without obligations. All individuals must accept responsibility for their actions and extend mutual respect for the equal rights of other people to self-ownership.

To libertarians, the right to property means each person has the right to acquire, possess, use, exchange, give away, or dispose of property. Property includes everything that can be owned, including land, objects, animals, and plants. Property also includes services that can be performed and the products of labor. The right to own and exchange property enables people to buy and sell things and work to earn wages. All persons should be free to use, exchange, or dispose of their property as they decide best serves their interests. The right to property is the right to engage in economic activity in a free market.

To libertarians, the right to liberty means that all persons can define their existence and own property free of interference from other people or the government. As described by Boaz, liberty is "a condition in which the individual's self-ownership right and property right are not invaded or aggressed against." The right to liberty is the vehicle through which people shape their individual identity, whether personal, professional, spiritual, or otherwise. It includes the right to freedom of speech and expression, the right to associate freely with other people, the right to freedom of personal behavior, and the right to privacy. It is, in essence, the right to be free. It is the right of every person to engage in any activity that does not violate the rights of other people, even if some people consider the activity irresponsible or immoral.

Perhaps the most fundamental principle of libertarianism is the nonaggression axiom. To libertarians, the right to life, property, and liberty ensures the right of all persons to act freely as long as their actions do not violate the equal rights of other people. The nonaggression axiom dictates that "no one has the right to initiate aggression against the person or property of anyone else." Thus, the right to liberty does not include the right to commit criminal offenses, such as murder, assault, rape, robbery, theft, kidnapping, or fraud, because those actions involve aggression against the victim's right to life and right to property. However, the use of force in response to aggression initiated by another person is permissible. The right to life, property, and liberty includes the right of all individuals to protect their person and their property.

Libertarianism is a political philosophy in which

each person has the right to live life in any manner chosen, as long as the equal rights of other people are respected, without interference from the government. The only role for government is to protect the equal rights of all people to define their own existence, to own and exchange property, and to pursue their aspirations. Libertarians believe the government's role is limited to protecting its citizens and their property through the adoption and enforcement of criminal laws and the establishment of civil remedies to enforce contracts and recover damages for injuries. But in doing so, the government should intervene only to the extent that a person's right to life, property, or liberty has been violated.

Mark A. Fulks

See also: Property Rights.

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Liberty Versus License

In the seventeenth and eighteenth centuries, Americans commonly distinguished "liberty" from its wilder twin, "license." Whereas license suggested an unlimited ability to act as one pleased, for good or ill, liberty suggested the ability to act as one pleased only within the boundaries of propriety or moral law. By the twentieth century, this distinction had begun to dim, as theorists of modern liberalism increasingly called into question the validity of "natural" laws of morality, arguing instead that all forms of restraint, even when justified, were contrary to liberty.

The classical distinction between liberty and license emerges from both of the major intellectual sources of Western culture: Greek philosophy and biblical monotheism. Plato and Aristotle appealed to this distinction in separating anarchic from lawlike states in both the political and psychological senses. For the Greeks, neither a disordered mind nor a lawless city could be described as truly "free" because both were enslaved to chaotic passions beyond individual or civic control. Similarly, the Judaic or Old Testament tradition found liberty in adherence to Mosaic law. Although Paul challenged this association of liberty and law in his letter to the Galatians, he nonetheless circumscribed liberty by faith or love, denying that liberty meant licentiousness.

Drawing on these traditions, early modern Europeans and Americans claimed that liberty had natural boundaries that were inherent to its very conception, although those boundaries could be variously defined depending upon what restraints were seen as necessary or good. Colonial and founding-era Americans viewed restraint through two alternative frameworks—the puritanical and the liberal-republican—which often overlapped in practice. The puritanical view, expressed by leaders of the Massachusetts Bay Colony such as Governor John Winthrop and John Cotton, the prominent divine, posed a stark contrast between liberty and license. In his " 'Little Speech' on Liberty" (1645), Winthrop called license (or "natural liberty") "that great enemy of truth and peace, which all the ordinances of God are bent against, to restrain and subdue it." In contrast, "civil" (or "moral") liberty was "liberty to [do] that only which is good, just, and honest. . . . This liberty is maintained and exercised in a way of subjection to authority; it is of the same kind of liberty wherewith Christ hath made us free." In this view, any action taken contrary to Christian morality could be defined as inconsistent with freedom, whereas submission to authority in various forms, such as "sumptuary laws" (regulations on commerce, sexuality, alcoholic consumption, or religious observance), could force one to be free.

The liberal-republican view of liberty, articulated by many of the European writers most influential for colonial Americans, including jurist William Blackstone, pamphleteer Algernon Sidney, and philosophers James Harrington, John Locke, and Charles-Louis Montesquieu, offered a more moderate and secular view of the restraints necessary to avoid license. Although they often attributed the limits on liberty to natural or divine laws, they claimed to derive these

laws primarily from human reason rather than biblical revelation. Locke, for example, in his *Second Treatise of Government* described the "state of nature" prior to the creation of government as one of perfect freedom: "though this be a state of liberty, yet it is not a state of license; though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it." Liberty must be reasonable, and killing oneself or others without just cause fails such a test. For writers of the liberal-republican tradition, liberty was the opposite of "slavery" rather than of restraint per se; freedom meant an absence of external domination and not simply the lack of all external impediments. Tyrants deprived citizens of liberty by exercising power arbitrarily, but fair and well-considered laws crafted by representative bodies did not—in fact, they augmented liberty by minimizing oppression.

Unlike the puritanical view of liberty, the liberal-republican view, reflecting the sensibilities of the eighteenth-century Enlightenment, was inherently skeptical of authority and optimistic about the possibilities of rational self-governance. Furthermore, personal liberty depended upon "political liberty," the proper arrangement of political institutions to avoid arbitrary domination, including equal representation, separation of powers, and guarantees of due process. As Montesquieu stated in *The Spirit of the Laws,* "Political liberty in a citizen is that tranquillity of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen." It is this view of liberty that fueled the fire of the American revolutionaries in their opposition to British royal authority.

Seventeenth- and eighteenth-century royalists, such as philosophers Thomas Hobbes and Robert Filmer and clergyman Jonathan Boucher, often appealed to a very different notion: that civic restraint and freedom were natural opposites. Since all restraints, even necessary ones, were inimical to liberty, government authority, even when arbitrary, had to be accepted to stave off anarchy. In other words, there are no real differences either between liberty and license or between representative government and royal absolutism—there will always be a conflict between what individuals want to do and what the authorities allow them to do. Hobbes's famous "state of nature" story, which he used to defend absolute monarchy, depicted the parade of horribles that would arise when there was no higher authority to stem the "war of every man against every man."

Ironically, modern liberals, such as political theorists Isaiah Berlin, John Rawls, and Robert Nozick, have usually favored the royalist equation of liberty with license over the classical liberal distinction between them, although they have employed this view to an opposite effect, depicting unrestrained liberty as a desirable end in itself and law as either a convenient means or a necessary evil toward attaining that end. Berlin, for example, argued that "positive" conceptions of liberty—those that entail internal conditions on how liberty may or may not be used, or "freedom to" rather than "freedom from"—were dangerous because they invited power-hungry elites to coerce citizens in the name of their own freedom. Liberty should not be confused with democracy, equality, reason, law, or self-mastery, but is simply the individual's ability to make as many choices as possible free of interference by others.

The resulting "libertarian" prejudice in modern liberalism has created a great deal of controversy. If individual liberty is a primary social good, and government authority is always a limitation upon it, then all social restraints are at least somewhat oppressive and even constitutional forms of government are intrinsically suspect. Some modern theorists of liberalism, such as Quentin Skinner and Philip Pettit, have argued for a return to the liberal-republican view of the contrast between liberty and license. Other writers of a more conservative bent, however, such as social critic Russell Kirk, legal scholar David Lowenthal, and jurist Robert Bork, prefer a definition of liberty more like the puritanical model, which embraces not only the limits of the law but also those of transcendent religious morality. The differences between these positions are not merely academic. As the popular understanding of "liberty" has changed over the past three centuries, so have Americans' conceptions of self

and national identity for which the founders' belief in freedom was so central.

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See also: Christian Roots of Civil Liberties; Liberalism; Locke, John; Natural Law; Natural Rights.

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Lie Detector Tests

Lie detector tests are devices that are used to render diagnostic opinions of the veracity—the truthfulness—of an individual. Such devices include polygraphs, deceptographs, voice stress analyzers, and psychological stress evaluators.

Use of lie detector tests and their results is strictly regulated by federal, state, and local laws, particularly in the courtroom and in the employment arena. The evolution of the law regarding the admissibility of polygraph evidence began with the seminal case of *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923).

A thirty-seven-year veteran lie detector operator tests a male subject. *(© Bob Daemmrich/The Image Works)*

In this case, a defendant appealed his murder conviction on the grounds that the trial court had erroneously excluded defense evidence of a "systolic blood pressure deception test," a precursor of the modern polygraph. The appellate court grappled with the question of when novel scientific evidence moved from the experimental to the established stage and concluded that such evidence must "have gained general acceptance in the particular field in which it belongs." The *Frye* court held that the systolic blood pressure deception test had not gained sufficient acceptance in the psychological and physiological communities, and it upheld the lower court's inadmissibility ruling.

For seventy years following *Frye,* the "general acceptance in the scientific community" standard led to a per se rule of inadmissibility for polygraph evidence

in a majority of jurisdictions, although some courts allowed the evidence if both parties stipulated to its use, and a very few jurisdictions, most notably New Mexico, rejected the exclusionary trend. However, in 1993, the U.S. Supreme Court altered the standard for evaluating the admissibility of expert scientific testimony. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), the Court held that the restrictive *Frye* test was trumped by the *Federal Rules of Evidence,* particularly Rule 702 permitting expert testimony if it is based on specialized knowledge and will assist the trier of fact. The mere fact that the opinion of the scientific community may be divided is not an automatic bar to admission; more important factors include the underlying theory or ability to test the technique, the known rate of error, the history of peer review and publication, the level of acceptance in the scientific community, and the existence of standards for determining acceptable use. Nevertheless, in spite of the acknowledgment by some federal courts that a reevaluation of the admissibility of polygraphs was called for, the majority of post-*Daubert* opinions expressed significant reluctance to change their exclusionary positions, preferring to rely on the fundamental principle that "the jury is the lie detector."

In 1998 the U.S. Supreme Court gave some support to the exclusionary jurisdictions when it upheld a per se ban on polygraph evidence in military courts. In *United States v. Scheffer,* 523 U.S. 303 (1998), a plurality of the Court rejected the argument that the exclusionary position was prohibited by the Sixth Amendment right of the accused to present evidence. However, four justices found the rule "unwise" and indicated that a later case involving different circumstances might compel another result. In the meantime, however, the trend of lower-court decisions has been to exclude polygraph evidence, although lie detector results are frequently used by law enforcement, prosecutors, and other government officials at various decision-making stages, such as determinations of probable cause for arrests.

In contrast to the legal uncertainty of polygraph use in the courtroom, lie detectors have a comparatively clearly defined status in the employment arena due to the 1988 passage of the Employee Polygraph Protection Act (EPPA). The act makes it unlawful for any employer engaged in or affecting interstate commerce to use lie detector tests on employees or prospective employees or to discharge, discipline, or deny employment or promotions based on the results of any such test. However, the exceptions to the prohibitions are critical: The EPPA does not apply to any governmental entity; in fact, government agencies such as the U.S. Department of Defense, the Central Intelligence Agency, and local police departments routinely depend on polygraph testing of employees. Furthermore, private employers are permitted to request an employee to submit to a polygraph as part of an ongoing investigation involving economic loss or injury to the employer's business. Additionally, employers engaged in security services or in the manufacture or distribution of controlled substances may use polygraph tests. However, these private employers may not take adverse action against an employee or prospective employee if the results of the polygraph test are the sole basis for the action. The requirement that there be additional supporting evidence underscores the law's continuing attempts to balance the benefits of polygraphic science against the potential dangers of overdependence.

Virginia Mellema

See also: Due Process of Law.

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Lilburne, John (1615–1657)

Hailed as "Free-Born John" for his defiance of Britain's Star Chamber court, John Lilburne wrote jeremiads in defense of liberty and became the most celebrated political prisoner of his age. Lilburne's combativeness and contempt for England's established church kept him in almost constant legal peril while also making him into a popular hero. As a leader of

the "Leveller" movement (Puritans who favored political and religious equality) during the English civil war (1642–1651), he played a crucial role in the development of modern liberal and democratic ideals, including popular sovereignty, religious tolerance, and the right against self-incrimination.

At a young age, Lilburne leaped into the contentious politics of post-Reformation England. An impassioned if unorthodox Puritan, he first gained attention in 1638 after authorities arrested him for plotting to publish works in Holland critical of the state church and then smuggle them into England. He was interrogated by the Privy Council and handed over to the Star Chamber for trial. Originally a court of equity and appeal for cases beginning in the common-law courts, the Star Chamber by Lilburne's time had been entrusted by the Stuart kings with considerable power: It held secret hearings, acted without threat of appeal, and punished subversion by imprisonment and torture, though not execution.

Lilburne proclaimed his innocence but refused to swear an oath, a common Puritan tactic but one never before used at the Star Chamber. Presiding over the court, Archbishop William Laud was incredulous as Lilburne asserted that the laws of nature, which dictated self-preservation, entailed that no man could be called to testify against himself. The Court found him guilty and sentenced him to prison, a steep fine, and a public whipping behind a slow cart as he was led to the pillory. While in prison, he somehow wrote and published his earliest pamphlets, which detailed his plight and aimed unwavering attacks on the Episcopalian establishment. Throughout his career, Lilburne remained an advocate for the freedoms of speech and religion.

Lilburne earned his freedom when a long-suspended Parliament reconvened in 1640, and Oliver Cromwell made his unjust imprisonment a public cause. In the years that followed, Lilburne fought against the king as an officer in Parliament's New Model Army, suffered capture and additional imprisonments, and became a leading voice for democratic reform. In *The Freedman's Freedom* (1646), Lilburne argued that absolute sovereignty belonged to God alone and that the human effort to claim such power had been Adam's original sin. Like Adam and Eve, men "were by nature all equal and alike in power, dignity, authority, and majesty—none of them having (by nature) any authority, dominion, or magisterial power, one over or above another," all of which made their "free consent" the only legitimate origin of government. Lilburne, alongside Richard Overton and William Walwyn—the other "Leveller" leaders, a name that Lilburne disavowed—helped radicalize Parliament's new army, pushing its leaders to defend popular sovereignty, parliamentary supremacy, and individual rights against unfair prosecution, including trial by jury, legal due process, and the proportionality of punishment to crime.

The Levellers soon became threatening to their old allies in Parliament, the army, and the Presbyterian Church. In February and March 1649, Lilburne published the two parts of *England's New Chains Discovered,* warning that the new "republic" was in danger of becoming a dictatorship, with the Council of State acting as an unchecked executive and legislative authority under Cromwell's control. Cromwell moved to suppress the Levellers and had Lilburne and the others arrested. Tried twice for treason, Lilburne won acquittals both times to great public acclaim. Nonetheless, Cromwell kept him imprisoned until his death in 1657, a cruel fate for a man who had committed his life to liberty and whose ideals have inspired liberal legal reforms in both England and the United States.

Robb A. McDaniel

See also: Christian Roots of Civil Liberties; Fifth Amendment and Self-Incrimination; Putney Debates.

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Lincoln, Abraham (1809–1865)

The enduring impact of Abraham Lincoln is reflected, in part, by the fact that he is the subject of more books than any other leader of a democracy in world history. Not only do experts consistently rank him as the greatest U.S. president (1861–1865), but they also regard his leadership style as one of the greatest gifts of American democracy to the world. His greatness overshadows his denial of the writ of habeas corpus (a petition for release from unlawful confinement) to more than 10,000 Southern sympathizers during the Civil War or his role in invoking the most extraconstitutional measures in U.S. history up to that time.

HUMBLE ORIGINS

Lincoln's rags-to-riches life epitomizes the self-made person who then used politics as a tool to help the working and emerging middle classes, codifying into law their "right to rise" in society based on individual initiative and merit, just as he had. Born February 12, 1809, in Kentucky, Abraham was the only son of Tom and Nancy Hanks Lincoln who survived infancy. His border-state origins and his frontier upbringing in Indiana and Illinois made him a rural "hick." By New England and aristocratic Southern standards, Lincoln remained a hick, a perception reinforced by his speech, dress, and lack of formal schooling. From a social standpoint, he "married up" when he wed Mary Todd, the daughter of one of the most prominent families in Lexington, Kentucky.

Early on, Lincoln rejected his father's model of working with his back to eke out a frontier living in favor of working with his brain. To accomplish his goal, Abraham Lincoln became America's best-known political autodidact. His self-taught command of the language produced prose that continues not only to shape U.S. political thought but also to impress generations of schoolchildren.

In 1832 he ran for the Illinois statehouse but lost. More important than the outcome of the race was the fact that Lincoln ran for public office long before he became a lawyer—earlier, in fact, than any other lawyer who eventually became president. In politics Lincoln discovered the perfect match for his interests and abilities. He ran for the same statehouse position again in 1834 and won the first of four terms as an Illinois legislator. Lincoln emerged in an extremely short time from the political wilderness to become the Whig floor leader in the Illinois legislature. It was the first of two transforming moments in his political life—the second would come during his presidency.

Between those two periods, Lincoln spent his time seeking or serving in political office, except for a seemingly dormant hiatus between his single term in the U.S. House of Representatives (1846–1848) and the seminal debates he had with Stephen A. Douglas in 1858 that marked Lincoln's active reentry into the political arena.

President Abraham Lincoln signing the Emancipation Proclamation, 1863. *(Library of Congress)*

Other than his two-year stint in the Congress, Lincoln spent seventeen years in Springfield, Illinois, practicing law and developing his jurisprudence. Lincoln enjoyed a highly active practice, mostly in state circuit courts, arguing hundreds of cases before the Illinois Supreme Court and federal courts. Gradually, he became one of the Prairie State's best-known lawyers.

With the demise of the Whigs, Lincoln became a Republican candidate for the U.S. Senate, representing the antislavery party that he had helped to organize in Illinois. He engaged in the seven famous debates with "the little Giant," Democratic incumbent Senator Stephen A. Douglas, who advocated the amorality of "popular sovereignty." Lincoln countered Douglas's philosophy by opposing the spread of slavery into new territories but upholding protection of the institution of slavery in the South, as guaranteed in the Constitution. Douglas won that battle and retained his Senate seat, but two years later Lincoln emerged as the dark-horse compromise candidate of the unified, antislavery Republican Party and defeated Douglas for the presidency. The Republican ticket won 39.8 percent of the popular vote, a plurality that made Lincoln the sixteenth president of the United States.

A TRANSFORMED PRESIDENT

When the extremist secessionists fired first at Fort Sumter, off the coast of South Carolina, they triggered not only the outbreak of the Civil War but also Lincoln's consummate political potential. Congress was in recess, so Lincoln instinctively transformed into philosopher John Locke's notion of an executive, assuming the "prerogative" power to guide his actions, unlike his more experienced yet befuddled presidential predecessor, James Buchanan. Lincoln insisted on preserving the Union and the climate of opportunity it represented for others to fulfill their innate potential as he had. He also recognized that America's great experiment in self-government represented "the last best hope of mankind." He understood that most autocratic governments in the world expected and hoped that the upstart Americans' democratic experiment would crumble from within and validate their predictions.

During the nation's internal strife, Lincoln was severely criticized then and later for taking extraconstitutional steps to deal with the escalating national crisis. Relying on his oath of office and exercising power he considered inherent to the commander-in-chief, he blocked Southern ports, doubled the armed forces, spent treasury funds, and suspended the writ of habeas corpus. But viewed in perspective against measures Jefferson Davis used in his reactionary Confederacy, Lincoln exercised restraint. Lincoln appreciated that the Congress had the right to pass judgment on his actions. More important was that Lincoln did not aspire to become an absolute monarch. Scrutiny of Lincoln's private and political behavior reveals that he was almost devoid of autocratic tendencies. The record is clear that he had little interest in monetary gain or personal power as ends unto themselves. To the contrary, even when he fully expected to lose the 1864 reelection, he insisted that the electoral tradition be sustained in the midst of the Civil War. He upheld democratic values even though he was frustrated by incompetent military commanders, still grieved the loss of his favorite son, and expected to lose.

As the Civil War ground on, Lincoln modified his earlier conservative stance of endorsing the South's constitutional right to slavery. The Emancipation Proclamation was used as a war measure. Lincoln worked for passage of the Thirteenth Amendment to use constitutional means to rid the nation of slavery, even if it meant political defeat. As he struggled to develop postwar plans to reconcile national factionalism, the Great Emancipator became the Great Reconciler by advocating a Reconstruction policy "with malice toward none," a virtually unprecedented display of magnanimity in history. Even as he focused on winning the Civil War to preserve the Union, he worked with a Republican-controlled Congress to enact legislation that encouraged "the right to rise" in society for all Americans.

That legacy was perpetuated in important legislation passed in 1862: the Land Grant College Act, the first significant piece of social legislation in U.S. history; the Homestead Act; and the Pacific Railroad Act, which provided for building the transcontinental railroad that would modernize the country in 1869 as it linked the East and West coasts for the first time.

Lincoln's presidential performance was so deft that

it often was misunderstood while he was in office. His eloquence endured long past any one speech. Indeed, schoolchildren can be heard even today reciting Lincoln's simple but profound "Gettysburg Address," which defined self-government at home and abroad for all time. It took an assassin's bullet to turn the often vilified Lincoln into an icon. The nation had never before experienced the assassination of its president, and its response was passionate. Yet conferring sainthood on Lincoln just because he was assassinated in office would mask his real greatness that came during his life, because he understood and practiced democratic leadership during a major civil war.

William D. Pederson

See also: Civil War and Civil Liberties; Emancipation Proclamation; Habeas Corpus; President and Civil Liberties.

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Living Will

See Right to Die

Lochner v. New York (1905)

In *Lochner v. New York,* 198 U.S. 45 (1905), the U.S. Supreme Court ruled unconstitutional a state law limiting bakers' work hours. For several generations of legal observers, *Lochner* symbolized the dangers of an activist Supreme Court. To progressives and New Dealers, it epitomized a laissez-faire Court's apparent desire to void economic regulations that did not comport with its members' ideological inclinations. Before *Roe v. Wade,* 410 U.S. 113 (1973), it was a lightning rod for critics who saw the Court's reliance on rights not explicitly included in the Constitution as the height of judicial activism. It was not the only case in which the Court invalidated an economic regulation on substantive (versus procedural) due process grounds, but it was probably the most famous.

Lochner presented a challenge to a New York law, passed in 1895 with unanimous support in both chambers of the legislature, limiting bakers to ten-hour days and sixty-hour weeks. Movement for reform was sparked by a journalistic exposé documenting unsanitary conditions and harsh work environments in New York's cellar bakeries, and it received necessary political backing from social reformers and some segments of organized labor. The resulting legislation included regulations directly concerning sanitary conditions of bakeries, but it was the maximum-hour provisions that were challenged in court by Joseph Lochner, an owner of a small bakery in Utica, New York. Lochner had been convicted of coercing or allowing one of his employees to work more than sixty hours in one week.

The Supreme Court had upheld maximum work-hour laws affecting miners in *Holden v. Hardy,* 169 U.S. 366 (1898), and employees of the government or of contractors working on public projects in *Atkin v. Kansas,* 191 U.S. 207 (1903); reformers hoped these precedents would guide the Court in *Lochner.* These hopes, however, were dashed, as the Court voted five–four that the New York law violated the Due Process Clause of the Fourteenth Amendment because it infringed upon "liberty of contract," which the Court had established in *Allgeyer v. Louisiana,* 165 U.S. 578 (1897). This right is not specified in the Constitution, but a majority on the Court held it to be implicit within the concept of due process. Maximum-hour laws, said Justice Rufus Peckham, were not a legitimate exercise of the state's police powers because they

infringed upon the right of both employers and employees to contract freely with respect to the terms and conditions of employment. In the Court's view, the New York law was not a health and safety regulation of the type that the Court had upheld in earlier decisions, because baking was not an inherently unhealthy profession, and its employees were adults who could look after their own interests. Instead, the statute was "a labor law, pure and simple."

The dissenting opinions took different approaches in critiquing the majority position. Justice John Marshall Harlan implicitly accepted the majority's position that the state's police power was limited to regulation for the public's health and safety, but he also accepted the state's claim that its maximum-hour law was actually motivated by health and safety considerations. He observed, "Whether or not this be wise legislation, it is not the province of the court to inquire." Similarly, Justice Oliver Wendell Holmes Jr. argued that the majority had misused the Due Process Clause to promote its laissez-faire ideology, then often known as "social Darwinism." In a famous reference to the philosophy of a contemporary sociologist, Justice Holmes observed that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Like Justice Harlan, he believed that questions regarding wisdom of the policy should be left to legislatures.

Lochner ultimately left a huge imprint on the country's political and legal terrain, despite the minimal reaction that initially followed the ruling. Reformers faced an uphill battle against a Supreme Court that had greatly circumscribed the permissible uses of the state's police power. The case also provided a prominent foil for progressive and New Deal legal scholars wishing to supplant the more formalistic approach exemplified by *Lochner.* To this day, *Lochner,* in the eyes of many legal observers, has remained synonymous with the Court's application of the idea of substantive due process and with judicial overreaching to achieve a politically desired result.

Jeremy Buchman and Steven A. Peterson

See also: Contract, Freedom of; Police Power; Substantive Due Process.

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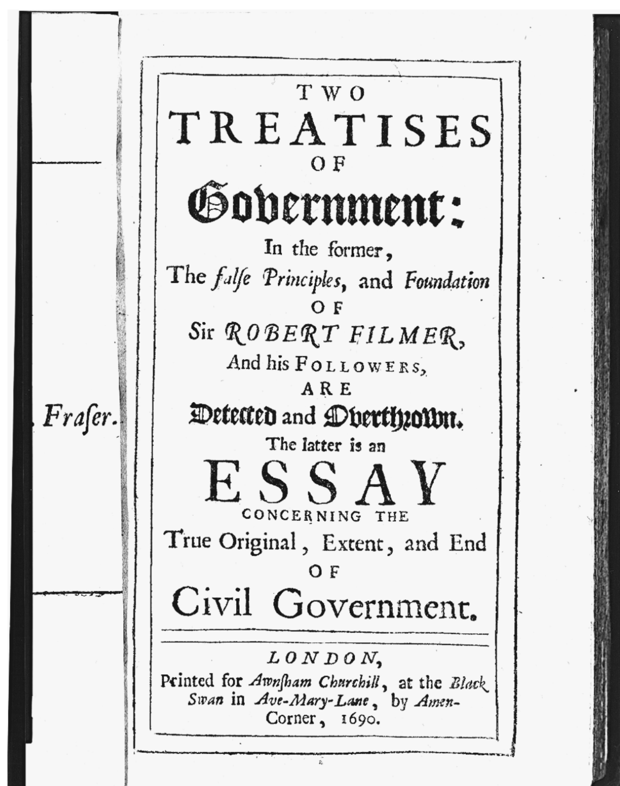
Locke, John (1632–1704)

John Locke was an English physician whose philosophy greatly influenced democratic thought and promoted civil liberties, especially in the United States. Born in Wrington in Somerset, England, on August 29, 1632, he attended Oxford University and in 1666 met Anthony Ashley Cooper, the future First Earl of Shaftsbury. Locke soon became Lord Ashley's personal physician and friend.

After Lord Ashley and others engaged in plotting against the king, Locke found it prudent in 1683 to leave England. He returned in 1689 and published his *Treatises on Civil Government* to justify the "Glorious ("Bloodless") Revolution." Locke's famous book on epistemology, *An Essay on Human Understanding,* appeared in 1690. From then until his death in 1704, Locke continued to write on freedom of the press and religious toleration.

Locke's political philosophy is found principally in *Two Treatises on Civil Government* (1689) and *Letter on Toleration* (1689). The First Treatise destroyed Sir Robert Filmer's claim (in *Patriarchia*) that the king ruled by divine right. In the Second Treatise Locke taught that governments originated from a primal social contract. Each person gives up certain rights (for example, vengeance) in order to better protect his or her more fundamental rights of life, liberty, and property. A government's first duty is to protect these fundamental individual rights. In his *Letter on Toleration,* Locke outlined the case for religious liberty.

Locke's thinking explicitly influenced America's Declaration of Independence. Its author, Thomas Jefferson, concurred with Locke's view that people were born with natural rights, including the rights to life, liberty, and the pursuit of happiness. Moreover, governments should exist to protect the rights of individuals. If the government failed to protect the liberties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TWO
TREATISES
OF
Government:
In the former,
The false Principles, and Foundation
OF
Sir ROBERT FILMER,
And his FOLLOWERS,
ARE
Detected and Overthrown.
The latter is an
ESSAY
CONCERNING THE
True Original, Extent, and End
OF
Civil Government.

LONDON,
Printed for Awnsham Churchill, at the Black Swan in Ave-Mary-Lane, by Amen-Corner, 1690.

Title page of John Locke's *Two Treatises of Government* (London, 1690). *(Library of Congress)*

or rights of the people, there was not only a right to revolution but even a duty to change the government.

Locke's influence on the Constitution of the United States was also enormous. Constitutionalism, the idea that governments are to be limited by a written document that assigns limited powers, appeared clearly in the document. Furthermore, in the Fifth and Fourteenth Amendments, Locke was quoted directly in clauses declaring that no person shall be deprived of "life, liberty, or property" without due process of law.

For Locke, property was a natural right. In his chapter on property in the *Second Treatise,* Locke discussed property in terms of the labor theory of value. The theory posited that property was created when individuals mingled their human energy as labor with materials. Stealing a person's property stole the person's "sweat equity," violating the person's rights.

In many state constitutions, the state's bill of rights is the first article of the constitution. Succeeding parts of the constitution specify that government is created to defend life, liberty, and property, thus demonstrating that a limited government derived from a social contract exists to protect the civil liberties and rights of the people. Locke's philosophy permeates these statements of the purpose of government.

A.J.L. Waskey

See also: Declaration of Independence; Liberalism; Natural Rights; Property Rights.

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Locke v. Davey (2004)

In recent years, the Supreme Court has indicated in a number of decisions that governments cannot discriminate against adherents of religious faiths in denying them services that are available to others, such as sign-language translators and tuition vouchers. In *Locke v. Davey,* 124 S. Ct. 1307 (2004), however, the Court indicated that the state of Washington was not obligated to extend its Promise Scholarship Program to enable Joshua Davey, who had since completed his studies and enrolled at Harvard Law School, to study theology at Northwest College, a school affiliated with the Assemblies of God denomination.

Although it permitted money to be used at accredited religious colleges, the Washington scholarship program specifically prohibited aid to students pursuing degrees in "devotional theology." In Davey's case, he hoped to become a minister but was denied state aid on the basis that the Establishment Clause of the First Amendment to the U.S. Constitution and a similar provision in the state constitution permitted states to prohibit scholarship funds from being used specifically to train individuals to become preachers.

Although the Ninth U.S. Circuit Court of Appeals had overturned a U.S. district court decision invalidating the Washington state law on grounds that it lacked a compelling state interest, the U.S. Supreme Court in a seven–two decision written by Chief Justice

William H. Rehnquist said the Ninth Circuit had not recognized "there is room for play in the joints" between the Establishment Clause and Free Exercise Clause of the First Amendment. He did not believe that either the compelling-state-interest level of scrutiny or the Ninth Circuit decision striking down the state law had been mandated by *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993)—a case in which a Florida city had adopted legislation directed at animal sacrifice that was aimed specifically at religion—because the Washington law involved "neither criminal nor civil sanctions" and did not impinge on the right of ministers to participate in religious activities. Moreover, the scholarship did not create "a forum for speech," such as that found to be at issue in whether university student fees were accessible to religious entities in *Rosenberger v. University of Virginia,* 515 U.S. 819 (1995). Legislation had long been directed (although not necessarily required) under the Establishment Clause at prohibiting the use of tax funds to support the ministry, and the Free Exercise Clause did not require otherwise.

In dissent, Justice Antonin Scalia argued that the Washington law impermissibly burdened religious believers by denying them general welfare benefits. He distinguished between the hostility of the Constitution's framers to funding the salaries of clergy members and denying them general benefits. In his view, the Washington law was not neutral but rather discriminatory. He therefore concluded, "This case is about discrimination against a religious minority."

Justice Clarence Thomas wrote a brief dissent distinguishing the mere study of theology from religious devotion but otherwise agreeing with Justice Scalia.

John R. Vile

See also: Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah; Establishment Clause; Free Exercise Clause; *Rosenberger v. University of Virginia.*

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Loving v. Virginia (1967)

In *Loving v. Virginia,* 388 U.S. 1 (1967), a landmark decision, the U.S. Supreme Court held that state prohibitions of interracial marriages were unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution.

In June 1958, Mildred Jeter, an African American, and Richard Loving, a Caucasian, lawfully married in the District of Columbia. After their marriage, the Lovings returned home to live in Caroline County, Virginia. The Lovings were charged with violating a Virginia law that banned interracial marriages. In 1959 the Lovings were sentenced to one year in jail, but the court said it would suspend the sentence for twenty-five years if the couple agreed to leave the state for the same period of time. Based on the state-court precedent of *Naim v. Naim,* 197 Va. 80, 87 S.E.2d 749 (1955), the state appellate courts upheld the Lovings' convictions, reasoning that Virginia had a right to maintain the racial integrity of its citizenry and that the Tenth Amendment left the regulation of marriage exclusively to the states. On appeal to the Supreme Court, the Lovings contended that the state law banning interracial marriages violated their fundamental liberty to marry and their rights to equal protection of the law. For its part, Virginia argued that regulating the qualifications for marriage was a right that belonged to the states.

Chief Justice Earl Warren wrote for the Court that Virginia's statute banning interracial marriages violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. According to the Court, the Lovings' equal protection rights were jeopardized because the prohibition of interracial marriages emerged as a consequence of slavery and had been pervasive in Virginia since the colonial period. The Court also recognized that the law allowed Caucasians to marry only other Caucasians, whereas all other races could intermarry. This, according to the Court, led to Virginia's policy of attempting to create

a pure-white bloodline. The Court, moreover, rejected Virginia's claim that the framers of the Fourteenth Amendment did not intend to include interracial marriages as part of the Equal Protection Clause. The Court instead stated that the clause should be read with a broader and more organic interpretation.

Chief Justice Warren reasoned that the Virginia law also violated the Due Process Clause, because marriage was a basic civil right of man and one of the essential personal rights to the pursuit of happiness. The state can regulate marriages, but, the Court stated, it could not violate any of the commands of the Fourteenth Amendment.

In concurrence, Justice Potter Stewart believed that a state law that punished individuals based on their race should be unconstitutional under any circumstance. Although he agreed with the Court's core holding, he believed the Court should have made a stronger pronouncement of protecting against any state-based racial discrimination.

With the *Loving* decision, the Court effectively struck down fifteen other similar state laws. The decision was important because it pronounced marriage a fundamental liberty under the Fourteenth Amendment Due Process Clause. *Brown v. Board of Education,* 347 U.S. 483 (1954), ended racial segregation in public schools, and *Shelley v. Kraemer,* 334 U.S. 1 (1948), precluded state-court enforcement of private racial discrimination under the Fourteenth Amendment Equal Protection Clause. It was *Loving v. Virginia,* however, that ensured that states could not regulate the fundamental right of marriage—one of the most intimate, important, and sacred liberties—based on race.

John R. Hermann

See also: Family Rights; Marriage, Right to.

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Loyalty Oaths

Loyalty oaths are sworn statements rejecting or forswearing belief or membership in particular ideologies or groups. In times of crisis or uncertainty over the course of the nation's history, the United States has made it necessary for public employees to take loyalty oaths. Because citizens are accustomed to reciting the Pledge of Allegiance as schoolchildren and are aware of presidents taking oaths of office (to "uphold and protect" the Constitution), these statements may not seem very important, but as Sandford Levinson stated, "Oaths are no small matters." Significant constitutional issues are at stake when the government requires such oaths, including free expression and assembly rights of the First Amendment to the Constitution, due process concerns under the Fifth and Fourteenth Amendments, and the Fifth Amendment protection against self-incrimination.

The history of loyalty oaths dates to the 1600s, when colonists had to swear an oath to support the colonial government. During the Revolutionary War, the new Americans required oaths to separate patriots from those loyal to the crown. Both the Union and the Confederacy required loyalty oaths during the Civil War. With the Union victorious, the Fourteenth Amendment was added to the Constitution, including the provision denying the right to serve in public office to anyone who had violated an oath to support the Constitution but had abrogated that oath, either by entering into rebellion or supporting it. This measure was designed to disqualify those who participated in the Civil War and violated their previous oath to support the U.S. Constitution.

In the twentieth century, loyalty oaths emerged during the "red scare" of the 1920s and later during the Cold War, which ushered in an extended period of uncertainty. Growing suspicion of Communists lurking in the hallways of government, the "loss" of China to communism, and the Soviet Union's development of a nuclear program created an atmosphere of distrust and suspicion. In 1947 the Truman administration responded to these perceived threats by instituting a loyalty-security program under Executive Order No. 9835 (Federal Employee Loyalty Program). Oaths were required of current and prospective

public employees to refute any belief in the overthrow of the government by violent means, or membership in any group that advocated such beliefs. "Reasonable grounds" for belief in disloyalty were necessary for termination of an employee, but by 1951 the standard had been reduced to "reasonable doubt." The burden of proof to show otherwise was on the accused, not the government. Those under inquiry who were charged with disloyalty were immediately suspended without pay. The process was conducted secretly, without the accused being given a chance to refute evidence or confront accusers, violating due process and fair hearing. During the Truman administration alone, approximately 1,200 employees were dismissed, and another 6,000 resigned. Similar oaths were required of state employees, and many colleges and universities followed suit, worried that professors might spread the Communist doctrine to students.

Intended to root out subversives, the oath requirement is instead better viewed as "a simple means of imposing restrictions and disabilities upon persons regarded as undesirable." There are serious means-ends problems with loyalty programs. First, one must wonder about the effectiveness of oath-taking: Wouldn't subversives, who find America's system abhorrent, have little problem dishonestly taking oaths? Second, in trying to secure loyalty, the government violates the very Constitution it seeks to uphold. Oaths tend to be vague in wording, leading to "self-execution," or forcing individuals to interpret what the oath requires and if they are complying. Additionally, failure to take an oath indicates guilt—reversing the presumption of innocence. Last, there is the guilt-by-association issue: Whether an individual belongs or belonged to a proscribed group should not automatically be equated with acting on subversive impulses.

Challenges to loyalty oath programs during the 1950s largely were decided in favor of the government. A review of cases before the U.S. Supreme Court shows it was unwilling to address the First Amendment issues raised by federal loyalty oath requirements. In *Garner v. Board of Public Works,* 341 U.S. 716 (1951), the Court ruled that loyalty oaths were not inconsistent with the Constitution. Other decisions upheld oaths based upon the "conditioned privilege" doctrine: There was no right to public employment, and in balancing First Amendment rights against the need to eliminate the Communist threat, a condition of public employment could permissibly include oaths. In *Adler v. Board of Education,* 342 U.S. 485 (1952), the Supreme Court thus upheld a New York law prohibiting the employment of public school teachers belonging to "subversive organizations." Similarly, in *American Communications Association v. Douds,* 339 U.S. 382 (1950), the Court upheld a provision of the Taft-Hartley Act of 1947 requiring union officers to sign oaths that they were not Communists as a legitimate exercise of congressional control over interstate commerce. By 1956, the Court had softened its stance a bit, ruling in *Cole v. Young,* 351 U.S. 536 (1956), that only those in "sensitive positions" could be discharged from duty for violating the loyalty-security program.

By the 1960s the Court had changed its position, striking down state loyalty oaths. Chief among these decisions was *Elfbrandt v. Russell,* 384 U.S. 11 (1966), in which oaths promising not to join the Communist Party were found to be unconstitutional, as failure to comply constituted guilt by association. The following year, in *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), the Court overturned a New York state law requiring loyalty oaths that allowed for dismissal of public employees who participated in or believed in advocating the overthrow of the government. The law violated First Amendment rights of speech and association and was considered overly vague. Furthermore, the Court rejected the conditioned-privilege doctrine, declaring that the government could not condition employment on the surrender of constitutional rights.

The current status of loyalty oaths is mixed. On the one hand, in 1970, loyalty oaths were eliminated by the U.S. Civil Service Commission, and the end of similar oaths necessary to obtain federal aid soon followed. But in 1972 the Supreme Court ruled in *Cole v. Richardson,* 405 U.S. 676 (1972), that a required state oath forswearing violent overthrow of the government was constitutional. Thus, if narrowly written, certain types of loyalty oaths are constitutionally valid.

Sharon A. Manna

See also: Communists; First Amendment; Red Scare.

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Lucas v. South Carolina Coastal Council (1992)

Under the Fifth Amendment to the U.S. Constitution, the federal government must compensate property owners when it seizes their property for public use. This Takings Clause also applies to state and local government, because the U.S. Supreme Court has incorporated it in the Fourteenth Amendment to extend the "just-compensation" protection. Takings law includes both regulatory and physical takings. A "regulatory taking" refers to government regulation of private property that reduces or eliminates the value of that property. Under some circumstances government may be required to compensate the owner for the property. In *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), the Supreme Court considered whether a land-use regulation that eliminated the total value of a parcel of property was a taking that required compensation.

In 1986 David Lucas purchased beachfront property in South Carolina for $900,000. In 1988 the South Carolina legislature prohibited new development on such property unless the owner obtained a waiver from the South Carolina Coastal Council. Lucas was denied a building permit for constructing two houses. He sued the council, claiming that the refusal to grant him a permit rendered his property worthless and hence constituted a taking of his property without compensation. The South Carolina Supreme Court upheld the law, stating that it banned the noxious use of property, which did not require any state compensation for the property.

Lucas appealed to the U.S. Supreme Court, and in June 1992, in a five–four decision, the Court agreed with Lucas, ordering the state to compensate him for the original value of his property. In his opinion for the Court, Justice Antonin Scalia noted that in order for a law not to constitute a taking, it had to advance a state interest and it could not eliminate all value in a property. According to Justice Scalia, South Carolina had the power to ban new construction on beachfront property in order to prevent erosion and environmental problems. At the same time, the justice noted the state had not shown that Lucas's construction of two houses on his property was noxious or would cause any environmental problems. By banning construction on the property, the state had made Lucas's $900,000 property worthless. Without proving that the houses were noxious, the state had engaged in a taking of private property for public use. Under the Fifth and Fourteenth Amendments, the Court ruled, the state would have to compensate Lucas for his land.

The Court's decision in *Lucas* created an entirely new field in Takings Clause law and presented opportunities for landowners to challenge environmental regulations in court. Prior to *Lucas,* the state only had to show a substantial interest in regulating property and could eliminate the value of property. Under the *Lucas* decision, government had to compensate landowners for a total loss of property value regardless of the reasons offered for the regulation.

Douglas Clouatre

See also: Land Use; Property Rights; Takings Clause.

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Lynch v. Donnelly (1984)

In *Lynch v. Donnelly,* 465 U.S. 668 (1984), the U.S. Supreme Court addressed the issue of what type of government-sponsored Christmas display would be permissible under the Establishment Clause of the First Amendment to the U.S. Constitution. That clause states that "Congress shall make no law respecting an establishment of religion." The Establishment Clause is also applied to state and local government through the Due Process Clause of the Fourteenth Amendment. Christmas displays have posed Establishment Clause difficulty because of their religious overtones, and the Court's decisions have often turned on minor factual differences from case to case.

The display at issue in *Lynch* was typical of what many communities traditionally engaged in at Christmas. In association with the downtown retail merchants association, the city of Pawtucket, Rhode Island, had, for more than forty years, included a crèche (nativity scene) in its Christmas display. All items in the display were purchased at taxpayer expense and were installed by city workers. A nonprofit association owned the park where the crèche was displayed, and yearly lighting costs for the crèche were estimated at $20.

The American Civil Liberties Union and local residents sought an injunction against the inclusion of the crèche. The legal issue was whether the inclusion of a crèche in the display, which also included a banner reading "Season's Greetings," a sleigh, reindeer, a Christmas tree, candy-striped poles, Santa's house, and other traditional Christmas items, violated the Establishment Clause by endorsing religion. The district court held that inclusion of the crèche did violate the Establishment Clause, and the First Circuit Court of Appeals affirmed.

In *Lemon v. Kurtzman,* 403 U.S. 602 (1971), a previous Court decision on the Establishment Clause, the Supreme Court explicitly stated that the clause was designed to maintain the separation of church and state. In this same case, the Court recognized that total separation was impossible, and governments and religious organizations must sometimes interact.

In supporting the display involved in *Lynch,* the city contended that the purpose of the entire display was exclusively secular (nonreligious). Chief Justice Warren E. Burger's five–four majority opinion reversing the First Circuit noted that in modern times Christmas had taken on nonsecular elements, and that the other items in the display were purely secular. The majority also recognized that the crèche symbolized the historical roots of the Christmas holiday. The Court held that the inclusion of the crèche did not endorse religion and that any benefit to religion by such presence of the crèche was indirect and incidental.

Concurring justices led by Sandra Day O'Connor set out a test for determining whether a government-sponsored display endorsed religion: What would "viewers fairly understand to be the purpose of the display?" This test considered the display as a whole and asked what meaning a fair person viewing the display would give to it. Viewed alone, a crèche is entirely religious in nature. However, Justice O'Connor found that when a crèche is displayed alongside purely secular Christmas symbols, the setting "changes what viewers may fairly understand to be the purpose of the display," and that such a setting serves to negate any endorsement of religion. The concurrence concluded that because the crèche itself was a traditional Christmas ornament and the display included other traditional Christmas ornaments, it did not violate the Establishment Clause.

The dissenting justices led by Justice William J. Brennan Jr. agreed that the overall display could be construed as being secular, but argued the secular items did not negate the fact that the inclusion of the crèche connoted endorsement of Christianity or the threat of excessive entanglement of church and state.

John L. Roberts

See also: County of Allegheny v. American Civil Liberties Union; Establishment Clause; *Lemon v. Kurtzman;* Religious Symbols and Displays.

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Lyng v. Northwest Indian Cemetery Protective Association (1988)

In *Lyng v. Northwest Indian Cemetery Protective Association,* 485 U.S. 439 (1988), the U.S. Supreme Court considered whether government construction activity on land used by certain Indian tribes for religious purposes constituted such interference with their religious practices as to be a violation of the Free Exercise Clause of the First Amendment to the U.S. Constitution. Under that clause, government "shall make no law . . . prohibiting the free exercise" of religion.

In 1982, the U.S. Forest Service completed the administrative process that would allow the construction of a paved road through the Chimney Rock area of the Six Rivers National Forest in California. It also provided for timber harvesting in the same area. In doing so, the Forest Service rejected a study it had commissioned. The study recommended against construction of the road because it would cause irreparable damage to land held sacred by certain American Indians who had historically used the land for religious ceremonies that required privacy, silence, and an undisturbed natural setting. The Northwest Indian Cemetery Protective Association, together with individual Indians, environmental organizations, and the state of California, filed suit in federal district court challenging both the road construction and the logging. The court held for the plaintiffs, finding the government's activity interfered with the free exercise of religion, and the Ninth Circuit Court of Appeals affirmed.

In a five–three decision (Justice Anthony M. Kennedy did not participate), the Supreme Court reversed the lower courts, ruling that the Free Exercise Clause of the First Amendment did not prohibit the Forest Service from building the proposed road and permitting logging in the area used by the Indians for religious purposes. Justice Sandra Day O'Connor, writing for the majority, accepted the assertion that the Indians' beliefs were sincere and that the Forest Service's actions would have a devastating effect on the practice of their religion. Justice O'Connor noted, however, that these projects would not "prohibit" the Indians' religious practices. The majority opinion emphasized the difficulties inherent in requiring the government to accommodate every citizen's religious beliefs and activities, because of the multiplicity and broad range of the government's activities: "Incidental effects of government programs, which may interfere with the practice of certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs, do not require government to bring forward a compelling justification for its otherwise lawful actions." Thus, the majority found that the Free Exercise Clause could not be interpreted in a way that would give citizens a veto over public programs unless the activity overtly prohibited the free exercise of their religion. The majority also emphasized the government's "right to use what is, after all, its land."

Justice William J. Brennan Jr., writing for the dissenters, discussed the fact that Indian religious beliefs and understandings were fundamentally different from those of the Judeo-Christian tradition. In particular, he emphasized that a "pervasive feature" of the Indian lifestyle was "the individual's relationship with the natural world." The site-specific nature of Indian religious activities arose from a perception that the land was "a sacred living being." Rejecting the majority's contention that the government's prerogative as a landowner should trump well-founded claims of Free Exercise Clause protection, he asserted that the decision in this case would have a "cruelly surreal result: governmental action that will virtually destroy a religion is nevertheless deemed not to 'burden' that religion."

Carol Barner-Barry

See also: City of Boerne v. Flores; Employment Division, Department of Human Resources of Oregon v. Smith; Free Exercise Clause; *Sherbert v. Verner.*

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Madison, James (1751–1836)

James Madison is one of the most significant figures in advancing and protecting civil liberties in the history of the United States. Madison served as a member of the Virginia House of Delegates, a delegate to the Continental Congress and Confederation Congress, a member of the House of Representatives, and secretary of state. Madison held office as the fourth president of the United States 1809–1817, succeeding his friend Thomas Jefferson. Although Madison served tirelessly in elected and appointed office, he also helped frame the U.S. Constitution and the Bill of Rights, the first ten amendments to the Constitution.

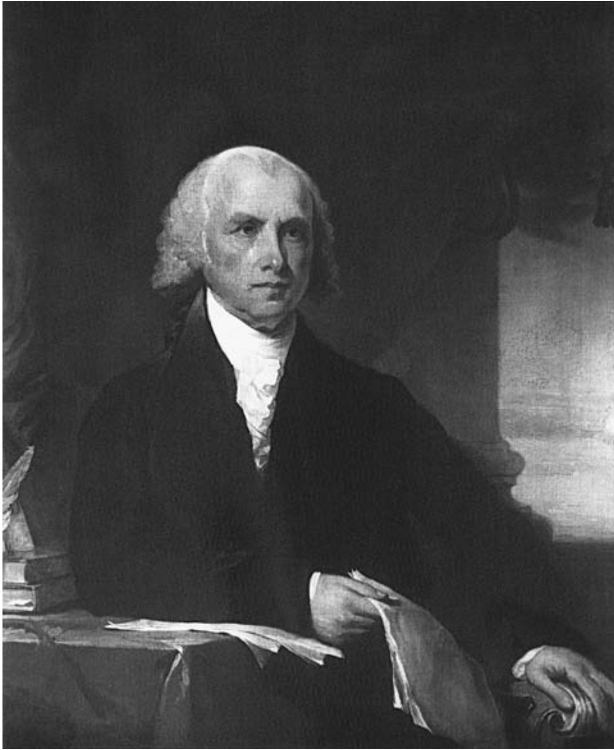
Madison was a member of the Constitutional Committee that helped draft the Virginia Constitution of 1776. He was a leading advocate within the state for religious freedom. Madison's concerns with the developing revolutionary government in America date to the end of the Revolutionary War. During General Charles Cornwallis's campaign through the Carolinas, Madison was frustrated by the failure of the states, as organized under the Articles of Confederation, to support the South against the British. Not only was coordination lacking among the states, but the government could not compel states to fulfill their obligations to one another. Although Madison wanted to safeguard the sovereignty of the states, particularly his home state of Virginia, he recognized that a new structure of government was necessary. The key was to balance state sovereignty against the advantages of a more centralized government.

The need for adjustments in the government became evident after several events, including Shays's Rebellion in 1786, in which New Englanders rose up in demanding property and debt reforms. Stimulated by a call from the Annapolis Convention in which Madison had played a role, leaders of twelve of the thirteen states (all but Rhode Island) met in 1787 at the Constitutional Convention in Philadelphia for the purpose of reforming the government. On May 29, 1787, the Virginia delegation presented the Virginia plan, which called for a more organized national government that still respected state sovereignty. Although attribution of authorship is uncertain, most historians credit Madison with a significant influence on this plan that set the agenda for the convention's initial sessions and strongly influenced the resulting Constitution that the convention delegates drafted. Madison was one of the central figures at the Constitutional Convention, and his papers are still the most important records of what occurred there.

Madison's influential role in shaping the Constitution continued far beyond the convention. During the ratification battles for the new Constitution, Madison joined Alexander Hamilton and John Jay to write a series of letters that New York newspapers published as *The Federalist Papers* under the pseudonym "Publius."

Madison's most salient contribution, often also regarded as one of his most significant writings, was *Federalist No. 10,* in which he discussed the evils of faction. His gravest concern with any democratically based government was the formation of factions along lines of interest. When those who shared several interests banded together, a tyrannical majority could impose its will upon weaker minorities. It was too easy, Madison argued, for "a predominant party to trample on the rules of justice." Madison argued that a representative system, containing a larger array of people and interests, could check the power of factions. This fear of a tyranny of the majority and the desire to protect minority interests against an overreaching majority formed the basis for the constitutional protection of civil liberties.

In Virginia, Madison led the proratification forces against staunch opposition, which included such notable figures as Patrick Henry and George Mason. Over the course of a twenty-three-day battle, Madison labored to convince his fellow delegates of the soundness of the Constitution and the protections it afforded to both the citizens and government of Virginia. He argued for ratifying the document and then making any needed amendments rather than ratifying the document conditionally or calling for a second constitutional convention. Virginia's ratifying



The fourth president of the United States, James Madison was one of the most important participants in the Constitutional Convention of 1787 and the primary author of the Bill of Rights. *(National Archives)*

convention ultimately chose to ratify the Constitution by a vote of eighty-nine to seventy-nine.

Despite state ratification of the Constitution, Antifederalists, as well as Madison's friend Jefferson, had raised grave concerns that the newly established federal government would use its powers to the detriment of the states and their citizens. Critics demanded establishing a mechanism to safeguard basic freedoms and prevent the federal government from overstepping its authority. When the new federal government convened in 1789, Madison again played a central role by drafting and proposing nine amendments in the U.S. House of Representatives that became the backbone of the twelve amendments on which the House and Senate eventually agreed. Madison did not succeed in gaining approval for a provision that would have limited the ability of states to "violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." The states did approve the ten amendments that compose the Bill of Rights, with yet another proposal preventing Congress from increasing its compensation before an intervening election adopted in 1992 as the Twenty-seventh Amendment.

The Bill of Rights continues to protect basic civil rights and civil liberties. It contains protections for free speech, free exercise of religion, the right to assemble, freedom of the press, protection from unreasonable searches and seizures, the right to counsel, protections for those accused of crimes, and protection from cruel and unusual punishments. Although the Bill of Rights was enacted to limit the powers of the federal government, courts have expanded the effect of most of the first ten amendments to apply to state governments and actors via the Due Process Clause of the Fourteenth Amendment.

As a leader with Thomas Jefferson of the Democratic-Republican Party, Madison continued to express opposition to arbitrary power, whether it involved what he considered to be undue executive influence over foreign policy in the administration of George Washington or opposition to governmental restrictions on freedom of speech and press under President John Adams. Madison and Jefferson authored the Virginia and Kentucky resolutions opposing the Alien and Sedition Acts of 1798. As president, Madison helped reestablish the national bank that he had once battled, arguing that governmental need and practice had to be taken into account in interpreting the U.S. Constitution. He was solicitous of civil liberties during the War of 1812.

Keith Wesolowski

See also: Alien and Sedition Acts; Articles of Confederation; Bill of Rights; Jefferson, Thomas; Tyranny of the Majority; United States Constitution.

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Magna Carta

The Magna Carta (Great Charter) is perhaps the best-known and earliest guarantee of the rights of English people. Although its authors were clearly responding to issues specific to their time, the document's main provisions proved to have lasting meaning far beyond what the authors could possibly have imagined. The Magna Carta serves as a cornerstone of civil liberties not only in England but also in America.

The charter was the product of a dispute between the barons of England and King John. The sixty years that preceded its passage in 1215 witnessed the steady encroachment of centralized royal authority at the expense of local baronial power. John's father, Henry II, had replaced baronial courts and local laws with royal courts and a uniform law, a process that not only extended his authority and weakened that of the barons, but also ensured that royal revenues increased at the barons' expense. Henry's son and John's brother, Richard I, further increased royal revenues, using the income to fund a crusade and to ransom himself from captivity under the Holy Roman Emperor. When John embarked on a series of expensive but unsuccessful campaigns on the Continent, the barons grew increasingly unhappy. John further enraged them by becoming a vassal of the pope and making England a papal fief. By Easter 1215, the barons had had enough. They presented John with a list of demands; when he delayed responding, they renounced their allegiance to him and began establishing military control over the country. The two sides met at Runnymede, near Windsor, where on June 15 John agreed to the barons' demands, including a provision that granted them immunity for their rebellion; the Magna Carta was drafted and John's seal attached on June 19, 1215.

John then appealed to the pope, who immediately annulled it, despite the fact that his legate in England

King John being forced to sign the Magna Carta, 1215.
(© North Wind Picture Archives)

had willingly signed it. Both the pope and John died the next year; John's heir was his young son Henry III, whose advisers immediately reissued the Magna Carta with the clauses relating to specific, temporary issues removed. The next year, the charter was again reissued (with clauses relating to the use of forests removed). Henry reissued this third version yet again in 1225; this version became statute in 1297. In 1368 a statute of Edward III ordered that any law that was contrary to the Magna Carta was invalid. By the end of the Middle Ages, the document had been confirmed by various monarchs a total of thirty-eight times.

Many of the charter's clauses were intended to ensure the proper functioning of the feudal system by codifying the kinds and amount of fees vassals were required to pay their lords and protecting the property and rights of orphans and widows. Many of these

clauses were motivated by John's abuse of his position; some even mentioned certain of John's followers by name and required that they be stripped of their positions. Clause fifty-two promised to return castles and lands that Henry II, Richard I, and John had seized. A similar provision declared that John would restore illegally levied fines.

The most enduring clauses of the Magna Carta concerned the principles governing the justice system. Clause thirty-nine ensured due process: A free man could not be jailed or punished "except by the lawful judgment of his peers and by the law of the land." Though this clause applied only to free men, by the fifteenth century virtually all Englishmen fell into that category. Furthermore, men were not to be put on trial in the first place unless "credible witnesses" could be found to support the accusation. According to clause forty, justice was to be free, prompt, and available to all. In reality, this clause was often ignored, but the principle remained and endures. Clauses twenty through twenty-two stated that, in effect, the punishment should fit the crime, and penalties were to be levied only upon "the oath of honest men of the neighborhood." The Magna Carta also introduced the concept of just compensation for goods or lands appropriated by the government, a principle that survives in the Takings Clause of the Fifth Amendment to the U.S. Constitution. The charter also stipulated that local issues be tried locally, while at the same time establishing a permanent home for central courts rather than having them follow the royal court as it moved from place to place.

In order to prevent future abuses, two key clauses were included in the charter. Clause twelve promised that no taxes would be levied unless approved by "common counsel." Clause fourteen specified who was to be summoned to give their permission. Starting in the late thirteenth and early fourteenth centuries, it came to be understood that "common counsel" meant Parliament, which was then in its infancy. In the seventeenth century, Charles I's efforts to raise taxes outside of Parliament was a significant cause of England's civil war, and his opponents frequently cited the charter as evidence that such taxes were illegal.

The Magna Carta also included a lengthy provision intended to ensure that John and his successors adhered to the charter's provisions. It established a committee of twenty-five barons who were to see that the terms were upheld. If and when they detected any transgressions of the charter, the barons were to notify the king (or his chief justice), who then had forty days to correct the matter. Failing that, the barons were freed from their allegiance to the king and charged with the duty to "distrain and distress [the king] . . . by all possible means" until the situation was corrected; ordinary people were supposed to support the barons in their actions until the king had been brought back into compliance.

Historians and legal scholars have long debated the Magna Carta's significance. Although roughly two-thirds of the charter's clauses were specific to the time and place, the remainder have proved more enduring and have formed the basis for civil liberties over the centuries. Not the least significant is the concept that government must abide by the rule of law and that the people are entitled to redress when that government violates their rights.

Carol Loar

See also: Due Process of Law; English Bill of Rights; English Roots of Civil Liberties; Petition of Right; Takings Clause.

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Maher v. Roe (1977)

In the aftermath of the U.S. Supreme Court decision in *Roe v. Wade,* 410 U.S. 113 (1973), that legalized abortion, a number of states tried to impose various restrictions limiting access to the procedure. One such effort was a regulation passed by the Connecticut Welfare Department that provided that no state Medicaid

money could be used for a first-trimester abortion unless a physician certified that the abortion was medically necessary (physically or psychologically). The regulation was challenged by two indigent women, one (designated Susan Roe) who was unable to obtain the certification necessary to have an abortion, and another (Mary Poe) who was left with the hospital bill for her abortion when the state refused to pay. They argued that Connecticut's regulation violated the Equal Protection Clause of the Fourteenth Amendment by treating one group of pregnant women differently from another and interfering with their right to obtain an abortion. A three-judge U.S. District Court upheld their claim.

In *Maher v. Roe,* 432 U.S. 464 (1977), the Supreme Court reversed the lower court and sustained the Connecticut regulation. Writing for the Court's six–three majority, Justice Lewis F. Powell Jr. said that "financial need alone does not identify a suspect class for the purpose of equal protection analysis," and therefore a state was not required to fund abortion even if it paid for childbirth. Indeed, the fact that a state chose to fund childbirth and not nontherapeutic abortions was a value judgment and a legitimate policy choice, which the state had every right to make. The Court ruled that the state's policy did not represent an impermissible positive barrier to a woman's right to abortion:

> The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to abortion. An indigent woman desiring an abortion is not disadvantaged by Connecticut's decision to fund childbirth; she continues as before to be dependent on private abortion services. . . . The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.

The dissenters argued that the state's refusal to fund abortions for Medicaid patients was a serious interference with the right to abortion, since a right without the resources to exercise it was meaningless. Justice William J. Brennan Jr. noted that the Court had previously ruled—in *Sherbert v. Verner,* 374 U.S. 398 (1963), a case invalidating the denial of unemployment benefits to an employee who lost a job for refusing to work on her Sabbath—that the state could not use financial pressures to force individuals to waive their constitutional rights. Brennan accused the Court of now condoning such pressure by ignoring the realities of life for the poor.

The *Maher* decision allowed states to choose whether or not to fund nontherapeutic abortions. Most chose not to do so. As a result, access to abortion became seriously restricted for indigent women. *Maher* also represented the first of several limitations on abortion rights accepted by the Supreme Court. Subsequently, the Court upheld (among others) informed-consent rules, waiting periods, reporting requirements, conditional parental notification, and a congressional ban on using Medicaid money for abortion (the Hyde Amendment).

Stephen L. Robertson

See also: Planned Parenthood of Southeastern Pennsylvania v. Casey; Roe v. Wade.

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Mandatory Student Activity Fees

A student activity fee (SAF) is a mandatory, nonrefundable charge levied on college or university students beyond the cost of tuition. Over 70 percent of public colleges and universities impose mandatory student fees to help fund programs and activities that benefit the students. SAF dollars are used for a number of purposes, including funding extracurricular activities such as intramural sports and supporting the many student organizations that are a part of the life of any institution of higher learning. This disbursement of funds has led to a number of concerns involving the Free Speech Clause and the Establishment Clause of the First Amendment. The first clause protects the right of free speech; the second prohibits government from engaging in establishment of reli-

gion. In the context of SAF money, the two clauses have been in tension in several cases.

Student activity fees fall under a type of First Amendment analysis called the "public-forum doctrine." The Supreme Court has recognized three types of public forums: traditional, nonpublic, and limited or designated forums. Each forum permits different levels of expression, and the Court applies different tests to government restrictions on speech depending on the forum and nature of the regulation. The limited or designated public forum includes public property opened up by the state for expressive activity. Mandatory SAF schemes fall into this category.

The U.S. Supreme Court first addressed the issue of mandatory student activity fees in *Rosenberger v. University of Virginia,* 515 U.S. 819 (1995). A student at the university sought financing from the SAF fund for publication of a Christian magazine by Wide Awake Productions. The university argued that the magazine was a religious activity and that it had a compelling interest in denying funding in order to comply with the First Amendment's Establishment Clause, which prohibits government from engaging in activity that would constitute "establishment" of religion.

In *Rosenberger,* a divided Supreme Court held that the denial of funds for the religious publication was unconstitutional viewpoint discrimination. Justice Anthony M. Kennedy's majority opinion emphasized free speech rights over Establishment Clause concerns. He concluded that the SAF fund constituted a limited public forum and that the student publication was denied funding because of its religious viewpoint. Kennedy said that funding the publication would not advance religion and that the government program was neutral toward religion.

In a dissenting opinion, Justice David H. Souter argued that the magazine was a sectarian religious publication and the university's refusal to fund the publication was compelled by the Establishment Clause. Souter was concerned that the decision could open the door to greater government entanglement with religion. As a consequence of the *Rosenberger* decision, the University of Virginia established a policy that granted a refund to any students who objected to how their activities fees were being spent.

In another SAF case, in 1996 three students attending the University of Wisconsin Law School at Madison sued the Board of Regents and the state university system. The students, self-described religious conservatives, claimed that the allocable fee system violated their rights against "compelled" speech. Some of the organizations whose advocacy the students strongly opposed included the Lesbian, Gay, Bisexual Campus Center; the International Socialist Organization; and Amnesty International. More than four decades previously, in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), the Supreme Court had recognized a right against compelled speech by holding that the First Amendment prohibited government from requiring a citizen to support ideas that the citizen found objectionable.

The funds at the University of Wisconsin were distributed in three ways: (1) The Associated Students of Madison appropriated funds for registered student groups for general operations, travel, and special events; (2) funds were distributed by a committee of the student government in the form of grants to student organizations, university departments, and community-based service organizations; (3) any registered student group could seek funding through a student-body referendum vote.

In defending the fee distribution system, the university argued that no student was required to join an organization, nor were students required to attend programs or events that were offensive to them. Objecting students could form their own organizations and seek funding. School officials also claimed that individual students had no more right to object to the student fee system than they could object to what courses were being taught or to the content of courses given by professors with whom they might disagree.

A unanimous Supreme Court upheld the university's student fee system in *Board of Regents v. Southworth,* 529 U.S. 217 (2000). The Court argued that the university had a legitimate educational policy of encouraging a marketplace of ideas among students. A mandatory fee was a reasonable way to promote this goal. The Court emphasized, however, that such programs had to be administered in a viewpoint-neutral fashion, and the Wisconsin program, except for the voting procedure, satisfied this requirement.

The *Rosenberger* holding expanded the protection for student religious speech, and the *Southworth* de-

cision rejected a compelled-speech challenge to a mandatory SAF system. Both decisions reaffirmed the use of a mandatory student activity fee system by public universities and colleges to promote a diverse marketplace of ideas.

John Fliter and James F. Van Orden

See also: Board of Regents v. Southworth; Establishment Clause; First Amendment; *Rosenberger v. University of Virginia; West Virginia Board of Education v. Barnette.*

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Mann Act

Also known as the "White Slave Traffic Act," the Mann Act of 1910 prohibited transportation of women and girls across state lines for prostitution; it was ultimately expanded by federal prosecutors to include noncoercive sexual relationships pursued through interstate travel. The act originated from highly publicized (and perhaps exaggerated) allegations of forcible prostitution and made it a federal felony to take women or girls, or aid in their taking, between states or in foreign commerce for this purpose, "debauchery," or "any other immoral purpose." The Mann Act thus raised the issue of whether it was within the federal government's responsibilities and powers to restrict certain freedoms to protect citizens' morality and safety, or whether state and local authorities had exclusive control over the police power. Recent decades of jurisprudence have often favored the federal government, but the Mann Act was written and upheld at a time when this question was much more controversial.

Although the Commerce Clause in Article I, Section 8 of the U.S. Constitution gives Congress the power to "regulate commerce . . . among the several states," the U.S. Supreme Court has long been at the center of debate over what exactly "commerce" entails. Such discussions may seem academic and relatively minor, but the larger question involves how much power the national government should have over activities traditionally considered within the realm of local and state regulatory and police powers, including sexual activity. Early cases concerning Congress's legislative powers, such as *McCulloch v. Maryland,* 17 U.S. 316 (1819), and *Gibbons v. Ogden,* 22 U.S. 1 (1824), established broad precedents for national powers concerning basic interstate economic activities, but it took over a hundred more years for the Supreme Court to give the federal government consistent support for reaching into a wider variety of local affairs.

When the Supreme Court upheld the Mann Act in *Hoke v. United States,* 227 U.S. 308 (1913), precedents were still divided and somewhat inconsistent regarding what should be considered interstate commerce. In the late nineteenth century, the Court started to become open to congressional regulations of interstate transportation if related to local health and morality, but it kept to a minimum the federal power to regulate more purely economic local activities.

Immediate precedents for *Hoke* included *Champion v. Ames,* 188 U.S. 321 (1903), also known as "the lottery case," in which a divided Court upheld the conviction of a man accused of shipping foreign lottery tickets between states in violation of the 1895 Federal Lottery Act. In that case, Justice Harlan wrote "[A] State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another." In dissent, Chief Justice Melville W. Fuller, joined by three other justices, was more protective of state powers: "To hold that Congress has general po-

Chuck Berry playing guitar, 1957. In 1959 he was convicted under the Mann Act for transporting a woman across state lines for immoral purposes and served a two-year sentence. *(Library of Congress)*

lice power would be to hold that it may accomplish objects not entrusted to the General Government, and to defeat the operation of the 10th Amendment."

Despite this argument for restricting Congress's powers to regulate local activity, the majority's holding in the lottery case gave progressives in Congress hope that the federal government could be used to regulate a variety of local activities. Within a decade of the *Champion* case, Congress passed new meat inspection laws, the Pure Food and Drugs Act, and the Mann Act, all of which were upheld in later cases.

In *Hoke,* Justice Joseph McKenna, writing for the unanimous Court, specifically cited the *Champion* case as well as the small group of other precedents supporting congressional regulation of certain types of interstate commerce:

> [I]f the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and more insistently, of girls. . . . Congress has power over transportation 'among the several States'; that the power is complete in itself,

> and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulation.

In 1917 the Supreme Court expanded upon the Mann Act to permit additional federal prosecution of noncommercial, noncoercive interstate "debauchery" in *Caminetti v. United States,* 242 U.S. 470 (1917). The federal government later relied on this precedent to investigate high-profile individuals, such as actor Charlie Chaplin, for sexual activity unrelated to prostitution.

But the Court was not set completely on a new course for federal interference in local health and safety concerns. In *Hammer v. Dagenhart,* 247 U.S. 251 (1918), the Court declared unconstitutional a 1916 federal law prohibiting items in interstate commerce made by children of certain ages working certain hours. In the majority opinion by Justice William R. Day, the Court differentiated federal regulation of child labor from other kinds of activity that might be used as precedent, such as the Mann Act, and said "in each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. . . . This element is wanting in the present case. . . . The goods shipped are of themselves harmless." Although the logic of *Hammer* and *Hoke* may seem inconsistent, it is important to remember that the Mann Act did not outlaw local prostitution, only its interstate traffic, whereas the child labor law essentially tried to create minimum age and hour standards for children, at the time a completely local issue. Today, prosecution under the Mann Act has become quite rare, but child labor is heavily regulated by the federal government and has been since 1941.

Jasmine Farrier

See also: Congress and Civil Liberties; Police Power.

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Mapp v. Ohio (1961)

In the landmark decision of *Mapp v. Ohio,* 367 U.S. 643 (1961), the U.S. Supreme Court held that all evidence obtained by searches and seizures in violation of the federal Constitution would be deemed inadmissible in a criminal trial in a state court. In doing so, the Court reversed in part its holding in *Wolf v. Colorado,* 338 U.S. 25 (1949), and significantly altered the landscape of criminal law and police practices in the United States. The Court widened the parameters of protection against illegal police conduct by specifying that the federal exclusionary rule—a rule of evidence disallowing admission at trial of evidence obtained by law enforcement in violation of the Fourth Amendment to the Constitution—applied to the states as well.

The case arose in spring 1957 when Cleveland police officers made a warrantless search of the home of Dollree Mapp and her daughter. Based on an anonymous tip they had received, the Cleveland police went to the Mapp home in search of an individual connected to a recent bombing who was believed to be hiding out in the home. Mapp phoned her attorney and refused to let the police enter the premises after the officers failed to produce a search warrant. The stalemate lasted for three hours when more officers arrived on the scene and the police entered the home by forcing open at least one door. When the police entered the home, Mapp demanded to see the search warrant, and one of the officers held up a piece of paper that was claimed to be a warrant. Mapp grabbed the paper and a struggle ensued in which the officers recovered the paper and handcuffed Mapp for being belligerent.

The officers then searched the premises, including Mapp's room, her daughter's bedroom, the kitchen, dinette, living room, and basement. In the basement the police located a trunk containing books and pictures said to be lewd and lascivious; as a result, Mapp was arrested on charges of violating the Ohio law prohibiting the possession of obscene materials. She was subsequently convicted and sentenced to one to seven years in prison based on the evidence found in the

trunk, despite the fact that the prosecution produced no search warrant at trial.

The central legal issue in *Mapp* was the application of the federal exclusionary rule to the states. Under this legal doctrine, evidence obtained in violation of the Fourth Amendment—by means of an unreasonable search or seizure—must be excluded in a trial proceeding in a federal court. The Supreme Court first articulated the doctrine in *Weeks v. United States,* 232 U.S. 383 (1914), noting the underlying premise that using evidence obtained by unreasonable searches and seizures was akin to compulsory self-incrimination and therefore the evidence must be excluded. The rule became the subject of significant legal argument. Before joining the Supreme Court, Justice Benjamin N. Cardozo summarized the criticism of the exclusionary rule when he wrote in *People v. Defore,* 242 N.Y. 13, 150 N.E. 585 (1926), "The criminal is to go free because the constable has blundered." Nonetheless, the Court repeatedly reaffirmed applicability of the rule in federal court, such as in *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920).

Despite the federal doctrine, states were not compelled to implement the exclusionary rule, because the Fourth Amendment, though clearly applicable to the federal government, was not necessarily applicable to the actions of state authorities. The Supreme Court specifically addressed the issue in *Wolf* and concluded that the Due Process Clause of the Fourteenth Amendment did incorporate the Fourth Amendment and make it applicable to the states, but specifically held that this incorporation did not forbid in state courts the admission of evidence obtained by unreasonable searches and seizures. In the majority opinion in *Wolf,* Justice Felix Frankfurter contended the exclusionary rule was only one remedy for illegal searches and seizures and left it to the states to implement their own remedies. The result was that state courts were not prohibited under the federal Constitution from using evidence obtained in violation of the Fourth Amendment.

Twelve years later, the Supreme Court in *Mapp* reversed the *Wolf* holding by which states could avoid applying the exclusionary rule. Writing for the majority, Justice Tom C. Clark noted that states were required to comply with the Fourth Amendment and that the exclusionary rule was the only effective means to protect the Fourth Amendment rights of U.S. citizens. Justice Clark made a pointed criticism of the existing system that allowed states to avoid the federal sanction for illegally obtained evidence: "The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest."

The implications of *Mapp* continued to be significant and even were popularized through television and movies. Nonetheless, even years after the decision, some justices continued to argue against the broad application of the exclusionary rule in the United States. Justice Warren E. Burger, dissenting in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), concluded the rule was "conceptually sterile" and "practically ineffective." Although *Mapp* continues to be the controlling law, the Court has modified the decision by recognizing exceptions to the application of the exclusionary rule, including finding and expanding a good faith exception for law enforcement officers in cases such as *United States v. Leon,* 468 U.S. 897 (1984), and *Massachusetts v. Sheppard,* 468 U.S. 981 (1984).

Kevin M. Wagner

See also: Exclusionary Rule; Fourth Amendment; Good Faith Exception.

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Marcuse, Herbert (1898–1979)

After emigrating from Germany to the United States in 1934, Herbert Marcuse gradually established himself as America's most prominent academic advocate of leftist revolution. Combining philosophical elements of Georg W. F. Hegel, Karl Marx, and Sigmund Freud into his social criticism, Marcuse argued that twentieth-century capitalism had become a "totalitarian" machine that crushed dissent and obstructed the cause of human liberation. In assimilating Freudian

psychoanalysis into a Marxist account of human history, Marcuse sought to expand the boundaries of freedom beyond the quest for economic equality to the elimination of sexual repression. As a result, he emerged as a primary inspiration for the student protests of the 1960s and the politics of cultural liberation that followed.

Marcuse studied philosophy under Martin Heidegger, embraced Marxist social analysis, and wrote his doctoral thesis on Georg W. F. Hegel. Marcuse saw Hegel as the key to understanding Marx and thought the idealism of Hegel's philosophy provided a corrective to the mechanistic materialism of Marx. In *Reason and Revolution* (1941), Marcuse described Hegel's work as a meditation on how human freedom advances through history, culminating in the "liberty, equality, and fraternity" of the French Revolution. Although Marcuse remained committed to a Marxist account of historical class struggle and the need for economic equality to liberate man from domination, he was also troubled by the failure of Marx's predictions of global revolution. Hegel's humanism suggested to him, against Marx, that the development of ideas could significantly affect the realization of the human needs to be free and happy.

In *Eros and Civilization* (1955), Marcuse argued that Freud could help explain how a repressive social system manipulated human needs and prevented their fulfillment. Freud had described "repression" as the foundation of civilization itself, a necessary and universal psychological process of delayed gratification by which instinctual sexual energy, or "libido," is redirected to productive tasks. Adding a historical dimension, Marcuse held that repression is variable: Although some minimal level of repression is necessary, most qualifies as "surplus repression," existing only to maintain the dominance of oppressive social classes by diverting the dangerous instinctual energies of subordinate groups. Because civilization had succeeded fully in producing material abundance, the historical purpose served by repression has become obsolete, and all that remains is the class domination. The oppressed must revolt for both justice and pleasure.

Marcuse had become pessimistic a decade later in *One-Dimensional Man* (1964), generally considered his most significant work. Instead of collapsing, Western capitalism appeared stronger than ever; even worse, it seemed to be making people happy. Rather than rethinking his Marxist assumptions, Marcuse took this as a sign that capitalism had become a "totalitarian" system much like its Cold War adversary, the Soviet Union. To maintain their monopoly on power, capitalists had learned to market technological comfort and sexual gratification, assimilating the avenues of revolt into a culture of bourgeois conformity. Even civil liberties were tools of domination insofar as consumer choice offered the illusion of autonomy and free election the illusion of influence. In a system of market rationality and manufactured needs, revolution was impossible.

Marcuse developed these ideas in "Repressive Tolerance" (1965) and *An Essay on Liberation* (1969). In the former, he argued that the liberal defense of "tolerance" maintains the conservative status quo by undermining the revolutionary commitment to "truth." Tolerance should thus be denied to right-wing movements but extended to left-wing movements, even when violent. In the latter, Marcuse speculated on the possibility of revolution from unexpected quarters. The decline of the blue-collar workforce suggests, contrary to Marx, that students, the unemployed, and radicalized urban minorities might serve as a vanguard for systematic social change. Marcuse's mix of sex and social theory proved well adapted to his era, but its ultimate coherence as a system of thought and guide to social policy remains in question.

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See also: Liberalism.

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Marketplace of Ideas

The "marketplace of ideas" refers to the belief that the free circulation of ideas is the best way to determine truth. It is an important concept fundamental to the exercise of free expression as provided by the First Amendment to the U.S. Constitution, and has been deemed indispensable to the functioning of a democracy such as the United States. The concept was first articulated by Justice Oliver Wendell Holmes Jr. in *Abrams v. United States,* 250 U.S. 616 (1919), in which he dissented from the majority decision upholding the convictions of five individuals for violating the Espionage Act of 1917 by distributing leaflets urging opposition to World War I:

> [T]he 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 [the people's] wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Some scholars have viewed Justice Holmes's statements as suggesting that freedom of expression is the best means of advancing knowledge and discovering truth: "[A]n individual who seeks knowledge and truth must hear all sides of the question. . . . He must consider all alternatives, test his judgment by exposing it to opposition, make full use of different minds to sift the true from the false. . . . [S]uppression of information, discussion, or the clash of opinion prevents one from reaching the most rational judgment, blocks the generation of new ideas, and tends to perpetuate error."

Despite the simplicity and apparent logic of the marketplace concept, few commentators believe that a free and open marketplace of ideas will necessarily or inevitably lead to the "truth." There have been many instances of "market failure" when the populace has failed to use the marketplace to make good or wise choices—for example, the election of Adolf Hitler and the rise of Nazi Germany in the late 1930s. Indeed, many critics doubt that truth is objective and question whether it is even possible to ascertain the truth. Some have argued that "knowledge depends on how people's interests, needs, and experiences" lead them to evaluate information and data. In addition, many psychological traits (for example, repressions, phobias, desires) "influence people's assimilation of messages" and their "understanding of perspectives." These psychological traits can lead to market failure and can "eviscerate . . . faith in the ability of the marketplace of ideas to lead to the 'best' truths or understandings."

Even though the assumptions that underlie the marketplace-of-ideas theory have been largely repudiated, the concept survives for a variety of reasons. First, the alternative to a free and open marketplace of ideas (governmental decrees of truth and repression of ideas the government regards as untrue) is repugnant to the concept of a free society. As one commentator stated, "The only justification for suppressing an opinion is that those who seek to suppress it are infallible in their judgment of the truth. But no individual or group can be infallible, particularly in a constantly changing world." Second, the United States functions as a representative democracy, which necessarily assumes that people should be allowed to choose their representatives. In order to exercise that right effectively, the people must be able to debate the issues of the day freely and openly and reach political consensus (at the ballot box) regarding those issues. This process necessarily assumes the existence of an

open marketplace or forum of ideas and the ability to foster change through persuasion. The U.S. Supreme Court retained the marketplace concept in *Nike, Inc. v. Kasky,* 123 S. Ct. 2554 (2003): "The First Amendment's protections of speech and press were 'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes.' "

Russell L. Weaver

See also: Abrams v. United States; First Amendment; *Gitlow v. New York; Schenck v. United States.*

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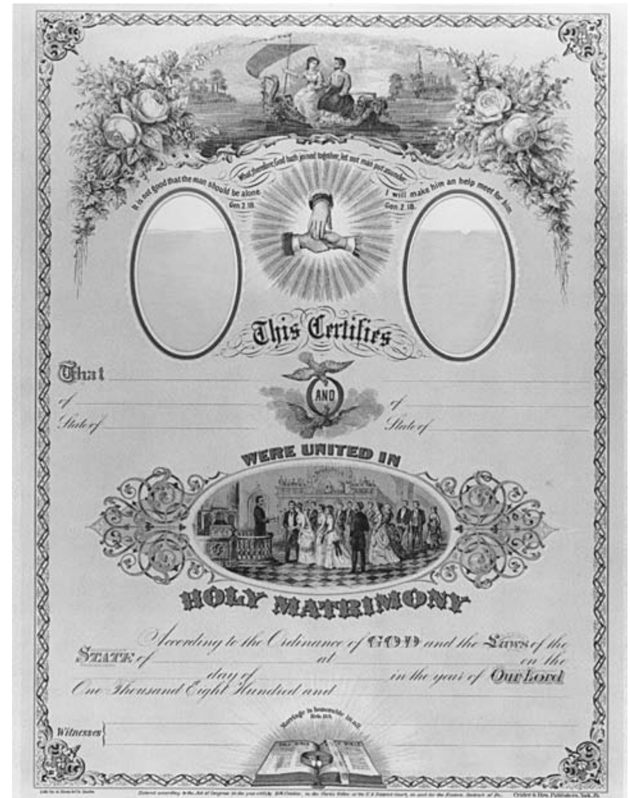

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According to the Ordinance of GOD and the Laws of the
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Witnesses

Marriage certificate, circa 1877. The marriage of a U.S. citizen receives legal recognition and thus can be a basis for claims, immunities, privileges, or entitlements. Although the right to marry is not mentioned in the Constitution, it has evolved into a fundamental right and has been left primarily to the states to regulate under the Tenth Amendment. *(Library of Congress)*

Marriage, Right to

The "right to marriage" means that the marriage of a U.S. citizen receives legal recognition and thus can be a basis for claims, immunities, privileges, or entitlements. Although the right to marry is not mentioned in the U.S. Constitution, it has evolved into a fundamental right and has been left to the states to regulate under the Tenth Amendment, though within limits that have slowly changed alongside the evolution in the institution of marriage itself. Regulation of the marital relation by the state has emerged out of a history wherein marriage was overdetermined by religious authorities, and common law marriage in the face of illegal unmarried cohabitation was the norm.

The importance of marriage was stressed in *Maynard v. Hill,* 125 U.S. 190 (1888): "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. . . . It is not so much the result of private agreement, as of public ordination. . . . It is a great public institution, giving character to our whole civil polity." *Maynard* notwithstanding, freedom of choice has fostered increasingly broad personal rights as regards marriage as well as divorce, and these rights challenge the social and legal status and restrictions surrounding the "traditional marriage."

The right to marry was given as one of the basic civil rights of mankind, linked to procreation, as the U.S. Supreme Court recognized in *Skinner v. Oklahoma,* 316 U.S. 535 (1942). The right to marry was first recognized as a liberty protected by the Due

Process Clause of the Fourteenth Amendment in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974). In *Zablocki v. Redhail,* 434 U.S. 374 (1978), the Court determined marriage was a fundamental liberty interest falling under the Due Process Clause of the Fourteenth Amendment as well as its Equal Protection Clause. Identification of the marital relationship as an individual's fundamental right with constitutional protection was recognized in a series of privacy cases starting with *Griswold v. Connecticut,* 381 U.S. 479 (1965), in which the Court stated that marriage was a right of privacy older than the Bill of Rights and covered a married couple's use of contraception. In *Loving v. Virginia,* 388 U.S. 1 (1967), the Court affirmed an individual's right to marry the person of his or her choice regardless of that person's race, thus finally striking down antimiscegenation laws in those six states that still maintained them.

Marriage is a civil contract that denotes a civil status. It is civil because it specifies a legal relationship subject to the control of the state, though marriages may be solemnized by acceptable religious authorities as well as by the state's agent, such as a justice of the peace. It is a contract because this relationship requires the consent of the two individuals party to it, whose personal, voluntary decision to get married is a prerequisite to license by the state. Marriage cannot be discarded at will but requires legal dissolution.

Many American citizens might subscribe to the romantic notion that their most personal relations of affection are for the most part undisturbed by the state, but this depends crucially on the identity of the claimant for the right to marry. The right to marry has until recently been denied to same-sex couples. In *Goodridge v. Department of Public Health,* 14 Mass. L. Rep. 591 (2003), however, the Massachusetts Supreme Court decided that the Massachusetts ban on same-sex marriage violated the state's commitment under its constitution to equal protection. In a follow-up decision with the same name, 440 Mass. 309 (2004), the court ruled that recognition of "civil unions" was not equivalent to marriage. Mayors in other cities in the United States have also issued marriage licenses to same-sex couples. The Defense of Marriage Act, signed into law by President William Clinton in 1996, defines marriage as exclusively between one man and one woman, calling into question the status of such relationships, especially in other states. President George W. Bush subsequently called for a constitutional amendment that would ban same-sex marriage throughout the United States. The much older restriction on the right to marry regarding a maximum of one spouse at a time remains in force across the fifty states, following the first unsuccessful challenge to the rule of monogamous marriage by members of the Mormon Church in *Reynolds v. United States,* 98 U.S. 145 (1879). Although certain limitations on the right to marry, such as age and degrees of relationship or kinship, may endure, others may emerge or return to the courts because of the increasingly pluralist nature of American society (for example, immigrants from some Muslim and Hindu countries where plural marriage is practiced) and changes in the law in nations similar to the United States (such as acceptance of same-sex marriage in some European Union states).

Gordon A. Babst

See also: Family Rights; *Griswold v. Connecticut; Loving v. Virginia;* Parental Rights; Polygamy; *Reynolds v. United States;* Transgender Legal Issues in the United States; *Zablocki v. Redhail.*

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Marshall, John (1755–1835)

John Marshall, the longest-serving chief justice of the U.S. Supreme Court, is considered the most important jurist in American history. He was responsible for, in essence, creating America's common law through his numerous opinions, and he authored several that concerned new civil rights and civil liberties created under the U.S. Constitution. As he stated in one prominent decision, *Marbury v. Madison,* 5 U.S. 137 (1803): "The very essence of civil liberty certainly consists in the right of every individual to claim the

protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. [The] government of the United States has been emphatically termed a government of laws, and not of men."

John Marshall was born September 24, 1755, into a family that had intimate ties to the Virginia gentry through his mother, who was related to the prominent Randolph family. One of his cousins was Thomas Jefferson, with whom Marshall would have many political conflicts later in life. Jefferson, however, was not the only famous founding father young Marshall knew; he attended the Westmoreland County Academy in Virginia with James Monroe. Later, Marshall took up arms with the Culpeper Minute Men to fight for American independence, and he became friends with Alexander Hamilton while both were camped at Valley Forge under the command of George Washington. (The feelings Marshall garnered then for Washington's leadership later led him to write a five-volume biography of the first president during his tenure as chief justice.)

After the Revolutionary War, Marshall resumed his studies. He chose to attend the College of William and Mary in Williamsburg, Virginia, where he became one of the earliest members of Phi Beta Kappa. Also at that time, he studied law under George Wythe, America's first law professor, and entered the Virginia bar. He gained wide fame as a young lawyer and became active in Virginia politics, serving in the legislature and at the state convention to ratify the United States Constitution. He later served as a diplomat during John Adams's presidency (1797–1801) and ultimately became secretary of state.

In fact, John Adams served as the major catalyst for Marshall's judicial career. As his presidential term was nearing its end, Adams nominated Marshall, whom he knew to be a loyal Federalist, to be chief justice of the U.S. Supreme Court in 1801. Marshall would serve in that capacity until his death in 1835. However, the position Adams appointed Marshall to was not the position of power it is today. When Marshall assumed the position of chief justice, the Supreme Court was not a truly coequal branch of government; rather, it was quite powerless to curb the actions of the executive or legislative branches. This would all change under Marshall's leadership.

Marshall's decision in *Marbury v. Madison* was significant because it created the concept of judicial review, the right of the judiciary to determine the constitutionality of the enactments and actions of the federal government. This concept would become an important tool in ensuring the civil rights and civil liberties guaranteed by the Constitution, because it enabled the Court to protect those freedoms through its judicial decisions. Later, Marshall's decision in *Cohens v. Virginia,* 19 U.S. 264 (1821), extended judicial review to actions taken by state legislatures and executives as well. Indeed, the Court would use judicial review over a century later to initiate integration in the South.

Marshall's most direct influence on civil rights and civil liberties, however, involved individual property rights, which he defended in two important cases by applying the Contracts Clause of the Constitution. *Fletcher v. Peck,* 10 U.S. 87 (1810) and *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819), would shape precedent for many years.

Fletcher v. Peck resulted from land grants issued by the Georgia legislature, which at that time was riddled with corruption. In the mid-1790s, the Georgia legislature issued land grants for the western part of its territory (now the states of Alabama and Mississippi). Those fraudulent grants, however, were later rescinded by the Georgia legislature after the corrupt legislators were defeated at the polls. The new legislature also terminated the rights of subsequent repurchasers. Fletcher, a repurchaser who had bought land from one of these grants, sued for breach of warranty of title. Marshall ruled that the Georgia legislature had acted unconstitutionally because it had violated the Contracts Clause of the Constitution. He stated that "in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights." In other words, once a right was given to the citizenry by the legislature, that right could not be revoked summarily, because the Constitution prohibits such an action.

Almost a decade later, Marshall was faced with a similar question in *Dartmouth College.* In that case, the New Hampshire legislature changed the 1769 royal charter that established Dartmouth College. Specifically, the legislature ousted the current trustees, changed the appointment process to involve the po-

litical process, and instituted external public oversight of the university. The former trustees sued under the Contracts Clause; their lawyer was Daniel Webster. Marshall agreed that the New Hampshire legislature acted in an unconstitutional manner, and he extended the protections of the Contracts Clause to corporate charters. Of major importance, he determined Dartmouth was a private, not public, institution, thus placing it beyond the New Hampshire legislature's purview. He further ruled that the royal charter was a contract and therefore was covered by the Contracts Clause. Because the university was private and the Contracts Clause applied, the New Hampshire legislature could not impinge on the college's property rights. Thus, Marshall again held property rights inviolate and found private entities exempt from state regulation.

Later, toward the end of his tenure as chief justice, Marshall employed the Commerce Clause to recognize property rights resulting from treaties made with Native Americans in Georgia. Although he initially held in *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831), that the Cherokee Nation could not be heard by the Court because its tribes were "domestic dependent nations" and in "a state of pupilage" to the United States, Marshall changed course in *Worcester v. Georgia,* 31 U.S. 515 (1832), finding unconstitutional the laws passed by the Georgia legislature that did not recognize Cherokee sovereignty: "From the commencement of our Government, Congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate." He also stressed that all dealings with Native American nations were the exclusive province of the federal government pursuant to the Commerce Clause. The Georgia legislature, therefore, acted unconstitutionally when it tried to negate Native American property rights. President Andrew Jackson, however, would not enforce Marshall's decision, which resulted in the removal of the Cherokees from Georgia, an event called the "trail of tears."

If only one of Marshall's decisions had to be selected for its influence on civil rights and civil liberties, *Barron v. City of Baltimore,* 32 U.S. 243 (1833), would be the case. John Barron owned a wharf in Baltimore, and he argued that the city's diversion of streams by his wharf violated his Fifth Amendment rights, because the city took part of his property without paying "just compensation." Marshall disagreed, however, and ruled that the Bill of Rights (the first ten amendments to the Constitution) did not apply to the states but rather constrained only the actions of the federal government. He ruled that civil and political liberties had to be guaranteed by state constitutions for an individual to recover:

> The [federal] [C]onstitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual States. Each State established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. . . . Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and would have been applied by themselves.

This philosophy held sway in U.S. jurisprudence until the early decades of the twentieth century, when the Court retreated from this position and started selectively to incorporate provisions of the Bill of Rights into the Fourteenth Amendment and apply them to the states through its Due Process Clause.

It is easy to read *Barron* as an indicator that Marshall's opinion was a negative influence on civil rights and civil liberties, but this sentiment ignores the decisions Marshall issued that established the fundamental individual property rights of the citizenry, especially in protecting those rights against interference by state legislatures. Through a number of very important decisions during the early days of the republic, Marshall shaped precedent that was relied on for years. He never saw the far-reaching effect of these cases because he died while still serving as chief justice July 6, 1835, but his influence on the law is still felt to this day.

David T. Harold

See also: Barron v. City of Baltimore; Fletcher v. Peck; Judicial Review; Property Rights; *Trustees of Dartmouth College v. Woodward.*

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Marshall, Thurgood (1908–1993)

One of the best-known legal figures of the twentieth century, Thurgood Marshall was a crusader for civil rights and liberties as an attorney for the National Association for the Advancement of Colored People (NAACP), solicitor general of the United States, judge on the U.S. Court of Appeals, and associate justice of the U.S. Supreme Court (1967–1991). Marshall believed in a "living Constitution," liberally interpreted to meet modern societal needs, and the rule of law. These were his chosen vehicles in a sixty-year legal career devoted to achieving not only civil rights for African Americans but also equality for women, the poor, and other underrepresented and disadvantaged people.

Marshall was born in Baltimore, Maryland, on July 2, 1908, the grandson of a slave. His father, William Marshall, worked as a Pullman car waiter and later as headwaiter at the Gibson Country Club. His mother, Norma Williams Marshall, taught elementary school and made tremendous sacrifices, such as pawning her wedding ring, in order to help pay for Thurgood's schooling. As a young man, Marshall attended local elementary and secondary schools for "colored" children. His experiences growing up in a segregated city had a lasting effect and influenced the career decisions he made later in life. After completing high school in Baltimore in 1925, he followed his brother William Aubrey Marshall and attended the historically African American Lincoln University in Chester, Pennsylvania, graduating with a bachelor's degree in 1929. After the University of Maryland Law School denied him admission because he was African American, he enrolled at Howard University Law School. At Howard he met the school's dean, Charles Hamilton Houston, the first African American lawyer to win a case before the U.S. Supreme Court. After graduating first in his class from Howard in 1933, Marshall passed the Maryland bar exam and went into private practice in his hometown of Baltimore. At the same time, he lent his legal talents to the local NAACP. Ironically, in one of his first legal victories, he forced the University of Maryland Law School to admit its first African American law student in 1935.

Marshall soon followed his law school mentor, Charles Houston, to New York and in 1938 was named the NAACP's chief legal officer, succeeding Houston. In 1940, Marshall helped to establish the organization's newly created Legal Defense and Education Fund (LDF). Marshall's tenure as head of the LDF, from 1940 to 1961, was a crucial time for the group that sought to overturn racial discrimination in American society. Marshall was joined in this effort by a host of brilliant young attorneys, including Charles Houston, William Hastie, William Coleman, Jack Greenberg, Lou Pollak, and others. Together, they implemented a long-term legal strategy to end racial segregation in housing, voting, and public education. As lead counsel, Marshall piled up a number of impressive victories before the Supreme Court. For example, in *Smith v. Allwright,* 321 U.S. 649 (1944), he successfully argued that a southern state's exclusion of African American voters from primary elections was unconstitutional. In *Shelley v. Kraemer,* 334 U.S. 1 (1948), he convinced the Court to rule that state judicial enforcement of racial "restrictive covenants" in housing was unconstitutional. In *Sweatt v. Painter,* 339 U.S. 629 (1950), he persuaded the justices that the new law school Texas created for African Americans was not equal to the existing law school at the University of Texas Law School at Austin.

Thurgood Marshall, chief counsel for the National Association for the Advancement of Colored People, talking to reporters in New York City after the Supreme Court ordered school desegregation to take place "with all deliberate speed," 1955. *(AP/Wide World Photos)*

Each of these victories helped lay the foundation for Marshall's most important case, *Brown v. Board of Education,* 347 U.S. 483 (1954). Marshall argued that placing African American children in segregated schools harmed them. He coupled legal arguments with social science studies to illustrate the damaging effect. In a unanimous opinion, the Supreme Court abandoned the doctrine of "separate but equal" and declared segregation of public schools unconstitutional. Although significant desegregation of public schools took decades to achieve, *Brown* was an important legal and moral victory for the civil rights movement. In all, Marshall won twenty-nine of the thirty-two civil rights cases he argued before the Court.

President John F. Kennedy appointed Marshall to the U.S. Court of Appeals for the Second Circuit in 1961, despite concerted opposition by a group of southern senators who held up his confirmation for months. Marshall served on the Second Circuit through 1965 and wrote nearly one hundred majority opinions, with none ever overturned by the Supreme Court. Many of his opinions focused on civil liberties issues, such as the rights of immigrants, limiting government intrusion in cases involving illegal search and seizure, double jeopardy, and right to privacy.

In 1965, President Lyndon Johnson appointed Marshall to the post of solicitor general of the United States, the government's chief lawyer before the Supreme Court. During his two-year tenure as solicitor, he won fourteen of the nineteen cases he argued before the Court, including a successful defense of the 1965 Voting Rights Act.

In 1967, Johnson appointed Marshall to the Supreme Court, making him the first African American ever to serve on that body. Marshall's twenty-four-year tenure on the Court was marked by a number of important victories in the area of civil rights and liberties. He challenged racism, bigotry, sexism, sexual preference, and prejudice in both his pointed questions during oral argument and his numerous opinions. He often joined his longtime ally Justice William J. Brennan Jr. and the other liberal members of the Court in such landmark cases as *Brandenburg v. Ohio,* 395 U.S. 444 (1969), which espoused the modern doctrine of protected speech; *Furman v. Georgia,* 408 U.S. 238 (1972), which held that the death penalty as then administered was unconstitutional; *Roe v. Wade,* 410 U.S. 113 (1973), which said that women had a constitutional right to privacy that included abortion; and *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), which allowed the use of affirmative action programs in higher education.

Toward the end of Marshall's years on the bench, the Supreme Court grew more conservative with the appointments of a number of Republican justices by Presidents Richard Nixon, Ronald Reagan, and George H. W. Bush. As a result, Marshall increasingly found himself on the losing end of important cases. His dissents were often personal, written from the perspective of someone who had experienced disadvantages firsthand. For example, in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1

(1973), he criticized the majority's holding that the Constitution's guarantee of equal protection was not violated by the property tax scheme used in Texas and most other states to finance public education. In dissent, Marshall derided the majority opinion's "unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens." In *City of Richmond v. J. A. Croson Co.,* 488 U.S. 469 (1989), the majority struck down the set-aside program used by Richmond, Virginia, for minority contractors. Disagreeing, Marshall wrote, "It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst. . . . The battle against pernicious racial discrimination or its effects is nowhere near won. I must dissent."

Marshall was opposed to retiring during the administration of a Republican president. Because he did not want his replacement to be a conservative jurist, Marshall hung on to his seat through the administration of Ronald Reagan. But in the third year of George H. W. Bush's presidency, Marshall finally relented—unable adequately to perform his judicial duties. He officially retired at the end of the Court's term on June 27, 1991, at the age of eighty-two; George H. W. Bush nominated another African American, Clarence Thomas, with much different political leanings, in Marshall's stead. Marshall died a year and a half later on January 24, 1993.

Artemus Ward

See also: Brandenburg v. Ohio; Brennan, William J., Jr.; Johnson, Lyndon Baines; *Roe v. Wade;* Solicitor General; Thomas, Clarence.

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Martial Law

The term "martial law" is used to describe two different but related events. The most common application refers to the displacement of civilian rule in a country by its own military authorities. Martial law also has been used to describe the military government of another nation's territories occupied by a victorious invader as the result of military conflict. U.S. history provides examples of both types of martial law and the conflicts that arise between the imposition of martial law and the preservation of civil liberties. Conflict arises from the differences between military procedures designed to maximize operational effectiveness and security in an area, on the one hand, and constitutional guarantees of due process designed to minimize government intrusion into civilian life, on the other.

The first sense of martial law describes a government responding to a threatening situation perceived as beyond the capacity of the regular civilian government to address. This perceived threat is used to justify the use of military authority to enhance government control in an area. The civil authorities may be only partially displaced, with the military assuming limited supplemental authority, or they may be totally supplanted with the military replacing the civilian government entirely.

In the United States, both national and state governments have imposed martial law. In court challenges to the use of military government of U.S. civilian populations, petitioners have argued that constitutional guarantees of civil liberties place strict limitations on this practice. During the War of 1812, General Andrew Jackson declared martial law in New Orleans. He imposed curfews on the civilian population and ordered the trial of civilians by military commission when he deemed their conduct contrary to the maintenance of order. A federal district court judge condemned Jackson's orders and declared them unconstitutional. The war ended before the case went beyond the district-court level.

During the Civil War, President Abraham Lincoln issued a proclamation September 24, 1862, declaring a limited state of martial law throughout the country and placing under the jurisdiction of military author-

Martial law on the Colorado border stops migratory laborers, 1936. *(Library of Congress)*

ities "all rebels and insurgents, their aiders and abettors, within the United States." This proclamation of martial law authorized the trial of civilians by military commissions and suspended the writ of habeas corpus (a petition for release from unlawful confinement). President Lincoln's proclamation was challenged in the landmark U.S. Supreme Court case of *Ex parte Milligan,* 71 U.S. 2 (1866). Lambdin Milligan, a civilian in Indiana, had been tried and sentenced by a military court under the president's declaration of martial law. His attorneys presented a lengthy list of precedents from British, French, and U.S. history supporting their argument that extension of martial law to a nation's own civilians violated the civilians' basic rights unless the regular civil authorities were not able to govern a jurisdiction. In contrast, the government supported its position by arguing that the rights of the civilians were superseded by necessity in times of military conflict and the government had the inherent right to do what was necessary to preserve the Union.

The Court was persuaded by the defense's argument and held that martial law could not be extended to civilians in the United States outside the area of insurrection if the civilian courts were still operating. The Supreme Court reaffirmed this precedent in *Duncan v. Kahanamoku,* 327 U.S. 304 (1946), when it held unconstitutional the trial of civilians by military courts under a declaration of martial law in Hawaii following the 1941 Japanese attack on Pearl Harbor, Hawaii.

State governors have declared martial law in response to both natural disasters and incidents of civil unrest. Declarations of martial law in response to labor unrest have been controversial. Union members have alleged that state authorities use the pretext of civil unrest to deploy troops to favor management interests in the labor dispute. Such allegations were made against California Governor Frank Merriam for using the California National Guard during the San Francisco general strike of 1934 and against Governor James Peabody for using the Colorado National Guard in response to the Cripple Creek miners' strike of 1903–1904.

The second sense of the term "martial law" refers to the military government of occupied territory in time of war. The Fourth Geneva Convention of 1949 governs modern practice and defines the obligations of occupying military powers during and after military conflict. The standards set forth in those treaties can be traced to the example set by U.S. General Winfield Scott's orders for his troops governing occupied territory in Mexico in 1846 and 1847. In his General Orders No. 20, General Scott used his troops to maintain law and order and perform the functions of traditional civilian courts.

General Scott's martial law administration provided guidance to Francis Lieber when he wrote General Orders No. 100, *Instructions for the Government of Armies of the United States in the Field,* published in 1863 and issued as a manual to federal troops during the Civil War. This manual specified the obligations of military forces to provide law and order and the essential functions of civil government in occupied areas. Lieber's manual became the model for the modern international conventions that require an invading force to ensure that law and order are maintained and the traditional functions of civil government are performed in occupied territories. Military and civilian leaders of occupying governments have been tried and convicted by international tribunals for violating these conventions.

Pinky S. Wassenberg

See also: Lincoln, Abraham; President and Civil Liberties.

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Massachusetts Body of Liberties

Thought to be the world's first modern bill of rights, the Massachusetts Body of Liberties was drafted in 1641 in response to both the practical necessity of codifying the laws of the young Massachusetts Bay Colony, as well as a popular desire to guard against the capricious actions of the Puritan governor and his magistrates. In form, the document was an extensive list of rights, procedures, and powers compiled by Nathaniel Ward, a preacher from nearby Ipswich, Massachusetts. Totaling ninety-eight numbered entries, the Body of Liberties addressed in detail the rights of the colonists in such matters as criminal proceedings, conscription, and even jury duty. Remarkably, seven of the twenty-six distinct rights spelled out in the Bill of Rights had their origin in this document, a number equal to the combined contributions of the Magna Carta, the English Petition of Right, and the English Bill of Rights.

Ward's document built on prior efforts by the colony to compile the existing laws of the towns that made up the Massachusetts Bay Colony, as well as to suggest appropriate measures in those areas where the laws were silent. Although owing much to English common law, the Body of Liberties was nevertheless striking in its appeal to Old Testament biblical law. Indeed, torn from its historical context, the document could be dismissed as simply a reactionary and oppressive instrument. Certainly, the evidence was there: The purchase of slaves was expressly allowed, and capital punishment was prescribed for such offenses as blasphemy.

Yet to embrace this view would be to miss the importance of the document in continuing and expanding for some in the New World the liberties first advanced in the Magna Carta; likewise overlooked would be the Body of Liberties' genesis, in part, as a bulwark protecting colonists from the threat of arbitrary government action; finally, also neglected would be the unique tension it reflected: The colony's Puritans were convinced that daily life was a struggle between serving out the higher purposes of God and resisting the temptations of the temporal world's surfeit of power, riches, and pleasures. Called on a mission to create a "city on a hill," a biblical commonwealth that would be the example for all other communities to follow, the Puritans raised the stakes of failure. The presence, then, of Old Testament passages in a document that limited the action of government through an enumeration of liberties should not be surprising, as it reflected the Puritans' attempt both to ground the law in the higher world of godly authority yet to recognize that governments were composed of fellow fallible persons against which individuals needed some measure of defense.

As an artifact of its era, the Body of Liberties reflects the Puritans' struggle to reconcile faith with the realities of worldly disorder. Yet it remains compelling in that it contains the seeds not only of America's greatest achievement in civil liberties—the Bill of Rights—but also, in the embrace of slavery, of its most egregious error.

Patrick Campbell

See also: Bill of Rights; Christian Roots of Civil Liberties; Magna Carta.

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Masses Publishing Co. v. Patten (1917)

Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), held that for speech to be stifled there must be a showing that the speech, written or oral, would lead the reader or hearer to participate in immediate unlawful action. It was the first prominent case to address the issue of incitement, and its rationale is still used by courts today in cases involving free speech rights under the First Amendment to the U.S. Constitution.

In some quarters, war has never been a popular thing. That was true in 1863, as it was in 1968, as it was in the days leading up to U.S. entrance into World War I. Catering to this segment of the population was the Masses Publishing Company. It produced a monthly radical publication called *The Masses.* The postmaster of New York City, T. G. Patten, however, was not fond of this publication, and he barred its dissemination after consulting with the postmaster general of the United States. The rationale for his action was that *The Masses* violated the Espionage Act.

The Espionage Act of 1917 made it illegal to "willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or promote the success of its enemies." *The Masses* did this, the postmaster argued, through four cartoons and four articles in its August 1917 issue. Examples of this subversiveness were found in a poetic tribute to Emma Goldman and Alexander Berkman, who were in prison for conspiracy to oppose the draft; an article praising those two individuals for opposing the draft; and a cartoon that showed the Liberty Bell broken into fragments. Masses Publishing moved for a preliminary injunction to prevent the postmaster from keeping *The Masses* out of circulation. The case was assigned to Learned Hand, a district court judge for the U.S. District Court for the Southern District of New York.

As it would turn out, Hand's opinion in *Masses Publishing Co. v. Patten* was the first major decision to address the concept of "incitement" as it related to the Free Speech Clause of the First Amendment. In fact, *Masses* was an influence on Oliver Wendell Holmes Jr. when he penned the concept of "clear and present danger" in *Schenck v. United States,* 249 U.S. 47 (1919). Ultimately, the U.S. Supreme Court in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), adopted Hand's rationale in *Masses* to guarantee the rights of those who chose to espouse beliefs that were not shared by the general public.

So what did Hand write that was so noteworthy? He created the concept that for speech to be suppressed, whether it be in written or spoken form, it must incite the reader or hearer to participate in immediate unlawful action. In other words, "[t]o counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it." *The Masses* did not contain such "incitement," Judge Hand found.

He made it a point to show that it was important to review both the manner of the words used as well as the content before free speech rights could be infringed: "Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state." Violence was not to be tolerated; free speech was.

For Hand, there was a fine line to be walked between prosecuting those who actively counseled the overthrow of government and those who held beliefs adverse to the government's aims. He ruled that "to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the

purpose to disregard it must be evident when the power exists. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation." This approach, however, was not endorsed by the Second Circuit Court of Appeals, which reversed his opinion outright in *Masses Publishing Co. v. Patten,* 246 F. 24 (2d Cir. 1917).

But Hand believed—and rightly so, as history suggests—that this standard should be employed whenever incitement was an issue. In fact, he participated in heated letter writing with Supreme Court Justice Oliver Wendell Holmes Jr., who was a close friend, as to whether "clear and present danger" or his test from *Masses* was the proper analysis for a court to conduct before ruling on an incitement case. Two years after his decision, as a tribute to Hand's opinion in *Masses,* noted constitutional scholar Zechariah Chafee dedicated his book *Freedom of Speech* to Hand. Ultimately, the power of the *Masses* decision is its longevity and its clear reasoning that courts follow to this day.

David T. Harold

See also: Brandenburg v. Ohio; Clear and Present Danger; First Amendment; Hand, Learned; Holmes, Oliver Wendell, Jr.; *Schenck v. United States.*

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Mayflower Compact

In September 1620, a party of English Separatists, dissenters from the alleged "Romanism" of the Church of England, left Britain to establish a semi-autonomous community in North America. On November 11, sheltered within Cape Cod Bay and prior to going ashore, the settlers drafted and signed the Mayflower Compact, an agreement that established lines of political authority and allegiance, and in time was interpreted as the seed of American constitutionalism, in both its form (a compact) and its content (the securing of civil rights).

According to William Bradford, the Compact's first signatory and the colony's future governor, the Separatists wanted the "churches of God [to] revert to their ancient purity and recover their primitive order, liberty and beauty." Seeking freedom to worship, they obtained a charter from the Virginia Company to settle in North America.

The origins of the Mayflower Compact are traceable to the Virginia Company's charter. The Pilgrims landed in Massachusetts, missing their authorized settlement in Virginia by several hundred miles and taking them to a place outside the jurisdiction of the Virginia Company. The charter granted by the Virginia Company had established the foundations of political authority in the future colony, but the failure to land at the point specified appeared to nullify the agreement and create a vacuum of authority. The Pilgrims' agreement within the charter to remain in communion with the Church of England, to obey the king, and to recognize the ultimate ecclesiastical authority of the crown was undermined.

Bradford explained how the Compact developed: "Occasioned partly by the discontented and mutinous speeches that some of the strangers amongst them had let fall from them in the ship: That when they came ashore they would use their own liberty, for none had power to command them, the patent they had being for Virginia and not for New England, which belonged to another government, with which the Virginia Company had nothing to do."

The continuities between the Mayflower Compact and the constitutionalism of the Declaration of Independence and Constitution are complex. The contractual form of the agreement, as well as the Pilgrims' embryonic concern for religious liberty and civil rights, mark the Compact as an obvious precursor to America's later process of developing a constitution. Yet the Compact also reveals a decidedly preliberal

The Pilgrims signing the compact on board the *Mayflower,* November 11, 1620. *(Library of Congress)*

understanding of political authority and the purposes of government.

For example, it would become clear from their own intolerance toward dissent that the Pilgrims sought religious freedom as a group, not as individuals. Furthermore, the ends of government articulated in the Compact were different from those later advanced in the American Revolution and secured by the state and national constitutions. According to the Declaration of Independence, government exists to secure rights. Yet the Compact describes the Pilgrims' voyage as "undertaken, for the glory of God and advancement of the Christian faith and honour of our king and country." Only to attain those goals did they "covenant and combine . . . into a civil body politic."

The relationship between America's Puritan origins and its later liberal revolution is complex. As recognized by French statesman and author of *Democracy in America* Alexis de Tocqueville (1805–1859), seventh U.S. president John Quincy Adams (1767–1848), and numerous constitutional interpreters, the Mayflower Compact is at least a part of America's civil religion, and it points the way toward a more sophisticated constitutionalism that would result in a richer protection of personal liberty.

Brendan Dunn

See also: Constitutionalism; Declaration of Independence; English Roots of Civil Liberties; United States Constitution.

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McCardle, Ex parte (1868)

In *Ex parte McCardle,* 74 U.S. 506 (1868), the U.S. Supreme Court upheld a law removing its authority to review a case concerning an individual whose right to a writ of habeas corpus was taken away. This case is important for the role it played in the battle among the three branches of the federal government over post–Civil War Reconstruction policies and in the development of case law on the limitations of the powers of the U.S. Supreme Court. One issue in play was whether the Court had power to protect individuals' civil liberties that were being restricted by the legislative branch.

William McCardle, editor of a Vicksburg, Mississippi, newspaper, was to be tried before a military commission on charges of inciting insurrection and publishing libelous materials in violation of the statutes Congress had passed to govern the defeated Confederate states. McCardle petitioned the U.S. Circuit Court for a writ of habeas corpus. (A "writ of habeas corpus" orders the government official confining an individual to produce the individual in court so the court can ascertain the legality of the individual's confinement.) McCardle argued that the recently decided U.S. Supreme Court case of *Ex parte Milligan,* 71 U.S. 2 (1866), prohibited the trial of civilians by military commission when the regular civilian courts were operating. After his petition was denied, McCardle appealed to the U.S. Supreme Court.

The statutory basis of McCardle's appeal is important to understanding the significance of the *McCardle* decision. The U.S. Constitution does not specify the scope of the federal courts' power to use the writ of habeas corpus. The Judiciary Act of 1789 recognized the power of the federal courts to issue the writ in cases of individuals held by federal authorities. In 1867, Congress amended the Judiciary Act extending the federal courts' power to issue the writs to include cases involving individuals held by state authorities as well. That 1867 statute also specifically authorized the appeal of habeas corpus cases to the U.S. Supreme Court. After McCardle's appeal had been argued before the Supreme Court, but before the Court had issued its decision, Congress passed another statute. This 1868 statute repealed the portion of the 1867 statute that had authorized McCardle's appeal to the Supreme Court. Championing the repeal statute were Republican senators who feared the Court would use McCardle's case to declare unconstitutional the statutory structure of Reconstruction government in the southern states.

In response to the passage of the repeal statute, the Supreme Court asked the parties to the McCardle case to appear again before the Court and argue the jurisdiction issue. The Court issued its unanimous decision in December in an opinion written by Chief Justice Salmon P. Chase holding that Article III of the U.S. Constitution gave Congress the power to make exceptions to the Court's appellate jurisdiction and that Congress had done so in the 1868 statute. The Court did not have the power to question the motives Congress had in passing the statute and, lacking jurisdiction, the Court only had the authority to dismiss the appeal.

Critics of *McCardle* accuse the Court of failing to exercise its constitutional authority to protect civil liberties from attack by the legislative branch. However, later in the 1868 term, in *Ex parte Yerger,* 75 U.S. 85 (1868), the Supreme Court reasserted its authority to hear appeals of habeas corpus petitions by holding that power was authorized by the original 1789 Judiciary Act. The 1868 repeal statute was interpreted to apply only to the extension of the Court's power granted by the 1867 amendment to the original statute.

The *McCardle* case is cited in contemporary legal literature as establishing the principle that the Supreme Court reads Article III of the U.S. Constitution as giving Congress the authority to limit, for any reason, the Court's appellate jurisdiction. The Court will not examine those motivations. As historical precedent, the case shows that Congress can be vulnerable to the temptation to use this power over the Court's appellate jurisdiction to block the Court from pro-

tecting civil liberties in times of national emergency. However, as the Court showed in *Yerger,* the obstacle to appellate review created by Congress is vulnerable to a creative reading of legislative history presented by a defendant's attorney who is able to show the justices a way to get at the merits of a civil liberties case without disturbing the Article III principle.

Pinky S. Wassenberg

See also: Civil War and Civil Liberties; Habeas Corpus.

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McCarran Act

The McCarran Act, officially known as the Internal Security Act of 1950, was the major attempt by Congress to move from criminalizing the activities of the Communist Party to regulating those activities. The statute created a policy of compulsory registration of Communists and communist organizations while decriminalizing membership on the theory that public exposure of Communists would also expose their secret activities. Because of the U.S. Constitution's Fifth Amendment provision against self-incrimination, compulsory registration had not been possible so long as membership remained a crime. The act also provided the federal government with the authority to round up registered subversives and transport them to internment camps in cases of national emergency. The legislation raised problems pertaining to the right of free association protected under the First Amendment to the U.S. Constitution.

The legislation required that "Communist-action organizations" register with the Subversive Activities Control Board (SACB), providing the names and addresses of their officers and members and persons who actively participated in their activities. Communist-action organizations were defined by how closely their political positions followed those espoused by international communism, their dependence on financial support from foreign governments, and whether members were perceived as disloyal to the United States. Organizations did not have to advocate the violent overthrow of the government or commit any form of violence, sabotage, or espionage to be listed. In 1954 the McCarran Act was amended to include a new category, "Communist-infiltrated" organizations, organizations that were not allied with the Communist Party but had a number of party members in leadership positions. SACB became bogged down in a long series of legal challenges to its proceedings, however, and many of its findings were invalidated after it used perjured testimony in its conclusions.

Registered organizations were denied the tax benefits generally extended to nonprofit groups; any mail an organization sent was required to be stamped as being disseminated by a "Communist-action" organization; and members could not hold a variety of jobs with the government or with private businesses performing work for the government considered sensitive. Organization members were prohibited from using or attempting to use a passport or even applying for one. Under the second part of the act, members could be interned, much as Japanese Americans were during World War II, as a preventive measure if federal authorities believed that a communistic invasion or revolution was imminent.

The McCarran Act was reviewed by the U.S. Supreme Court in *Communist Party v. Subversive Activities Control Board,* 351 U.S. 115 (1956), but the Court avoided the issue of compulsory registration by focusing on SACB's use of allegedly perjured testimony in its hearings. Five years later, the Supreme Court upheld the registration requirement for organizations in *Communist Party v. Subversive Activities Control Board,* 367 U.S. 1 (1961), by arguing that registration with SACB was little different from the registration required of many commercial organizations by the government under the securities laws. The Court's opinion avoided the question of how the disclosure of members' and sympathizers' names would affect those individuals. That issue was decided four years later in *Albertson v. Subversive Activities*

Control Board, 382 U.S. 70 (1965), when the Court found that mere association with the Communist Party was enough to provoke reasonable fears of prosecution among members, thus infringing on their Fifth Amendment right against self-incrimination. In *Aptheker v. Secretary of State,* 378 U.S. 500 (1964), the Supreme Court had already struck down the denial of passports to members of the Communist Party because the prohibition violated the constitutionally protected right to travel.

The McCarran Act was effectively invalidated by the courts during the mid-1960s after fear of communism had faded. Although SACB had issued several orders to register, organizations continued to resist the orders, a strategy that was validated when the Supreme Court voided the board's remaining orders. The Court found that the record on which the orders were based was too antiquated to be used in determining whether the organizations were currently Communist-controlled in *American Committee for Protection of the Foreign-Born v. Subversive Activities Control Board,* 380 U.S. 503 (1965), and *Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Board,* 380 U.S. 513 (1965). Two years later, the McCarran Act became completely moot following *United States v. Robel,* 389 U.S. 258 (1967), when the Supreme Court found that the legislation "quite literally establishes guilt by association alone," violating the First Amendment right of association.

Daniel A. Levin

See also: Communists; Fifth Amendment and Self-Incrimination; First Amendment.

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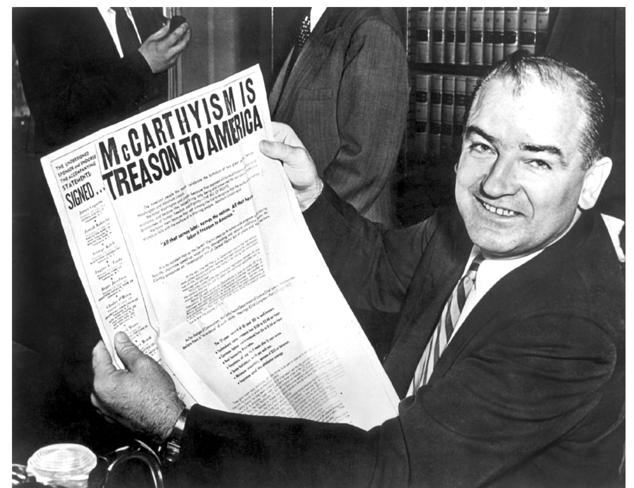
McCarthy, Joseph (1908–1957)

Joseph McCarthy was a Republican senator from Wisconsin who, from 1950 to 1954, launched a series of investigations into alleged Communist infiltration in the United States. His investigations led to the suppression of the rights of many individuals.

McCarthy began his career as a senator when he defeated Senator Robert La Follette Jr., son of the famous Republican senator, in the 1946 Wisconsin election. His early career was uneventful until a speech he made in 1950 in Wheeling, West Virginia, in which he announced he had the names of dozens of known Communists in the Department of State. His claim followed the discovery of a series of spy rings at the top levels of government that included Alger Hiss, Lawrence Duggan, and Harry Dexter White. McCarthy had run on an anticommunism agenda during his Senate campaign and made speeches against communism on the Senate floor, but after the West Virginia speech he became the driving force in Congress for anticommunism. His speech likely was the opening blast in his reelection campaign for 1952, but it soon spun out of control.

Using his position as chairman of the Senate Government Operations Committee, McCarthy began hearings and investigations about what he said were examples of Communist infiltration of the government and society in general. Over the period 1950–1954, McCarthy used the committee's subpoena power to call witnesses, bully and threaten them, and



Senator Joseph McCarthy grins boldly during a recess of his subcommittee's hearing at Albany, New York, February 1954. He is holding up a reprint of an advertisement reading "McCarthyism is treason to America" that was paid for by the independent United Electrical Workers Union.
(© Topham/The Image Works)

damage the cause of anticommunism in the United States.

McCarthy and his committee were unrelenting, attacking those with Communist ties and smearing those who were not Communists. His questioning of the beliefs and motives of witnesses was seen by some as an attack on the individual right of free association. McCarthy exhibited an overbearing demeanor and reckless conduct during the hearings, and he seemed less directed at rooting out Communists than garnering attention for his own purposes. His refusal to abide by the moderate tone found in the nation's political and legal discourse made him an easy target for those who despised anticommunism. Hearings have been described as the "greatest disaster in the history of American anticommunism." McCarthy smeared the witnesses before his committee, but he and the entire anticommunism movement were smeared by his opponents.

McCarthy's downfall was inevitable, as his attacks became more strident. He accused the administration of President Dwight D. Eisenhower of deliberately protecting Communists within the executive branch and took aim at one of the most respected institutions in American society, the U.S. military. In the Army-McCarthy hearings, the senator made wild accusations against the military and was met by a withering denial from military officials. The hearings were broadcast on television, giving American citizens their first view of McCarthy's style of questioning. They did not like what they saw, and his support in the polls plummeted. The Senate took action in December 1954, formally censuring McCarthy and ending his committee's hearings. McCarthy continued serving as senator until his death in 1957.

Douglas Clouatre

See also: Blacklisting; Communists; *Dennis v. United States;* McCarthyism; Movie Treatments of Civil Liberties.

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McCarthyism

McCarthyism refers to the political practice of falsely accusing political opponents of being disloyal to the United States. The tactic often is used to suppress political opponents and therefore it works to threaten political dissent and disagreement. For those committed to free speech rights as guaranteed under the First Amendment to the U.S. Constitution, McCarthyism is a major threat to civil liberties.

McCarthyism is named after Senator Joseph McCarthy (1908–1957) (R-WI) who from 1950 through 1954 used Senate hearings and speeches to root out alleged Communist influence or infiltration in the State Department, the military, and Hollywood. McCarthyism is thus often also referred to as "red baiting," or the practice of seeking to discredit political opponents, usually those on the liberal or political left, by labeling them as Communists and disloyal to the United States.

When the czar's government fell to the Bolsheviks in 1917, many U.S. observers feared that Russian spies were seeking to infiltrate America and orchestrate its overthrow. In the 1930s and during the Great Depression, the Communist Party of the United States (CPUSA) grew rapidly, heightening that concern. During the 1930s and 1940s, several laws, such as the Smith Act, were passed by Congress in an effort to make Communist advocacy illegal, and the House Un-American Activities Committee (HUAC) was formed in 1938 to investigate Communist influence in the United States. As a member of HUAC, Rep. Richard M. Nixon (R-CA) held hearings into supposed Communist activity in the country.

After World War II, fear that the Soviet Union would steal U.S. secrets about nuclear weapons, the North Korean invasion of South Korea in 1950, and the arrest of Julius and Ethel Rosenberg in 1950 for allegedly spying for the Soviets exacerbated Communist hysteria. Within this context, McCarthyism emerged.

In February 1950, in a speech in West Virginia,

Senator McCarthy claimed to have a list of fifty-seven known Communist spies who were working in the State Department. He did not name names or offer proof, and in speeches and subsequent Senate hearings, the numbers of supposed Communists changed and their identity was occasionally revealed. The best evidence indicates that the vast majority of these individuals were not Communists but were instead political liberals or other persons who were labeled as such for a variety of personal and political motives.

From 1950 until 1954, Senator McCarthy, along with his assistant Roy Cohn, held numerous hearings into alleged Communist influence in the United States. These hearings often involved the use of subpoenas to compel witnesses, often with little notice, to appear before Senator McCarthy's committee where they were asked about their alleged Communist activities and also directed to name others who were Communists. Witnesses were badgered and threatened when they refused to answer questions by pleading or invoking their Fifth Amendment right to remain silent. Through these hearings and speeches, many individuals, including General George Marshall, were accused of being disloyal, and fellow senators and other individuals who criticized Senator McCarthy and his tactics were accused of being Communist sympathizers.

As a result of the hearings, many individuals lost their jobs in and outside of government. In Hollywood, in part as a result of director Elia Kazan's testimony naming Communists in the motion picture industry, a blacklist was created that prevented supposed Communists from working in the movies. Dozens of individuals lost their jobs. Beyond the State Department and Hollywood, Communist hysteria led to the requirement that individuals sign loyalty oaths; in general, red baiting was used across the country to brand many people as unpatriotic. Organizations suspected of being Communist fronts were placed on the Attorney General's List of Subversive Organizations, with membership in these groups often used as proof of a person's political disloyalty.

The legacy of McCarthyism in America has been enormous. Many people were questioned by McCarthy about their political views, with the senator often asking people, "Are you now or have you been a member of the Communist Party?" Individuals were often demeaned by being described as "card-carrying members of the Community Party." These phrases became part of American popular culture.

Some scholars argue that McCarthyism began with Senator McCarthy and the threat of communism, but others see it as rooted in various aspects of U.S. political and social psychology. Arthur Miller's *The Crucible,* written in the 1950s, is a play about the 1692 Salem, Massachusetts, witch-hunts that resulted in the deaths of twenty-four people—nineteen were hanged, four died in prison, and one was crushed to death—because they were accused of being witches. Miller and others contend that the Salem witch-hunts were an early precursor of McCarthyism, in that lies and fear were used to attack individuals who were unpopular. In this conceptualization of McCarthyism, its real roots rest in fear and prejudice against foreigners and unpopular individuals, and thus there are other examples to cite, such as the 1798 Alien and Sedition Acts and, after the 1941 attack on Pearl Harbor, the forcible relocation of and internment of over 125,000 loyal Japanese Americans into concentration camps.

McCarthyism did not end with the 1950s. Since then, the tactic of equating political criticism with disloyalty has persisted. For example, J. Edgar Hoover and the Federal Bureau of Investigation scrutinized Martin Luther King Jr. and the civil rights movement during the 1950s and 1960s, and those who participated in these activities and demonstrations were labeled Communists. During the 1988 presidential race, some observers saw McCarthyism at work when Republican presidential candidate George H. W. Bush attacked Democratic presidential candidate Michael Dukakis as being a "card-carrying member of the American Civil Liberties Union." In addition, after the terrorist attacks on the United States on September 11, 2001, Congress passed the Patriot Act to make it easier for government to investigate terrorist activity in the country. Some critics have contended that President George W. Bush and U.S. Attorney General John Ashcroft have used McCarthyite tactics to attack their political critics. In sum, McCarthyism as a means of questioning political loyalty has been a potent tactic to attack opponents and suppress dissent.

David Schultz

See also: Blacklisting; McCarthy, Joseph; Movie Treatments of Civil Liberties; Red Baiting; Red Scare.

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McCleskey v. Kemp (1987)

In *McCleskey v. Kemp,* 481 U.S. 279 (1987), the U.S. Supreme Court rejected a challenge to capital punishment rooted in statistical findings of racial bias in sentencing. In so doing, it closed off what opponents of the death penalty had viewed as a promising line of attack. Attorneys for Warren McCleskey, an African American man convicted in Georgia of murdering a white police officer, sought to challenge his death sentence on the grounds that it reflected a racial bias that permeated Georgia's system of capital punishment, in violation of the Eighth Amendment prohibition on cruel and unusual punishments and of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The equal protection argument had been unsuccessful when presented by earlier advocates of abolishing the death penalty, but McCleskey's counsel had reason to believe that it would fare better by the mid-1980s because new research substantiated claims that race played a significant role in Georgia's capital sentencing. More specifically, a team of researchers, led by David Baldus, examined almost 2,500 murder and nonnegligent homicide cases in Georgia during the 1970s and performed a multivariate analysis of factors potentially related to the decision to impose a death sentence. The Baldus study found that the decision to impose death sentences was weakly correlated with the race of the perpetrator and more strongly correlated with the race of the victim. In other words, an African American murderer was likelier to receive a death sentence than a white murderer, and one who killed a white person was likelier to receive a death sentence than one who killed an African American person.

When it agreed to hear *McCleskey,* the Supreme Court was embroiled in conflict over capital punishment. Conservatives argued that the death penalty's effectiveness was undermined by the lengthy capital appeals process, whereas liberals claimed that a capital sentence was inherently cruel and unusual punishment. These divisions within the Court were evident in its five–four decision rejecting McCleskey's equal protection claim. Led by Justice Lewis F. Powell Jr., the majority refused to assess the validity of the Baldus study's methodology and results. Instead, the Court assumed the study's validity but held that its findings were insufficient to sustain a claim of racial bias in capital sentencing. It would not be enough to show that a jurisdiction's capital sentencing decisions, taken in the aggregate, reflected an intent to discriminate; an appellant would have to demonstrate that racial bias had permeated his or her specific proceedings. The majority acknowledged that the Court had accepted similar uses of statistical findings when considering discrimination in the contexts of employment and jury selection, but held that capital sentencing decisions required consideration of factors unique to each defendant and criminal offense, such that courts could not draw inferences about particular sentencing decisions from general statistical patterns.

McCleskey, then, represented a crucial setback for anti-death-penalty activists. Had the Court relied on the Baldus study in overturning McCleskey's death sentence, it would have acknowledged that capital sentencing was administered arbitrarily in Georgia, contrary to the Court's dictates in *Furman v. Georgia,* 408 U.S. 238 (1972). The constitutionality of capital punishment would then have been called into question whenever statistical evidence of racial discrimination in capital sentencing could be demonstrated. Instead, the Court raised the bar for claimants such as McCleskey.

Jeremy Buchman

See also: Capital Punishment; *Furman v. Georgia; Gregg v. Georgia.*

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McConnell v. Federal Election Commission (2003)

In *McConnell v. Federal Election Commission,* 124 S. Ct. 619 (2003), the U.S. Supreme Court upheld the Bipartisan Campaign Finance Reform Act of 2002, popularly known as the McCain-Feingold Act. This law imposed new limits on how money may be used by individuals and some groups to influence elections. Campaign finance in elections has generated multiple issues involving rights to free speech and association under the First Amendment to the Constitution.

The regulation of money in politics is historically a cycle of regulation, loophole discovery, and exploitation. By 2002 the system put in place by the Federal Election Campaign Act of 1974—and modified by the Supreme Court in *Buckley v. Valeo,* 424 U.S. 1 (1976)—hung in tatters: Both political parties evaded restrictions on political contributions to individuals by raising millions of dollars in unregulated "soft money"—cash purportedly earmarked for "party-building activities" such as voter registration drives but routinely redirected for carefully worded television advertisements. Consequently, the process swung into the legislation phase, resulting in the Bipartisan Campaign Reform Act of 2002 (BCRA).

The brainchild of Senators John McCain (R-AZ) and Russell Feingold (D-WI) and Representatives Christopher Shays (R-CT) and Martin Meehan (D-MA), the BCRA closed the soft-money loophole, forcing the political parties to raise only money that could be tracked by statutory limits. It also banned interest groups, corporations, and unions from using general treasury funds to run television commercials that referred to a particular candidate within thirty days of a primary election or within sixty days of a general election (discarded was the old "magic words" doctrine banning only the urging of a candidate's election or defeat). Groups could now only run commercials referring to specific candidates close to election day if they had been paid for by money raised specifically for advertising purposes through a political action committee. Other provisions included an increase in the overall contribution limits, which had remained static since the passage of the FECA, and a structure in which candidates facing independently wealthy opponents would have their contribution limits trebled if deep-pocketed opponents dipped into their personal assets to fund their campaigns.

Within days of its passage in March 2002, the BCRA was challenged in several lawsuits, including one filed by its main congressional antagonist, Senator Mitch McConnell (R-KY). McConnell eventually secured his name atop the consolidated litigation, which featured a list of eighty-four plaintiffs representing diverse political viewpoints, including the National Rifle Association, the American Civil Liberties Union, the AFL-CIO, and the National Right to Work Committee. These odd alliances were a tradition in the fight over campaign finance reform; in the original *Buckley* lawsuit, for example, former Watergate prosecutor Archibald Cox submitted an amicus (friend of the Court) brief supporting the FECA, thus making himself a legal teammate of the Ford administration's solicitor general, Robert Bork—who had controversially fired Cox in the 1973 "Saturday night massacre" ordered by President Richard Nixon.

Pursuant to an acceleration provision in the statute—included so as to produce a ruling on its constitutionality in time for the 2004 presidential election—the lawsuit went directly before a special panel of three federal judges: District Judges Colleen Kollar-Kotelly and Richard Leon and D.C. Circuit Judge Karen LeCraft Henderson. The hoped-for expedited review took significantly longer than anticipated, however, and when the panel at last announced its ruling five months after oral argument, the reason for the delay was clear. The three judges had been comprehensively unable to find common ground on the case, and in an orgy of acrimony and contradiction, the panel produced a monstrous 1,638-page ruling that was so spectacularly incomprehensible that it required a four-page spreadsheet merely to summarize each judge's separate findings on each issue.

Finally, in December 2003, mere weeks before the first 2004 presidential primaries, the U.S. Supreme

Court stunned observers by narrowly upholding the BCRA. The five–four opinion was jointly authored by Justices John Paul Stevens, for years an outspoken and caustic critic of the Court's campaign finance jurisprudence, and Sandra Day O'Connor, who had written very little on the subject during her two decades on the Court despite being the only justice even to have run for elective office.

After *Buckley,* the Court had consistently adhered to two basic principles in its campaign finance cases. The first was that the only constitutionally acceptable rationale for campaign finance regulation was to combat the appearance of corruption; purposes advanced for restricting political money included to level the playing field between rich and poor candidates or to hold down the cost of running for office, but these were repeatedly rejected as unworthy reasons to encroach upon the First Amendment. The second was that the only kind of corruption the Court feared was the quid pro quo exchange of a campaign contribution for a cooperative vote on legislation; a broad view of corruption signaling that the political system was generally "for sale" was insufficient to justify campaign finance rules. Although neither of these principles was abandoned in *McConnell,* the majority effectuated a subtle attitude adjustment that enabled it to preserve the law—and that could have far-ranging implications for future regulatory schemes.

The adjustment was a fine-tuning of the Court's understanding of quid pro quo corruption. The specter of a quid pro quo remained a prerequisite for campaign finance regulation, but the Court for the first time interpreted access to the process as a thing of value that could be offered in exchange for a campaign contribution, thus bringing the anticorruption rationale into play. Prior to *McConnell,* the Court had insisted that only the tangible result of the legislative process—a vote in favor of friendly legislation, a regulatory exemption, or a pork-barrel project, for example—triggered the possibility of corruption. In *McConnell,* the fact that the lawmaker's door was being held open for contributors was now itself regarded as a commodity, and the Court was especially cognizant of the brazenness with which this commodity was being sold by political parties and legislators. Justice Anthony M. Kennedy's dissenting complaint that the Court should adhere to a system that monitored only "actual corrupt, vote-buying exchanges, as opposed to interactions that possessed quid pro quo potential" was tartly dismissed by the majority, which labeled this perspective "a crabbed view of corruption."

The language of *McConnell* bears the hallmarks of Justice Stevens's twenty-seven years of frustration over the Court's campaign finance decisions. But the result of *McConnell* is classic Justice O'Connor—a pragmatism that emphasizes the political realities that result from the Court's work, and a studious avoidance of broad statements of principle in favor of crafted compromise.

Steven B. Lichtman

See also: Buckley v. Valeo; First Amendment; Independent Expenditures.

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McIntyre v. Ohio Elections Commission (1995)

In *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995), the U.S. Supreme Court ruled that an Ohio law banning the distribution of anonymous political campaign literature violated the right of free speech protected under the First Amendment to the U.S. Constitution and applied to the states through the Fourteenth Amendment. The issue was whether anonymity of the communication deprived the speech of First Amendment protection.

Margaret McIntyre opposed her local school district's request for a tax levy. She expressed her opposition by preparing and distributing flyers to persons attending a public meeting concerning the levy. Some

of the flyers identified her as the author, but others were signed "Concerned Parents and Tax Payers." None of the information on the flyers was false, misleading, or libelous. An assistant school superintendent informed McIntyre that some of the flyers did not conform to Ohio's election laws because they did not identify the author. McIntyre handed out more flyers at a second public meeting. The tax levy was defeated in two public votes before being approved in a third election. Five months after the levy was approved, the assistant school superintendent filed a complaint with the Ohio Elections Commission, charging McIntyre with illegal distribution of anonymous flyers. The commission found that her actions were unlawful and fined her $100, a decision reversed by a local trial court. The Ohio Court of Appeals reversed the local court and reinstated the fine, a decision affirmed by the Ohio Supreme Court.

In a seven–two decision, the U.S. Supreme Court reversed, holding that McIntyre's right to distribute anonymous campaign literature was protected by the constitutional guarantee of free speech. In its ruling, the Court overturned Ohio's law and similar laws on the books in nearly every other state. In his opinion for the majority, Justice John Paul Stevens surveyed the history of anonymous speech in the United States, pointing out such important works as *The Federalist Papers,* written by Alexander Hamilton, James Madison, and John Jay under the name "Publius," and the writings of Samuel Clemens, written under the pen name "Mark Twain." Stevens wrote, "No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's." Anonymous speech about important public issues was "core political speech," and any attempt by a state to regulate this speech must be "narrowly tailored" to achieve the state's legitimate interest in prohibiting unknown authors from providing the electorate with fraudulent and libelous information. The Court found that the Ohio prohibition was not narrowly tailored because it punished all unknown authors, not only those who attempted to publish false and misleading information. Justice Stevens limited the reach of the ruling by indicating that the Court was addressing only written communications. He also stated that the Court was not overturning laws requiring the disclosure of the identities of campaign contributors.

The breadth of Justice Stevens's opinion concerned Justice Antonin Scalia, who, joined by Chief Justice William H. Rehnquist, stated in dissent, "[I]t may take decades to work out the shape of this newly expanded right-to-speak-incognito."

Justice Ruth Bader Ginsburg filed an opinion concurring with the majority's holding but stressing the narrow nature of the ruling. She also signed the majority opinion. Justice Clarence Thomas did not sign the majority opinion; instead, he offered a concurring opinion with his own survey of anonymous writing in the United States. Using a stricter interpretation of the Constitution, he concluded that "anonymous political leafleting" was part of the framers' original intent of freedom of speech and the press.

Margaret McIntyre died of cancer one year before the Supreme Court issued the ruling in her case.

John David Rausch Jr.

See also: Anonymous Political Speech; First Amendment.

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Members of City Council of Los Angeles v. Taxpayers for Vincent (1984)

In *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789 (1984), the U.S. Supreme Court concluded that a municipal ordinance prohibiting the posting of signs on public property did not unconstitutionally burden free speech rights protected under the First Amendment to the U.S. Constitution and applied to the states through the Fourteenth Amendment. Taxpayers for Vincent (TFV), a group supporting Roland Vincent for the Los Angeles City Council, contracted with a political sign service company to construct and post signs supporting his candidacy. The company designed the cardboard signs to

be draped over the cross-wires supporting utility poles and then stapled at the bottom. In accordance with the ordinance, city workers removed Vincent's signs, and the TFV group brought suit, alleging an unconstitutional abridgment of its First Amendment speech rights.

The TFV organization argued that the ordinance was both facially unconstitutional (because of its overbreadth) and unconstitutional as applied to the group's particular situation. In the course of a political campaign, many candidates, parties, and interests must employ the most efficient, influential, and economical methods for communicating their message to the public. Categorically prohibiting the posting of signs on public property deprived many potential speakers and advocates of an important medium. Yet, the city contended, to provide unrestricted access to public property for these purposes would cause visual clutter and blight, diminish property values, increase public expenses, and constitute a safety hazard for those municipal workers charged with removing the signs. States and localities have a legitimate interest in preserving the aesthetic appeal of their communities, and viewpoint-neutral regulations of this sort serve such interests.

Writing for the Court, Justice John Paul Stevens found that the statute was not unconstitutional, facially or as applied, but rather was a reasonable "time, place, and manner" regulation. Reaffirming the Court's holding in other cases involving undesired exposure to certain forms of expression, Justice Stevens reasoned that the ordinance was a content-neutral effort to minimize the visual assault launched upon drivers and passersby. Moreover, although First Amendment rights were certainly implicated, the Court was confident that the TFV group had alternative methods for communicating its message. Or did it?

Writing for the dissent, Justice William J. Brennan Jr. criticized the majority for relying on an imprecise and inherently subjective standard like "aesthetic appeal" and for failing to consider that a dissident group, or a position or proposal lacking broad appeal, might not have access to an alternative forum. (Those advocating an increase in property taxes, for example, would likely have trouble persuading private property owners to post signs supporting such a position.) The medium and method chosen by TFV entailed relatively small expense and allowed it to reach a wide audience; to foreclose such options, the dissenters argued, subordinated speech to subjective assessments and unfounded suppositions.

To what degree should government be able to restrict First Amendment rights in the interest of aesthetics—or in an effort to preserve the appeal or ambience of public spaces or property? At what point does a collection of ideas, voices, or propositions become a clutter? *Taxpayers for Vincent* offered important insight into the Court's balancing of individual and community interests: When the burden on expression is presumed to be minimal and legitimate municipal concerns may be demonstrated, states and localities may impose reasonable, content-neutral restrictions on speech in its various forms.

Brian K. Pinaire

See also: First Amendment; Lawn Signs; Overbreadth Doctrine; Police Power; Time, Place, and Manner Restrictions.

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Metro Broadcasting Co. v. Federal Communications Commission (1990)

In *Metro Broadcasting Co. v. Federal Communications Commission,* 497 U.S. 547 (1990), the U.S. Supreme Court upheld affirmative action initiatives by the Federal Communications Commission (FCC) that were aimed at promoting greater diversity and responsiveness to the American public by giving preference to

minority licensing applicants within the broadcast industry. Rather than adhering to the strict-scrutiny doctrine usually required of all classifications based on race, the Court opted for the less stringent intermediate-scrutiny doctrine, arguing that the racial classifications created under the FCC plans were essentially "benign" but not specifically defining what that term meant. Citing the Communications Act of 1934 that mandated diversification within the broadcast industry, the FCC had established minority preferences when granting new or transferring existing radio and television licenses. Metro Broadcasting Company argued that the preferential granting of a television license to Rainbow Broadcasting under this affirmative action plan was a violation of Metro's equal protection rights guaranteed under the Fifth and Fourteenth Amendments to the Constitution because the FCC unfairly favored the minority-owned Rainbow over Metro when awarding the license.

In the five–four majority opinion, Justice William J. Brennan Jr. argued that the FCC affirmative action plan in no way violated the U.S. Constitution, rejecting Metro's claim that the provisions violated the right to equal protection of the laws. On the contrary, Brennan wrote that "[B]enign federal racial classifications are not 'remedial' in the sense of being designed to compensate victims of past governmental or social discrimination." Furthermore, the Court argued in *Metro* that the Constitution placed no barriers when benign racial classifications served "important governmental objectives" that were "substantially related to achievement of those objectives" of obtaining diversity within the broadcast industry. The majority argued that the FCC initiative was given significant legitimacy by the fact that "minority ownership programs have been specifically approved—indeed mandated—by Congress."

As late as the previous year, in *City of Richmond v. J. A. Croson Co.,* 488 U.S. 469 (1989), the Court had reiterated its dependence on the strict-scrutiny doctrine when it overturned a Richmond, Virginia, affirmative action program that mandated minority preference when awarding federal construction contracts, insisting that "the need for remedial action in particular cases would seem to be simply administrative convenience, which, standing alone, cannot justify the use of a suspect classification under equal protection strict scrutiny," In *Metro,* the Supreme Court also backtracked from its traditional position that both the Fifth and Fourteenth Amendments were directed toward protecting the rights of persons rather than the rights of groups. The *Metro* decision considered the rights not only of minorities as a group but also the rights of the broader group of the listening audience, reiterating the Court's belief that "broadcasting may be regulated in light of the rights of the viewing and listening audience, and that the widest possible dissemination of information from diverse and antagonistic sources is essential to the public welfare."

In her dissent to *Metro,* Justice Sandra Day O'Connor expressed doubt that the FCC's affirmative action plan was capable of promoting the diversity advocated by the agency. She stopped short of rejecting affirmative action entirely, however, arguing that "Congress may identify and redress the effects of society-wide discrimination" without making "specific findings of discrimination to engage in race-conscious relief." Chief Justice William H. Rehnquist and Justices Antonin Scalia and Anthony M. Kennedy joined O'Connor's dissent, insisting that the FCC's affirmative action plan was unconstitutional because it did indeed violate the Fifth and Fourteenth Amendments. The minority also rejected the concept of "benign" racial classifications and stood by the strict-scrutiny requirement, contending that the FCC had failed to meet this requirement because there was no compelling state interest in implementing such a plan.

Elizabeth Purdy

See also: Fourteenth Amendment; Strict Scrutiny; Suspect Classifications.

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Meyer v. Nebraska (1923)

In *Meyer v. Nebraska,* 262 U.S. 390 (1923), the U.S. Supreme Court decided that a state law infringed on the "liberty" interest guaranteed under the Fourteenth Amendment to the U.S. Constitution and protected against state infringement. The law affected the right of teachers to engage in education of certain students by teaching them modern languages other than English. Such laws were not uncommon in the post–World War I xenophobic atmosphere that existed in the United States. Many states after the war adopted laws that reflected a strong dislike of anything foreign.

Representative of such legislation was a Nebraska law enacted in 1919, which forbade teaching anyone who had not completed the eighth grade any subject in a language other than English. The law applied to all schools within the state and imposed a fine or jail term of up to thirty days for noncompliance. Robert T. Meyer, a parochial school teacher, used Bible stories written in German to teach reading to his ten-year-old students. Meyer was charged and convicted in a Nebraska trial court. The Nebraska Supreme Court upheld his conviction, concluding that the law was intended to establish English as the "mother tongue" of all children reared in Nebraska and represented a legitimate use of the state's police power.

The U.S. Supreme Court in *Meyer* applied the doctrine of substantive due process, an approach the Court under Chief Justice William H. Taft in the 1920s was more inclined to use to protect property rights than to expand constitutional protection of civil liberties. By contrast, the *Meyer* case presented the Court with an issue in which property rights and state censorship were intertwined. The Court concluded that the term "liberty" in the Fourteenth Amendment covered the right of individuals to engage in the "common occupations of life" and the acquisition of "useful knowledge," and struck down the Nebraska statute on a seven–two vote (Justices Oliver Wendell Holmes Jr. and George Sutherland dissenting). Justice James C. McReynolds, writing for the majority, said that government could not interfere with such liberty in the name of protecting the public interest. He suggested that the objective of the Nebraska law was to "foster a homogenous people with American ideals." As well-meaning as Nebraska's objective may have been, the Court concluded that the state had attempted "materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own." A state cannot use coercive methods that conflict with the Constitution—even a "desirable end cannot be promoted by prohibited means." The Court was also troubled by the selective character of Nebraska's policy—the statute targeted only instruction in a modern foreign language and exempted all other content.

The Court set aside Meyer's conviction, concluding that the due process language of the Fourteenth Amendment protected teachers' rights to teach and parents' rights to hire them to do so—economic liberties that had long been constitutionally protected. Although not condemning the end sought by Nebraska, the Court found that the chosen means to attain these ends were too extreme. The *Meyer* ruling had the short-term consequence of limiting the state's capacity to control private school curricula, but the more important, long-term effect was not evident for several decades: Justice McReynolds's opinion helped provide the foundation for the Court's recognition of a constitutional right to privacy in *Griswold v. Connecticut,* 381 U.S 479 (1965).

Peter G. Renstrom

See also: Griswold v. Connecticut; Pierce v. Society of Sisters; Substantive Due Process; Taft, William Howard.

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Miami Herald Publishing Co. v. Tornillo (1974)

In *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), the U.S. Supreme Court considered whether government could force the print media to publish specific editorial content without infringing the right to a free press under the First Amendment to the U.S. Constitution. Union leader Patrick Tornillo thought so, and he sought to force a newspaper to publish his response to editorials critical of him. He was understandably angry about two *Miami Herald* editorials slamming his 1972 campaign for a Florida legislative seat, calling him the "boss of the Classroom Teachers Association," accusing him of "shakedown statesmanship," and telling voters it would be "inexcusable" to elect him. The newspaper cited his key role in a Dade County teachers' strike in 1968, when such strikes were illegal.

Citing Florida's 1913 right-of-reply law, Tornillo demanded that the *Herald* print his replies verbatim. The statute mandated that newspapers publish responses of candidates whose "personal character" or official record had been attacked, without charge and in a place and type size as conspicuous as the original criticism. Violators could face misdemeanor prosecution.

The *Herald* refused and Tornillo sued. He convinced the Florida Supreme Court that the compulsory right of reply enhanced rather than abridged the First Amendment and furthered the free flow of information to the public.

The U.S. Supreme Court was unpersuaded. The justices unanimously held that enforced-access laws trespassed on newspapers' editorial discretion, observing that "A newspaper is more than a passive receptacle or conduit for news, comment, and advertising." Florida's law, they ruled, unconstitutionally imposed a penalty based on content. That penalty: additional printing costs and the use of space that a newspaper could otherwise devote to material it would prefer to print. To force publication of an aggrieved candidate's response also would force the newspaper to omit something else. Such governmental coercion violated the First Amendment and, in effect, was no different from a law forbidding newspapers to print specific information.

The Court acknowledged Tornillo's argument that contemporary newspapers often are monopolies, owned by large chains with vast power to shape public opinion. Even so, Chief Justice Warren E. Burger said, "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." In other words, newspapers must decide for themselves how to act responsibly.

The Court warned that right-of-reply laws could chill political coverage because newspapers might decide that the safer course would be to avoid rather than report on controversy. For example, election and political coverage might be "blunted or reduced," impeding public debate.

At the same time, the Court distinguished between right-of-reply laws, which are unconstitutional, and the government's right to regulate newspaper advertising, such as gender-specific help-wanted ads, which are considered pure commercial speech. In contrast, U.S. courts have upheld public access requirements for radio and television, because broadcasters—unlike newspapers—are licensed and regulated by the Federal Communications Commission, and for cable companies operating under municipal franchises.

From a newspaper's perspective, though, it may prove strategically wise voluntarily to publish replies, which may help to avert libel suits or to minimize potential damages if a libel claim proves successful. The difference, of course, is that the decision on what to print would then be left up to the newspaper, not to the complainant.

Eric Freedman

See also: Fairness Doctrine; First Amendment; Reply, Right to.

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Michael H. v. Gerald D. (1989)

In *Michael H. v. Gerald D.,* 491 U.S. 110 (1989), the U.S. Supreme Court grappled with a difficult fact pattern that struck at the heart of any individual's civil liberties: parental rights. At issue was whether there was a "substantive" due process right—that is, a right not enumerated in the Constitution but nevertheless protected—for the unmarried father of a child by a married woman to have visitation rights with respect to the child.

The petitioner, Michael, had an adulterous affair with his married neighbor, Carol, an international model. Carol gave birth to a baby and shortly thereafter informed Michael that the baby was his and not her husband's. Michael wanted a parental relationship with his daughter, but neither Carol nor her current husband, Gerald, wanted Michael to play any role in the child's life. A California court denied Michael's request for parental visitation rights by looking to a California statute, which established the presumption that a child conceived during marriage was presumed to be the offspring of that marriage. The presumption could be rebutted only via blood evidence within two years of the child's date of birth. Furthermore, the only individuals who could present such evidence were the mother or father of the child and not a third party such as Michael.

Gerald and Carol failed to make a motion rebutting the presumption within the allotted time frame, and Michael brought suit, claiming that this statute, by effectively denying him a relationship with his child, was a violation of both his procedural and substantive due process rights and his equal protection rights under the Fourteenth Amendment to the U.S. Constitution. Despite precedent in *Stanley v. Illinois,* 405 U.S. 645 (1972), indicating that a father who was actively participating in the life of his child did have the right to such a relationship, the plurality nevertheless held that it was not unconstitutional for the California statute to enforce a presumption of paternity against a challenge by a putative father who was not the husband of the mother. Consequently, neither due process nor equal protection was violated in this case.

Michael H. v. Gerald D. was pivotal for several reasons. First, it laid out the various schools of thought among the justices on how the Court should recognize unenumerated but fundamental substantive due process rights. According to the holding, the Court should protect rights under the Due Process Clause only if there were a tradition, stated at the most specific level of abstraction, for safeguarding the liberty. The general tradition of protecting unmarried fathers' rights was found to be irrelevant in *Michael H.* because no specific tradition existed when the child was conceived as a result of adultery. Second, the case addressed the question of who had a constitutionally protected interest in a relationship with a child: Biological fathers could not have an unconditional liberty interest in a relationship with their children because no tradition protected that right. In this case, there was no such tradition because the mother was married to someone else at the time of conception.

It is difficult to distinguish *Michael H.* from *Stanley,* in which the Court struck down the irrebuttable presumption of an Illinois statute that automatically made children of deceased mothers wards of the state if their parents were not married, on the grounds that in these circumstances the father was unfit. Moreover, the decision in *Michael H.* arguably contradicts the broad holding in *Troxel v. Granville,* 530 U.S. 57 (2000), in which the Court found that an Oregon statute allowing third parties state-court review of decisions made by parents regarding the visitation rights of others interfered impermissibly with a parent's fundamental right to control her child's upbringing. The implicit holding in *Troxel* was that there can be no interference with the rights of fit parents. However, if the *Michael H.* reasoning were applied to the *Troxel* facts, the "fitness" criteria would be irrelevant. An open question, then, is how the Court would rule when presented with the facts of *Michael H.* but the person claiming the right is female instead of male. Unquestionably, the Court would not be able to deny the fact of biology, especially when so much of the Court's reasoning about gender issues has been grounded in the heuristic assumption that a woman's "biology is destiny."

Gia Elise Barboza

See also: Parental Rights; Right to Privacy; Substantive Due Process.

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Military Commissions

Under its Article I constitutional powers to define and punish "offenses against the laws of nations" and to make rules for the governance of the armed forces, Congress can authorize U.S. military forces to create military commissions. Unlike courts-martial, which exist to try members of the armed forces for violations of military law, military commissions exist to try civilians or enemy belligerents. These individuals can be subjected to military authority because they are in some area controlled by military government, such as occupied hostile territory. Or they can be civilians accused of offenses against the laws of nations, such as sabotage and spying, if Congress has made them punishable in this way.

Commissions were used during the American Revolution and in some early Indian campaigns. They were extensively used during the Civil War to maintain order in parts of the country occupied by the military, including areas in which no hostilities occurred. As late as the end of World War II, military commissions tried more than 2,500 persons, some U.S. citizens, for ordinary crimes in occupied territories that had no functioning civilian courts. The U.S. Supreme Court noted the authority of commissions in *Madsen v. Kinsella,* 323 U.S. 341 (1952): "Since our earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities relating to war. They have been called our common-law war courts." At present, the authority to create military commissions is explicitly provided to the armed services as part of the Uniform Code of Military Justice.

Although the military has occasionally employed civilian judges, military commissions are more commonly made up of panels of officers with no specialized legal training. Unlike civilian courts, military commissions can take into account military expediency and such constraints as the need to protect intelligence sources. These variables can affect the kinds of forums provided and the degree to which civil liberties are protected. Procedures are traditionally streamlined, with no elaborate indictment procedures or rules of evidence. Commissions during the Civil War operated in secret, were not required to presume innocence, and did not allow defense counsel or juries. Verbatim records were usually not kept. Convictions were subject to review and veto by military commanders. But because the Supreme Court held in *Ex parte Vallandigham,* 68 U.S. 243 (1864), that the panels were not "courts of the United States" under then-existing jurisdictional rules, their decisions could not be reviewed through civilian appellate channels.

The rules of March 2002, under which the Pentagon proposed to try people accused of "unlawful belligerence" after the September 11, 2001, terrorist attacks in New York City and Washington, D.C., would provide military courts much more respectful of civil liberties than those of the past. The proposed procedures require a presumption of innocence. Defendants will be represented by military counsel, may provide civilian counsel at their own expense, and will be given time to prepare and present material in their defense. They will receive a copy of the charges, will have access to prosecution evidence and reasonable access to military resources to help them prepare this defense, will be able to cross-examine witnesses, and will not be required to testify. Conviction is to be based only on proof beyond a reasonable doubt, and double jeopardy is forbidden. Though the proceedings may be closed if required by "military expediency," the Pentagon will encourage "reasonable openness."

The Pentagon has become more concerned with civil liberties since its 2002 proposals because of U.S. public opinion and also because of treaty responsibilities. Military commissions must comply with requirements of the Geneva Conventions of 1949 and 1977, other relevant treaties, and all relevant principles of international law. These were designed to protect civilians caught up in hostilities and to guarantee humane treatment of captured legal combatants; it is not clear whether they protect illegal combatants. Still, they can be read to require some protection of at least some civil liberties, and they were considered when the 2002 proposals were written. But even those more

Mock military tribunal being held in the School of Military Government at the University of Virginia, 1943.
(Library of Congress)

protective rules would not create courts with civilian judges, juries of the defendants' peers, the requirement of unanimity for conviction (instead of the proposed two-thirds vote of the panel), legal education for critical personnel, rules of evidence comparable to those used in civilian courts, guaranteed openness, and independence from command channels. Nor is there provision for civilian appellate review, either by creating regular appeals channels or by allowing habeas corpus petitions.

Because military commissions do not provide trials substantially in accordance with the Bill of Rights, the principal legal question has always been whether U.S. civilian citizens could be subjected to them. In the critical case of *Ex parte Milligan,* 71 U.S. 2 (1866), the Supreme Court decided that the answer was generally no but allowed certain exceptions. One exception, decided in *Milligan* and reaffirmed in *Duncan v. Kahanamoku,* 327 U.S. 304 (1946), is for civilians accused of crimes in areas so disordered by war or natural disaster that ordinary courts are incapable of functioning. The second exception is for citizens who have joined the enemy and become unlawful combatants, who come secretly through the lines, without uniforms, and who intend to commit hostile acts during wartime.

Paul Lermack

See also: Due Process of Law; Sixth Amendment.

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Military Surveillance of Civilians

The role of the military in the surveillance of civilians has ebbed and flowed from the very beginning of American history. Traditionally the realm of domestic police agencies, in several times of national crisis the military has taken an increased role in monitoring civilian activities. Both the U.S. Supreme Court and Congress have addressed military involvement in the handling of domestic security issues, with widely varying results. As the technological capacity to scrutinize the population increases and the definition of "national security" evolves, the function of the military in the internal monitoring of citizens will continue to be a significant issue in U.S. politics.

Although delegates to the Constitutional Convention of 1787 in Philadelphia considered adding a specific provision formally separating the military and civilian realms, the delegates considered that separation was sufficiently secured by other clauses. However, the division between military and civilian intelligence was never enacted into law, except for the Posse Comitatus Act of 1878 forbidding the use of the military to enforce the law. Nonetheless, the military largely shied away from assuming a policing role until the twentieth century.

The first significant instance of sweeping military surveillance of civilians came with the passage of the Espionage Act of 1917 and the Sedition Act of 1918 during the period leading up to U.S. involvement in World War I. These acts made it illegal to interfere with the recruiting of troops, to disclose information dealing with national defense, or to criticize the government or the Constitution. The government created a national network of military informers primarily to monitor and arrest members of the Communist Party and opponents of World War I. After the war ended, that network was allowed to dissolve.

Although the president is authorized by statute to use the National Guard and other U.S. military forces to suppress domestic violence, until the 1960s this right was exercised very rarely. During the civil unrest caused by the civil rights movement and opposition to the Vietnam War in the 1960s, the military was called upon with increasing frequency to keep the peace. Under pressure from the Justice Department and the White House, the U.S. Army began to obtain and keep records on individuals and groups associated with the civil rights and peace movements.

According to later testimony in the Senate, Army intelligence agents undertook massive efforts to penetrate protest demonstrations. In addition, political dissent was routinely investigated and reported on in many parts of the United States. These reports were then circulated to law enforcement agencies at all levels of government. In all, an estimated 100,000 individuals were the subjects of Army surveillance. At the same time, the Central Intelligence Agency (CIA) was involved with "Operation Chaos," which kept track of more than 7,000 people involved in the peace movement, in direct violation of the agency's mandate to coordinate only foreign intelligence operations. At the request of other government agencies, the National Security Agency (NSA) began intercepting and disseminating the communications of thousands of people on its "watch list."

By the 1970s when these surveillance activities came to light, public outrage led to legal challenges on a number of levels. In 1971, during the course of a hearing before Senator Sam Ervin's (D-NC) Subcommittee on Constitutional Rights, the Defense Department announced the drastic reduction of its domestic surveillance program, restricting it to only "military" targets. Beginning in 1975, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, also known as the Church Committee after its chairman, Senator Frank Church (D-ID), began a widespread investigation into intelligence activities in the United States. Among the fourteen reports issued in 1975 and 1976 were detailed accounts of military surveillance of ci-

vilians, often in violation of their rights. This sparked a major national debate on the role of secrecy in a democracy.

In 1972, the Supreme Court ruled in *Laird v. Tatum,* 408 U.S. 1, that the military was constitutionally permitted to conduct surveillance, and that the existence of surveillance itself was not an infringement of the First Amendment. In his dissenting opinion, Justice William O. Douglas called the military surveillance of civilians a "cancer on the body politic." The same year in *United States v. United States District Court,* 407 U.S. 297 (1972), the Court ruled that even in cases involving national security, a court order was required to permit electronic surveillance. The sum of these rulings was that although the military is permitted to engage in domestic surveillance in limited circumstances involving threats to national security, it must follow the same rules required of domestic police agencies.

The results of the Church Committee hearings as well as the Watergate scandal (the bungled 1972 burglary of Democratic National Headquarters in the Watergate apartments by individuals with connections to President Richard Nixon) led to a series of legislation and executive orders, including the Foreign Intelligence Surveillance Act of 1978, which limited the power of any group to conduct surveillance domestically. However, the majority of the reforms came in the form of changes to internal agency regulations, leading many critics to believe that the limitations were only temporary and could be easily reversed.

Since that time, many allegations have been made of vast government surveillance networks at work eavesdropping on citizens, but very little has been proved. Most of the substantive allegations now center around the NSA. In coordination with U.S. allies, the NSA can intercept and interpret vast numbers of electronic communications globally. Although the NSA is regulated by the Foreign Intelligence Surveillance Act and overseen by Congress, many critics, including the American Civil Liberties Union, allege that such oversight is weak at best.

In the aftermath of the September 11, 2001, attacks, Congress adopted the USA Patriot Act, granting broader authority to government agencies to monitor citizens in cases of prospective national security risk. This act lowers many of the requirements for surveillance and increases the scope of surveillance permitted once court permission is secured. Perhaps most worrying to critics, national security need be only a "significant" reason for permitting military surveillance rather than the sole reason.

The question of what level of privacy must be exchanged for security is as old as America itself. Changes in technology and the rise of electronic communication have made it possible for the government to intrude into the lives of citizens on an unprecedented level, restricted only by the laws put in place to stop these tactics. In an age of global terrorism, the line between privacy and security is increasingly blurred.

Ben Reno-Weber

See also: First Amendment; Fourth Amendment; Patriot Act; Posse Comitatus; Search; Seizure.

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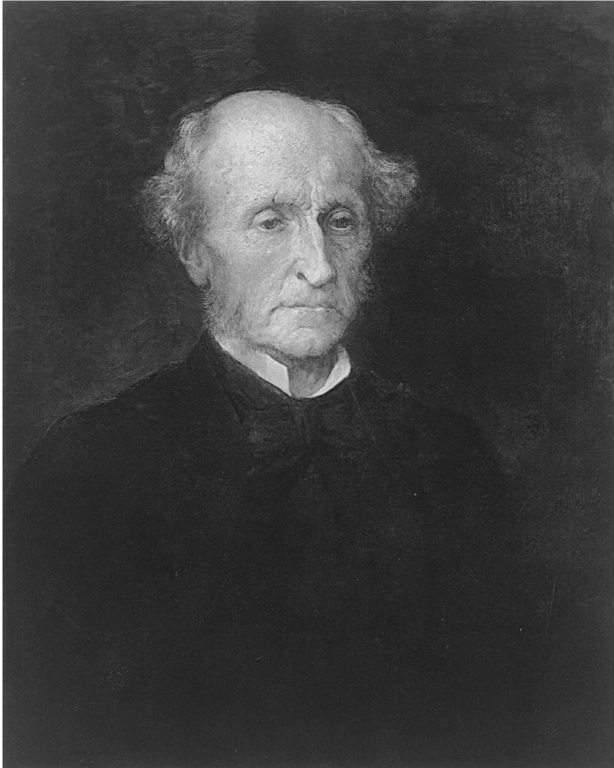
Mill, John Stuart (1806–1873)

John Stuart Mill is best known for his defense of the liberty of the individual—for making fundamental the liberty in the individual, as opposed to some theory of social rights, which he referred to as "monstrous" and "dangerous" in his most famous work, *Essay on Liberty* (1859). Mill's concern was to unite social progress with republicanism through the device of freeing up the individual person to the greatest extent reasonably possible. Released from common superstitions, specious arguments, and theological drivel, society in Mill's libertarian state would be able to benefit from the untapped potential of all its inhabitants.

In his youth, Mill was an ardent utilitarian, a fol-



John Stuart Mill is best known for his defense of the liberty of the individual. *(Library of Congress)*

lower of Jeremy Bentham, much like his father James Mill, who raised John with severity though educated him well in the classics. In his twenties, the younger Mill experienced a nervous breakdown, which he attributed to an overemphasis on developing his intellect at the expense of his sentiments. Mill emerged from this period to challenge the utilitarian notions that happiness can be directly sought as an end itself rather than a state that emerges as a by-product of an overall flourishing life, and that happiness can be measured quantitatively and interpersonally. Mill was a progressive, forward-looking thinker, who advocated for a humane sensibility based in reason regarding personal freedoms and the legitimate purview of the state that is as congenial to many contemporary Americans as it is threatening to others.

Mill was the first major male thinker in the Western tradition to champion the rights of women, and to argue in word and deed for the equality of the sexes, especially in his essay *On the Subjection of Women* (1869): "That the principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other." Mill referred to the "hot-house and stove cultivation" of women in his society, and the resulting apparent differences in natural endowment between them and their male counterparts, as part of his argument that were women to have the same education, they undoubtedly would succeed to the same degree as men were allowed and encouraged to do. Furthermore, Mill argued that the unjust discriminations against women were rooted not in reasoned analysis and reflection on evidence, but rather in widespread feelings formed in the despotic bosom of the traditional family—not in knowledge, but in prejudice. Hence, "women cannot be expected to devote themselves to the emancipation of women, until men in considerable number are prepared to join with them in the undertaking."

Mill's advocacy of the rights of women and presentation of the obstacles to be overcome, as well as his critique of the social and legal context of women's subordination, follow from *Essay on Liberty.* In that earlier essay he sought to distinguish the legitimate purview of the state from the legitimate realm of the individual person. He early on qualified his stand on the utilitarianism of his upbringing: "I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being." In *Utilitarianism* (1863), he further clarified this distinction: "Human beings have faculties more elevated than the animal appetites, and when once made conscious of them, do not regard anything as happiness which does not include their gratification. . . . It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied." The nature of the state appropriate to human beings thusly considered would include a representative form of government restrained from interfering with the liberty of the people except to prevent harm to others, which Mill thought was fairly easy to discern. In *Essay on Liberty* he argued that the state was prohibited from coercing in favor of received custom, tradition, or certain preferred types of indi-

viduals, or to impose the majority's view of the good life on them, for this would be to treat citizens as children and to stultify the development of their mental and moral powers. A person's liberty was not to be infringed when there was no showing of physical, palpable injury to another person or his legitimate interests, such as in property.

Mill placed an emphasis on the centrality of free expression to forming one's own opinions and maintaining a healthy, critical engagement with them, so that the ideas one holds have vitality in one's life and are not taken on faith or regarded as beyond question, such as dogma. Neither the government nor public opinion shall have the power to suppress dissenting points of view, no matter how few subscribers there may be, or to assume a paternal pose so as to deny individuals the right to live their lives from the inside, embarking on whatever "experiments of living" are original with them.

Mill asks a lot of the individual, expecting people not only to acknowledge their fallibility and the utility of exposure to contrary, even offensive points of view, but also to welcome them as the conditions that best make for social progress given the nature of the human as a social and moral being. Mill, however, seemed to have a blind eye for the pluralism of the world's peoples, in that he considered progress possible only for peoples in the civilized world, who can treat peoples in "barbaric" lands with a heavy hand, much as one would treat a child. He also favored the cultivation of taste and erudition, as would be expected from members of the British upper class, casting some doubt on whether his liberal philosophy was driven by utilitarian considerations or, instead, was based in a not so thinly veiled perfectionist principle of ideal human flourishing, applied both to individuals and to societies.

Gordon A. Babst

See also: First Amendment; Liberalism; Right to Privacy.

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Miller Test

The *Miller* test was formulated by the U.S. Supreme Court in *Miller v. California,* 413 U.S. 15 (1973), as a means of evaluating whether written or visual material is obscene. The Court has long held that obscenity does not merit First Amendment protection, but the problem is to determine what makes a work obscene. The Court over the years devised a variety of tests to make that determination. The *Miller* test was a reaction to the test that had been evolving since 1957 when the Court decided *Roth v. United States,* 354 U.S. 476 (1957), and refined it more in what became known as the *Fanny Hill* case, officially listed as *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts,* 383 U.S. 413 (1966).

The key parts of the *Fanny Hill* test were that the material in question would be judged by a fixed national standard and be found obscene only if it was utterly without redeeming social value. That test was very forgiving because it was virtually impossible for anything to be considered obscene. The Court under Earl Warren (chief justice 1953–1969) was roundly criticized for its policies in the obscenity area. The Warren E. Burger Court (1969–1986) sought to change the standard, and the *Miller* case provided the first opportunity to tackle the issue.

The components of the *Miller* test hold that the standard for the trier of fact would be if the average person, applying contemporary community standards, would find the work, taken as a whole, appeals to a prurient interest in sex; the material depicts or describes, in a patently offensive way, sexual conduct

specifically defined by applicable state law; and the material lacks serious literary, artistic, political, or scientific value.

The significance of the test is reflected in two parts. First, the *Miller* test changed the focus from the forgiving national standard to a local community standard. This would allow communities to tailor their standards to the population. Having a national standard had prohibited local communities from establishing their own standards. More important, the standard for the value of the material changed such that it had to have serious literary, artistic, political, or scientific value (the so-called SLAPS test) to merit First Amendment protection. Under the *Fanny Hill* test, any slight value would save the material in question. Under the later *Miller* test, the overall value of the material as a whole had to be clear.

Miller is a much more restrictive test than the Court used in *Fanny Hill,* but it has not had the sweeping effects that were predicted. The *Miller* test made it much easier for local communities to regulate sexually explicit materials than under the previous standard. Indeed, states and local communities responded by passing a variety of laws to reflect their local standards. *Miller* clearly led to significant variation in First Amendment protection across different communities. Under the *Roth* test, the justices had to review much of the material, and they hoped the *Miller* test would permit them to end their supervision of obscenity cases and turn responsibility over to local communities and lower courts. But the Court was not totally successful. For the next few years, the justices had to accept a variety of cases, on occasion to chide a lower court for applications that were too restrictive. The Court under Chief Justice William H. Rehnquist has expanded the definition of the "average person" and broadened community standards, thus making the *Miller* test slightly less restrictive.

Richard L. Pacelle Jr.

See also: Miller v. California; Obscenity; Pornography.

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Miller v. California (1973)

Miller v. California, 413 U.S. 15 (1973), was one of a group of cases the U.S. Supreme Court reviewed in a reexamination of standards enunciated in earlier cases defining obscenity, which the Court had long held was not entitled to protection under the right to free speech as outlined in the First Amendment to the U.S. Constitution and as also applied to the states through the Due Process Clause of the Fourteenth Amendment. The difficult issue in these cases has been how to judge whether certain expression is obscene.

The petitioning defendant was a commercial vendor convicted of mailing unsolicited brochures containing pictures of sexually explicit activities in violation of a California statute. The California statute was based loosely on the Supreme Court's previous holding in *Roth v. United States,* 354 U.S. 476 (1957), in which the Court ruled that implicit in the history of the First Amendment was the rejection of constitutional protection for obscenity as its being utterly without redeeming social importance. *Roth* identified certain well-defined and narrowly limited classes of speech, the prevention and punishment of which never were thought to raise any constitutional problem, including the lewd and obscene. The *Roth* test for obscenity was "whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appealed to the prurient [lustful] interest."

After the *Roth* decision but prior to *Miller,* no majority of the Court was able to agree on a standard to determine what constituted obscene, pornographic material subject to regulation under the states' police power. The justices disagreed over many elements of the test, including what constituted a "prurient interest," what was the appropriate "community standard," and whether a work must be "utterly without redeeming social quality" to be regulated.

In *Miller,* the Court clarified its position on obscene material and established a new test for identifying obscenity. The *Miller* test was somewhat more restrictive than *Roth,* since the Court rejected the requirement that a work be "utterly without redeeming social value," under which it was next to impossible

to label material as obscene. In its place, *Miller* established that a work may be subject to state regulation if (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The Court defined "community" as a local or state community rather than a national community. The Court still follows *Miller* and usually focuses on the third prong of the test pertaining to lack of "serious literary, artistic, political, or scientific value." When considering obscenity depicting, or directed to, juveniles, however, the Court has used more restrictive standards.

James Barger

See also: First Amendment; *Miller* Test; Obscenity; Pornography.

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Milligan, Ex parte (1866)

In *Ex parte Milligan,* 71 U.S. 2 (1866), the U.S. Supreme Court ruled that so long as the courts were open and operative, a civilian could not be tried in a military tribunal. The importance of *Milligan* is that it placed important limits upon the power of the president's military authority over civilians in times of emergency.

In 1864, President Abraham Lincoln issued a proclamation ordering that individuals sympathetic to the Confederacy be tried in military instead of civilian courts. Lambdin Milligan, a civilian, and several others in Indiana were charged with conspiracy to seize munitions and to attempt to free Confederate solders from the North's prison camps. Milligan was convicted by a military tribunal in 1864 and ordered to be hanged, although at the time, the federal court in the area was open and functioning. Milligan sought habeas corpus relief in a local U.S. circuit court, and when the two judges split in their opinion of whether to grant review of his case, it went to the Supreme Court for review.

Writing for the Court, Justice David Davis ruled in favor of habeas review for Milligan. According to Davis, the Constitution was not in operation only during times of peace. Instead, the Constitution "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." The president did not have special powers in times of war and other emergencies to suspend the Constitution and order civilians to be tried in military courts so long as the civilian courts were able to meet.

Ex parte Milligan has come to be recognized as a major landmark case in U.S. constitutional law. It is an important case drawing limits upon presidential war powers, especially when it comes to civilians arrested in the United States, and it is also an affirmative defense of the federal courts as having primary jurisdiction over individuals who are charged with crimes or who wish to contest the grounds of their detainment. For example, *Milligan* was cited by the Supreme Court in *Hamdi v. Rumsfeld,* 124 S. Ct. 2633 (2004), in ruling that a U.S. citizen could not be held indefinitely on American soil without a right to habeas review; and in *Rasul v. Bush,* 124 S. Ct. 2686 (2004), in which the Court held that aliens being held in confinement at the U.S. military base in Guantánamo Bay, Cuba, were entitled to have a federal court hear challenges to their detention under the federal habeas corpus statute. In the wake of the September 11, 2001, terrorist attacks on the United States, these two cases placed significant limits upon President George W. Bush's ability to use presidential powers to limit the civil liberties of individuals suspected of being terrorists.

David Schultz

See also: Civil War and Civil Liberties; Habeas Corpus; *Hamdi v. Rumsfeld;* President and Civil Liberties; *Quirin, Ex parte; Rasul v. Bush.*

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Milton, John (1608–1674)

John Milton, one of the great English poets, also became well known for his 1644 essay "Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England." It is a classic document of Western civilization and an intellectual foundation for freedom of the press as later articulated in the First Amendment to the U.S. Constitution. Milton was a humanist, a firm believer in the value of scientific inquiry, and a devoutly religious man who lived during a time of religious and political turmoil.

Milton was born in London, England, December 9, 1608. He received an excellent education and the finest moral and religious training available. He loved to read and as a child developed the habit of reading far into the night, by candlelight. This may have contributed to his total loss of sight in 1651. He attended St. Paul's School in London and also received private tutoring. In 1625 he entered Christ's College, Cambridge, where he received a bachelor of arts degree in 1629 and a master's in 1632. After he graduated, he lived with his family for six years and continued to educate himself. He traveled abroad in 1638, and when he returned he rented a house in London and tutored two of his nephews.

In the sixteenth and seventeenth centuries, Puritanism developed as a movement to reform the Church of England. The Puritans in England gained political power between 1640 and 1660 as a result of the English civil war (1642–1648). Also known as the Puritan Revolution, it was a conflict between King Charles I of England and the members of Parliament, most of whom were Puritans. The war ended with the defeat and execution of Charles I and the establishment of a republican commonwealth. The two major religious and political factions during the civil war were the Presbyterians and the Independents. Milton initially supported the Presbyterian faction and its attempt to reform the Church of England. However, when the Presbyterians started enacting laws granting Parliament the power to suppress publications of their political and religious opponents, he turned his allegiance to the Independents. In 1648, when the commonwealth was established, Milton worked in Oliver Cromwell's government as Latin secretary for foreign affairs.

Milton was married three times. He married his first wife, Mary Powell, in 1642, the same year the war began. His new bride left him after only a few weeks of marriage. This impelled him to write three essays advocating divorce. Shocked, his contemporaries condemned them. The essays provided some of the fuel for Parliament's crackdown on publishing the following year. But Milton did not divorce his wife. In fact she returned to him in 1645, and the couple had several children. She died in 1652, and in 1656 Milton married Catharine Woodcock. Catharine died in 1658, and Milton married Elizabeth Minshull, who outlived him.

In 1643, Parliament reestablished the practice of licensing, which required authors to submit their work for approval by an official licenser before it was allowed to be published. This was a form of "prior restraint" because it gave the government control over what works would be published. Milton responded by writing "Areopagitica," in which he advocated freedom of conscience and civil liberty against both ecclesiastical and political tyranny. He believed that the search for truth required free and open discussion. He had no quarrel with copyright, the power of Parliament to suppress offensive publications after they were published, or the power of Parliament to prevent publication of scandalous, seditious, and libelous material. His opposition was limited to the practice of licensing, a form of prior restraint that Milton thought hindered the search for truth and therefore lessened knowledge.

"Areopagitica" went largely unnoticed during Milton's lifetime, and his life's work centered on his poetry, not politics. Yet the essay inspired later philosophers, such as John Stuart Mill, and those who fought for freedom of conscience around the time of the American Revolution. It is frequently cited as one

of the most compelling arguments for freedom of the press.

Judith Haydel

See also: Censorship; English Roots of Civil Liberties.

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Minersville School District v. Gobitis (1940)

Minersville School District v. Gobitis, 310 U.S. 586 (1940), was the first flag-salute case to reach the U.S. Supreme Court and was of particular interest to legal scholars because of the Court's supposedly liberal tilt (several justices had been appointed by President Franklin D. Roosevelt). The case required the Court to interpret the two religion clauses of the First Amendment to the U.S. Constitution, the Establishment Clause (prohibiting government activity that would constitute establishment of religion) and the Free Exercise Clause (prohibiting government interference with an individual's free exercise of religion). The Court held that the flag salute was a constitutionally permissible part of a public school day and mandatory allegiance was not a violation of the First Amendment, although this holding would be reversed a mere three years later.

Gobitis involved two children of a Jehovah's Witness who were expelled from public school for refusing to participate in the required daily ceremony of saluting the American flag and reciting the Pledge of Allegiance. The children had been raised to believe that saluting and pledging allegiance to the flag was forbidden by command of scripture and that the Bible, as the Word of God, was the supreme authority. The local board of education required all teachers and students to participate in the ceremony.

The Court was faced with deciding whether the requirement of participation in the ceremony, forced upon the Gobitis children who refused based on sincere religious grounds, infringed on their First Amendment right to free exercise of religion, which had been made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Justice Felix Frankfurter, in an eight–one decision for the Court, stated:

> The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities . . . [I]n all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable. Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom.

Justice Frankfurter noted that the flag was a symbol, and that people lived by symbols. To salute it was a constitutionally allowable part of school and could be made mandatory. Furthermore, he argued that the courtroom was not the place to debate issues of educational policy. For that, the majority felt the legislature should embrace its role.

The sole dissenter, Justice Harlan F. Stone, argued that *Gobitis* rested on liberties guaranteed by the First and Fourteenth Amendments. He claimed that the children were expelled solely because of their religious convictions and that neither their actions nor statements of opinion exhibited any disloyalty to the government of the United States. Stone wrote:

> The very essence of the liberty which [the First and Fourteenth Amendments] guarantee is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guarantees are to have any meaning they must, I think, be deemed to with-

Children reciting the Pledge of Allegiance in a public school in Norfolk, Virginia, 1941. *Minersville v. Gobitis* (1940) was the first flag-salute case argued before the Supreme Court, which upheld the mandatory salute. In 1943, the Court overruled this decision in *West Virginia Board of Education v. Barnette.* *(Library of Congress)*

> hold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.

Justice Stone's stirring dissent served to support the Court's 1943 reversal of *Gobitis* in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943). The six–three majority opinion in *Barnette,* still the controlling precedent in flag-salute cases, disapproved of the mandatory element of such policies. Since then, state and local officials have tried to draft policies that would reinstate the salute and Pledge in schools but not as a required activity.

Aaron R. S. Lorenz

See also: Establishment Clause; Free Exercise Clause.

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Minnesota v. Dickerson (1993)

In *Minnesota v. Dickerson,* 508 U.S. 366 (1993), the U.S. Supreme Court was asked to decide whether there was a "plain feel" or "plain touch" exception to the warrant requirement of the Fourth Amendment to the U.S. Constitution. In reviewing this issue, the

Court was presented with an opportunity to address the scope of protection granted to individuals under the Fourth Amendment when the government seeks to seize property.

The case began when two police officers saw Timothy Dickerson leave a Minneapolis, Minnesota, apartment building known for illegal drug activity. Dickerson walked toward the officers, then turned around suddenly and fled into a nearby alley. The officers chased Dickerson into the alley, where they stopped him and searched him for weapons. One of the officers patted down the outside of Dickerson's clothes in search of weapons. The officer discovered no weapons, but he felt a lump in Dickerson's jacket pocket. The officer inspected the lump closely by moving it around with his fingers. The size and shape of the lump led the officer to suspect it was a rock of crack cocaine. The officer removed the lump from Dickerson's pocket and confirmed his suspicion. Dickerson was arrested and later convicted for possession of illegal drugs.

The Supreme Court accepted the case to consider whether illegal objects and substances felt during a stop-and-frisk pat-down search for weapons may be legally seized under an exception to the warrant requirement of the Fourth Amendment. The Court concluded that a law enforcement officer could seize contraband in such circumstances, noting the search would not extend beyond the limits already authorized by the stop-and-frisk doctrine announced in *Terry v. Ohio,* 392 U.S. 1 (1968). Therefore, no violation of the Fourth Amendment's warrant requirement would occur in those circumstances. However, the contraband's identity must be immediately apparent, and no more than a pat-down may be used to examine the object. The Court thus invalidated the seizure of Dickerson's cocaine on this basis. The officer determined that Dickerson was not carrying any weapons and then identified the contraband through significant manipulation of the contents of Dickerson's pocket. This additional handling of the object went beyond the scope of the search allowed under the stop-and-frisk doctrine because it was done after the officer determined that Dickerson was unarmed and because it involved more than a simple pat-down with the officer's hand. Thus, the contraband was illegally seized and was not admissible in Dickerson's trial under the exclusionary rule. As a result, the court overturned Dickerson's conviction.

In *Dickerson,* the Supreme Court decided that an officer could legally seize contraband detected through the sense of touch when the officer was legally in position to feel the object. Thus, the Court applied to a new situation the principle that an officer who detects contraband from a lawful vantage point may seize the contraband. In this case, the officer was not operating from a lawful vantage point when the cocaine was identified.

Mark A. Fulks

See also: Exclusionary Rule; Fourth Amendment; Search Warrants; Stop-and-Frisk.

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Minor Political Parties

The emergence of smaller political parties in the United States has been an early indicator of political change. Parties championing antislavery, temperance, women's suffrage, antiwar efforts, environmental protection, and pro-working-class policies are examples. Aside from better-known Green, Libertarian, and Natural Law Parties, two hundred other ideologically diverse local, regional, and national minor political parties were active in 2003. They ranged from the Working Families Party of New York and the Legal Marijuana Party of New Jersey to the Peace and Freedom Party of California and Aloha Aina (Love of the Land) and Free Energy Parties in Hawaii. In national, state, and local elections, half of these were on the ballot in state elections during the 1990s. If majority electoral support is the criterion for inclusion as a "minor party" (third party), no historically consistent quantitative cutoff qualifies. For example, every U.S. president has been elected by less than 50 percent of voting-age adults. As of 2000, ten U.S. presidents had been elected with only a minority of the popular vote;

of those ten, four became president with less than a plurality.

Throughout the twentieth century, only Republicans and Democrats were successful in presidential elections. To marginalize other parties, the major-party spokespersons began labeling them as "minor." Persistent subordination of the smaller parties in state and national politics is a window into a duopoly, that is, two-party electoral predominance. The long-term marginalization of other political parties challenges democratic theory. For example, how effectively can active supporters of smaller political parties participate and contest for power? Does structural marginalization deprive them of full citizenship?

No minor party has won the White House since 1860. That year, Abraham Lincoln received 39.8 percent of the popular vote and 59.4 of the electoral votes in an election with four strong candidates. More than 130 years later, Reform Party supporters in fifty states and the District of Columbia cast 19,741,065 popular votes for H. Ross Perot (almost 20 percent) in 1992. Their 20 percent share of the national vote (half that of Lincoln's) did not capture a single state's electoral votes. Nonetheless, the Reform Party share topped all national third-party candidates since the Bull Moose Party ran former U.S. President Theodore Roosevelt in 1912 and received 4,119,207 popular votes (29.6 percent) and eighty-eight electoral votes (16 percent). In contrast, Ralph Nader's 2000 guest candidacy on the Green Party ticket in forty-three states and the District of Columbia won 3.5 percent of the popular vote and zero electoral votes. Electoral college dynamics reinforce two-party predominance at the state level because national Republicans and Democrats need strong state parties to energize a plurality or majority of the popular vote and because forty-eight states apportion their electoral votes on a winner-takes-all basis.

Margaret Lewis campaigns for Congress on the environmentally oriented Green Party ticket at Waryas Park in Poughkeepsie, New York, September 2002.
(© Kathy McLaughlin/The Image Works)

Members of one of the two major parties usually became state governors during the twentieth century. Jesse Ventura (Minnesota, 1998–2002) was an exception to the pattern. Occasionally, Republicans and Democrats ran and were elected as "nonpartisan" or "independent" governors. Less often, candidates of smaller parties sometimes were elected to Congress.

Although the United States is a presidentialist system, institutional constraints on effective participation and contestation are not inherent in presidentialism. For example, by the 1980s, the Philippines and South Korea demonstrated that non-U.S. presidential systems reserve seats in their national legislatures for candidates elected nationally from party lists who otherwise might not be able to win in individual districts.

Fusion is another alternative participatory tactic. Fusion lets supporters of parties other than the two major ones vote for their party's candidate when their party endorses the candidate of another party, but they vote on their own party's ballot line. Anticipating that scenario, fusion also lets supporters of the smaller party promote their agenda in candidate selection by the larger party. If the fusion candidate prevails, fusion lets supporters of smaller parties document their impact on the victory. Fusion flourished in some regions until the early decades of the twentieth century. However, by 2003, fusion was outlawed almost everywhere outside New York state.

Winner-takes-all single-member-district (SMD) elections are the rule for Congress and are typical for members of a majority of the state legislatures. SMD elections disadvantage the smaller political parties more so than would be the case if multimember-electoral-district (MMD) elections were the rule for elections to Congress and state legislatures. If fusion ballot lines were combined with MMD elections for Congress, a runoff requirement when no majority winner emerges would further diminish the smaller

parties' disadvantage. In use by several representative democracies, the single nontransferable vote is also likely to benefit electorally sophisticated minor parties.

In addition to these legal restrictions, managers of television stations and leaders of national civic groups disadvantage small parties by using a "viability" criterion to minimize and exclude media exposure of minor political parties in media coverage of candidates' debates. Whereas numerous Republican and Democratic candidates appear on televised talk shows and debates during the run-up to primary elections in national and state elections, free media coverage is less often afforded to candidates of other political parties.

The prevailing wisdom of the "wasted-vote" axiom deserves closer scrutiny. Arguably, single-member-district/first-past-the-post elections lead voters leaning toward support of minor parties to feel constrained to vote for candidates with whom they have major differences rather than throw away their vote for a candidate and party with whom they really agree. However, a perception of a potentially "wasted vote" has two other effects: It leads potential voters to withhold their votes from all Republican and Democratic candidates by withdrawing altogether from voting. And it leads yet other voters and would-be voters to value nonelectoral political activity more highly.

In 1998 bicameral legislatures in thirteen (27 percent) of the forty-nine bicameral states had single-member-district elections for members of at least one house. Like the other thirty-six bicameral states and like one house in most of the remaining thirteen, voters in unicameral Nebraska also elect their legislature in first-past-the post SMD elections.

The Green Party and other smaller parties are sometimes more successful at the polls in municipal elections where ostensibly nonpartisan elections are common. Indeed, MMDs at the municipal level may be a quiet protest against two-party dominance.

Several amendments to the U.S. Constitution expanded the franchise (Amendments Fourteen, Fifteen, Seventeen, Nineteen, Twenty-three, Twenty-four, and Twenty-six), as did the Voting Rights Act of 1965 and successor statutes. Yet the tendency to dismiss issues of fair representation and civil liberties issues embedded in the contest for ballot access and inclusion in televised debates disenfranchises a substantial plurality of U.S. citizens. Dismantling those barriers is the next frontier of citizen empowerment.

Vincent Kelly Pollard

See also: Democracy and Civil Liberties; First Amendment; Political Parties; Presidential Debates; Tyranny of the Majority.

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Miranda v. Arizona (1966)

Whether they realize it or not, most Americans are familiar with the U.S. Supreme Court's decision in *Miranda v. Arizona,* 384 U.S. 436 (1966). Many crime dramas on television and in the movies incorporate the *Miranda* warnings in dialogue when a character is being arrested: "You have the right to remain silent. If you give up that right, anything you say can and will be used against you. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand these rights?" At minimum, average Americans hearing these familiar words on television have become at least somewhat

Police officer reads *Miranda* rights to suspect.
(© Bob Daemmrich/The Image Works)

more aware of the constitutional rights afforded criminal defendants. Although civil libertarians applauded the *Miranda* decision, its protections have been limited by subsequent Court decisions. When the case was first decided, it was highly controversial because many law enforcement officials feared it would put convicts back on the streets. Those fears have been largely unfounded.

The U.S. Supreme Court under Chief Justice Earl Warren was considered very liberal and was known for its protection of civil liberties. The *Miranda* decision forced all states to read suspects the aforementioned warnings before questioning them to avoid forced self-incrimination. The case dealt with an indigent Mexican male with mental problems who was not informed of his Fifth Amendment protections before incriminating himself. The Court held that his incriminating testimony was given under a so-called badge of intimidation, and the Court directed that the warnings must be read in the future to all persons under "custodial interrogation"—persons who were not free to leave a police interview. A precursor to this ruling was *Escobedo v. Illinois,* 378 U.S. 478 (1964), which had also liberalized protections for custodial interrogations.

The Court under the more conservative leadership of Chief Justices Warren E. Burger and William H. Rehnquist, however, created exceptions to the *Miranda* warnings. For example, the Burger Court developed a "public-safety" exception to *Miranda* in *New York v. Quarles,* 467 U.S. 649 (1984), that allowed the police to ask questions of a suspect, such as "Where's the gun?" without providing Miranda warnings if the safety of the public was in jeopardy. Another ruling by the Burger Court in *Nix v. Williams,* 467 U.S. 431 (1984), created the "inevitable-discovery" exception that upheld a conviction without *Miranda* warnings because police would have found the incriminating evidence anyway.

Furthermore, the Rehnquist Court added a third limit to the self-incrimination protection. Prior to this Court's decision in *Arizona v. Fulminante,* 499 U.S. 279 (1991), the justices had held that any coerced confession automatically violated the Fifth Amendment. The Court created the harmless-error standard for coerced confessions in *Fulminante,* however. Although the Court overturned the conviction in this particular case, the broader application of the harmless-error standard is that if an individual would have been convicted even without a coerced confession, admitting the confession into evidence is deemed merely a "harmless error" and is not grounds for reversing a conviction.

Lori M. Maxwell

See also: Fifth Amendment and Self-Incrimination; Harmless Error; Sixth Amendment.

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Mississippi University for Women v. Hogan (1982)

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), established a new judicial standard for assessing discrimination against women. The case raised issues of gender discrimination under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and resulted in a special balancing test to be applied to cases involving classification by gender.

Joe Hogan, a registered nurse, was a nursing supervisor in a Columbus, Mississippi, medical center. He had never obtained a baccalaureate degree in nursing and wanted to work toward one at the state-supported Mississippi University for Women (MUW) School of Nursing, which was the only nursing school in the area. He could not matriculate there, university officials told him, because only women were admitted, but he could audit courses. Hogan sued in federal court, charging that excluding him on the basis of his sex violated the Equal Protection Clause of the Fourteenth Amendment, which provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The MUW School of Nursing argued that single-sex education afforded unique benefits to students and that maintaining a women-only policy was in keeping with the state's interest in providing female students with the greatest possible range of public educational opportunities, compensating them for past discrimination. When the case reached the U.S. Supreme Court in 1983, Justice Sandra Day O'Connor, writing for the five–four majority, rejected that claim. The women-only rule did not compensate anyone for past discrimination, she wrote. Women who chose to become nurses had not been discriminated against; on the contrary, 94 percent of those holding nursing degrees in Mississippi and almost 98 percent of nurses nationwide were women. What MUW's policy did, Justice O'Connor said, was "perpetuate the stereotyped view of nursing as an exclusively woman's job." The school's argument that having men in its classrooms would interfere with women students' learning made no sense, since MUW allowed men to audit courses.

The importance of the case, however, lay in the constitutional test articulated by Justice O'Connor. In cases that involved classification of people on the basis of gender, she wrote, the state "must carry the burden of showing an 'exceedingly persuasive justification.' " That meant the government had to prove that the gender classification served "important governmental objectives" and that the means employed were "substantially related to the achievement of those objectives." Additionally, the classification could not reflect "fixed notions concerning the roles and abilities of males and females" or "archaic and stereotypic notions."

Much of the path-breaking gender-equality litigation of the 1970s had revolved around the constitutional test to be used in deciding such cases. Women's rights advocates argued that classification on the basis of gender, like that on the basis of race, should be labeled "suspect" by the courts, and the burden should be on the government to prove that classification was necessary for a constitutionally legitimate purpose. Governmental entities replied that a "rational-relation" (or rational-basis) test was all that was necessary: If the classification was rationally related to a legitimate governmental goal, it was constitutional. Justice O'Connor and the majority of the Court chose an intermediate test in *Hogan,* in effect holding that gender classification by publicly supported institutions was not automatically suspect but had to be defended under the stringent criteria she articulated—and, by inference, that perpetuating stereotypical notions about gender roles did not meet those criteria.

Philippa Strum

See also: Balancing Test; Intermediate-Level Scrutiny; Strict Scrutiny; Suspect Classifications.

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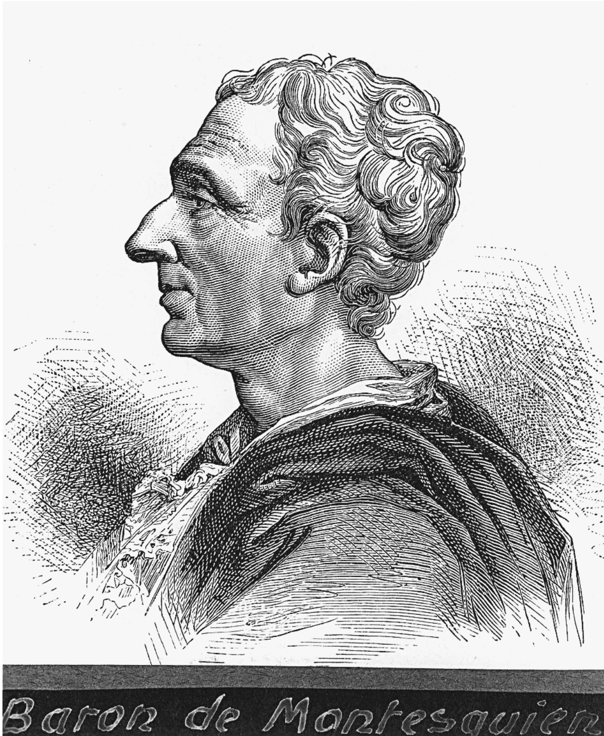
Montesquieu, Baron of (1689–1755)

Charles-Louis de Secondat, who would become known as Baron de Montesquieu, was a French writer and intellectual who played an important role in the creation of the U.S. Constitution. Montesquieu was regarded as one of the most influential political theorists of the eighteenth century.

Montesquieu was born to an important French family in 1689. He was extensively educated at the



Baron de Montesquieu advocated tolerance and political openness. *(Library of Congress)*

College de Juilly and studied law at the University of Bordeaux and Paris. In 1713, upon his father's death, Montesquieu became head of the family estates in Bordeaux. The next year he became a member of the parliament of Bordeaux. In 1716 he inherited the barony of Montesquieu when his uncle died.

Montesquieu followed a conventional pattern for a member of the nobility. His Bordeaux parliamentary duties were primarily judicial. Montesquieu presided over the Tournelle (criminal division) during his time of active participation. He oversaw prisons and torture and doled out punishments that included executions and deportations.

In 1721 Montesquieu anonymously published *The Persian Letters,* a fictional account of two travelers from Persia who encounter mysterious and comical customs on a trip to Paris. In 1728 he was elected to the French Academy and began three years of traveling in Europe and England. In 1748 Montesquieu published *The Spirit of the Laws,* by far his most important book. He became an outspoken reformer and published in Denis Diderot's *Encyclopedia* before his death in 1755.

Montesquieu's work focused on a rational and liberal reform of governmental power. He advocated tolerance and political openness. His years spent in England gave him the ideas for much of his political philosophy. Montesquieu called for a separation of powers and an independent judiciary to safeguard personal liberty. He also advocated reform in the criminal law that recognized differences of opinion and religion. In his *Encyclopedia* entry on political liberty, Montesquieu wrote, "It is the triumph of liberty when criminal laws draw each penalty from the particular nature of the crime. All arbitrariness ends; the penalty does not ensue from the legislator's capriciousness but from the nature of the thing, and man does not do violence to man." Montesquieu's examples included withdrawing the benefits of religion from someone convicted of sacrilege and withholding the benefits of society from someone who had violated public mores.

Montesquieu had a major influence on the framers of the U.S. Constitution. He was liberally quoted by federalists such as Alexander Hamilton and James Madison to defend their formation of a three-part government. Antifederalists also quoted Montesquieu's belief that a republic should be small in size. Both sides of the constitutional debate used Montesquieu as a source of wisdom, quoting him more often than they did John Locke.

Montesquieu's writings tried to bring enlightened humanism into practice. Although he was acknowledged as a great intellectual in his own time and became more famous with the next generation of American and French politicians, he is less known today than are many others who played lesser roles in influencing the new nation's Constitution.

Charles C. Howard

See also: Constitutionalism; United States Constitution.

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Moore v. City of East Cleveland (1977)

In *Moore v. City of East Cleveland,* 431 U.S. 494 (1977), the U.S. Supreme Court was brought face-to-face with the changing nature of the typical American family. This new family was composed of Inez Moore, a resident of East Cleveland, Ohio, who shared her home with her son Dale and her two grandsons. One of her grandsons, John Jr., who was the child of her other son, John, had returned to live with Inez Moore after his own mother died. This living arrangement proceeded unhindered for nine years.

In the meantime, East Cleveland passed an ordinance that limited occupancy of each dwelling unit to members of a single family, with "family" defined essentially as the nuclear family of parents and their children. Moore, who was then sixty-three years old, subsequently received a notice from the city informing her that she was in violation of the housing ordinance and directing her to remove John Jr. from her home. When she refused to expel her ten-year-old grandson, Moore was fined and sentenced to five days in jail. She appealed, arguing that the city ordinance violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution by making a crime out of a grandmother's choice to live with her grandson.

Before the Court could resolve this issue, it had to find within the text of the Constitution a right of the individual to define and preserve family living arrangements. Only three years earlier, in *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974), the Court had determined that unrelated individuals did not possess a fundamental right to live together. Justice Lewis F. Powell Jr., writing a plurality opinion on behalf of the Court in *Moore,* distinguished *Belle Terre,* stating that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." The Court then held that because the ordinance infringed on the liberty interest people possess in defining their family living arrangements, the Court must examine carefully the importance of the governmental interests advanced. The Court noted that those interests—preventing overcrowding, minimizing traffic and parking congestion, and avoiding financial burdens on the school district—were legitimate but were advanced only marginally by the ordinance. Therefore, Justice Powell concluded, the ordinance infringed on Moore's substantive due process rights. In his concurrence, Justice William J. Brennan Jr. noted that the pattern of the nuclear family was one found largely in white suburbia, and that African American families, which more commonly depended on extended family living arrangements, would be disproportionately impacted by ordinances like the one propounded by East Cleveland.

The Court had an opportunity to revisit the sanctity of the family nearly a quarter century later in *Troxel v. Granville,* 530 U.S. 57 (2000), and again noted the "fundamental right of parents to make decisions concerning the care, custody, and control of their children." That the Court will continue to revisit this issue should not be surprising, considering the increasing trend away from the traditional nuclear family. For example, in 1998, as the Court noted in *Troxel,* approximately 4 million children—or 5.6 percent of all children under age eighteen—lived in their grandparents' household. The Court has acknowledged that states have primary responsibility for creating a legal system that promotes the interests of families, but it has not shied away from protecting family interests in the past, and it will likely maintain this position in the future.

Andrew Braniff

See also: Family Rights; First Amendment; Right of Unmarried People to Live Together; Right to Privacy; Substantive Due Process; *Village of Belle Terre v. Boraas.*

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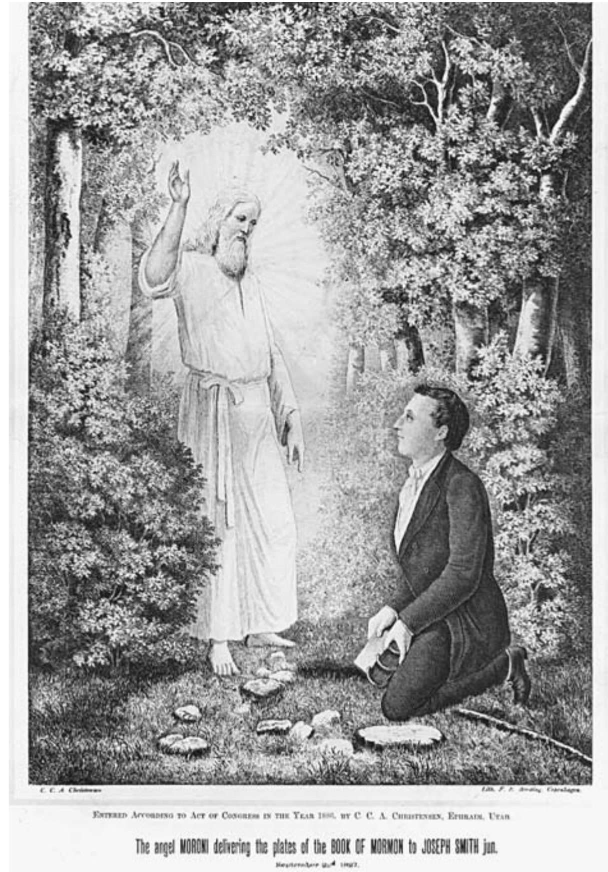
Mormons

The term "Mormon" is a nickname ascribed to members of the Church of Jesus Christ of Latter-day Saints. Church members typically refer to themselves either as Latter-day Saints or simply as Saints. The term "Mormon" comes from the *Book of Mormon,* which Latter-day Saints accept, along with the Bible, as scripture. Church members believe the *Book of Mormon* is a record of a branch of the tribes of Israel that left Jerusalem around 600 B.C.E., shortly before Jerusalem was captured by Babylon. This group came to the Americas and established a civilization that lasted approximately a thousand years before collapsing due to internal divisions and wars. The *Book of Mormon* contains an account of a visit by Jesus Christ to the Americas after his crucifixion and resurrection, and Latter-day Saints regard the book, according to its subtitle, as "Another Testament of Jesus Christ." Church founder Joseph Smith claimed to translate the book by the power of God from an ancient record written on gold plates that were buried in a hill named Cumorah, near Palmyra, New York.

The Church of Jesus Christ of Latter-day Saints has been among the most persecuted religious groups in the United States. The church was formally organized in April 1830 in New York, but shortly thereafter established Kirtland, Ohio, and Jackson County, Missouri, as gathering places for members. Conflicts soon arose with the old settlers of Jackson County as a result of cultural, religious, and political differences. Most of the Saints had migrated to Missouri from New England and valued Sabbath worship, education, and refinements, in contrast to the prevailing frontier atmosphere of Jackson County. The Latter-day Saints disapproved of slavery and were friendly with Indians. Many Missourians regarded the Mormons' beliefs in the *Book of Mormon,* as revelation, and modern-day prophets as unorthodox. The growth of the church also threatened the old settlers' political control of the county. By 1833, 1,200 Latter-day Saints had moved into Jackson County, and the local residents demanded that they leave. When the Latter-day Saints refused, a mob destroyed their printing press, looted the church store, and tarred and feathered church leaders. After continued violence, the Latter-day



A depiction of the angel Moroni delivering the plates of the Book of Mormon to Joseph Smith. *(Library of Congress)*

Saints were exiled to Clay County and later to Caldwell County.

Similar developments took place in Kirtland, Ohio. By 1838 about 2,000 Latter-day Saints lived in Kirtland, contributing to a tripling of the town's population in just seven years. In 1837, Latter-day Saints won all but one of the elected township offices and shifted voting patterns from Whig to Democratic. Kirtland became the only Democratic-voting township in a Whig-controlled county, and opposition grew from threats to mob action. In 1838 most of the Latter-day Saints in Kirtland left to join the Saints in Caldwell County, but the additional influx only increased animosities against the Saints in Missouri. Violence erupted again when Latter-day Saints in neighboring Davies County were prevented from voting on election day. Church leaders petitioned Missouri Governor Lilburn W. Boggs for protection. Governor Boggs told them to provide for their own

protection, so church leaders in the town of Far West organized their own state-authorized militia after mob action resulted in a number of deaths.

The violence escalated into open warfare. The Far West militia met a renegade group of Missouri militia in the Battle of Crooked River, which left one dead on each side. Rumors of Mormon aggression spread as a result of the battle, and Governor Boggs issued the "extermination order" on October 27, 1838, authorizing the Missouri militia to drive the Mormons from the state or exterminate them. The state militia attacked a Latter-day Saints settlement at Haun's Mill, killing seventeen, and then laid siege to the main body of the Saints at Far West. They arrested Joseph Smith, disarmed the Far West militia, and drove about 12,000 Latter-day Saints from Missouri into eastern Iowa and western Illinois. Joseph Smith was held for five months before guards allowed him to escape.

Governor Boggs issued the extermination order in the form of a military order in his capacity as commander-in-chief of the Missouri militia. The Missouri legislature debated the legality of the order during its 1839 session but did not come to a determination on the issue. The extermination order was not rescinded until Governor Christopher S. Bond did so in 1976.

In 1839, Joseph Smith traveled to Washington, D.C., to present affidavits to the federal government detailing the Saints' losses in Missouri and petition for redress. In February 1840 he met with President Martin Van Buren who replied, "Gentlemen, your cause is just, but I can do nothing for you." Technically, President Van Buren was correct, because the constitutional guarantees contained in the Bill of Rights did not apply to the states until after the ratification of the Fourteenth Amendment. However, the response also was indicative of the unwillingness of federal authorities to exercise their political influence to end religious persecution of the Mormons.

Church members fleeing Missouri's mobs and militia were welcomed in Illinois. The legislature granted Joseph Smith a charter for the city of Nauvoo on the banks of the Mississippi River. Nauvoo grew rapidly as converts arrived from the eastern United States, Canada, and the British Isles. At its peak, Nauvoo's population reached 15,000 to rival Chicago in size. However, opposition to the Mormons began to grow in Illinois. In 1844, Joseph Smith was arrested and then shot and killed by a mob while in the Carthage jail awaiting a hearing. The following year mob arson and violence drove many Latter-day Saints from their farms, and the legislature revoked the Nauvoo charter. Under the leadership of Brigham Young, the church began preparations to leave Illinois. When the mobs began stealing wagons needed for the journey and Illinois Governor Thomas Ford sent troops to Nauvoo to arrest church leaders, the Latter-day Saints were forced to begin their exodus in February, driving their wagons across the frozen Mississippi River. To escape persecution, the Saints settled in the Salt Lake Valley (in present-day Utah) outside the territorial boundaries of United States, though the United States shortly thereafter acquired the territory from Mexico in the Treaty of Guadalupe Hidalgo. Concern over the Mormon practice of polygamy delayed statehood for Utah until 1896 after church leaders officially renounced this doctrine.

Despite early persecution, the Church of Jesus Christ of Latter-day Saints has grown to become the sixth-largest church in the United States, with over 11 million members worldwide. Though perhaps still not considered mainstream, the church is respected for promoting self-reliance, abstinence from alcohol and tobacco, genealogy, and strong families.

Owen Abbe

See also: First Amendment; Free Exercise Clause; Polygamy; *Reynolds v. United States.*

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Movie Treatments of Civil Liberties

Moviemakers produce movies primarily to entertain audiences and to make money, but, like books on which they are sometimes based, movies also can help

educate and sway viewers about political matters. Despite the famous remark by Hollywood mogul Samuel Goldwyn that "messages are for Western Union," movies have always dealt with weighty political and legal topics—including issues related to civil liberties. The criminal justice system, the rights of persons accused of crimes, freedom of speech, freedom of the press, the Hollywood blacklist, and the right of privacy have all been addressed by Hollywood films. Shows dealing with crime and punishment, with criminal investigations and lawyers and judges, are also a staple of television.

Crime and the legal system have long been popular film topics. Numerous movies stress the need for an effective system of criminal justice. *The Man Who Shot Liberty Valance* (1962) and *The Life and Times of Judge Roy Bean* (1972) considered the lawlessness of the early American West, and *Mad Max* (1979) and its sequels looked at the same problem in a post-apocalyptic future. *Fury* (1936) and *The Ox-Bow Incident* (1943) highlighted the evils of mob justice. Gangster movies from the 1930s to the present, including *Little Caesar* (1931), *The Godfather* (1972), and *Goodfellas* (1990), explored the world of illegal activities and thereby spotlighted the need to combat crime.

Criminal trials have been frequently featured in movies, including *Anatomy of a Murder* (1959), *To Kill a Mockingbird* (1962), *. . . And Justice for All* (1979), *The Verdict* (1982), *Jagged Edge* (1985), and *Presumed Innocent* (1990). These films addressed issues such as the fairness of the judicial system and the importance of the individual lawyers and judges who worked in it. *Twelve Angry Men* (1957) looked at the jury system and the responsibilities of citizens who served on juries. The television movie *Gideon's Trumpet* (1980) told the story of the Supreme Court case that mandated that states provide defense counsel for indigent defendants. The issue of punishment arose in *A Clockwork Orange* (1971), in which mind control was used to try to reform criminals, and in *I Am a Fugitive from a Chain Gang* (1932), *The Shawshank Redemption* (1994), and *American History X* (1998), which looked at the prison system and its effects. The death penalty was explored in *Dead Man Walking* (1995), an even-handed look at the volatile issue, as well as in *The Chamber* (1996), *The Green Mile* (1999), and *The Life of David Gale* (2003).

The constitutional protections given to persons charged with crimes have often generated public opposition, a feeling that intensified as the Supreme Court expanded the rights of the accused in the 1960s. Several Hollywood movies reflected a frustration with those rights, seeing them as loopholes through which criminals escaped punishment. *Dirty Harry* (1971) and its sequels featured a San Francisco detective who sometimes ignored constitutional protections and instead sought justice by taking the law into his own hands. *Death Wish* (1974) and its sequels and *The Boondock Saints* (1999) celebrated vigilante action by private citizens as a way to compensate for the limitations of the legal system. In *The Star Chamber* (1983), judges, frustrated with the loopholes in the legal system, formed a secret organization to dispense justice as they saw fit. *RoboCop* (1987) and its sequels involved a cyborg designed to bring immediate justice in Detroit in the near future.

Another basic civil liberty, free speech, has been the subject of several films. *The People v. Larry Flynt* (1996) told the story of how an otherwise unadmirable pornographer became a champion of free speech. *Talk Radio* (1988) portrayed an abrasive radio host exercising his right to express his opinions. The related issue of freedom of the press arose in a variety of films. *All the President's Men* (1976) recounted how two reporters for the *Washington Post,* despite opposition from the president's administration, helped to expose the Watergate scandal. *Absence of Malice* (1981) presented a less glorified view of the power of the press when a newspaper got a story wrong and ruined lives in the process.

From 1947 to 1962, the film industry blacklisted, or refused to hire, persons suspected of having had Communist sympathies. This episode, prompted by the Cold War and America's strong fear of communism, was a key event in the history of the movie industry and had significant civil liberties implications. The blacklist plunged Hollywood into turmoil, as did the related question of whether people working in the industry should cooperate with the House Committee on Un-American Activities (HUAC), the congressional panel investigating the influence of Communists in the movies. Those opposing cooper-

ation argued that their constitutional rights under the Fifth Amendment should enable them to refuse to answer questions.

Hollywood has examined the blacklist era in numerous movies. Films such as *The Way We Were* (1973), *The Front* (1976), *Guilty by Suspicion* (1991), *Rock the Cradle* (1999), and *The Majestic* (2001) dealt with the issue directly, whereas other films looked at the subject more allegorically. *High Noon* (1952) told the story of a Western marshal deserted by his townspeople at a key moment, much as those who refused to cooperate with HUAC were deserted by their colleagues. *On the Waterfront* (1954) sought to justify cooperation with the committee through a story of man who assisted a government investigation of a labor union even though it made him highly unpopular.

The Supreme Court added to the list of Americans' civil liberties when it enunciated, beginning in the 1960s, a right to privacy. One of the most controversial privacy issues has been abortion, a topic examined in several films, including *Citizen Ruth* (1996) and the television movies *Roe v. Wade* (1989) and *If These Walls Could Talk* (1996). Other films have considered the dangers to citizens' privacy posed by government, particularly when well-equipped with technology. In *Conspiracy Theory* (1997), the seemingly far-fetched fears of a New York City cabdriver about an out-of-control government proved to be true. A lawyer's privacy was grossly violated by the government's National Security Agency (NSA) in 1998's *Enemy of the State.* In *Minority Report* (2002), futurist police officers read the thoughts of citizens to predict when they planned to commit murder.

Mark E. Byrnes

See also: Blacklisting; Capital Punishment; Due Process of Law; First Amendment; Right to Privacy; Trial by Jury.

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Muller v. Oregon (1908)

In *Muller v. Oregon,* 208 U.S. 412 (1908), the U.S. Supreme Court faced the issue of whether the police power of a state to protect the public health, safety, and welfare of its citizens could be used to limit the liberty of contract for working women. Only three years earlier, in *Lochner v. New York,* 198 U.S. 45 (1905), the Supreme Court had struck down a New York regulation that prohibited bakers (a profession that was exclusively male) from working more than ten hours a day or sixty hours a week as a violation of the liberty of contract, which was protected by the Due Process Clause of the Fourteenth Amendment. In *Muller,* however, the Court unanimously ruled that an Oregon statute prohibiting women from working more than ten hours per day in factories or laundries was constitutional. In doing so, the Court placed limits on the liberty-of-contract doctrine and the requirement of due process protections for economic liberties as applied to women because of their special status as mothers. As Justice David J. Brewer's opinion noted, the state could legitimately use its police power to regulate the working hours of women because "as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race."

Justice Brewer's opinion in *Muller* also made note of a nontraditional brief filed in support of the state by Louis D. Brandeis, a prominent Boston attorney who would later become a Supreme Court justice. Eschewing the traditional format of lengthy legal arguments and citations to precedents, Brandeis filed a brief containing only two pages of precedent and over one hundred pages of sociological, economic, physiological, and medical data purporting to show the deleterious effects of long working hours on women's health. The Court's acceptance of this "Brandeis brief" successfully opened the door for judges across the country to consider nonlegal materials, especially social science data, in making their decisions, a prac-

tice that has now become commonplace. Moreover, the justices' comments about the brief reflected a broader recognition that judges should consider the relevant social context—and not solely legal precedents—when making their decisions, and they also gave implicit approval to the "sociological jurisprudence" movement (which was based on the idea that the law ought to reflect the reality and needs of society), of which Brandeis was a leading advocate.

Although the Court acknowledged Brandeis's arguments about the genuinely negative effects of long working hours on women, its actual decision in *Muller* reflected the generally held paternalistic view of working women at the time. Furthermore, the holding in *Muller* was confined solely to regulations that limited women's working hours. By contrast, in *Adkins v. Children's Hospital,* 261 U.S. 525 (1923), the Court struck down a minimum-wage law for women as a violation of the liberty of contract. Thus, although the *Muller* decision was a victory for progressive reformers, it did not overturn the Supreme Court's general support of substantive due process protections of economic liberties during this time.

James McHenry

See also: Brandeis, Louis Dembitz; Contract, Freedom of; *Lochner v. New York;* Substantive Due Process.

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Murphy, Frank (1890–1949)

Frank Murphy was President Franklin Roosevelt's fifth Supreme Court nominee. Murphy was born in Sand Beach, Michigan, on April 13, 1890, to a devoutly Catholic and politically active family. He received his law degree from the University of Michigan in 1914 and joined a Detroit law firm until his military service in World War I. After his discharge, he was appointed an assistant U.S. attorney for the Eastern District of Michigan. He briefly undertook private practice, but returned to public life with his election as judge of Detroit's Recorder's Court in 1923. He demonstrated unusual sensitivity to the interests of racial minorities and the economically disadvantaged. He was elected mayor of Detroit in 1930 and responded to the hardships resulting from the Great Depression by developing a public assistance program in Detroit.

Murphy was instrumental in Franklin Roosevelt's election to the presidency in 1932. Soon after Roosevelt's inauguration, Murphy was appointed governor general of the Philippines, returning to be elected governor of Michigan in 1936. Politically damaged by his intervention in an automobile workers' strike, Murphy lost his bid for reelection. He moved to Washington, D.C., and Roosevelt appointed him U.S. attorney general, a position he used in aggressively seeking to protect the interests of organized labor and racial minorities. These priorities created some friction inside the administration, which prompted Roosevelt to nominate him for the Supreme Court.

Murphy served on the Supreme Court for about a decade (1940–1949) and has been characterized as the most liberal justice ever. He was ends-driven and viewed law as a means to advance freedom and justice. One writer suggested that Murphy subscribed to a "visceral" jurisprudence and that his opinions "swept aside technical 'niceties' in a quest for justice and 'human dignity.' " Murphy doubted his capacity to function as a justice, but this did not prevent him from having a judicial philosophy, which featured the primacy of constitutional rights over all other constitutional provisions. This "preferred freedoms" view was given effect by subjecting any law that impinged on a protected right to exacting judicial scrutiny. Murphy embraced this value in *Thornhill v. Alabama,* 310 U.S. 88 (1940), in which he concluded that the First Amendment protected peaceful picketing.

World War II occasionally led Murphy to take the government's side against individual rights claims, such as in the first flag-salute case, *Minersville School District v. Gobitis,* 310 U.S. 586 (1940). He "corrected" his *Gobitis* vote in *West Virginia Board of Ed-*

ucation v. Barnette, 319 U.S. 624 (1943), and said a justice has "no loftier duty or responsibility than to uphold . . . spiritual freedom to its farthest reaches." He voted with the Court in *Hirabayashi v. United States,* 320 U.S. 81 (1943), as it upheld the curfew provisions of Roosevelt's executive order during World War II directed at those of Japanese ancestry. Murphy later became an outspoken critic of relocating the Japanese, concluding that it "legaliz[ed] racism." Many regard his dissent in *Korematsu v. United States,* 323 U.S. 214 (1944), as his most powerful opinion.

Murphy was adamant that procedural guarantees of the Constitution extended to all persons. The protections afforded by the Bill of Rights must "survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them." One scholar suggested that no Court justice "was so consistent and passionate a judicial crusader for civil liberties for everyone; for Nazi spies and for Japanese generals, in peacetime and in wartime, as Murphy." Many of the positions Murphy took presaged the liberal decisions of the Court under Chief Justice Earl Warren during the 1950s and 1960s. As early as 1942, Murphy began to experience health problems, and during his last three years on the Court, he was hospitalized several times. He suffered a fatal heart attack and died July 19, 1949.

Peter G. Renstrom

See also: Korematsu v. United States; Preferred-Freedoms Doctrine.

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Music Censorship

Music is a way for people to explain their feelings, whether those emotions are love, anger, joy, dismay, disapproval, or myriad others. Because music is open to interpretation and because people enjoy or dislike music according to their own individual tastes, ages, and lifestyles, music censorship has been present since advances in technology provided a means of bringing music in its many forms to listening audiences. Music has long been considered a way for young people to express themselves and to declare independence from their parents and other adults in positions of authority. Because of this, successive generations of parents have responded to new styles of music by viewing them as threats to their control over their children and as detrimental to society as a whole. In retrospect, the censorship of certain kinds of music or artists assumes a certain ludicrousness. Young adults who were reared on MTV may find it hard to believe that saxophone music was called the "devil's flute" in the 1920s, that singing cowboy Gene Autry was banned in the 1930s, that Cole Porter and Billie Holiday were considered "obscene" in the 1940s, that a gyrating Elvis Presley was filmed only from the waist up in the 1950s, or that the Beatles were considered "dangerous" to mainstream morality in the 1960s. Of course, the mere notion of censorship of music cuts to the heart of the right to free expression protected under the First Amendment to the Constitution. Nonetheless, there have been occasional successful efforts to ban particular types of music or individual songs.

Rock and roll has been banned more than any other kind of music in history for a variety of reasons. In 1954 the House of Representatives considered a bill that would have made it a federal crime to mail "dirty" music, punishable by a $50,000 fine. In 1955 one Chicago radio station received 15,000 calls in a single week from adults complaining about the "evils" of rock and roll, which was thought to promote juvenile delinquency. A deejay in Portland, Oregon, was fired in December 1957 for playing Elvis Presley's version of "White Christmas" because the arrangement was in "poor taste." In 1960 a number of radio stations banned Ray Peterson's "Tell Laura I Love Her" about a teenager who died, dubbing it "the death

disk." Chubby Checker's "The Twist" was called "un-Christian." Bob Dylan was banned in El Paso, Texas, because his lyrics were hard to understand and "might" be obscene.

In the early days of rock and roll, black music, or rhythm and blues, was seen as "lewd and lascivious" and as a threat to the decency of white middle-class teenagers. In April 1956 the White Citizens Council of Birmingham, Alabama, banned all rock-and-roll music because the members believed it had been created by the National Association for the Advancement of Colored People (NAACP). In 1958 several Middle Eastern nations banned the entire rock-and-roll genre because an Iranian doctor insisted that teenagers were injuring their hips from the "extreme gyrations." In 1965, after a number of rock stations in the United States banned the Rolling Stones' "Satisfaction" for being too "suggestive," the song shot to number one on charts around the world.

As protests against the Vietnam War spread in the 1970s, radio stations banned large numbers of musicians for being "anti-American." Other 1970s songs, such as Peter, Paul, and Mary's "Puff the Magic Dragon" and the Beatles' "Yellow Submarine" were thought to promote the drug culture. The Reverend Jesse Jackson announced that all dance music contributed to promiscuity and drug use. Beginning in the late 1970s and continuing into the early 1980s, the United States experienced a period in which record burnings were held throughout the country. Rumors were spread that rock music contained satanic messages if played backward. A California legislator introduced a bill to ban "back masking," which he insisted could "manipulate our behavior without our knowledge or consent and turn us into disciples of the anti-Christ."

Over a period of several decades, parents, politicians, and radio stations have discussed the idea of a standardized labeling system for recorded music and music videos. No individual has been more closely associated with the music-labeling system than Tipper Gore, wife of former Vice President Al Gore. Tipper Gore helped to found Parents Music Resource Center (PMRC) in 1985 with a $5,000 start-up grant from Mike Love of the Beach Boys. PMRC lobbied Congress and the music industry for labels on any music that contained sexually explicit and/or vulgar language, harangued against women, or advocated inflicting pain or committing suicide. PMRC insisted it was not advocating censorship but simply asking that parents be warned about the content of questionable music before it was placed in the hands of their children.

In 1990, Congress considered but did not pass a resolution that would have urged the music industry to adopt a uniform warning label for all recorded music and music videos identified as violent or obscene. In that same year, the rap group 2 Live Crew became a household name after members were arrested on obscenity charges for graphically simulating sex at a concert in Hollywood, Florida. In Greenville, South Carolina, seven record-shop owners were arrested for selling the group's album "As Nasty As They Wanna Be." Throughout the 1990s, censuring rock musicians such as Guns 'n' Roses, Nirvana, Madonna, and Ice-T was common practice. Censors also objected to some country music. Both Garth Brooks's "The Thunder Rolls" and Martina McBride's "Independence Day" were banned because they referenced domestic violence. As the twenty-first century began, music censors were still at work. Four private school students were suspended for listening to the Backstreet Boys who were considered "indecent" and "inappropriate." The New York Police Department (NYPD) boycotted Bruce Springsteen's "American Skin," which told the story of unarmed immigrant Amadou Diallo killed by the NYPD when he reached for his wallet.

Elizabeth Purdy

See also: Censorship; First Amendment; Internet and the World Wide Web; Obscenity; Parents Music Resource Center; "Seven Dirty Words."

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National Association for the Advancement of Colored People v. Alabama ex rel. Patterson (1958)

In the mid-1950s, several southern states began efforts to hamper the ability of civil rights organizations such as the National Association for the Advancement of Colored People (NAACP) to organize and operate openly. These efforts raised issues involving the freedom to associate and assemble as provided in the First Amendment to the U.S. Constitution. One such attempt was the 1956 lawsuit by John Patterson, the attorney general of Alabama, to enjoin (stop) the NAACP from doing business in Alabama without registering as a "foreign" corporation. Business corporations organized in one state are "foreign" in another state and may only do business in another state after such registration. At the time, Alabama had generally neglected to require nonprofit organizations to undertake such registration. The NAACP was a nonprofit group.

As part of the lawsuit, the attorney general obtained a court order requiring the NAACP to produce records including the names and addresses of all its members in Alabama. Fearing that its members would face harassment and danger if their names were made public, the NAACP refused to produce the records. The trial court held the NAACP in contempt of court and assessed a fine of $100,000. The Supreme Court of Alabama refused to review the fine, after holding that the NAACP should have sought appellate review before it disobeyed the order to produce the records.

On appeal, the U.S. Supreme Court unanimously held in *National Association for the Advancement of Colored People v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958), that the Alabama Supreme Court had erred in refusing to review the order to produce records and the fine. The Supreme Court held that compelling an association to reveal the names of those who are its members may violate the First Amendment right to freedom of association, "particularly where a group espouses dissident beliefs." Since the NAACP had shown, as the Court said,

> that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility[,] . . . compelled disclosure of [the NAACP's] Alabama membership is likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have a right to advocate.

Despite the Supreme Court's ruling, it took two more appeals by the NAACP to that Court before the state of Alabama's efforts at banning the organization ended in 1964. In *National Association for the Advancement of Colored People v. Alabama ex rel. Flowers,* 377 U.S. 288 (1964), the Supreme Court held that even if the NAACP was required to register with the Alabama secretary of state before "conducting business" in the state, its failure to do so did not constitute grounds for permanently barring it from the state. Alabama also sought to bar the NAACP on the grounds that it had encouraged the 1955–1956 Montgomery bus boycott and had made false charges against state officials in 1956 in a case to desegregate the University of Alabama. The Supreme Court held these charges "furnish no basis for the restriction of the right of the [NAACP's] members to associate in Alabama."

Courts have cited these cases numerous times in denying government attempts to force unpopular organizations and minor political parties to disclose their membership lists.

Edward Still

See also: First Amendment; Right to Privacy.

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National Endowment for the Arts v. Finley (1998)

In *National Endowment for the Arts v. Finley,* 524 U.S. 569 (1998), the U.S. Supreme Court held that decency and respect standards may be imposed on works of art receiving funding from the federal government without interfering with First Amendment rights to free expression.

Two late 1980s photography exhibitions caused such a furor with a portion of the public that a congressional group called for the abolishment of the National Endowment for the Arts (NEA)—which had partially funded the exhibits—and a group of twenty-two senators sent the NEA a letter demanding that the agency decline to fund this type of work.

One exhibit—sponsored by a North Carolina contemporary arts group—included Andres Serrano's photograph depicting a crucifix immersed in a jar of urine, entitled "Piss Christ." The other, sponsored by the University of Pennsylvania's Institute of Art, consisted of photographs by Robert Mapplethorpe of which a few (out of 150 photographs) caused controversy due to their depiction of homoerotic and sadomasochistic themes among biracial couples.

After significant debate in Congress, an amendment offered by Senator Jesse Helms (R-NC) passed requiring that NEA funds not be used to promote, disseminate, or produce materials that in the judgment of the NEA might be considered obscene. Congress also adopted the Williams-Coleman Amendment—a bipartisan effort to save the NEA—establishing that the NEA chairperson should ensure that artistic excellence and artistic merit were the criteria by which applications were judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public. Furthermore, the legislation stated that obscenity was without artistic merit, was not protected speech, and should not be funded.

Previously, four performance artists—Karen Finley, John Fleck, Holly Hughes, and Tim Miller—had applied for and gained initial advisory panel approval for their grants, but the NEA denied them upon recommendation of the National Council of the Arts. These artists filed suit claiming that the NEA violated their First Amendment rights, first by denying their applications on political grounds and on the basis of their past artistic work rather than on the criteria set forth in the statute, and second, by violating procedural safeguards that required the council's decisions to be made by the group as a whole. After Congress imposed the decency clause on NEA funding requirements, the plaintiffs amended their complaint to include a facial challenge (that is, the law at issue always operates unconstitutionally) to the decency clause on First and Fifth Amendment grounds.

The U.S. District Court for the Central District of California examined the facial challenge and found the decency clause unconstitutionally "broad" (it prohibited too much protected speech) in violation of the First Amendment right to free expression and unconstitutionally "vague" (it was unclear as to what was prohibited) in violation of the Fifth Amendment right to due process. Four years later, a divided panel of the Ninth Circuit Court of Appeals affirmed the lower court's decision.

The Supreme Court in an eight–one decision, with Justice Sandra Day O'Connor writing the majority opinion, held that the federal government could deny grants to artists if the NEA determined the work indecent. Justice O'Connor held that applying a "decency and respect" standard to NEA grants neither inherently interfered with First Amendment rights nor did it violate constitutional vagueness principles.

In sum, applying a standard that can have many interpretations—as "decency and respect" certainly does—presents a threat to free speech. In the NEA context, however, artists who challenge social norms through works deemed indecent or disrespectful may face obstacles, at least in obtaining federal funding.

Mark Alcorn

See also: First Amendment; *Miller v. California;* Obscenity.

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National Firearms Act of 1934

The National Firearms Act of 1934 (NFA) was the nation's first major federal gun control law. Passed in response to public concerns about the use of "gangster weapons" in violent organized crime, the act applied to certain categories of firearms, including Thompson submachine guns ("tommy guns"), sawed-off shotguns, silencers, and a variety of other weapons. Congress passed the NFA as part of the tax code to avoid constitutional issues related to federal gun control. Originally proposed as a much more comprehensive gun control law, the final version of the act required anyone manufacturing, selling, buying, and owning the specified gangster weapons to register with the Internal Revenue Service (IRS) and to register and pay heavy taxes for transferring ownership of the weapons. The Bureau of Alcohol, Tobacco, and Firearms (BATF) was charged with administering the act. The NFA has changed little over the years and, together with the often revised Gun Control Act of 1968, remains at the core of federal gun control legislation.

Prohibition and the Great Depression spawned widespread violence. The Valentine's Day massacre in Chicago, Illinois, in 1929, in which seven gangsters were killed, and an attempted assassination of President Franklin D. Roosevelt in 1933 were just two of many violent episodes that contributed to public fear and outrage and led to calls for firearms regulation. The demand for federal action to curtail violence coincided with Roosevelt's becoming president in 1933 and the inception of the New Deal with its emphasis on federal activism. As governor of New York, Roosevelt had supported gun control. U.S. Attorney General Homer Cummings favored firearms control and registration of all weapons, except sporting rifles and shotguns, declaring in 1937, "Show me the man who does not want his gun registered and I will show you a man who should not have a gun."

The Justice Department's first version of the NFA (House Resolution 9066) required registering and taxing of most firearms, including pistols and revolvers. Cummings, however, had underestimated opposition to handgun control measures. A coalition of small-arms manufacturers, hunting groups, gun enthusiasts, and especially the National Rifle Association (NRA) mobilized against the more comprehensive version of the bill, which became widely known as the "machine gun bill." This pressure led to two significant changes in the final version of the act (House Resolution 9741). Most important, it omitted the provisions for handgun registration. Congress also changed the definition of a machine gun from semiautomatic to fully automatic weapons.

To avoid questions of the constitutionality of a federal gun control law, Congress modeled the NFA after the Narcotics Drug Act of 1914, the Harrison Act, which used the government's taxing power to control drugs and had already survived a constitutional challenge. The intent of the NFA was clearly to eliminate gangster weapons by establishing prohibitively expensive taxes on them. The transfer tax on machine guns, sawed-off shotguns, and silencers was $200, with a tax of $5 on other types of weapons. All weapons covered by the NFA had to be registered, and transferring ownership of such a weapon involved a formal application.

The importance of the NFA transcends its specific provisions. It is significant for its omissions and for its unintended consequences. The omission of handgun registration from the final version of the act was an important lost opportunity. In addition, the NFA and the debate over it galvanized the pro-gun-rights political movement, especially the NRA, which became more closely involved in the legislative process. The NRA and other groups went on to play an even more important role in passage of the federal Firearms Act of 1938, which was significantly weaker than the NFA.

Walter F. Carroll

See also: Second Amendment.

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National League of Cities v. Usery (1976)

National League of Cities v. Usery, 426 U.S. 833 (1976), was the first case since the New Deal era in which the U.S. Supreme Court declared unconstitutional congressional exercise of the Commerce Clause power. At issue in the case was the permissible scope of the federal Fair Labor Standards Act, which had been amended in 1974 to include employment standards for state and local government workers. The Court's majority opinion, by then-Justice William H. Rehnquist, spelled out a vision of federalism much at odds with the post–New Deal consensus on the Court. In that regard it was a precursor to the federalism controversies that preoccupied the Court in the late 1990s and beyond—albeit the case only remained good law for less than a decade.

Justice Rehnquist's opinion centered on the concept of state sovereignty and how best to protect it through the Constitution and the courts. Rehnquist acknowledged that the commerce power was wide ranging, subject only to the limits prescribed by the Constitution. He further accepted that those limits were generally understood to be the guarantees of individual rights provided by the Constitution. Rehnquist's innovation was to interpret the federal nature of the Constitution as a comparable restraint upon congressional action. He argued that the sovereignty of the states acted as an affirmative limit on the scope of the Commerce Clause.

The majority claimed that in much the same way as the right to a fair trial or the right to due process limited the applicability of the commerce power on individuals or corporations, state sovereignty should limit the scope of the commerce power as it applied to the states. Justice Rehnquist did not provide a great deal of evidence to suggest that the Constitution's authors explicitly sought to protect state sovereignty. He relied instead upon the tradition of the Court to respect state sovereignty in the past. This was particularly true when Congress had attempted to regulate the states as states.

Much of the Commerce Clause expansion that typified the post–New Deal certainly offended what might be labeled state sovereignty, but did so generally by means of preempting or overruling what was traditionally state jurisdiction. Commerce Clause regulation by Congress frequently filled in areas and activities previously undertaken by the states or presumed to be within the ambit of the states. The commerce power had much less frequently been used by Congress to regulate the states in the conduct of their own activities. By trying to set wage and overtime rates for local government employees, Congress was setting out to regulate the states as employers. The federal government argued that its regulation of states and local governments as employers was no more abusive of state jurisdiction than the preemption of state authority more typical of Commerce Clause expansion.

Given that state employees represented a high proportion of the workforce, efforts to control prices and wages would be stymied if they did not apply to state employees as well as those in the private sector. Rehnquist rejected this argument, claiming that the Court had "repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." In other words, the commerce power might very well allow Congress to make laws regulating employment, but it did not permit Congress to tell the states how to conduct their own affairs.

What qualified as the undeniable attributes of state sovereignty was left somewhat vague by the majority. Rehnquist did suggest that "traditional state functions" needed to be left untouched by Congress. At a minimum, Rehnquist believed that the hiring and remuneration of state employees was an "undoubted attribute of state sovereignty."

National League of Cities was a stunning victory for advocates of states' rights. The Court had not overruled an attempt at commerce regulation by Congress

in nearly forty years, and the case firmly cemented Rehnquist's credentials as an advocate of state autonomy. Rehnquist's doctrinal innovation, however, would prove to be short-lived. Limitiations on Congress based on state sovereignty perhaps challenged conventional wisdom, but they did not in turn become conventional wisdom. After an attempt to flesh out a standard of "traditional state functions" in *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264 (1981), the Court overturned *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), nine years later.

Gerald Baier

See also: Garcia v. San Antonio Metropolitan Transit Authority.

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National Organization for Women v. Scheidler (1994)

In *National Organization for Women v. Scheidler,* 510 U.S. 249 (1994), the U.S. Supreme Court found that the National Organization for Women (NOW) could sue protest groups who blocked access to abortion facilities, on grounds that they engaged in racketeering and extortion in violation of federal statutes. A decade later, in *Scheidler v. National Organization for Women,* 537 U.S. 393 (2003), the Court held that the antiabortion protest groups did not violate racketeering laws unless they "obtained" property.

This landmark litigation, concerning both the right of the protest and the right to conduct business, developed over a period of seventeen years and reached the Supreme Court twice. In 1986, NOW brought charges against a coalition of antiabortion groups involved in antiabortion activity, alleging that they were part of a conspiracy to shut down abortion facilities through racketeering and extortion. One such group was the Pro-Life Action Network (PLAN), whose president was Joseph Scheidler. NOW accused PLAN and the other groups under the federal antiextortion law (Hobbs Act) of being in violation of the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970.

NOW brought a class action suit representing all women and abortion providers who were denied access to abortion facilities due to protests and blockades created by members of PLAN. The prosecution claimed PLAN conspired to employ threatened or actual force, fear, and violence to prevent patients from accessing services and to prevent doctors and employees from working at the facilities. The U.S. District Court and the federal Court of Appeals dismissed the case, finding that RICO did not apply because the defendants did not have an economic or profit-generating motive. In 1994 the U.S. Supreme Court overruled and found that RICO did not require an economic motive to classify an activity as racketeering or extortion as long as the activity negatively affected business. Thus, NOW did have standing to bring the claim on behalf of the affected women and health providers.

The case was returned to the lower courts for further proceedings, and in 1998, Joseph Scheidler, PLAN, Operation Rescue, and other named defendants were found guilty of racketeering under RICO. On appeal, the Seventh Circuit Court of Appeals upheld the decision, and the defendants appealed to the Supreme Court.

Because the defendants' appeal caused party names to be reversed at the Supreme Court level, the case became *Scheidler v. National Organization for Women,* and in the opinion, at 537 U.S. 393 (2003), Chief Justice William H. Rehnquist ruled for the antiabortion petitioners. Rehnquist argued that the petitioners did not violate the Hobbs Act because they did not "obtain" property from the defendants. The Court argued that although PLAN and others did disrupt business, in order for the Hobbs Act to apply, both a deprivation and acquisition of property must occur. Thus, there was no violation of the Hobbs Act or RICO.

This decision not only was important in abortion debate, but it also affected all individuals and groups concerned with the right to protest. If the Court had found PLAN guilty under RICO, all future protests

could have been in danger. A protesting activist found guilty of a single charge of racketeering and extortion could face enormous penalties, and political groups engaged in protest could be treated as a form of organized crime. For this reason, diverse groups such as People for Ethical Treatment of Animals (PETA) filed amicus curiae (friend of the court) briefs in support of PLAN.

Lynne Chandler Garcia

See also: First Amendment; *Roe v. Wade.*

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Natural Law

Proponents of natural law believe there is a fundamental and unchanging law common to all human beings and accessible through reason. Natural-law theory is usually contrasted to positive-law theory, which maintains that law is based upon the will of the sovereign and is manifested in human laws or constitutions. Natural-law theorists recognize positive, or human, law but do not end the inquiry there. Thus, Dr. Martin Luther King Jr. argued that laws requiring racial segregation, even when enacted according to legal norms, were wrong.

For most natural-law theorists, natural law is founded in the eternal law of God. Scholars believe the ancient Greeks originated this theory. Roman orator and lawyer Marcus Tullius Cicero, in *De Republica,* observed that "[t]rue law is right reason in agreement with nature; it is of universal application, unchanging, and everlasting. . . . And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge."

In *Treatise on Law,* written in the thirteenth century, Catholic theologian Saint Thomas Aquinas divided laws into four types: eternal, natural, human, and divine. He defined natural law as the rational creature's participation in the eternal law. William Blackstone, the eminent English law historian, wrote in his *Commentaries on the Law of England* that "when he [God] created man, and imbued him with free will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws." Hugo Grotius, the early seventeenth-century Dutch legal theorist and father of international law, stated that "natural law is the dictate of right reason indicating that any act is forbidden or commanded by God, the Author of nature." Nevertheless, Grotius maintained that natural law exists "even if we were to suppose . . . that God does not exist or is not concerned with human affairs." Later natural-law theorists, such as Thomas Hobbes and John Locke, sought more explicitly to separate natural-law, or natural-right, principles from God's law.

Many American constitutional scholars maintain that American law is rooted in natural law and that the founders indicated this in the Declaration of Independence when referring to "the Laws of Nature and of Nature's God," to "self-evident" truths, and to the belief that people are "endowed by their Creator with certain unalienable Rights." In some of its early constitutional decisions, the U.S. Supreme Court relied upon natural law. For example, Justice Samuel Chase in *Calder v. Bull,* 3 U.S. 386 (1798), stated that "[a]n act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." However, Justice James Iredell, in his opinion in the same case, pointed to the difficulty of determining the conclusions to be drawn from natural-law principles: The "ideas of natural justice are regulated by no fixed standard: the ablest and the purest of men have differed upon the subject; and all that the Court could properly say, in such an event, would be that the Legislature (possessed of an equal right of opinion) had passed an act which, in the

Hugo Grotius, the early seventeenth-century Dutch legal theorist and father of international law, stated that "natural law is the dictate of right reason indicating that any act is forbidden or commanded by God, the Author of nature." *(Library of Congress)*

opinion of the judges, was inconsistent with the abstract principles of natural justice."

In the nineteenth century, natural-law theory was attacked by the emerging legal-positivist school, whose advocates contended that law is simply what the sovereign says it is. This intellectual debate found its way into American federal courts. Thus, in *Swift v. Tyson,* 41 U.S. 1 (1842), the Supreme Court held that in deciding cases based on diversity jurisdiction (that is, for federal courts to have jurisdiction to hear a case, the opposing parties must be citizens of different states, or "diverse"), federal courts were not bound by state common law but were instead free to apply their own interpretation of the *proper* common law. Thus, federal judges in ascertaining the appropriate common law, guided by their reason, would in essence be applying "natural law." State-court judges, guided by the interpretation of the common law by federal judges, would eventually alter state law accordingly. In *Swift,* Justice Joseph Story quoted Cicero's famous statement noted previously for the proposition that there could not be two versions of *the law*—not one version in Rome and another in Athens. Similarly, there could not be two versions of the common law in each state—one binding in state courts and another in federal courts.

After *Swift,* however, the states continued to adhere to their own interpretation of the common law, and by the 1930s, there were in fact two bodies of common law in every state. Oliver Wendell Holmes Jr., perhaps the most famous American positivist, criticized Justice Story's approach in *Swift* and characterized the natural law as a "brooding omnipresence in the sky." In *Erie Rail Road Co. v. Tompkins,* 304 U.S. 64 (1938), the Supreme Court overruled *Swift* and held that the federal court must apply the substantive law of the state in which it sat. Many legal scholars claimed that the *Erie* decision represented the victory of legal positivism over natural-law jurisprudence. Other scholars maintained that *Erie* simply placed authority over state law properly in the hands of state judges, who could then rely upon natural-law principles in their decision-making process if they chose to do so.

The debate over the existence and content of natural law continues. Part of the controversy over the 1991 nomination of Justice Clarence Thomas to the Court involved Thomas's alleged adherence to natural-law philosophy. Likewise, the increasingly politicized debates over constitutional interpretation regarding abortion and homosexuality raise the question of whether natural law should play a greater role in modern American jurisprudence.

Elizabeth M. Rhea

See also: Christian Roots of Civil Liberties; Constitutional Interpretation and Civil Liberties; Natural Rights.

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Natural Rights

Natural-rights theories hold that individuals have certain universal and eternal rights, grounded in human nature, that exist apart from the "positive" or conventional laws adopted by governments at particular moments in time. Thus, for a believer in natural rights, the mere fact that a law is in force does not necessarily mean that it is morally binding. Theories of natural rights exerted a strong influence on the founding of the United States and on debates over the protection of civil liberties. Throughout U.S. history, individuals and groups have criticized public officials and policies, staged protest rallies, and engaged in civil disobedience to protest laws believed to be unjust. The concept of natural rights historically has played an important role in establishing a basis for evaluating the justice of existing laws and the actions of those in power.

Natural-rights thought has deep roots in the ancient natural-law tradition, which emphasized that even the most powerful rulers were subject to certain higher, fundamental commands. The modern philosophy of natural rights placed individual rights at the starting point of analysis. From this perspective, human beings had certain basic rights even in a state of nature, outside any organized political society. Probably the natural-rights theorist who had the greatest influence on the framers of the nation's founding documents was seventeenth-century English philosopher John Locke. For Locke, individuals in a hypothetical, prepolitical state of nature held the rights to self-preservation and to property in the fruits of their labor. In this state of nature, however, people would find that they were unable fully to enjoy these rights in the absence of adequate security and order. Thus, when people entered into a social contract, they agreed to give up some of their rights and to be governed by a common political authority. Since government was instituted to protect natural rights, individuals retained the right to rebel against an illegitimate government that failed to protect the most basic liberties. Thus, unlike the earlier English natural-rights philosopher Thomas Hobbes, who advocated a sovereign with absolute power to maintain order, legitimate government for Locke was necessarily one with only limited powers.

The Declaration of Independence reflected the influence of natural rights and Lockean philosophy, proclaiming as self-evident truths "that all men are created equal; that they are endowed by their Creator with certain unalienable rights; . . . that to secure these rights, governments are instituted among men." The Bill of Rights (the first ten amendments to the Constitution), along with certain individual rights set forth in the original Constitution, gave concrete expression to the general proposition that government must be limited and directed to protecting the rights of the governed. Although the notion of a higher law restraining government was familiar in Europe, the innovation of American constitutionalism was to give effect to this higher law in the form of legally enforceable individual rights.

Judges in the late eighteenth and early nineteenth centuries sometimes referred to natural law or natural rights to justify their decisions, but explicit mentions waned in the decades preceding the Civil War. In the late nineteenth century, however, the influence of natural rights on constitutional jurisprudence became highly visible and controversial, especially in an area of constitutional law known as "substantive due process." The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit government from depriving persons of life, liberty, or property without due process of law. The clauses were always under-

stood as providing procedural protections, but courts began relying on them to invalidate certain governmental regulations on the grounds that they arbitrarily interfered with certain basic liberties. This line of reasoning was controversial because these basic liberties were not explicitly set forth in the Constitution. In one of the most famous examples, the Supreme Court in *Lochner v. New York,* 198 U.S. 45 (1905), struck down a New York law setting a maximum number of hours that bakers could work in a given day or week. According to the justices, the law violated the right to the freedom of contract, which they viewed as part of the "liberty" protected by the Due Process Clauses.

Although the Supreme Court pronounced in the 1930s and 1940s that it would henceforth accord great deference to legislatures in the area of economic regulations, the debate over whether the Constitution protected certain basic rights not explicitly identified in the Constitution shifted to other areas. Most notably, the Supreme Court held in *Roe v. Wade,* 410 U.S. 113 (1973), that the right of a woman to choose whether to terminate a pregnancy fell within the "liberty" protected by the Due Process Clause. More recently, in *Lawrence v. Texas,* 539 U.S. 558 (2003), the Court determined that this liberty also included the right of consenting adults to engage in private homosexual conduct.

Theories of natural rights have played a crucial role not only in the debate over which civil liberties deserve protection from governmental intrusion but also in the debate over the proper role of the Supreme Court in protecting civil liberties. At the core of the controversy is a basic tension: Some rights identified as part of the liberty to which a free people are entitled are not specifically identified in the Constitution. Should unenumerated rights enjoy constitutional protection, and, if so, is the judiciary the proper institution to enforce them? As public attention continues to focus on a wide range of difficult issues regarding the meaning of civil liberties, the debate over these questions will likely remain at the heart of the controversy.

Stephen A. Simon

See also: Bill of Rights; Civil Disobedience; Declaration of Independence; *Lawrence v. Texas;* Locke, John; Natural Law; Right to Privacy; *Roe v. Wade;* Substantive Due Process.

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Naturalization

Naturalization is an important mode through which an individual acquires citizenship, which confers on that individual the civil liberties and other rights enjoyed by a country's native-born citizens. However, the process of naturalization and the rights of naturalized citizens raise several civil liberties issues. Unlike place of birth, naturalization requires choice both on the part of prospective new citizens and on the part of nation-states conferring it. The criteria and procedures for naturalization reflect choices the nation has made regarding the desired character of new citizens, their terms of allegiance, and the future shape of their populations. The motives of individuals seeking to naturalize may be economic, ideological, pragmatic, or deeply patriotic, but whatever the reasons, these individuals have made a choice that binds them to the most privileged form of shared belonging that liberal-democratic polities bestow. Because so much is at stake in such choices, naturalization policies are often subject to considerable controversy by affected groups and interests.

The rules governing naturalization vary widely among nations, but all recognize these rules as important tools of inclusion and exclusion. All three of the so-called classic lands of immigration—Australia, Canada, and the United States—have similar requirements. Prospective new citizens must be lawful permanent residents for several years prior to applying, possess good moral character (for example, have no

Department of Labor naturalization class, between 1912 and 1932. *(Library of Congress)*

major criminal convictions), demonstrate an adequate knowledge of their new country's history and civics, and have a basic command of the language. All three countries also require an oath of loyalty. In the United States, new citizens taking the oath must swear exclusive loyalty to the United States and explicitly renounce all former loyalties to other sovereigns. Canada and Australia demand a much less exclusive expression of allegiance. Their pledges do not require a renunciation of other loyalties or a profession of sole loyalty to the country.

Article I, Section 8, clause 4 of the Constitution of 1787 gave Congress the power to establish a "uniform rule of naturalization." The institutional structure of naturalization has been centralized over time. Congress enacted the first federal nationality and citizenship law in 1790 and continued to revise the conditions of naturalization. Before the national rules of naturalization were established, states had authority over the grant of citizenship. Even after the substantive requirements of naturalization became federalized, the procedures remained inconsistent throughout thousands of naturalization courts nationwide, most of which were local courts in the various states. The enactment of the basic Naturalization Act of June 29, 1906, created for the first time a centralized federal agency charged with the responsibility of enforcing the naturalization statutes. Under this statute the

courts retained ultimate authority to grant or deny citizenship, but administrative supervision over naturalization was vested in a federal agency (originally the Bureau of Immigration and Naturalization in the Department of Commerce and Labor) that later became the Immigration and Naturalization Service (INS).

In 1940 a revised Nationality Act codified existing nationality laws, following a comprehensive study and report of a committee appointed by President Franklin D. Roosevelt and consisting of the U.S. secretary of state, the attorney general, and the secretary of labor. In 1952 the multiple laws that governed immigration and naturalization were brought into one comprehensive statute. In the Immigration Act of 1990, Congress significantly amended the 1952 Immigration and Nationality Act to bring an end to the blanket role of courts in the naturalization process, making naturalization almost entirely an administrative procedure under the authority of the attorney general. The recent reorganization of the Immigration and Naturalization Service into the Department of Homeland Security shifted authority over the grant of citizenship to a new agency structure but retained the basic requirements and procedures for naturalization.

The debates regarding the substantive criteria of naturalization weighed the benefits that new citizens could offer against the fears that new immigrants might undermine the republican institutions upon which the nation was founded. Under English law prior to 1776, naturalization required the alien to be a Protestant, to have lived in the colony for seven years, and to take an oath of allegiance to the British king. After the American Revolution, the newly independent country eliminated the oath to the king and allowed anyone professing a belief in the Christian religion to become a naturalized citizen. Gradually, the main criteria focused on length of residency, good moral character, and allegiance to the Constitution. The first federal naturalization act in 1790 was fairly broad, providing for citizenship of any "free white person" who resided in the United States for two years. The early years brought a political struggle between the Federalists and emerging Jeffersonian Republicans to lengthen the number of years a person must reside in the territory before an application for citizenship could be made and, thereby, to block political participation of new immigrants. In the Alien Act of 1798, the Federalists lengthened the required residency to fourteen years, but once Thomas Jefferson took office he reduced the requirement to five years, a period that has remained unchanged since the Naturalization Act of 1802.

Along with naturalization, denaturalization became a component through the creation in the Naturalization Act of 1906 of a procedure to take away citizenship if a later judicial proceeding determined that the naturalization was illegally or fraudulently acquired. This procedure has changed little since that time. Denaturalization proceedings may be brought only by U.S. attorneys, not by private parties, and only when based on an affidavit of good cause, which is ordinarily prepared by immigration officials.

Even though the promise of U.S. citizenship has lured scores of migrants to U.S. shores, many long-term residents eligible for naturalization still chose to remain permanent residents. Others eventually have become U.S. citizens, but plainly found little reason to hurry to change their nationality. Although patterns vary considerably by country of origin, the median number of years of residence before naturalization has held quite steady at eight. Naturalization rates have lowered in part because many rights traditionally reserved to citizens have been extended to aliens. As rights have come to be predicated on residency, the perception has been that fewer people seek naturalization.

The Supreme Court has been of two minds on the issue. The Court has generally extended the rights and protections of the Constitution to long-term permanent residents as integrated members of the population. At the same time, the Court has spoken of the importance of citizenship and has made it more difficult to deprive a person of citizenship once it has been acquired. In an important line of equal protection cases beginning with *Graham v. Richardson,* 403 U.S. 365 (1971), the Court stated that the very distinction between citizen and alien amounted to a "suspect classification," and states could treat aliens differently from citizens only if they demonstrated compelling reasons for doing so. Not too many years before that, however, the same Court, after a decade of sharp division, concluded in *Afroyim v. Rusk,* 387

U.S. 253 (1967), that a person could not be involuntarily deprived of U.S. citizenship. In that case, and in preceding cases that laid the groundwork for such a holding, several justices wrote at length about the preciousness of citizenship status. In *Trop v. Dulles,* 356 U.S. 86 (1958), the Court stated that the deprivation of citizenship "is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development." In *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), the Court stated that "American citizenship . . . is 'one of the most valuable rights in the world today.' "

Galya Benarieh Ruffer

See also: Citizenship; Immigration Law.

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Near v. Minnesota (1931)

In *Near v. Minnesota,* 283 U.S. 697 (1931), the U.S. Supreme Court held that "prior restraint" of printed materials violated the First Amendment of the U.S. Constitution, which guarantees freedom of the press. The phrase "prior restraint" refers to *prohibiting* publication, as opposed to *punishing* material after the fact of publication. *Near v. Minnesota*—considered the most important pre–World War II case dealing with freedom of the press—arose out of a 1925 Minnesota statute that made certain speech a public nuisance. Specifically, it allowed for the abatement of any "malicious, scandalous, and defamatory newspaper, magazine or other periodical." This statute quickly became known as the "Minnesota gag law" because it was passed primarily to curtail the then-prevalent practice of yellow journalism, a style given to sensationalized, highly opinionated, and often untruthful or scurrilous writing.

J. M. Near, who could best be described as an "unsavory character," owned and published a newspaper called the *Saturday Press.* The purpose of this paper was to advance Near's beliefs, which were "anti-Catholic, anti-Semitic, anti-black, and anti-union." Additionally, the *Saturday Press* printed articles unfavorable to individuals who were active in Minneapolis politics. In fact, "the articles charged, in substance, that a Jewish gangster was in control of gambling, bootlegging, and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties." The paper specifically attacked the chief of police, the county attorney, and the mayor for their willing participation in this illegal activity.

As a result, charges were levied against Near and the *Saturday Press.* Near acknowledged he was the paper's owner and the articles in question appeared in it, but he rejected the notion that they were "malicious, scandalous, or defamatory." He argued, therefore, that the Minnesota gag law did not apply to him. The district court in Minnesota disagreed and determined the *Saturday Press* to be a public nuisance. It then "perpetually enjoined"—prohibited forever—the further printing of such articles in the future. Near unsuccessfully appealed this judgment to the Minnesota Supreme Court, then took his case to the U.S. Supreme Court.

In a narrow five–four holding, the U.S. Supreme Court reversed the prior restraint of the *Saturday Press.* In the majority was Chief Justice Charles Evans Hughes, just then new to the Court, and four of the court's associate justices: Oliver Wendell Holmes Jr.,

Louis D. Brandeis, Harlan Fiske Stone, and Owen J. Roberts. In dissent were the justices who had earned the derisive moniker of the "Four Horsemen": Pierce Butler, Willis Van DeVanter, James C. McReynolds, and George Sutherland. In fact, historians have argued that the result would have been wholly different had former president William Howard Taft still been on the Court as chief justice. The case had arrived at the Court during Taft's tenure; however, it languished there and was not argued until Charles Evan Hughes had replaced the terminally ill Taft.

The *Near* decision, considered to be one of Hughes's best opinions, ruled that the Minnesota gag law constituted a prior restraint under the First Amendment's provision for freedom of the press and was therefore unconstitutional. A prior restraint "is any scheme which gives public officials the power to deny use of a forum in advance of its actual expression." In other words, it was improper for Minnesota to prohibit the publication of material it was assumed would be libelous before it was, in fact, published. Hughes argued that the Minnesota statute was "the essence of censorship." He drew examples from such legal luminaries as William Blackstone, Joseph Story, and James Madison to show that it did not matter if the future speech was false or true; the right to its being published was sacrosanct. "The fact that liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

Justice Butler, in his dissent, was alarmed that the Court was incorporating yet another clause of the Bill of Rights to apply to the states. He stated that "[i]t is of the greatest importance that the states shall be untrammeled and free to employ all just and appropriate measures to prevent abuses of the liberty of the press." Butler concluded that the current state of libel law was not sufficient to curtail such pernicious publications, but his views did not carry the day. The *Near* decision would serve as the first of many cases in which the Court defended freedom of the press.

David T. Harold

See also: First Amendment; Libel; *New York Times Co. v. Sullivan; New York Times Co. v. United States.*

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Nebraska Press Association v. Stuart (1976)

In *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976), the U.S. Supreme Court unanimously overturned a gag order issued by a Nebraska district court judge that prohibited the publication or broadcast of pretrial courtroom proceedings regarding a criminal case. A gag order is a form of "prior restraint" that refers to *prohibiting* publication or broadcast, as opposed to *punishing* material after the fact of publication. As such, a gag order raises issues of freedom of the press as provided under the First Amendment to the Constitution.

The town of Sutherland, Nebraska, became a scene of tragedy when local police found six family members murdered in their home. The crime and subsequent apprehension of a suspect attracted widespread media attention to the small western Nebraska town. Concerned that the heavy publicity surrounding the event would make it impossible to impanel an impartial jury in the sparsely populated area, attorneys from both sides in the case asked the judge to issue an order preventing those in attendance at the court's hearings from reporting on its proceedings. The judge agreed to the request and issued an order prohibiting the publication of information concerning the testimony and evidence introduced in the courtroom until a jury was impaneled. The Nebraska Press Association filed suit claiming the actions of the judge amounted to prior restraint of the press, thereby violating the First Amendment.

The Court's unanimous decision declared the judge's gag order unconstitutional. The Court's opinion, delivered by Chief Justice Warren E. Burger, rec-

ognized the conflict between the First Amendment, which guarantees a free press, and the Sixth Amendment, which provides the accused with the right to an unbiased jury. Citing the founding fathers, the Court refused to give priority to the interests protected by either Amendment, although Justice Burger's opinion clearly placed the burden on the Nebraska judge to prove that the potential damage done by unrestrained reporting of the court's hearings jeopardized the defendant's right to a fair trial. The Court found that the circumstances surrounding the criminal case did not meet the high requirements necessary to issue a gag order. First, although the judge was justified in his concern about pretrial publicity, the effect it might have on potential jurors was only speculative. Second, the judge presented no evidence that other steps short of a gag order could also have been used to achieve the same outcome. Third, it seemed unlikely the gag order would have helped secure a fair trial, especially considering the court's limited territorial jurisdiction, the difficulty of determining what information would sway a juror, and the small-town setting where information traveled rapidly by word of mouth. Finally, the gag order violated a long-standing principle that courtroom events were public events open to the press for scrutiny.

A concurring opinion by Justice Lewis F. Powell Jr. emphasized the high standards that must be met before prior restraint of the press can be issued. Another concurring opinion by Justice Byron R. White called into question the constitutionality of any instance of prior restraint. Finally, a concurring opinion by Justice William J. Brennan Jr. argued that prior restraint should never be used to guarantee the freedoms of the Sixth Amendment.

Jason Stonerook

See also: First Amendment; *Near v. Minnesota; New York Times Co. v. United States.*

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Negative and Positive Liberties

Negative liberty is the right to be free of state coercion. The First Amendment right "to petition the government for a redress of grievances," for example, is a negative liberty. Positive liberty, by contrast, is the right of private citizens to have the government affirmatively provide something to them. The right to basic police protection that the state usually provides is an example of a positive liberty. In the United States, negative and positive liberties derive from both constitutional and statutory law.

The liberties delineated in the U.S. Constitution are mostly negative. As Judge Richard Posner expressed the point in *Hilton v. City of Wheeling,* 209 F.3d 1005 (7th Cir. 2000), the Constitution "creates areas in which the government has to let people alone; it does not entitle them to demand services, such as police protection." The concept of positive liberty has, not surprisingly, fared poorly in modern constitutional jurisprudence. Its nadir was probably reached in *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989), in which Justice Antonin Scalia wrote for a majority of the Supreme Court that "the Due Process Clauses generally confer no affirmative right to governmental aid" and therefore held that "a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."

This understanding of the distinction between positive and negative liberties was not inevitable. Writing for the three dissenting justices in *DeShaney,* Justice William J. Brennan Jr. surveyed the Court's precedent and found himself "unable to see . . . a neat and decisive divide between action and inaction." The dissenters criticized the majority's "initial fixation on the general principle that the Constitution does not establish positive rights" and argued that "this principle does not hold true in all circumstances." To this day, many legal scholars share the dissenters' enthusiasm for enshrining positive liberties into constitutional law. Unless the Court revisits the issue and adopts Justice Brennan's openness to the notion of positive liberty, however, the prospects of positive liberty within U.S. constitutional law will remain dim.

In *DeShaney,* Justice Scalia reasoned that the fram-

ers of the Constitution left the creation of positive liberty "to the democratic political process" and, indeed, ordinary legislation has proved a fertile ground for positive liberty. The federal government, for instance, has created numerous rights that the individual may demand from the government. Prominent examples include disability benefits under Social Security, medical insurance for the poor, and the right to be free of invidious discrimination from other private citizens. In the view of those who support the creation of these types of positive liberties, such legislation has succeeded in creating a more just society. One scholar has explained in detail why the entitlement programs created during President Lyndon Johnson's Great Society initiative of the 1960s have been successful (Edelman 1993). Edelman's view is not unpopular. At least since the New Deal, government has created myriad positive liberties through ordinary legislation, many of which have since become embedded in the nation's social fabric. Thus, although positive liberties have proved less hardy than their negative counterparts as a matter of constitutional law, they have flourished through the democratic process.

There is, however, a danger in the promulgation of positive, as opposed to negative, liberties: Positive liberties are often a zero-sum proposition in which one citizen's gain is necessarily another's loss. As another scholar noted, the "confusion of liberty as power with liberty in its original [negative] meaning inevitably leads to the identification of liberty with wealth; and this makes it possible to exploit all the appeal which the word 'liberty' carries in the support for the demand of the redistribution of wealth." To the extent that this warning is correct, the delineation of positive liberties will be an issue of public controversy, as the victims and beneficiaries of proposed positive rights vie for legislative success. Unless *DeShaney* were to be overturned, however, such struggles will take place in the legislature, not in the federal courts.

Matthew J. Hank

See also: Bill of Rights; *DeShaney v. Winnebago County Department of Social Services;* United States Constitution.

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New Jersey v. T.L.O. (1985)

In *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), the U.S. Supreme Court held that public school children do have a right to some degree of Fourth Amendment protection when they are at school, but that the Constitution does not require school officials to obtain a warrant based upon probable cause prior to searching students' belongings. This case established a set of guidelines under which searches performed by school officials would be tested. The Supreme Court held that students do have a right to privacy and a right to the protection against unreasonable searches and seizures conferred by the Fourth Amendment. Whereas an adult's right to freedom from unreasonable searches is protected by the requirement that the search be based upon probable cause and that a warrant is required for state officials to engage in the search, such is not the case in public schools. On these two critical issues, the Court departed from its Fourth Amendment jurisprudence to create an exception for school officials. The Court in *T.L.O.* held that students may be searched by a school official based upon reasonable suspicion of wrongdoing, and that the school official need not obtain a warrant prior to the search. These searches may be conducted based on the violation of a school rule or suspicion of illegal conduct on the part of a student.

In *T.L.O.,* a fourteen-year-old girl (identified only as T.L.O. to afford her some anonymity) in a public school was caught smoking in the women's bathroom with a friend. The teacher who caught T.L.O. took her to the principal's office to meet with the vice principal on duty at the time. T.L.O. told the vice prin-

cipal she did not have any cigarettes and had not smoked at all. He asked her for her purse and opened it, revealing cigarettes. In addition to the cigarettes, he saw a package of rolling papers, which he knew to be associated with the use of marijuana. He continued to search her purse and found marijuana, a substantial sum of money, pipes, plastic bags, and an index card with the names of people owing T.L.O. money. T.L.O. sought to suppress this evidence (that is, to prevent the prosecutor from using the evidence) from her juvenile delinquency proceedings, arguing that it must be excluded based on the invalid search of her purse. The Court disagreed with T.L.O. and held that the search was reasonable in light of the evidence of her smoking in violation of school rules. Thus, the "probable cause" standard was lowered to require only "reasonable suspicion," and the Court approved the warrantless search of T.L.O.'s belongings.

The school's interest in maintaining order and in ensuring that an environment exists where learning can take place was central to the Court's reasoning in *T.L.O.* The Court sought to achieve the delicate balance between a student's right to be free from unreasonable searches and seizures and the state's legitimate interest in maintaining educational order. Since the *T.L.O.* decision in 1985, schools have experienced an increase in violent student conduct that arguably has precipitated further curtailment of students' individual rights. School officials have employed metal detectors and full-time school security guards and police officers in an effort to ensure safer schools, the effect of which has been the diminishing of students' privacy rights.

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See also: Fourth Amendment; *Gault, In re;* Rights of Minors; Search; Search of Student Lockers.

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New York Times Co. v. Sullivan (1964)

In *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), the U.S. Supreme Court first articulated how the rights of free speech and press as protected by the First Amendment to the Constitution are applied to the issue of libel. In this case the *New York Times* ran an advertisement, placed by a civil rights organization, that contained certain false or exaggerated statements about police and police actions in Montgomery, Alabama. Although the ad did not refer to him by name, the plaintiff contended that the ad referred to him since he was the city's commissioner of public affairs, and he brought a civil suit under Alabama's libel law against those who had placed the ad. After a jury trial, the commissioner was awarded $500,000, and the Alabama Supreme Court upheld that award. The newspaper appealed to the U.S. Supreme Court.

At the outset, the Court ruled it had jurisdiction to hear the case because appellants were raising the claim that Alabama's libel law impermissibly restricted the First Amendment guarantees of freedom of speech and press, which are applied to the states through incorporation into the Due Process Clause of the Fourteenth Amendment. As another preliminary matter, the Court determined the speech in question was protected by the First Amendment even though such speech was contained in a paid advertisement. In distinguishing this civil rights ad from "purely commercial advertising," the Court focused on the fact that the content of the ad conveyed a noncommercial message rather than on the fact that the newspaper had been paid to publish it.

The Court also stressed that the falsity of some information in the ad did not remove the ad from the protections of the First Amendment. Rather, the nature of the ad as political expression ensured that it

was covered by the Constitution's free speech and press guarantees. As for the central issue, the Court decided Alabama's libel law impermissibly restricted rights of free speech and free press. Further, the Court set a new standard in order for libel laws not to run afoul of the First Amendment when applied to "public officials." According to this standard, public officials cannot recover damages for false statements in regard to their official conduct unless they can prove such statements were made with "actual malice." The Court defined "actual malice" as either knowledge that the statements were false or reckless disregard about whether the statements were truthful, and it required a plaintiff to provide "clear and convincing" proof of such malice.

The Supreme Court's opinion in *New York Times* made clear the high value of the free exchange of ideas in American society. The Court emphasized that the value of public debate trumps a public official's interest in preventing criticisms even if untrue, as long as the statements were not purposely untrue or published without regard to their truth. This opinion ensured that the free exchange of ideas would not be needlessly dampened by the fear that such exchange might result in a lawsuit or otherwise have a "chilling effect."

Martha M. Lafferty

See also: Actual Malice; Chilling Effect; First Amendment; Libel; Slander.

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New York Times Co. v. United States (1971)

In *New York Times Co. v. United States,* 403 U.S. 713 (1971), (sometimes referred to as the *Pentagon Papers* case), the U.S. Supreme Court held that the First Amendment to the U.S. Constitution prohibited government from engaging in prior censorship of speech, and the Court refused to enjoin newspapers from publishing a purloined Defense Department document. For intrigue and drama, few Supreme Court cases can match the *Pentagon Papers* case. Set against the backdrop of growing political unrest about U.S. involvement in the Vietnam War, the case required the Court to convene a rare emergency session to decide whether the federal government could prevent the publication of portions of a 7,000-page classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" (the *Pentagon Papers*) that had been leaked to the press by a government employee, Daniel Ellsberg.

The legal question presented was whether the government's claim that publication would endanger national security could justify prohibiting in advance (prior restraint) the publication of the *Pentagon Papers.* The government's claim was at odds with the core meaning of the First Amendment that the government may not suppress speech before it is released, even if the speech could later be punished. The government claimed that when national security was at issue, the president had inherent powers to act to protect national security even if that meant instituting prior restraints on speech.

"Images Removed Due to Copyright Issues"

The Court issued a short per curiam decision in which it reiterated that under the First Amendment, prior restraints are presumed invalid, and it held that the government had not shown extraordinary circumstances that would justify suppressing publication. In addition, four justices wrote concurring opinions and two authored dissenting opinions that further elaborated their views.

Justice Hugo L. Black in a concurring opinion, joined by Justice William O. Douglas, argued that to give the executive the inherent power to engage in prior restraints would be to "wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make 'secure.' " Justice William J. Brennan Jr., in a concurring opinion, emphasized the high standard the government must meet before it may engage in a prior restraint. Brennan wrote that mere surmise and conjecture of harm were not sufficient; rather, the government must prove that publication would inevitably and directly cause harm equivalent to revealing troop locations during a time of war.

Interestingly, none of the justices argued that no harm would come from the publication of the *Pentagon Papers.* Indeed, a concurring opinion by Justice Byron R. White, joined by Justice Potter Stewart, noted their belief that publication would be detrimental to the public interest, but that the harm did not rise to the level needed to justify a prior restraint.

By contrast, dissenters Chief Justice Warren E. Burger and John Marshall Harlan thought that the *New York Times* had been irresponsible in not consulting with the government prior to publication. They also thought the Court should give greater deference to presidential actions involving foreign affairs.

J. C. Salyer

See also: First Amendment; Nixon, Richard M.; President and Civil Liberties.

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New York v. Ferber (1982)

In *New York v. Ferber,* 458 U.S. 747 (1982), the U.S. Supreme Court held that a state could prohibit the dissemination of material showing children engaged in sexual conduct, regardless of whether the material was obscene, without violating the First and Fourteenth Amendments. The case involved a bookstore owner who had been convicted under a New York child pornography statute of promoting the sexual performance of a child under the age of sixteen. On appeal, he argued that the New York statute was unconstitutionally overbroad because it did not contain a requirement that the child's performance was obscene. The New York Court of Appeals agreed and reversed his conviction, because it found that the statute would prohibit the promotion of materials traditionally entitled to protection as free expression under the First Amendment to the Constitution.

Justice Byron R. White, writing for a unanimous Court, reversed the New York court's decision. The state had a compelling interest in regulating child pornography in order to protect the physical and psychological well-being of minors. The statute was also an appropriate means to promote the state's interest, because the value of permitting children to appear in pornographic films was exceedingly minimal. In these circumstances, where the evil to be restricted so substantially outweighed any First Amendment interests at stake, Justice White concluded that a restriction on the content of speech was permissible. He rejected the obscenity test of *Miller v. California,* 413 U.S. 15 (1973), in these circumstances, because it focused on the harm the material posed to society, not on the psychological harm inflicted on the child. Since *Miller* was inapplicable, Justice White crafted a four-part child pornography test: (1) adequate definition of the offensive sexual conduct, (2) visual depiction, (3) the minority of the subject, and (4) the knowledge of the defendant. The New York statute satisfied all four elements of this test.

Justice White also dismissed the claim that the New York statute was unconstitutionally overbroad because it prohibited the distribution of medical and educational materials that portrayed adolescent sex in a nonobscene manner. Where conduct and not speech

is involved, he said, the Court in *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), had held that "the overbreadth of a statute must be real and substantial as judged by the statute's legitimate objective." Applying *Broadrick,* Justice White found that the New York statute was not substantially overbroad, because its "legitimate reach dwarfed any impermissible applications." Even if the statute might forbid the distribution of material with serious literary, scientific, or educational value, he found that the statute would still not be substantially overbroad, because this material would be no more than a fraction of the material prohibited by the statute.

In sum, *New York v. Ferber* upheld state child pornography statutes that dispense with the obscenity requirement for the promotion and distribution of visual child pornography as long as these statutes comply with the Court's four-part test and are not substantially overbroad. *Ferber* later was extended to even the private possession of child pornography with the Court's decision in *Osborne v. Ohio,* 495 U.S. 103 (1990). All other obscene sexual representations of children in books, magazines, pamphlets, and oral recordings are governed by *Miller v. California.*

William Crawford Green

See also: Child Pornography; First Amendment; *Miller v. California;* Overbreadth Doctrine; Pornography.

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Nixon v. Shrink Missouri Government PAC (2000)

In *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377 (2000), the U.S. Supreme Court considered the constitutionality of a $1,075 limit on campaign contributions to statewide candidates for political office. Previous Supreme Court decisions had uniformly upheld contribution limits, and *Nixon* proved to be no exception. *Nixon* is important to the development of civil liberties in the United States not because it radically changed Supreme Court doctrine, but because it demonstrated the Court's difficulty in balancing the individual's First Amendment right to free speech and association with the government's interest in eliminating potential corruption in elections.

In its landmark campaign finance case, *Buckley v. Valeo,* 424 U.S. 1 (1976), the Supreme Court upheld a $1,000 limit on contributions to candidates for federal office. Twenty years after *Buckley,* Missouri enacted a $1,000 contribution limit for statewide races (adjusted for inflation, the limit was $1,075). Shrink Missouri Government PAC, a political action committee, contributed $1,075 to the state auditor campaign of Zev David Fredman. The Shrink Missouri PAC alleged that it would have contributed more without the limit in place, and Fredman asserted that he was unable to run an effective campaign because of the contribution limit. After the Eighth U.S. Circuit Court of Appeals struck down the Missouri contribution limit, the Supreme Court agreed to review the case.

Although neither party urged the Court to overrule *Buckley,* some legal observers believed the Court would take the opportunity to revisit its much-criticized decision. Fredman and the PAC limited their argument to Missouri's failure to present sufficient evidence that contributions above $1,075 posed a true risk of corruption. But a majority of the Court disagreed. Although it refused to specify exactly how much evidence was required, the Court found adequate proof in an affidavit from a Missouri state legislator, in newspaper stories from which inferences of impropriety could be drawn, and in voter support for contribution limits. Holding that *Buckley* was controlling precedent for state contribution limits, the Court ruled that Missouri's $1,075 limit was constitutional.

Although the Court did not overrule *Buckley,* the concurring and dissenting opinions in *Nixon* expressed profound skepticism about *Buckley*'s reasoning. Justice John Paul Stevens, concurring in the majority opinion, challenged the fundamental assumption of *Buckley* when he wrote, "Money is property; it is not speech." Justices Stephen G. Breyer and

Ruth Bader Ginsburg, in a concurring opinion, stated that *Buckley* would have to be reexamined if it did not afford legislatures sufficient leeway to protect the fairness of elections. Justices Clarence Thomas and Antonin Scalia, writing in dissent, also supported overruling *Buckley.* But unlike Justices Stevens, Breyer, and Ginsburg, who would permit greater regulation of campaign fundraising, the dissenters would have struck down all limits on contributions and expenditures. Finally, in a confusing dissent, Justice Anthony M. Kennedy indicated that he might someday agree with Justice Thomas's position, but for the time being would overrule *Buckley* and permit legislatures to impose contribution and expenditure limits.

Nixon revealed that six of nine justices were prepared in 2000 to abandon *Buckley,* but it also demonstrated that the justices held no shared position on how *Buckley* should be overruled. The Court has not yet written the final chapter on the constitutionality of regulating campaign contributions and expenditures.

Grant Davis-Denny

See also: Buckley v. Valeo; Federal Election Campaign Act of 1971; Independent Expenditures; *McConnell v. Federal Election Commission.*

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Nixon, Richard M. (1913–1994)

Richard Milhous Nixon challenged civil liberties in several ways during his long career in public office, which ended with his resignation as the thirty-seventh president of the United States (1969–1974). Nixon was implicated in the burglary and wiretapping of the Democratic National Party headquarters, an event known as Watergate, and for obstructing the ensuing Senate investigation. Watergate became synonymous with illicit and secretive use of high office to rig elections or block investigations. Watergate marked a time of broad challenge to political, social, and cultural authority, but aspects of Nixon's transgressions of civil liberties were evident throughout his career.

Richard M. Nixon signing the last bill of the 92d Congress, the 1973 Appropriations Act, H.R. 17064, on October 31, 1972. *(National Archives)*

The Watergate scandal symbolized a loss of trust in government and demonstrated how individuals in power could usurp basic understandings of fair electoral competition and free speech. The Senate investigation occurred within the wider context of military setbacks in Vietnam (Saigon fell in 1975) and of the Middle Eastern oil embargo (1973), which triggered a recessionary economy. These epochal changes were felt throughout the nation.

Watergate also epitomized the fact that the president did not always exercise noble leadership qualities.

The general trend of questioning authority, by students in particular, gained increased credence simultaneously with Watergate. Immanuel Wallerstein was among the scholars who viewed the early to mid-1970s as a threshold in which the liberal reformist state of "by the people for the people," with its broad benefits in education and health care, began to erode. Nixon's role was often enigmatic. For example, he supported increased access to fair housing, affirmative action, and women's rights, but at the same time he appealed to southern racial fears and nominated conservative southerners to the U.S. Supreme Court.

His presidency was not the first time Nixon conjured political "witches" to rally votes before and during elections. In the early years of the Cold War, Nixon rose to prominence in the U.S. House of Representatives (1946–1950) when he pressed the House Un-American Activities Committee to prosecute Alger Hiss (1948). Hiss was accused of supplying the Soviets with classified information from the State Department. In the wake of his tough stance on communism, Nixon ran successfully for the Senate in 1950. He also targeted his opponent, Helen Douglas, as naive about the Communist threat. As a vice presidential candidate running with Dwight D. Eisenhower (1952), Nixon was accused of overseeing a "slush fund" to promote Republican causes. In response, he contended that he accrued no financial gain, and that his family lived modestly. In a televised melodramatic rebuttal, Nixon refused to return the dog (Checkers) given to his two daughters and thereby perpetuated an image that later fit in well with family values.

Nixon lost a hard-fought and close campaign for the presidency to John F. Kennedy in 1960 when his sallow appearance in a series of televised debates suffered by comparison to JFK's robust good looks and poise before the camera. After defeat in a California gubernatorial race in 1962, Nixon said he would never run for public office again, but he staged a remarkable comeback in 1968 by defeating Hubert Humphrey. Nixon's victory came amid concerns of an ever-escalating war in Vietnam and was furthered by a law-and-order platform keyed to public concerns over increased dissent and perceived lawlessness. He won a second term in a landslide victory over George McGovern in 1972 by portraying his opponent as inexperienced in foreign affairs and militarily weak. Speaking as a Cold War warrior, Nixon warned that if communism were not contained in Southeast Asia, countries across the globe would fall to that ideology like "dominoes." Ironically, Nixon would later renew U.S. relations with the People's Republic of China on the mainland.

Nixon castigated political opponents as "straw men/women," as he did Douglas early on and McGovern later. And he portrayed those who held different views, such as Hiss or the anti-Vietnam protesters, as insurgents against the state. After the United States invaded Cambodia and college campuses across the country erupted in protest, Nixon approved expanded domestic surveillance by federal agencies (July 1970).

As the election in November 1972 drew near, Nixon apparently reasoned that publication of *The Pentagon Papers* in June 1971 would expose the underside of how the increasingly unpopular Vietnam War had been initiated and pursued and thus negatively impact his reelection (1972). To stop the "leaks" of potentially embarrassing information, a small team from the White House was formed and burglarized (September 1971) the files of Daniel Ellsberg, who had covertly released the papers. In *New York Times Co. v. United States,* 403 U.S. 713 (1971), the U.S. rebuffed Nixon's effort to enjoin publication of *The Pentagon Papers.* In June 1972, five men, some with ties to the Central Intelligence Agency (CIA), were arrested for burglarizing the Democratic National Committee headquarters at the Watergate apartments. The burglars were apparently acting on orders from the Committee to Reelect the President (CREEP), directed by former Attorney General John Mitchell, who controlled a secret fund to disrupt ("dirty tricks") the campaign of the Democrats.

Ten days after Nixon was inaugurated in 1973, Nixon aides G. Gordon Liddy and James McCord were convicted of burglary and wiretapping in the Watergate episode. Three months later, the members of Nixon's innermost circle resigned—Bob Haldeman, John Ehrlichman, and Attorney General Richard Kleindienst. Two weeks into the hearings by the Senate Watergate committee, former White House counsel John Dean testified that he had briefed the president no fewer than thirty-five times on Water-

gate—a beleaguered Nixon was obviously closely monitoring the investigation. Two months into the hearings, Senate investigators learned that all conversations and telephone calls in Nixon's offices were electronically recorded. Nixon refused to turn over the tapes of specified conversations in the Oval Office to Special Prosecutor Archibald Cox. Nixon summarily fired Cox, and Attorney General Elliot Richardson resigned. In December 1973 a gap appeared in one subpoenaed tape, which gave momentum to the movement to impeach Nixon. In July the Supreme Court ruled unanimously in *United States v. Nixon,* 418 U.S. 683 (1974), that Nixon must turn over the tape recordings to the new special prosecutor, Leon Jaworski, and thereby rejected his claim of executive privilege. The tapes indicated that Nixon had participated in a cover-up of the Watergate break-in.

Three days later the House passed three articles of impeachment. One article asserted that Nixon obstructed justice during the investigation. The second alleged that he abused the powers of the office of the president and violated the constitutional rights of American citizens, and the third, that he illegally suppressed evidence and ignored the subpoena power of the House Judiciary Committee. When it became clear that he was likely to be impeached and convicted, on August 9, 1974, Richard M. Nixon became the first president in U.S. history to resign.

Nixon's legacy continued to be felt after his resignation. In 1975 the Committee on Un-American Activities (then renamed the Committee on Internal Security) disbanded. Congress adopted campaign reform legislation in response to Nixon's maintenance of secret funds to undermine political opponents; legislation now limits the amounts individuals can give to candidates and requires detailed accounting of donations. The landmark Watergate hearings established that President Nixon was implicated in burglary, wiretapping, direction of federal government employees to discredit political adversaries, and obstruction of justice. Most of the White House operatives involved in Watergate were convicted or pleaded guilty in court and were imprisoned.

Gerald Ford, President Nixon's successor, pardoned Nixon for all offenses committed while in office. A number of state legislatures subsequently

GRANTING PARDON TO RICHARD NIXON

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Richard Nixon became the thirty-seventh President of the United States on January 20, 1969 and was reelected in 1972 for a second term by the electors of forty-nine of the fifty states. His term in office continued until his resignation on August 9, 1974.

Pursuant to resolutions of the House of Representatives, its Committee on the Judiciary conducted an inquiry and investigation on the impeachment of the President extending over more than eight months. The hearings of the Committee and its deliberations, which received wide national publicity over television, radio, and in printed media, resulted in votes adverse to Richard Nixon on recommended Articles of Impeachment.

As a result of certain acts or omissions occurring before his resignation from the Office of President, Richard Nixon has become liable to possible indictment and trial for offenses against the United States. Whether or not he shall be so prosecuted depends on findings of the appropriate grand jury and on the discretion of the authorized prosecutor. Should an indictment ensue, the accused shall then be entitled to a fair trial by an impartial jury, as guaranteed to every individual by the Constitution.

It is believed that a trial of Richard Nixon, if it became necessary, could not fairly begin until a year or more has elapsed. In the meantime, the tranquility to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States. The prospects of such

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trial will cause prolonged and divisive debate over the propriety of exposing to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office of the United States.

NOW, THEREFORE, I, Gerald R. Ford, President of the United States, pursuant to the pardon power conferred upon me by Article II, Section 2, of the Constitution, have granted and by these presents do grant a full, free, and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.

IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of September, in the year of our Lord nineteen hundred and seventy-four, and of the Independence of the United States of America the one hundred and ninety-ninth.

Presidential Proclamation 4311 of September 8, 1974, by President Gerald R. Ford granting a pardon to Richard M. Nixon. *(National Archives)*

passed codes of ethics in an attempt to rebuild trust in the actions of elected officials.

John W. Fox

See also: Burger, Warren Earl; Fourth Amendment; Sixth Amendment.

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Noise, Freedom from

Unwanted noise and freedom from it have been the subject of discussion and regulation at all levels of government, posing issues of whether noise is within the government's police power to control and even of whether the volume of speech could pose free speech issues under the First Amendment to the U.S. Constitution. High noise levels, such as loud, continuous, or frequent sound, can be the cause of frustration and annoyance. Natural sounds are less intrusive and less likely to be regulated. Prolonged exposure to certain types of noise can interfere with hearing, sleep, work performance, and general well-being. The regulation of noise and noise control lies primarily with the state and local government. Noise sources in interstate commerce, such as noise from airplanes, are regulated by the federal government.

NOISE AND THE FEDERAL GOVERNMENT

As early as 1970 the Occupational Safety and Health Act (OSHA) established guidelines for noise in the workplace, proscribing noise levels that may be harmful to workers. In 1972 the U.S. Environmental Protection Agency (EPA) announced that a study of airport noise and motor carriers prompted the development of formal noise standards outside of the workplace. EPA Administrator William D. Ruckelshaus defined this problem as an environmental issue af-

An Environmental Protection Agency–supported study on noise and its effects, March 1973. *(National Archives)*

fecting millions of people. President Richard M. Nixon signed into law an environmental package authorizing the EPA to regulate and set standards for any product or class of products that were identified as major sources of noise. The categories of equipment covered by this legislation included construction, transportation, motors or engines, and electrical and electronic items. The EPA was also granted the authority to label products as to their noise-generating characteristics or their noise-reducing effectiveness. OSHA and the EPA created the primary guidelines for tolerable noise levels at work and in the airline and transportation industry.

STATE AND LOCAL REGULATION

Noise levels are measured in decibels, and penalties are established for violation of permitted decibel lev-

els. Protection from unwanted noise generally follows a complaint procedure outlined in the laws or regulations by jurisdiction. Noise and noise abatement laws have emerged throughout the United States to address sounds that are not primarily regulated by the federal government. Some cities have enacted laws to eliminate the use of specific machinery, such as leaf blowers. Others have attempted to regulate the ambient noise levels in order to preserve, protect, and promote the public health, safety, welfare, and peace and quiet.

Unreasonable noise levels have often been declared a nuisance. Minimizing this nuisance is the general basis for state and local law. Loud, prolonged, or frequent noise levels are defined under zoning or nuisance abatement codes. Permissible and prohibited noise levels by neighborhood category are often contained in these regulations. Permissive noise, such as sirens on emergency vehicles, are generally defined and exempted from regulation. Noise sounds from activities such as festivals, trash haulers, or lawn care usually require a permit or are restricted to specific hours of operation. Some states have passed specific laws that require danger signs warning of amplified sound (Massachusetts), that create penalties for excessive horn honking (New York), and that regulate loud car stereo equipment (Oklahoma). Local laws often define noise as a nuisance and penalize excessive dog barking, loud boom boxes, car stereos, and outdoor parties. Some states have installed barriers to mitigate sound between highways and residential areas.

Finally, in some cases individuals have tried to argue that noise is a protected First Amendment right. In *Kovacs v. Cooper,* 336 U.S. 77 (1949), the Supreme Court upheld a city law that made it illegal to use sound amplifying devices that created loud noises. The owner of a sound truck who was arrested for violating that law challenged it, claiming it was a violation of his First Amendment free speech rights. The Court rejected the argument, holding that the regulation of noise was a legitimate abatement of a nuisance.

Darlene Evans McCoy

See also: First Amendment; Police Power.

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Noise Pollution Clearinghouse. http://www.nonnoise.org.
Occupational Safety and Health Act of 1970. U.S. Code. Vol. 42, secs. 4905, 4907.

No-Knock Warrant

No-knock warrants authorize police to conduct searches or arrests by forcibly entering homes without prior announcement. Under current law, a no-knock entry of a home or business is permissible if an officer has reasonable suspicion to believe that knocking on the door would be dangerous or would hamper a criminal investigation by giving suspects time to destroy incriminating evidence or escape. No-knock warrants represent an important exception to the normal Fourth Amendment rule that police must recognize the sanctity of the home and avoid the use of force by giving suspects a chance to comply with a warrant.

Federal law (since 1917) and the law in many states require law enforcement officials to knock on a suspect's door and announce their intentions and identity before entering and executing arrest or search warrants. But federal and state lawmakers and courts have also authorized no-knock warrants in circumstances where a normal "knock-and-announce" policy might compromise the safety of the police or others at the scene, threaten evidence, or give a suspect time to flee. No-knock warrants, similar to regular warrants, are issued after an officer makes a sworn statement or affidavit before a judge or magistrate that evidence or a suspect can be secured only by dispensing with traditional knock-and-announce procedures.

No-knock warrants became popular and received increased scrutiny throughout the war on drugs in the 1980s and 1990s. Given the ease with which narcotics could be destroyed or hidden, and the linkage of the drug trade with violence, the police looked to no-knock searches as a way to preserve law enforcement investigations and personnel.

The Supreme Court attempted to clarify the constitutional rules surrounding no-knock procedures in *Wilson v. Arkansas,* 514 U.S. 927 (1995). Among other issues, the Court considered whether the Con-

stitution's Fourth Amendment protections against "unreasonable searches and seizures" required police to adhere to a knock-and-announce rule prior to entering a dwelling. In *Wilson,* police identified themselves and entered an unlocked residence pursuant to a search warrant for illegal drugs. They found drugs, drug paraphernalia, and the suspect, Sharlene Wilson, flushing marijuana down a toilet. Wilson challenged her conviction on state drug charges, asserting that the Constitution required police to knock before serving a warrant in order to give the accused an opportunity to cooperate.

The Supreme Court's unanimous opinion held that officers' adherence to the standard knock-and-announce rule was only one of the factors judges should consider in assessing the constitutional reasonableness of a search or seizure. In some cases, the Court conceded, "an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." At the same time, the Court emphasized that it was not creating a "rigid" rule that every forcible entry "be preceded by an announcement." The Fourth Amendment's requirement of reasonableness would have to be balanced against "countervailing law enforcement interests." The Court declined to provide a "comprehensive catalog" of the factors that might establish the reasonableness of no-knock warrants, but it favorably cited concerns about safety and evidence preservation and authorized lower courts to develop a more comprehensive list.

State lawmakers and judges took up the implicit invitation in *Wilson* to experiment with no-knock procedures. Several states, for example, adopted a categorical or "blanket" approach, authorizing no-knock warrants whenever officers faced certain classes of crime, such as felony drug cases. But in *Richards v. Wisconsin,* 520 U.S. 385 (1997), the Court rejected this broad approach, emphasizing the importance of establishing case-specific circumstances that would allow police to deviate from the standard knock-and-announce rule. Law enforcement officials must have "reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime."

Although *Richards* reined in some of the more expansive authorizations of no-knock warrants, it also affirmed their basic legitimacy. Indeed, the ruling held that even if judges or magistrates declined to authorize a no-knock warrant in advance, officers might independently decide that exigent circumstances at the scene validated forcible, unannounced entry.

Critics of no-knock warrants contend that the Court's emphasis on case-by-case, context-specific examinations of the reasonableness of no-knock searches and seizures places too much discretion in the hands of the police and marginalizes the role of the supposed guardians of individual liberties, the judges. These skeptics point to cases in which officers' misjudgments have led to injuries and even deaths, sometimes of clearly innocent people. Proponents of no-knock searches and seizures defend these practices as effective, pragmatic, and safe law enforcement techniques vital for prosecuting certain kinds of crime.

Bruce Peabody

See also: Exclusionary Rule; Fourth Amendment; *Mapp v. Ohio.*

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Nollan v. California Coastal Commission (1987)

In *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), the U.S. Supreme Court defined some of the limits of the Takings Clause—the last clause of the Fifth Amendment that prohibits the government's taking of private property for a public use without paying the owner just (fair) compensation. The case addressed whether the government can require a landowner to grant an easement that gives the public access over the landowner's land as a condition for approving a building permit.

The Nollan family owned a beachfront lot that was a quarter-mile south of an oceanside public park and 1,800 feet north of another public beach. A concrete seawall separated the beach portion of the Nollans'

property from the rest of their property. The Nollans wanted to demolish a small bungalow on the property and replace it with a three-bedroom house. To do so, they were required under California law to obtain a coastal development permit from the California Coastal Commission (CCC). The CCC granted the Nollans' rebuilding permit subject to the condition that the Nollans grant the public a permanent easement to pass across the portion of their property between the mean high tide line and their seawall. The CCC justified the condition by stating that the public-access easement would protect the public's ability to see the beach, assist the public in overcoming a perceived psychological barrier to using the beach, prevent beach congestion, and was part of a comprehensive program to provide beach access arising from prior coastal permit decisions. The Nollans sued the commission, claiming that the permit condition violated the Takings Clause.

In a five–four ruling, the U.S. Supreme Court found that although the outright taking of a permanent, public-access easement by a local or regional government would violate the Takings Clause, conditioning a building permit on an easement would be lawful if there was a nexus, or connection, between the easement and the action requested by the landowner. The Court ruled that the government's power to forbid particular land uses in order to advance a legitimate governmental purpose included the power to condition the land use on some concession by the landowner. This concession can include the transfer of property rights, such as the right to exclude the public.

When the Court examined the CCC's easement condition, it ruled the condition was not a valid exercise of the commission's land-use regulation power because there was no nexus between the condition and a legitimate government purpose. The Court rejected the commission's justifications for the permit condition and ruled that although the commission could advance its comprehensive program by purchasing easements, it could not compel coastal residents to contribute to it.

Nollan defined when government-required concessions violate the Takings Clause, but it was not the Court's final ruling on the issue. Seven years later, in *Dolan v. City of Tigard,* 512 U.S. 374 (1994), the Court again revisited the Takings Clause limits, holding that concessions constituted a taking unless the government could show a substantial nexus between the permitted activity and the concession. Since *Dolan,* the Court has frequently struggled over the difference between mere regulation versus a taking of property.

Robert W. Malmsheimer

See also: Dolan v. City of Tigard; Property Rights; Takings Clause.

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Northwest Ordinance

The Northwest Ordinance was enacted by the Congress of the United States in 1787 when the country was governed by the Articles of Confederation, the precursor to the Constitution. This important law was an effort to provide some form of government to westward-moving settlers; it created a three-step process by which an area could progress from wilderness to statehood. Before an area became a state, its citizens would have limited rights of self-government; in addition, a bill of rights guaranteeing basic civil liberties was written into the statute. Significantly, the law prohibited slavery in the region to which it applied.

During the American Revolutionary War, settlers began moving to the lands between the Appalachian Mountains and the Mississippi River. Although several American colonies had claims to that region, it was controlled by the British; at the conclusion of the war, however, it became part of the United States. Soon, the new American states relinquished their claims to these frontier lands, allowing the U.S. government to organize them. The Northwest Ordinance created the "Northwest Territory" out of that part of the frontier that was north of the Ohio River.

The law provided for the U.S. government to appoint five key officials to control the new territory—a governor, a secretary, and three judges. The people

who lived in the territory would have no voice in its administration. When any part of the Northwest Territory attained a population of 5,000 adult males, it could break away and become a separate territory. The men would elect a legislature to share power with the appointed officials and a delegate to represent them in Congress. When a territory's population totaled 60,000, the territory could petition Congress to make it a state.

In 1789—when the U.S. Constitution went into effect—no states had yet been carved out of the Northwest Territory, so Congress reenacted the Northwest Ordinance to continue it in force. The system established by the law was used often in the creation of new territories and states as the frontier moved across the continent to the Pacific Ocean.

By passing the Northwest Ordinance, the U.S. government had indicated early in its existence that slavery was an undesirable system that ought to be limited. As it created new territories, Congress sometimes (but not always) outlawed slavery in them. In 1820 the Missouri Compromise prohibited slavery in the northern portions of the Louisiana Purchase. When a proslavery majority of the U.S. Supreme Court declared the Missouri Compromise unconstitutional in *Scott v. Sandford,* 60 U.S. 393 (1857), the ruling was immediately ridiculed by many Americans as being based upon political beliefs rather than sound constitutional analysis. One reason for this reaction was that Congress had been outlawing slavery in some territories for the seventy years since the passage of the Northwest Ordinance.

Roger D. Hardaway

See also: Fundamental Rights.

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Nude Dancing

Since the early 1980s, nightclubs that offer various kinds of nude dancing or striptease acts have become increasingly popular. Many forms of striptease or burlesque have been around since the 1930s, but the contemporary "gentleman's club" offers an atmosphere of provocative dancing, alcohol, and music that bears little resemblance to the more conventional striptease style of earlier years.

Although some communities have tolerated the growing gentleman's club industry as a benefit for tourism and convention business, many others have attempted to eliminate the establishments through a series of law and regulations. Many of these restrictions have been challenged as violations of the First Amendment because they infringe on the individual's right to freedom of expression.

In a series of U.S. Supreme Court decisions, nude dancing, especially in clubs or cabarets, has been declared a form of symbolic expression. However, the Court also has given local communities wide latitude in regulating this form of expression through a variety of measures, including zoning, liquor licensing, and outright bans.

In *California v. LaRue,* 409 U.S. 109 (1972), the Supreme Court upheld a state law that denied liquor licenses to establishments that offered nude dancing in bars. The Court's ruling, however, focused on the Twenty-first Amendment (which repealed prohibition) rather than on First Amendment considerations. In other cases during the 1970s and 1980s, the Court hinted that nude dancing could be protected by the First Amendment but did not explicitly state the boundaries.

In *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991), the Court ruled that nude dancing was expressive. Chief Justice William H. Rehnquist, in the majority opinion of the narrow five–four holding, stated that nude dancing was "within the outer perimeters of the First Amendment, although only marginally so." Still, the majority upheld an Indiana regulation providing that the intent of the law was not aimed at the erotic message but was a general prohibition against public indecency. The Court's close ruling with a fractured majority left many people

confused as to the state of the law. Justice David H. Souter, in a concurring opinion, suggested that the secondary effects of crime and sexual assaults that might accompany nude dancing should justify its regulation. Justice Byron R. White and three other dissenters argued that the Indiana statute was prohibiting expressive conduct and that nudity was essentially related to the message of the dance; the dissenters would have held the regulation unconstitutional.

In *City of Erie v. Pap's A.M.,* 529 U.S. 277 (2000), the Court reaffirmed that nude dancing had symbolic meaning but this time ruled that laws banning nude dancing entirely could be upheld because of the negative "secondary effects" that accrue to areas with adult entertainment establishments; among such effects were crime, prostitution, and drug use. The Court did not require cities to prove that these effects were present or that they were lessened by restrictions on nude dancing. This decision was again split and hotly contested, with two concurring opinions within the seven-person majority. Justice Souter again concurred, saying he wanted more proof on whether the ban affected the secondary effects. Justice John Paul Stevens dissented, arguing that the total ban was overly broad and that zoning laws were a less restrictive means to achieve the same results.

Charles C. Howard

See also: First Amendment.

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O

Oaths of Office

The "oath" taken by U.S. government officials has its origins in the English legal tradition that forms the foundation of American jurisprudence. Since the early Anglo-Saxon period, English kings had taken specific oaths as a part of their coronations. These oaths defined the legitimacy of the monarchy and the duties of governance and served as models for the pledges later applied to lords, ministers, and members of Parliament, as well as to sheriffs, coroners, constables, and other officials. From the English tradition came the use of constitutional oaths in the United States.

All federal officials must take an "oath of office," which typically includes a person's sworn allegiance to uphold the Constitution. The Constitution specifies an oath of office only for the president, but Article VI states that other officials, including members of Congress, "shall be bound by oath or affirmation to support this constitution." Permitting officials either to swear or to affirm indicates that even prior to the 1791 adoption of the First Amendment, the framers of the Constitution were sensitive to the concerns of

Lyndon Baines Johnson takes the presidential oath of office aboard Air Force One after the assassination of John F. Kennedy, November 22, 1963. *(Cecil Stoughton, White House/John Fitzgerald Kennedy Library, Boston)*

religious minorities such as Quakers, who opposed swearing. The presidential oath of office is detailed in Article II, Section 1, of the Constitution: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect and defend the Constitution of the United States." Presidents have also traditionally added, "So help me God" afterward, a tradition established by George Washington when he took the first oath April 30, 1789.

The president's term of office was changed in 1933 by the Twentieth Amendment, which provides that the term begins at noon January 20 of the year following the election. The Chief Justice of the United States traditionally administers the oath, as the president-elect places a hand on the Bible, raises a right hand, and recites the wording.

Members of the legislative branch also take an oath of office at the start of each new Congress. The words "I do solemnly swear (or affirm) that I will support the Constitution of the United States" constituted the original oath. After the Civil War, this oath was revised to ensure loyalty to the union. It currently specifies: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

Cases as early as the seminal *Marbury v. Madison,* 5 U.S. 137 (1803), addressed the constitutional importance of oaths. Chief Justice John Marshall stated that judges and legislators take oaths as recognition that the Constitution provides a rule of government for them.

President Abraham Lincoln justified his conduct during the Civil War by the oath of office. Lincoln believed that his oath bound him to support continuation of the Union against Southern plans for secession.

In contemporary cases, courts have dated the beginning of an official's prescribed duties to the taking of an oath. Upon taking the oath, an official must act in a manner consistent with the oath. In *Bush v. Gore,* 531 U.S. 98 (2000), the U.S. Supreme Court used the oath of office as a legal standard of fiduciary principles. As Justice Ruth Bader Ginsberg said in dissent, "There is no cause here to believe that the members of Florida's high court have done less than 'their mortal best to discharge their oath of office,' " citing *Sumner v. Mata,* 449 U.S. 539 (1981).

Michael W. Hail and J. Gregory Frye

See also: Lincoln, Abraham; President and Civil Liberties.

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Obscenity

Just as laws forbidding "obscene" expression have been around for centuries, so too has been the extremely difficult task of defining this elusive term. In fact, defining obscenity has dominated the U.S. Supreme Court's jurisprudence concerning how it comports with First Amendment rights to freedom of expression. Even at common law and in the early days of the republic, definitions of obscene expression were vague at best, and they are no less so today. As Leo Alpert put it, "There is no definition of the term. There is no basis of identification. There is no unity in describing what is obscene literature, or in

prosecuting it. There is little more than the ability to smell it."

An early and influential definition was the one formulated by Lord Cockburn, lord chief justice of the Court of Queen's Bench, in the 1868 case *Regina v. Hicklin,* L.R. 3 Q.B. 360, in which he declared that the test is "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such influences, and into whose hands a publication of this sort may fall." The *Hicklin* standard was applied to isolated excerpts upon susceptible persons.

Although some courts adopted the *Hicklin* test, its influence gave way to a test that judged the effect of obscenity on the "average" person. In fact, as early as 1896 the U.S. Supreme Court in *Dunlop v. United States,* 165 U.S. 486, approved a jury instruction that required a finding that the alleged obscene expression "must be calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes." Perhaps the best-known signal of a change in the definition of obscenity was the notable decision by U.S. District Judge John M. Woolsey in *United States v. One Book Entitled "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), in which Woolsey declared that obscenity must be tested by "its effects on a person with average sex instincts" only after "reading 'Ulysses' in its entirety, as a book must be read on such a test as this."

Defining the boundary of obscene expression began in earnest in 1957 when the U.S. Supreme Court explicitly rejected the *Hicklin* test as unconstitutionally restrictive in *Roth v. United States,* 354 U.S. 476 (1957). Justice William J. Brennan Jr., speaking for the Court in *Roth,* approved the following definition: The question is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Sensitive to the charge raised by Justice John M. Harlan in a concurring opinion in *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684 (1959), that the Supreme Court "should shun considering the particularities of individual cases in this difficult field lest the Court become a final 'board of censorship,' " the Supreme Court restricted the boundary of obscenity in what became known as the *Fanny Hill* case, formally listed as *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts,* 383 U.S. 413 (1966). The *Fanny Hill* test required three essential elements: (1) The dominant theme of the material taken as a whole must appeal to a prurient interest in sex; (2) the material must be patently offensive by affronting contemporary community standards in its description or representation of sexual matters; and (3) the material must be utterly without redeeming social value.

Seven years after the *Fanny Hill* case, in *Miller v. California,* 413 U.S. 15 (1973), the Supreme Court, in the words of Chief Justice Warren E. Burger, reexamined the "standards enunciated in earlier cases involving what Mr. Justice Harlan called 'the intractable obscenity problem.' " Seeking to "formulate standards more concrete than those in the past," Chief Justice Burger stated the revised test as follows: "The trier of fact must determine (1) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient [lustful] interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If so, the expression is obscene With this test, the Court was "satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

Despite the *Miller* Court's optimism, many civil liberties advocates agreed with Justice Brennan's dissent in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973), that the Court

> failed to formulate a standard that sharply distinguishes protected from unprotected speech, and out of necessity, we have resorted to the *Redrup* approach (the approach taken in *Redrup v. New York,* 386 U.S. 767 (1967), by making per curiam reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene), which resolves cases as between the parties, but offers only the most obscure guidance to

> legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decisions. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion.

In short, when all is said and done, the most viable approach to defining obscenity may be Justice Potter Stewart's lament in *Jacobellis v. Ohio,* 378 U.S. 184 (1964):

> It is possible to read the Court's opinion in *Roth v. United States* and *Alberts v. California,* 354 U.S. 476, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts,* that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.

Clyde E. Willis

See also: Federal Communications Commission v. Pacifica Foundation; First Amendment; *Lady Chatterley's Lover; Miller v. California;* Pornography; *Roth* Test.

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O'Connor, Sandra Day (b. 1930)

Sandra Day O'Connor took her oath of office as a justice on the U.S. Supreme Court on September 25, 1981, under the administration of President Ronald Reagan. She was the first woman on the Court.

Born Sandra Day in El Paso, Texas, on March 26, 1930, she was the eldest of three siblings, the others a brother and a sister. They grew up on a cattle ranch, the Lazy B, located on the high desert south of the Gila River and sectioned by the Arizona–New Mexico border, that her paternal grandfather started in the 1880s. Especially during the dry heat of long summer days, family and cowboys shared in the constant work, which included breaking wild horses and training them for roundup for use in branding or cutting cattle for sale. Although her family no longer owns the ranch, she described in her *Lazy B* autobiography the lessons that lifetime ingrained in her as she learned from her folks and the resident cowboys and from nature itself: "What counted was competence and the ability to do whatever was required to maintain the ranch operation in good working order—the livestock, the equipment, the buildings, wells, fences, and vehicles. Verbal skills were less important than the ability to know and understand how things work in the physical world. Personal qualities of honesty, dependability, competence, and good humor were valued most."

Sandra Day went to school in El Paso, living with her maternal grandmother, attending first the private Radford School for Girls, then public high school. At the age of sixteen, she entered Stanford University as a freshman, majoring in economics. She learned John Maynard Keynes's theory of public finance, a theory inconsistent with her dad's "pay-as-you-go" style of ranching. In her third year, she took an undergraduate class taught by one of the university's law school professors and fell in love with the study of law. In the following two summers, she worked as a secretary and receptionist for a general practice attorney in Lordsburg, Arizona. One colorful criminal law client was a bar owner accused of permitting illegal gambling and prostitution at his business.

In her fourth year as an undergraduate, she entered

Photograph of President Ronald Reagan and his Supreme Court Justice nominee Sandra Day O'Connor at the White House, July 1981. *(National Archives)*

law school and received her bachelor's degree with honors. In law school, while serving as editor of the *Stanford Law Review,* she met John O'Connor. They had a coassignment to check legal citations for an article, and John suggested they finish the project by having a beer at a local pub. That led to a series of dates for the next forty nights in a row. None of that stopped her from graduating third in her class of 102 law school students in 1952. She and John held their wedding at the ranch on December 20, 1952.

While O'Connor's husband was busy finishing law school, she studied for the California bar exam. She also worked as a deputy county attorney in San Mateo rather than accept the only job that any private firm offered to her: a legal secretary. When her husband graduated in June 1953, he joined the Army and served as a lawyer in the Judge Advocate General's Corps in West Germany; she was then a civilian lawyer for the Army's Quartermaster Corps.

After Army duty, the couple settled in Phoenix, Arizona. She began her own law firm when she could not find a private law firm that offered a sufficiently flexible schedule to enable the couple to have a family. They have three sons. Before the boys entered elementary school, she took a break from her professional career. In the meantime, she joined community volunteer organizations doing charity work and became active in local and state Republican Party politics, supporting Senator Barry Goldwater. When she reentered her profession full-time, she accepted a position as assistant attorney general for Arizona. In 1969 her political contacts landed her an appointment to the state senate. Voters reelected her to two more terms. She became majority leader in 1973, another first achievement for women in the nation.

O'Connor next served as a trial judge in Maricopa County, Arizona, also an elected position. People wanted her to run for governor against the Democratic Party incumbent, Bruce Babbitt, but she declined. In 1979, Governor Babbitt appointed her to the Arizona Court of Appeals. He also sponsored her nomination to the Supreme Court before the U.S. Senate Judiciary Committee.

Justice O'Connor is not a radical feminist. She favors policy-making that overcomes gender stereotypes. She believes history proves that there is value in a critical mass of women working together. She has written about the historical and current role of women making public policy through an organized social movement, legislation, and on the courts: "Dramatic change can occur only when members of a large group surmount their individual differences and unite in pursuit of a concrete goal." This describes the women's suffrage movement, which culminated with ratification of the Nineteenth Amendment in 1920 that granted women the national legal right to vote. It also describes the movement in the 1960s and 1970s to ratify the Equal Rights Amendment, of which she was an early supporter, but it did not receive ratification. Need for such an amendment lessened as the Supreme Court began to broaden the rights set forth in the Fourteenth Amendment, such as equal protection of the laws, to be applicable to women when governmental policies were involved.

She urged that more women enter professional occupations: "It matters a great deal to me to have a second woman on the Supreme Court," she said in reference to Justice Ruth Bader Ginsburg, "a woman who has advanced directly in so many ways the progress of women." Justice O'Connor finds convincing empirical data from sociological studies that women attorneys whose mothers were themselves professionals use their mothers as role models more frequently than they do if their mothers did not work. However, she consistently discounts commentary that her jurisprudence is more "feminine" or empathetic than that of her male colleagues. She finds such analysis close to stereotyping and paternalistic: "There is simply no empirical evidence that gender differences lead to discernible differences in rendering judgments."

Some find Justice O'Connor's stand on abortion policy controversial. The Court decided *Roe v. Wade,* 410 U.S. 113 (1973), eight years before she was appointed to it. President Reagan and his more conservative supporters might have expected her to vote to overrule *Roe.* Instead, she has decided that governmental restrictions on abortion must not impose any "undue burden" on the right of privacy, a test she applied for the Court majority in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992). Since then the Court has dealt only with governmental restrictions on so-called partial-birth abortion cases, and in those cases her vote joins a holding necessitating exceptions for when a woman's health is at stake.

O'Connor applauds judicial independence. Until about the middle of the twentieth century, a norm of judicial consensus existed, which Chief Justices John Marshall and William H. Taft encouraged. Most justices adhered to a past decision, even when an individual justice had a contrary public policy preference. This jurisprudence style deserves respect, according to Justice O'Connor, because it laid the foundation of credibility for the Court and fostered a historical-institutional evolution that enabled each justice to have a freer, more independent style of case-by-case analysis and voting.

Political scientists discount any claim that the Court's justices decide a case purely by canons of legal reasoning, including adherence to precedent (called *stare decisis,* pronounced *STAR-ry de-SI-sis,* meaning to follow previous Court decisions). In this context, scholars might classify Justice O'Connor as predictably motivated to vote ideologically in a moderate conservative way, which means her vote sometimes swings to accommodate a more liberal public policy preference. She has played this pivotal role in many landmark decisions, including cases involving rights for women and minorities, the public values of religion, criminal justice, and states' rights. For example, she has not been consistently conservative about gay rights. In *Romer v. Evans,* 517 U.S. 620 (1996), she voted to affirm Colorado courts in striking down a voter-approved Amendment 2 to the state constitution because its language targeted people of a homosexual or bisexual orientation and denied them legal rights that local elected public officials granted.

Similarly, in *Lawrence v. Texas,* 539 U.S. 558 (2003), she voted to strike down a Texas statute banning same-sex sodomy as being a violation of the Equal Protection Clause of the Fourteenth Amendment.

Sharon G. Whitney

See also: Ginsburg, Ruth Bader; *Planned Parenthood of Southeastern Pennsylvania v. Casey;* Rehnquist, William Hubbs; *Roe v. Wade; Romer v. Evans.*

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Oklahoma City Bombing

Until September 11, 2001, the destruction of the Alfred P. Murrah Federal Office Building in Oklahoma City, Oklahoma, was the single largest domestic terrorist attack in U.S. history. The September 11 attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., further proved that the United States had enemies abroad as well as at home.

The target of the April 1995 attack in Oklahoma City was a nine-story office building housing a variety of federal government agencies. Some of the agencies had federal law enforcement and military recruiting responsibilities, but the majority of employees worked in offices of the Department of Housing and Urban Development, the Social Security Administration, and the General Services Administration. Other building tenants included a federal employees credit union and a child day care center.

The explosion came from the detonation of a 4,800-pound ammonium nitrate fuel bomb hidden in a rental truck. The truck had been parked on a street immediately in front of the Murrah Building. The explosion caused the collapse of most of the north face of the structure. The explosion killed 168 people, with most of the deaths occurring in the Murrah Building. The explosion also injured hundreds of others and caused tens of millions of dollars of property damage in the area.

Timothy McVeigh, age twenty-seven, under arrest April 21, 1995, two days after the terrorist bombing of the Murrah Federal Building in Oklahoma City, which left 168 men, women, and children dead. *(© Allan Tannenbaum/The Image Works)*

A primary suspect was arrested north of Oklahoma City within two hours of the explosion. This suspect was later identified as Timothy McVeigh, a decorated former soldier in the U.S. Army and a veteran of the 1991 Gulf War. Following his discharge from the Army, McVeigh had made substantial contacts with militias and other private organizations challenging the legitimacy and authority of the U.S. government.

McVeigh and one close companion, Terry Nichols, were charged with the deaths of eight federal law enforcement officers and employees of federal law enforcement agencies. Because of pretrial publicity, conduct of the federal trial was assigned to U.S. District Court Judge Richard P. Matsch in Denver, Colorado. Evidence presented at trial showed McVeigh and Nichols gathered bomb-making materials near Nichols's home in Kansas. The prosecution's key witness was Michael Fortier, who pleaded guilty to assisting McVeigh in identifying a suitable bombing target.

McVeigh was convicted of murder and conspiracy in the deaths of the federal law enforcement officers

and employees and sentenced to die for his crimes. He was executed June 11, 2001, at a federal penitentiary in Indiana. His execution was the first by the federal government in more than thirty-eight years. Nichols was convicted of involuntary manslaughter and conspiring with McVeigh and sentenced to life imprisonment. Fortier was sentenced to a term of imprisonment for his guilty plea.

Despite the arrest, prosecution, and conviction of McVeigh, Nichols, and Fortier, the Oklahoma City bombing remains controversial. Some critics are unconvinced that McVeigh and Nichols could have acted alone in this venture without further financial or moral support. Others have questioned law enforcement errors, including some that occurred in the early hours of the bombing investigation. Some conspiracy theories have charged that the federal government had a role in the destruction of its own property. There is, furthermore, a continuing debate over the decision of Oklahoma state authorities to prosecute Nichols in Oklahoma state court for the murder of the remaining 160 victims, those who were not the subject of the federal prosecution.

The Murrah Federal Office Building site and the immediately surrounding area are today a unit of the National Park Service. The historical site includes the Oklahoma City National Memorial, an outdoor symbolic marker of 168 empty chairs (one for each victim) dedicated to the bombing victims, and a Memorial Center that opened February 19, 2001. The Memorial Center includes an institute devoted to the study of terrorism.

Jerry E. Stephens

See also: Patriot Act.

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Olmstead v. United States (1928)

Olmstead v. United States, 277 U.S. 438 (1928), was a momentous U.S. Supreme Court decision in which the Court held five–four that private telephone conversations could be wiretapped by law enforcement officials without violating the Fourth and Fifth Amendments to the U.S. Constitution. Chief Justice William Howard Taft wrote the majority opinion in this decision that would stand for almost four decades. However, *Olmstead* is memorable largely due to the eloquent, insightful, and prophetic dissenting opinion of Justice Louis D. Brandeis.

The federal government was investigating the illegal possession, transportation, and importing of alcohol in violation of the National Prohibition Act. As part of their case against Roy Olmstead and others, prohibition officers intercepted telephone conversations through wiretaps placed on the phone lines without any literal, physical trespass of Olmstead's residence and business. These wiretapped conversations came to consist of 775 typewritten pages of damning evidence used to convict Olmstead and others in federal court; the convictions were upheld by the Ninth Circuit Court of Appeals and affirmed by the Supreme Court.

According to Chief Justice Taft and his "no trespass" doctrine, neither the Fourth nor the Fifth Amendment was violated because no actual, physical intrusion into Olmstead's home or place of business took place. In addition, Taft argued that telephone conversations were not tangible property and thus could not be seized. There was, Taft ruled, no search or seizure as prohibited by the Fourth Amendment, nor was there any "compulsory production of a man's

private papers" as covered by the Fifth Amendment. Focusing overwhelmingly on the Fourth Amendment, Taft contended, "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only."

Justice Brandeis's dissent was classic. He argued that because stated and implied powers had grown since the nation's founding in the late eighteenth century, constitutional protections against "specific abuses of power must have a similar capacity of adaptation to a changing world." Brandeis reasoned that since the government had no power to search a sealed envelope to read an individual's letter, it lacked legitimate authority to invade the privacy of a telephone conversation. Brandeis cautioned strongly against a cramped and literal reading of the language of the Fourth Amendment; according to Brandeis, the essential purpose of the Fourth Amendment lay behind its literal verbiage:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. . . . They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

In 1967, in *Katz v. United States,* 389 U.S. 347 (1967), the Court overruled *Olmstead,* essentially turning Brandeis's dissent into the controlling precedent in U.S. constitutional law.

Stephen K. Shaw

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Open-Fields Exception

U.S. courts generally have interpreted the Fourth Amendment to the Constitution as requiring officials to obtain warrants to conduct governmental searches. However, courts have recognized certain occasions and exigent circumstances under which individuals do not have a "reasonable expectation of privacy"; in these cases, warrants are not required. One such exception to the warrant requirement is the "open-fields" exception. Courts have determined that individuals do not have a reasonable expectation of privacy in areas that are open to public view, such as open fields. By contrast, areas within the "curtilage"—the enclosed spaces immediately surrounding a dwelling, such as garages or toolsheds—are generally presumed to be covered by the Fourth Amendment warrant requirement.

Several factors are considered in determining whether an area is part of a dwelling's curtilage. These include the proximity of the area to a home; whether the area is included within an enclosure surrounding the home; the type of use to which the area is put; and whether the owners have taken steps to protect the area from observations by passersby.

The open-fields doctrine came into its own as part of an expanded government effort to conduct the war on drugs during the 1970s and 1980s. In one of the early cases, *Oliver v. United States,* 466 U.S. 170 (1984), the U.S. Supreme Court established that there was no expectation of privacy in open fields, where police had discovered marijuana growing.

A major innovation in the open-fields doctrine occurred when the Court ruled in *California v. Ciraolo,* 476 U.S. 207 (1986), that police did not need a warrant to conduct air surveillance of a person's backyard from an altitude of 1,000 feet, even though the backyard was fenced. In *United States v. Dunn,* 480 U.S. 294 (1987), the Court further stated that open fields need be neither "open" nor a "field" as these concepts are commonly used. Thus, even thickly wooded areas may be considered an open field if the person in control of such area has no reasonable expectation of privacy within that location. In *Maughn v. Bibb County,* 160 F.3d 658 (11th Cir. 1998), the U.S. Court of Appeals for the Eleventh Circuit ruled that uninhab-

ited property was an open field and subject to search without a warrant. The Court also maintained that a state may provide greater search and seizure protection than is available under the Fourth Amendment, the latter being merely a threshold minimum protection that states must observe.

Sam W. McKinstry

See also: Fourth Amendment; Right to Privacy; Search Warrants.

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Original Intent

See Constitutional Interpretation and Civil Liberties

Original Jurisdiction

The term "original jurisdiction," an important legal concept, refers to the types of cases that may be argued initially before the U.S. Supreme Court without being first taken to a lower court (state or federal). Original jurisdiction is important because it affects the ability of certain individuals or parties to bring cases to the federal courts to protect their individual rights.

Article III, Section 2 of the U.S. Constitution specifies two types of jurisdiction (the authority of a court to hear a case) granted to the Supreme Court. Appellate jurisdiction, the first type, refers to cases that originate in and are initially decided by other courts and that are then brought to the Supreme Court for review. The Constitution gives Congress broad authority to define or amend the Court's appellate jurisdiction. For example, the Judiciary Act of 1789 declared that the Supreme Court could take cases on appeal from the highest court in a state if a "federal question" was involved—that is, a case presented an issue under the federal Constitution or federal statutes. Conversely, in *Yakus v. United States,* 321 U.S. 414 (1944), and in *Ex parte McCardle,* 74 U.S. 506 (1868), the Court accepted limitations on its appellate jurisdiction. In *Yakus,* the Court upheld the ability of Congress to limit the Court's appellate jurisdiction to review price controls during World War II. In *McCardle,* the Court upheld a congressional law removing its appellate jurisdiction to hear federal habeas corpus petitions (petition for release from unlawful confinement), even though this law was passed after the Court had already heard oral arguments in a pending case of this sort.

The Court's second type of jurisdiction is called original jurisdiction. These are cases that can be filed initially with the Supreme Court. Under Article III, Section 2 of the Constitution, all cases involving ambassadors, public ministers, and consuls and those in which states are the parties can originate in the Supreme Court. In *Marbury v. Madison,* 5 U.S. 137 (1803), perhaps the most famous case in American law, the Supreme Court ruled that Congress could not alter this original jurisdiction. In ruling that Congress lacked the authority under the Judiciary Act of 1789 to give the Court original jurisdiction to hear requests for mandamus (orders to compel the government to do some act), Chief Justice John Marshall stated that Congress could not add to or subtract from the Supreme Court's original jurisdiction. In reaching that ruling, the Court not only rejected a request to order Secretary of State James Madison to deliver a judicial commission to William Marbury, but it also used that case to declare for itself that it had the power of judicial review (the authority to declare laws unconstitutional).

In addition to the constitutional provision, federal statute clarifies how the Supreme Court may employ original jurisdiction to hear cases involving ambassadors, public ministers, and consuls. Since 1789, however, the Court has heard only three such cases.

Second, the Court may invoke original jurisdiction when a case involves a dispute between the federal government and a state, although lower federal courts also may hear the case (called concurrent jurisdiction). Generally, the Supreme Court defers to the lower court to hear the case first and then takes it on appeal. Third, the Court may hear cases involving states and citizens of another state or those in which one state is suing another state. For the most part, cases of the former type are also first heard in lower court, whereas

cases involving two states are usually heard as original jurisdiction. Most state-versus-state cases, however, involve boundary disputes between the parties. In these cases, the Supreme Court generally appoints a special master to gather the facts of the case before the justices decide the issue. Often the special masters are former or current federal judges.

More than 99 percent of all cases heard by the Supreme Court occur through its appellate jurisdiction. The image of lawyers engaging in lengthy arguments for hours or days before the Court is not a reality. Most cases it hears under its appellate power are given no more than one hour to argue, and the few original-jurisdiction cases that have been brought effectively have involved very little argument being presented to the Court by the litigants. Individuals who believe their civil liberties have been violated will find it virtually impossible to bring a case directly before the Supreme Court. If the case reaches the Court at all, it will come in under its appellate jurisdiction. Yet if *Yakus* and *McCardle* are valid interpretations of the power of Congress to alter the Supreme Court's appellate jurisdiction, the legislative branch conceivably could remove the bulk of the Court's work, making it harder for the Court to protect civil liberties.

David Schultz

See also: McCardle, Ex parte; United States Constitution.

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Orwell, George (1903–1950)

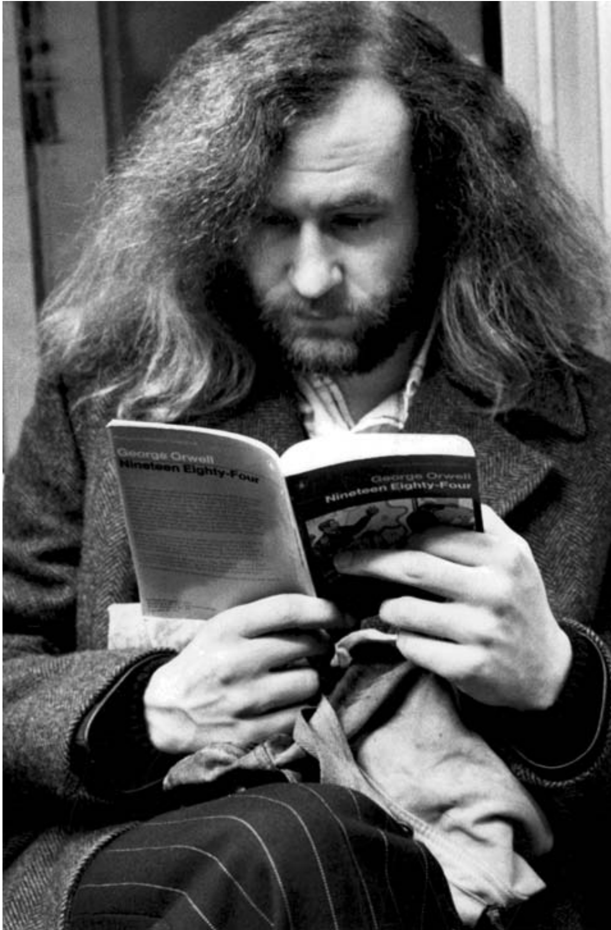
George Orwell was the twentieth century's greatest propagandist for liberty. In books and essays from the 1930s and 1940s, he created the preeminent vocabulary of resistance—in both Europe and the United States—to the totalitarian movements of his age. A despiser of fascism and an advocate of democratic socialism, Orwell was one of the first prominent intellectuals of the European Left to decry the menace of Soviet communism, which he saw as a sadistic betrayal of genuine revolution.

Orwell was born Eric Arthur Blair on June 25, 1903, in Motihari, India, into a family that he described as part of the English "lower-upper-middle class." Educated at Eton, Orwell chose imperial service over university schooling and became a policeman for the British in Burma, a subject he later wrote about in *Burmese Days* (1934). His role in imperialism repelled him, and after five years he returned to England where he spent several years as a semiemployed tramp and aspiring writer. His first published work, *Down and Out in Paris and London* (1933), chronicled lives of the pre-Depression urban poor and garnered him some attention as a writer with a social conscience.

Orwell later put this concern to more powerful effect in *The Road to Wigan Pier* (1937), an account of underclass conditions in the mining regions of northern England and his first book of nonfiction reportage. Divided into two halves, *Wigan Pier* expresses the two sides of Orwell's conscience. The first half details the degradations of the poor and the environmental and aesthetic costs of industrial capitalism; the second half explains why socialism, despite its justice, had become unattractive to the middle class and was losing ground to fascism. Decrying socialism's "machine-worship," its pacifism and lack of patriotism, and "the stupid cult of Russia," Orwell alienated himself from many on the Left, including his publishers at the Left Book Club, who ran an apologetic preface accusing him of shortsightedness and "snobbery."

Soon after, Orwell took up arms to defend the Spanish republic against Francisco Franco's fascists. Affiliated with the Party of Marxist Unification (PUM) militia, an anti-Stalinist leftist group, Orwell witnessed firsthand the brutality and misinformation of the communists who, backed by Russia, aggressively suppressed all rival factions. He reported this experience in what many critics consider his finest book, *Homage to Catalonia* (1938). As he later explained in "Why I Write" (1946), "The Spanish war and other events in 1936–37 turned the scale and thereafter I knew where I stood . . . *against* totalitarianism and *for* democratic socialism."

Orwell's writings of the 1940s, especially *Animal Farm* and *1984,* made him famous. Rejected for mil-



Student reading George Orwell's *1984* in the 1960s.
(© Topham/The Image Works)

itary service due to poor health, he joined the Home Guard in London, wrote for several journals, and did radio propaganda for the BBC. This period honed his critical edge, developed his sense of apocalyptic pessimism, and gave him a first-person perspective on bureaucratic power. In *Animal Farm* (1946), Orwell delivered a brutal satire of the Russian Revolution in the form of a children's fable at a moment when Britain and the United States were trying to minimize conflicts with their Soviet allies. He depicts farm animals espousing equality and rebelling against their human masters. Matters go awry when violent factions develop and the new rulers proclaim that "All animals are equal, but some animals are more equal than others." Many publishers rejected the book, at least one for Orwell's impolitic portrayal of the Bolsheviks as "pigs."

In *1984* (1949), Orwell upped the ante. Here, more than anywhere else, he savaged the totalitarian mind and forged a language of resistance. As literature, *1984* has many flaws: stilted dialogue, an awkward romance, and a dramatic structure that peaks when the lead character, Winston Smith, sits in a room and reads a dry book of fictive political theory called *The Theory and Practice of Oligarchical Collectivism.* As political writing, however, *1984* is a masterpiece, a reverse agitprop that has etched indelible images upon the minds of generations of readers. Orwell presents Winston as the last rebel in a totalitarian world—modeled less on an imagined future than on the dark side of the present—in which "Big Brother is watching you" holds sway through massive telescreens planted in every room and on every street. Like Aldous Huxley, one of his teachers at Eton, Orwell was sensitive to ways that modern technology could imperil freedom. The *1984* dystopia presages both television, which exposes a mass culture to repetitive propaganda, and the Internet, which makes every keystroke a matter of public record.

Orwell saw how totalitarian regimes could manipulate popular perceptions by altering historical memory and politicizing language, a practice he termed "Newspeak." Winston sits in a cubicle in the Ministry of Truth and changes old newspaper articles, turning enemies of the party into "unpersons," while a comrade named Syme labors at "destroying words. . . . In the end we shall make thoughtcrime literally impossible, because there will be no words in which to express it." Party members practice *doublethink:* "the power of holding two contradictory beliefs in one's mind simultaneously and accepting both of them." The power of the totalitarian system is the power of illogic, the strength of the repeated lie over the truth, and Winston's final submission comes when he accepts the lesson of his torturer, O'Brien, that 2 + 2 = 5. Ideology is a mask for power exercised for its own sake. The government redirects subversive energies by engaging in constant warfare with enemies that change imperceptibly (is it Eastasia or Eurasia?), giving truth to the dicta that "War is peace" and "Freedom is slavery." Orwell presented the counterfactual to J. S. Mill's historical optimism about liberty and truth and contradicted the nineteenth-century liberal faith with twentieth-century cynicism.

Orwell saw himself as a "pamphleteer," claiming in "Why I Write" that his best work began from "a feeling of partisanship." Although it would be comforting to read him as a relic of his age and its politics, the threats to liberty against which he warned remain. His communists were not utopians but power-adoring fascists in disguise; the government of Oceana was one of oligarchical—not egalitarian—collectivism, thus implicating much of the contemporary "free world." Like any smart informer, Orwell was good at spotting his enemies and even better at fingering his friends.

Robb A. McDaniel

See also: Censorship; First Amendment; Movie Treatments of Civil Liberties.

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Overbreadth Doctrine

The overbreadth doctrine permits a litigant whose own speech is unprotected by the First Amendment to challenge a law's constitutionality based on the free speech rights of persons who are not party to the lawsuit. The doctrine illustrates two subtle points about the law of civil liberties in America. First, it exemplifies an ongoing battle between liberals and conservatives over the proper role for the federal courts in protecting civil liberties. Second, because the doctrine applies exclusively to restraints on free speech, it strongly indicates that this right occupies a paramount position in the hierarchy of civil liberties protected by the First Amendment to the U.S. Constitution.

The overbreadth doctrine is most commonly characterized as an exception to the rule against "third-party standing." Under that rule, litigants typically cannot challenge a law by raising the constitutional rights of others—that is, the litigants have no "standing" to bring a claim. To illustrate this prohibition, imagine that California passes a law authorizing all searches and seizures, not just ones that are reasonable. Because the Fourth Amendment prohibits unreasonable searches and seizures, the California law can be both constitutionally applied (when the police conduct a reasonable search and seizure) and unconstitutionally applied (when the police conduct an unreasonable search and seizure). Assume Mr. Smith is arrested after a reasonable search of his apartment uncovers evidence of a crime. Mr. Smith could argue that the California law, as applied in his case, violated his constitutional rights, but he would lose because the search of his apartment was reasonable. Mr. Smith might also want to argue that the law should not be enforced because it could violate the Fourth Amendment rights of persons who were subjected to unreasonable searches and seizures. But under the rule against third-party standing, the court will not consider this argument. Mr. Smith has no standing to bring this claim. The court will examine only whether the law was constitutionally applied ("as-applied") in Mr. Smith's case, and Mr. Smith will lose his constitutional challenge.

This traditional prohibition on third-party standing is consistent with a conservative, restrained view of the federal courts' role in protecting civil liberties. The rule is justified on the grounds that a defendant whose conduct is unprotected by the Constitution should not avoid punishment merely because the law might be unconstitutionally applied to others. Moreover, conservatives argue, courts are supposed to decide concrete cases, not hypothetical invasions of a third party's rights. Under this view, courts operate best when they are presented with real, factual situations.

As an exception to this rule, the overbreadth doctrine requires courts to consider the rights of third

parties who are not before the court. For example, assume Arizona passes a law banning all speech that advocates lawless action. Like the California law, this speech restriction can be either constitutionally or unconstitutionally applied. Under current Supreme Court precedents, the law is constitutional when it is applied to speech that is likely to produce imminent lawless action, but is unconstitutional when applied to speech that advocates lawless action at some undetermined future point in time. Assume Ms. Jones, at a rally advocating the legalization of drugs, orders members of her organization to immediately commence smoking marijuana to protest the drug laws. The Arizona law could be constitutionally applied to Ms. Jones's speech because it advocates immediate lawless action and is likely to cause such action. But Ms. Jones has an advantage over Mr. Smith. Under the overbreadth doctrine, Ms. Jones can avoid punishment by arguing that the law could be applied to speech that is constitutionally protected—specifically, advocacy of lawless action at some point in the distant future. Thus, an overbroad speech restriction is unenforceable even against parties whose speech is unprotected.

The overbreadth doctrine's primary justification is that permitting only as-applied challenges to speech restrictions would chill the exercise of protected free speech. Arizona's speech restriction, for example, might deter a philosophy professor from discussing the merits of civil disobedience. The philosopher might justly fear criminal prosecution or even wonder whether the courts would protect his speech. Not only would the philosopher's speech be chilled, but his challenge to the law also would not reach the courts. By permitting litigants to raise the free speech rights of others, courts can more quickly determine that a law contains unconstitutional speech restrictions. Thus, the overbreadth doctrine is a tool for those who favor a broader role for federal courts in protecting civil liberties.

The overbreadth doctrine is usually traced to *Thornhill v. Alabama,* 310 U.S. 88 (1940), in which the Supreme Court permitted a facial challenge (a law challenged as unconstitutional on its face) of an antipicketing statute. But it was the Earl Warren Court that most actively employed the doctrine to strike down speech-restrictive laws. In *Gooding v. Wilson,* 405 U.S. 518 (1972), for example, the Warren Court held that a Georgia law's restraint on the use of offensive words was unenforceable because of the law's overbreadth. An antiwar demonstrator had said to an officer, "You son of a bitch, I'll choke you to death." The demonstrator's speech was clearly unprotected by the First Amendment because, under the Supreme Court's "fighting words" doctrine, words "which by their very utterance . . . tend to incite an immediate breach of peace" may be criminally punished. But the Georgia statute was not limited to fighting words. Rather, the statute was overbroad because it punished the utterance of all "opprobrious words" or "abusive language" that at some unspecified future point could "cause a breach of peace." Even though the defendant's speech was unprotected by the First Amendment, he avoided punishment because the law was overbroad.

In contrast with the Warren Court, the Court under Chief Justices Warren E. Burger and William H. Rehnquist has viewed the overbreadth doctrine as "strong medicine" because it renders statutes unenforceable and alters traditional rules of standing. The Supreme Court has placed three limitations on the doctrine. First, the overbreadth must be "substantial." In *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), the Court explained that the overbreadth of a law must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Second, the courts will narrowly construe a statute, if possible, to avoid finding substantial overbreadth. Consider *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), in which the Supreme Court created the fighting-words doctrine: The New Hampshire law applied to "any offensive, derisive, or annoying word" and lacked any requirement that the language cause a breach of peace. Arguably, the New Hampshire state statute upheld in *Chaplinsky* was more overbroad than the law struck down in *Gooding.* But because the Supreme Court of New Hampshire had limited the statute's application to fighting words, the U.S. Supreme Court rejected the overbreadth challenge. Third, the overbreadth doctrine does not apply to commercial speech. In *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), the Court explained that commercial speech is less likely to be chilled than other types of protected

speech because it promotes the speaker's economic well-being.

Grant Davis-Denny

See also: Chaplinsky v. New Hampshire; First Amendment.

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Overturning Supreme Court Decisions

According to tradition long upheld in Anglo-American courtrooms, judges follow the principle of *stare decisis* (pronounced *STAR-ry de-SI-sis*), which is the rule that justices are expected to follow prior decisions, or precedents. This helps ensure that case law is consistent, fair, and predictable, so that citizens know how a law is likely to be interpreted in the future and can make decisions based on this knowledge. For example, when the U.S. Supreme Court ruled in *Roe v. Wade,* 410 U.S. 113 (1973), that women had the right of abortion choice in the first six months of pregnancy, citizens could expect that subsequent Court decisions would follow this precedent and that legal abortion would be available.

It was partially this expectation of *stare decisis* that caused the Court to uphold *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992). In *Casey,* the majority wrote that in order for the Court to overrule precedent, it should have "special justification" over and above a belief that the precedent was incorrectly decided. Although some of the majority justices personally did not like the right of abortion choice, they chose not to overturn *Roe;* they felt such a decision would have threatened the Court's legitimacy because the ruling would have seemed overly political. Moreover, they said the right of privacy on which the right of abortion choice was based had expanded since *Roe,* and women had a settled expectation that the right of abortion choice would continue in the future. Thus, following precedent leads to stability in constitutional principles and results in the Court's not arbitrarily changing such principles as it faces each new case.

Nevertheless, the Supreme Court sometimes overrules its prior decisions. Often, a past decision may have been based upon historical facts or beliefs that are no longer true. If the social, political, and economic situation has fundamentally changed, the Court may decide that case law should evolve accordingly. This helps to ensure that the Court's decisions will evolve with a constantly changing country and society.

Brown v. Board of Education, 347 U.S. 483 (1954), is one of the most famous instances when the Court ruled to overturn precedent. This case struck down the 1896 ruling in *Plessy v. Ferguson,* 163 U.S. 537, which permitted racial segregation on the grounds that "separate but equal" facilities were constitutional. In *Brown,* the Court acknowledged that the role of public education in U.S. political, social, and economic life had changed with the times and that segregation in public schools was no longer constitutional under the Equal Protection Clause of the Fourteenth Amendment. The justices in *Casey* compared the two segregation cases and wrote that *Brown* did have the special justification needed to overturn a precedent that *Casey* lacked—in *Brown,* circumstances had significantly changed in such a way that the basis for the *Plessy* decision no longer was valid.

Scholars vary widely in their views as to whether and why the Supreme Court should overturn prior decisions. Most scholars fall into the group that emphasizes that justices are bound by institutional norms, such as the need to support a rule of law over individual facts, to follow precedent and not overrule past landmark decisions. They argue that landmark cases should not be overruled unless principles in cases decided since the landmark case have changed significantly and external forces in society—such as history, economics, politics, and the role of individuals and institutions in society—require the Supreme Court to reverse prior decisions.

Some scholars follow the attitudinal model, arguing that "justices overwhelmingly overturn decisions because of their ideology." The attitudinal model emphasizes that justices vote for purely political reasons and follow their personal agendas and are rarely bound by precedent. Other observers emphasize that in cases of constitutional interpretation (versus interpretation of statutes), the Court is more willing to reexamine and sometimes reverse precedent. In fact, the three most recent Courts (under Chief Justices Earl Warren, Warren E. Burger, and William H. Rehnquist) have overturned constitutional precedents twice as often as nonconstitutional precedents. Justices may consider constitutional precedent to be less subject to *stare decisis* because the Constitution is rarely amended and yet decisions must still remain relevant to the modern world. There is no way for a legislature to correct mistakes or problems in the Constitution by simply voting for a new law; the amending process is lengthy and difficult, and it would therefore be difficult to correct a problem in interpretation through this process. Therefore, if changes are to be made, the Court is the most likely institution to make them.

A third group of scholars, called originalists, argue that justices must interpret the words of the Constitution as the framers of the Constitution and its amendments would have interpreted them (original intent), and not change such interpretations as society changes. The Court should overturn landmark decisions only if they were wrongly decided originally. If the people want to overturn Court decisions, they can do so through constitutional amendments. For example, the Sixteenth Amendment, which provided for a federal income tax, overturned *Pollock v. Farmers Loan and Trust Co.,* 158 U.S. 601 (1895), which had declared such a tax unconstitutional.

Ronald Kahn

See also: Constitutional Amending Process.

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Palko v. Connecticut (1937)

Palko v. Connecticut, 302 U.S. 319 (1937), was an eight–one decision (Justice Pierce Butler dissented without a written opinion) that became one of the landmark cases involving the application of provisions of the Bill of Rights (the first ten amendments to the Constitution) to the states. Justice Benjamin N. Cardozo's decision for the U.S. Supreme Court was a classic exposition of the doctrine of "selective incorporation," the "double standard" by which the Court has justified applying some, but not all, of the provisions of the Bill of Rights to the states via the Due Process Clause of the Fourteenth Amendment.

Frank Palko had been tried for murder in the first degree but convicted by a jury of second-degree murder, for which he was sentenced to life in prison. Citing various errors in the trial, the Connecticut Supreme Court of Errors reversed the judgment and ordered a new trial. At this new trial, Palko was sentenced to death, a decision affirmed by the Connecticut Supreme Court of Errors. Had this case been initiated by the national government, the sentence in the second case would have been invalid as a violation of the double jeopardy provision in the Fifth Amendment.

Palko argued that the guarantee against double jeopardy in the Fifth Amendment (like other provisions of the Bill of Rights) should limit the states via the Due Process Clause of the Fourteenth Amendment just as it did the national government. Justice Cardozo denied that there was such a general rule. In examining previous cases, Cardozo observed that the Supreme Court had incorporated some provisions of the Bill of Rights against the states and failed to incorporate others. Thus, it had ruled that the Fifth Amendment provision for a grand jury indictment and the Sixth and Seventh Amendment requirements for trial by jury did not apply to the states. By contrast, the Court had incorporated against the states the constitutional protections for freedom of speech, freedom of the press, free exercise of religion, right of peaceable assembly, and right to counsel in capital cases.

Acknowledging that "the line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other," Cardozo found "a rationalizing principle which gives to discrete instances a proper order and coherence." He argued that this line of division centered on distinguishing rights, such as "freedom of thought, and speech," that were "fundamental," or "implicit in the concept of ordered liberty," from guarantees that, though important, were not so fundamental and without which justice would not perish.

Cardozo decided that the provision against double jeopardy was not fundamental, especially in a case such as Palko's in which the government was not using a second trial to wear down a defendant but simply to redress errors in the first trial. He therefore denied the appellant's claim. Palko was subsequently electrocuted.

Over the course of the twentieth century, the Supreme Court acknowledged an increasing number of Bill of Rights provisions to be fundamental and thus subject to the doctrine of selective incorporation. The Court ultimately applied the double jeopardy provision to the states in *Benton v. Maryland,* 395 U.S. 784 (1969).

John R. Vile

See also: Bill of Rights; Incorporation Doctrine; Selective Incorporation.

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Palmer Raids

The Communist takeover of Russia in 1917 sparked fear in many people in the United States that a similar revolution could happen in their country. One official

manifestation of this concern was a series of mass arrests conducted by U.S. Attorney General A. Mitchell Palmer against real and suspected opponents of U.S.-style democracy. The Palmer raids blatantly and brazenly denied many Americans the basic civil liberties guaranteed them by the U.S. Constitution.

The late nineteenth and early twentieth centuries brought the establishment of several third parties in the United States, founded by those who viewed the Democrats and Republicans as more interested in politics than in solving problems of ordinary people. Several of these parties demanded that the government curb the power of wealthy corporations and individuals while adopting policies to benefit working people. Political movements that enjoyed some electoral success during this period included the Greenback Labor, Socialist, People's (or Populist), and Progressive parties. Additionally, many labor organizations sought to put pressure on employers to pay their employees better wages and to improve working hours and conditions.

World War I caused many Americans to view more negatively than before those who challenged the democracy and capitalism that had made the United States a militarily powerful and economically important country. To be sure, many people in the United States had always opposed labor unions and small political parties; after World War I, however, many who had tolerated these entities before now saw them as posing real threats to the "American way of life." This harsh reaction, heightened by the fear resulting from the ascent of communism in Russia, became known in U.S. history as the "red scare" (a scare to be repeated in the 1940s and 1950s).

A. Mitchell Palmer, a former Democratic congressman from Pennsylvania, became President Woodrow Wilson's attorney general in 1919, shortly after the end of World War I (the Great War) in Europe. He decided to seek the Democratic nomination for president in 1920, and he hoped to capitalize on Americans' fear of communism. The raids he conducted against supposed "radical" political and labor groups and individuals, therefore, were at least partially the result of his political ambitions. Assisted by a young J. Edgar Hoover, Palmer's agents arrested several thousand people suspected of plotting a Communist revolution in the United States. Several hundred resident aliens were summarily deported as alleged security risks.

Public opinion, however, soon turned against Palmer's conduct. The majority of Americans found the actions of the Department of Justice to be too aggressive in arresting and harassing many people who were guilty only of espousing unpopular opinions and beliefs. Instead of enhancing Palmer's political career, the raids ruined it. The Democrats refused to nominate him for president in 1920, and he retired from public life when the Wilson administration ended in 1921.

Roger D. Hardaway

See also: Democratic Party; Department of Justice; Hoover, J. Edgar; Red Scare.

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Parental Rights

In a number of cases, the U.S. Supreme Court has had occasion to address whether the right of parents to direct the upbringing and education of their children without interference by the state is protected by the U.S. Constitution.

The Court's first significant case regarding parental rights was *Meyer v. Nebraska,* 262 U.S. 390 (1923), in which the Court considered whether a Nebraska statute that prohibited the teaching of foreign modern languages to children who had not passed the eighth grade violated the Fourteenth Amendment. The Court held that it did, reasoning that the liberties protected by the Due Process Clause of the Fourteenth Amendment included the freedom "to acquire useful knowledge, to marry, establish a home and bring up children." Accordingly, the Court concluded that the

Nebraska statute violated the teacher's "right to teach and the right of parents to engage him so to instruct their children," a right protected by the Fourteenth Amendment.

Two years later, in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), the Supreme Court once again addressed the scope of constitutionally protected parental rights. In *Pierce,* the Court reviewed an Oregon compulsory attendance law that required all children age eight to sixteen to attend public school. One of the appellees, the Society of Sisters, a corporate entity devoted to Catholic education, objected to the law, contending that its enrollments had significantly declined. The Hill Military Academy, a private secular institution, similarly objected to the statute. In holding that the statute violated the Fourteenth Amendment, the Supreme Court relied upon *Meyer* and reasoned that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The Supreme Court later delineated the boundaries of parental rights in *Prince v. Massachusetts,* 321 U.S. 158 (1944). In that case, a nine-year-old child's guardian was arrested for permitting the child to sell magazines on the street in violation of a Massachusetts statute. The guardian argued that the statute violated her right to freedom of religion under the First Amendment (because the magazine sales related to the Jehovah's Witness religion) and her parental rights under the Fourteenth Amendment. The Court concluded, however, that "neither rights of religion nor rights of parenthood are beyond limitation." The Court also noted that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction." Finding the Massachusetts child labor law in question to be within the state's power, the Court therefore affirmed the guardian's conviction.

In *Wisconsin v. Yoder,* 406 U.S. 205 (1972), the Supreme Court reviewed the conviction of members of the Amish and Mennonite churches for violating Wisconsin's compulsory attendance laws by refusing to send their children to any school (public or private) after the eighth grade. Because the Amish's objection to formal schooling was intertwined so closely with their religious beliefs, they challenged the Wisconsin law based on both the Free Exercise Clause of the First Amendment and the Fourteenth Amendment's protection of parental rights. Acknowledging that the state has a strong interest in the education of children, the Court noted that the state's interest "is not totally free from a balancing process when it impinges on fundamental rights and interests." On the facts of the case before it, and based on the combined rights asserted under the First and Fourteenth Amendments, the Court concluded that the Amish had presented enough evidence to overcome the state's interest in requiring a formal high school education.

Finally, the Supreme Court recently addressed the constitutional scope of protected parental rights in *Troxel v. Granville,* 530 U.S. 57 (2000). At issue was a grandparents' petition for greater rights to visit their grandchildren than their mother wanted to permit. The trial court entered a visitation order for the grandparents. On appeal, the Supreme Court held that the visitation order was an unconstitutional infringement on the mother's parental rights, relying on *Meyer* and its progeny. Because the Washington statute in question permitted a court to disregard any decision by a fit parent concerning third-party visitation, the Court concluded the statute exceeded the bounds of the Fourteenth Amendment.

In conclusion, it seems clearly established in the constitutional jurisprudence of the past century that parents have a significant constitutionally protected interest in the rearing of their children. As the Supreme Court noted in *Yoder,* however, "the power of the parent . . . may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."

Elizabeth M. Rhea

See also: Pierce v. Society of Sisters; Right to Privacy.

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Parents Music Resource Center

Formed in the mid-1980s, the Parents Music Resource Center (PMRC) sparked a maelstrom of debate regarding music, censorship, and the role of government in regulating the limits of artistic expression. The debate raised important issues about the protection afforded by the First Amendment for freedom of expression. Congressional hearings involving testimony by senators and several recording artists in the summer of 1985 delved deeply into the influence of music on American children and the role of the government and record companies in helping parents to make informed decisions about what music their children were hearing. The PMRC eventually succeeded in getting warning labels put on potentially offensive music, although the group failed in some of its more ambitious goals.

In December 1984, Tipper Gore, wife of then-Senator Al Gore, purchased the soundtrack to the movie *Purple Rain.* When she listened to it with her teenage daughter, Tipper Gore was shocked by the explicit references to sex and masturbation. Within weeks, she, Susan Baker, and the wives of eight other influential Washingtonians had formed the PMRC. The group argued that rock music was a contributing factor in increased levels of rape, drug use, sex, and suicide among those age sixteen to twenty-four. In support of this claim, the PMRC cited explicit lyrics in songs such as Prince's "Darling Nikki," Van Halen's "Too Hot for Teacher," Ozzie Osbourne's "Suicide Solutions," and AC/DC's "Shoot to Thrill."

The PMRC's first step was to write a letter to the Recording Industry Association of America (RIAA), signed by the wives of twenty influential Washington politicians, urging that the RIAA develop a voluntary rating system similar to that used for movies. At the time, the proposed Home Recording Act, which would prohibit home recording of music and music videos, was in congressional committee. The RIAA believed that the industry was losing millions of dollars a year in pirated products because of home recording, and it was particularly interested in the views of PMRC members, four of whom had husbands on committees hearing the proposed legislation.

The PMRC had six goals in 1985: to print lyrics on album covers, keep explicit covers under the counter, establish a ratings system for records similar to that for films, establish a ratings system for concerts, reassess the contracts of performers who engage in violence and explicit sexual behavior onstage, and establish a citizen and record-company media watch that would pressure broadcasters not to air "questionable talent."

Within five months of the group's founding, more than 150 newspapers and several television programs had taken up the discussion. Large retailers such as Wal-Mart, J.C. Penney, and Sears, fearing controversy, started pulling rock music and rock magazines off their shelves.

In September 1985, the Senate Committee on Commerce, Science, and Transportation opened hearings involving testimony from recording artists such as John Denver and Frank Zappa, record company executives, PMRC members, and a variety of senators. On November 1, 1985, PMRC and RIAA announced the creation of the "Parental Advisory: Explicit Lyrics" label. This label, in black and white measuring 1" x ⅝," would be placed on albums with lyrics that reflected "explicit sex, violence, or substance abuse." Twenty-two participating RIAA record companies agreed to apply the label to their music. Although the sticker itself was not considered censorship, many stores refused to carry music that had the warning label.

After this initial success, the PMRC's influence waned. PMRC press releases in 1986 and 1988–1990 reporting that record companies were adequately applying labels were largely ignored, although the PMRC succeeded in convincing the RIAA to develop more detailed criteria about when to use the Parental Advisory label. Since then, the PMRC has changed its goals and serves as a resource center to educate and promote public awareness of the positive long-term effects of music on health, analytical and creative thinking, and self-esteem.

Ben Reno-Weber

See also: Censorship; *Federal Communications Commission v. Pacifica Foundation;* First Amendment.

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Paris Adult Theatre I v. Slaton (1973)

In *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973), the U.S. Supreme Court upheld a Georgia Supreme Court decision that declared two movies shown at the Paris Adult Theatre in Atlanta "obscene." The same day, the Court also issued its landmark decision in *Miller v. California,* 413 U.S. 15 (1973), in which it attempted to develop a working definition of "obscenity" that could be used to measure the obscenity standards of various states. The obscenity controversy had raged throughout the country for years, and there was little consensus on the extent to which the rights to free expression protected by the First Amendment to the Constitution were applicable.

The Paris Adult Theatre in Atlanta, Georgia, had shown *It All Comes Out in the End* and *Magic Mirror*, both of which had been explicitly labeled as "adult" with large warnings outside the theater that stated "Adult theater—You must be 21 and able to prove it. If viewing the nude body offends, Please Do Not Enter."

After being notified that the Paris Theatre was showing films that were "obscene" if not "hard-core pornography," Fulton County dispatched two undercover investigators to view the two films in December 1970. County officials then declared both films obscene and found them to be in direct violation of a Georgia statute that defined obscenity as a work, which taken as a whole, violated contemporary standards by appealing to a prurient in sex, nudity, and excretion and that was without any redeeming social value whatsoever. The state of Georgia then requested an injunction to prevent subsequent showings of the "obscene" movies. The theater owners challenged the ruling, arguing that since the films were shown only to adults who chose to see them, they were protected by the First Amendment.

Paris Adult Theatre dealt with four separate but interrelated issues. First, the Court needed to determine whether different definitions of "obscenity" existed for consenting adults and for the rest of the population. Second, the Court had to determine whether the burden of proof lay with the prosecutor to show that the films were obscene or with the Paris Theatre to show that they were not. The third issue was whether evidence was needed to substantiate the harmful effects of an "obscene" item on society as a whole. Finally, the Court was being asked to deal with definitions of "obscenity" that varied from state to state and that might conflict with its own definitions of "obscenity" as articulated in *Miller.*

The Court found for the city of Atlanta, contending that the films were obscene according to "applicable state law" as defined in *Miller* and, therefore, did not come under the protection of the First Amendment. Writing for the majority, Chief Justice Warren E. Burger stated: "We categorically disapprove the theory . . . that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only." Burger concluded that Georgia did not have to show that the material was obscene, since it met the standards of obscenity under local law. Georgia had exercised a legitimate interest in "regulating the exposure of obscene materials to juveniles and unconsenting adults," since all states had the authority to stem "the tide of commercialized obscenity" according to the dictates of its own laws. According to the Court, it was the responsibility of the states to protect "the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." *Miller* allowed some variations in state definitions of obscenity, but no state definition could be more restrictive than allowed by *Miller.*

Dissenting with great force, Justice Lewis F. Powell Jr. reiterated his belief that "obscenity" was, indeed, protected by the First Amendment because "[a]rt and literature reflect tastes; and tastes, like musical appre-

ciation, are hardly reducible to precise definitions." Powell argued that tastes were "too personal to define and too emotional and vague to apply." In a separate dissent, joined by Justices Thurgood Marshall and Potter Stewart, Justice William J. Brennan Jr. called for greater freedom of expression rather than the restrictions the Court applied in *Paris Theatre.* Brennan contended that extended freedom would "introduce a large measure of clarity to this troubled area [and] would reduce the institutional pressure on this Court and the rest of the State and Federal Judiciary."

Elizabeth Purdy

See also: Miller v. California; Obscenity; Pornography.

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Patents

See Copyright, Patent, and Trademark

Patriot Act

The USA Patriot Act is a broad, far-reaching act that provides law enforcement many new tools, presumptively for use in fighting terrorism. It was enacted on October 26, 2001, only forty-five days after the September 11, 2001, attacks on the World Trade Center in New York City and the Pentagon in Washington, D.C. It was passed overwhelmingly by the U.S. Congress and signed into law by President George W. Bush the same day, after only one day of debate and with almost no public awareness. Its official title is "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001."

Many organizations and individuals, conservative and liberal, agree it is the most far-reaching modern act of its kind ever passed in the United States, on a par with the Alien and Sedition Acts of the late eighteenth century. Those acts were fueled by fear of the violence of the French Revolution and led to the closing down of publishers suspected of unpatriotic views. They were born of fear, a fear similar to the fear that spawned the Patriot Act.

By late 2003, the Patriot Act had become more controversial as its provisions became more widely understood. Even so, less than 10 percent of registered voters in the United States were aware of the law's potential for encroachment on their civil liberties.

The Patriot Act grants to law enforcement new investigative tools that violate or circumvent the Constitution in numerous ways. The Patriot Act infringes on at least six of the original Bill of Rights (the first ten amendments to the Constitution), specifically the First, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments. Many constitutional scholars also would include the Thirteenth and Fourteenth Amendments. To illustrate, following are a few actions the federal government can undertake since passage of the Patriot Act that it previously could not do:

The FBI can enter private homes, search through personal effects, and confiscate personal property, without previously informing the residents, and sometimes informing them only several months after the fact. This so-called "sneak and peek" provision proved so controversial that the House of Representatives voted to repeal it in August 2003.

The FBI can visit anyone's place of employment to demand personal records about them. Agents can question coworkers and supervisors about individuals without explaining why the information is being sought. Those asked about coworkers will be warned not to tell them or anyone else, under penalty of being prosecuted themselves.

On designation by the U.S. attorney general, anyone can be detained and questioned, without the government having to show Fourth Amendment probable cause that the person has committed any illegal act.

Hundreds of people gathered in Boston, Massachusetts, on September 9, 2003, to protest Attorney General John Ashcroft, who spoke exclusively to law enforcement personnel to promote and defend the USA Patriot Act. Protesters contend that Ashcroft's plan has eroded civil liberties under the guise of improving public safety. *(© 2003 Marilyn Humphries/The Image Works)*

By informing a U.S. magistrate judge that an individual is part of an ongoing terrorist or intelligence investigation, the government can obtain an ex parte (unilateral) warrant giving it access to the person's personal records, including medical and banking records. Magistrates are required to sign the order.

The president, in cooperation with the attorney general, can designate a U.S. citizen an "enemy combatant." The person then can be incarcerated indefinitely, without charges, without the right to an attorney, and without family or friends knowing where the individual is being held.

The Patriot Act redefines terrorism very broadly to include a new range of activities that may be considered acts of "domestic terrorism." Many nonterrorist political protest activities, such as those of Greenpeace, Operation Rescue, animal rights actions, protest marches, and demonstrations now can be considered acts of domestic terrorism.

Grand jury testimony, long considered inviolable and not subject to subpoena, now can be obtained by law enforcement on a claim it may be useful in a terrorist investigation.

The government can investigate the use of the Internet by anyone, and intercept the person's e-mail, on

an allegation by the government of a connection to terrorist activity. The Federal Bureau of Investigation (FBI) supposedly cannot read the contents of the e-mail, only the sites visited.

Records of books or magazines checked out from a library, or information about purchases from private booksellers, can be obtained about anyone on an allegation that the information is sought for an intelligence investigation.

The scope and power of a secret court, originally created in 1978 to hear matters pertaining to foreign intelligence, have been expanded to include domestic investigations the government claims are related to possible terrorist activities, including domestic terrorism.

Since passage of the Patriot Act, the president, the Justice Department, and law enforcement have engaged in these actions:

Secretly arrested and incarcerated more than 1,200 persons, mainly immigrants of Arab descent, in connection with the investigation of the events of September 11, 2001. Subsequently, the Justice Department refused to disclose the names of those being held in jail, despite a U.S. District Court order and congressional demands to do so.

Conducted more than 600 secret deportation hearings based on the attorney general's assertion that open hearings might compromise national security.

Declared two U.S. citizens to be "enemy combatants," José Padilla and Yaser Hamdi. This enabled the government to keep both men in military prisons indefinitely, without charges, without access to a lawyer, and without contact with friends and family.

Made secret visits to hundreds of U.S. universities seeking information about untold numbers of individuals.

Began instituting an airline passenger data collection and personal information system in cooperation with national airlines. The system will track credit card and banking records and other personal information about passengers and cross-check them against a list of names on a government "watch list." The watch list, compiled by undisclosed profiling techniques, would then be used to assign each passenger a terrorist-threat level of red, yellow, or green.

Mandated that some 6,000 U.S. universities assist the government in maintaining surveillance of foreign students, under penalty of no longer being able to enroll foreign students if the school fails to comply.

Sent two FBI agents to investigate and question a nineteen-year-old college freshman in North Carolina who had put on her bedroom wall a poster critical of George W. Bush for his position on capital punishment when he was governor of Texas. The agents, while there, asked if she had any pro-Taliban materials.

Used the Patriot Act to press charges against a young, lovesick woman who posted threatening notes aboard a cruise ship because she thought it would cause the ship to return to port and her boyfriend. She was sentenced to two years in federal prison.

Permitted security guards at the Crossgates Mall in Albany, New York, to refuse to allow a lawyer and his son to enter the mall at Christmas wearing T-shirts that read "Peace on Earth" and "Give Peace a Chance." When the attorney refused to leave, he was arrested for trespass.

Used the Patriot Act to seek prosecution of an animal rights group that attacked the residence of a restaurateur who served paté de fois gras in his restaurant, calling it an act of domestic terrorism.

There are increasing indications the American people and some federal lawmakers are becoming concerned about the government's use of the Patriot Act to violate traditional civil liberties. As of fall 2003, some 200 local governments in thirty-four states, including Chicago, Illinois, and Sarasota, Florida, and three states had passed resolutions condemning the legislation.

The House of Representatives passed legislation to restrict the use of FBI break-ins and searches of individual homes. Other members of Congress are proposing to restrict the use of law enforcement's powers

under the act to obtain medical, financial, and reading-habits records about citizens for whom no probable cause can be shown that they have engaged in or are about to engage in any terrorist act.

Many civil rights organizations are conducting intensive campaigns to publicize the Patriot Act and the many threats it potentially represents to the civil liberties of U.S. citizens and U.S. residents. Scores of teach-ins and public assemblies have been conducted in every state in the United States. Two major civil rights organizations filed lawsuits challenging the constitutionality of the act.

During World War II, the U.S. Supreme Court accepted for review a case in which Fred Toyosabura Korematsu, a U.S. citizen of Japanese ancestry, was convicted for failing to comply with an extraordinary military order that compelled him to leave his home in San Leandro, California, and report to an assembly center for internment in a camp. In *Korematsu v. United States,* 323 U.S. 214 (1944), the Court upheld Korematsu's conviction and found the government's actions pursuant to the war powers clause to be constitutional because of the alleged threat of a Japanese invasion. That case bears resemblance to the climate of fear in the United States spawned by the events of September 11, 2001. U.S. residents of Arab ancestry were arrested, questioned, and interred, primarily because they were of Arab ancestry.

The Justice Department in 2003 began seeking even more expansive powers via a proposed new, stronger Patriot Act II. Among other provisions, it would permit law enforcement officials to sign search warrants themselves, bypassing the judicial system entirely, and would broaden the range of activities in which the death penalty could be applied. Members of the Bush administration, the Justice Department, and law enforcement officials contend no abuses of the civil rights of U.S. residents are being committed under the act. Yet other members of the Justice Department admit the law is being used to investigate ordinary garden-variety crime that has nothing to do with terrorism. FBI agents have infiltrated anti–Patriot Act protest groups, and already their members are being accused of having Communist ties.

There have been other times in U.S. history when the government suspended or violated the civil liberties of thousands of Americans because official actions were fueled by fear and overzealous patriotism. Examples include the previously noted Sedition Acts of the late eighteenth century; President Abraham Lincoln's suspension of the writ of habeas corpus (petition for release from illegal confinement) during the Civil War; the passage of the Espionage Act of 1918 that sent many pacifists and activists to prison; the forced internment of U.S. citizens of Japanese, German, and Italian ancestry during World War II; the Communist witch-hunts during the late 1940s and 1950s, illustrated by *Scales v. United States,* 367 U.S. 203 (1961) (criminal conviction for membership in the Communist Party); and violent law enforcement reactions in the late 1960s to anti–Vietnam War protesters.

James V. Cornehls

See also: Exclusionary Rule; Fourth Amendment; *Milligan, Ex parte; Olmstead v. United States.*

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Payne v. Tennessee (1991)

The petitioner in *Payne v. Tennessee,* 501 U.S. 808 (1991), brutally stabbed to death a neighbor and her two-year-old daughter and seriously wounded her three-year-old son. Payne asked the Supreme Court to set aside his capital sentence on the ground that victim-impact evidence had been received at his penalty trial, in violation of *Booth v. Maryland,* 482 U.S.

496 (1987). In *Booth*, the Court had banned such evidence from capital proceedings because it created a serious risk that the ultimate punishment would be imposed, contrary to the Eighth Amendment's ban on cruel and unusual punishments, for arbitrary reasons "wholly unrelated to the blameworthiness of a particular defendant."

By a six–three margin among the justices, the U.S. Supreme Court rejected the petitioner's argument and *Booth* itself. In so doing, the justices took the very unusual step of overruling one of their decisions a scant four years after its pronouncement. Indeed, in *South Carolina v. Gathers,* 490 U.S. 805 (1989), the Court had even extended *Booth* to bar prosecutorial argument dwelling on the victim's characteristics. These facts led two of the dissenters in *Payne* who had formed part of the slim, five-justice majority in *Booth* to comment cynically in *Payne* that power, not reason, informed the approach of the new majority. In the words of Justice Thurgood Marshall, nothing had changed since the earlier precedent except "the personnel of this Court."

Ordinarily, victim-impact evidence consists of testimony from family and friends, presented in person or in writing, about the pain inflicted on them by the loss of their loved one; it may also include descriptions of the deceased's personal traits, such as kindness or spirituality, as well as a call (explicit or veiled) for the jury to sentence the killer to death. In *Booth*, which involved the robbery-murder of a cherished and admired elderly couple, the trial court admitted a powerful victim-impact statement based on interviews with several of the victims' close relatives. It was extremely emotionally charged and contained all of these kinds of evidence.

In *Payne*, by contrast, a lone witness, the grandmother of the sole survivor of the knife attack, testified briefly that her grandson cried for his mother and baby sister. Arguably, the justices could have avoided overturning *Booth* by distinguishing *Payne* upon its facts. Yet the prosecutor's closing remarks developed the victim-impact theme and also suggested that the jurors' verdict would answer the boy's eventual question about "what type of justice was done." Perhaps more important, the Court, which had lost two members of the *Booth* majority, signaled its intentions before the case was even heard by directing the litigants to brief the issue of whether *Booth* should be overruled.

Chief Justice William H. Rehnquist's opinion for the Court, embracing the reasoning of *Booth*'s dissenters, held that victim-impact evidence was properly designed to show the jury "the specific harm caused by the crime" and "*each* victim's uniqueness as an individual human being." It also relied on the supposed unfairness of allowing the killer to offer virtually unlimited evidence in mitigation, while denying the prosecution the right to personalize the killer's victim. A dissent written by Justice John Paul Stevens predictably echoed the *Booth* majority. Among other things, he stated that victim-impact evidence "sheds no light on the defendant's guilt or moral culpability" and serves only to encourage juries to opt for death on emotional rather than rational grounds.

As of 2004, thirty-three out of thirty-eight death penalty states, the federal government, and the military permit the use of victim-impact evidence and argument.

Vivian Berger

See also: Capital Punishment; Effective Death Penalty Act of 1996; Victim-Impact Statement.

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Penn Central Transportation Co. v. City of New York (1978)

When the U.S. Supreme Court delivered its landmark decision in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), it ended a half century of relative stability in jurisprudence involving the Takings Clause of the Fifth Amendment, which mandates that government cannot take private property for public use without providing the owner "just com-

pensation." During that period of stability, courts were guided by a rather amorphous standard for a compensable regulatory taking established in *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922). Pursuant to *Pennsylvania Coal,* courts were required to examine whether a regulation went "too far" and thus overburdened a property owner. Only then could a property owner receive compensation under the Fifth Amendment, as applied to the states through the Fourteenth Amendment.

In *Penn Central*, however, the Court was given a prime opportunity to reexamine what constituted a compensable taking of private property. The Court was asked whether the application of New York's Landmark Preservation Law to the parcel of land occupied by the Beaux Arts Grand Central Terminal was a taking in violation of the Fifth and Fourteenth Amendments. Grand Central Terminal was recognized as a "landmark" under the law, thus requiring the Landmark Preservation Commission to approve any exterior changes to the building, even if the changes were consistent with applicable zoning regulations. This law was especially burdensome to Penn Central Transportation Company, the owners of the terminal, because it had entered into an agreement with a third party to construct a multistory office building on top of the terminal. Penn Central sought approval of two plans to build the high-rise additions, both of which met zoning requirements, but the commission rejected both plans. To add insult to injury, it rejected the plans on the grounds that an addition would aesthetically denigrate the landmark. This reasoning, in effect, eliminated any opportunity that Penn Central would have to expand the terminal upward into its airspace. With no other options, Penn Central challenged the application of the law as a taking.

In reaching its decision, the Court abandoned the "too far" analysis and instead settled on what the Court itself described as an "ad hoc" balancing test consisting of three factors: (1) "the character of the governmental action"; (2) "the economic impact on the property owner resulting from a loss of all reasonable use or value in the entirety of the property"; and (3) "the regulation's interference with the property owner's investment-backed expectations." Applying the new test, the Court ruled that the application of the Landmarks Preservation Law to the terminal did not constitute a compensable taking. The Court reasoned that even though Penn Central was essentially prevented from ever constructing an office building over the terminal, the law did not "interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel"—that is, a train terminal. Also inherent in the Court's decision was a sense that takings jurisprudence should not ignore the social benefits of these public acts. In writing the majority opinion, Justice William J. Brennan Jr. noted that the plaintiff bore a heavy burden when "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." It was with this point that the dissent drew its sharpest disagreement with the majority, with Justice William H. Rehnquist stating in a note to his dissent that the Court had given local governments "an authority for invasion of private right under the pretext of public good, which had no warrant in the laws or practices of our ancestors."

In the years since the *Penn Central* ruling, there has been a marked increase in takings claims addressed by the Supreme Court. However, despite many challenges and the creation of several exceptions, the "ad hoc" balancing test still remains central to the Court's takings analysis. As long as the *Penn Central* test remains the law, courts must consider not only the economic impact of regulations on private property but also the societal impetus behind those regulations.

Andrew Braniff

See also: Eminent Domain; Fifth Amendment and Self-Incrimination; Takings Clause.

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Penn, William (1644–1718)

William Penn is best known as the founder of Pennsylvania. Throughout his life, he struggled to ensure what he saw as the basic freedoms to which all people were entitled: life, liberty, and property. Most famously, he argued that true liberty included freedom of religion, a belief that prompted the founding of Pennsylvania.

William Penn was born in London, England, on October 14, 1644, the son of Admiral William Penn. Raised in an orthodox, if not particularly devout, Anglican household, Penn underwent his first intense religious experience when he was only eleven years old. While studying at Christ Church, Oxford, he attended the sermons of a well-known Dissenter (as British Nonconformists were called), and was dismissed from Oxford for nonconformity in 1661. In an attempt to wean him from Dissent, his father sent him to Europe. Upon his return in 1664, Penn began studying law at Lincoln's Inn, and in 1666 he went to Ireland to manage the family's estates. After helping to put down an Irish mutiny, he briefly considered a military career, but in 1667, after hearing the famous Quaker preacher Thomas Low, he converted, an act that was to change the course of his life.

Penn quickly became involved in efforts to end persecution of Quakers, and in 1670 he was arrested for preaching at an illegal gathering. He pleaded not guilty and was acquitted, though the jury was immediately arrested for returning a false verdict. The jurors appealed: This became known as *Bushell's Case,* 1 State Trials 869 (1670, Great Britain), and established the precedent that juries were free to rule as they saw fit, without fear of reprisal or punishment.

William Penn's treaty with the Indians, when he founded the province of Pennsylvania in North America, 1681.
(Library of Congress)

Despite repeated arrests, Penn continued to publish tracts calling for the establishment of what he believed were natural and ancient rights. Because the Whigs supported religious toleration, Penn became active in Whig politics. In 1680, however, Penn turned his attention toward establishing a colony where Quakers and others could live without persecution. He petitioned Charles II for a grant of land in America on which to establish his colony; Charles granted the charter March 4, 1681.

Penn arrived in America in 1682 and immediately went to work to establish for Pennsylvania a government that would protect those basic freedoms he valued so highly. Unlike England, Pennsylvania was to be governed by a popularly elected bicameral legislature; residents were guaranteed trial by jury, with proceedings conducted in English and open to all; defendants could plead their own cases and challenge jurors; and defendants were entitled to bail except in capital cases, which were limited to treason and murder. Above all, the charter granted freedom of religion to all, though officeholders had to be Christians.

Penn's devotion to the cause of religious toleration led not only to the founding of Pennsylvania but also to his continued efforts in that regard in England. Unfortunately, his willingness to trust James II to secure toleration meant that Penn was on the wrong side of the 1688 Glorious Revolution; he was arrested several times on suspicion of treason and cleared only in 1693. Although Pennsylvania lost its charter in 1691, it was restored in 1694 and retained the basic liberties that Penn had envisioned. Penn died in England in 1718, having spent only four years in the colony he founded.

Carol Loar

See also: First Amendment; Quakers.

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Pennsylvania Coal v. Mahon (1922)

Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), was the principal U.S. Supreme Court case to establish what was required for governmental regulation to be classified as a "taking." Under the Takings Clause of the Fifth Amendment, the owner of property taken by the government for public use is entitled to "just compensation."

In the early part of the twentieth century, U.S. industry was growing rapidly, and business interests wielded significant power. Industry was driven by energy, and the primary energy source of the times was coal. Pennsylvania was underlain by vast coal deposits. Mining coal in Pennsylvania was problematic, however, because removal of it caused subsidence of the surface area. Significant parts of Pennsylvania were sinking. The state, justifiably concerned about the problem, passed the Kohler Act, which prevented the mining of coal when it would result in subsidence.

The coal companies conventionally sold the surface rights to land while retaining the mineral rights. In *Mahon,* the owners of surface rights sued Pennsylvania Coal to prevent the company from exercising its option to remove the coal from beneath their property because it would cause subsidence, requiring them to vacate their home.

In what was to become one of the most important landmark cases decided by the U.S. Supreme Court, Justice Oliver Wendell Holmes Jr. wrote for the Court in a decision that favored the coal company. Although not denying the right of the government to regulate under the police power, Justice Holmes opined that "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." He concluded that Pennsylvania had gone "too far" and unconstitutionally deprived the coal company of a property right protected by the Fifth Amendment. The opinion began a long history of cases resulting in what commonly is referred to as the takings doctrine.

The standard established by the Court, which did not define how far was "too far," left the determination of a taking to be made almost on a case-by-case

basis. This standard, although amplified by subsequent Court decisions, still remains a guiding principle used by courts in determining if and when an unconstitutional taking of property has occurred that requires compensation to the owner.

Pennsylvania Coal was decided on the basis of the Fifth and Fourteenth Amendments to the U.S. Constitution. The Fourteenth Amendment, enacted by Congress and ratified after the Civil War, was intended to protect newly freed African Americans from laws enacted by individual states that violated their privileges and immunities as citizens of the United States. Within fifteen years of its passage, however, the Supreme Court had eviscerated the amendment as it applied to African Americans.

Ironically, the Fourteenth Amendment was to become a bedrock for business interests, which successfully sought to have declared unconstitutional government regulations that adversely affected the uses and value of their property, by extending to the states the Fifth Amendment's prohibition of the taking of private property without due process and just compensation.

James V. Cornehls

See also: Eminent Domain; Fifth Amendment and Self-Incrimination; Property Rights; Takings Clause.

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Pennsylvania v. Mimms (1977)

In *Pennsylvania v. Mimms,* 434 U.S. 106 (1977), the U.S. Supreme Court held that a police officer who lawfully stops the driver of an automobile for a traffic violation may constitutionally order the driver to step out of the automobile. The decision is consistent with the Court's long-standing tradition of allowing the police greater authority than normal to control suspects physically and to conduct searches and seizures around and within automobiles. Such behavior does not run afoul of the Fourth Amendment's protections against unreasonable search and seizure, protections that also are applied against the states through the Fourteenth Amendment.

Two Philadelphia police officers stopped Harry Mimms's car in order to cite him for driving a car with an expired license plate. One of the officers asked Mimms to step out of his car. This officer ordered drivers out of their cars "as a matter of course"; he had no particular suspicion that Mimms had committed any other crime, and he had no particular concern for his safety. When Mimms stepped out of the car, the officer saw a large bulge under his jacket, whereupon the officer frisked Mimms and found an unlicensed gun. Mimms was convicted of carrying a firearm without a license.

The Pennsylvania Supreme Court held that ordering Mimms from the car absent any suspicion of criminal activity or physical threat to the police officer was an unconstitutional "seizure" of Mimms in violation of the Fourth and Fourteenth Amendments. The U.S. Supreme Court reversed.

The constitutionality of police behavior under the Fourth Amendment is determined, according to the Court, by balancing the government's interest in a particular police practice with an individual's right to be free of arbitrary government intrusion into his or her personal liberty. The Court accepted as "legitimate and weighty" Pennsylvania's assertion that because a driver's body is partially hidden by a car, an automobile driver may more easily make "unobserved movements" to assault an officer. Danger to the officer is reduced, therefore, by allowing officers to order drivers out of their cars. At the same time, the Court concluded that the "incremental intrusion" of forcing drivers to exit their cars after a lawful stop was a "mere inconvenience." The Court concluded that ordering a driver out of a car on a lawful traffic stop was a constitutional method of ensuring officer safety.

The constitutionality of the officer's "pat-down" search of Mimms was resolved through a straightforward application of the rules of *Terry v. Ohio,* 392 U.S. 1 (1968), and its progeny. The pat-down search

of Mimms, which occurred after he was constitutionally ordered out of his car, was permissible because the officer in the case reasonably suspected that Mimms possessed a weapon. The *Mimms* holding does not, therefore, grant police blanket authority to search people pulled over for traffic violations; there must be "reasonable suspicion" to conduct a search, and this principle was confirmed by the Court in *Knowles v. Iowa,* 525 U.S. 113 (1998).

In *Maryland v. Wilson,* 519 U.S. 408 (1997), the Court affirmed and extended the *Mimms* decision, holding that the police may order not only the driver but also the passengers of a car to exit the car incident to stopping the car for a traffic violation.

James Daniel Fisher

See also: Exclusionary Rule; Fourth Amendment; Racial Profiling; Search; Seizure; *Terry v. Ohio.*

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Pennsylvania v. Nelson (1956)

Pennsylvania v. Nelson, 350 U.S. 497 (1956), was a civil liberties case that also had legal significance for constitutional questions involving federalism, including whether the states retained power to regulate matters that already were governed by federal law.

Steve Nelson was a Communist Party officer in western Pennsylvania who had been found guilty of violating Pennsylvania's antisedition law. That law criminalized speech, or membership in an organization, that advocated the overthrow of the federal government or of the Commonwealth of Pennsylvania, and it therefore criminalized much the same behavior covered by the federal Smith Act. The Pennsylvania Supreme Court reversed Nelson's conviction because it found that the Smith Act preempted the state act when applied to speech advocating the overthrow of the federal government; it also found that Nelson was not accused of attempting to overthrow the government of Pennsylvania. The U.S. Supreme Court affirmed that decision in an opinion authored by Chief Justice Earl Warren.

Justice Warren focused on the issue of whether the Smith Act had "occupied the field," a shorthand way of saying that Congress intended its legislation to be first, foremost, and solely the law, with no power of the state to regulate the subject. This principle has come to be known as the "preemption doctrine."

In *Nelson,* Justice Warren found that other federal regulatory regimes had provided for a complementary state role, but Congress had not provided for a state role within the extensive body of federal law covering subversion. Although Congress had not explicitly preempted state legislation, Warren argued that this omission constituted an implicit preemption of state law. Warren also found that federal legislation treated "seditious conduct as a matter of vital national concern, [that] it is in no sense a local enforcement problem," and that state prosecutions could interfere with federal enforcement of federal antisedition laws.

In dissent, Justice Stanley F. Reed, joined by Justices Harold H. Burton and Sherman Minton, argued that because Congress had never explicitly preempted the field, the states retained their inherent police powers, including the power to punish crimes against the state. Reed further asserted that the federal laws regarding sedition were not so pervasive as to exclude a state role.

Pennsylvania v. Nelson was arguably one of the most pivotal cases to cause the states to abandon criminal actions against the Communist Party and its members. When the Court issued its decision in *Nelson,* forty-two states and the then-territories of Alaska and Hawaii had state laws prohibiting sedition, criminal anarchy, or syndicalism, all aimed primarily at preventing the overthrow of the federal government. The Court's decision in *Nelson* provided the Court's critics in the South, already enraged by *Brown v. Board of Education,* 347 U.S. 483 (1954), only two years prior that mandated school desegregation, with allies among northern anti-Communists. *Nelson* fit particularly well into the southern argument that the Court did not sufficiently respect states' rights, in this case, Pennsylvania's ability to protect its citizens against communism. Legislation was introduced in Congress to reverse *Nelson,* but that legislation foundered when it

was made part of larger legislation that would have ended the larger doctrine of implied preemption and thus would have threatened many federal regulatory regimes in other areas.

Daniel A. Levin

See also: Communists; Preemption; Smith Act Cases.

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Personhood

"Constitutional personhood" refers to the status of an entity who is a "person" or part of "the people" within the meaning of the U.S. Constitution. Only constitutional persons are entitled to the rights and privileges conferred by the Constitution. Who is or is not a constitutional person, therefore, is a fundamental question for determining the scope of civil liberties in the United States. It is principally the role of the U.S. Supreme Court, as the final interpreter of the Constitution, to determine formally who is or is not a constitutional person, and the Court has examined the issue of personhood explicitly in several decisions.

Who gets to share in the political power and liberties of a constitutional democracy such as the United States? The quick and easy answer is "everyone." In the U.S. constitutional system, having a share of political power appears at first blush to be predicated simply on "humanity"; being human qualifies one to be part of "We the People."

There are three major problems with this answer. First, the question of what entities are or are not "human" is complex and contentious. Are fetuses, for example, "human" such that they deserve a share of political power? The Court declined to grant such status in the famous decision in *Roe v. Wade,* 410 U.S. 113 (1973). What about those species of animals, such as chimpanzees, who are human-*like* cognitively and emotionally (Wise 2002)?

Second, even in the most inclusive democracy, not *every* human being is entitled to a share of political power. In the American system, for example, noncitizens (aliens) who are not in U.S. territory are not entitled to constitutional protections and certainly may not vote, as the Court specified in *United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990). Even if fetuses are recognized as full-blown human beings, they still may not be entitled to constitutional protections. American citizens, on American soil, who act as "illegal" or "enemy combatants" appear to lose (or severely compromise) their status as a constitutional "person," as suggested in *Ex parte Quirin,* 317 U.S. 1 (1942). In other words, how does a political system decide *which* human beings are entitled to political privileges?

Third, political systems may not limit the distribution of political power to human beings alone. American constitutional doctrine, for example, holds that corporations are "people" entitled to (limited) constitutional protections, as the Court held in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978). In short, what appears at first an obvious and natural feature of the U.S. constitutional system, that "humans" are constitutional "persons" entitled to constitutional rights and privileges, is in fact a complex political construction.

Despite the potential complexity of constitutional personhood issues and its status as a prerequisite for receiving any civil liberties protection, the Supreme Court has not examined the issue all that often. The litigants in a civil liberties case and the justices of the Supreme Court tend to assume the personhood of the parties at issue; the Court, for example, does not reaffirm the personhood of white male adult American citizens in every civil liberties case. The Court explicitly addresses personhood issues when there is some interpretive play regarding an entity's personhood, when assumptions of American culture regarding questions of humanity and politics are challenged by traits associated with a class of entities, such that a minimally plausible argument over an entity's personhood status may be made.

For example, the precise nature of personhood for aliens is open for reevaluation because alien personhood is based on a concept, presence on American soil, that is variable and subject to multiple interpretations. What does it mean to say that someone is present on American soil? The Court has not defini-

tively stated whether the physical presence of a human being on American soil alone is sufficient to make one a constitutional person, or whether more (such as being on U.S. soil voluntarily, being legally present, and/or establishing some connection to a community) is required. The fact that corporations are not human beings spurs unsuccessful attempts, from time to time, to assert that granting corporations personhood was a mistake.

When the Court explicitly examines a personhood issue, the justices typically use a form of constitutional interpretation generally known as "originalism." In other words, the Court determines whether an entity is a constitutional person by asking whether the authors of the Constitution or its amendments originally intended a particular entity to be a "person," or whether the original understanding of the populace at the time the Constitution was ratified in 1788 would have been that the entity at issue was a constitutional person. For example, in the first major personhood case, *Scott v. Sandford,* 60 U.S. 393 (1857), the Supreme Court held that people of African descent, slave or free, were never intended to be constitutional people by the authors of the Constitution; in *Roe v. Wade,* the Court held that the unborn, though human, were never intended or understood to be constitutional people and therefore did not have any sort of constitutional right against being aborted.

As a practical matter, originalism is an attractive method of interpretation for answering personhood questions. In the Constitution, the terms "person," "persons," and "people" have varying meanings depending on the location of the words and the context in which they are used. In addition, there is no single set of unchanging traits that entities possess that always make them constitutional people. For example, American citizens may go abroad and still have constitutional protections, as the Court held in *Reid v. Covert,* 351 U.S. 487 (1956), whereas aliens who are "people" while in the United States lose that privilege when they leave American soil. Some humans are not constitutional "people" (such as aliens not on American soil), whereas some nonhumans are (corporations, for example). These difficulties, therefore, make originalism attractive because the Supreme Court can avoid attempting to craft a single definition of personhood and instead simply ask whom the overall class of American constitutional "persons" was intended or understood to include.

Originalism is also attractive because it allows the Court to avoid openly engaging tricky scientific, philosophical, theological, and political issues raised by some personhood questions. For example, rather than tackling questions about the philosophical and moral status of the fetus, the Court in *Roe v. Wade* simply noted that fetuses were not originally intended or understood to be people; it was not the Court's responsibility or role to examine such issues.

In practice, issues of politics, religion, and the like probably do influence the Court's decision making on personhood issues, but the Court is somewhat better able to preserve its reputation as a neutral interpreter of the law by not openly engaging issues for which the justices have no greater expertise than anyone else has. A major implication of interpreting the Constitution in this way, for better or for worse, is that the overall class of constitutional persons is essentially closed; only those entities originally intended or understood to be persons or people have personhood.

In the future, the Court might encounter new personhood issues as scientific and technological developments, for example, push back the boundaries of life and death, raising new issues of who is sufficiently "born" to be a person and who is sufficiently "dead" such that they are no longer a person. Some issues are currently resolved—the "unborn" are not people per *Roe v. Wade*, and the Court, for example, assumes that people in a permanent vegetative state are still people per *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261 (1990)—but the Court may be tempted to revisit them. Scientific advances in genetics might create new species of semihumans or mixed-species creatures; two biotechnology activists have applied to patent a genetic human-mouse combination. Animal rights activists argue that the more scientists learn about animals, the more "human" they seem. Although the Supreme Court as final interpreter of the Constitution is primarily responsible for resolving issues of constitutional personhood, it may be the least qualified U.S. political institution to address these issues as they implicate ever more difficult questions of science, philosophy, religion, and politics.

James Daniel Fisher

See also: Cloning of Human Beings; Rights of Aliens; *Roe v. Wade;* Transgender Legal Issues in the United States.

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Petition of Right

The Petition of Right, the product of the British Parliament's efforts to control the power of Charles I, was part of a larger controversy about the rights of the people and the limits of the king's prerogative. Although it is a brief document, it nevertheless stands as a key step in the development of civil rights in England. Its provisions—banning arbitrary and discretionary imprisonment, nonparliamentary taxes, martial law and the quartering of troops, in addition to its emphasis on due process—also appear in the Constitution of the United States.

Charles I came to the throne in 1625, and from the outset his relations with Parliament were strained. Desperate for money and unsuccessful in persuading Parliament to grant him the necessary taxes, Charles resorted to nonparliamentary means, requiring his subjects to "lend" him the money he required. This forced loan provoked immediate resistance, and five gentlemen—the Five Knights, as they came to be known—refused to pay what they saw as an illegal tax. Charles had them arrested and imprisoned in November 1627; when they applied for writs of habeas corpus (petitions asking to be released from unlawful imprisonment), Charles's privy council ordered that the writs be returned declaring that the knights were held "by his majesty's special commandment." The Court of King's Bench ruled that Charles was not then required to state what had prompted the arrests in the first place, a ruling that allowed him to continue to detain the knights. The court's decision kept the knights in prison but was not intended to resolve the deeper question of whether (or when) the crown had to file charges. Charles's attorney general, acting on Charles's orders, then tried to alter the legal record to show that the judges' ruling established a precedent that the king had the right of discretionary imprisonment.

Parliament met in March 1628 and immediately took up the matter. The House of Commons, led by the famous lawyers John Selden and Sir Edward Coke, passed a series of resolutions in early April declaring that the king had abused his powers and violated the law. These resolutions became the basis for the petition that they would later write. In response to the resolutions, Charles promised that he would allow Parliament to pass legislation that would clarify the law and prevent future problems. Both houses of Parliament then debated the issue; the Commons were adamant that a new, binding bill be passed, whereas the Lords were divided over whether such a bill would infringe on the king's prerogative. By May 1, however, the situation had changed. Despite his earlier promise to accept a statute, Charles now insisted the Parliament accept his word that he would never again violate his subjects' civil rights. Given his previous actions and his attempt to alter the legal record, Parliament remained unconvinced. Furthermore, Charles made it plain that he now would not accept any bill that went beyond confirming Magna Carta and several other medieval statutes.

Sir Edward Coke then proposed that the Commons draft a petition; this was a practice that had not been used since the fifteenth century, but if both houses of Parliament passed it and if Charles accepted it, the petition would gain the legal status of a statute. After much debate in both houses and several conferences between them, both chambers passed the measure in late May, though the House of Lords insisted that it be delivered to Charles with a verbal promise that the Lords did not intend to limit his prerogative. Charles's initial response on June 2 was equivocal: Even as he stated his wish that his subjects' rights be

The Petition of Right, the product of Parliament's efforts to control the power of King Charles I of Great Britain, was part of a larger controversy about the rights of the people and the limits of the king's prerogative.
(Library of Congress)

respected, he also jealously guarded his prerogative. Thus it appeared that there was no resolution to the issue; Charles's invocation of his prerogative is what he had argued allowed him to keep the Five Knights in prison in the first place.

The House of Commons was furious but held a trump card: Charles still needed money. Accordingly, he capitulated and on June 7, 1628, issued the standard response to a petition: "Let right be done as is requested." With this reply, the Petition of Right was duly recorded and became, in effect, part of the law of the land. With Charles's permission, the Petition of Right had been included in the official records of Parliament, and a copy of it, including Charles's second response, was printed. As soon as he adjourned Parliament, however, Charles ordered the printing rescinded and replaced it with a version in which he once again asserted his prerogative.

Charles also wasted no time in collecting tonnage and poundage, taxes that he claimed were his by right, though traditionally Parliament granted them to monarchs. In clear violation of the Petition of Right, Charles began collecting these taxes, and his officers began confiscating the goods of those who refused to pay a nonparliamentary tax. When Parliament reassembled in spring 1629, it once again took up the issue. When the Speaker of the House of Commons tried to adjourn the Commons without any debate, several members held him in his chair while another read three resolutions, two of which—a condemnation of tonnage and poundage (which still had not been granted to Charles) and a statement announcing that anyone who voluntarily paid these taxes would be "a betrayer of the liberties of England and an enemy to the same"—were direct responses to the king's flouting of the petition. Parliament was then dissolved, and Charles resolved to rule without it. He did not summon another Parliament until 1640; in the meantime, he continued to violate the Petition of Right. If relations between the king and Parliament were poor in 1628, by 1640 they had deteriorated completely; civil war between the two broke out in 1641.

Though Charles routinely and willingly violated the terms of the Petition of Right, the document nevertheless stands as a key guarantor of civil liberties. By law, the king could not imprison people or seize their property without due cause, could not levy taxes without consent of the legislature, could not quarter the military on civilians, and could not impose martial law on civilians. Charles's flouting of these laws turned Parliament against him in 1641; had he abided by the terms and spirit of the Petition of Right, it is entirely possible that civil war could have been avoided.

Carol Loar

See also: Bill of Rights; Blackstone, William; English Bill of Rights.

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Physician-Assisted Suicide

As technology has advanced, it has posed new problems that have forced reexamination of issues involving both the beginning of life and its end. Matters involving cloning and U.S. Supreme Court decisions such as *Roe v. Wade*, 410 U.S. 113 (1973), dealing with abortion, have focused on the beginning of life. The issue of euthanasia, or the purposeful termination of life to relieve physical suffering, focuses on life's end. Proponents of euthanasia see the procedure as a way not only to alleviate suffering but also to empower individuals to have control over their own death. By contrast, opponents see euthanasia as eroding the traditional concern of doctors with providing life-sustaining care. They further fear that legalizing euthanasia might create a slippery slope that pressures vulnerable people (for example, elderly persons who fear burdening their families or want to pass on inheritances) or vulnerable populations (racial minorities or the disabled) to consent to such assistance.

BACKGROUND

Reflecting common law precedents, state laws in America have generally reflected intolerance for all forms of physician-assisted suicide, but such laws have been questioned in recent years. In 1991, the citizens of Washington state petitioned for a referendum on Initiative 119, which proposed that a mentally competent, terminally ill, adult patient could request "aid-in-dying" and that a willing physician could then act to end the patient's life as humanely as possible. The voters defeated this initiative by 56 to 46 percent. California voters subsequently rejected a similar proposition the following year, whereas in 1994 Oregon voters approved Measure 16 by a narrow margin. This measure allowed for physician-assisted suicide, on condition that physicians only could provide drugs for this purpose, but patients must be able to administer the dose. The measure further required that the patient must have been diagnosed with a terminal illness and reached the decision to terminate life rationally and voluntarily. Courts have somewhat refined the application of this law, which still remains in effect, notwithstanding efforts by federal officials to curtail it. In May 2004, the Ninth Circuit Court of Appeals said the U.S. attorney general could not prosecute doctors operating under the Oregon law.

Precedents related to euthanasia have been laid in several cases involving termination of care. The New Jersey Supreme Court ruled in *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), that parents had the right to turn off life support for a daughter who remained in a persistent coma after a traffic accident. In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), the U.S. Supreme Court also acknowledged that an individual had the constitutional right to refuse medical treatment, but it held in this case that Nancy Beth Cruzan's guardians did not have the right under Missouri law to terminate life support for a comatose daughter absent clear evidence that their daughter would have so desired it—a decision that stimulated interest in "living wills" directing physicians as to what kind of care to give in such situations.

Another precedent of sorts was established with the conviction in Michigan courts of Dr. Jack Kevorkian, the self-styled "Dr. Death" who had engaged in over 130 assisted suicides. Unlike others who would assert the right to assist patients, Dr. Kevorkian did not have long-standing doctor-patient relationships with those whom he helped to commit suicide. He was tried and sentenced after his highly publicized assisted suicide of Thomas Youk, a man with end-stage Lou Gehrig's disease (ALS, or amyotrophic lateral sclerosis), which was broadcast on the television show *60 Minutes.*

SUPREME COURT DECISIONS

The U.S. Supreme Court has heard two companion cases on the issue of physician-assisted suicide—*Wash-*

ington v. Glucksberg, 521 U.S. 702 (1997), and *Vacco v. Quill,* 521 U.S. 793 (1997). The first case addressed a Washington state law that prohibited aiding a suicide. It was successfully challenged in the U.S. Court of Appeals for the Ninth Circuit on the basis that it violated a liberty interest guaranteed by the Fourteenth Amendment in allowing a mentally competent, terminally ill adult to opt for physician-assisted suicide as a matter of choice. Although the Supreme Court lauded the fact that Americans were debating the morality, legality, and practicality of physician-assisted suicide, it overturned the circuit court decision and upheld the state law, declining to interpret the Due Process Clause of the Fourteenth Amendment so as to require recognition of physician-assisted suicide.

The outcome was similar in *Vacco v. Quill.* The Court again upheld the constitutionality of a pertinent law, in this case a New York law stating that a person who intentionally caused or aided another person to attempt or commit suicide was guilty of a felony. Overturning a decision by the Second Circuit Court of Appeals, the justices concluded that the law did not violate the Equal Protection Clause of the Fourteenth Amendment by distinguishing between physician-assisted suicide and refusal of life-saving medical treatment. Although there were numerous opinions in the case, the Court was unanimous in its holding, with Chief Justice William H. Rehnquist authoring the lead opinion. In a concurring opinion, Justice Sandra Day O'Connor observed that there was no legal barrier to palliative care (directed solely to relieving suffering), even when it might hasten death. Similarly, the Supreme Court decisions appear to indicate that although the Constitution does not mandate such laws, the justices are willing to uphold state laws permitting euthanasia.

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See also: Cloning Human Beings; Right to Die; *Roe v. Wade; Washington v. Glucksberg.*

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Pierce v. Society of Sisters (1925)

In *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), the U.S. Supreme Court invalidated an Oregon statute requiring children to attend public schools, because the law violated the due process liberty rights of parents to send their children to a school of their choice.

In November 1922, voters in Oregon approved the Compulsory Education Act, a citizen initiative that required every child age eight to sixteen to attend "a public school for the period of time a school shall be held during the current year." The law made it a misdemeanor for parents to send their children to a secular or religious private school. The initiative passed largely through the public efforts of the Ku Klux Klan and the Oregon Scottish Rite Masons. These organizations argued that separating students into different schools based on religious belief would create dissension in the state. Campaign rhetoric also was tinged with fears about Bolshevism and the large number of immigrants as well as some anti-Catholicism.

The Society of the Sisters of the Holy Names of Jesus and Mary, an operator of Catholic schools, and the Hill Military Academy believed the new law to be unconstitutional. Together they sued Governor Walter Pierce and state and county district attorneys seeking to block implementation of the law. Using an economic argument, the three-judge district court that heard the case ruled in favor of the plaintiff private school operators, stating, "The law had the effect of depriving them of their property without due process of law." Oregon appealed the case to the U.S. Supreme Court. At the time, seventeen other states were in the process of adopting laws modeled on Oregon's.

In a unanimous decision, the Supreme Court ruled against the state of Oregon, writing that a state government cannot require all children to attend public

schools. In his opinion for the Court, Justice James C. McReynolds avoided a discussion of freedom of religion and the First Amendment, instead grounding the ruling in the law of property rights. He wrote,

> The law conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business or profession, and is accordingly repugnant to the Constitution and void. And, further, that unless enforcement of the measure is enjoined the corporation's business and property will suffer irreparable injury.

The Court further recognized that a state had the power to require students to attend some school and to provide regulation to assure that the schools were doing a good job at education.

Pierce influenced the development of civil liberties jurisprudence in the twentieth century. The ruling was especially important in developing the right to privacy identified in *Griswold v. Connecticut,* 381 U.S. 479 (1965), and applied to abortion in *Roe v. Wade,* 410 U.S. 113 (1973). Supporters of school choice at the end of the twentieth century adopted a line from the decision, "The child is not the mere creature of the State," to support their movement for greater educational freedom.

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See also: Due Process of Law; Education; Family Rights; Right to Privacy.

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Plain-Sight Doctrine

The plain-sight, or plain-view, doctrine is a line of reasoning that carves out an exception to the warrant requirement for searches and seizures under the Fourth Amendment to the Constitution. The Fourth Amendment protects the rights of individuals "in their persons, houses, papers and effects, against unreasonable searches and seizures" by generally mandating that authorities get a warrant before conducting a search. To obtain a warrant, authorities must have sufficient grounds, in the form of probable cause. The warrant process is designed to balance the individual's right of privacy with the valid governmental interest in maintaining social order and the rule of law through the investigation and prosecution of criminal acts.

Out of this context, the Supreme Court has repeatedly asserted a "plain-view" exception to the First Amendment warrant requirements. Under this exception, if police officers see a piece of incriminating evidence in plain sight during the routine course of police work, they may seize it without a warrant. This doctrine was formed because it would be logistically impossible for officers to leave the evidence in question while they obtained a warrant, since doing so could threaten the officers, the investigation at hand, and the evidence seen in plain view. The plain-view doctrine also allows police conducting a warrant search to seize contraband or other evidence of criminal activity lying in the open even though those items have not been specifically listed in the warrant.

Two prohibition-era cases drew on this doctrine. In *Hester v. United States,* 265 U.S. 57 (1924), the Court ruled that a bottle of "moonshine whiskey" that Samuel Hester had disposed of during a chase in "an open field" was not subject to the same Fourth Amendment warrant procedures as was the adjacent farmhouse. *United States v. Lee,* 274 U.S. 559 (1927), arose out of the sighting of seventy-one cases of grain alcohol on a boat near Boston. The Court reasoned that because the liquor was in plain view and was discovered before Coast Guard officials even had boarded the motorboat, the admission of the alcohol was constitutionally permissible and the Coast Guard did not need a warrant to seize the liquor. Similarly, the Court

allowed the seizure of drugs in *Ker v. California,* 374 U.S. 23 (1963). Justice Tom C. Clark wrote, "[T]he discovery of the brick of marijuana did not constitute a search, since the officer merely saw what was placed before him in full view."

More recent cases have further clarified the plain-sight doctrine. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), established that the plain-sight doctrine "applies to the situation in which a police officer has a prior justification for an intrusion in the course of which he comes inadvertently across a piece of evidence incriminating the accused . . . and permits the warrantless seizure." This extended the status of admissibility to items found "inadvertently" whether or not they were in plain view. In short, an item in plain view and found inadvertently was admissible, as was an item that was not in plain view but was found inadvertently during the normal course of a warranted search. Further, if the police have a predetermined reason to believe they will find something, they cannot rely on its being in plain view as justification for a search; rather, they should obtain a warrant. To forgo the warrant requirement in those instances would "fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure." *Texas v. Brown,* 460 U.S. 730 (1983), upheld Brown's conviction for drug possession because the officer saw this evidence by looking into his pulled-over vehicle.

The *Coolidge* and *Brown* cases established that for the plain-view doctrine to apply, officers must meet three requirements. First, the officers needed a legally valid reason to be in position to see the piece of evidence. This could be due to a warrant for other evidence or because of other valid exceptions to the warrant requirement, such as being in "hot pursuit" (police trying to apprehend a fleeing suspect). Second, the discovery must be inadvertent. Third, it must be immediately evident that the item in plain sight is actually evidence.

The last of these standards was further articulated in *Arizona v. Hicks,* 480 U.S. 321 (1987), in which an officer investigating a shooting (a valid reason to be in Hicks's apartment) noticed stereo equipment that he suspected was stolen and turned this equipment over to read serial numbers. The Court overturned the defendant's conviction on the basis that the policeman had only a "reasonable suspicion," not probable cause. Justice Antonin Scalia reasoned that since the policeman had turned over the equipment absent probable cause, the search went beyond what was allowed under the plain-sight doctrine. In short, the police did not properly know that the stereo equipment was actually evidence since they did not have probable cause. Justice Scalia wrote, "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." Thus, *Arizona v. Hicks* elucidated the power of the Fourth Amendment to protect privacy, although the core plain-view principle remains intact, along with its original goal of promoting efficient and safe police work.

James F. Van Orden

See also: Arizona v. Evans; Exclusionary Rule; Fourth Amendment; Search; Seizure.

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Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)

In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), the U.S. Supreme Court limited but did not negate the constitutional right to abortion that it had articulated nearly two decades earlier in *Roe v. Wade,* 410 U.S. 113 (1973).

During the 1960s, some states in the United States began liberalizing their laws banning or restricting abortions. The U.S. Supreme Court's enunciation of the constitutional right to reproductive freedom in *Roe v. Wade*, however, led abortion rights opponents to mobilize, as the right applied across the nation. The Court nonetheless initially maintained its insistence on a right defined rather broadly and struck down most state-imposed limitations other than requirements that abortions be performed in state-approved

facilities, as the Court held in *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983), and that minors obtain parental or judicial consent, the holding in *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986). As protest mounted, some politicians, including President Ronald Reagan, made repeal of *Roe v. Wade* a centerpiece of their platforms. Coincidentally, some of the justices who supported abortion rights retired. The result was the issuance of Court decisions more restrictive of the right; for example, the Court in *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989), upheld a ban on the use of public money to fund abortions.

The *Casey* case, which reached the Court twenty years after *Roe,* therefore arrived at a time when the justices seemed to be withdrawing from their articulation of reproductive rights. In it, abortion providers challenged a 1982 Pennsylvania statute that required a woman to wait at least twenty-four hours after having given her consent for an abortion, to obtain either parental or judicial consent if she was a minor, and to inform her husband if she was married.

The Court was too divided to fashion a majority opinion. Some of the justices who favored restricting abortion rights were nonetheless concerned about the impact on public opinion if the Court appeared to give in to popular pressure by reversing itself and striking down *Roe.* The plurality opinion of the Court, written by Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter, affirmed *Roe*'s holding that the Fourteenth Amendment's guarantee of liberty protects the right of women "to have an abortion before [fetal] viability and to obtain it without undue interference from the State." The three justices recognized both that there was societal disagreement "about the profound moral and spiritual implications of terminating a pregnancy" and that the right to abortion had become part of the national fabric. "Liberty finds no refuge in a jurisprudence of doubt," the opinion said. The citizenry had come to count on the availability of abortion during "two decades of economic and social developments," and "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."

Noting that the Court's legitimacy was "grounded truly in principle, not . . . compromises with social and political pressures," the plurality stated that "to overrule [an earlier decision] under fire in the absence of the most compelling reason to reexamine a watershed decision" would subvert that credibility. The three justices reiterated their belief that "choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment," and contended that it was "imperative" for the Court "to adhere to the essence of *Roe*'s original decision."

Two other justices agreed with enough of the plurality opinion to make it a five–four majority. Although the Court therefore affirmed what it described as the core of *Roe,* it also criticized that decision for giving too little consideration to the state's "substantial interest in potential life." It rejected *Roe*'s trimester standard and held that states could take unspecified "steps" to ensure that a decision to terminate pregnancy, even in the earliest stages, "is thoughtful and informed." Regulations of abortion rights, the Court declared, were to be overturned only if they constituted an "undue burden" on the right to abort a nonviable fetus.

Applying that criterion to the Pennsylvania statute, the Court upheld the twenty-four-hour and parental consent provisions but struck down the spousal notification requirement. It did so in a lengthy section describing the extent of domestic violence in the nation and the undue burden caused by placing a battered woman in the position of choosing between an unwanted pregnancy or additional physical abuse by her husband.

Casey thus confirmed the constitutional right to abortion but gave the states greater leeway to regulate it than they had under *Roe.* The new standard was fact-based and would require a showing that a regulation was unduly burdensome if it was to be invalidated. The burden of proof would fall on women to prove not only that a burden existed but also that it was "undue" or excessive. The four dissenters declared that they would have upheld the Pennsylvania statute in its entirety and that *Roe* should be overruled. Whether that will be the result of future changes in Court personnel remains to be seen.

Philippa Strum

See also: Griswold v. Connecticut; Right to Privacy; *Roe v. Wade.*

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Plea Bargaining

One of the most common yet controversial aspects of the U.S. criminal justice system is the process of plea bargaining. Plea bargaining is the process through which defendants plead guilty to a criminal charge with the expectation that they will receive some form of leniency from the state. The procedure implicates multiple constitutional issues, including a defendant's rights to due process of law, to a fair trial, to adequate assistance of counsel, and against self-incrimination.

The media and popular culture are largely responsible for dramatizing and overemphasizing the role of the trial in the judicial system. In reality, very few criminal cases are filtered through the adversary process with full-blown trials. The criminal justice system is designed to screen out weak cases early in the process. In fact, almost 90 percent of criminal cases are resolved by plea bargaining.

Although it has received much attention in recent years, plea bargaining dates back more than a century. During the mid-nineteenth century, plea-bargained cases were commonplace, and by the 1920s the practice was an established feature of the judicial system. In federal courts, the massive number of liquor prosecutions stemming from prohibition led to the formal practice of plea bargaining during the 1920s.

THE BARGAINING PROCESS

A plea agreement is worked out between lawyers. Defense attorneys typically initiate plea negotiations, which suggests that most defendants who reach this stage are either guilty of criminal violations or have a good chance of being found guilty at trial. The personal and professional familiarity among defense lawyers, prosecutors, and judges, known as the courtroom "work group," encourages plea negotiations. Past cases often help establish future parameters of pleas for a particular offense.

Plea agreements must be approved by the judge. Judges rarely reject a plea agreement, however, believing that the bargain adequately protects the community and defendant. Pleas must be voluntary, and defendants must understand they are waiving their right to a trial. The judge will question the defendant to make sure the plea was devoid of threats, there was no misrepresentation, and no bribes were offered.

There are several types of plea bargains. One type involves a reduction of the seriousness of the charges. For example, a charge may be reduced from armed robbery to robbery. Another involves the deletion of some charges, or counts. This is known as "count bargaining." Finally, a plea agreement many involve a guilty plea given in exchange for the prosecutor recommending a lenient sentence; the defendant usually receives less than the maximum. All of these types of bargains are designed to reduce the sentence in some way in exchange for the guilty plea.

The incentives for defendants to bargain are rather obvious. If the evidence against them is strong, they may want to plead guilty in order to receive a less severe punishment. A prosecutor also may have several reasons to bargain with a defendant. If there is a heavy caseload and few resources, plea bargaining offers an efficient way to manage the caseload. Another reason the state may bargain is to get the conviction. There are too many uncertainties during a trial, and a guilty plea avoids a potential loss in the trial court. Cases in which the evidence is weak and/or the crime is not serious may be good candidates for a plea bargain.

The U.S. Supreme Court has sanctioned the practice of plea bargaining. In *Brady v. United States,* 397 U.S. 742 (1970), the Court recognized the positive aspects of plea bargaining by pointing out that the practice benefits both sides in the adversary system. In *Santobello v. New York,* 404 U.S. 257 (1971), the Court acknowledged that plea bargaining had become "an essential component of the administration of justice" and emphasized that bargaining was an efficient way for the state to dispose of criminal cases. The

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Court stated that as long as it was properly administered, plea bargaining was to be encouraged.

CRITICISMS OF PLEA BARGAINING

Plea bargaining has been criticized from both the left and right sides of the political spectrum. Those concerned about due process and the rights of criminal defendants question whether the defendant is making a voluntary choice. The choice is usually between a lesser known punishment and a greater unknown punishment. Rather than risk trial, defendants may plead guilty even if they are innocent. Statistics show that those who opt for a full trial and are convicted usually are sentenced to more severe punishments. This is known as the "jury trial penalty." The Supreme Court sanctioned this practice in *Bordenkircher v. Hayes,* 434 U.S. 357 (1978).

Some critics point out that plea bargaining affects poor defendants in particular. Defendants in jail because they could not afford bail have the greatest incentive to plead. The desire to get out of jail may pressure such defendants to plead guilty to a charge. Other opponents of plea bargaining are concerned about the danger of overcharging. Prosecutors may bring a severe charge or may add multiple charges in order to give the state leverage in negotiating a plea. "Vertical overcharging" is charging a single offense at a higher level than the facts of the case support. "Horizontal overcharging" is charging the defendant with every conceivable crime related to the incident. Finally, critics of plea bargaining argue that it can become routine. When defendants do insist on trial, they may be viewed as a nuisance. Efficiency, rather than justice, becomes the goal of the criminal court system.

Those who favor a tough approach to crime often complain that plea bargaining allows guilty defendants to get off with lighter sentences and as a result they do not receive the punishment they deserve. Others concerned about victims' rights argue that plea bargaining does not encourage participation by the victim and protection of victims' interests.

PROPOSALS TO REFORM OR ABOLISH PLEA BARGAINING

A number of states and local jurisdictions have implemented reforms of plea bargaining. For example, in Wayne County, Michigan, plea bargains in felonies are not accepted if the defendant used a gun during the felony. Some jurisdictions limit the types of charges that can be plea bargained. Other jurisdictions have imposed a ban on plea bargaining after felony indictment or have enacted a complete ban on all forms of plea bargaining. Alaska banned plea bargaining altogether from 1975 to 1980, although studies suggest that some form of implicit bargaining still occurred.

The persistence and prevalence of plea bargaining derive from the fact that it offers benefits to all members of the courtroom work group—prosecutors, de-

fense lawyers, and judges—as well as defendants. These benefits provide strong incentives to negotiate a plea, and they ensure that plea bargaining will continue to be an important feature of the criminal justice system.

John Fliter

See also: Fifth Amendment and Self-Incrimination; Fourth Amendment; Sixth Amendment.

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Police Brutality

Police brutality is the excessive use of force by police or law enforcement officials against civilians or individuals suspected of committing a crime. This brutality may occur outside on the street, inside police headquarters, or in jail or prison. Police brutality invokes several possible violations of individual rights under the Constitution.

In the vast majority of interactions between police and civilians or between police and criminal suspects, little or no use of force or incident is involved. Yet images of police using excessive force often appear in news reports. These images include the police assaulting demonstrators in Chicago during the 1968 Democratic National Convention; the 1991 videotaped beating of Rodney King by police officers in Los Angeles; the storming of the Branch Davidian compound in Waco, Texas, by federal Alcohol, Firearms, and Tobacco agents in 1993; and the New York City police shooting of Amadou Diallo in 1999. These high-profile cases and other acts of abuse by police officers raise critical issues about whether any individual rights have been violated and what can be done to limit the excessive use of force by the police.

Victims of alleged police brutality who wish to take legal action against police have two ways to proceed. The first is to file tort actions against police in state court; the other approach is to raise claims of federal constitutional deprivations. In terms of tort liability, individuals may sue police officers under state law alleging a variety of torts. For example, intentional torts such as assault, battery, false arrest, or false imprisonment may be filed against police who use excessive physical force or illegally detain individuals. In addition, police may be sued under state law for a variety of negligence actions if it can be shown that the police breached a specific duty to an individual that resulted in some injury or damages. These types of torts are more often used in cases when the police fail to exercise their power properly, such as in the negligent operation of a vehicle during a high-speed chase, than in cases that address specific instances of excessive force or brutality.

Moreover, because many individuals who are the victims of police brutality often are convicted of crimes, they do not make the most sympathetic plaintiffs, and therefore state tort actions usually are not adequate remedies to protect against excessive force.

A far more common approach for addressing police brutality problems since the 1970s has been to file what is called a "section 1983" claim. This type of claim is based on the Civil Rights Act of 1871 as amended—specifically, section 1983 (*U.S. Code,* Vol. 42, sec. 1983). To prevail under a section 1983 claim, the plaintiff must show three things: (1) The person alleging the claim is a person meant to be protected under the statute; (2) the defendant, usually law enforcement, was acting under the "color of the law"; and (3) the alleged violation was of some constitutional right and the resulting damage reached a constitutional level. To prevail in a section 1983 case, victims must show that the police acted with deliberate indifference to their rights. In addition, the U.S. Supreme Court in *Hudson v. McMillian,* 503 U.S. 1 (1992), stated that any use of force imposed in a malicious and sadistic fashion was actionable as being excessive.

Plaintiffs can bring a section 1983 claim for any violation of constitutional rights, such as those in the Fourteenth Amendment, against a state, and plaintiffs can bring what is often called a *Bivens* action—so named after *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971)—against the federal government. Similarly, in *Monell v. Department of Social Services,* 436 U.S. 658 (1978), the Supreme Court held that section 1983 actions could also be brought

against local governments. Overall, claims arising under section 1983 are the way individuals can challenge police brutality cases in court to claim excessive use of force or treatment violated their constitutional rights.

The U.S. Supreme Court has established a variety of tests to determine police liability, depending on the type of force involved. For example, in *Tennessee v. Gardner,* 471 U.S. 1 (1985), the Court stated that in cases involving use of deadly force, the appropriate inquiry is to balance the victim's interests in not being subjected to a Fourth Amendment violation versus the government's interest in seeking to justify the intrusion against this right. In *Garner*, a police officer shot and killed a fifteen-year-old boy who was fleeing arrest. In clarifying when police officers may use deadly force to apprehend a fleeing suspect, the Court said such action was appropriate only when the person posed a threat of serious harm to the officer or others, or when the suspect had already used or threatened force against others. Thus, under *Gardner*, police are not barred from shooting a fleeing suspect, but they may not do it except under vary narrow circumstances.

Claims that police have used nondeadly but excessive force require somewhat different analysis. Examples might be when the police beat a suspect or otherwise use more force than is necessary to apprehend, detain, question, or punish. In *Graham v. Connor,* 490 U.S. 386 (1989), the Court said that such cases are analyzed under the Fourth Amendment. To determine whether excessive force has been used, four factors must be considered: (1) whether the suspect posed an immediate threat to the officer or others; (2) the severity of the crime; (3) whether the suspect actively resisted arrest; and (4) whether the person was seeking to escape custody. Again, these factors do not resolve all uses of force by police but instead offer guidelines indicating that force may be reasonable or not depending on the circumstances.

The Court has imposed section 1983 in a variety of contexts, including prison conditions, negligent operation of emergency vehicles, and abandonment of citizens in dangerous places or situations.

Overall, although most police officers are restrained in their dealings with the public, allegations of brutality are not infrequent. From 1987 to 1991, New York City paid out over $44 million to settle police brutality claims, and since the late 1960s, claims of excessive force have dramatically increased.

David Schultz

See also: Bivens and Section 1983 Actions; Fourth Amendment; Police, Restrictions on.

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Police Power

The police power may be one of the most important and yet least understood of the powers of government. American scholar Ernst Freund included it in his list of fundamental government powers, along with the military power, the taxing power, and the power of eminent domain. Although by necessity vague, the definition of police power is the broad discretionary power of a state government to decide how best to regulate the general welfare of its citizens. The police power is also sometimes called the "regulatory power." As the most open-ended of the fundamental government powers, the police power is the main source of state authority to regulate people, places, and things. These police power regulations involve issues as diverse as zoning, land use, building safety, gambling, discrimination, parking, crime, licensing of professionals, liquor, motor vehicles, education, and sanitation.

THE POLICE POWER IN THE UNITED STATES

Very few principles are taken for granted in law, but one of them is that all sovereign states and nations inherently have the police power. The police power is thus one of the powers reserved for the states under the Tenth Amendment to the U.S. Constitution. When the original thirteen states ratified the Constitution and formed the United States, they did not surrender the police power to the federal government. Under the "equal footing" doctrine, new states that

joined the union also retained the police power in their constitutions.

Under the U.S. system of federalism, the federal government is limited to those powers granted or implied by the Constitution. Therefore, only the states can regulate under the police power. In turn, however, the states' exercise of those police powers may be limited by prohibitions in the Constitution of the United States.

CHECKS ON THE POLICE POWER

The police power is wide and expansive, and thus its scope is sometimes difficult to define, but it is not an unlimited power. Regulations made under the police power may be challenged with a general claim that the regulation is arbitrary and unreasonable and hence beyond the scope of the power; on grounds that the regulation violates the state or federal constitution, such as the Due Process or Takings Clauses of the Fifth Amendment to the U.S. Constitution; on grounds that the regulation has a technical legislative defect; or on other enumerated grounds.

The first of these limitations, reasonableness, is the requirement that the regulation the legislature is imposing be rationally related to the evil the regulation is aimed at suppressing. Second, the police power is also subject to the due process requirements found in all state constitutions and in the federal Constitution. Due process is first a requirement that appropriate procedures must be followed when the state moves to regulate something. Second, in more limited cases, if the regulation is severe enough and the regulation poorly constructed so that it tends to be arbitrary and yield widely disparate results, it might violate the substantive aspect of due process.

Third, restrictive government regulations may constitute a "taking." A "taking" exists when the government takes private property for public use without just compensation. Depending on the circumstances, if government takes property from a private citizen through the operation of a regulation, the government may have to pay for it. Takings do not prohibit regulations but may make them so expensive that government policy-makers may think twice about imposing them.

Finally, most states have other constitutional restrictions that require legislation to be generally applicable to the public at large or to a well-defined segment. Regulations that are too specific and were clearly written to regulate just one person instead of a group of people tend to run into problems with state prohibitions against specific rather than general legislation. It is important to note that not all states have the same requirements about what makes a law valid, and there is a wide range among the states.

DELEGATION DOCTRINE

A state government may delegate its police powers to local government units within its borders. This grant of the police power, however, can be withdrawn at any time by the state. How this delegation works out in a particular state requires construing that state's constitutional law and any relevant statutes. Therefore, the precise scope of the delegation doctrine varies from state to state, though its basic principle does not change.

In the 1750s, English jurist Sir William Blackstone wrote about the police power in his *Commentaries,* calling it "the due regulation and domestic order of the Kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious, and inoffensive in their respective stations." In sum, if everyone in society is able to get along like a family, there is little need for regulation, but if friction arises, regulations are in place to smooth things out.

Kenneth Salzberg

See also: Due Process of Law; Takings Clause.

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Police, Restrictions on

The early American settlers did not employ an independent police force, because during colonial times, law enforcement was the individual duty of every citizen. Eventually, through growth and expansion, the colonists applied Adam Smith's principles of economic specialization from his 1776 *Wealth of Nations* and created a mandate for a dedicated occupational group to ensure public order. The development of police forces as an integral part of the American justice system traces its roots to English tradition, dating to the Norman conquest in 1066. Under that feudal land system, the king implemented a tax system and delegated control of law and order through local subdivisions that were administratively managed by dukes, barons, soldiers, shire reeves (sheriffs), and constables, who performed clerical court duties and were ultimately responsible for housing prisoners awaiting trial. In 1829, after a decade of experimentation and political debate, the first modern formal English "metropolitan" police force was created under the auspices of Sir Robert Peel, the British Home Secretary.

Soon thereafter in America, the Boston police force was created in 1838 with nine officers; New York City followed in 1844 with a police force of 800 officers. The evolution and growth of police organizations were a direct function of the interaction of local political influence, corruption, neighborhood enforcement styles, and varying tolerance levels for deviance among friends and acquaintances. Eventually, government officials realized that effective and efficient law enforcement required reform that included organized systems of managed departments with professional codes of conduct, specialized training, and personnel standards, guidelines, and restrictions.

Police functions include law enforcement, maintenance of order, and services, ranging from traffic accident investigation, transporting injured civilians to medical facilities, providing first aid to crime or accident victims, to finding missing persons. In maintaining order, police settle small disputes, disperse crowds, and move traffic, whereas law enforcement activities include detecting and apprehending criminal offenders, responding to alarms and citizen complaints of crime, investigating suspicious persons and circumstances, and arresting suspected offenders. The role of the police has evolved and expanded to include many public services that are not provided by other government agencies. Citizens' expectations regarding the expanded role of the police to provide a diversified range of services to the community has created the need to give these officers, employees, and agents broad discretion to perform these functions and duties. Constitutional protections, departmental policies and procedures, and new recruit training serve as boundaries on police behavior.

CONSTITUTIONAL REGULATION OF POLICE PRACTICES

In the law enforcement aspect of the police process, police are clothed with wide latitude, face a range of choices, and make sequential discretionary decisions in the process of crime detection, investigation, and arrest. To limit the potential for abuse in the criminal justice system while protecting the freedoms and rights enumerated in the U.S. Constitution, various restrictions are placed upon police officers to regulate the quantity and quality of discretionary behavior. In the detection and investigation stages, for example, police searches are restricted by the exclusionary rule, under which illegally or improperly obtained evidence cannot be used in a trial to persuade the jury as to guilt, even if the evidence is conclusive of guilt. Except for certain categories of events and circumstances, a warrant (a signed court order), granting permission to conduct a search generally in a private place, must be obtained before the search may be conducted and completed. Certain events obviate the need for a search warrant, such as a "hot pursuit," when police are trying to apprehend a fleeing suspect, as in *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294 (1967); and the "frisk," or a pat-down search as developed in *Terry v. Ohio,* 392 U.S. 1 (1968).

Other warrant exceptions exist for automobile and inventory searches, border searches with consent, searches incident to lawful arrest, and seizure of evidence in "plain view." The "good faith" exception allows police officers to avoid the warrant requirements and permit the inclusion of evidence at trial if the

officers' subjective belief that a search was valid (for example, a search based on a defectively prepared warrant) can be independently verified and substantiated. In *Mincey v. Arizona,* 437 U.S. 385 (1978), the Court expanded the exception to permit warrantless searches in emergency situations or in support of a person needing immediate aid and assistance.

Once a citizen is suspected of wrongdoing and is arrested for questioning, the police must adhere to various rules and regulations during the course of investigation. Just as the Fourth Amendment to the U.S. Constitution protects the homes, papers, and possessions of the citizenry from unreasonable search and seizures, the Fifth Amendment protects citizens from overzealous interrogation. *Miranda v. Arizona,* 384 U.S. 436 (1966), gave rise to the now-famous warnings that police must recite before questioning a suspect in custody. These *Miranda* warnings include the right to remain silent and the right to have legal counsel present, and if officers fail to give them, any evidence obtained during the course of that constitutionally defective interrogation must not be heard or seen by the trial jury.

Another investigatory practice subject to careful scrutiny is the police lineup. Eyewitness identification is one of the most critical tools police officials use as a basis for establishing probable cause. The lineup, however, must be free of suggestive techniques, such as photographs containing six females and one male, or six white males and one African American, or five men with a mustache and one cleanly shaven man. Thus, the Supreme Court held in *United States v. Wade,* 388 U.S. 218 (1967), that an attorney representing the defendant may be present during the lineup or witness identification, at the defendant's request.

In the area of criminalistics and forensic evidence, the police rely on a host of technological and scientific advances, such as human DNA, ballistics examinations of weapon discharges, clothing fibers analyses, hair and dental records and matches, footprints, fingerprints, semen, and blood analysis. The quality of the security protecting that evidence is subject to strict scrutiny. If the "chain of custody" is broken to the point that there is a reasonable possibility of outside intrusion, confiscation, or tampering with the evidence, then another version of the exclusionary rule is applied and the evidence is withheld from the jury.

Undercover investigations, "stings," "crackdowns," and decoys are other tools police use to obtain evidence and apprehend criminals. One of the most famous sting operations was the Federal Bureau of Investigation's ABSCAM operations during the 1980s in which FBI agents posed as wealthy foreign representatives to uncover bribery activity among members of Congress and other governmental officials. The use of this technique is limited by the defense of entrapment—that is, the alleged offender did not have the inclination to commit the crime and would not have committed it absent police enticement. These cases turn on cause and effect: Did the suspected offender intend to participate in illegal activities, which were effectively manipulated by the police, or did the police create the situation that the offender unwillingly and without original intent was lured or stumbled into because of the potential for a quick windfall that was too good to pass up?

One of the most confusing restrictions on police is the legal requirement of having "probable cause" to arrest. In *Beck v. Ohio,* 379 U.S. 89 (1964), the U.S. Supreme Court declared that probable cause exists when the police have facts and circumstances within their knowledge and of which they have reasonably trustworthy information sufficient to lead a "prudent person" to believe that an offense was, or was in the process of being, committed. Thus, the court applied an objective (not a subjective) test, limiting police discretion. Moreover, after arrest, the police must file specific charges (called booking or charging) so as not to hold citizens in custody for an unlimited time period. Under the Eighth Amendment to the Constitution, unnecessary confinement is prevented through the use of bail or pretrial release procedures. To further screen unreasonable police arrest tactics while protecting the fundamental principle that every person accused of a crime is innocent until proved guilty, a preliminary hearing is held to ascertain the propriety of the arrest and the sufficiency of the evidence leading to the arrest.

The tension between crime control and prohibitions on police procedures derives from the due process protections in the U.S. Constitution. When

evidence has been illegally seized or obtained and excluded from use at trial, due process serves to protect the guilty, because presumably the evidence would have led to a conviction. This hurdle can be overcome if there is other unrelated, untainted evidence available to present to the jury that will support a guilty verdict. In sum, the rights of the accused outweigh the rights of the people in obtaining a conviction for criminal conduct.

FIRST AMENDMENT RIGHTS AND GOVERNMENT IMMUNITY

Every police organization, urban or rural, large or small, village, town, city, state, or federal, possesses internal departmental regulations, codes of conduct, and manuals governing practices and procedures. For example, New York City police are governed by the NYPD Patrol Guide, a document that describes recommended police practice in dangerous situations. In a recent case, *Lubecki v. City of New York,* 758 N.Y.S.2d 610 (2003), sections 104-1 (use of deadly force) and 117-12 (procedures to be used when a hostage is taken or suspect is barricaded) of the guide were admitted into evidence against the City of New York in a tort action. The family of the decedent sued the transit police and the city for failure to follow the Patrol Guide during the pursuit of a bank robber, who had exchanged gunfire with the police.

During the chase, the robber grabbed the decedent in a choke-hold and used her as a shield. A standoff occurred, and the gunfire exchanged between the robber and police officers ultimately killed the hostage as well as the robber. A twenty-three-year police veteran testified that any officer who fired his weapon under circumstances that would endanger innocent life violated the protocols and procedures set forth in the NYPD Patrol Guide. The only issue was whether the $4 million judgment awarded to the family of the decedent could be apportioned between the defendant city and the police. Generally, municipalities are afforded immunity for employees' discretionary conduct, but the court held that such immunity did not extend to situations in which the employee, in this case, the police officer, violated acceptable police practice. Moreover, the court affirmed the use of the Patrol Guide as evidence when the issue is the standard of care to be employed by police officers using deadly force against others during which an innocent bystander is injured or killed. These departmental manuals were held not to impose a higher duty of care than that appropriate for common law negligence. Police procedures relating to hostage situations were not followed. A hostage negotiator was required to be called when a human shield is placed in a dangerous situation with a high risk of death by perpetrators of a crime in progress.

Many police departments possess manuals that provide guidelines to police officers in connection with media interviews and appearances. These guidelines often clash with other freedoms and liberties enjoyed by the average American citizen. In *Kessler v. City of Providence,* 167 F. Supp. 2d 482 (D.R.I. 2001), a female police officer challenged an internal written guideline that prohibited communication with the press. She had been quoted in the press about internal investigations of her performance in cases involving sexual misconduct. The officer was defending herself against comments made by parents of victims of the assault. She was suspended because she was not given prior permission to speak to the press. The trial court held that the challenged Rhode Island regulation impermissibly infringed on government employee speech. In *Gasparinetti v. Kerr,* 568 F.2d 311 (3d Cir. 1977), the court recognized a significant government interest in regulating some speech of police officers in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution.

Thus, regulations may be promulgated, but their restrictive effect must be limited to the extent necessary to accomplish a legitimate governmental interest. Anything beyond that requirement must be deemed facially overbroad and a violation of the First Amendment right of free speech.

The right to freedom of expression was further challenged in a case in which the Massachusetts state police academy refused to hire an applicant because he held ownership interests in two adult bookstores. In *O'Neill v. Foley,* 2002 U.S. Dist. Lexis 3650, the police officer was granted a preliminary injunction because the state failed to prove actual harm, not potential or conjectural harm, that would override the

individual's protected First Amendment right. In *Wagner v. City of Holyoke,* 100 F. Supp. 2d 78 (D. Mass. 2000), the police officer criticized certain supervisors and police practices in an interview with the press. He received a three-day suspension without pay for conduct unbecoming an officer. The officer challenged the police regulations as constitutionally vague because it provided no ascertainable standard of its reach. The court stated that he lacked standing to assert this claim, but he could challenge the language of the rule because he did not have sufficient warning that his conduct would violate the regulation. In contrast, a deputy sheriff was fired for making derogatory remarks about the appellant in *Barrett v. Thomas,* 649 F.2d 1193 (5th Cir. 1981). The Republican sheriff had demoted those employees who had supported the Democratic incumbent. After the appellant had been terminated for expressing his objections to the press, he filed a class action claiming abridgment of free speech. The Court held that the employees were not confidential policy-makers for whom political allegiance was essential to job performance. The County of Dallas was also joined and held liable, and the appellate court motion filed by the county to intervene in the action was denied because it was never entertained at the trial court level.

However, when police officers are the object of investigation, the disclosure of information about the officers by a New York City Civilian Complaint Review Board carries no qualified immunity. In *Pirozzi v. City of New York,* 950 F. Supp. 90 (S.D.N.Y. 1996), the plaintiff officers sought civil rights damages. The court held that the mere access by the prosecution to immunized statements by the plaintiff in the judicial records did not violate the Fifth Amendment right against self-incrimination.

If police officers plainly violate a citizen's constitutional rights, the legal precedent established in *Monell v. Department of Social Services,* 436 U.S. 658 (1978), applies to hold municipalities liable for police conduct exercised to carry out unconstitutional or illegal policies, customs, or practices. In addition, the governmental entity (municipality, county, village, township, and so on) may also be held liable for failing to properly supervise and train its employees.

J. David Golub

See also: Due Process of Law; Exclusionary Rule; Fifth Amendment and Self-Incrimination; Fourth Amendment; Immunity; *Miranda v. Arizona*; Search; Search Warrants; Seizure; Sixth Amendment.

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Political Parties

Political parties are organizations that seek to win political offices and to promote particular viewpoints on political issues. Parties consist of voters who identify with the goals of the group, elected officeholders, and party workers who keep the party operating during periods between elections. In the United States, two major parties, the Democratic and Republican, win most elections. Despite this two-party dominance, minor parties do play a role in American politics, as demonstrated by the activities of the Green Party at the end of the twentieth century and the Socialist Party and Progressive Party in the early twentieth century.

Political parties are subject to regulation by state governments. The First Amendment to the U.S. Constitution guarantees "freedom of association," but the states are authorized under the Constitution to establish procedures for elections. During the early years of U.S. history, states imposed property requirements for voting. Beginning in the late nineteenth century, states adopted the Australian, or secret, ballot. In the twentieth century, the conduct of primary elections came under the control of state law as well as federal standards. Today, state regulations determine the ways political parties gain access to the political process, how candidates are selected, and whether national party rules take precedence over state and local selection methods.

During the late nineteenth century and until the 1940s, the Democratic Party in the southern states operated in a manner designed to prevent political participation by African American citizens. Claiming

that the party was a private organization and could set its own membership standards, southern Democrats asserted that only whites could participate in the party's primary elections. Because the Republican Party lacked any significant support in the South, the only critical election was the Democratic Party's selection of its candidates in its primary. The Democratic nominee was guaranteed victory in the fall general election, as no credible Republican opposition could be mustered.

In 1944, the U.S. Supreme Court declared the white primary to be unconstitutional. In *Smith v. Allwright,* 321 U.S. 649 (1944), the Court ruled that the states were involved in the conduct of primary elections. Accordingly, the Democratic Party could not use race as a basis for excluding an entire group of individuals from participation in its primary. Although the Supreme Court ruled against the whites-only primary, several other court actions would be needed to compel some southern states to follow the ruling in *Smith v. Allwright.*

Maintained by federal and state laws, the two-party system of the United States discourages the formation of viable minor parties. The first-past-the-post (FPP) elections in the United States effectively guarantee that the Republican or Democratic candidate will win most elections. A minor party that secured as much as one-quarter of the vote would not win the election under the FPP system. In contrast, other nation-states use proportional representation (PR) systems that base party strength in the national assembly on the percentage of the vote cast for each party. Moreover, ballot regulations in some states make it more difficult for minor parties to get on the ballot.

The American states determine how political parties select their candidates for public office. The nineteenth-century model that gave party elites the authority for candidate selection persisted into the twentieth century, although the first substantial challenge of it came in the 1900s with the progressive reform movement. Progressive reformers called for opening the major parties' candidate selection process to the voters through primary elections. Although the progressive movement was an early twentieth-century phenomenon, it had substantial impact during the latter half of the century.

Leading the way with reforms in the early 1970s, the Democratic Party opened its presidential selection process to rank-and-file Democrats. In 1964, Mississippi Democrats sent to the Democratic National Convention an all-white delegation selected under procedures that prevented African American political participation. At the convention, the Mississippi Freedom Democratic Party challenged the credentials of this all-white delegation. Four years later, following the defeat of Democrat Hubert H. Humphrey by Republican Richard M. Nixon for the presidency, the Democratic Party established a commission to study party rules regarding candidate selection. A commission led by Sen. George McGovern (D-SD) and Don Fraser (D-MI) recommended that delegates to the national nominating convention be selected through primaries or other open procedures and that guidelines be established for increased representation of the young, minorities, and women. State legislatures followed the recommendations by enacting legislation to establish primary elections.

The two major parties receive public funding for their presidential campaigns every four years. The financial connection between the two parties and the federal government serves as a poignant reminder that political parties are quasi-public entities. Although the First Amendment guarantees Americans the right to associate with political parties other than the Democratic or Republican, the realities of American politics are that the two major parties are closely linked to the institutions and traditions of American government.

Michael E. Meagher

See also: Colorado Republican Federal Campaign Committee v. Federal Election Commission; First Amendment.

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Political Patronage

William Marcy, secretary of state under President Franklin Pierce (1852–1856), once stated, "To the victors go the spoils," and ever since U.S. politicians have given their supporters government jobs. Political patronage was an accepted method for politicians to build political support for their reelection. But this acceptance changed when the U.S. Supreme Court considered whether patronage appointments violated the First Amendment to the Constitution.

In *Elrod v. Burns,* 427 U.S. 347 (1976), the justices ruled that the dismissal of public employees based on their party identification violated their right to free association protected under the First Amendment. The *Elrod* decision was extended in 1980 by *Branti v. Finkel,* 445 U.S. 507 (1980). Aaron Finkel, a Republican lawyer working in the New York public defender's office, was released by the new Democratic public defender. Finkel sued, arguing that his dismissal based on his Republican Party identification violated his right to associate with any political party. The Court agreed.

In his opinion, Justice John Paul Stevens drew a line between what he termed nonpolitical government employees and political employees. Political employees who make policy decisions and have access to confidential information in the office can be removed for political reasons because their politics may prevent them from efficiently performing their job. But employees without access to such information, who simply complete tasks assigned to them, have a First Amendment right to belong to a political party and not be punished for belonging to that party.

The decisions in *Elrod* and *Branti* limited the ability of elected officials to replace government employees with their supporters. The power to hire and promote their supporters was limited in *Rutan v. Republican Party,* 497 U.S. 62 (1990). In response to the Court's rulings on political patronage, the Republican governor of Illinois initiated a hiring freeze, forbidding the hiring or promotion of state employees without the express agreement of the governor and an agency established to oversee state hiring. An employee claimed he was denied promotion because of his Democratic Party support and argued that the hiring freeze was really a political patronage scheme.

The Supreme Court agreed. In *Rutan,* Justice William J. Brennan Jr. extended the ban on patronage to include promotions based on party support. Brennan stated that promoting people purely because of their party identification violated their freedom of association.

During the 1990s, political patronage cases were affected by the move to privatize local government services. To reduce costs of services, many local governments signed contracts with private companies to perform services such as garbage pickup and vehicle towing. In 1996 the Court extended protection from patronage decisions to private business.

In *O'Hare Truck Services v. City of Northlake,* 518 U.S. 712 (1996), the Supreme Court extended its patronage rulings to include independent contractors. The city of Northlake, Illinois, had signed contracts with several private towing services to tow cars parked in certain no-parking zones. The owner of O'Hare Truck Services had supported a mayoral candidate who lost the election. The elected mayor immediately ended the company's contract to tow cars in Northlake, and the service sued, claiming it was being denied city work because of the owners' political views.

The Court agreed. In his opinion, Justice Anthony M. Kennedy wrote that the dispensing of public contracts could not be based on the willingness of private business to provide support or contributions to a politician. The O'Hare Trucking owners must be allowed to support whatever candidate they chose and be able to compete with other companies for city business. Terminating the contract violated the free association rights of the owners of the towing company.

The Court backed up this opinion in *Board of Commissioners v. Umbehr,* 518 U.S. 668 (1996), which involved a trash company that provided trash services to Wabaunsee County in Kansas. When the company owner criticized the board of commissioners and individual members, his contract was not renewed. The owner sued, arguing that the trash contract was not renewed simply because he criticized the government, an action that violated his speech rights under the First Amendment. Once again the Court agreed. Justice Sandra Day O'Connor, writing for the seven-justice majority, ruled that the government

could refuse to renew contracts based solely on economic factors including poor work done by the contractor or in a competitive bid in which a contractor was underbid by another contractor. Refusing to renew a contract based on the contractor's criticism of government punished him for his free speech and violated the First Amendment.

Douglas Clouatre

See also: First Amendment.

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Political-Question Doctrine

The political-question doctrine permits the U.S. Supreme Court to avoid deciding cases that involve political issues more appropriately resolved by the political branches of government. The doctrine originated with *Marbury v. Madison,* 5 U.S. 137 (1803), in which Chief Justice John Marshall suggested that delicate political matters ought to be considered nonjusticiable and the Court ought not to intervene in presidential decisions.

Luther v. Borden, 48 U.S.1 (1849), extended the doctrine to legislative decisions. *Luther* arose out of the Rhode Island government's arrest of the leaders of a rebellion of disenfranchised citizens who had formed a more democratic state government. The Court held that there were no judicial standards to decide which government was the lawful state government, and that Congress had been granted the power by the Guarantee Clause (Section 4) in Article IV of the Constitution to decide whether Rhode Island government, challenged by the rebels, was a republican form of government.

The Court reaffirmed the validity of the doctrine in *Coleman v. Miller,* 307 U.S. 433 (1939), when it refused to decide whether too much time had elapsed to permit further ratification of the proposed Child Labor Amendment, because the Constitution's Article 5 had granted Congress authority over the constitutional ratification process. The Court even extended the doctrine to legislative apportionment in *Colegrove v. Green,* 328 U.S. 549 (1946), which involved a challenge to malapportioned Illinois congressional districts. Justice Felix Frankfurter, writing for the Court, held that the judiciary was without power to reapportion congressional districts because the issue was "of a peculiarly political nature and . . . [c]ourts ought not to enter this political thicket."

When the Supreme Court revisited the issue in *Baker v. Carr,* 369 U.S. 186 (1962), it addressed a claim that the malapportioned Tennessee legislature violated the Fourteenth Amendment's Equal Protection Clause. In his opinion for the Court, Justice William J. Brennan Jr. repudiated *Colegrove* and then defined the political-question doctrine to permit the Court to avoid deciding cases lacking judicial standards and containing separation-of-powers issues but not those involving the judiciary's relationship with the states. Since state legislative apportionment involved neither the Guarantee Clause nor separation-of-powers issues, it did not satisfy the Court's political-question doctrine, because there were "judicially discoverable and manageable [equal protection] standards for resolving it."

Since *Baker,* the Supreme Court has refused to apply the political-question doctrine to state legislative redistricting. In *Davis v. Bandemer,* 478 U.S. 109 (1986), the Court held that a political gerrymander of state legislative districts by Indiana state legislators was subject to adjudication under applicable equal protection criteria. The Court has also ignored the political-question doctrine if there were no judicial standards to resolve a case or it involved the constitutional exercise of congressional and presidential power.

In *Powell v. McCormack,* 395 U.S. 486 (1969), the House of Representatives had refused to seat Adam Clayton Powell, an African American member reelected by his district, because of his political misbehavior and improper use of congressional funds. The Court held that the political-question doctrine did not bar its review of the House's exercise of its Article 1, Section 5 power to judge the qualifications of its members, because Representative Powell was excluded for reasons other than the Article 1, Section 2 requirements of age, citizenship, and residence.

In two subsequent congressional cases, however, the Court denied review for political-question reasons. In *Gilligan v. Morgan,* 413 U.S. 1 (1973), it refused to decide whether the training of the Ohio National Guard failed to comply with the Fourteenth Amendment's Due Process Clause, because Article 1, Section 8 of the Constitution had authorized Congress to evaluate military training. In *Nixon v. United States,* 506 U.S. 224 (1993), the Court held that the Senate's use of a select committee to hear testimony and gather evidence in the impeachment trial of a district court judge did not violate Article 6, Section 3, which provides that [t]he Senate shall have the sole power to try all impeachments" (clause 6). Unlike in *Powell,* the Senate had not transgressed any identifiable textual constitutional limit, because the word "try" in Article 6 did not preclude the Senate from delegating these tasks to a committee.

The Supreme Court turned to the exercise of executive power in *United States v. Nixon,* 418 U.S. 683 (1974), to consider President Richard Nixon's refusal to supply tape recordings requested by the special prosecutor investigating the Watergate scandal. (This incident was the bungled burglary of Democratic National Committee headquarters in the Watergate apartment complex by individuals associated with Nixon's reelection campaign and the subsequent attempted cover-up.) The Court held that Nixon's refusal did not raise a political question, because his action was based on a claim of executive privilege, which was traditionally justiciable. The Court was much more reluctant, however, to intervene in the president's conduct of foreign affairs. In *Goldwater v. Carter,* 444 U.S. 996 (1979), it refused to decide whether President Jimmy Carter could unilaterally terminate a treaty with Taiwan. Justice William H. Rehnquist's plurality opinion found that the president's action was a nonreviewable political question because it involved the president's authority to conduct foreign relations, and because the Constitution was silent about the Senate's role in treaty termination, it was a matter to be resolved by the executive and legislative branches.

The political-question doctrine is rooted in prudential concerns and separation-of-powers principles. As one of the Court's self-crafted restrictions on its jurisdiction, the doctrine permits the Supreme Court to avoid political controversies that lack manageable judicial standards and that the Constitution has clearly committed to Congress and the president.

William Crawford Green

See also: Baker v. Carr; United States Constitution.

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Polygamy

Polygamy is the popular term for plural marriage. Plural marriage is typically practiced as *polygyny,* a man marrying more than one woman, rather than *polyandry,* a woman marrying more than one man. In the United States, polygamy is historically identified with the Church of Jesus Christ of Latter-day Saints (LDS), sometimes called the Mormon Church. Polygamy was a part of the church's nineteenth-century beliefs and practices, and it engendered constitutional conflicts over freedom of religion and federal regulatory powers when its practice conflicted with federal laws.

According to the LDS understanding of the practice, church founder Joseph Smith was conducting a "retranslation" of the Bible in 1831 and inquired of God why Abraham, Jacob, and other biblical prophets were justified in having many more than one wife. Smith learned that a man may have more than one wife when the Lord commands it, as in the case of Abraham. He also learned that the church would be required to live the law of Abraham at a future time. Smith married his second wife, Fanny Algers, in the mid-1830s, probably in 1835. Plural marriage was introduced as a church doctrine privately to church leaders during the Nauvoo (Illinois) period beginning in 1841, though a few became aware of it at an earlier date.

The practice of polygamy was highly regulated in the church, but the private nature of its initial introduction led to some difficulties. For example, John C.

A group of polygamists in the Utah Penitentiary, 1885. *(Library of Congress)*

Bennett, mayor of Nauvoo, Illinois, and a close friend of Joseph Smith, capitalized on the rumors and limited information by persuading a number of women to have sexual relations with him, claiming that they had been married "spiritually." Bennett was excommunicated for his actions, and he became a bitter opponent of the church. A man could not volunteer to take multiple wives. Church leaders called men to take additional wives on the basis of their religious devotion and capability of supporting the family, much as they called men to serve missions to proclaim the gospel in distant locations. The wedding ceremony could be performed only by "sealers" who were authorized to perform plural marriages.

Polygamy also caused trouble in the form of religious persecution. The Latter-day Saints had been driven from New York, Ohio, and Missouri, and rumors of polygamy served to intensify persecution in Nauvoo, Illinois, as well. Bennett and a number of other dissenters toured Illinois speaking against the church and began publishing the Nauvoo *Expositor*, which ran an exposé on polygamy, setting in motion a series of events that resulted in Smith's death.

Polygamy was openly practiced once the Latter-day Saints left Nauvoo, but the doctrine was not publicly announced and explained until 1852, some time after the church had settled in the Salt Lake valley in Utah. Polygamy became an issue in Utah's effort to attain statehood. The territory made its second attempt at statehood in 1856, the same year the Republican Party in its platform described slavery and polygamy as the "twin relics of barbarism" and pledged to end both. The territory's third effort for statehood came in 1862 but was not seriously considered because Congress was in the process of passing the Morrill Act, which outlawed polygamy in the territories of the United States and disincorporated the church. Increasingly punitive antipolygamy laws followed, such as the Poland Act of 1874, the Edmunds Act of 1882, and the Edmunds-Tucker Act of 1887. Many church

leaders and others practicing polygamy went into hiding to avoid prosecution, and some moved to Canada and Mexico.

The church challenged the legislation in court on the basis of the clause in the First Amendment granting free exercise of religion. After the U.S. Supreme Court upheld the laws, most notably in *Reynolds v. United States,* 98 U.S. 145 (1879), the church announced in 1890 that it would no longer teach or perform plural marriages. Ambiguity over this manifesto persisted, and subsequently some plural marriages were performed in Mexico and Canada, and even a few in Salt Lake. In 1904 the church issued a second manifesto declaring that anyone who performed or entered into a plural marriage would be excommunicated and anyone who performed or entered into a plural marriage after 1890 would be barred from serving in church callings. That policy has remained in effect to the present day. Even in nations that accept polygamy, LDS church members are not permitted to enter into plural marriages.

Some Latter-day Saints rejected the church's new position and formed a number of small splinter groups composed mostly of excommunicated Mormons. These groups include the United Apostolic Brethren, the Fundamentalist Church of Jesus Christ of Latter-day Saints, the First Warders, the Kingstonites, and the True and Living Church. There are also other groups in the United States practicing polygamy that have no historical ties to the LDS church. Organizations such as Truth Bearer and Liberated Christians promote plural marriages based on biblical interpretations.

Owen Abbe

See also: Free Exercise Clause; Mormons.

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Pornography

The word "pornography" comes from the Greek words for "prostitute" (*porne*) and "to write" (*grapho*), and until the nineteenth century it referred to a description of prostitutes and prostitution as related to public hygiene. The word has a much broader meaning today, including any depiction or portrayal of sexually explicit conduct. Although pornography is a very elusive legal term and is inextricably related to the more familiar yet equally indistinct term "obscenity," its delineation elucidates the general parameters of the pornographic-obscenity syndrome.

Pornographic expression—like other forms of expression—is entitled to protection under the First Amendment to the U.S. Constitution. "Pornography" and "obscenity"—the latter term comes from the Latin *obscenus*, meaning abominable or ill-omened—are frequently used interchangeably, but the two terms cannot be considered coextensive. To be sure, the U.S. Supreme Court has determined that "obscenity" is not a protected genre under the First Amendment. Nonetheless, just as an expression can be pornographic but not obscene, it can as well be obscene and not pornographic. In fact, there are many literary examples that contain sexually explicit material—thus objectionable to many people—yet are generally considered entitled to First Amendment protection.

Notable and sometimes controversial authors of such works include Anthony Burgess (*A Clockwork Orange*), Geoffrey Chaucer (*The Canterbury Tales*), Theodore Dreiser (*Sister Carrie*), William Faulkner (*As I Lay Dying*), Nathaniel Hawthorne (*The Scarlet Letter*), and Ernest Hemingway (*The Sun Also Rises*). Two famous books that led to litigation are James Joyce's *Ulysses*, banned by the U.S. Customs Office and the ban lifted in *United States v. One Book Entitled "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), and *Fanny Hill*, a 1750 work, banned by the Massachusetts Attorney General and the ban lifted in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966). Although the Supreme Court's definition of obscenity includes elements of prurience and sexual conduct, there are in a nonlegal sense examples of

obscenity that are not pornographic—scenes of war or genocidal holocaust, for example.

Pornographic or sexually explicit material loses its First Amendment protection when it crosses a line separating ordinary pornography from the pornographically obscene, or what the courts at times, and often interchangeably, label "hard-core pornography." A precise definition of hard-core pornography is elusive at best. As one judge put it in *United States v. Porter*, 709 F. Supp. 770 (E.D. Mich. 1989), the effort to define the term involves "an area of law so murky and fraught with difficulty that scholars and courts have struggled for decades to distinguish between permissible pornography and unlawful obscenity." As Justice Potter Stewart stated in *Jacobellis v. Ohio,* 378 U.S. 184 (1964), it involves the "task of trying to define what may be indefinable." Perhaps, as suggested by Justice Stewart in *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726 (1978), the best definition of hard-core pornography is that it can be equated with obscenity, which the Supreme Court has struggled at length to define.

In *Miller v. California,* 413 U.S. 15 (1973), the Court defined obscenity as a work that an average person, applying contemporary community standards, would find, when taken as a whole, appeals to prurient interests, and depicts or describes, in a patently offensive way, sexual conduct that the law has defined, and when, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The Supreme Court has created other categories of pornography that, like hard-core pornography, are not protected by the First Amendment. In *Ginsberg v. New York,* 390 U.S. 629 (1968), the Court held that providing a more restricted First Amendment right for expression that would reach minor children was constitutionally permissible. Speaking for the Court in *Ginsberg*, Justice William J. Brennan Jr. stated that governments may adjust the definition of obscenity for minors to include otherwise permissible pornography, "for we have recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,' " quoting *Prince v. Massachusetts,* 321 U.S. 158 (1944). Another category of unprotected expression was created in *Rowan v. Post Office Department,* 397 U.S. 728 (1970), which upheld a statute that provided a procedure for postal patrons to insulate themselves from advertisements that offered for sale "matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative."

In 1982, the Supreme Court carved out another significant impermissible category of pornography: child pornography. Agreeing with the proposition that use of children as subjects of pornographic materials is very harmful to both the children and society, the Court in *New York v. Ferber,* 458 U.S. 747 (1982), approved laws proscribing the distribution of depictions and portrayal of sexual activity by juveniles. Child pornography can, of course, involve obscene depiction of children that would otherwise be unlawful under the definition of obscenity, but it also can include nonobscene sexual depictions of minors that would not. Thus, the *Ferber* Court modified the *Miller* standard to account for this possibility. The modified test does not consider whether a work, taken as a whole, appeals to the prurient interest of the average person, because it has no relationship to whether a child has been physically or psychologically harmed. The requirement that pornographic depictions or portrayals must be patently offensive was also discarded for the same reason. Finally, the modified standard in *Ferber* considers child pornography to be constitutionally impermissible although it may contain serious literary, artistic, political, or scientific value when taken as a whole. As Justice Byron R. White stated, "It is irrelevant to the child [whom they have abused] whether or not the material . . . has a literary, artistic, political or social value."

Clyde E. Willis

See also: Child Pornography; *Federal Communications Commission v. Pacifica Foundation;* First Amendment; *Lady Chatterley's Lover; Miller v. California; New York v. Ferber;* Obscenity.

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Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico (1986)

Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986), threw into doubt the continued utility and vitality of the test the U.S. Supreme Court had used since 1980 in its First Amendment cases involving commercial speech (advertising). In *Central Hudson Gas and Electric Company v. Public Service Commission of New York,* 447 U.S. 557 (1980), the Court established a four-part analysis to determine when commercial speech was protected by the First Amendment and when it could be regulated by the government. First, did the speech concern a lawful activity and was it not misleading? Second, was the asserted governmental interest in regulating this speech a substantial one? Third, did the regulation at issue directly advance this interest? Fourth, was the regulation no more extensive than necessary? In order for government to regulate commercial speech, the answer to the first question must be "no," or the answer to all four questions must be "yes."

Although Chief Justice William H. Rehnquist's majority opinion in *Posadas* used the *Central Hudson Gas* test, portions of that opinion appeared to weaken the test's commercial speech protections. In this case, Puerto Rico had enacted a ban on advertising of gambling casinos to Puerto Rico residents but allowed such advertisements directed at tourists. By a five–four majority, the Court upheld the ban, finding that the speech was about a legal activity and not misleading, that the government's interest in reducing gambling by its residents was substantial, and that the ban directly advanced that interest and was no more extensive than necessary.

Three portions of Chief Justice Rehnquist's opinion raised the concern of supporters of commercial speech protection. First, he wrote that the Court should defer to the legislature when it makes policy choices in matters such as the one presented in *Posadas.* Second, he observed that such deference was particularly warranted when, as in *Posadas*, commercial speech regarding a vice product was regulated. Third, he wrote that since Puerto Rico had the "greater power" to prohibit gambling entirely, it surely had the "lesser power" to prohibit its advertisement.

In a dissenting opinion joined by Justices Thurgood Marshall and Harry A. Blackmun, Justice William J. Brennan Jr. opined that when the government seeks to suppress truthful commercial speech about a legal product or service, the Court should use a more speech-protective test than *Central Hudson Gas.* He pressed instead for the use of the strict-scrutiny test used in noncommercial speech cases; that is, the government's interests must be compelling, and the means used to achieve these interests must be both necessary and narrowly tailored. Even using the less protective *Central Hudson Gas* test, however, these three justices thought the Puerto Rico law violated the First Amendment, as did Justice John Paul Stevens, who wrote a separate dissent.

Ten years later, in *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996), Justice Stevens would write a majority opinion unanimously striking down a ban on alcohol advertising and holding that the three controversial portions of Chief Justice Rehnquist's *Posadas* opinion were "no longer persuasive."

Michael W. Bowers

See also: Commercial Speech; First Amendment.

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Posse Comitatus

The first posse comitatus, a Latin phrase translated as "the power or force of the county," was formed during the reign of King Henry II of England. In 1181 he issued the Assize of Arms, orders creating a small group of armed soldiers intended both for domestic

peacekeeping and foreign wars. This group was named the Jurata ad Arma.

The use of military personnel in a posse comitatus was a staple of the American western frontier. Known simply as a "posse," soldiers were called upon to enforce civil law in expansive territories of sparse population. Similarly, during Reconstruction efforts to rebuild the South after the Civil War, Union soldiers often were used in a variety of peacekeeping missions, including guarding voting polls. Many in the South perceived this military presence as a coercive force that constituted a threat to the separation of military and civilian authority. The Posse Comitatus Act of 1878 was written two years after a contested presidential election decided by the House of Representatives. As a concession to southern representatives, the act banned the use of the army "as a posse comitatus or otherwise to execute the laws."

Today, the amended Posse Comitatus Act provides for many exceptions. People who favor exceptions cite challenges from foreign and domestic terrorism, change in the nature of war itself and its combatants, and the need for expensive technology and specialized training that states cannot afford. Opponents believe that exceptions threaten the military's war preparedness, grant the military undue influence in civilian matters, and challenge concepts of due process. They also cite conflicting differences in training: The military—more authoritarian, more oriented to deadly force, less constrained by the individual's rights—train for national security. The police—less rigid, taught to diffuse violence, oriented to civil rights, and local in scope—train for peacekeeping. Traditional military training is at dangerous cross-purposes with peacekeeping.

Written originally as a rider to an appropriations bill (20 Stat. 145, 152), the Posse Comitatus Act was expanded after World War II to cover the Air Force. In 1986 the Navy and Marines were also included. The National Guard, organized as a state militia, is not affected by the legislation except when federalized. The Coast Guard's traditional peacekeeping mission, under the authority of the Department of Transportation, also is not affected.

Exceptions to the act are permitted only when expressly authorized by the Constitution or by an act of Congress. Constitutional authorization for exceptions is seen as inherent in the executive powers of the president, his function as commander-in-chief of the military, and the presidential charge to take care that the laws be faithfully executed (Article II, secs. 2, 3). Congress has also authorized several exceptions. Military personnel have been used as strike replacements, on border patrol, in drug interdiction, for civil rights protection, in riot control, for protection of national parks, to execute health laws, and as support personnel at the Olympics.

There have been a number of privately financed paramilitary organizations in recent years that call themselves a "posse comitatus." Historically, only a legal authority can form a posse comitatus, and therefore these groups have no legal standing.

Kevin Collins

See also: Civilian Control of the Military; Police Power.

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Powell v. Alabama (1932)

In *Powell v. Alabama,* 287 U.S. 45 (1932), the U.S. Supreme Court issued the first of two rulings in the notorious case of the "Scottsboro boys," nine African American males arrested in Alabama for the rape of two white girls, which was alleged to have taken place on a train. In *Powell,* the Court strengthened the right to counsel under the Sixth Amendment to the Constitution by overturning an Alabama Supreme Court

decision affirming the conviction of seven of the eight defendants; in *Norris v. Alabama,* 294 U.S. 587 (1935), the Court further overturned the conviction of Clarence Norris, the ninth boy involved, on his showing that African Americans had been systematically excluded from both the grand jury that indicted him and the trial jury that found him guilty.

Although it was an important precedent, *Powell* was largely limited to the facts of the case. Ozzie Powell and eight other African American boys had been arrested, arraigned, and shortly thereafter tried for rape in an environment dominated by hostility and awash in racism. Eight had been convicted (the jury had been divided on the other). The boys not only were young and indigent but also were acknowledged to be ignorant and illiterate. They were out-of-state residents with no family or friends nearby, and the state sought and obtained sentences of death. At their trial the judge had vaguely appointed all members of the local bar to represent the defendants, but the most prominent individual, a Tennessee lawyer, who stepped forward to help on the day of the trial, acknowledged that he had not had time to do much work on the case.

In issuing the Supreme Court's seven–two ruling, Justice George Sutherland recognized that the English common law had not extended the right to counsel in capital cases, but he argued that American states had almost uniformly rejected this exclusion. Although the Court had ruled in *Hurtado v. California,* 110 U.S. 516 (1884), a case dismissing the need for grand jury indictments, that the Fourteenth Amendment had not applied all of the provisions of the Bill of Rights to the states, this decision had been modified by other cases establishing certain rights as so fundamental that they were implicit in the idea of due process of law guaranteed by the Fourteenth Amendment. Although the logic of Sutherland's argument arguably encompassed individuals in serious noncapital cases, he limited the application of this precedent to capital cases involving special circumstances like those in *Powell.* Even so, Justice Pierce Butler argued in dissent that the lower court had made adequate provision of counsel, and Justice James McReynolds concurred.

In *Gideon v. Wainwright,* 372 U.S. 335 (1963), the Supreme Court subsequently ruled that the Fourteenth Amendment encompassed the Sixth Amendment right to counsel by requiring court appointment of counsel for indigents in noncapital felony cases. It further extended this right to most misdemeanor cases in *Argersinger v. Hamlin,* 407 U.S. 25 (1972).

John R. Vile

See also: Argersinger v. Hamlin; Gideon v. Wainwright; Hurtado v. California; Right to Counsel.

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Prayer in Schools

School prayer is a complicated issue of religious liberty. The First Amendment to the Constitution of the United States protects religious liberty with two clauses, the Establishment Clause and the Free Exercise Clause. The Establishment Clause is designed to prevent the government from becoming too involved in religious matters; it constrains government power. The Free Exercise Clause, on the other hand, guarantees all people the right to exercise their religious beliefs within reason. Both of the religion clauses come into play when school prayer is at issue. Whether verbal prayer in public schools should be allowed and in what settings it may be permitted have been controversial political and social issues in the United States that have resulted in a great deal of litigation testing the limits of the religion clauses of the First Amendment.

Of the two clauses, the Establishment Clause has received far more attention in the school prayer cases decided by the U.S. Supreme Court. Because public school officials are government employees, their decisions about how to handle student- or teacher-led prayers are considered by the courts to be governmental decisions and thus are subject to constitutional restrictions. It is unconstitutional for teachers to coerce their students to join in a prayer. Doing so violates the right of students to exercise their religion

The controversial political and social issue of school prayer in the United States has produced a great deal of litigation that has tested the limits of the two religion clauses of the First Amendment. *(© Nancy Richmond/The Image Works)*

freely and would also amount to governmental endorsement or establishment of the religious beliefs professed in the prayer.

A decision by school officials in New York to encourage teachers to lead their students in a one-sentence prayer at the beginning of the school day was ruled unconstitutional in *Engel v. Vitale,* 370 U.S. 421 (1962). Had the students been forced to participate in the prayer, the case would have been much easier to decide, because such coercion would be unconstitutional. But because the New York students were allowed to opt out of the prayer with their parents' permission, the state argued that it was not forcing anyone to participate in the prayer and was thus not violating the Constitution. In its first major ruling on school prayer, the Supreme Court held in *Engel* that the Establishment Clause did not require plaintiffs to prove that they had been forced to participate in government-ordered prayers, but only that a government agent, in this case teachers and other school officials, had lent their support to particular religious beliefs. The Supreme Court was sensitive to the fact that students might face ridicule by peers for refusing to participate in the prayers, but such indirect coercion was not necessary to prove an Establishment Clause violation. After *Engel,* even voluntary prayers led by school officials were deemed unconstitutional.

The Supreme Court revisited this issue one year later in *Abington School District v. Schempp,* 374 U.S. 203 (1963). In this case, the plaintiffs challenged the reading of passages from religious texts and teacher-led prayer in Pennsylvania public schools. As in the *Engel* case, students were allowed to opt out of the exercises by sitting silently or leaving the room. Just as it had in *Engel,* the Supreme Court ruled in *Schempp* that proving a violation of the Establishment Clause did not require plaintiffs to show that they had been coerced. Instead, plaintiffs had to show that an

act by a government official had the primary purpose or effect of furthering or inhibiting religion. Because the prayers and religious readings were adopted, in the Court's view, to encourage religious beliefs among students, the Supreme Court ruled that the religious exercises were an unconstitutional establishment of religion.

Schempp was a harder case than *Engel* because students had more opportunities to remove themselves from the religious exercises. There was less coercive pressure from school officials on the students in Pennsylvania than there was in New York. Alabama adopted a less coercive measure. The state amended an earlier law providing for a minute of silence at the beginning of the school day by specifying that this time could be used for silent meditation or prayer. The Supreme Court again ruled that this law was an unconstitutional establishment of religion. The bill's primary sponsor had argued that the reason he supported the bill was to get prayer back into public schools, and Alabama had passed a series of laws with that apparent aim. Since the purpose and primary effect of the law were to promote particular religious beliefs, the Alabama law was ruled unconstitutional in *Wallace v. Jaffree,* 472 U.S. 38 (1985). As the degree of coercion in school prayer laws decreases, whether they are unconstitutional becomes a closer question.

Since *Wallace,* the Supreme Court has ruled that prayer is unconstitutional at school functions even outside of regular classroom instruction time. In *Lee v. Weisman,* 505 U.S. 577 (1992), the Court ruled that prayers at graduation exercises were unconstitutional. Eight years later, in *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), the Court held that student-led prayers at high school football games were also unconstitutional. To be sure, no one was forced to attend either the graduation exercises at issue in *Lee* or the football games in *Doe.* In addition, it would be difficult if not impossible to determine the cost to the state of the prayers independently from the cost of the event, information that could support a suit by taxpayers who objected to their tax dollars supporting religious activities. The Court ruled, however, that graduation and football games are parts of life in the United States that students are pressured by peers and others to attend. Forcing students with different religious beliefs to choose between surrendering these parts of their lives to avoid hearing the prayers or attending the events and hearing prayers they might find offensive was deemed to be unconstitutional.

The Supreme Court has ruled that forcing or encouraging students to participate in prayers while attending public schools violates the Constitution. The Free Exercise Clause guarantees all students the right to act on their own beliefs free of outside coercion. The Establishment Clause prohibits the government from endorsing or discouraging any religious beliefs. Together, the two clauses work to preserve the religious liberty of students in U.S. public schools.

Matthew D. Cannon

See also: Engel v. Vitale; Establishment Clause; First Amendment; Free Exercise Clause; *Lee v. Weisman; West Virginia Board of Education v. Barnette.*

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Precedent

Precedents consist of the decisions of previous cases that judges use to help guide them as to how to rule in new cases. Prior cases that are quite close in facts or legal principles to the case before a court are called precedents. Through the process of analogy, or comparison, judges review the principles and fact situations in earlier cases and compare them with the principles at issue and the fact situations in the new case they must decide. Following precedent helps ensure that case law is consistent and fair as well as efficient. The principle of following precedent is also known as *stare decisis* (pronounced *STAR-ry de-SI-sis,* meaning to stand by decided cases).

WHEN PRECEDENTS ARE FOLLOWED

The principle of following precedent, long upheld in Anglo-American courtrooms, ensures that rulings are consistent and predictable, so that citizens and institutions know how a law is likely to be interpreted in the future and can make decisions based on such expectations. For example, after the Supreme Court ruled in *Roe v. Wade,* 410 U.S. 113 (1973), that women had the right to abortion choice in the first six months of pregnancy, women could expect that future case decisions in this area would follow this precedent. Therefore, they could make choices with the expectation that legal abortion would be available to them. In fact, it was partially this expectation that caused the Court to use *stare decisis* to uphold *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992). In *Casey,* the majority opinion emphasized that in order for the Court to overrule precedent, it should have a special justification over and above a belief that the precedent was incorrectly decided in terms of its policy outcomes. Following precedent adds to the stability of law and legitimacy for the Supreme Court as an institution, because it limits the Court from changing its decisions in an arbitrary manner.

By following the same principles in precedents for different individuals in similar situations, the Court helps to ensure a fair ruling. If the Court did not have to follow precedent, its decisions would not be based on any past principles; *stare decisis* therefore encourages judicial restraint, so that justices do not decide cases based solely on their personal opinions or prejudices.

Last, the use of precedent is efficient. Judges do not have to start with a blank slate when they begin hearing a case. Instead, they have a basis from which to rule, making sure that they do not waste time on a decision that has already been made. Lower courts are able to coordinate and make uniform decisions efficiently by referring to the precedent of higher courts.

The rule of precedent helps to ensure that lower courts are consistent with higher courts. Because all courts must follow the precedent set by courts above them, when the U.S. Supreme Court makes a decision, whether it be of a part of the Constitution, an interpretation of what a law means, or a decision limiting government from acting in a certain way, this ruling applies to all courts in the United States, not just those persons who are parties in a particular case. This guarantees that there is national uniformity of important case law. Citizens of one state will not be judged differently, because all lower courts must follow the precedents of the Supreme Court.

WHEN PRECEDENTS ARE NOT FOLLOWED

Stare decisis, however, is not followed all the time. At times courts choose not to follow precedent when the social, economic, and political conditions have changed greatly or when different principles have been established in subsequent cases. If the situation has fundamentally changed, the Court may decide that case law should evolve along with it. This helps to ensure that the Court's decisions can grow with a constantly changing nation.

Justices also have some leeway with regard to following precedent because they can view a new case in different ways, as to what principles and precedents are at issue in it. Also, they can argue that the fact situation in a case is so different from that in a prior decision that the earlier decision is not precedent. For example, when the Supreme Court had to decide whether the government could regulate offensive but not obscene speech on the Internet in *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997), the justices rejected *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726 (1978), as precedent. In *Pacifica,* the Supreme Court said that government could require offensive speech on radio to be moved to late at night to protect against children hearing such speech. In *Reno,* the Supreme Court said that the Internet was so different from radio, with regard to the ability of parents to limit child access, that the precedent in *Pacifica* allowing such government regulation of offensive speech would not be permitted with regard to the Internet.

Judges, particularly in higher courts such as the Supreme Court, do not automatically follow precedent in every case. By the time cases reach the Supreme Court, there are often conflicting precedents, so simply following a previous decision is not enough. Be-

cause a case has gone through lower federal courts first in order to reach the Supreme Court, it usually must address legitimate conflicts in interpretation in the lower courts—otherwise, it would have been settled before it reached that point. Furthermore, the Court elects to hear only certain cases, so those selected are likely to be ones that address difficult issues that cannot be easily solved by simply following previous cases.

Some scholars have noted that particularly in cases of constitutional interpretation, the Court is often willing to reexamine and sometimes reverse precedent. In fact, the three most recent Courts (under Chief Justices Earl Warren, Warren E. Burger, and William H. Rehnquist) have overturned constitutional precedents twice as often as nonconstitutional precedents. Justices may consider constitutional precedent to be less subject to *stare decisis* because the Constitution is rarely amended and yet decisions must still remain relevant to the modern world. There is no way for a legislature to correct mistakes or problems in the Constitution by simply voting for a new law; the amending process is lengthy and difficult, and it would therefore be difficult to correct a problem in interpretation through this process. Therefore, the Court is the proper institution to make changes if they are to be made.

Brown v. Board of Education, 347 U.S. 483 (1954), is one of the most famous instances when the Court ruled to overturn precedent in order to protect civil rights and liberties. This case struck down the 1896 ruling in *Plessy v. Ferguson,* 163 U.S. 537, that permitted racial segregation on the grounds that "separate but equal" facilities were permissible. In *Brown,* the Court acknowledged that changing times meant that segregation was no longer constitutional under the Equal Protection Clause of the Fourteenth Amendment.

The use of precedent does not mean resorting to a mechanical formula. No two cases are precisely alike, and precedent may often conflict when it comes to a particular issue. Therefore, justices use the process of analogy to apply past precedent to modern situations. They compare principles from precedent to the facts in the case and examine the differences and similarities in the situations to determine how much control the precedent should have over the new ruling.

Ronald Kahn

See also: Constitutional Amending Process; United States Constitution.

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Preemption

The doctrine of preemption provides that federal law supersedes state law. This doctrine flows from the Supremacy Clause found in Article VI, clause 2 of the U.S. Constitution: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land."

The preemption doctrine dates back to 1824 and the landmark case of *Gibbons v. Ogden,* 22 U.S. 1 (1824). In *Gibbons,* the plaintiff, Ogden, had received from the state of New York an exclusive license to operate steamboats on state waterways. Ogden sued Gibbons, claiming that Gibbons violated Ogden's exclusive license by running a steamboat service between New Jersey and New York City. Gibbons, however, had a federal license to operate on the state waterway. The U.S. Supreme Court held that the Supremacy Clause meant that Gibbons's federal right trumped

Ogden's state license and accordingly ruled in favor of Gibbons.

Since *Gibbons,* the Supreme Court has expanded the preemption doctrine. Currently, a federal law preempts state law in one of three ways, through (1) express preemption, (2) conflict preemption, or (3) complete preemption.

Express preemption exists when Congress specifically states that federal law overrides state law. For example, in passing the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act, Congress expressly provided that "No state or political subdivision of a state may establish or continue in effect with respect to a device intended for human use any requirement—(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter." This statute (*U.S. Code,* Vol. 21, sec. 360k(a)) thus expressly trumps state laws regulating medical devices. In other words, states may not compete with the federal government in the regulation of medical devices.

Even if Congress does not expressly state that it is trumping state law, state law is nonetheless preempted under the doctrine of conflict preemption when state law conflicts with federal law. In that case, federal law prevails. A conflict may exist because it is physically impossible to comply with both federal and state law, or because the state law conflicts with a federal goal. For example, if a federal law requires cars to have bumpers of one size, it would be impossible to comply if states also had different size requirements for the auto part.

Finally, complete preemption, also called field preemption, exists when Congress has occupied an entire area of the law. Under complete preemption, any state law in that field or area is trumped, regardless of whether the state law conflicts with the federal law. For instance, in passing the Employment Retirement Insurance Security Act, or ERISA, which regulates employee benefit plans, such as health insurance plans, Congress completely preempted the field. Thus, a state cannot in any way regulate employee benefit plans, and any lawsuits brought relating to such plans are considered federal claims under ERISA.

The idea that federal law trumps state law based on the Supremacy Clause is fairly straightforward. However, in practice, it is very difficult to determine when federal law preempts state law, and rulings in this area often appear inconsistent. For instance, one year the Supreme Court held that federal law regulating automobile safety standards preempted state tort lawsuits regarding airbags. But two years later, the Court concluded that federal regulations concerning motorboats did not preempt state tort lawsuits involving boat propeller guards. The Court reached these apparently conflicting outcomes based on the specific language of the federal laws at issue and its interpretation of the federal government's intent in passing those laws. These are complex issues, and the cases demonstrate the uncertainty in this area of law.

Margot O'Brien

See also: United States Constitution.

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Preferred-Freedoms Doctrine

The preferred-freedoms doctrine holds that some constitutionally protected freedoms, particularly those contained in the First Amendment, are so fundamental in a free society that they require greater judicial protection than other constitutional provisions. Supreme Court Justice Harlan Fiske Stone is credited with articulating the preferred-freedoms concept in a footnote (footnote four) in the otherwise obscure case of *United States v. Carolene Products Co.,* 304 U.S. 144 (1938). Henry Abraham and Barbara Perry suggested that the doctrine embraces a judicial "double

standard" in applying a higher level of scrutiny to cases in the "cultural/noneconomic/civil rights/civil libertarian category than in the economic proprietarian one." This double standard is a "carefully drawn" distinction developed following World War I and is still applied today.

Justice Stone discounted his own role and suggested that others laid the foundation for the preferred-freedoms doctrine. More than three decades before the *Carolene Products* decision, for example, Justice Oliver Wendell Holmes Jr. had noted that judges should defer to legislative judgments except in cases involving civil liberties. Justice Stone also drew from the reasoning in *Palko v. Connecticut,* 302 U.S. 319 (1937), in which Justice Benjamin Cardozo distinguished constitutional rights that were "implicit in the concept of ordered liberty" from others. Justice Cardozo focused on the First Amendment because the freedom of speech was the "matrix, the indispensable condition, of nearly every other freedom," and he contended that First Amendment rights were on a "different plane of social and moral values" than other liberties guaranteed by the Bill of Rights (the first ten amendments to the Constitution).

Stone's *Carolene Products* footnote was prompted not only by his commitment to protect civil liberties but also by his grave concern about spiraling racial and religious intolerance in the 1930s. According to Peter Irons, footnote four "soon became the deadliest weapon in the judicial war against those who deny minorities their rights." Ironically, this powerful weapon emerged from a case that had nothing to do with fundamental freedoms. Rather, *Carolene Products* dealt with a federal ban on the shipment of "adulterated" milk, skimmed milk compounded with any fat or oil other than milk fat.

The famous footnote four consisted of three paragraphs. The first addressed legislative deference. Justice Stone strongly believed that judges should generally presume that legislative enactments are constitutional, but he said in the footnote that there may be a "narrower scope for the operation of the presumption of constitutionality when legislation appears . . . to be within a specific prohibition of the Constitution, such as those of the first ten amendments." In other words, whenever a government regulation appears to be in conflict with a Bill of Rights provision, the usual presumption that laws are constitutional should be relaxed or waived altogether.

In the second paragraph of the footnote, Justice Stone noted that the judiciary had a special responsibility to protect the effective functioning of the political process. Although this certainly included expressive rights, he extended heightened judicial vigilance to laws that impaired the capacity of the political process to protect civil liberties. Such undesirable laws must also be "subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment." Reference to the Fourteenth Amendment means that the footnote included considerations of due process and that at least some provisions of the Bill of Rights applied to the states as well as to the federal government. Finally, Justice Stone called for the courts aggressively to protect the rights of minorities and unpopular groups. He warned that laws directed at particular racial, national, or religious minorities should also lose any presumption of constitutionality and should prompt searching inquiry into the reasons they were passed. In his view, such review was needed because laws containing "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."

The stringent judicial review required under footnote four of *Carolene Products* came to be known as the "preferred position" doctrine. That phrase was first used by Justice Stone four years later in his dissent in *Jones v. Opelika,* 316 U.S. 584 (1942), a case that upheld a tax on door-to-door salespeople. Jehovah's Witnesses challenged the tax, claiming it burdened the sale of their religious literature. The doctrine was first used as the basis for a majority opinion the following year in *Murdock v. Pennsylvania,* 319 U.S. 105 (1943), the decision that overturned *Jones.* Justice Wiley B. Rutledge stated for the Court in *Murdock* that "freedom of the press, freedom of speech, freedom of religion are in a preferred position."

The fullest elaboration of the preferred-freedoms doctrine came in *Thomas v. Collins,* 323 U.S. 516 (1945), which involved a state restriction on labor-organizing activities. Justice Rutledge wrote in *Thomas* that it was the Court's duty to "say where the individual's freedom ends and the State's power begins."

Such line-drawing, he conceded, was "always delicate," especially when the presumption of constitutionality must be "balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." Attempts to restrict those liberties "must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." Justice Rutledge concluded that only the "gravest abuses, endangering paramount interests, give occasion for permissible limitations."

The preferred-freedoms doctrine was not universally accepted. Among its chief critics was Justice Felix Frankfurter who, like Justice Stone, was a vigorous advocate of judicial restraint. In *Kovacs v. Cooper,* 336 U.S. 77 (1949), he characterized the doctrine as a "mischievous phrase, if it carries the thought . . . that any law touching communication is infected with presumptive invalidity." When balancing First Amendment rights, Frankfurter typically put great weight on legislative judgment. Two years later in *Dennis v. United States,* 341 U.S. 494 (1951), he wrote that free speech cases were "not an exception to the principle that we are not legislators, that direct policy making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment."

Currently, the phrase "preferred freedom" is infrequently used, but the underlying sentiment remains operative. Even the more conservative, post–Earl Warren Court has considered statutes that limit First Amendment rights as "highly suspect" and often has required a compelling justification to support them. If such scrutiny were not employed, the scope of constitutional rights would be subject to legislative definition, and the Bill of Rights would be ineffective in constraining legislative power. The importance of Justice's Stone footnote goes beyond its obvious declaration of a new standard for evaluating First Amendment claims. In *Carolene Products,* Justice Stone modified the fundamental role of the Court by assigning it special responsibility for protecting civil rights and civil liberties. His footnote called for the Court to modify its previous emphasis on settling private economic disputes and wrestling with questions of government power. From *Carolene Products* forward, the Court's civil liberties docket grew dramatically, and the Court rapidly began to evolve into an institution with a primary focus on constitutional rights.

Peter G. Renstrom

See also: Bill of Rights; *Carolene Products,* Footnote 4; First Amendment; Fundamental Rights; Strict Scrutiny.

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President and Civil Liberties

After the September 11, 2001, terrorist attacks on the World Trade Center in New York City and the Pentagon in Washington, D.C., and the unsuccessful attempt in Pennsylvania, the relationship between the nation's president and the people's civil liberties once again rose to the forefront of public discussion in American politics. On the one hand, President George W. Bush, primarily through his attorney general, John Ashcroft, took steps to ensure the security of the United States by providing the federal government with new powers to fight terrorism. On the other hand, critics complained that these new antiterrorist measures were unprecedented in scope and threatened to undermine America's historical commitment to defending individual liberty.

Indeed, although always present, in times of crises the relationship between the president and civil liberties rises in importance. And it is in these times that the power of the presidency has been most threatening to civil liberties in the United States. Justice Oliver Wendell Holmes Jr. highlighted this distinction in his famous free speech opinion in *Schenck v. United States,* 249 U.S. 47 (1919). In upholding Charles T.

Schenck's conviction for violating the Espionage Act of 1917, Justice Holmes emphasized that the temper of the times strengthened the government's ability to stifle Schenck's speech. In another time and place, the Court would likely have considered Schenck's actions in a different light, but to Holmes "the character of every act depends upon the circumstances in which it is done." Given America's involvement in World War I, Schenck's production and distribution of 15,000 antiwar leaflets had posed a "clear and present danger" to the government's ability to fight the war.

The Espionage Act of 1917 itself is a fine example of the somewhat paradoxical position times of crisis often present for a president. In an effort to make the world safer for democracy, President Woodrow Wilson had seemingly limited democratic deliberation within America's borders by pushing this legislation through Congress and adding his name to it to make it law. In response to critics of this and other wartime measures, Wilson and his congressional allies emphasized the need for national unity and patriotism rather than acceptance of a full discussion about America's participation in the war. Any other choice, they suggested, might endanger military victory. Although not an overt legislative effort to restrict civil liberty, implementation of the Espionage Act of 1917 clearly allowed the federal government to suppress civil liberties. For example, the legislation prohibited "false statements" that might interfere with the war effort. Passage of the Espionage Act also had a ripple effect in the states, encouraging state and local officials to follow suit. President Wilson and the Congress took another step in restricting liberty in 1918 by amending the Espionage Act with the Sedition Act, which virtually made it illegal to openly criticize the war effort. In *Debs v. United States,* 249 U.S. 211 (1919), the Court upheld the legislation.

Wilson, of course, was not the first president put in the predicament of seeking to preserve (and perhaps expand) democracy by restricting civil liberty in America. Most famously, President Abraham Lincoln undertook a variety of wartime measures in April 1861, including suspension of the writ of habeas corpus, while Congress was in recess. In Lincoln's view, the prerogative power of the presidency granted him such authority when it was necessary for the public good. As he told Congress, "These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity." In other words, with Congress out of session, Lincoln felt that he possessed the authority to act under the Constitution. The Supreme Court eventually rejected Lincoln's authorization of military trial of civilians in *Ex parte Milligan,* 71 U.S. 2 (1866), but it did so after the war was over and the president was dead.

Even before Lincoln's actions, President John Adams provoked significant alarm from civil libertarians with his support of the Alien and Sedition Acts of 1798. Enacted in response to concern about an imminent war with France and the loyalty of some foreigners living in the United States, the acts provoked a great debate about the definition of American freedom in the still-developing nation. The Sedition Act of 1798 in particular outraged Adams's partisan foes, Thomas Jefferson's Democratic-Republicans. Specifically, the Sedition Act authorized the prosecution of virtually anyone who wrote, published, or uttered statements critical of the government. The debate over the appropriateness of the Alien and Sedition Acts had a profound effect on American politics, helping to secure the White House for Thomas Jefferson in the 1800 election.

It would be a mistake, however, for episodes of repression solely to define the relationship between the president and civil liberties. For example, James Madison attempted to secure civil liberties during the War of 1812. In suspending the writ of habeas corpus, Lincoln sought to carry out more effectively a war effort against the Confederacy, an effort that would ultimately lead to freedom for America's slaves. In World War II, Franklin Roosevelt's issuance of an executive order enabling the U.S. military to intern Japanese Americans has also been viewed by history as a tragic episode for civil liberties in America. But Roosevelt's liberty-restricting actions do not tell the whole story of his wartime behavior. Just before America entered the war against Hitler's Germany, Mussolini's Italy, and Hirohito's Japan, President Roosevelt outlined his understanding of the principles of democracy—in essence, a creed for what America would soon be fighting for. To him, there were "four essential human freedoms" to be secured by all governments of the existing world order: "freedom of speech

and expression . . . freedom of every person to worship God in his own way . . . freedom from want . . . [and] freedom from fear."

Even during peacetime, international conflict has affected the relationship between the president and civil liberties. For example, just as a wave of anti-German hysteria and heightened patriotism had influenced President Wilson's actions, a new concern inspired more restrictions on civil liberties immediately after World War I. Significantly, 1919 was marked with numerous uprisings throughout the world as Communists seized power in Bavaria and Hungary; Leon Trotsky's Red Army went to war with Polish nationalist forces; and Great Britain's Labour Party proclaimed its program for a postwar socialist order. In the United States, a wave of labor unrest erupted in 1919 as more workers than ever before in the nation's history left their jobs to join a record number of strikes. Given this tension, the Wilson administration acted quickly following a spate of bombings by would-be revolutionaries within America's borders.

In a famous reaction, Attorney General A. Mitchell Palmer ushered in a new era of federal involvement with regard to civil liberties as the Justice Department led the effort to end the revolutionary bombings and labor troubles allegedly caused by alien extremists by rounding up large numbers of immigrants and deporting them. Fearing the effects of Russia's 1917 Bolshevik Revolution in the United States, the Justice Department, despite abandoning many of its prosecutions under the Espionage Act at war's end, pursued its campaign against the radical labor union International Workers of the World (IWW). As had occurred during wartime with regard to the general suppression of civil liberties, this repressive approach toward the union reverberated throughout the nation. For instance, after a gunfight erupted between some IWW members and American Legion members celebrating Armistice Day in Centralia, Washington, a mob dragged an arrested IWW leader from jail and castrated and lynched him.

Indeed, the "red scare" of 1919–1920 began what would be a long decade for labor, and it is perhaps the best example of how international conflict affects civil liberties in the United States during times of peace. In limiting the civil liberties of workers, the federal government not only put its force behind industrialists, but also sent the message that restrictions on civil liberties were at times acceptable. This spelled trouble for labor because the success of the struggling labor movement rested implicitly on workers' ability to secure their First Amendment freedoms. Specifically, so long as federal and state governments denied workers their rights of speech, press, and assembly, the right to organize a labor union would be constrained.

In the 1930s, however, as dictators replaced democracies throughout Europe, international politics had a positive effect on the state of civil liberty in America. During this decade, Congress enacted and President Franklin Roosevelt signed the National Labor Relations Act, which protected workers' First Amendment freedoms and empowered them with the right to bargain collectively. Also in this decade, the Supreme Court signaled in *United States v. Carolene Products Co.,* 304 U.S. 144 (1938), that it was significantly altering its attitude with regard to the level of constitutional protection it would grant to civil rights and liberties. President Roosevelt further secured this liberty-extending attitude with his appointment of nine justices to the Court between the years 1937–1943.

These examples display how presidents have shaped the state of civil liberties throughout U.S. history. They also show that the discussion between liberty and security is a continuing one for U.S. citizens—a discussion in which the president's voice carries significant weight, ready to employ the powers of the office either to extend or to restrict individual liberties throughout the nation.

Kevin J. McMahon

See also: Civil War and Civil Liberties; Espionage Act of 1917; *McCardle, Ex parte;* Patriot Act; World War I.

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Presidential Debates

In fashion and politics, image matters. Perhaps this is why two media scholars observed that "at no time in the nineteenth century did a presidential candidate debate his opponent." Campaigning was reserved for "surrogate debaters" and party machines. The notable debates in 1858 between Abraham Lincoln and Stephen A. Douglas, involving core issues of race and democracy, with Lincoln calling for an end to the expansion of slavery and Douglas arguing for popular sovereignty, took place during the Illinois Senate election campaign rather than the presidential campaign that followed two years later.

It was not until 1948, when Republicans Harold Stassen and Thomas Dewey debated on radio, that a national electorate heard presidential candidates debate face-to-face on a constitutional question: the Mundt-Nixon Subversive Activities Control bill—named after Representatives Karl Mundt (D-SD) and Richard Nixon (R-CA)—which required the registration of Communist organizations. After Dewey expressed his belief that the bill violated constitutional civil liberties, such issues and the image of American democracy remained prominent in presidential debates. These topics appeared again in 1960 when during the Kennedy-Nixon debates John F. Kennedy asked whether the world would "exist half slave and half free" and invoked the names of Abraham Lincoln and Soviet premier Nikita Khrushchev.

These contrasting images were revived in subsequent presidential debates. During the Reagan-Carter debates of 1976, Ronald Reagan criticized the traditional Democratic vision of Jimmy Carter. In 1988 the Bush-Dukakis debates centered around abortion and the death penalty, with Democratic nominee Michael Dukakis fielding George H. W. Bush's infamous question "Governor, if Kitty Dukakis were raped and murdered, would you favor an irrevocable death penalty for the killer?" Dukakis maintained his anti-death-penalty and prochoice positions, with Bush on opposite sides of both issues. In addressing judicial appointments, Bush stated he would appoint persons who would not "legislate from the bench." In the second 1992 debate among Arkansas Governor William Clinton, independent Ross Perot, and President Bush, the three disagreed on how to ensure freedoms under the Second Amendment. Bush opposed a "national registration of firearms"; Clinton supported the gun control measures in the Brady bill; Perot chastised ineffective policies.

During the first presidential debate of 1996, President Clinton and Robert Dole heartily disagreed on First Amendment freedoms. Whereas Clinton invoked the Religious Freedom Restoration Act and opposed constitutional amendments for voluntary school prayer and protecting the American flag, Dole viewed such amendments as important and alluded to disagreement with the ruling in *Texas v. Johnson,* 491 U.S. 397 (1989), in which the U.S. Supreme Court struck down as unconstitutional a law making it illegal to burn the U.S. flag. In the 2000 debate, Vice President Al Gore and Republican challenger George W. Bush differed on school vouchers, the abortion pill RU-486, and Internet filters to shield children from pornographic material. When asked about judicial appointments, Bush remarked, "I don't believe in liberal activist judges. I believe in strict constructionists." Taking these comments as a direct reference to *Roe v. Wade,* 410 U.S. 113 (1973), which granted women abortion rights, and to potential government intrusion into citizens' lives, Gore responded, "Those are code words, and nobody should mistake this."

Because debates affect how citizens interpret candidates' varying positions on civil liberties, rulings by the Commission on Presidential Debates (CPD), created in 1987, have been questioned. Using controversial criteria, it excluded all non-major-party candidates in 1988, 1996, 2000, and 2004, despite a Federal Election Commission (FEC) report concluding that the exclusion violated the law in 1996. Presidential candidates will continue to debate civil liberties; however, CPD decisions may limit the range of participants.

Tyson King-Meadows

See also: Buckley v. Valeo; First Amendment.

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Preventive Detention

Preventive detention refers to a confinement that aims not to punish but rather to protect the community from the detainee's likely harmful act. Although it is in tension with the guarantees of due process and presumption of innocence under the U.S. Constitution, the practice of preventive detention is well entrenched in three areas of U.S. law: criminal procedure, immigration, and executive war powers. With the onset of the "war on terror" after September 11, 2001, its use has grown dramatically—and often under a veil of secrecy.

PRETRIAL DETENTION

The U.S. Constitution, like the Magna Carta before it, severely curbs the ability of government to detain a person without trial, for it is through such extrajudicial detentions that the most severe abuses of rights have traditionally taken place. But the curb is not a ban: Courts are sensitive to the government's need to temper liberty in the name of security, and they have widened the scope of pretrial detention in recent years in response to fears of growing crime rates.

The Bail Reform Act of 1984 was the first federal law to allow pretrial detention aimed at protecting the community from a defendant's future crimes. Until then, defendants could be jailed only if they posed a flight risk, could not afford bail, or would likely obstruct justice. In *United States v. Salerno,* 481 U.S. 739 (1987), the Supreme Court upheld the Bail Reform Act in a five–four decision, saying that preventive detention was a regulatory measure and not a form of punishment under the Constitution. Justice Thurgood Marshall warned in his dissent that the ruling risked creating a system in which "a person innocent of any crime may be jailed indefinitely." The ruling led to an increase in the jail population, but Justice Marshall's dire prediction did not come true.

Laws at the state level also provide for pretrial detention for defendants who pose a flight risk, cannot afford bail, or would likely obstruct justice. The states vary on the use of pretrial detention to protect the community from future acts.

IMMIGRATION LAW

Until creation of the Department of Homeland Security after the September 11, 2001, terrorist attacks in New York City and Washington, D.C., the Immigration and Naturalization Service (INS) had the power to deport immigrants who did not have legal permission to stay in the United States. Pending deportation, the INS could detain immigrants who posed a flight risk or a danger to the community. The INS also detained some immigrants upon illegal entry pending a decision on their plea for political asylum, and it could detain immigrants charged with an aggravated felony. These powers led to lengthy, open-ended detentions, particularly in cases where the country to which an immigrant would be deported denied admission. In *Zadvydas v. Davis,* 533 U.S. 678 (2001), however, the Supreme Court restricted the INS's powers, ruling that it could not detain an immigrant beyond a six-month limit.

Only a few months after *Zadvydas,* the terrorist attacks dramatically altered the situation of immigrants and U.S. detainees, and INS responsibilities were placed under the new Department of Homeland Security. Hundreds of immigrants, mostly of Arab descent, were detained for alleged violations of immigration laws. Further, the U.S. attorney general issued a directive that the names of detainees not be released and that immigration judges neither deny nor

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confirm the existence of particular cases, so that only the government would know the names of and charges against the detainees. The Patriot Act, passed in October 2001, further affected the legal status of immigrants: It allows the attorney general to designate certain noncitizens as terrorist threats. In a provision that would seem to clash with at least the spirit of *Zadvydas,* these immigrants may be held for repeated six-month periods indefinitely without trial or deportation.

Critics argue that the war on terrorism has stretched immigration laws beyond their proper scope in order to bypass the constitutional guarantees granted to criminal defendants. The government counters that the detentions are both lawful and essential to ensure security from terrorism. What is clear is that immigrants have borne the brunt of the post–September 11, 2001, tip toward permitting detention to further security interests over individual liberty.

WAR POWERS

The terrorist attacks in 2001 were not the first time that a national crisis has led to greater use of preventive detention; indeed, it is an American tradition. The Enemy Alien Act of 1798 gave the president the power to detain foreign nationals of a country with which the United States was at war regardless of an individualized showing of disloyalty or criminal conduct. During the Civil War, President Abraham Lincoln greatly expanded the executive's war power by suspending the writ of habeas corpus, which allows judges to review whether a detention is unlawful. In World War II, the government interned 110,000 per-

sons of Japanese ancestry, roughly two-thirds of whom were U.S. citizens.

Perhaps the most dramatic expansion of preventive detention after September 11, 2001, was the detention of over 600 combatants taken during the 2001 war in Afghanistan. The U.S. government took these prisoners to a military base in Guantánamo Bay, Cuba, claiming that the laws of war did not apply and that U.S. courts had no jurisdiction. The prisoners were detained indefinitely on preventive grounds, deemed beyond the reach of legal justice.

Alexandra Huneeus

See also: Bail, Right to; Eighth Amendment; Fifth Amendment and Self-Incrimination; Fourth Amendment; Habeas Corpus; Immigration Law; *Rasul v. Bush.*

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Prison Litigation Reform Act

The Prison Litigation Reform Act (PLRA) was passed in 1996 in an effort to limit the number of "frivolous" lawsuits brought by prisoners against their keepers. Prisoner litigation at the federal level has always been complicated. Even as entire prison systems have been overhauled and reformed, the courts also have had to decide whether prisoners have constitutional rights to amenities such as radios, televisions, and weight benches. In order to limit the latter types of suits, Congress enacted the PLRA. Unable to undermine the underlying case law used by prisoners to bring lawsuits against their keepers, Congress instead attempted to curb inmate litigation through other means.

The first provision of the PLRA requires an inmate to exhaust all administrative remedies before filing in federal court. Previously, if administrative procedures were not completely exhausted, the proceedings were only stayed (halted temporarily), but now the case is dismissed outright. This part of the legislation was originally of little concern to those who deal with inmate lawsuits, but it has proved to be quite effective in stopping them. The district courts formerly could step in and hear a case if they found that administrative procedures were too long or cumbersome, but that is no longer true. Prison administrators have put in place quicker filing deadlines and extra levels of hearings in order to slow potential inmate litigation.

The legislation also requires indigent inmates to pay the $150 filing fee even if they are allowed to proceed *in forma pauperis* (literally, "in the manner of a pauper"; this status confers reduced fees and other assistance). Such inmates must use funds from their prison accounts to pay the fee or must pay it in installments. Inmates who have had three prior actions dismissed as frivolous or malicious may not proceed *in forma pauperis* unless they can prove they are in "imminent danger of serious physical injury."

The legislation also set out to streamline the process. The district court must review all inmate complaints either before docketing or as soon as possible thereafter and must dismiss a complaint that is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." Defendants are no longer required to respond to filings without having nonresponse held against them. Whereas inmates previously were transported to court, judges are now required to hold hearings through some form of telecommunications while the inmate remains in prison.

The litigation also limits damage awards and does not allow them for mental or emotional injury unless there is a prior showing of physical injury. It also requires that any damages awarded first be used to make any outstanding restitution payments, with the prisoner getting what is left over. It also limits attorney's fees, which now cannot exceed 150 percent of the total damage award and the hourly pay cannot exceed 150 percent of the rates authorized for appointed criminal counsel.

One of the most controversial parts of the legislation is that aimed at curbing federal judicial intervention in state prison systems. When a state requests an end to judicial monitoring, a stay of judicial orders is

automatically granted after thirty days, and the district court has ninety days to rule on the motion. If the court fails to act during that period, the motion is automatically granted and the supervision is lifted.

One study showed that inmate filings have decreased since the PLRA took effect. Thus, the legislation seems to have hit its mark, although a critic might wonder how many legitimate suits are being quashed in addition to the frivolous ones. The act also brings up separation-of-powers issues, since it seems as if the Congress is trying to act as judge from the legislature, but as of 2004 no part of the PLRA had been overturned in the Supreme Court. As such, the PLRA is another brick in the foundation of the ongoing hands-off approach to prisoners' rights litigation.

Eric Williams

See also: In Forma Pauperis Petition; Prisoners' Rights.

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Prisoners' Rights

Prisoners do not enjoy the extensive civil liberties that are afforded to individuals not incarcerated. In fact, prisoners' rights were not a particularly large concern to the federal courts throughout most of the nation's history, and the courts took a hands-off approach to prison litigation. This changed in 1964 when in *Cooper v. Pate,* 378 U.S. 546 (1964), the U.S. Supreme Court found that prisoners could sue their keepers for violations of their rights due to the conditions of their confinement. Starting with Arkansas in *Holt v. Sarver,* 309 F. Supp. 362 (ED Ark. 1970), entire state systems were found to be in violation of the Eighth Amendment and were put into federal conservatorship. By 1984, 24 percent of the nation's prisons were under some form of court order, including at least one institution in each of forty-three different states. District court judges have overhauled state prison labor practices, medical systems, mental health care systems, and prison facilities that were in a state of general disrepair. The Supreme Court, however, has drawn the line and allowed practices such as double bunking and "supermax" conditions (holding inmates an average twenty-two hours a day in their cells).

After some years of Court holdings granting prisoners greater rights, the Court in the mid-1980s swung back toward its previous hands-off doctrine. For example, in *Turner v. Safley,* 482 U.S. 78 (1987), the Court held that the needs of the prison administration superseded an individual prisoner's constitutional rights. Thus, any prison regulation reasonably related to a legitimate penological interest probably will be upheld. Another retrenchment was a decrease in issuance of writs of habeas corpus (petitions for release from unlawful confinement) by the Court after William H. Rehnquist became chief justice in 1986. In addition, Congress passed the Prison Litigation Reform Act in 1996.

Prisoner's rights do not begin and end with the Eighth Amendment. Prisoners retain some of their First Amendment rights, such as the right to send and receive mail as well as certain fundamental religious freedoms. Black Muslim inmates won suits against prison officials during the 1960s and 1970s for being

denied access to services granted to their Jewish and Christian counterparts. Many of the early victories were pared back after *Safley,* but the passage of the Religious Freedom Restoration Act in 1993 (later overturned) restored many rights, such as allowing orthodox Jews to grow full beards and eat kosher food.

The image of prisoners being dragged off to the hole for long periods of time may still appear in movies, but inmates now have some due process rights. Corrections officers must write up violation tickets for rule infractions, and prisoners are allowed to defend themselves against charges in administrative hearings.

Prisoners' Fourth Amendment rights are quite limited. All searches must be reasonable, but something as simple as an outside visitor is grounds for a strip search of an inmate. Courts have routinely found that a prisoner has no expectation of privacy in a cell; the cell is therefore open to reasonable searches at any time.

The status of prisoners' rights litigation seems to be swinging back toward the hands-off approach, but a few areas remain unresolved. With longer sentences comes a graying prison population, and treatment of geriatric inmates is becoming more of an issue. Also, the proliferation of private prisons has raised questions of whether the same rules apply as in publicly run institutions. Also yet to be resolved is the extent of rights to grant prisoners and detainees in the wake of recent terrorist activities, including the September 11, 2001, attacks in New York City and Washington, D.C. Even so, unless the Court's makeup changes significantly, prisoners probably can expect more of less in terms of civil liberties for the foreseeable future.

Eric Williams

See also: In Forma Pauperis Petition; Prison Litigation Reform Act.

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Probation

Probationary services are somewhat invisible in the U.S. criminal correctional system. Despite the collective size and importance of such services, polls consistently reveal that the public has limited factual knowledge about the probation process. Events stimulating interest in corrections more commonly regard prison costs and overcrowding, or take the form of periodic, sensational cases of prisoner activities while on furlough or parole (for example, Willie Horton in Massachusetts, who was paroled during then-Governor Michael Dukakis's tenure but who committed a heinous murder while on parole; the Horton case became a soft-on-crime albatross for Dukakis during his 1988 presidential campaign against George H. W. Bush). The goal here is to sketch some of the major attributes of probation and to highlight developments that have focused researchers' attention if not always that of the public.

In the United States, probation is a leading dispositional alternative to incarceration. Whereas parole is a decision by an agent (paroling authority) of the executive branch to conditionally release a prisoner who has served a substantial portion of a sentence behind bars, under court-ordered probation the convicted offender might not serve any time in prison provided the conditions of probation are not violated. Probation can provide an essential "last chance" in which offenders gain access to treatment and counseling without being dislodged from important com-

Arrest of probationer who violated terms of court-ordered probation in Travis County, Texas.
(© Bob Daemmrich/The Image Works)

munity and family networks. Aside from freedom as an obvious advantage to the offender, taxpayers benefit from lower correctional expenditures. For about the same annual cost of incarcerating one prisoner, nearly fourteen probationers can be supervised for a year.

Perhaps the most striking characteristic of probation is how, in terms of sheer volume, this sentencing option dominates the U.S. correctional landscape. It is true the United States has one of the highest rates of incarceration in the world, but it is also the case that most Americans sentenced to governmental supervision live in communities and not behind bars. In 1999, there were as many adults on probation (approximately 4 million) as there were in the entire correctional system—on probation or parole, in jail or prison—in 1989. Of every ten adults serving a criminal sentence in the United States, nearly six ostensibly were accountable to a probation officer, and just over one was to report to a parole officer; only three in ten were held in the actual, physical custody of a jailer or prison guard. Notably, these figures exclude juvenile courts and their substantial reliance on probationary sentences. This pattern of far more probationers than inmates contrasts sharply with configurations in some other countries (Japan, for example) where courts more frequently impose prison than probationary sentences.

Similar to developments in other types of correctional supervision and in part a response to burgeoning prison populations, the U.S. probation system experienced explosive growth during the 1980s as the number of probationers doubled from 1980 to 1987. Although the pace of expansion later slowed, well over a million more adult Americans were on probation in 2000 than in 1990, and by the late 1990s, probationers again were the fastest growing of the four major correctional populations.

Typically, probationers are those deemed to have committed nonviolent and less serious crimes, though considerable discretion exists in deciding who receives probation. Often, the presentence investigation report prepared by a probation officer carries the most influence in this sentencing calculus. As a member of the judiciary's supporting cast in local, state, and federal trial courts, the probation officer may go unnoticed by court observers. Nevertheless and despite what is technically only an advisory role played by the probation officer at this juncture, judges routinely accept the officer's recommendations in whole or with minor adjustments. The latitude afforded judges and the related importance of the presentence report vary considerably across jurisdictions. Judges in some states enjoy relatively broad sentencing discretion. Elsewhere, as in California, strict sentencing guidelines constrain judges and likely diminish the influence of probation officers' recommendations.

Offenders fortunate to avoid incarceration by receiving a probationary sentence will likely face a number of conditions to be in effect throughout the months or years of probation. In addition to maintaining periodic contact with a probation officer, probationers commonly must agree to restrict certain behaviors. Subsequent criminal activity, of course, violates the terms of probation and, if discovered, usually leads to revocation of the probationary status and incarceration of the offender for the remainder of the original sentence. Employment is typically required of adults, and judges commonly mandate participation in drug treatment and other rehabilitative programs. Courts regularly curb the freedom of association by forbidding many probationers to be in contact with known criminal influences, especially those implicated in the events leading to the probationer's original conviction, and some state laws suspend voting rights during the probationary period. Essentially all probationers are ordered to remain within a given jurisdiction, and many are restricted from frequenting trouble spots such as taverns. In some cities, program

conditions seem especially tailored, such as those barring convicted prostitutes from certain downtown street corners associated with the illegal sex trade. Because the alternative is incarceration, few offenders formally challenge the appropriateness of these conditions, at least during the initial stage of probation.

Compared with offenders in prison, the profile of probationers varies slightly on some measures and substantially on others. Though probationers are more likely to have committed a lesser offense, the Bureau of Justice Statistics reports slightly more than half have been convicted of a felony as opposed to a misdemeanor. Certain demographic groups such as whites constitute a larger proportion of the probation than the prison population, though gender provides one of the sharpest contrasts. Whereas women account for only about 6 percent of America's prison population, 22 percent of probationers are women.

Scholars debate the degree to which such differences are attributable to bias, but few refute two major challenges posed by the current probation population. First, because management has not grown to match the influx of probationers, effective supervision is often illusionary. Whereas the optimal target caseload traditionally is pegged at fewer than forty probationers per probation officer, the average officer has the unrealistic task of supervising 175 probationers, with many assigned to well over 200 cases. Increasingly, probationers abscond from supervision and become lost in a system ill designed to track them. Second, not only has the caseload increased, but the average probation case also has become more complicated, potentially more dangerous, and less manageable as the probation sentence increasingly is used as a tool to ameliorate problems associated with surging prison populations. One of the great ironies of the dominant crack-down-on-crime mentality is that the more people the justice system incarcerates, the more offenders are diverted from prisons to offset overcrowding pressures. Many of those flowing through the safety valves of probation and parole likely would not have been deemed appropriate for community supervision in decades past. Moreover, recent public demands to stiffen conditions through intensified or enhanced probation (for example, increased visits with a probation officer, drug testing) encounter considerable practical and political limitations. These programs not only cost more and add to the already burdensome caseload of probation officers, but the heightened scrutiny also can increase the likelihood of detecting infractions, leading to revocation of probation and more prison sentences. For now, the 800-pound gorilla seems destined to grow even as the system's capacity to control it shrinks.

Michael McCall

See also: Prisoners' Rights.

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Probationer Rights

Probation is a sentencing option under both state and federal law that allows a defendant convicted of a criminal offense to avoid incarceration. Probation allows the probationer to remain in the community but requires the probationer to comply with conditions set by the judge at the time of sentencing. Conditions of probation frequently require that the probationer pay restitution and fines, not commit other offenses, meet periodically with a probation officer, submit to substance-use testing, and maintain regular employment. Failure to comply with those conditions can lead to incarceration or to modification of the probation with the addition of more restrictive conditions. Most litigation over the rights of probationers falls into three categories: the probationer's Fourth Amendment and Fifth Amendment rights; the procedures required under the Due Process Clauses when probation is revoked or modified; and a more recent group of challenges focusing on the question of whether mandatory therapeutic interventions violate probationers' civil liberties.

Probationers sentenced under either federal or state law usually are required, as a condition of their probation, to consent to searches of themselves and their property based only on reasonable suspicion that the probationer has violated a condition of probation or committed a new offense. For an individual not a probationer, such a search would require a showing of probable cause. In *United States v. Knights,* 534 U.S. 112 (2001), the Court held that probationers who accepted probation with such a condition had a diminished expectation of privacy and could be subject to searches based only on reasonable suspicion.

Orders of probation require probationers to meet regularly with their probation officer and answer all questions fully and truthfully. This requirement has been challenged as a violation of the Fifth Amendment privilege against self-incrimination, which is applied to the states through the Due Process Clause of the Fourteenth Amendment. However, the U.S. Supreme Court held in *Minnesota v. Murphy,* 465 U.S. 420 (1984), that a probationer's fear that invoking the privilege would lead to a revocation of probation did not create an unconstitutionally coercive situation. If the officer asked questions that focused only on compliance with the conditions of probation and could not implicate the probationer in another crime, the probationer did not have a constitutional right to refuse to answer when the only potential penalty was probation revocation.

Clarence Norris, one of the nine young African Americans involved in the "Scottsboro boys" case, walks through the main cell gate at Kilby prison in Montgomery, Alabama, after receiving his parole, 1946. *(AP/Wide World Photos)*

A probationer's probation may only be modified or revoked after a judicial hearing. In *Black v. Romano,* 471 U.S. 606 (1985), the Court applied the Due Process Clauses of the Fifth and Fourteenth Amendments to require that the probationer be given written notice of the alleged violation leading to the prosecution's

request, be informed of the evidence supporting the request, have an opportunity to present evidence and respond in court, and have assistance of counsel. The standard of proof in probation revocation or modification hearings is lower than the standard for criminal trials. In revocation or modification hearings, the prosecution must prove the violation with merely a preponderance of the evidence; proof beyond a reasonable doubt is not required.

Innovative programs aimed at probationers diagnosed with substance abuse and mental illness have encouraged judges to impose additional conditions of probation directing a probationer to cooperate with substance abuse or mental health treatment. These mandatory therapeutic interventions have generated litigation by probationers alleging that participation in substance abuse treatment programs violated their First Amendment religious freedoms when the only available treatment programs involved acknowledgment of a higher spiritual authority. Probationers also have challenged, with mixed success, participation in treatment programs that required the probationers to state agreement with program goals. These challenges alleged that such program requirements constituted forced speech prohibited by the First Amendment to the U.S. Constitution.

Pinky S. Wassenberg

See also: Prisoners' Rights.

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Procedural Due Process

See Due Process of Law

Prohibition

See Volstead Act

Property Rights

James Madison argued that in addition to the people's right to protections for tangible objects, goods, and assets, individuals have a possessory property interest in their opinions, religious beliefs, safety, and liberty. Madison believed that private ownership was essential to the advancement of society, and freedom was superior to authority as the mechanism for serving the public interest. The blueprint for the U.S. Constitution was derived from the property protections embedded in the English Magna Carta, the teachings of philosopher John Locke, and the opinions of famous British jurist Lord Edward Coke, whose commentaries served as the foundation for the English common law system. Coke's ideology incorporated the notion of the supremacy of fundamental laws protecting individuals in the rights of life, liberty, and property, as long as those individuals had not violated the laws of the land.

The Bill of Rights (the first ten amendments to the Constitution), ratified in 1791, applied originally only to the federal government and not to the states. It contained the Fifth Amendment's Due Process Clause drafted by congressman James Madison, the leading proponent of the separation of powers, who advocated the rejection of absolute rule by majority. His articulated vision of the purpose of government as the institution charged with the responsibility of benefiting the people consisted of the enjoyment of life and liberty, with the right of acquiring and using property while pursuing and obtaining happiness and safety.

In *Campbell v. Morris,* 3 Harris and McHenry 288 (Md. 1797), a judge applied the Privileges and Im-

munities Clause in Article IV, Section 2 of the U.S. Constitution and held that a citizen's privileges and immunities included the right to acquire and hold real property in any of the states and to "secure and protect personal rights." In 1897, the U.S. Supreme Court in *Chicago, Burlington and Quincy Railroad Co. v. Chicago,* 166 U.S. 226, ruled that the Fourteenth Amendment's Due Process Clause incorporated the Fifth Amendment's Takings Clause, thus making it applicable to the states, the first such Bill of Rights guarantee to be so applied.

DUE PROCESS OF LAW AND DEPRIVATION OF PROPERTY

Under the Due Process Clause, no person may be disenfranchised or deprived of any property right except by due process of law or the judgment of his peers. "Due process" is a technical legal term of art, defined as the process and proceedings of the courts of justice, as distinguished from statutory law or an act of the legislature. Even otherwise unencumbered ownership of real property is limited by the superior ownership interest held by the government. The power of eminent domain, for example, gives the government the right to take privately owned land for public use, which is designated as a "taking," but the government must compensate the private party for the fair market value of the property because the Takings Clause of the Fifth Amendment states "nor shall private property be taken for public use, without just compensation."

U.S. SUPREME COURT ANALYSIS

Under the general rules applied in most jurisprudence involving "fundamental rights" (for example, freedom of speech and association) in the United States, the government has the burden of proving that a law limiting a protected liberty or property interest will either largely or substantially achieve its purpose. A law proscribing liberty should be neither overinclusive nor underinclusive in achieving its objective. Therefore, a land-use regulation subject to judicial scrutiny and review in a judicial forum will fail on constitutional grounds unless it substantially advances a legitimate state interest.

In *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), the Supreme Court invalidated a local government requirement that a construction permit would be issued only if the landowner granted a public easement, with the Court holding that the local planning authorities were not advancing a substantial and legitimate state interest. In 1992, the Supreme Court decided *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, which involved a South Carolina regulation that prevented new building on coastal beachfront land likely to erode within forty years. The developer of a section of property on the coast argued that the law was constitutionally equivalent to a "taking" of the property, entitling him to compensation for the lost development value of the land. Justice Antonin Scalia's opinion for the Court created a new category of takings cases labeled the "total taking," defined as the situation when a governmental regulation denies "all economically productive use" or, alternatively, leaves the land entirely valueless. In such cases, the regulations are deemed presumptive takings that require compensation. Moreover, the Court elevated vacant land to a superior position over all other forms of property, using the maxim of property appraisal and valuation known as "highest and best use."

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2000), at issue was whether a thirty-two-month moratorium on the development of land constituted a taking. Here the Court ruled no, arguing against a categorical rule that would have declared all delays in development to be a taking. Moreover, the court stated here that the *Lucas* rule would apply only if the value of property were diminished by 100 percent. Anything short of a complete loss of value of the property would not be deemed a categorical, or per se, taking.

Both special and temporal aspects of real property must be considered if the property interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely diminishes its value is not. Logically, an estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. Mere fluctuations in value during the process of governmental decision-making, absent extraordinary de-

lay, are incidents of ownership. They cannot be considered a "taking" in the constitutional sense.

"WISE USE" AND THE PROPERTY RIGHTS MOVEMENT

In *City of Monterey v. Del Monte Dunes,* 526 U.S. 687 (1999), the California city justified its actions of rejecting five applications by the developer of oceanfront property on the grounds that it was protecting various forms of wildlife, such as the blue butterfly. After each rejection, the city denied more use of the property. The U.S. Supreme Court upheld the $1.45 million in damages awarded to Del Monte but went further to rule that under the Seventh Amendment to the Constitution and federal statute (*U.S. Code,* Vol. 42, sec. 1983), the lower-court decision to try the case before a jury was proper. In a case involving an uncompensated taking by regulation, the Court refused to accept the city's argument that a formal condemnation proceeding must go before a judge only.

The creation of individual as distinguished from collective ownership rights is a necessary rather than a sufficient condition for the efficient use of resources. Legal protection of property rights creates incentives to exploit resources efficiently. In the absence of this protection, property users would have neither incentives nor expectations of protected rewards, nor would they invest the necessary labor, materials, and time to produce final products, even if consumers were to offer significant premiums over those costs. The proper incentives are created by parceling out mutually exclusive rights to the use of particular resources among members of society. If every piece of land is claimed by legitimate ownership title, and title holders have the power to exclude others from entry and use, then owners will have the necessary incentives to invest and improve the specific parcel of land in question. This principle applies not only to physical but also to intangible property rights, such as patents, copyrights, trademarks, trade secrets, and licenses.

J. David Golub

See also: Bill of Rights; Due Process of Law; Fifth Amendment and Self-Incrimination; Fourteenth Amendment; Takings Clause.

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Proportionality of Sentences

The principle of proportionality of sentences, also known as the doctrine of excessiveness, is rooted in the Eighth Amendment's ban on cruel and unusual punishments. Proportionality of sentences suggests that criminal penalties should not be excessively harsh or severe, and that the punishment should fit the crime. The principle has been applied to both capital sentencing and punishments involving prison terms.

The language of the Eighth Amendment to the U.S. Constitution can be traced to the English Bill of Rights (1689), which states that "excessive bail ought not be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." The prohibition on cruel and unusual punishments in the English Bill of Rights was meant to prevent the recurrence of the barbaric punishments that had been imposed under English criminal law prior to the seventeenth century, including face branding, nose splitting, crucifixion, public dissection, and burning at the stake.

Because the words of the Eighth Amendment are taken almost verbatim from the English Bill of Rights, the ban on cruel and unusual punishments is, at the very least, designed to prohibit the kind of barbaric and inhumane punishments that were imposed under English law. In addition, however, if the amendment's ban is read in conjunction with the prohibition on excessive fines and bails, the amendment seems to support the principle of proportionality in sentencing. Scholars have long debated whether the framers of the Constitution intended for the Eighth Amendment to require proportionality in punishment, but the U.S. Supreme Court and lower courts have recognized a limited proportionality principle in the application of the death penalty for certain crimes and in cases where prison terms appear to be excessive.

For nearly a century after the Eighth Amendment was passed, the proportionality requirement was found by many courts not to have any relation to the ban on cruel and unusual punishments. During this period, judges at all levels interpreted the clause only to prohibit certain forms of punishment. The Supreme Court first considered the issue of proportionality under the Eighth Amendment in *O'Neil v. Vermont,* 144 U.S. 323 (1892). John O'Neil was convicted on 307 separate counts for selling intoxicating liquor unlawfully. He was fined $20 for each count and had to pay court costs. If he failed to pay the fine, he was to be imprisoned for three days for each dollar owed—a total of 19,914 days, or more than fifty-four years. Although the majority decision rejected the proportionality argument, the case is known more for Justice Stephen J. Field's dissenting opinion, in which he argued that the Eighth Amendment's prohibition was directed against "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."

In *Weems v. United States,* 217 U.S. 349 (1910), the Supreme Court for the first time used the Eighth Amendment to invalidate a punishment. A federal disbursing officer was convicted under Philippine law of falsifying documents. He was sentenced to fifteen years at hard labor in chains, deprived of civil rights, fined 4,000 pesos, and subjected to police surveillance after the completion of his sentence. Finding the punishment unconstitutional, the Court argued that English common law history, as well as the intention of the framers, suggested that excessively severe punishments were restricted by the ban on cruel and unusual punishments.

In capital cases, the Supreme Court has held that a sentence of death is too severe for certain crimes. In *Coker v. Georgia,* 433 U.S. 584 (1977), and *Eberheart v. Georgia,* 433 U.S. 917 (1977), the Court ruled that death was an inherently disproportionate punishment for the rape of an adult woman and for kidnapping, respectively, unless the victim was killed. Also, in *Enmund v. Florida,* 458 U.S. 782 (1982), the Court rejected the death penalty for accomplice liability in felony-murder (a death that occurs during the commission of another felony) for someone who neither took a life, attempted to take a life, nor intended to take a life. In *Tison v. Arizona,* 481 U.S. 137 (1987), however, the Court permitted a sentence of death for someone who participated in felony murder and showed reckless indifference to human life.

In *Robinson v. California,* 370 U.S. 660 (1962), a ninety-day sentence for the status offense of drug addiction was ruled disproportionate because the Court found addiction was an illness, not a crime. In *Rummel v. Estelle,* 445 U.S. 263 (1980), a very divided Court held that the Eighth Amendment was not violated when a state imposed a mandatory life sentence for someone convicted of three nonviolent felonies. In *Solem v. Helm,* 463 U.S. 277 (1983), however, the Court backed away from the *Rummel* precedent. Jerry Helm had been convicted of six nonviolent felonies over a period of years when he was charged with another nonviolent offense—writing bad checks. He received a life sentence without the possibility of parole. Writing for the majority in *Solem,* Justice Lewis F. Powell Jr. stated that the "principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." He argued that proportionality analysis under the Eighth Amendment should be guided by objective criteria, including the gravity of the offense and the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for the same crime in other jurisdictions. Applying these criteria, the Court found that Helm's sentence was significantly disproportionate to the crime.

The Court under Chief Justice William H. Rehnquist severely weakened the proportionality principle in *Harmelin v. Michigan,* 501 U.S. 957 (1991), holding that a mandatory life term without the possibility of parole for possessing over 650 grams of cocaine did not constitute cruel and unusual punishment. Justice Antonin Scalia's opinion deferred to the authority of the states to set penalties for criminal violations. The proportionality principle was further limited in *Ewing v. California,* 538 U.S. 11 (2003), and *Lockyer v. Andrade,* 538 U.S. 63 (2003), in which the Court upheld California's "three strikes" law requiring a sentence of twenty-five years to life for a three-time repeat offender, even if the third conviction was only for petty theft.

The principle of proportionality in sentencing, though not explicit in the language of the Eighth

Amendment, has been recognized and applied by the Supreme Court in cases involving both capital punishment and mandatory prison terms. The scope of the principle, however, has divided the justices on the Court, and its recent decisions have given state governments broad authority in determining whether a punishment fits the crime.

John Fliter

See also: Capital Punishment; Cruel and Unusual Punishments; Effective Death Penalty Act of 1996; Eighth Amendment.

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Prosecutorial Misconduct

Prosecutorial misconduct is a constitutional violation that occurs when a breach of any of the constitutional provisions, statutes, procedural rules, or ethical rules governing criminal trials deprives a criminal defendant of due process or fundamental fairness, as protected by the Fifth and Fourteenth Amendments to the U.S. Constitution. The prohibition against prosecutorial misconduct, by distinguishing between proper and improper prosecutorial advocacy, ensures that criminal defendants will receive a fair trial. To establish a claim of prosecutorial misconduct, a defendant must show that misconduct occurred and resulted in prejudice to the defendant's case.

The prosecutor is often involved in every stage of a criminal case, from the initial investigation to the closing arguments at trial. At each stage, laws and ethical rules govern the prosecutor's actions. The violation of any of these may be characterized as misconduct. In *Berger v. United States,* 295 U.S. 78 (1935), the U.S. Supreme Court described the prosecutor as a "servant of the law," whose role is to pursue justice by convicting the guilty while protecting the innocent from wrongful conviction. In serving these dual goals, the prosecutor "may strike hard blows, [but] is not at liberty to strike foul ones," because it is as much the prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

During the investigation of a crime, the prosecutor may be called upon to decide whom to charge with an offense, what offense to charge, and when to file the charges. In deciding whom to charge and what offense to bring, prosecutors cannot act upon improper motives. For example, the decisions of whom to charge and what to charge cannot be based upon bias or prejudice regarding the defendant's race, religion, gender, or political beliefs. Nor can these decisions be based upon the prosecutor's desire to penalize a defendant for exercising constitutional rights or asserting constitutional privileges. In deciding when to file criminal charges, prosecutors cannot seek to delay a suspect's trial in order to gain tactical advantage. For example, a prosecutor cannot intentionally delay a prosecution until evidence is lost or destroyed or until witnesses become unavailable for trial.

After criminal charges are filed, the prosecutor plays a central role in preparing the case for trial. The trial is designed to be an adversarial process in which the defendant has a fair opportunity to challenge the prosecutor's case. To ensure that the trial is truly adversarial, the prosecutor is required to make the evidence available to the defendant before the trial begins in a process known as "discovery," which is governed by the jurisdiction's rules of criminal procedure. During discovery, the prosecutor must provide the defendant with any evidence that may have a bearing on the defendant's guilt, the defendant's sentence, and the credibility of witnesses. The prosecutor has an affirmative duty to disclose evidence favorable to the defendant.

When the trial begins, the prosecutor largely controls the evidence that is presented to the jury because the prosecutor has the burden of proving the defendant's guilt beyond a reasonable doubt. In pursuing a conviction, the prosecutor cannot use fabricated evidence, present perjured testimony, or advise witnesses to be evasive in answering questions. Similarly, when

questioning witnesses, the prosecutor cannot misstate facts, allude to facts that have not been introduced in evidence, or argue with witnesses.

At the conclusion of the trial, the attorneys make closing arguments summarizing the testimony and evidence for the jury. In arguing in favor of the defendant's guilt, the prosecutor must be dignified and temperate. The prosecutor's conclusion must be based upon reasonable inferences from the evidence introduced at trial. The prosecutor cannot make insinuations unsupported by the evidence, nor can the prosecutor make misleading assertions. And, most important, the prosecutor cannot inflame the passions of the jury, demonize the defendant, or suggest any improper reason for conviction.

Prosecutorial misconduct may occur at any stage of a criminal case and may arise from any action of the prosecutor. As Peter Henning observed, an allegation of prosecutorial misconduct "does not describe any particular type of act or category of violation" and may be attached to any prosecutorial action "because the admonition to ensure 'justice' shadows every endeavor of the prosecutor." The prosecutor must be fair and impartial in initiating a prosecution. The prosecutor must ensure adversarial testing of the case by disclosing the evidence to the defendant. The prosecutor must pursue convictions based upon reliable evidence and dignified arguments. Judicial remedies for misconduct may consist of (1) taking action to remedy the prejudice that resulted from the misconduct, such as suppressing evidence; (2) granting a new trial; or (3), in extreme circumstances, dismissing the charges.

Mark A. Fulks

See also: Brady Rule; Due Process of Law; Racial Profiling.

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Public-Danger Exception

The "public-danger exception" applies in the context of law enforcement officers questioning suspects before reading them their so-called *Miranda* rights; the exception permits pre–*Miranda* warning questioning on matters concerning imminent danger to the public. Any statements and physical evidence obtained as a result of such questioning are legally admissible in ensuing prosecution if the danger to public safety warrants making the exception.

Under the Fifth Amendment to the U.S. Constitution, "no person shall . . . be compelled in any criminal case to be a witness against himself." This provision relates closely to the adversarial nature of the U.S. justice system, in that the accused is presumed innocent and the state has the burden of proving guilt. In short, an accused person is constitutionally protected against aiding the state in making its case. In 1966, the U.S. Supreme Court handed down its five–four decision in *Miranda v. Arizona,* 384 U.S. 436, which sought to protect suspects in custody by requiring officers to provide a set of prescribed warnings before they interrogate suspects about alleged crimes. *Miranda* warnings are generally these: "You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to the presence of an attorney. If you cannot afford an attorney, one will be appointed for you prior to questioning."

These warnings are well known and are universally used by the law enforcement community. The Court saw these warnings as a necessary prophylactic measure to ensure that police did not brush aside the Fifth Amendment self-incrimination guarantees as well as the Sixth Amendment right to counsel in the pursuit of criminal justice. Because custodial interrogations opened wide the possibility of coercion, the Court asserted the need for explicit verbal warnings, and for nearly two decades this was unexceptionally the law of the land.

The public-danger exception arose in *Quarles v. New York,* 467 U.S. 649 (1984). A woman approached two patrolling police officers and told them she had just been raped at gunpoint. She gave a description of her assailant and told the officers the man

had just entered a nearby supermarket and was armed. One of the officers entered the store and saw a suspect who matched the woman's description. The officer pursued him with his gun drawn but lost track of him for a short time. Upon regaining sight of the suspect, the officer ordered him to stop and put his hands over his head, frisked him, and discovered he was wearing an empty shoulder holster. After handcuffing him, the officer asked, "Where is the gun?" The suspect gestured toward some empty cartons and responded, "The gun is over there." After the officer retrieved the gun, he read the suspect his *Miranda* warnings. In the ensuing court case, the defendant argued that the statement made regarding the location of the gun, as well as the gun itself, were inadmissible because police obtained them before administering the *Miranda* warnings.

The Supreme Court went against precedent and outlined the foundation for a public-danger exception to the dictates of *Miranda.* Justice Rehnquist concluded, "[U]nder the circumstances involved in this case, overriding considerations of public safety justify the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon." Since the gun was still hidden in the store, it endangered public safety; an accomplice could make use of it, or a customer or employee might later find it. These concerns were significant and merited an exception to *Miranda.* The Court endorsed as being justified the officer's actions to retrieve the firearm safely, because the benefits of abating public danger outweighed the costs of the non-*Miranda* interrogation. Since the *Miranda* warnings might deter the suspect from providing this information in a timely fashion, it would be permissible to forgo the warnings to safeguard the public. The Court also believed that officers could make the calculus of whether public safety was threatened "instantaneously" and would quickly decide the prudent time to read the suspect his rights.

The dissenting opinion, along with the concurrent reasoning of Justice Sandra Day O'Connor, sharply criticized the majority's reasoning because it weakened the integrity of *Miranda* warnings, leading to what Justice O'Connor called "constitutional uncertainty." Whereas *Miranda* provided certainty in its universality, *Quarles* left open many questions, and lower courts have had to apply the Court's general holding to separate and distinct fact patterns with little further post-*Quarles* clarification by the Court.

James F. Van Orden

See also: Exclusionary Rule; *Miranda v. Arizona;* Search; Seizure.

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Public Defenders

A public defender is a lawyer paid by the government who represents clients unable to afford legal services. The Sixth Amendment to the U.S. Constitution requires that individuals accused of crimes have the assistance of an attorney. Many individuals accused of crimes, however, are unable to afford legal representation. As many as 80 percent of individuals charged with felonies rely on the services of state-paid attorneys. In a series of cases, the U.S. Supreme Court has outlined the circumstances under which an indigent person is entitled to legal representation. As a result of these decisions, the public defender plays an important role in protecting the rights of the accused.

The right to counsel was included in the Bill of Rights (the first ten amendments to the Constitution) because the British did not allow a person charged with treason or felony to retain counsel, even if the accused could afford one. In the United States, the right to counsel has meant, until recently, that the accused could have an attorney if he could pay for representation. Pursuant to the Sixth Amendment, legislation and court rulings secured that right when an individual was being prosecuted by the federal government. The same requirements were not initially binding on the states.

In *Powell v. Alabama,* 287 U.S. 45 (1932), the Court held that the circumstances under which counsel was appointed offended the Due Process Clause of the Fourteenth Amendment. A judge appointed all

Judge Jeanne Meurer gazes intensely at a young defendant during a juvenile-court detention hearing in Austin, Texas. At left is a public defender appointed by the court in cases when a defendant cannot afford legal counsel.
(© Larry Kolvoord/The Image Works)

the members of the bar to represent several young black men who were accused of raping two white women. No particular lawyer was appointed until the day of the trial, at which the defendants were convicted and sentenced to death. The Court overturned their convictions and emphasized that the assistance of counsel was fundamental to a fair trial.

After this ruling, many states enacted laws providing a right to counsel in cases where the death penalty could be imposed. Other states required counsel in all felony cases regardless of the type of punishment. This variation in state-mandated counsel was eliminated in *Gideon v. Wainwright,* 372 U.S. 335 (1963), the landmark case that required states to provide the assistance of counsel in all noncapital felony cases. This ruling was later extended to include misdemeanor cases in which there was a possibility of a jail sentence.

After the *Gideon* ruling, government spending for the purpose of providing legal representation to the indigent dramatically increased. States have, however, created different systems to ensure the assistance of counsel to the indigent. The first type is the public defender system, in which government employees represent defendants. In most states that use this type of system, the public defender is an elected official authorized to hire a staff of attorneys. The second type is the assigned counsel system in which judges appoint private attorneys, often from a list of volunteers, to represent defendants. The majority of states use both systems. Typically, public defender systems are used in urban areas that have a high criminal caseload, whereas rural areas use assigned counsel.

Despite the initial spending for indigent counsel, both of these systems suffer from a lack of adequate funding. In many states, the administration of indigent services and the funding for those services are left to individual counties with little or no state money available to alleviate the financial burden. Another problem stemming from inadequate funding is the low salaries traditionally available for public defenders. With the cost of law school rising, many law students are forced to take out loans to pay for their education. Given that amount of debt, it is increasingly difficult to attract lawyers to indigent representation. Inadequate funding has also raised questions about the quality of representation afforded to the poor.

Another problem often raised with public defenders involves their independence. Public defenders and prosecutors often become well-acquainted with one another over time. Critics argue that this familiarity leads to a system in which the goal is to maximize efficiency rather than to pursue justice. Similarly, critics have alleged that because local jurisdictions both fund and choose public defenders, their independence may be jeopardized through local politics.

The U.S. Supreme Court has held that individuals accused of crimes for which a jail sentence may be imposed are constitutionally entitled to legal representation regardless of their ability to afford such services. There is variation in state methods of providing those services, but public defenders unquestionably play a major role in indigent defense. Public defenders are an important part of the criminal justice system as they attempt to protect the constitutional rights of the poor.

Kara E. Stooksbury

See also: Gideon v. Wainwright; Right to Counsel; Sixth Amendment.

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Public Forum

The "public forum" is a concept that involves issues of free speech and assembly; it encompasses public property where citizens are allowed to exercise their rights to speech and assembly with a high degree of freedom from state intervention. The public-forum doctrine refers to the collection of U.S. Supreme Court decisions outlining the limits of the individual's right to use public property for speech and assembly purposes. As such, issues pertaining to the public forum lie at the core of the First Amendment to the U.S. Constitution.

Advocates of broad protections for speech and assembly in the public forum often emphasize its place in ensuring the proper functioning of a democratic system. Such arguments are built on the idea that democracies rely upon challenges to the status quo and government policies and full, open debate in order to ensure the desirability of such policies. The role of this public forum is to create a place for unpopular opinions to be aired directly to the public in order to create such challenges and debate.

Although arguably essential to a functioning democratic system, the public forum includes certain risks and problems. First, there is a high propensity for order to be threatened and conflicts to occur by allowing groups to assemble in the public forum and unpopular opinions to be aired there. Second, given this likelihood that events in the public forum may threaten order, questions arise about acceptable regulatory limits on speech and assembly within the public forum. Finally, it is often hard to define which public spaces should be included as part of the public forum.

The Supreme Court began the public-forum doctrine in *Hague v. Congress of Industrial Organizations,* 307 U.S. 496 (1939), and *Schneider v. State,* 308 U.S. 147 (1939). These cases reversed previous Court opinions that had held the state could prohibit speakers from using public property just as private property owners could prohibit speakers from using their private land for speech and assembly purposes. In *Hague* and *Schneider,* the Court declared that the historical right of citizens to use public spaces to discuss and debate public issues limited the state's rights as a property owner. The Court, however, also found that the right to speech and assembly in the public forum was not absolute, and that there still existed a need for state regulation within the public forum.

Just as the public's rights were not absolute, the state's interest in regulating speech and assembly in the public forum was meant by the Court to be limited, and these limits remain a continuing question for courts today. Although the law is in some flux, the guiding principle the Court has followed in resolving questions in this area is that state regulations of speech or assembly in the public forum must be content-neutral. In short, the regulation must not be aimed at, or legitimated in reference to, the content of the speech that is to be regulated. If regulations are not content-neutral, courts view them with suspicion and apply "strict scrutiny" when reviewing them. If the regulations are deemed to be content-neutral, then courts ask only if the regulations are narrowly written in order to further a significant state interest and if alternative means of communication are left open to the speakers being regulated.

Content-neutrality is open to criticism, however, in its use as a category for determining the validity and utility of government regulations. For example, critics claim this approach leaves too much room for the state to create a facade of content-neutrality while actually taking aim at content.

The final contested area of the public-forum doctrine relates to the question of what property is included in the public forum. Although originally thought of exclusively in terms of publicly owned and operated property, there have been attempts to extend the public forum to include privately owned property. Examples of such attempts include incorporating into the public forum company towns, shopping malls, and airports. Along more traditional lines, advocates have sought to include such specific-use public lands as military bases, schools, courthouses, and prison properties in the public forum. Like the movements to include private property, these efforts to bring specific-use public lands within the public-forum doctrine have achieved mixed results. The Supreme Court

has shown some willingness to let speakers be banned from these areas and the surrounding property, although the validity of the Court's reasoning has been the subject of debate.

Joshua C. Wilson

See also: Democracy and Civil Liberties; First Amendment; Strict Scrutiny.

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Publicity Act of 1910

By the end of the nineteenth century, many states had enacted campaign disclosure laws that required candidates for public office and their campaign committees to publicize the sources and amounts of their campaign contributions and expenditures. In the early part of his administration, President Theodore Roosevelt made campaign finance reform a major priority. Congress followed Roosevelt's call for action with the Tillman Act of 1907, which limited the ability of corporations to finance political campaigns. The Publicity Act of 1910 quickly followed to establish the nation's first federal political campaign disclosure system. However, the publicizing of contributors raised free speech concerns under the First Amendment to the U.S. Constitution.

The Publicity Act was directed mainly at political committees, which the act defined as "national committees of all political parties and the national congressional campaign committees of all political parties, and committees, associations, organizations" that shall seek to influence congressional elections in two or more states. The act required political committees to identify contributors of $100 or more and recipients of expenditures of $10 or more. Moreover, the act required those who made independent expenditures of $50 or more in one year to disclose those transactions if they were made "for the purpose of influencing or controlling, in two or more states, the result of" a congressional election. Congress revised the Publicity Act in 1911 to cover prenomination activities conducted in and around political conventions and primary election campaigns.

The Publicity Act of 1910 and its 1911 amendment are noteworthy as examples of early attempts to regulate the role of money in politics and government, but neither was very effective. Although the act required disclosure, it contained no enforcement mechanism. Finally, the U.S. Supreme Court's decision in *Newberry v. United States,* 256 U.S. 232 (1921), effectively nullified the amendment's prenomination coverage by holding that Congress lacked the power under Article I, Section 4 of the U.S. Constitution to regulate a political party's primaries election—a decision that remained effective for two decades until overruled by the Court in *United States v. Classic,* 313 U.S. 299 (1941). Today, Congress has little authority to regulate primaries.

Clyde E. Willis

See also: Buckley v. Valeo; Federal Election Campaign Act of 1971; Tillman Act of 1907.

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Pure-Speech Doctrine

"Pure speech" refers to the core expressive freedoms of speech and association protected by the First Amendment to the Constitution. Protections for pure speech must be inherent in a democracy, for without freedom of thought and expression, tyranny is just a step away. In *Palko v. Connecticut,* 302 U.S. 319 (1937), Justice Benjamin N. Cardozo wrote that free speech was "the matrix, the indispensable condition of nearly every other form of freedom." Historically, the Supreme Court of the United States has defined

pure speech as that which is chiefly expressive, descriptive, or assertive. In this context, most Americans stand by at least the theory that free speech is guaranteed in the First Amendment: "Congress shall make no law . . . abridging the freedom of speech." However, there are a number of ways to express oneself that many people believe should not be protected. The Supreme Court has tended to analyze First Amendment freedoms under what is known as the preferred-freedoms doctrine, which gives these rights precedence when they come into conflict with others.

At certain periods in U.S. history, the right to free speech was on particularly shaky ground. During the presidency of John Adams, Congress passed the Alien and Sedition Acts, which made "writing, printing, uttering, or publishing any false, scandalous, and malicious writing" against the government a federal crime. Thomas Jefferson called these actions of the Adams administration a "reign of witches." In wartime, the rights of free speech tend to become even more fragile than at other times. For instance, during World War I, Congress basically made it illegal to say that the war was wrong. One man was even arrested for telling a group of women they were wasting their time by knitting socks for the soldiers in the trenches.

At no time was freedom of speech more threatened than under McCarthyism (named for Senator Joseph McCarthy of Wisconsin) during the 1940s and 1950s, when Congress engaged in a witch hunt to eradicate any kind of leftist thought in the United States, in the process infringing upon the right of association protected under the First Amendment. During this period, Congress passed the Smith Act of 1940 and the McCarran Internal Security Act of 1950, both of which challenged the foundations of American democracy. During the presidency of Ronald Reagan, free speech was threatened when Reagan handlers made it appear unpatriotic to criticize his conservative administration. During the war on terrorism in the early part of the twenty-first century, patriotism was likewise equated with supporting U.S. intervention in the Middle East.

It is when speech ceases to be "pure" and turns into action, or when speech goes beyond the definition of what is generally acceptable to a person of average intelligence, that the guarantee of total freedom of speech ceases to exist. The classic example of the line between pure speech and action was given by Justice Oliver Wendell Holmes Jr. in *Schenck v. United States,* 249 U.S. 47 (1919), in which the Court was asked to decide whether Charles Schenck, who had been charged with conspiracy to violate the Espionage Act of 1917, had a First Amendment right to distribute literature that encouraged World War I draftees to refuse to report for duty. In *Schenck,* Justice Holmes developed what became known as the "clear-and-present-danger test," which determined that when words were used "in such circumstances . . . as to create a clear and present danger that they will bring about . . . substantive evils[,]" they ceased to be protected by the First Amendment.

The Supreme Court has held that certain forms of speech are never "pure," and because of this, they are never protected by the First Amendment. Traditionally, those unprotected forms of speech were identified as slander and libel, "fighting words," obscenity, and sedition. In *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), the Court established a test for determining whether so-called slander (spoken) and libel (written) were protected. Such words were not protected if the user acted with malice aforethought and with total disregard for the truth. In *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), the Court determined that "fighting words" were those that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." Obscenity received attention in *Miller v. California,* 413 U.S. 15 (1973), in which the Court established a three-tier test to be used in identifying obscenity that basically allowed states to define what was obscene according to the dictates of their own diverse cultures.

The Supreme Court's position on sedition has varied, partly depending on whether the country has been at war. The Court tried out Justice Holmes's clear-and-present-danger test in *Schenck* in 1919, deciding that seditious speech must be weighed against the immediate dangers that follow the speech. Several months later, the Court seemed to veer toward the "bad-tendency" doctrine with *Abrams v. United States,* 250 U.S. 616 (1919), when the justices agreed that the intention of the five defendants "was to excite, at the supreme crisis of the war, disaffection, sedition,

riots, and, as they hoped, revolution," thereby creating a tendency toward violent and disruptive behavior. The overall rule appeared in *Whitney v. California,* 274 U.S. 357 (1927), in which the Court determined that sedition occurred when an individual tried to overthrow the government with the means to bring it about.

Ironically, speech does not have to be truthful in order to be considered "pure." The classic example of this is the rhetoric of political campaigns. For instance, in the presidential campaign of 1988, which was as acrimonious as any other in recent history, Republican George H. W. Bush waged a negative campaign against Governor Michael Dukakis, his Democratic opponent. Vice President Bush called Dukakis's patriotism and loyalty into question when he "charged" him with being a "card-carrying member of the American Civil Liberties Union" and accused him of being "soft on crime."

Whether First Amendment protections extend to what is called "speech-plus" may depend on circumstances. The Court extended free speech protection to symbolic speech in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), which dealt with high school students who wore black armbands to school to protest the Vietnam War, and to commercial speech (advertising) in, for example, *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). In *Virginia v. Black,* 538 U.S. 343 (2003), the Court backed away from approving speech-plus when the majority upheld a Virginia statute that banned burning a cross on public property or on private property belonging to another person if the purpose of the act was to intimidate a person or group. The Court admitted that "the protections the First Amendment affords speech and expressive conduct are not absolute."

Abortion protests have provided a number of cases in which the courts have been asked to determine the line between pure speech and unprotected action. For example, in *Rust v. Sullivan,* 500 U.S. 173 (1991), the Court upheld a gag rule (promoted by both Presidents Ronald Reagan and George H. W. Bush) that prevented workers in family planning clinics that received Title X funds from even uttering the word "abortion." Dissenting in *Hill v. Colorado,* 530 U.S. 703 (2000), in which the Court was again asked to determine the rights of abortion protesters outside family planning clinics, Justice Anthony M. Kennedy acknowledged that words considered pure speech were often "imprecise."

Elizabeth Purdy

See also: Democracy and Civil Liberties; First Amendment; *Palko v. Connecticut; Whitney v. California.*

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Putney Debates

On October 28, 1647, the General Council of England's New Model Army met in the town of Putney to quell insurgency within its ranks, staging a debate between the Army's leaders and "agitators" elected to represent the concerns of the rank and file. Lasting two weeks, the Putney debates revolved around defining the "liberty" of Englishmen, as participants raised issues of parliamentary representation, manhood suffrage, religious tolerance, and limited government. Perhaps at no other time in European history had the ideals of the American Revolution been anticipated so clearly. More striking, however, from a modern vantage point, was that these debates took place within a militia overwhelmed by puritanical religious passions.

The extraordinary events at Putney emerged during the English Civil War. In 1642 conflicts between the House of Commons and King Charles I reached a fevered pitch when Parliament voted to create an army to vie against that of the king. Historically, Parliament

had been a weak sister in English government, minimally representative of the people, divided between Houses of Lords and Commons, and existing only when called by the king. Religious disputes added fuel to the fire: To parliamentarians, King Charles I, who proclaimed his "divine right" to rule, seemed to be a closet Catholic in conspiracy with the pope; they, by contrast, had embraced Presbyterianism and other, more radical forms of Puritanism. In short, the Anglican middle ground became less tenable by the day. Charles surrendered after a four-year fight, and between 1646 and 1648 all parties were in negotiation over the new government. Parliament moved to reduce and redeploy the Army, but those who had fought against the king now worried that their interests would be forgotten. Furthermore, Army radicals had joined a movement, headed by John Lilburne, Richard Overton, and William Walwyn, that called for democratic reforms and the abolition of kingship and the House of Lords. At Putney their moderate opponents, notably Henry Ireton, dubbed them "the Levellers" (for the notion of "leveling" the prevailing class and power system).

Shortly before Putney, the Levellers had issued two key statements of purpose: "The Case of the Army Truly Stated" and "Agreement of the People." The former listed the Army's grievances, called for recognition of popular sovereignty and regular parliamentary elections, and demanded tax reform to aid the poor; the latter condensed these concerns into a written contract, dictating equal representation based on geography, parliamentary supremacy, religious tolerance, and the equality of all men before the law. Army leaders, including Lieutenant General Oliver Cromwell and Commissary General Ireton, his son-in-law, feared that such radicalism would tie their hands in negotiations with the king and Parliament. Together, Cromwell and Ireton sought to confuse and convince the Agitators. In the early stages of the Putney debates, they argued that Army unity must be preserved at all costs, and that unity depended upon continued adherence to Ireton's "A Solemn Engagement of the Army," a contract that could not be broken without dire consequences.

The Levellers, led by Thomas Rainborough, John Wildman, and Edward Sexby, countered that the "laws of nature" derived from God, canceling any unjust contract that failed to guarantee individual freedom. Unconvinced, Ireton held that natural law required that covenants be kept, and that tradition, property, and the common law be preserved. Ireton and Cromwell continued to believe that English liberty derived from an "ancient constitution," the age-old balance of king and the two houses of Parliament (Lords and Commons) all sharing in legislative power. Although both sides agreed on some particulars, such as parliamentary reform and expanded liberties, Cromwell and his cohorts pushed for protections of traditional privilege, including property qualifications for voting (the "freehold"), and respect for monarchical authority. Ireton argued that government was designed to guard the "permanent fixed interest" of the community against the property-destroying anarchy that would be unleashed if any man could exercise political power. Rainborough responded that "the poorest he that is in England hath a life to live, as the greatest he," thus making suffrage a "birthright." Against Ireton's specter of lawlessness and leveling, Rainborough asserted that without the active consent of the poor to their government, the rich would be free to steal and oppress.

The debates had mixed outcomes. Cromwell remained a dominant figure, but the Agitators pushed him toward acceptance of popular sovereignty, wider suffrage, and institutional reform. The Leveller movement waned and waxed again before being suppressed, its leaders killed or arrested for treason. At the same time, Parliament was purged of royalists, the House of Lords was abolished, and the king was executed on the way to a brief experiment in English republicanism. For their part, the Putney debates embodied "liberalism" and "democracy," both in theory and in practice, long before those concepts became commonplace, and they continue to demonstrate the vital historical link between radical Protestantism and the modern defense of individual liberty.

Robb A. McDaniel

See also: English Roots of Civil Liberties; Locke, John; Natural Law; Natural Rights.

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The Encyclopedia of Civil Liberties in America

Volume Three

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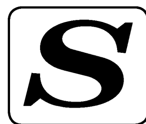

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Quakers

The involvement of Quakers in civil liberties began with their emergence as a Protestant denomination in England in the 1650s. Forbidden to worship freely, they became advocates for freedom of religion. Over the next three centuries, their concern for civil rights expanded to encompass a much more wide-ranging agenda.

Quakerism developed in England during the English Civil War and Interregnum (1651–1653). With the passage of the Test Act in 1661 and Conventicle Act in 1664, Quakers were denied freedom of religion. They endured imprisonment and heavy fines while continuing to advocate freedom of conscience. In the first few years of Charles II's reign, over 8,500 Quakers were imprisoned for their religious beliefs; later in his reign, Quakers were fined over 48,000 pounds for refusing to obey laws dictating religious conformity.

Quakers began emigrating to the colonies where they found persecution in Massachusetts but a sympathetic government in Rhode Island. With the establishment of a Quaker community in West New Jersey in 1675 and the founding of Pennsylvania in 1682, Quakers were able to establish governments built around the right to religious freedom. Closely linked to religious freedom for the Quakers was their refusal to take oaths. Pennsylvania's constitution guaranteed the right of individuals to affirm rather than to swear.

Just as freedom of religion was part of early Quakerism, so too was pacifism. Quakers' emphasis on peace meant that until the mid-1750s Pennsylvania had no formal militia and paid no taxes to support the British crown's army. In 1755, the Assembly finally established a militia to help defend the colony against attacks by the French and Indians, but legislators included a clause that guaranteed conscientious objectors exemption from service. When the Revolutionary War began, Quakers took great pains to establish their neutrality, even though that neutrality was often interpreted as support for the crown. During the Revolutionary War, Quakers worked to serve those affected by the war, treating the injured on both sides and providing food and shelter where necessary.

The Civil War brought Quaker pacifism into the public eye again. Though Quakers opposed slavery and were active abolitionists, their religious principles forbade them to fight. In both North and South, Quakers' refusal to serve in the army brought them under suspicion. They continued their service activities during the Civil War and included freed slaves in their relief efforts. By the time the United States entered World War I, Quakers had become active in protecting the rights of conscientious objectors, and throughout the twentieth century, the American Friends Service Committee (AFSC) provided legal advice and counsel for those seeking conscientious objector status.

Whereas freedom of religion and pacifism were Quaker principles from the beginning, their opposition to slavery developed over the course of the eighteenth century. In 1696, the Philadelphia Yearly Meeting recommended that Quakers refrain from importing slaves but provided no penalties or consequences for those who ignored the recommendation. In 1733, Elihu Coleman published the first officially sanctioned antislavery tract, and in 1743, the Philadelphia Yearly Meeting forbade Quakers to import or buy slaves. In 1754, church officials announced that it was unequivocally wrong to own slaves, but it was not until 1774 that slave-owning Quakers were subject to being disowned by the Yearly Meeting. Meetings in other areas followed a similar pattern, although in North Carolina, state law outlawed the manumission (emancipation) of slaves; there, Quakers resorted to the tactic of declaring the slaves the property of the Yearly Meeting, which allowed them complete freedom, including the right to leave the state and settle elsewhere.

Quakers did not confine themselves to the issue of slaveholding within their own communities, however. As their antislavery stance advanced, they became active in the abolitionist movement; leaders included Benjamin Lundy, John Greenleaf Whittier, and Lucretia Mott. Quakers also became active participants

Slavery was only one of the issues that mobilized Quaker activists in the nineteenth and twentieth centuries. Suffrage also attracted women such as Lucretia Mott (pictured), who helped organize the 1848 Seneca Falls (New York) Conference on women's rights. *(Library of Congress)*

in the Underground Railroad, helping escaping slaves to reach safety in the north and in Canada. From the inception of Quakerism, its practitioners had refused to obey laws that they believed were unjust or violated God's teachings; their participation in the Underground Railroad marked the first time that they secretly broke the law, as it was not their safety or lives that were in jeopardy.

Slavery was only one of the issues that mobilized Quaker activists in the nineteenth and twentieth centuries. Women's rights, including suffrage and the right to separate property, attracted women such as Lucretia Mott, who helped organize the 1848 Seneca Falls (New York) Convention on women's rights, and Susan B. Anthony, the well-known suffragette. After World War II, Quakers became active supporters of the civil rights movement. Although the issues changed over time, the Quakers' efforts on behalf of civil liberties did not.

Carol Loar

See also: Christian Roots of Civil Liberties; Civil Disobedience.

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Quarantines

The government's use of quarantine as a means of containing contagious diseases raises important issues as to the extent to which officials can infringe individual fundamental liberties, such as not being detained without a hearing or having freedom of movement. The practice of quarantine began during the fourteenth century in an effort to protect coastal cities from plague epidemics. Ships arriving in Venice, Italy, from infected ports were required to sit at anchor for forty days before landing.

Yellow-fever epidemics led to the passage of federal quarantine legislation by Congress in 1878 that created a role for the federal government in quarantine activities. In 1892 the law was reinterpreted to give the government more authority in imposing quarantine requirements because of cholera epidemics. Another act of Congress in 1893 further clarified this federal role. Local quarantine stations, where ships and passengers were held in quarantine, were gradually turned over to the government as local authorities came to realize the benefits of federal involvement.

In the 1970s, the Centers for Disease Control of the Public Health Service reduced the size of the quarantine program and changed its focus from routine

Families living in the Temperance Hotel, a shelter for poor people in Seattle, Washington, celebrate the end of a smallpox quarantine of the building in April 1946. Many states had laws that quarantined individuals suspected of having communicable diseases. *(© Seattle Post-Intelligencer Collection; Museum of History and Industry/Corbis)*

inspection to program management and problem intervention. An enhanced surveillance system was developed to monitor the onset of epidemics abroad and the inspection process as international traffic increased.

The Public Health Service Act provides for preventing the introduction, transmission, and spread of communicable diseases from foreign countries into the United States. The Public Health Service's Division of Global Migration and Quarantine is empowered to detain, medically examine, or conditionally release individuals and wildlife suspected of carrying a communicable disease. Diseases that trigger quarantine are listed in a presidential executive order and currently include cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, and viral hemorrhagic fevers, such as Marburg, Ebola, and Congo-Crimean.

Under the concept of police powers, quarantine laws have been enacted to protect the public health, but they have had an adverse impact on the civil rights of some individuals. In *Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana,* 186 U.S. 380 (1902), the U.S. Supreme Court addressed a potentially discriminatory practice. In 1900, New Orleans, Louisiana, was experiencing an epidemic of smallpox. The numbers of immigrants arriving at New Orleans as a point of entry had increased, the majority of whom were from Italy. The Court upheld the restriction of healthy persons from the epidemic area.

The evolution of personal rights, the development of due process mechanisms in government, and the success of public health efforts have limited the use of police powers in recent decades to adopt isolation rather than quarantine as the means of responding to contagious diseases. Isolation applies to the ill individual. Voluntary isolation is common, as when children stay out of school because of chickenpox, or restaurant workers remain off work while infectious with hepatitis. Quarantine is the restriction of well people who may have been exposed to a disease. This may include exclusion from an area as in the New Orleans case, or it may entail restricted liberty, as dealt with in *Crayton v. Larabee,* 110 N.E. 355, 220 N.Y. 493 (1917), which involved the restriction of a woman to her home for several weeks after her potential exposure to smallpox in Syracuse, New York. She brought suit against the board of health for wrongful imprisonment, among other allegations, but the appeals court supported the discretionary use of police powers by the board of health.

The evolution in the concept of civil liberties has significant implications for the quarantine procedure. Because there has been no significant use of quarantine in many years, and freedom of movement is an assumed right, the procedure would no doubt result in outrage and legal challenge. The modern threat of emerging diseases, bioterrorism, and rapid international travel have resulted in the use of quarantine in China and Canada to control severe acute respiratory syndrome (SARS). In the United States, there is conflict regarding the use of quarantine in any case. The Vaccination Liberation Organization and the Citizens Council on Health Care are among the groups that have challenged the concepts of forced vaccination and quarantine in smallpox planning.

Individual states may have a broad or limited regulatory framework for the use of quarantine. These statutes and regulations may very well be preempted by the Department of Health and Human Services once the scope of an epidemic is recognized. In cases of unidentified disease like SARS, this may take some time. If the disease is quickly identified and well understood, such as smallpox or plague, the Public Health Service may rapidly implement pertinent federal laws that provide for the apprehension, detention, or conditional release of individuals for diseases identified through executive order.

As for civil liberties, public policy and the courts have determined that the restriction of individual liberty is appropriate to combat a public health issue. In quarantine, however, the virulence of the disease, the mechanism of disease transmission, the susceptibility of contacts, and the scope of the epidemic must all be considered, and these varying factors pose the potential for medical, political, and judicial conflict.

Kevin G. Pearce

See also: Bill of Rights; First Amendment; Police Power.

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Quinlan, In re (1976)

The difficult facts presented in *In re Quinlan,* 70 N.J. 10, 355 A.2d 647 (1976), ignited a firestorm of controversy among the public and the medical community about an individual's right to die. Karen Ann Quinlan (1954–1985) collapsed just sixteen days past her twenty-first birthday on April 15, 1975, and slipped into a coma. The exact cause of the collapse was not determined, but she fell into a chronic persistent vegetative state, relying on a respirator to breathe. Her adoptive parents, Joseph and Julia Quinlan, requested in July 1975 that the artificial means of medical technology prolonging Karen's life be ended because the doctors could give them no hope of her recovery. Karen's attending physician refused to do so, and the hospital sustained that denial on the grounds that her parents could not make that decision on her behalf since she was an adult and living on her own prior to her collapse.

Her parents then filed litigation to have Joseph Quinlan appointed as her guardian with an express grant of authority by the court to permit him to dis-

"Images Removed Due to Copyright Issues"

continue the medical procedures artificially sustaining her life. The judge, following the standard practice in such cases, appointed a guardian to represent Karen's interests. This request was opposed by the treating physicians, the hospital, the county prosecutor, and the attorney general of New Jersey. During the course of the trial, expert testimony was adduced that there was no course of treatment that would lead to an improvement in Karen's condition, but the trial judge denied the Quinlans' petition in November 1975.

The New Jersey Supreme Court, relying primarily on the constitutional right to privacy first established in *Griswold v. Connecticut,* 381 U.S. 479 (1965), and on the state constitution, reversed the lower court and granted the Quinlans' request. In a decision generally viewed as activist in character, New Jersey Chief Justice Richard J. Hughes stated, "There comes a point at which the individual's rights overcome the state's interest" in maintaining life and that Karen should not be forced to "endure the unendurable." She was removed from the respirator in May 1976, although she retained a feeding tube. Karen survived another nine years without ever regaining consciousness and died on June 11, 1985.

The Quinlans' situation spawned widespread debate encompassing both the public and the medical profession about whether it was always in the best interest of patients to keep them alive and about the ethical issues inherent in such decisions. Beginning with California, all states enacted laws permitting the execution of living wills (advance directives) or durable powers of attorney for health purposes that would advise physicians and family members of a person's wishes regarding the artificial maintenance of life and authorizing them to take the appropriate steps to meet those wishes.

Susan Coleman

See also: Right to Die; Right to Privacy.

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Quirin, Ex parte (1942)

In 1942 eight Nazi saboteurs landed on the U.S. East Coast with materiel to destroy war facilities. They buried their German uniforms and equipment and proceeded in civilian clothing across the country. Upon their arrest, President Franklin D. Roosevelt ordered them to be tried before a military commission. The saboteurs, charged with violating both the law of war and the articles of war Congress passed that authorized U.S. entry into World War II, challenged the constitutionality of the president's order and the jurisdictional authority of the commission.

In *Ex parte Quirin,* 317 U.S. 1 (1942), the U.S. Supreme Court unanimously upheld the military commission's jurisdiction, although stated it would not "define . . . the ultimate boundaries of the jurisdiction of military tribunals." The Court stated that the congressional articles of war provided for trial before military commissions of such offenses. The president exercised "the authority conferred upon him by Congress" and "such authority as the Constitution . . . gives the commander-in-chief." The Court avoided determining to what extent the president had constitutional power to create military commissions without congressional legislation.

The Court drew a distinction between "lawful" and "unlawful" combatants. Both lawful and unlawful combatants were subject to capture and detention. Moreover, enemy combatants who without uniform came secretly through the lines with the purpose of waging war, as the saboteurs had done, were not "entitled to the status of prisoners of war but were offenders against the law of war" subject "to trial and punishment by military tribunals for acts which render their belligerency unlawful." The alleged U.S. citizenship of some of the saboteurs was irrelevant because the law of war may be violated by U.S. citizens as well.

The Court also disposed of *Ex parte Milligan,* 71 U.S. 2 (1866), which was invoked to protect the right of civilians to jury trial in areas where civil tribunals operated, as having specific reference to "the facts before it." As for the saboteurs, a jury trial was not procedure in a military tribunal for offenses against the law of war. The constitutional provisions were designed to protect trial by jury as "known and applied" and not to extend to new situations. Finally, the Court held that no claim for habeas corpus (petition for release from unlawful confinement) could be based on the articles of war (although the justices were divided as to the grounds for this aspect of the decision).

Quirin has been widely cited to justify President George W. Bush's military order of November 13, 2001, allowing military commissions to try non-U.S. suspects of terrorism. Some commentators lauded the Supreme Court's decision to hear the *Quirin* case as an example of "the rule of law at its best," but others spoke of "rush to judgment" and described the *Quirin* decision as "a ceremonious detour to a predetermined end" in which "the drive for unanimity limited and conditioned what could be said." Advocates and opponents of Bush's military order have emphasized different aspects of the decision.

Nada Mourtada-Sabbah

See also: Milligan, Ex parte; Patriot Act.

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R

R.A.V. v. City of St. Paul (1992)

In *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992), the U.S. Supreme Court examined a Saint Paul, Minnesota, hate-speech ordinance that banned the use of Nazi swastikas, burning crosses, and similar symbols to arouse fear or anger on the basis of race, color, creed, religion, or gender. R.A.V. (initials for the appellant) and other white teenagers in a group had burned a cross on the lawn of a black neighbor and were arrested under the Bias-Motivated Crime Ordinance. The primary issue in the case was whether such forms of expression were constitutionally protected under the First Amendment to the U.S. Constitution.

The city argued that the law prohibited the use of fighting words—words used in a specific context that are likely to bring about a breach of peace or disorder and that, traditionally, are not protected by the First Amendment. The Supreme Court disagreed, ruling that the ordinance represented what is called "viewpoint discrimination." In the majority opinion, Justice Antonin Scalia wrote that the ordinance was unconstitutional because it banned the offensive symbols only when used by the proponents of racial (or religious) hatred but not by other groups. Speakers who had other intentions could use the symbols as they pleased. The city prevented the use of these fighting words only by specific groups, therefore making the law an unconstitutional restriction on speech based on its content. Cities and states could not pick and choose which groups could use fighting words on the basis of their viewpoint.

Furthermore, Saint Paul listed only certain sorts of bias that were prohibited. For example, a speaker using a symbol meant to arouse fear on the basis of sexual orientation would not be punished under the ordinance. This distinction also made the ordinance impermissibly content-based.

Although *R.A.V.* was a unanimous decision, concurring Justices Byron R. White, Harry A. Blackmun, Sandra Day O'Connor, and John Paul Stevens decided the case on vastly different grounds. They saw the city's ordinance as overbroad because it prohibited not only nonprotected fighting words but also speech that, although offensive, did not reach a level of directionality and threat against specific individuals such that it could be considered fighting words.

The Court subsequently dealt with this concern in *Virginia v. Black,* 538 U.S. 343 (2003), in which it held that laws banning cross burning were constitutionally permissible only when the action was carried out with an attempt to intimidate. This decision was consistent with *R.A.V.* because it ruled specifically on cross burning. The Court noted that this particular act had a long history in the United States and that in circumstances in which there is a direct intent to intimidate specific individuals, burning a cross becomes a truly threatening action rather than being simply speech.

Additionally, the Supreme Court has permitted states to punish criminal acts like assault that are motivated by racial hatred more harshly than others, treating them differently from words that insult. In *Wisconsin v. Mitchell,* 508 U.S. 476 (1993), the Court upheld the constitutionality of a Wisconsin hate-crime act that allowed for stricter punishments if a criminal act was motivated by bias. Because the law was tied to conduct rather than speech, the Court allowed the Wisconsin law even though the state opted to punish racially motivated crimes while not punishing, for example, crimes motivated by bias against the poor. Just as employers may be punished for discriminatory hiring practices, when a crime is similarly motivated by bias, it has ceased to be speech and therefore loses First Amendment protection.

Ronald Kahn

See also: First Amendment; Hate Crimes; Hate Speech; *Texas v. Johnson; Virginia v. Black.*

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Racial Profiling

Racial profiling is a law enforcement practice of stopping and interrogating persons, inspecting or searching vehicles driven by such persons, or initiating investigative procedures against such persons, who because of their race or ethnicity share a particular statistical profile with actual and suspected criminal offenders. This practice raises the question of balancing fundamental constitutional protections against the need for public safety, and neither a 2000 presidential debate in New York City's Harlem nor police procedures adopted after the terrorist attacks of September 11, 2001, offered a clear resolution. The controversial practice of racial profiling earned national attention after New Jersey state troopers shot three black and Hispanic men on the New Jersey Turnpike following a traffic stop in 1998. For some individuals, the probability of being profiled—satirically known as either "driving while black" or "flying while Muslim"—intensified with the "war on drugs" and the "war on terrorism."

The war on drugs has been identified particularly as the single most important factor that explains the prevalence of blacks and Latinos among criminal suspects and defendants and police dependence on racial profiling. Because of the supposed disproportionate number of minorities engaged in drug offenses, law enforcement agencies developed a pattern of interdiction premised on finding persons involved with illicit drug activity. As a result of this perception, law enforcement agencies began systematically to target minority groups, believing that such tactics (playing the odds) would yield a higher proportion of criminal drug offenders than alternative report-and-respond tactics. Yet the language and attitudes underlying racial profiling are constitutionally questionable given the Fourth and Fourteenth Amendments to the U.S. Constitution, which protect against unreasonable search and seizure and arrest without probable cause and guarantee individuals the right to due process.

For example, an American Civil Liberties Union (ACLU) report (Harris 1999) cited a 1985 Florida police guideline titled "The Common Characteristics of Drug Couriers." In the report troopers were cautioned "to be suspicious of rental cars, 'scrupulous obedience to traffic laws,' and drivers wearing 'lots of gold,' or who do not 'fit the vehicle' and 'ethnic groups associated with the drug trade.' " The ACLU report documented anecdotal and statistical evidence suggesting that minorities were twice as likely to face a traffic stop than were other groups.

Other researchers have compiled data on suspected racial profiling practices by using law enforcement records from across America. In New Jersey, for example, the *New York Times* reported that internal investigations long before the highly public 1998 incident suggested that then-State Attorney General Peter G. Verniero knew that troopers disproportionately stopped black and Hispanic motorists. A *Los Angeles Times* article reported that data from traffic stops revealed similar patterns in Los Angeles. A 1999 report titled *Crises of the Anti-Drug Effort* found that blacks in Maryland were stopped more often than their overall distribution in that state or issuance of driver's licenses should suggest. Civil libertarians found these data disturbing given both the enactment by Congress in 1994 of legislation authorizing the U.S. Department of Justice (DOJ) to conduct investigations into racial profiling and to bring lawsuits, and a 2001 DOJ report indicating that although minorities were more likely to be stopped, "they were less likely to be in possession of contraband."

Claiming that such statistics have been based on faulty scientific data, critics have cited studies revealing that although blacks constitute only 13 percent of the population, black drug offenders account for almost triple that number for those arrested or sentenced to prison. Other observers have suggested that racial profiling may be more myth than empirical reality, given the preponderance of anecdotal evidence and institutional self-evaluation procedures.

Both this tension between anecdotal evidence and empirical substantiation and questions of institutional accountability have driven class-action suits and group protest, but these decisions have sometimes given sanction to increased governmental power. In a 1975 case involving border patrols, *United States v. Brignoni-Ponce,* 422 U.S. 873, the U.S. Supreme Court ruled that the Fourth Amendment did not allow Mexican ethnic appearance to be the *only* factor used by officers to stop a motorist but did allow appearance to be *a* factor. In a case involving evidence

Activists and students gathered on April 10, 2003, at the JFK Federal Building in Boston, Massachusetts, to protest the "Special Registration Program" developed by the Bureau of Citizenship and Immigration Services of the Department of Homeland Security. Opponents of the program believe it targets Arab, Muslim, and South Asian men. These immigrants must submit to photographing and fingerprinting or face severe legal penalties.
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of illicit drug activity found during a minor traffic violation, the Court in *Whren v. United States,* 517 U.S. 806 (1996), dealt a blow to critics of racial profiling. In this unanimous decision, the Court ruled "the temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment's prohibition against unreasonable seizures." For the ACLU and other civil rights groups, the *Whren* decision enabled police constitutionally to engage in "pretextual stops"—using a minor traffic violation to facilitate stopping a vehicle and its passengers. Civil rights groups deplored the Court's acceptance of pretextual stops, particularly given suspicions that police officers would have the constitutional latitude to use traffic violations as probable cause for racial profiling—a growing concern given treatment of Muslims and Arabs in the aftermath of the September 11, 2001, terrorist attacks in New York City and Washington, D.C., which ushered in a new era of heightened patriotism and stringent security measures.

Citing violation of fundamental rights, civil libertarians and civil rights groups have used *Whren* and cases involving suspected terrorists to initiate legislation and lawsuits against city and police officials. These groups are also pressuring other states to follow the lead of the nine states—California, Connecticut, Kansas, Missouri, North Carolina, Oklahoma, Rhode Island, Tennessee, Washington—and a plethora of cities that have already either defined racial profiling and prohibited it, taken legislative steps to address it, or adopted legislation requiring police departments to collect data on traffic stops, including the race, gender, and ethnicity of motorists and the nature of the violation. To date, Congress has not passed the End Racial Profiling Act (ERPA), proposed in 2001, authorizing entities to "develop and implement best practice devices and systems to ensure the racially neutral administration of justice" or mandating the collection of data to determine racial profiling. Perhaps Congress has been reluctant to address racial profiling again given passage of the Patriot Act and equally persuasive arguments supporting efforts to ensure homeland security. In March 2003, the Supreme Court refused to intervene in a Patriot Act surveillance case brought by civil rights groups against the Justice Department.

Tyson King-Meadows

See also: Exclusionary Rule; Fourth Amendment; Roadblocks; Search; Seizure; *Terry v. Ohio.*

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Random Drug Testing

Courts have been confronted in recent decades with legal challenges to programs designed to subject persons to warrantless and even suspicionless testing for illegal use of drugs. When conducted by a public agency or state actor, testing for drug use through urinalysis or blood tests is a search that raises Fourth Amendment concerns, as the U.S. Supreme Court noted in *Skinner v. Railway Labor Executives Association,* 489 U.S. 602 (1989). Under the Fourth Amendment to the U.S. Constitution, individuals are protected against unreasonable search and seizure, and drug testing is literally a "search" of the person. The Fifth Amendment right against self-incrimination also is at issue, because testing results may reveal evidence of illegal drug use and thus criminal behavior. (When there is no government action, for example, testing is required by private employers, no civil liberties issue arises under the U.S. Constitution, though tort law questions of privacy and state constitutional claims may be implicated.) Notwithstanding Fourth Amendment protections, courts have upheld testing performed on an entire population of individuals (for example, all applicants for a job) or on a randomized basis, reasoning that no individualized stigma attaches to the personal search and that such a program may be constitutional if certain safeguards are met.

In *Ferguson v. City of Charleston,* 530 U.S. 1295 (2000), the Supreme Court defined the category of constitutionally permissible suspicionless searches by employing a balancing test weighing the intrusion on the individual's privacy interest against the "special needs" that justified the program. The first privacy concern raised by drug testing is the actual procuring of a sample. Blood testing requires a person to sit for a minor medical procedure in which a needle penetrates the body, essentially a per se intrusion on personal privacy. Urinalysis requires some sort of monitoring, at least aural and sometimes visual, of the act of urination, usually considered among the most private of bodily functions.

The second major privacy concern relates to the handling of test results. In particular, courts have been concerned that warrantless, suspicionless testing be done for purposes unrelated to criminal law enforcement, and that results not be routinely made available to criminal authorities. The Court has stressed that the "special need" officials claim as justification for testing must be separate from a general law enforcement interest, and has insisted that there be protection against the dissemination of the results to third parties, particularly law enforcement authorities. The Court also has found testing less offensive when it results in disqualification from eligibility for particular benefits, such as job promotion or extracurricular school programs, rather than in imposition of an affirmative penalty.

The "special needs" designation originated in a concurring opinion by Justice Harry A. Blackmun in *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), which involved a school official's search of a student's purse. Justice Blackmun agreed with the *T.L.O.* majority that in limited circumstances probable cause was not required if a search was reasonable given the balance of governmental and private interests at stake, but he insisted that such a test should be applied only "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." The reference to "special needs" was ultimately incorporated into the Court's opinions in *O'Connor v. Ortega,* 480 U.S. 709 (1987) (plurality opinion); *Griffin v. Wisconsin,* 483 U.S. 868 (1987); and *Vernonia School District v. Acton,* 515 U.S. 646

(1995). The *T.L.O.* decision also made it clear that public school officials have custodial and tutelary responsibilities not applicable to the general public, and these duties permit much more flexible standards for searches and seizures; thus individualized suspicion often has been ruled unnecessary in the context of testing public school students.

Critics have argued that there is insufficient evidence that random testing in the workplace reduces drug use. They also suggest that testing may even be counterproductive by encouraging drug users to switch from drugs that remain detectable in the body for an extended period, such as marijuana, to drugs that dissipate in the blood in a shorter period, such as alcohol and crack cocaine. Preliminary studies of testing programs for student athletes have found indications that random drug testing does reduce some forms of drug use, though there also is evidence that some students subject to testing may switch from use of illicit drugs to use of alcohol.

With the imprimatur of the courts, drug testing has become widespread in a variety of educational and occupational contexts. This practice has led to the development of not only a burgeoning industry of commercial drug testing providers but also an emerging industry claiming to provide techniques and materials useful in defeating drug testing.

Ronald Steiner

See also: Board of Education v. Earls; Fourth Amendment; Search; Seizure; *Vernonia School District v. Acton.*

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Rankin v. McPherson (1987)

In *Rankin v. McPherson,* 483 U.S. 378 (1987), the U.S. Supreme Court held that the First Amendment protected a public employee from being fired for speech her employer deemed to be offensive. Although the First Amendment to the U.S. Constitution broadly provides for a right to free speech, this right is not absolute and is subject to some governmental regulation. As the Supreme Court explained in *Schenck v. United States,* 249 U.S. 47 (1919), the First Amendment does not protect someone who yells "fire" in a crowded theater, unless of course there really is a fire. Accordingly, what restrictions on free speech are reasonable, such that they do not violate the First Amendment? That was the issue in *Rankin,* which concerned a public employee whose employment was terminated for a comment that her employer considered offensive. Writing for the five–four majority of the Court, Justice Thurgood Marshall held that the First Amendment protected this public employee's right not to be fired for her speech.

Sometime after the assassination attempt on President Ronald Reagan in 1981, a clerical employee at a Texas county constable's office (which deals in law enforcement) said to a fellow employee, "If they go after him again, I hope they get him." The employee, who was still on her probationary period, was fired for making this comment. The Supreme Court previously had provided in *Pickering v. Board of Education,* 391 U.S. 563 (1968), and *Connick v. Myers,* 461 U.S. 138 (1983), that public employees do not lose their First Amendment rights upon accepting employment with a government entity. However, the employee's rights must be balanced against the employer's interests in fulfilling the obligation to provide efficient public services, and the speech must be of appropriate public concern to be protected.

Applying the standards set out in *Pickering* and *Connick,* the Supreme Court in *Rankin* determined that the comment was a matter of public concern, since it was made during a conversation on President Reagan's policies. In balancing the employee's First Amendment right to make a comment of public concern and the state's interests in promoting effectual public service, the Court held that the government's

interests did not outweigh those of the individual, in part because her comment was not a detriment to the efficient functioning of the public agency. Furthermore, because her job was clerical and she was not involved in confidential or policy-making matters, her job and comment had no repercussions for the law enforcement agency. Accordingly, the public employee was improperly fired because of the content of her speech, and as a consequence she was entitled to reinstatement.

Justice Lewis F. Powell Jr. concurred in the majority's opinion, stating that the comment was a matter of public concern, but it was made in private by the employee to her boyfriend, with no expectation it would be overheard; thus, the employer could not punish this employee for private speech that is routine in the workplace. On the other hand, writing for the dissenters, Justice Antonin Scalia contended that the comment was not a matter of public concern, and even if it were, the law enforcement agency was justified in not permitting such comments by its employees. Notwithstanding Justice Scalia's arguments, the Supreme Court majority held that in this case the government's interests did not outweigh the First Amendment right of one of its employees to express matters of public concern.

Mark S. Hurwitz

See also: First Amendment.

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Rasul v. Bush (2004)

In *Rasul v. Bush,* 124 S. Ct. 2686 (2004), and the companion case of *Al-Odah v. United States,* the U.S. Supreme Court held that aliens being held in confinement at the U.S. military base in Guantánamo Bay, Cuba, were entitled to have a federal court hear challenges to their detention under the federal habeas corpus statute. The decision was significant because it placed limits upon the president's authority to detain indefinitely individuals captured as a result of the "war on terrorism" that President George W. Bush initiated after the attacks on the United States on September 11, 2001.

On September 11, 2001, terrorists associated with Osama bin Laden and the al-Qaeda network hijacked four commercial airplanes and used them in several attacks against the United States, resulting in over 3,000 deaths. Subsequent to these attacks, Congress passed a joint resolution authorizing the president to use all "necessary and appropriate force" against any persons, organizations, and nations that aided or supported these acts of terrorism. President Bush used this authorization to send U.S. troops to Afghanistan against al-Qaeda and the Taliban regime that had supported the group.

As a result of this military action, approximately 640 non-Americans were captured and relocated to the U.S. military base in Guantánamo Bay, Cuba, where they were being held indefinitely and without access to legal counsel and to the federal courts. Among the individuals detained were two Australian and twelve Kuwaiti citizens who claimed they were innocent of any terrorist activity and who wished to be set free. In the latter group were Shafiq Rasul and Fawzi Khallid Abdullah Fahad Al-Odah.

In 2002 relatives of these two individuals filed actions in U.S. District Court for the District of Columbia challenging the detentions. First that court and then the U.S. Court of Appeals for the District of Columbia dismissed the cases, with both courts claiming they lacked jurisdiction to hear the challenges. The U.S. Supreme Court disagreed, ruling six–three that the courts did have jurisdiction and that the detainees were entitled to have their petitions heard.

The petitions filed by the relatives of the detainees were seeking habeas corpus review, the constitutional right of individuals to have a judge review the reasons for their detention and determine if their confinement is illegal. Habeas relief is provided both in the Constitution (Article I, Section 9, clause 2) and by federal statute (*U.S. Code,* Vol. 28, sec. 2241). The law was

well established that U.S. citizens being held in the United States were entitled to habeas corpus review, but there was some uncertainty regarding that right for the noncitizens held in Guantánamo Bay. Several reasons contributed to this lack of certainty.

First was the issue of whether the detainees were being held "in the United States." In 1934, Cuba granted the United States a lease to Guantánamo Bay for as long as the base was being used. The United States continued to recognize Cuba's sovereignty over the area, however, which raised a genuine question regarding whether the place of detention was part of the United States. Second, in cases such as *Johnson v. Eisentrager,* 339 U.S. 763 (1950), the Supreme Court had ruled that aliens detained outside the United States were not entitled to habeas review. Thus, the Bush administration argued that it had legal authority to detain aliens at Guantánamo indefinitely without granting them access to the courts to contest their confinement.

In the majority opinion, written by Justice John Paul Stevens, the Court found jurisdiction was proper and held for the detainees. In reaching its opinion, the Court first reviewed the history of federal habeas corpus law, noting how this right had significantly expanded since its original enactment in 1789. In fact, Justice Stevens noted that the Court had permitted habeas review in a wide variety of situations involving presidential detention of individuals, including those who were deemed "enemy combatants." Second, the Court examined the status and extent of U.S. control over Guantánamo Bay, finding that control was so pervasive that although Guantánamo was not sovereign U.S. territory, it was under U.S. jurisdiction, and therefore the ruling in *Eisentrager* did not apply. Thus, all of the individuals being detained at Guantánamo were entitled to challenge their detention. In dissent, Justice Antonin Scalia, joined by Justice Clarence Thomas and Chief Justice William H. Rehnquist, contended that the federal habeas law was limited by *Eisentrager* because the base in Cuba was not under U.S. sovereignty.

Rasul v. Bush was an important decision. It was issued the same day as *Hamdi v. Rumsfeld,* 124 S. Ct. 2633 (2004), in which the Court ruled that a U.S. citizen could not be held indefinitely on American soil without a right to habeas review. These two cases together not only placed significant limits upon the government's ability to detain individuals suspected of being terrorists, but also represented a major affirmation of the right of citizens and noncitizens alike—even those suspected of terrorism—to challenge their detention. Almost immediately after *Rasul* was decided, the U.S. government was forced to undertake procedures to permit the Guantánamo detainees to bring habeas challenges to their confinement.

David Schultz

See also: Habeas Corpus; *Hamdi v. Rumsfeld; Quirin, Ex parte.*

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Rational-Basis Test

The minimum level of scrutiny the courts apply to governmental regulation on socioeconomic matters is the rational-basis test. This test requires that government rules or regulations be *rationally related* to some *legitimate government interest.* Since its inception, the courts have applied the rational-basis test liberally. Because this is a relatively low burden for the government to carry, the vast majority of the legislation to which this test has been applied has been upheld.

In *United States v. Carolene Products Co.,* 304 U.S. 144 (1938), the U.S. Supreme Court upheld the Filled Milk Act, which prohibited the shipment in interstate commerce of "filled milk," an artificial fat or oil product made to resemble milk, in an effort to protect public health. The Court held that legislation that regulated the economy should be presumed constitutional and upheld if there was any rational relationship between the legislation and the government's legitimate interest. By contrast, the Court would apply more exacting scrutiny (strict scrutiny) to cases in-

volving provisions in the Bill of Rights or the Fourteenth Amendment, restrictions of the political process, or the treatment of minorities; these involve fundamental personal liberties, such as the right of free speech, protection against unreasonable search and seizure, and the guarantee of due process.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), illustrates the application of the rational-basis test. The case involved legislation that used property tax as the basis for supplementing funding to school districts. The state's interest was to provide extra funding for school districts. The appellees argued that because property values were drastically lower in poorer school districts, the legislation amounted to discrimination based on wealth. In other words, there was a violation of the Equal Protection Clause, and as such the legislation should be subject to strict scrutiny. The trial court agreed.

The Supreme Court overturned the lower court's ruling in that respect and held that, however important, education was not a fundamental right, wealth was not a suspect classification, and the legislation was appropriate so long as it had a rational relationship to some legitimate state purpose. As in *Carolene Products,* the Supreme Court applied the traditional rational-basis test. However, in recent years that test has evolved.

Until recently, the rational-basis test has not been applied to cases involving a suspect classification (for example, race) or a fundamental right (for example, free speech); rather, legislation on these matters is subject to the strict-scrutiny test. In certain situations, however, in which legislation apparently targets a specific group but that group does not rise to the level of a suspect class, a "heightened" rational-basis test has been applied.

The Supreme Court applied this heightened rational-basis test in three cases beginning in 1982. In *Plyler v. Doe,* 457 U.S. 202 (1982), a Texas statute denied free public education to "illegal alien children." The state interest at issue was to save money by refraining from spending money on persons who entered the country illegally. The Court rejected any argument that "illegal alien children" were a suspect class but implied that they were a quasi-suspect class, and, in overturning the Texas statute, the Court applied the lowest level of scrutiny, rational basis. In *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), the Cleburne, Texas, zoning board denied a permit for a group home for the "mentally retarded." The Fifth Circuit Court of Appeals struck down the board's decision on the grounds that the "mentally retarded" were a quasi-suspect class, and any government discrimination against them must pass heightened scrutiny. Although it upheld the invalidation of the board's decision, the Supreme Court rejected the claim that the "mentally retarded" were a suspect or quasi-suspect class and reduced the level of scrutiny by applying merely rational basis. More recently, in *Romer v. Evans,* 517 U.S. 620 (1996), the Court struck down an amendment to the Colorado Constitution that prevented state and local agencies from enacting legislation to protect homosexuals from discrimination. The state argued that the amendment was meant to protect the freedom of association of those who have personal or religious objections to homosexuality. However, the Court found that the "status-based" amendment in question would actually result in an entire group of citizens finding it more difficult to seek government aid.

In these three cases, the Court applied a "rational-basis test with bite." What the Court actually did, however, was to apply a balancing test. The Court balanced the individual rights and liberties allegedly being violated against the state interest and took notice of the fact that in each case the legislation was targeted at a specific group of people who, although their group did not rise to the level of a suspect class, were singled out for special treatment. Today, where legislation is specifically targeted at a definable group, the heightened rational-basis test will be applied.

John L. Roberts

See also: Romer v. Evans; San Antonio Independent School District v. Rodriguez; Strict Scrutiny; Suspect Classifications.

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Red Baiting

In the aftermath of World War II, the specter of communism loomed large in the American consciousness. The Cold War with the Soviet Union moved communistic sympathies from a matter of domestic political opinion to an issue with dire implications for national security. This trend led to an aggressive search for Communist influences throughout American society, but particularly in government, the educational system, labor unions, and Hollywood. Those whose Communist leanings were publicly exposed faced significant economic penalties, most often loss of their jobs. In addition, more than 150 people went to prison, and two were executed. The question of how to deal with communism at home and abroad significantly impacted the U.S. political process for the next fifty years and highlighted the vulnerability of civil liberties in times of national tension over left-wing causes.

After the Bolshevik Revolution in Russia in 1917, the fear of communism and communistic influences pervaded American society. The Communist Party of the United States (CPUSA) was formed that same year, but the CPUSA did not really get off the ground until the Great Depression of the 1930s appeared to evidence the failure of capitalism. Sympathy for the ideals of equality for all and an end to the domination of rich capitalists had broad appeal particularly among unemployed or underemployed laborers, social liberals, and African Americans.

In 1940, Congress adopted the first peacetime sedition act in U.S. history, the so-called Smith Act (*U.S. Code,* Vol. 18, sec. 2385). It provided for the prosecution of people who distributed material found to advocate either the violent overthrow of the government or the indoctrination of a group in preparation for violent acts. This law was immediately applied to distribution of Communist materials. The U.S. Supreme Court upheld the constitutionality of the Smith Act in a series of court cases including *Dennis v. United States,* 341 US. 494 (1951), *Yates v. United States,* 354 U.S. 298 (1957), and *Scales v. United States,* 367 U.S. 203 (1961). Laws prohibiting the distribution of pro-Communist materials remained on the books in some states through 2002.

The entry of the United States into World War II and its alliance with the Soviet Union muted the loudest criticism of communism for the duration of the war. Thereafter, Soviet actions abroad in the aftermath of the war led to renewed fervor in the anti-Communist battle at home.

In 1947, several different groups began active anti-Communist campaigns. Senator Joseph McCarthy and the House Committee on Un-American Activities (HUAC) began their first examination of Hollywood, investigations that led to the creation of a list of blackballed writers, directors, and performers, who were forbidden employment by any major studio. At the same time, President Harry Truman forbade anyone with Communist Party ties to be employed in the executive branch of the government. The Taft-Hartley Act of 1947 denied the facilities of the National Labor Relations Board to unions that failed to file affidavits avowing that their officers were not Communists, and in 1949–1950 the Congress of Industrial Organizations (CIO) expelled unions that were still perceived to be Communist-dominated. In 1950, Congress passed the Internal Security Act, giving the government a broad range of powers to fight "subversives." President Truman immediately vetoed the law on the grounds that it would "make a mockery of our Bill of Rights," but Congress overrode his veto by an 89 percent majority. Both the Congress and state legislatures passed a series of similar laws intended to curb the power of communism and the Communist Party at the federal and state levels throughout the 1950s.

Significant efforts to root out communism continued through the 1950s and early 1960s, eventually petering out as the nation's attention turned to other matters. Significant damage had been done, however, to the protections against state-sponsored violations of citizens' rights in pursuit of national security, and continued fear of communism was a factor on the U.S. political scene until the end of the Cold War in the late 1990s.

Ben Reno-Weber

See also: Communists; *Dennis v. United States;* House Un-American Activities Committee; McCarthy, Joseph; McCarthyism; *Yates v. United States.*

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Red Lion Broadcasting Co. v. Federal Communications Commission (1969)

In *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367 (1969), the U.S. Supreme Court upheld the constitutionality of the "fairness doctrine," legislation mandating that broadcasters give free airtime to an individual whose political views on public issues were challenged so that the individual had adequate means to reply to the challenge. The doctrine raised fundamental issues involving the right to free speech under the First Amendment to the U.S. Constitution. The Federal Communications Commission (FCC) was charged with enforcing the fairness doctrine.

On November 27, 1964, the WGCB radio station in Pennsylvania broadcast a fifteen-minute "Christian Crusade" segment by Reverend Billy James Hargis. Hargis discussed a book by Fred J. Cook entitled *Goldwater—Extremist on the Right,* about then-Senator Barry Goldwater (R-AZ). Hargis made comments about Cook's politics and work history that could have been deemed derogatory. When Cook learned of the broadcast, he argued that he had been personally attacked and demanded free reply time. The Red Lion Broadcasting Company, which owned the station, refused, and the FCC sued for violation of the fairness doctrine. The case was argued in April 1969 and decided in June that year, along with its companion case, *United States v. Radio Television News Directors Association,* (127 U.S. App. D.C. 129, 381 F.2d 908, affirmed; No. 717, 400 F.2d 1002, reversed and remanded).

Under the now-obsolete fairness doctrine, when a licensed broadcast company personally attacked an individual in the course of discussing a controversial public issue, it had to contact that individual and notify him or her of what was said, provide the individual with a tape or transcript of the statement, and then offer that individual the right to reply at the station's expense. When it endorsed a candidate or position, the broadcaster also had to give the other side a right to reply. The Court was asked whether the FCC's fairness doctrine violated the First Amendment's freedom of speech guarantees and ruled unanimously that it did not. (Justice William O. Douglas did not participate, since he had not been present during the hearing.)

The Court's opinion had three components: First, the First Amendment was designed to protect the rights of the viewing and listening public, not the licensed companies that serve them. Second, the purpose of the regulation was to ensure that the "marketplace of ideas" functioned effectively, allowing listeners to be informed citizens. Finally, the FCC acted properly in its ruling in this particular case.

Reviewing the history of radio broadcasting, the Court stated that the FCC was created to handle the "chaos" of stations fighting for limited bandwidth. Broadcasting is not a right but a privilege, and with it comes an obligation to serve the public. The fairness doctrine was created to encourage broadcasters to discuss controversial issues of public importance free from the pressure of supporting one side or the other, as their sponsors might demand. At first glance, the idea of a company being forced to broadcast opinions with which it did not agree appeared to run afoul of the First Amendment. The Court explained, however, that broadcasting companies were licensed to serve the public's interest in learning both sides of politically important issues, which advances the very spirit of the First Amendment. In the two cases at hand, the FCC operated properly in ensuring that the marketplace of ideas was protected by giving an attacked individual the right to reply and to do so at the station's expense.

The FCC abandoned the fairness doctrine in 1987, although it continued to enforce rules on political editorials and personal attacks such as in *Red Lion* until

2000. Broadcasters complained that their announcers had difficulty determining when the doctrine applied, which caused a chilling effect on airing controversial views. The FCC also concluded that enforcement was no longer necessary in light of emerging technologies that opened up broadcasting to a greater number of outlets, such as cable television.

Brian J. Glenn

See also: First Amendment.

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Red Scare (1919–1920)

Hysterical fear of foreigners spawned by the 1917 Bolshevik Revolution in Russia, formation of the international communist party COMINTERN, and the establishment of the Communist Party of the United States (CPUSA) in 1919 epitomized the 1919–1920 "red scare" in the United States when wholesale and unconstitutional deportations of aliens occurred. Widespread fear of communism manifested itself principally in ridding the nation of foreign-born radicals. It was a period that Chief Judge James Skelly Wright of the U.S. Circuit Court for the District of Columbia—himself a subject of ostracism for his desegregation orders as a U.S. district judge in New Orleans during the late 1950s and early 1960s—described in *Faruki v. Rogers,* 349 F. Supp. 723 (D.C. Cir. 1972), as "shameful incidents in which the foreign-born—citizen and non-citizen alike—have been subjected to hysterical popular oppression."

Many people in the nation perceived the Communist threat as an attack on American institutions by foreign radicals. Typical targets were avowed anarchists like Russian-born Emma Goldman and Alexander Berkman, who were involved with various radical activities, including the radical periodical *Mother Earth.* In April 1917, the United States entered World War I, and although President Woodrow Wilson curbed a Justice Department proposal to try civilians in military tribunals, he signed into law the new Espionage Act of 1917 under which the government arrested, convicted, and later deported Goldman, Berkman, and others. The order was signed by Assistant Secretary of Labor Louis F. Post, who had once represented Goldman and who later canceled more than 1,500 deportation orders during the waning days of the red scare. Finally, Post had to defend himself (successfully, as it turned out) against a resolution of impeachment introduced in the House of Representatives amid accusations that he had become a "friend of enemy aliens" and "had let loose on the country these public enemies."

Congress strengthened the 1917 Espionage Act with the enactment of the Sedition Act of 1918, which made it a crime to "utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States." Moreover, the act provided "That . . . aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or . . . violence of the government of the United States shall be excluded from admission into the United States." The statute made any such person already in the country subject to deportation.

Although the war ended with the German surrender on November 11, 1918, the distrust of "things foreign" did not abate as an "anarchist bombing campaign" flourished in the early part of 1919. The newly elected Republican Congress responded with the Senate's rejection of U.S. participation in the League of Nations and with increased appropriations for the fight against foreign radicals. By March 5, 1919, President Wilson's appointment of A. Mitchell Palmer, a former Democratic member of the U.S. House of Representatives and unsuccessful candidate for the U.S. Senate from Pennsylvania, as U.S. attorney general fortified the government's arsenal for fighting communism and other forms of foreign-led subversion. On July 19, 1919, at Palmer's request, Congress appropriated, and the president approved, a special fund of $500,000 for the Justice Department to use in the fight against radicalism. On August 1, 1919,

the head of Palmer's newly created General Intelligence Division of the Justice Department appointed as his assistant a young man, twenty-four-year-old J. Edgar Hoover, who immediately compiled a list of thousands of names of individuals he believed to be Communists and therefore proper subjects for prosecution and deportation. There followed the notorious "Palmer raids"—a manifestation that the nation was in the "throes of another national seizure of paranoia," as Justice William O. Douglas noted in his concurring opinion in *United States v. United States District Court,* 407 U.S. 297 (1972).

One typical Palmer raid, described in detail in *Colyer v. Skeffington,* 265 F. 17 (D. Mass. 1920), occurred the evening of January 20, 1920, in as many as twenty New England cities from Holyoke, Massachusetts, through Boston to Lincoln, New Hampshire. In some cities police raided meeting halls, and in most communities they invaded homes to make arrests without warrants. They searched homes in summary fashion, breaking open suitcases, boxes, and drawers and seizing personal effects and papers. Police officers took between 800 and 1,200 people into custody in a way that prompted Judge George W. Anderson to comment in *Colyer,* the case that effectively halted the Palmer raids, that "a mob is a mob, whether made up of government officials acting under instructions from the Department of Justice, or of criminals, loafers, and the vicious classes."

Judge Anderson also observed in *Colyer* that some of the people taken into custody were taken before an immigration inspector for examination but without the right to be assisted by counsel "until the inspector, co-operating with or advised by the agent of the Department of Justice, was of the opinion that the hearing had proceeded sufficiently in the development of the facts to protect the government's interests." Judge Anderson concluded that this treatment left many of the aliens "entirely unprotected from the zealous attempts of the Department of Justice agents to get from them some sort of apparent admission of membership in the Communist or Communist Labor Party."

In all, Palmer raids were conducted between July 1919 and June 1920 in more than thirty cities across the nation in which 6,000–10,000 people—most of whom were innocent of any wrongdoing—were arrested, incarcerated, and/or deported. With the *Colyer* decision that membership in the Communist Party could not subject a person to deportation, combined with Post's cancellation of more than 1,500 deportation orders and the failure of a series of Palmer-predicted terrorist attacks to materialize, the 1919–1920 red scare dissipated.

Clyde E. Willis

See also: Communists; *Dennis v. United States;* Palmer Raids; Red Baiting.

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Rehnquist, William Hubbs (b. 1924)

William H. Rehnquist, the sixteenth chief justice of the U.S. Supreme Court, was first appointed to the U.S. Supreme Court as an associate justice by President Richard Nixon in 1972 and was elevated to the position of chief justice by President Ronald Reagan in 1986. His service since then in leading the Court has included presiding over President William Clinton's Senate impeachment trial. Chief Justice Rehnquist has brought concern for federalism back into the mainstream of judicial thinking, and he has been an able judicial administrator, both modernizing the

Court and facilitating good working relationships among justices with diverse views.

The Court over which Rehnquist has presided has rendered many libertarian decisions relative to freedom of speech and has widened constitutional protections for women (approving laws limiting sexual harassment and overturning the Virginia Military Institute's all-male admissions policy). His career has also been marked by his view that elective bodies are generally more capable of assessing the relative rights and liberties than are judicial bodies, especially when the U.S. Constitution is silent or speaks in broad language.

Rehnquist grew up in a solid Republican household in an upper-middle-class suburb of Milwaukee. From the time he attended law school at Stanford, he was described as brilliant and conservative. His conservative views were evident in the memoranda that he authored as a law clerk to Justice Robert H. Jackson and in views opposing racial desegregation that he took as a private lawyer in Phoenix, Arizona.

In 1969, President Nixon appointed Rehnquist as assistant attorney general of legal counsel in the Department of Justice. Because of his legal expertise and ideological fervor, he became a point man for the administration. He argued that the government could limit the political speech of its employees, and he was a forceful advocate for policies to crack down on crime. For example, in 1971, he encouraged the arrest of 12,000 demonstrators in Washington, D.C. During the period 1969–1972, he also supported wiretapping and surveillance without a prior court order; no-knock entry by the police; preventive detention; the abolition of habeas corpus proceedings after trial; and the abolition of the exclusionary rule. He provided legal encouragement for the U.S. Army's surveillance of private citizens, and he defended the proposed allocation of new powers to the Subversive Activities Control Board.

Although the Senate confirmed Rehnquist's nomination to the Court, it drew strong public opposition from a variety of liberal groups, including the American Civil Liberties Union, which, for the first time in its then-fifty-two-year history, opposed a Supreme Court nomination.

Rehnquist is a consistent proponent of property rights and of federalism. He supports constitutional interpretations based on the original intent of the framers. He believes that the government should have more power to catch and prosecute criminals, and he has consistently voted to support laws that make it illegal to disrespect the flag, as he held in *Spence v. Washington,* 418 U.S. 405 (1974), and *Texas v. Johnson,* 491 U.S. 397 (1989). His voting record has also given states more leeway to regulate pornography and nudity.

The core of Rehnquist's philosophy is that the Constitution places a limit on the scope of noneconomic civil liberties that individuals have, especially at the state level. According to Rehnquist, respect for states' rights or federalism means that states have broad discretion in terms of how many noneconomic rights are defined and protected. Like his predecessor, Warren E. Burger, Rehnquist has narrowed some the Earl Warren Court criminal due process rulings, often recognizing exceptions to some of the rights of the defendants. For example, in *Rawlings v. Kentucky,* 448 U.S. 98 (1980), he voted to limit defendants' ability to challenge search and seizures. In *Illinois v. Gates,* 462 U.S. 213 (1983), he argued that police should have easy access to obtain a search warrant, and in *California v. Acevedo,* 500 U.S. 565 (1991), he maintained that police should have more discretion to conduct searches without a warrant. In *California v. Minjares,* 444 U.S. 887 (1979), he urged the Court to abolish the exclusionary rule.

Rehnquist has voted, as in *Scott v. Illinois,* 440 U.S. 367 (1979), to limit the right to counsel established in *Gideon v. Wainwright,* 372 U.S. 335 (1963). In *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991), he allowed police to detain suspects for forty-eight hours without providing a hearing for probable cause. Although he endorsed a number of exceptions to the *Miranda* rules, Rehnquist agreed in *Dickerson v. United States,* 530 U.S. 428 (2000), that the warnings were based on constitutional principles.

Rehnquist upheld state powers to apply the death penalty in *Furman v. Georgia,* 408 U.S. 238 (1972); he voted to allow states to apply the penalty to people who were mentally retarded in *Penry v. Lynaugh,* 492 U.S. 302 (1989), to fifteen-year-olds in *Thompson v. Oklahoma,* 487 U.S. 815 (1988), and to rapists in *Coker v. Georgia,* 433 U.S. 584 (1977). In *Rummel v. Estelle,* 445 U.S. 263 (1980), Rehnquist upheld a life

sentence for a defendant who passed three bad checks for a total of $229. Rehnquist is reluctant to reopen cases on federal habeas corpus review, sometimes denying appeals even when evidence revealed after the trial pointed to the innocence of the accused.

When interpreting the First Amendment's Establishment Clause prohibiting government from engaging in establishment of religion, Rehnquist has continued the direction set by the later Burger Court, supporting religious accommodation rather than strict separation of church and state. He thus cast votes, many in dissent, permitting a nativity scene on government property in *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573 (1989); supporting prayer in public school in *Wallace v. Jaffree,* 472 U.S. 38 (1985), and *Lee v. Weisman,* 505 U.S. 577 (1992); allowing government aid to religious schools in *Mitchell v. Helms,* 530 U.S. 793 (2000); and supporting state laws requiring the teaching of creationism in public schools in *Edwards v. Aguillard,* 482 U.S. 578 (1987). In addition to allowing government to aid religion, he voted with the majority to apply less stringent standards to state limits on the free exercise of religion in *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), and to strike down the federal Religious Freedom Restoration Act in *City of Boerne v. Flores,* 521 U.S. 507 (1997).

Rehnquist's views on the Constitution also have led him to find only a limited right to privacy. He has consistently voted against recognizing abortion as a constitutionally protected right and has called for overturning and limiting *Roe v. Wade,* 410 U.S. 113 (1973). In *Eisenstadt v. Baird,* 405 U.S. 438 (1972), he voted in dissent to deny unmarried people the right to contraceptives. In *Bowers v. Hardwick,* 478 U.S. 186 (1986), he voted with the five–four majority to uphold state sodomy laws, and in *Romer v. Evans,* 517 U.S. 620 (1996), he dissented when a majority of his colleagues ruled that Colorado's constitutional amendment prohibiting laws protecting homosexuals violated the Equal Protection Clause. Rehnquist has sided with the claim that the First Amendment right of private groups to associate sometimes overrides laws designed to provide equal protection to minorities.

Long one of the Court's most conservative members who has voted alone, he is often joined by Justices Clarence Thomas, Antonin Scalia, and others, and in many areas of the law, Rehnquist has been successful in forging a working majority for many of his views.

Alan M. Fisher

See also: Capital Punishment; Fourteenth Amendment; Prisoners' Rights.

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Release-Time Program

A release-time program is one in which public schools permit their students to use a certain period of the day to leave campus to receive religious instruction. The program is said to have had its origin in a 1914 project by William A. Wirt, a superintendent of education in Gary, Indiana, who enlisted more than six hundred students who attended off-campus religious instruction during the school day. According to a survey by Bestnetwork, a national association of release-time Bible education providers dedicated to establishing release-time programs in public schools, release-time programs were active in twenty-three states by 1922 with 40,000 students in 200 school districts participating, and the programs reached a peak in 1947 with 2 million students and 2,200 school districts. According to surveys cited in *Gordon v. Board of Education of the City of Los Angeles,* 178 P.2d 488 (1947), by 1947 forty states had authorized some form of release-time program for public school students, and no appellate court in any state had held such programs unconstitutional.

Release-time programs appear to present a classic confrontation between the First Amendment's Free

Exercise Clause, under which government cannot interfere with the individual's free exercise of religion, and the Establishment Clause, which prohibits government from engaging in establishment of religion. On the one hand, students may claim that going off campus for religious instruction is necessary in order for them to exercise their religion freely; on the other, many people might argue that the government is establishing religion by facilitating religious activities during school hours.

Following the U.S. Supreme Court's 1947 decision in *Everson v. Board of Education,* 330 U.S. 1, which applied the First Amendment's two religion clauses to state government, the Court took a hardening attitude toward violation of the line between religion and government. In the first case to involve "release time," *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203 (1948), the Court in an eight–one decision disapproved of a policy enabling teachers to offer religious instruction in the school for an hour a week. *McCollum* involved a local board of education in Illinois that agreed to permit religious instruction in the schools under a "released time" arrangement that allowed students whose parents had signed "request cards" to attend religious instruction classes conducted during regular school hours in the school building by outside teachers furnished by a religious council representing the various faiths, subject to the approval and supervision of the superintendent of schools. Attendance records were kept and reported to the school authorities in the same way as for other classes, and pupils not attending the religious instruction classes were required to continue their regular secular studies. The Court found that "the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education" violated the Establishment Clause.

Four years later the Supreme Court took a more liberal turn toward the ability of schools to provide release time to students. In *Zorach v. Clauson,* 343 U.S. 306 (1952), the Court in a six–three decision validated a New York statute that permitted schools to provide students release time to obtain religious instruction off campus with no costs to the school. Easing the line between separation of religion and government without explicitly overruling *McCollum,* Justice William O. Douglas, writing for the Court, firmly placed government on the side of religion while maintaining neutrality among different religious faiths:

> We are a religious people whose institutions presuppose a Supreme Being. . . . We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Justice Hugo L. Black dissented in *Zorach,* asserting that the holding posed a liberty issue under the Establishment Clause; he claimed that a neutrality in which a public school "encourages religious instruction or cooperates with religious authorities . . . is all the more dangerous to liberty because of the Court's legal exaltation of the orthodox and its derogation of unbelievers." Justice Robert H. Jackson, also in dissent, saw a liberty issue as well. He denied neutrality between government and religion, claiming that the school "serves as a temporary jail for a pupil who will not go to Church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion." Furthermore, Justice Jackson was concerned that "The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power." However, Justice Douglas rejected the liberty issue, stating that "it takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools."

In any event, since *Zorach,* public school authorities are free from First Amendment constraints to dis-

miss students for off-campus religious instruction without dismissing the entire school program, provided they do not encourage or discourage student participation in the release-time program and do not penalize students who for whatever reason do not attend. Release-time programs are popular in many parts of the country.

Clyde E. Willis

See also: Establishment Clause; Free Exercise Clause; Prayer in Schools; *West Virginia Board of Education v. Barnette; Zorach v. Clauson.*

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Religious Freedom Restoration Act of 1993

Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA) in response to the 1990 U.S. Supreme Court decision of *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990). RFRA was intended to set out a high standard of constitutionality for any law that had the effect of "burdening" free exercise of religion, a fundamental freedom found in the First Amendment to the U.S. Constitution.

In *Smith,* two members of a Native American church were terminated from their jobs. The employees were then refused Oregon state unemployment benefits on the grounds that their use of the drug peyote violated the law. The employees contended that peyote was part of their religious ceremonies, and thus their use of it was protected by the First Amendment. They sued to contest the antipeyote law as it applied to their religious use of peyote.

The U.S. Supreme Court found in favor of Oregon and ruled that the antidrug law applied to the terminated employees, despite the fact that they used peyote in a religious manner. The Court wrote that "[t]o make an individual's obligation to obey such a law contingent on that law's coincidence with his religious beliefs . . . contradicts both constitutional tradition and common sense." The employees had violated a law against the use of drugs that applied to everyone, whether or not that use was religious in nature. Therefore, the fact that they used peyote in their religious ceremonies was not enough to excuse them from the law.

Smith caused widespread protests on the grounds that religious exercise had long been exempt from generally applicable laws, such as the Oregon antidrug law. As an example, the Amish were often exempt from the obligations of general laws because these laws conflicted with clear Amish religious beliefs. In response to these protests, Congress enacted RFRA.

RFRA reversed the Supreme Court's decision in *Smith* and provided an exemption to any law that had the effect of substantially burdening religious exercise. RFRA itself did not define what constituted a "substantial burden" on religious exercise. Subsequent court cases defined the term to mean any law that forced people to do something their religion prohibited or that prevented people from doing something central to their religion.

The statute had five parts. The first part criticized the *Smith* decision and stated that "Congress finds that the compelling interest test . . . is a workable test for striking sensible balances between religious liberty and compelling prior government interests." The "compelling-interest standard" is the highest burden in constitutional law for a statute to meet when it is reviewed in court.

The second part of RFRA set out the elements of the compelling-interest test. Under the compelling-interest test, a law would be unconstitutional unless it did two things: First, the statute must serve the most important governmental interests; second, it must be the least restrictive alternative available to serve those interests. The compelling-interest standard

is applied in almost every circumstance involving fundamental rights guaranteed under the Constitution.

The remaining parts of the statute involved technical matters, including a provision explicitly stating that RFRA did not affect previous judicial decisions interpreting the Establishment Clause of the First Amendment. RFRA applied only to the Free Exercise Clause of the First Amendment.

RFRA was itself subsequently declared unconstitutional by the Supreme Court four years after its enactment, in *City of Boerne v. Flores,* 521 U.S. 507 (1997). In *Boerne,* a local zoning board denied the Roman Catholic Archdiocese of San Antonio a building permit to enlarge a church, finding that the church was of historical value and the planned expansion would ruin that value. The archdiocese sued under RFRA, arguing that the denial of the permit placed a substantial burden on meeting its religious needs.

The Court did not rule on whether the zoning board had violated RFRA. Instead, it found that RFRA itself was unconstitutional. The Court stated that in enacting RFRA, Congress had exceeded the power granted to it under Section 5 of the Fourteenth Amendment, and the statute was therefore unconstitutional. Further, the Court found that the scope of RFRA, which potentially touched every law passed on any subject, was out of proportion to the evidence of interference with religious exercise that Congress considered in enacting RFRA.

Because *Boerne* was based on the extent of the power of Congress to regulate state law, courts that since have considered the issue have held that RFRA still applies to *federal* law.

Gerald J. Russello

See also: City of Boerne v. Flores; Compelling Governmental Interest; *Employment Division, Department of Human Resources of Oregon v. Smith;* Establishment Clause; Free Exercise Clause; Strict Scrutiny.

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Religious Holidays

As the United States has become increasingly pluralistic, observance of religious holidays has caused conflict about the proper role of government in recognizing religious holidays and about the rights of individuals in the workplace and in public schools to observe religious holidays. These conflicts involve interpretation of the Establishment Clause and the Free Exercise Clause of the First Amendment. Under the Establishment Clause, government cannot engage in the establishment of religion; under the Free Exercise Clause, government cannot interfere with the individual's free exercise of religion. At times the conflicts also manifest the inherent tension between these two clauses. For example, if government must refrain from recognizing religious holidays to avoid establishing religion, does this infringe on the free exercise of individuals who wish to enjoy their religious holidays in public as well as private venues? If government, in order to protect free exercise rights, makes special accommodations for individuals to observe religious holidays, does this amount to favoring their religions over others, or religion over nonreligion, thus violating the neutrality expected under the Establishment Clause?

RELIGIOUS HOLIDAYS AND ESTABLISHMENT OF RELIGION

Establishment Clause conflicts have centered on public places, such as parks and courthouse lawns, and on public schools.

The first major Supreme Court pronouncement on public places came in *Lynch v. Donnelly,* 465 U.S. 668 (1984), involving a government-sponsored Christmas display in Pawtucket, Rhode Island. The elaborate display included Santa Claus, reindeer, a Christmas tree, and various whimsical figures. Featured prominently was a nativity scene. Pawtucket officials claimed the purpose of the display was to promote downtown Christmas shopping.

A divided Supreme Court upheld the constitution-

ality of the display. The majority of five justices agreed with Pawtucket officials that Christmas was both a secular and a religious holiday and that placement of the manger scene in the midst of secular Christmas symbols essentially secularized it. They also relied on tradition as a justification. They determined that Pawtucket's display passed the "*Lemon* test," derived from *Lemon v. Kurtzman,* 403 U.S. 602 (1971), for determining what was allowed under the Establishment Clause. They found no primary religious purpose, effect, or potential for entanglement and divisiveness in the Pawtucket display.

The dissent also applied the *Lemon* test and found that Pawtucket's nativity scene failed all three parts. They further disputed the majority's assertion that this use of a crèche was part of a long-standing tradition of public observance of Christmas.

Despite jokes about the "plastic reindeer rule," the Court did not address how many secular items are needed to secularize a display otherwise perceived as religious. Their ruling also raised other questions. What about privately owned nativity scenes or other religious objects placed on public property? Which types of public property—public parks as opposed to courthouse lobbies, for example—are appropriate for private displays? What disclaimers are needed to avoid violating the First Amendment?

The courts continue to face these questions. For example, a very divided Supreme Court in *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573 (1989), held unconstitutional a crèche placed in the Allegheny County courthouse in Pittsburgh by a Roman Catholic organization because its prominent location, religious banner, and absence of secular items implied government endorsement of religion. However, a menorah and Christmas tree outside the city-county building passed the acceptability test because the Christmas tree secularized the menorah and the display was called a "Salute to Liberty."

Government property may through usage become a "public forum"—a public place for free expression that must be equally available for speech and expression by all without content-based restrictions. Groups sometimes place religious symbols in such locations during religious holiday seasons. However, efforts by the Ku Klux Klan to place crosses in public forums at Christmas led even persons otherwise supportive of holiday displays on government property to object because of the racist connotations. One such conflict resulted in the Supreme Court reiterating the "public forum" concept even for unpopular groups. Many civil libertarians have welcomed such decisions, but others take a strict separationist stance, believing that religious conflict is best avoided by keeping all religious holiday displays off public property.

Conflict over religious holiday observances in public schools has given rise to the so-called December dilemma caused by the proximity of Hanukkah to Christmas. Recognition of Christmas but not Hanukkah in schools has drawn criticism, but giving equal billing to both holidays has also been criticized as elevating a lesser Jewish holiday into a major celebration simply because it falls in December.

Supreme Court pronouncements on religion in public schools indicate that Christmas, Hanukkah, and other religious holidays may be observed in their secular forms. Also, teachers may teach objectively about the religious aspects when appropriate as part of secular instruction. Only holidays that have secular as well as religious significance may be celebrated, though instruction is permissible for others.

As public school populations have become more diverse, some efforts have been made to give recognition to holidays of Muslims and other minority religions. Meanwhile, increased sensitivities have brought school observance of such holidays as Valentine's Day and Halloween—largely secular but religious in origin—under greater scrutiny, leading some schools to avoid them or transform them into more inclusive occasions, such as celebrating fall festivals instead of Halloween.

RELIGIOUS HOLIDAYS AND RELIGIOUS LIBERTY

Religious holidays also raise issues involving religious liberty. Whereas the Free Exercise Clause protects against government restrictions on religious liberty, federal law protects private-sector employees who wish to be absent from work on their religious holidays. Public- and private-sector employers may accomplish this in such ways as switching employees' schedules or letting employees make up missed days. Employees may not make unreasonable demands on employers.

Similarly, public schools must, within reason, excuse students on religious holidays and allow them to make up work missed.

As the population becomes more diverse, three trends are in evidence. First, those people insistent on holiday displays on public property are testing various combinations of private and public involvement and religious and secular symbols to see what passes judicial scrutiny. Second, others continue to challenge questionable government observance of religious holidays. Finally, governments are becoming more sensitive to potential conflicts and the cost of litigation and are seeking acceptable ways to both reflect and respect community diversity.

Jane G. Rainey

See also: County of Allegheny v. American Civil Liberties Union; Establishment Clause; *Lemon v. Kurtzman; Lynch v. Donnelly.*

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Religious Land Use and Institutionalized Persons Act of 2000

Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) in recognition of "the importance the free exercise of religion plays in our democratic society." It is meant to address the deficiencies the Supreme Court found with its predecessor, the Religious Freedom Restoration Act (RFRA) of 1993. RLUIPA addresses two specific areas: laws that govern land use and laws that impact the religious exercise of persons in prisons, mental hospitals, or similar institutions.

In its deliberations, Congress found that land use is an inextricable part of religious exercise. Religious groups must have a place to gather and worship. The Senate explicitly stated that "[t]he right to build, buy or rent such a space [for religious exercise] is an indispensable adjunct of the core First Amendment right to assemble for religious purposes." Those purposes extend beyond formal religious services to encompass a wide range of outreach, including educational, social, and charitable programs. Institutionalized persons are even more affected in the exercise of their religious beliefs because burdensome regulations govern most aspects of their behavior and their conduct is subject to the discretion of government officials.

In the hearings and other proceedings leading up to enactment of RLUIPA, Congress heard testimony from a wide variety of groups whose religious exercise was threatened or burdened by these two types of laws. Representatives of Catholic, Jewish, Muslim, Mormon, and other religious groups testified about the difficulties their faiths faced in disputes with government officials over land-use decisions and prison regulations.

In general, RLUIPA prohibits any governmental agency from enacting regulations in a manner that treats religious exercise on less than equal terms with nonreligious exercise. It further prohibits government from discriminating against religious exercise in the land-use and institutionalized-person settings. One federal appellate court interpreted RLUIPA as establishing that "a law that simply protects religious organizations from unfair treatment certainly cannot be impermissible as an unconstitutional endorsement of religious activity."

Zoning and other land-use decisions have traditionally been left to the discretion of local government authorities. RLUIPA, however, establishes minimum guidelines for constitutionally permissible treatment of religious land uses. Under RLUIPA, government can neither totally exclude "religious assemblies from a jurisdiction" nor unreasonably limit the "religious assemblies, institutions, or structures" within its jurisdiction. Moreover, the government must allow for some religious uses of land within its jurisdiction. This determination that some religious use of land must be permitted rests upon prior federal and state law that has found residential communities benefit by having religious institutions present.

RLUIPA prohibits any government agency—local,

state, or federal—from imposing or implementing "a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution." The act applies in three specific sets of circumstances: where the substantial burden (1) "is imposed in a program or activity that receives federal financial assistance, even if the burden results from a rule of general applicability"; (2) "affects, or removal of the substantial burden would affect" interstate commerce or commerce with Native American tribes; or (3) "is imposed in the implementation of a land use regulation or system of land use regulations, under which the government makes . . . individualized assessments of the proposed uses for the property involved." An "individualized assessment" is a determination made by a zoning board or other governmental agency that is based on the particular facts of one unique piece of property. It is not, in other words, a general law applicable to every property in a given area. As almost every zoning plan and land-use approval process involves an individualized assessment, including the proposed use for the property and the character of the area where the property is located, RLUIPA applies in a broad array of circumstances.

The portions of RLUIPA that deal with institutionalized persons track the land-use sections. Any law that imposes a substantial burden on any program receiving federal funding is subject to the statute where those laws affect institutionalized persons. It also applies to any regulations concerning institutionalized persons that affects, or would affect, interstate commerce or Native Americans.

If a law in one of these two areas is challenged under RLUIPA, the government must show both that the imposition of the burden on a complaining party "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." Even if the government can show that the regulation furthers such an interest, it still must show also that the challenged regulation is the least burdensome way to further that goal. This compelling-interest test is the highest level of review in constitutional law.

Instead of meeting this two-part test, the government as an alternative can remove or modify the challenged law or regulation. When such action is taken to remove or modify the challenged ordinance, the standard of review is lessened to the more lenient rational-basis standard. Under that standard, a government need only show that the land-use regulation bears some logical connection with a governmental purpose.

Because RLUIPA was passed recently, the Supreme Court has not yet ruled on its constitutionality. Several lower federal courts, however, have been presented with constitutional challenges to RLUIPA on a wide variety of grounds. Most have ruled that the statute is an appropriate exercise of congressional power and does not suffer from the same flaws as RFRA.

Gerald J. Russello

See also: City of Boerne v. Flores; Free Exercise Clause; Land Use; Religious Freedom Restoration Act of 1993; Zoning.

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Religious Symbols and Displays

The public display of religious symbols is a contentious religious liberty issue. The Establishment Clause of the First Amendment to the Constitution of the United States prohibits the government from supporting or hindering religion. How people interpret this prohibition and how they believe it relates to other fundamental freedoms in large part determines how they perceive the issue of public display of religious symbols.

Presently, three main theories of Establishment Clause interpretation exist in U.S. Supreme Court jurisprudence, all of which have been applied to different religious symbol and display cases. One theory holds that it is necessary for individuals to be coerced

into exercising or abstaining from exercising their religious beliefs in order to prove an Establishment Clause violation. This theory makes it difficult for plaintiffs to prove that the public display of a religious symbol is unconstitutional, since merely erecting a display does not coerce anyone and can be done at little or no cost to taxpayers. A second theory contends that the Establishment Clause actually prohibits any act that could be perceived as government endorsement of religion. In the context of religious displays, the appropriate constitutional inquiry under this theory is whether a reasonable observer, viewing the display, would believe that the government was endorsing the religious message of the display.

Both of the first two theories of Establishment Clause interpretation claim to derive from the test originally advocated by the Supreme Court in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). According to the Court in that case, an act violates the Establishment Clause if its primary purpose or effect is the promotion or hindrance of religion or if it excessively entangles the government with religion. Most religious symbol and display cases turn on whether five justices agree that a display violates the endorsement test, since it incorporates much of the *Lemon* analysis without limiting the Establishment Clause to a prohibition on government coercion.

In *Lynch v. Donnelly,* 465 U.S. 668 (1984), the Supreme Court permitted the display of a religious Christmas scene by the city on private property. The Court held that allowing the display was permissible because it was unlikely that anyone viewing it would infer that the government supported the religious message of the display. In creating the display, the city of Pawtucket, Rhode Island, was demonstrating the historically religious significance of the Christmas holiday without necessarily supporting that religious claim. Five years later, in *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573 (1989), the Supreme Court reached the opposite result. In the *Allegheny* case, a Christmas scene was placed on the steps of the county's courthouse. A majority of justices held that the placement of the scene on the steps of the courthouse, far from the other holiday decorations that the county had erected around the building, could convey to a reasonable observer that the county endorsed the religious content of the display. These two cases illustrate the contextual nature of the endorsement theory inquiry. The justices determine, on a case-by-case basis, whether a particular display in a particular location could lead a reasonable observer to perceive the government as supporting the religious content of the display. If this is the case, the display is unconstitutional.

Lower federal courts have wrestled with the endorsement theory and the other Establishment Clause theories in resolving the many religious display cases presented to them. One issue has proved to be especially difficult to resolve: Who should have standing (that is, the right) to sue a government to halt a religious display? An individual has standing, or the right to file a lawsuit, in a religious display case if that person has been injured by the display in some way. The injuries do not have to be physical or economic, but they do have to be identifiable. Circuit courts have split on what injuries are sufficient to confer standing. Some courts have argued that merely coming into contact with an offensive religious display by a government is an injury that can support a lawsuit. Other courts have said that contact with a display is not sufficient, but taking action such as driving out of one's way to avoid contact with an offensive display would be sufficient. Still other courts have held that an offensive display must impair the individual's ability to use public resources such as a park or government building in order to confer standing. The Supreme Court has yet to pronounce clear rules for determining who can bring suit in religious display cases.

Another difficult issue for both lower courts and for the Supreme Court has been deciding what to do with religious symbols or displays set up by private citizens on public property. A typical case in this category might deal with whether it is constitutional for a city to allow a private service organization to display a nativity scene in a city park. The city might arguably be supporting a religious message by allowing such a display, but it would be more difficult for an observer to perceive that the government endorsed that message if the display is in a park rather than on the steps of a county courthouse. A sign disclaiming government support for the religious message or private financial support for the display could further insulate the city from an Establishment Clause challenge.

A further complication lies in the tension between the Establishment Clause's prohibition on government support for religious messages and the right of all Americans to speak freely. The First Amendment includes not only the two religion clauses but also the clause protecting free speech, which indicates the high importance of both freedoms. If the park was a public forum, a site designated as accessible for people professing all opinions, the city would be forced to choose between allowing the display and potentially violating the Establishment Clause and prohibiting the display and potentially violating the right of private individuals to express their beliefs in public. The Supreme Court ruled in *Capitol Square v. Pinette,* 515 U.S. 753 (1995), that even religious groups should have equal access to public forums. In this case, the Ohio Ku Klux Klan sought to display an unattended cross in the area around the state capitol alongside other holiday displays. The state denied the Klan's request out of concern that allowing the cross might be a violation of the Establishment Clause. The Supreme Court decreed that Ohio was obligated to grant the permit, since the land in question was an officially designated public forum to which all citizens had access.

The chance that a passer-by might misperceive the display as a government endorsement of religion was an inadequate justification for denying the permit. Although the fact that the Ku Klux Klan was displaying the cross raised other issues about its significance, lower courts have held relatively consistently that fears of Establishment Clause violations cannot trump the free speech rights of private citizens in public forums.

The reach of the Establishment Clause has yet to be firmly established in the United States. Depending on which theory of interpretation courts accept, and depending on how courts believe the Establishment Clause should relate to other rights, such as the right to free speech, courts can come to different conclusions about when a religious display is constitutional and when it is not. As courts hand down more case-by-case determinations of whether particular displays violate the Establishment Clause, its reach will become clearer.

Matthew D. Cannon

See also: County of Allegheny v. American Civil Liberties Union; Establishment Clause; *Lemon v. Kurtzman.*

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Reno v. American Civil Liberties Union (1997)

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997), presented the U.S. Supreme Court with old questions about the reach of the First Amendment to the Constitution in a new context: the Internet. The Court decided that material on the Internet was entitled to full First Amendment protection and that two provisions of the Communications Decency Act of 1996 were unconstitutional because they were too vague.

Two provisions of the act and the First Amendment took center stage in the case. The first provision prohibited the knowing transmission of obscene or indecent messages to any recipient under age eighteen. The second prohibited the knowing sending or displaying of patently offensive messages in a way that made them available to a person under age eighteen. Of course, the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."

Before the Court could decide the constitutionality of the statutory provisions, it had to decide what level of First Amendment protection to afford Internet material. Not all media receive the same level of protection. The government may regulate television and radio more heavily because of the history of heavy regulation, the scarcity of available frequencies, and the invasive nature of these media to which passive listeners may be exposed. The Internet, the Court concluded, does not share those characteristics: (1) There is no history of regulation; (2) space for ex-

pression is not scarce; and (3) content is available only to an active participant.

After deciding that Internet material should receive full speech protection, the Court turned to the constitutionality of the two provisions. Both, the Court decided, were unconstitutionally vague. The first used the term "indecent" without providing a definition. The second used the term "patently offensive" without supplying a solid definition. The Court was particularly troubled by this vagueness because the act imposed content-based restrictions and assessed criminal penalties for their violations. Thus, the prospect of "chilling," or silencing, lawful speech was high. Moreover, vague regulations are particularly susceptible to discriminatory enforcement, an especially worrisome prospect when criminal penalties are involved.

The question of whether the two provisions were constitutional was complicated by the fact that they were aimed at minors. In several decisions the Court has recognized that because the government has a strong interest in protecting children, First Amendment rights are more limited when speech is directed to children versus adults. This principle is limited, however. For example, the government may not limit adults, as it attempted to do in this case, to only that material fit for children. Although the Court struck down most of both statutory provisions, it did not invalidate the oft-repeated view that the First Amendment does not protect obscenity.

Thus, the Court ultimately decided that Internet materials deserve full free speech protection and the bulk of the provisions of the Communications Decency Act were too vague to be enforceable under the First Amendment.

Justin M. Sandberg

See also: Censorship; Chilling Effect; First Amendment.

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Reply, Right to

A "right to reply" means the right of access to the columns of a newspaper or magazine, the airtime of a broadcast station, or the envelopes of a private mailing to respond to a political attack against a person or institution. The notion that the media can be forced in this de facto manner to publish messages they do not sanction raises difficult issues of the right to free speech, which is guaranteed under the First Amendment to the U.S. Constitution. The U.S. Supreme Court has held that there is no such right to reply in the case of the print media but that there may be a limited right in the case of broadcasters because of the limited number of outlets.

In 1974, the U.S. Supreme Court struck down a Florida right-of-reply law that applied to newspapers. A candidate for the Florida House of Representatives who was criticized by editorials in the *Miami Herald* demanded that the *Herald* print his response verbatim. He pointed to a state law entitling any candidate whose personal character or official record was attacked by a newspaper to have the newspaper print, free of charge, the candidate's unedited reply in "as conspicuous a place and in the same kind of type as the charges which prompted the reply." The Florida Supreme Court upheld the law, asserting that free speech was enhanced, not stifled, by a right to reply, and that the law furthered the "broad societal interest in the free flow of information to the public." The newspaper appealed.

Writing for a unanimous Court in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 421 (1974), Chief Justice Warren E. Burger reversed the Florida court, saying that the right-of-reply law "exacts a penalty on the basis of the content of a newspaper" by forcing the editors to pay the costs "in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print." Faced with these costs, the editors "might well conclude that the safe course is to avoid controversy" and might therefore be more likely to blunt or reduce the newspaper's political coverage. But at the core of the First Amendment's protection of freedom of speech is the "free discussion of gov-

ernmental affairs." The Florida law intruded "into the function of editors," by constraining their view of what should be published and where and how it should be placed. "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment," all of which are protected by the First Amendment.

In a similar vein, in *Pacific Gas and Electric Co. v. Public Utility Commission,* 475 U.S. 1 (1986), the Supreme Court voided a public service commission's order to a privately owned utility company that it distribute in an envelope containing its monthly customer newsletter an advocacy group's mailing opposing the utility's position on public issues. The Court held that the public service commission was discriminating on the basis of "viewpoint" because the only groups covered by the order mandating free distribution by the utility company were those that opposed the company's position on rate-making issues.

Although the general rule is the same for broadcast stations—there is no constitutional right to airtime beyond the discretion of the station owners and managers—the Court upheld as constitutional the so-called "fairness doctrine," a form of right to reply that the Federal Communications Commission (FCC) originally mandated for broadcasting stations in 1934. In *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), the Court said that the First Amendment did not bar the FCC from imposing the fairness doctrine on radio and television stations. Under the fairness doctrine, broadcasters had to give free time for replying to personal attacks on the air or to political editorials broadcast by the stations. The fairness doctrine was not a requirement of the First Amendment, however, and the FCC was free to revoke the fairness doctrine at any time, as it later did.

In *CBS v. Democratic National Committee,* 412 U.S. 94 (1973), the Court rejected the claim that the First Amendment required broadcast stations to sell time generally to political parties so that they could air dissenting views on current social and political controversies. By contrast, in *CBS v. Federal Communications Commission,* 453 U.S. 367 (1981), the Court made an exception to the general rule against mandatory purchase of advertising time. A station had refused to permit a legally qualified candidate for federal office to buy broadcast time to air his views. The FCC threatened to revoke the license of the station because of its refusal, and the Court said the First Amendment would allow the FCC's action under the circumstances. Thus, the FCC may require stations to sell a qualified candidate airtime notwithstanding the general rule that there is no overall right of access to a broadcast outlet.

Jethro K. Lieberman

See also: Fairness Doctrine; First Amendment.

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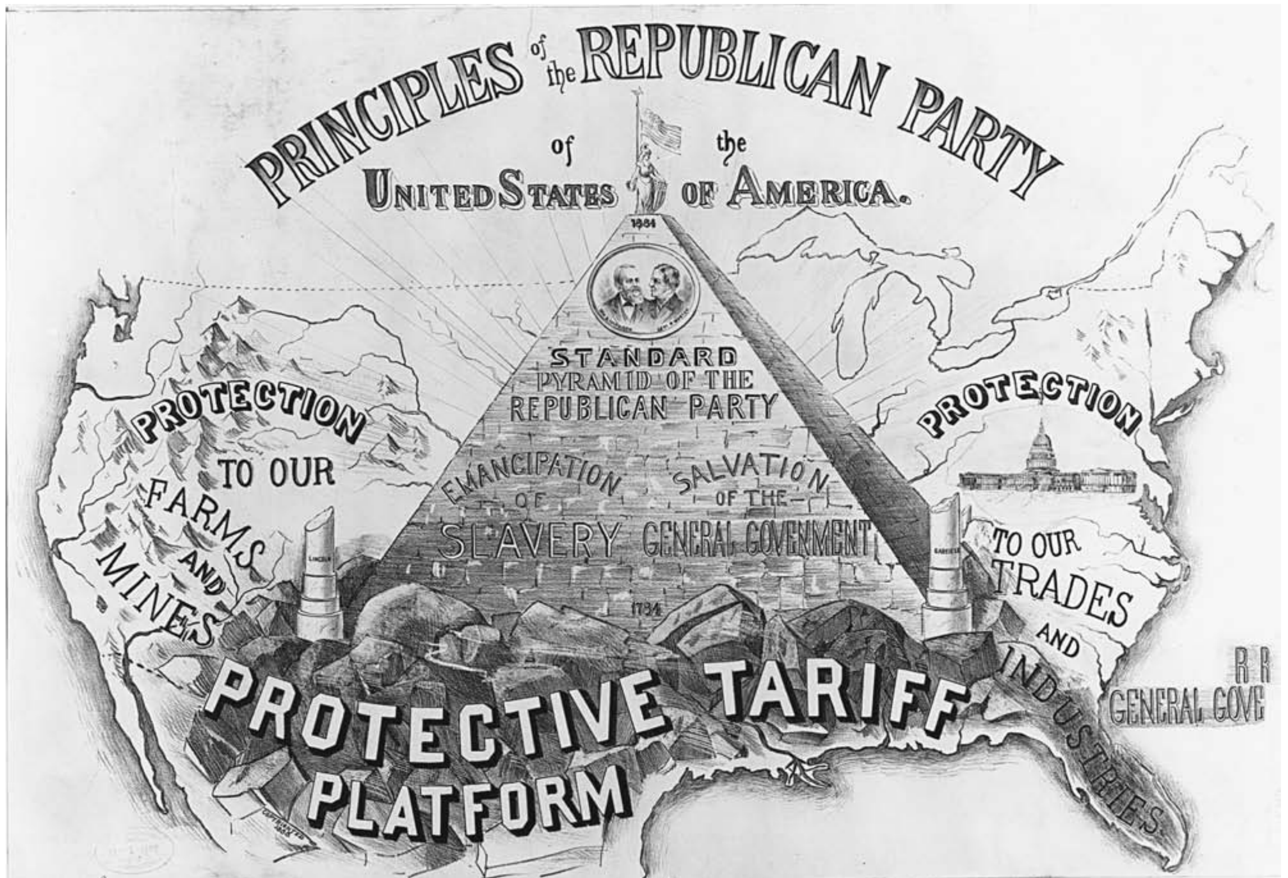
Republican Party

Founded in 1856 with a commitment to the abolition of slavery, the Republican Party gained national office in 1860 and has remained one of the two major parties in the United States since then. Throughout its history, the Republican Party has addressed many civil liberties issues.

Although a minor party at its founding, it led the United States through the trauma of the Civil War under the presidency of Abraham Lincoln. It was during the Lincoln administration that the party adopted policies with important ramifications for civil liberties. Facing the secession of many Southern states, President Lincoln undertook actions of questionable constitutionality. In several areas of the country, the president suspended the writ of habeas corpus, the basic guarantee that citizens be brought before magistrates and informed of the reasons for being held by authorities.

Equally significant, the Lincoln administration established military courts in several regions, including areas where the Union government had never lost



Principles of the Republican Party of the United States of America, circa 1888. *(Library of Congress)*

control. These courts derived their authority from the president and were responsible to the executive branch alone. Although the Supreme Court never addressed the constitutionality of the military courts during Lincoln's administration, in 1866, under President Andrew Johnson, the Court ruled that Lincoln had acted improperly in establishing military courts in Indiana, a state that remained loyal to the Union cause. According to the Court, individuals suspected of illegal activities against the government should have been tried in the existing state and federal courts of Indiana, instead of military courts created by the executive branch.

Lincoln took other actions that weakened the civil liberties protections of the Constitution. For instance, he ordered the arrest of some Maryland legislators when it was feared the Maryland legislature might vote for secession. This instruction from the president, though far-reaching, was typical of the methods the administration used to preserve the Union. Intimidation of political foes and newspapers was employed as a tactic as well.

Initially, the "Radical" Republicans during Reconstruction supported civil liberties for African Americans by passing the Thirteenth, Fourteenth, and Fifteenth Amendments. Still, one major decision taken during this time had far-reaching implications for the nation. In return for an agreement with the Democrats giving the Republican nominee, Rutherford B. Hayes, victory in the 1876 presidential election, the Republican Party agreed to end Reconstruction policies in the South. This action restored the old Southern power structure to positions of authority, and by the end of the nineteenth century, restrictions on civil rights and liberties had been enacted throughout the South.

Anticommunism became an important national issue during the twentieth century. Both the Democrats

and Republicans responded to this national urgency. During the 1920s, Republican administrations continued the anti-Communist policies of President Woodrow Wilson's attorney general, A. Mitchell Palmer. In the late 1940s and into the 1950s, some members of the Republican Party were associated with the anti-Communist congressional hearings of Senator Joseph McCarthy (R-WI).

Richard M. Nixon won the 1968 presidential election, inheriting the Vietnam War from the Democratic administration of Lyndon B. Johnson. In 1971 the *New York Times* published the *Pentagon Papers,* a set of documents detailing the nation's policies in Southeast Asia. These documents were given to Daniel Ellsberg, a former employee of the Department of Defense. Sufficiently concerned about the impact of this action on U.S. foreign policy, the Nixon administration went to the Supreme Court seeking a court order to prevent the newspaper from publishing the materials (prior restraint). In *New York Times Co. v. United States,* 403 U.S. 713 (1971), the Court ruled against the administration, and the White House took other extraconstitutional actions.

A special operations team, called the "plumbers," was established by the White House. With the purpose of stopping leaks of information to the press, the plumbers tried to discredit Ellsberg. They broke into the office of his psychiatrist, hoping to uncover incriminating information about him. Later, the plumbers broke into the offices of the Democratic National Committee in Washington, D.C., an event that became known as the Watergate scandal and that led to an attempted cover-up and the downfall of the Nixon administration. As the press began to investigate the Watergate matter, the Nixon White House tried to defend itself by pressuring the owners of the *Washington Post.* More bluntly, the White House prepared a list of its enemies in an effort to intimidate its political opponents.

Since the 1960s, especially during the 1964 presidential campaign by Barry Goldwater, some have accused the Republican Party of backing away from support for civil liberties issues in order to appeal to some of its more conservative members. Ronald Reagan was accused of not supporting many types of individual rights, such as abortion, for example.

When the Pentagon in Washington, D.C., and the World Trade Center in New York City were attacked September 11, 2001, the United States entered a new phase. Since these attacks were launched by a terrorist group rather than a nation-state, the lines between law enforcement, civil liberties, and national security became blurred. In response to these events, the executive and legislative branches approved new powers for the federal government to monitor communications and obtain information. The administration of George W. Bush even declared that certain individuals were not entitled to the due process of law guaranteed by the U.S. Constitution.

The federal reaction to September 11, 2001, should be placed within the historical context of previous crises as well as previous Republican administrations. Presidential power tends to expand at the expense of civil liberties during times of crisis, as evidenced by the Lincoln presidency and the treatment of anticommunism in the mid-twentieth century. Eventually, presidential power over civil liberties shows a pattern of retreating once the threat becomes less ominous or perceived. In contrast to Lincoln and late-nineteenth-century presidents, the presidents of the Cold War operated in conditions of permanent crisis.

Whereas the presidency almost immediately lost its tremendous authority as the Civil War ended, the Cold War presidency continued to exercise and gain power. Its high point was the Nixon administration, when revelations about executive branch misconduct caused the legislative branch to reassert its authority as its nineteenth-century predecessor did after the Civil War. In seeking new powers over civil liberties, the George W. Bush administration is following a long-established pattern in U.S. political history of expanding executive authority in response to a national threat.

Michael E. Meagher

See also: Democratic Party; Minor Political Parties; Political Parties.

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Republican Party of Minnesota v. White (2002)

In *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), the U.S. Supreme Court expanded freedom of speech for state judicial candidates. Although the president appoints all federal judges with the advice and consent of the U.S. Senate, many state judges are elected. In such cases, there is a fundamental conflict between a commitment to an independent judiciary and the belief that well-informed voters can more thoughtfully choose their leaders than ignorant voters can. If candidates can discuss their views on controversial issues, how can they be trusted to be impartial? That is the constitutional tug-of-war over whether would-be judges can talk about topics ranging from abortion to crime control to welfare to capital punishment. This type of content-based gag on political speech lies at the heart of First Amendment freedoms and the public's ability to assess the qualifications of candidates. As it is, fewer voters cast ballots in judicial races than in other contests, partly because they know little about the candidates.

The Supreme Court's answer—the First Amendment is trump—came in the *Republican Party* case from Minnesota, one of thirty-nine states that elect judges on a partisan or nonpartisan basis. When Gregory Wersal first sought the Republican endorsement for a nonpartisan seat on Minnesota's Supreme Court, he was confronted with the state Code of Judicial Conduct, which prohibited judicial candidates from announcing their views "on disputed legal or political issues." Violators faced professional disciplinary charges. That rule of silence was rooted in the rationale that political views should be irrelevant to a judge's performance, and that allowing such commentary would mislead the public into thinking candidates had prejudged certain types of cases. As University of Wisconsin political scientist Charles H. Franklin observed, "This ethical canon provides cover for judicial candidates to avoid taking positions on issues that are of general public concern, yet it in no way prevents the judge from actually having a position on such issues."

The challenge was backed by the state GOP, which argued that the ban prevented parties from learning candidates' views and deciding whether or not to support their election. Candidate Wersal said, "It's important public policy if you're going to have meaningful elections. My goal is to put power back in the hands of the people, and the final arbiter of whether judges are doing the right thing is the people through a judicial election."

Writing for a five–four majority, Justice Antonin Scalia asserted: "The notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. . . . We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election." The Court recognized an important public interest in having an impartial judiciary, but concluded that Minnesota's ban was not narrowly tailored to achieve impartiality or the appearance of it. Neither did such a ban have a "long [or] universal" history in the United States, it noted. Although Vermont elected judges even before it joined the Union in 1791, and although Georgia started judicial elections in 1812, there were no restrictions on what judicial candidates could discuss until 1924. Even before the Court's decision in *Republican Party,* four states imposed no candidate-speech restrictions.

The dissenting justices argued that there were core differences between campaigns for the bench and for other offices and emphasized the importance of impartiality for judges, who hold special offices of trust.

Eric Freedman

See also: First Amendment.

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Reynolds v. United States (1878)

In 1878 the U.S. Supreme Court rendered its first significant decision regarding the scope of the Free Exercise Clause of the First Amendment to the U.S. Constitution, holding that a statute passed by Congress prohibiting polygamy did not infringe upon the religious liberty guaranteed by the Free Exercise Clause.

At issue in *Reynolds v. United States,* 98 U.S. 145 (1879), was the constitutionality of the statute prohibiting the practice of polygamy. Upon taking a second wife, George Reynolds, a practicing Mormon (a common term used for a member of the Church of Jesus Christ, Latter-day Saints, or LDS), was convicted of violating the antipolygamy statute. Reynolds ultimately sought to have his conviction overturned, arguing that in taking a second wife he was fulfilling a religious obligation imposed upon all believers of his faith. Reynolds maintained that the statute at issue infringed upon his ability to practice his religion freely, thereby offending the Free Exercise Clause of the First Amendment.

Chief Justice Morrison R. Waite, writing for the Court, concluded that the congressional regulation did not offend the Free Exercise Clause. He differentiated between the degree of constitutional protection afforded religious belief, on the one hand, and religiously inspired conduct, on the other, concluding that "[1]aws are made for the government of actions and while they cannot interfere with mere religious beliefs and opinions, they may with practices." Chief Justice Waite emphasized that polygamy had never received the imprimatur of traditional Western cultures or religions. Congressional prohibition of an unorthodox practice endorsed by a nondominant religion, therefore, was a permissible regulation of behavior perceived to be "subversive of good [societal] order."

Moreover, the Court noted that an individual's motivation for engaging in willful, illicit behavior was immaterial for purposes of assigning criminal responsibility. A person may not assert a religious exemption to justify disobedience of a generally applicable, neutrally constructed statute merely because the law conflicted with that person's religious teaching. Underscoring his point, Chief Justice Waite insisted that an individual's religiously founded belief in human sacrifice, for example, did not undermine government's legitimate authority to prohibit behavior obviously corrosive to societal order. He surmised: "To permit [a religious exemption for the statutory prohibition of polygamy] would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

The Court in *Reynolds* seized an opportunity to rule on the scope of religious liberty guaranteed by the Free Exercise Clause of the First Amendment. Liberty to hold whatever religious beliefs one chooses exceeds the scope of congressional regulation and, therefore, is afforded absolute constitutional protection. Religiously motivated conduct, however, remains susceptible to reasonable governmental regulation crafted to promote societal order. Therefore, an individual may not successfully assert a religious exemption to avoid criminal responsibility for deliberately violating a neutral, generally applicable statute.

Melanie K. Morris

See also: Establishment Clause; Free Exercise Clause.

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Richardson v. Ramirez (1974)

In *Richardson v. Ramirez,* 418 U.S. 24 (1974), the U.S. Supreme Court upheld the power of states to bar convicted criminals from voting, whether temporarily or indefinitely. The Court had glanced approvingly at such laws in a few prior cases, but *Richardson* marked the first time the Court evaluated their constitutionality. The case is unique in the Supreme Court's jurisprudence on voting rights for its emphasis on the

obscure second section of the Fourteenth Amendment rather than on the Equal Protection Clause in the first section.

In 1972, three California men who had completed their sentences for felony convictions were turned away from the polls by their respective county clerks. At that time, California law barred from voting those convicted of a felony or any other "infamous crime." The men argued that under the demanding standard the U.S. Supreme Court was then using to judge restrictive suffrage laws, only an extraordinarily important state interest could justify limitation of the franchise, and no such interest existed. California's high court agreed and struck down the law in *Ramirez v. Brown,* 507 P.2d 1345 (Cal. 1973).

The California ruling did not mention Section 2 of the Fourteenth Amendment. That was understandable, because Section 2 had been almost entirely ignored by the U.S. Supreme Court in the century since its ratification in 1868. Unwilling simply to ban racial discrimination in voting—as the Fifteenth Amendment would do just two years later—northern Republicans after the Civil War also wanted to prevent resurgent southern whites from disenfranchising newly freed blacks and regaining their old power in the national government. Section 2 solved the problem, as it permitted southern whites to disenfranchise blacks but set up a stiff political penalty should they choose do so: Under Section 2, a state that disenfranchised any number of adult males would face proportionate reduction of its congressional representation. Buried within the explanation of that rule, however, was an exemption: States could disenfranchise a person "for participation in rebellion, or other crime" without suffering diminished representation.

In *Richardson,* that phrase ended the debate over the constitutionality of laws barring convicts from voting. The majority held that there was no need to ask whether disenfranchisement fulfilled a compelling state interest—as analysis under the Equal Protection Clause would require and as the California Supreme Court had done—because the "express language" of Section 2 permitted states to bar convicts from voting. The majority decided that reference in Section 2 to "crime" effectively insulated the policy from examination under the Equal Protection Clause—an interpretation strongly challenged by critics of the ruling.

Dissenting, Justice Thurgood Marshall insisted that laws disenfranchising criminals should face much stricter scrutiny. As Marshall and others have argued, the fact that the authors of the Fourteenth Amendment apparently accepted a suffrage restriction did not exempt it from skeptical review in the twentieth century. Indeed, long residency requirements for voting were universally accepted in 1868, but the Court subsequently held that such requirements violated the Constitution. Justice Marshall also pointed out that by the majority's logic, disenfranchisement for a jaywalking conviction would be fully constitutional. Moreover, he argued that the "historical purpose" of Section 2—presenting southern states with a choice between allowing blacks to vote and losing large portions of their congressional representation—was "dispositive" of the case. That purpose was narrowly political and partisan, Justice Marshall contended, and it was clear that Section 2 "was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment." Other critics have noted that all of the alleged practical purposes of disenfranchisement laws, such as prevention of fraud, could be better achieved with less restrictive policies. Finally, some Court observers have argued that by resurrecting the dormant Section 2 of the Fourteenth Amendment—which explicitly endorses limited suffrage—the Court injected serious uncertainty into its voting rights jurisprudence.

A decade after *Richardson,* the Court held in *Hunter v. Underwood,* 471 U.S. 222 (1985), that criminal-disenfranchisement laws enacted with racially discriminatory intent were unconstitutional. But *Hunter* set a high standard for proving such intent, and in general *Richardson* remains a serious obstacle to bringing an equal protection challenge to laws barring convicts from voting.

Alec C. Ewald

See also: Felon Disenfranchisement; First Amendment; Fourteenth Amendment.

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Right of Confrontation

The Sixth Amendment to the U.S. Constitution states that "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation and to be *confronted with the witnesses against him."* Thus the Confrontation Clause guarantees that the defendant is permitted to be present when witnesses appear before the "trier of fact" (the judge or jury). The rationale behind this protection is that a witness who is relating a story about the accused is less likely to fabricate or stretch the facts when the defendant is present. Simply put, it is always more difficult to tell a lie about a person "to his face" than behind his back.

PROCEDURE AND PURPOSE

The witness is not required to stare at the accused when the accused is on the stand and testifying before the jury. But the adversarial process functions on the premise that the witness who must appear in court is at least available for observation by the jury and judge as to demeanor and trustworthiness.

Moreover, the availability and implementation of *cross-examination* by defense counsel provide a way to ferret out and screen the witness's physical response to intense interrogation, including under-oath admissions, physical reaction, and behavioral tendencies; through this process, the impartial jury may make its own evaluation and conclusion about the veracity of the witness's testimony. Thus, the Confrontation Clause guarantees the defendant an opportunity for effective cross-examination to elicit physical infirmities or other impediments about a witness, such as poor eyesight, colorblindness, screened or blocked vision, defective hearing, inadequate memory or recall, lack of care or attentiveness, or the existence of some other physical defect or bad motive that the jury could interpret as calling into question the accuracy, reliability, or veracity of the testimony provided by the witness.

LIMITATIONS ON CONFRONTATION

When a prosecution witness is hailed into court, two issues emerge in the confrontation context. First, when is the defendant denied a face-to-face encounter with that witness; second, to what extent may the cross-examination of the witness be denied? When the witnesses are underage victims, there is some precedent under state laws that permit shielding or preventing these witnesses from appearing before the accused.

In *Coy v. Iowa,* 487 U.S. 1012 (1988), the U.S. Supreme Court ruled unconstitutional a state law that permitted a large screen to be placed between the defendant and two thirteen-year-old girls who testified that the accused had sexually assaulted them. The majority opinion written by Justice Antonin Scalia, who drew from a wealth of historical and linguistic sources, emphasized that the Confrontation Clause guaranteed the defendant a face-to-face meeting. The minority opinion disagreed and argued that a youthful victim could be overcome with trauma at any time; had the trial court made an individualized finding that a child victim would benefit from special protection, then no constitutional violation would be presumed as long as the victim could be cross-examined.

In *Maryland v. Craig,* 497 U.S. 836 (1990), a state statute permitted a one-way television monitor to be implemented as a substitute procedure in circumstances where the judge has evaluated the emotional effect face-to-face confrontation with the defendant potentially would have on the well-being of the child. The Supreme Court upheld this procedure in a five–four decision on the grounds that the defendant was given an acceptable substitute to observe direct and cross-examination of the child over the video hookup. The Supreme Court thus carved out a judicial exception to the Confrontation Clause—namely, if other elements or alternative means of confrontation are present, the traditional "plain meaning" rule regarding the Confrontation Clause would be deemed satisfied. The Court also emphasized that many states in addition to Maryland had enacted similar statutes, and, as a matter of public policy, literal face-to-face confrontation would not be required as long as the reliability of the testimony was deemed genuinely acceptable. In addition, the majority opinion also focused on scientific studies documenting the psychological trauma suffered by child abuse victims; this evidence necessitated the exception for such witnesses.

Various states have created exceptions to the Confrontation Clause, and several of these have reached the Supreme Court. For example, in *Davis v. Alaska,* 415 U.S. 308 (1974), another case dealing with underage children, the prosecution sought to exclude information about its witness's prior juvenile record, which included probation on two burglaries. The state argued that the disclosure of this information in the courtroom would stunt or impede the rehabilitation process of the witness and cause him further embarrassment and hardship with present or future employers and associates. The Court, forced to engage in a balancing test of competing rights, reversed the Alaska Supreme Court by adopting the policy argument that the defendant's rights under the Confrontation Clause were superior to any claims by the youth to privacy rights.

In *Smith v. Illinois,* 390 U.S. 129 (1968), a prosecution witness who was also a police informant was allowed to testify in the lower court under an assumed fictitious and concealed identity to protect his value as an informant and to protect him from possible retaliation by the accused. The Supreme Court reversed the conviction on the grounds that the defendant's right to confrontation superseded any prosecutorial claims to protect or safeguard the police informant. The prosecution's argument that the reversal would deter future informants who were associated with criminal activity was overshadowed by the need to have the credibility, weight of the testimony, and reliability of the witness cross-examined before the jury, especially when vendettas and other ulterior vindictive motives could pervade the process.

In *Chambers v. Mississippi,* 410 U.S. 284 (1973), the Supreme Court reversed the defendant's murder conviction because the witness, who had confessed to the murder on three prior independent events, was called by the defense as a "hostile" (adverse) witness. Under the state's voucher rule, the judge did not permit cross-examination by the defense because the witness was never called to testify by the prosecution. The Court weighed the prior confessions against the in-court repudiation and concluded that the Confrontation Clause was superior to the state procedural rule. Moreover, under the *Federal Rules of Evidence,* a judge is empowered under Rule 614 to call witnesses for interrogation before the jury, even if the defense and the prosecution omit the witness from their submitted pretrial witness lists. The purpose of the rule is to lessen the jury's inherent inclination to associate a particular witness with the state or the defendant. However, under no circumstance may the judge become an advocate for a party or favor one party over another. The court abuses its authority when it fails to maintain its neutral position.

Multiple defendants present complex Confrontation Clause issues, as do defense counsel's demands for disclosure of all investigative material uncovered by the prosecution. In capital cases, defendants facing the death penalty are afforded special protection and given the broadest confrontation coverage available. No general rule can be articulated other than to state that the Confrontation Clause guarantees a defendant an opportunity to cross-examine all witnesses. Thus, prior out-of-court statements of "hearsay" (words spoken by person A to person B that person B repeats in court) by witnesses are not subject to exclusion under the constitutional protection as long as the witness is available to appear and be subjected to cross-examination.

The Confrontation Clause is a fundamental constitutional right designed to protect both the innocent and the guilty. It does so by guaranteeing the opportunity to challenge through the art of cross-examination false statements, misrepresentations, or fabrications offered by witnesses. Clearly, it cannot guarantee that every lie or untruth will be exposed.

J. David Golub

See also: Adversarial Versus Inquisitorial Legal Systems; Confrontation Clause; Hearsay.

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Right of School Boards to Ban Books

Under the U.S. federal political system, states have the primary responsibility for making and administering education policy. Most states accomplish this through locally elected school boards and an appointed school superintendent. School boards evolved around the turn of the twentieth century as part of the municipal reform movement, which was part of the larger progressive movement (some members of which formed the Progressive Party). They were created partly as a result of the desire or perceived need of reformers to remove educational policy-making and administration from partisan politics and political party control. Members of local school boards would be elected on a nonpartisan ballot, and the administration of education policy would be in the hands of a board-appointed professional school superintendent.

School boards often choose from a list of state-approved texts when selecting textbooks for use in public schools as well as books and materials for school libraries. In fact, as agents of the state, school boards have the constitutional authority under the Tenth Amendment to make such decisions to protect the health, safety, welfare, and morals of public school students. The selection of books and materials is influenced by local community values, which can vary widely from community to community. At the same time, public school students have rights under the First Amendment, including the right to receive information. This can create a dilemma. On one hand, local authorities have a duty to instill community values in public school students and to protect them against controversial material, which they may not be mature enough to handle. Yet the First Amendment is an integral part of every public school child's education, and allowing students access to controversial material can foster the intellectual stimulation needed for students to succeed in school and in life.

School officials have some power to restrict expression, but the limits of their power have not been clearly defined by the courts. Hundreds of books in schools and school libraries are challenged as inappropriate by parents, school officials, and interest groups who believe they have the responsibility, the moral obligation, or the right to determine what public school children can and cannot read. To complicate matters, there is a difference between selecting books and materials that will become integral parts of a school curriculum and ordering the removal of books already selected. Although both decisions involve making value judgments, removing books and other materials from schools once they have been accepted as part of the curriculum or as appropriate for the school library poses a distinct problem. In some cases, material is removed before it is objectively and appropriately evaluated.

Challenges to schoolbooks occur in just about every state. Few of these challenges end up in the courts. When they do, courts must determine whether the school board's authority to remove materials overrides students' First Amendment right to read and receive information. Courts have been inconsistent in interpreting students' First Amendment rights regarding local school board authority to remove books and other materials from school curricula and school libraries. The courts generally (but not always) defer to local authorities, on the premise that under the U.S. federal political system, it is the responsibility of local officials and not the courts to determine public school policy.

The U.S. Supreme Court addressed this issue in *Board of Education v. Pico,* 457 U.S. 853 (1982). The case involved the school board's obligation to inculcate community values in students versus the First Amendment rights of the students. A divided Court ruled that the school board could not deny the students access to ideas with which the board disagreed for political reasons. School boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." The First Amendment, however, protects the expressive rights of students, including the right to receive information and ideas. Unfortunately, the Court did not speak with one voice. The five justices in the majority agreed that school boards cannot remove books from public school libraries for political reasons, but they could not agree on why. Another problem with the decision is that it applied only to removing books from public

middle and high school libraries. Since the ruling was narrow, its impact is uncertain. The potential for conflict between the power of school boards and the First Amendment rights of students remains.

Judith Haydel

See also: Board of Education v. Pico; Censorship; First Amendment.

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Right of Unmarried People to Live Together

Government restrictions on the right of unmarried people to live together raise privacy and civil liberties issues. In *Moore v. City of East Cleveland,* 431 U.S. 494 (1977), the defendant, a grandmother named Inez Moore, lived in her East Cleveland, Ohio, home with her son Dale and two grandsons, Dale Jr. and John, who were first cousins. An East Cleveland housing ordinance limited occupancy of a dwelling unit to members of a single family but defined "family" restrictively to include only nuclear family relationships. In particular, the ordinance's restrictive definition of "family" prevented the plaintiff from having the two grandchildren live with her. Moore was convicted of a criminal violation of the ordinance. Her conviction was upheld on appeal over her claim that the ordinance was unconstitutional, but the U.S. Supreme Court reversed her conviction.

In *Moore,* the city contended that the ordinance should be sustained under *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974), which upheld an ordinance imposing limits on the types of groups that could occupy a single dwelling unit. In reversing the judgment of the lower court, the Supreme Court held that the ordinance deprived Moore of her liberty in violation of the Due Process Clause of the Fourteenth Amendment. The Court held that people related to each other had a fundamental unenumerated (that is, not specified in the Constitution) substantive due process right to live together in one household, as either a nuclear or extended family. In holding that extended families were entitled to protection, the Court relied on tradition by considering the role that family life has played in American history. The Court also weighed the government's interest in supporting the statute against the right of an extended family to live together. Accordingly, the Court asserted that U.S. history and tradition required a broader definition of "family" than the conventional one. Many scholars have debated whether the Court applied the "strict-scrutiny test," the standard of analysis for laws governing fundamental rights, or an intermediate standard, as evidenced by use of such terminology as "the importance of the governmental interests," a phrase that gave implicit recognition to the idea that the legislature had some right to regulate family living conditions.

The plurality in *Moore* distinguished it from *Belle Terre,* in which a majority of the Court upheld a zoning restriction prohibiting more than two unrelated people from living together. In *Belle Terre,* a landowner who rented his house to unrelated college students challenged the ordinance. In contrast to *Moore,* the *Belle Terre* majority ruled that excluding three or more unrelated persons from living together did not impinge on any fundamental right; specifically, the Court held that the ordinance met the constitutional standard and was valid land use legislation. Reconciling *Moore* with *Belle Terre* necessitates realizing that the Court has bestowed the status of "fundamental rights" on *family relations,* not on the desire of individuals to choose with whom they live. Many courts have since adopted the Court's reasoning in *Belle Terre* and upheld similar ordinances based on the rational relationship of a law to the permissible goal of laying out zones that enhanced family values and a peaceful environment (the rational-basis test).

The significance of *Moore* lies in its holding that there is a fundamental unenumerated substantive due process privacy right of blood-related people to live together in one household, as either a nuclear or extended family. In applying substantive due process to

statutes that impinge on this right, the Court will use either strict scrutiny or intermediate scrutiny based on a reluctance to uphold infringements of the right.

Despite the Court's rhetoric in *Moore* that the "Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns," this case ignores the heterogeneous and pluralistic society the United States has become. If the Court were truly interested in abolishing standardization among individuals, it would preclude the legislature from using zoning ordinances to exclude or limit nontraditional family living arrangements. Although the Court recognized that "family" includes more than the nuclear family, it stopped short of acknowledging nontraditional family living arrangements that may still be prohibited under *Moore.*

Gia Elise Barboza

See also: Family Rights; *Moore v. City of East Cleveland;* Right to Privacy; *Village of Belle Terre v. Boraas.*

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Right to Appeal

Generally, the losing party in a criminal case or a civil lawsuit has either a statutory or constitutional right to appeal the unfavorable decision (judgment). The process involves requesting a court with appellate jurisdiction to review the trial court's judgment for the purposes of reversing or modifying it. An appeal consists of the formal judicial proceedings or steps required to obtain such a review. The initiation of the process of an appeal is normally permitted only after the completion of trial court proceedings, because it is a request for reexamination and alteration of the final judgment. Most state and federal courts permit a party to ask (by motion) the trial judge to reconsider the trial court decision, whether rendered by judge or jury, but this must be done prior to filing an appellate appeal, which requests other judges in a separate court to review the law and result of the trial.

An intermediate appellate court is one entrusted with the primary function of reviewing the decisions and judgments of trial courts and the decisions rendered by administrative agencies. Higher appellate courts in the state can in turn review such intermediate appellate decisions. Similarly, the U.S. Supreme Court is the highest appellate court in the land, overseeing thirteen intermediate courts of appeal. The procedural rules that govern the process of obtaining an appeal and review differ from state to state. Although there are slight procedural differences, the substantive law governing requirements for filing cases in federal courts are generally uniform. Whether the original plaintiff or defendant, the party who undertakes an appeal is called the *appellant,* and the other party who must answer the appeal is designated the *appellee.* In criminal cases, the *appellant* is usually the *defendant* who has been convicted of the commission of a crime, and the *respondent* is *the people* of the state (or of the United States if it is a federal case), represented by the prosecution.

The major steps in an appeal include the following:

1. The filing of a formal document in the court having appellate jurisdiction;
2. Securing a copy of the record of the original proceedings, often called the trial transcript;
3. The filing of briefs (written legal arguments) in the appellate court by the opposing parties;
4. Oral arguments before the appellate judges; and
5. The appellate court written opinion, which either affirms, reverses, modifies, or alters the lower court decision.

The appellate court judges, after hearing oral arguments, deliberate by reviewing the record of the earlier proceedings, and consider the allegations and arguments as to why the lower court decision contains *material nonharmless errors.* In most cases, immaterial or harmless error is insufficient grounds to reverse the lower court.

INTERLOCUTORY APPEALS AND APPEALS AS OF RIGHT

An *interlocutory* (in the middle of proceedings) appeal is a request from either party at the trial court level

The U.S. Supreme Court (east facade shown) is the highest appellate court in the land, overseeing thirteen federal intermediate courts of appeal and also accepting appeals from the highest court in each state. *(Library of Congress)*

before a judgment or decision has been rendered to have an appellate court exercise jurisdiction to review an order or ruling that may have a substantial effect on the course and duration of the trial. Unlike federal courts, some state courts do not permit an interlocutory appeal unless special, very limited circumstances exist. When the subject matter of the appeal is such that it would likely have a bearing on the outcome of the case, such as the suppression of evidence in a criminal case, then the trial court proceeding may be stayed or temporarily suspended until the determination of the appeal. In the federal forums, examples of appealable interlocutory orders under federal statute (*U.S. Code,* Vol. 28, sec. 1292(a)) include (1) orders that grant, continue, modify, refuse, or dissolve injunctions, except where a direct appeal may be made to the U.S. Supreme Court; (2) orders that appoint receivers or refuse to appoint receivers to wind up receivership; and (3) admiralty case orders.

In order for a federal appeals court to hear a discretionary interlocutory case, it must involve a controlling question of law, where there is a substantial difference of opinion and an immediate appeal would materially advance the termination of the litigation. In addition, there exists a category of collateral orders that are final and appealable even though they do not end the litigation. Moreover, an order denying a motion for permission to intervene by a nonparty who

has a substantial interest relating to the outcome of the action in a pending case is also immediately appealable.

An *appeal as of right* is one in which the appellate court *must* review the lower court result at the conclusion of the trial court proceedings. Such reviews are often mandatory in criminal cases. An appeal subject to discretionary review is one in which the court having appellate jurisdiction may exercise discretion to agree or decline to hear the appeal. Procedurally, the party seeking appellate review must first request the trial court for permission to make the appeal (known as *leave to appeal*), by stating the reasoning and legal basis for appeal. The trial court has discretion to grant or deny the request. Some states permit an automatic appeal, as in capital cases when the defendant has been sentenced to the death penalty. No special filing requirements are needed in this category of cases. In any event, the appellant must elect to appeal or accept the lower court decision irrespective of whether the appeal is as of right or subject to the appellate court discretion.

Under federal practice, the receipt of a final written judgment is a very important procedural prerequisite. An appeal as of right may not be effective unless the clerk of the court enters the written final judgment on the docket sheet. Also, the filing deadlines are governed by the clerk's entry of the judgment into the record. For example, the federal rules strictly require that a notice of appeal must be filed within thirty days of the entry of the order or judgment. The final judgment is a separate written instrument that states only which party was victorious and what relief was granted. It is distinguished from the court's opinion, which states the legal reasoning as applied to the facts of the specific case. Last, only a final judgment is given preclusive effect (barring further action under principles of res judicata and collateral estoppel) in relation to future litigation involving the same subject matter or claims among the same parties. In state courts, practice varies regarding the service of orders and judgments. Many state courts place this burden on the adversarial process by requiring the lawyers to prepare orders to be signed by judges. The adversaries are then responsible for timely serving the signed orders on the other parties.

A well-written opinion stating the facts determined by the trier of fact and the legal reasoning justifying the decision can be just as important as the filing and service of the order. Appellate court judges will admonish lower court judges who fail clearly to articulate the facts and legal reasoning for their opinions. In cases where lower court decisions are deficient, unclear, or inconsistent, appellate courts (generally consisting of three sitting judges) may *remand* the decisions to the lower courts, returning them for retrial and correction.

SCOPE OF REVIEW

The purpose of appeals is to correct improper decisions by lower courts when it is necessary to protect the losing party. Trial lawyers must be careful to preserve the record with issues and alleged errors that are subject to appellate review. If during trial certain objections have not been entered into the official written record, there is a strong possibility that the issue cannot be presented for appellate review.

The scope and standard of review used by an appellate court depend upon the nature of the alleged error and whether the trial was before a judge or jury. The fullest scope of review involves questions of law, such as an erroneous jury instruction, the admission of improper evidence, conclusions of law, summary judgment motions, and judgments as a matter of law. These reviews are decided on a *de novo* (anew) basis, meaning that they are analyzed in their entirety from inception. The appellate court can substitute its judgment for that of the lower court. Lower court rulings that were delivered at the discretion of the court are subject to an *abuse of discretion* standard. Reversal of these decisions will occur only if the trial judge exceeded his discretion and they were clearly erroneous, as when the findings of fact were clearly wrong. Other examples include discovery orders, motions for new trials, and motions for transfers of venue. A review of the fact-finding process in a jury trial must exceed a higher burden before reversal occurs because jury determinations of the sufficiency of the evidence are given more weight and greater deference. Last, the harmless-error rule applies to all appeals. Thus, before an appellate court will reverse the trial court, alleged errors must be shown to have been harmful to the

appellant by materially contributing to the adverse part of the judgment.

In all cases, the standard of proof at the trial court will also influence the appellate review process. In a criminal case, the defendant must be found guilty beyond a reasonable doubt. In a basic civil case, the preponderance of the evidence must favor one party over the other. In a range of cases, the standard to be satisfied prior to penalty is clear and convincing evidence; that norm lies somewhere between the other two burdens of proof. Last, a winning party cannot expect to accept the lower court award and at the same time file an appeal to expand or increase the award. However, when a winning party has won some of the claims or issues in a case containing multiple claims, an appeal is permissible on the other claims or issues that were denied or ruled on unfavorably.

BRIEFS AND ORAL ARGUMENT

The formal appellate brief in most jurisdictions must conform to special rules of appellate practice and procedure. The purpose of the brief is to summarize the lower court decision and present the facts, legal statutes, case law, and precedent that demonstrate to the appellate court that a substantial error has occurred. Many appellate lawyers are specialists. The purpose of oral argument before the appellate judges is to (1) clarify issues; (2) clarify the record; (3) clarify the scope of claims or defenses; (4) examine the practical impact of claims and defenses; (5) examine the logic of claims and defenses; (6) lobby for or against particular positions; (7) correct or highlight misimpressions of fact or law by judicial officers; and (8) expand or contract the outer boundaries of judicial precedent.

The process of appeals is fundamental to the protection of basic civil rights and liberties in the United States. It provides oversight of trial judges and allows for the imposition of greater uniformity of procedures. Many pathbreaking decisions of the U.S. Supreme Court, especially in the area of criminal law, have been made in cases reversing lower court decisions in which individual rights were ignored or inadequately protected.

J. David Golub

See also: Due Process of Law; Harmless Error; United States Supreme Court.

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Right to Counsel

The Sixth Amendment to the U.S. Constitution provides "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." Historically, state and federal appellate courts interpreted this clause to mean that an accused who could afford to retain counsel should not be deterred from exercising that right. For the accused without funds, the story was much different, since there was no language in the amendment that obligated government to provide counsel to the indigent accused.

TRIAL-COURT RIGHTS

In *Powell v. Alabama,* 287 U.S. 45 (1932), the decision concerning the "Scottsboro boys," African American youth accused of the rape of two white girls, the U.S. Supreme Court held for the first time that states must provide counsel to defendants who were indigent, ignorant, illiterate, feebleminded, or otherwise unable to provide their own defense in a capital (case involving a possible death sentence) felony case. The ruling did not extend to indigent defendants charged with noncapital offenses in state courts. Unless the state constitution or the state legislature specifically provided for indigents to receive court-appointed counsel, the traditional practice required defendants to defend themselves.

Powell v. Alabama, however, involved a state pros-

ecution. In *Johnson v. Zerbst,* 304 U.S. 458 (1938), the Court maintained that persons accused in federal courts of felonious criminal acts, including noncapital offenses, had a basic right to legal representation regardless of their economic status. For indigents, this meant that counsel would be appointed to represent them.

In *Betts v. Brady,* 316 U.S. 455 (1942), the Court reaffirmed that states were obligated to furnish counsel to indigent defendants only in capital cases or in felony cases posing such special circumstances that assistance of counsel was required in order for a fair trial to occur. This changed in *Gideon v. Wainwright,* 372 U.S. 335 (1963), in which the Court required states to furnish counsel in noncapital felony cases as well. In *Argersinger v. Hamlin,* 407 U.S. 25 (1972), the Court made indigent defendants charged with misdemeanors eligible for court-appointed counsel, saying that judges who failed to appoint counsel for an indigent defendant could not impose any jail time upon a finding of guilt. The Court refined this right in *Scott v. Illinois,* 440 U.S. 367 (1979), holding that the right of an indigent defendant to court-appointed counsel applied only when the defendant was in fact incarcerated, not just when incarceration was a possibility.

In addition to mandating counsel in criminal cases, the Court has ruled that defendants are entitled to counsel in certain pretrial procedures. In *Miranda v. Arizona,* 384 U.S. 436 (1966), the Court mandated that individuals who are suspects must be informed of these rights to protect their Fifth Amendment right against self-incrimination during police interrogations. The right to counsel also applies to preliminary hearings, as held in *Coleman v. Alabama,* 399 U.S. 1 (1970), and to police lineups, the ruling in *United States v. Wade,* 388 U.S. 218 (1967).

COUNSEL AT APPELLATE STAGE

Most states provide persons convicted of felonies a first appeal as a matter of right. To accommodate the Sixth Amendment right to counsel, the U.S. Supreme Court ruled in *Douglas v. California,* 372 U.S. 353 (1963), that states were obligated to furnish indigent defendants counsel when an appeal was given as a matter of right. The Court's rationale was based upon the idea that appeals focusing upon alleged errors of law required the legal acumen of counsel if the appeal was to be meaningful.

Discretionary appeals—cases in which the decision to file an appeal rests with the convicted person and the court to which the appeal is directed has discretion to hear or refuse to hear the case—do not require continued assistance of appointed counsel who served during the trial. In *Ross v. Moffitt,* 417 U.S. 600 (1974), the Court stated that once an appellate court decided to hear a discretionary appeal, that court would then appoint counsel and thus there was no obligation to continue to furnish the original counsel who served at trial.

OTHER ISSUES

Faretta v. California, 422 U.S. 806 (1975), focused on the issue of whether accused individuals have a constitutionally protected right to serve as their own counsel. The Court emphasized that although it considered assistance of counsel to be the more viable alternative, so long as the judge was able to determine that indigent defendants desiring to serve as their own counsel were capable of "knowing, willingly and intelligently waiving their right to court-appointed counsel," the trial judge was required to allow such an individual to have that choice.

In a related area, the Supreme Court has generally been reluctant to uphold claims based on ineffective assistance of counsel. The Court thus established a relatively high hurdle for such challenges in *Strickland v. Washington,* 466 U.S. 668 (1984), denying that a defendant who had alleged ineffective counsel in a death penalty case had shown that it resulted in a difference in the outcome.

Sam W. McKinstry

See also: Argersinger v. Hamlin; Gideon v. Wainwright; Powell v. Alabama; Sixth Amendment.

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Right to Die

The term "right to die" is used to describe the ability of an individual to determine the time and manner of his or her death. The U.S. Supreme Court has held that the U.S. Constitution provides no such right. The Court has ruled, however, that a mentally competent adult has the right to refuse medical treatment that would unnecessarily prolong life. Ultimately, there is a conflict between state laws prohibiting criminal acts such as suicide and murder and the freedom for individuals to end their life.

Active euthanasia occurs when death results from a positive act such as lethal injection or other types of "mercy killings" and is prohibited by law. Passive euthanasia, conversely, is death that results from either a failure to act to preserve life or from the removal of life-sustaining equipment such as ventilators. With the advent of the right-to-die movement in the 1970s, courts and legislatures began to outline the contours of the right to die.

The right-to-die movement gained notoriety in 1976 because of two noteworthy events. The New Jersey Supreme Court held in *In re Quinlan,* 70 N.J. 10, 355 A.2d 647 (1976), that a ventilator could be removed from Karen Ann Quinlan, who was in a persistent vegetative state. Also in 1976, California enacted the first living-will law. A living will, or advance directive, allows an individual in advance of illness to refuse medical treatment and to release health care providers from liability if the individual becomes terminally ill and is unable to communicate the refusal of treatment.

The U.S. Supreme Court first dealt with the right to die in *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261 (1990). Nancy Beth Cruzan remained in a persistent vegetative state as a result of an automobile accident. Four years after the accident, her parents undertook legal action to have her removed from life support. The Missouri Supreme Court ruled that due to the lack of "clear and convincing evidence" regarding her wishes, her parents could not withdraw life-sustaining medical treatment. The U.S. Supreme Court affirmed this ruling. The Court reasoned that the precautions were needed to prevent against potential abuses. Although the ruling upheld the Missouri standard, it also recognized that a competent adult was permitted to reject life-saving medical treatment. Unlike Missouri, most states allow guardians to make medical decisions for incompetent patients even if they involve the rejection of life-saving treatment. Two standards are applicable to guardians of incompetent patients: The "substituted judgment" standard allows guardians to use their own judgment in making decisions; the "best interest" standard allows guardians to make decisions based on the best interests of incompetent patients.

The public debate during the 1990s centered on physician-assisted suicide largely due to the actions of Dr. Jack Kevorkian, a Michigan physician also known as Dr. Death. Kevorkian developed a "suicide machine" that caused death to terminally ill patients through carbon monoxide poisoning. Kevorkian was ultimately convicted in 1999 of second-degree murder. In this instance, he went beyond assisting a suicide to actually injecting a patient with lethal drugs. His actions were videotaped and aired on *60 Minutes* two months later. Because this was regarded as active euthanasia, the state won the conviction. He was sentenced to ten to twenty-five years in prison and is reportedly responsible for assisting in 130 suicides.

Dr. Timothy Quill, who has assisted in suicides, with a patient at Genesee Hospital in Rochester, New York. The U.S. Supreme Court has held that the Constitution does not grant any such right to die but that a mentally competent adult has the right to refuse medical treatment that would unnecessarily prolong life. *(© Bob Mahoney/The Image Works)*

The Court has held that state laws forbidding physician-assisted suicide are constitutional. In *Washington v. Glucksberg,* 521 U.S. 702 (1997), and *Vacco v. Quill,* 521 U.S. 793 (1997), the Court differentiated between refusal of treatment and assisted suicide. The Court concluded that the state had a legitimate interest in affirming the value of life and emphasized again that there was no right to assisted suicide.

Oregon voters passed the Death with Dignity Act in 1994. Under this law, doctors could provide, but not administer, a lethal prescription if two doctors determined that the patient was competent and had less than six months to live. Attorney General John Ashcroft attempted to undermine this legislation by prosecuting under federal law physicians who prescribed lethal doses of narcotics. In 2002 a judge ruled that the Oregon law should remain in effect. The controversy, however, is far from over.

Although there is no constitutionally protected right to die or to have a physician assist in a suicide of a terminally ill patient, a competent individual is allowed to refuse life-sustaining treatment. Much of the conflict over this issue stems from the tension between the state's responsibility to protect life and the humane treatment of terminally ill patients.

Kara E. Stooksbury

See also: Cruzan v. Director, Missouri Department of Health; Right to Privacy; *Washington v. Glucksberg.*

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Right to Education

Contrary to the assumption held by many Americans, there is no federal right to education in the United States. Education has long been a state affair, and state laws govern most of U.S. education policy. In spite of this, the federal government has been involved in education, specifically education-related rights and liberties, since the beginning of the twentieth century.

What most Americans think of as their "right" to an education is actually provided by the state in which they live. Most state constitutions either explicitly proclaim a right to education or at least guarantee a certain minimum level of schooling for all residents. Similarly, a citizen's obligation to attend school until reaching a certain age is a duty imposed by the state.

This is not to say, however, that the federal government is not involved in education or even that it does not guarantee certain levels of equality within public education. Although neither "education" nor "schooling" (nor anything similar) is mentioned in the Constitution, the U.S. Supreme Court has relied on this document to provide some semblance of a guarantee of access to education, even though it has never explicitly stated that all Americans have a right thereto.

Although the Court had heard education-related cases before the mid-1950s, the most famous and most important decision in this arena was *Brown v. Board of Education,* 347 U.S. 483 (1954). In this case, Thurgood Marshall of the National Association for the Advancement of Colored People (NAACP), who later joined the Court, argued that the Equal Protection Clause of the Fourteenth Amendment forbade the states to require that black and white children attend separate schools. The states involved argued that because they provided all children with an education at public expense, they were fulfilling their burdens under the amendment. According to the states, the doctrine of "separate but equal," which in 1896 had been upheld in *Plessy v. Ferguson,* 163 U.S. 537, permitted them to force children to attend separate schools, as long as all children were provided with an equal education.

In a unanimous decision in *Brown*, the Court disagreed with the states. In his opinion for the Court, Chief Justice Earl Warren argued that "separate educational facilities are inherently unequal." This was based largely on research by sociologist Kenneth Clark, who had argued to the Court that placing black children in separate schools marked them with a

badge of inferiority, and that this occurred whether or not black and white schools were otherwise "equal." Thus, according to the Court, it was not possible for schools to be equal when they were racially segregated.

It is easy in reading *Brown* today to think that the Court established a right to education with this decision, but that is not the case. The Court did not claim that all children have a right to an education. Rather, the justices said that *when* the state has decided to provide a public service such as education, it must be provided to all citizens equally. There is, however, no federal requirement that the state provide this service at all.

The Court seemed to turn its back on the idea of the right to education in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). In this case, the Court overruled a lower court finding that school funding, when based on property taxes, was a violation of the Equal Protection Clause of the Fourteenth Amendment. The lower court had found this to be a violation because areas with greater property wealth were able to raise more money than areas with less property wealth. The Supreme Court disagreed. The justices ruled that because being poor did not place individuals in a "suspect class," only heightened scrutiny—more than the rational-basis test but less than strict scrutiny—of the state law was in order. (Had the differences been based on race, the Court would have invoked strict scrutiny and likely have upheld the decision.) When reviewing the evidence with heightened scrutiny, the Court ruled that the state had the discretion to fund its schools as it saw fit and that differential funding did not necessarily violate the Equal Protection Clause.

Although this case seemed to be a step backward in the provision of equal education, some observers read the decision the opposite way. The Court was careful to note that the students involved were not denied an education. Had the state decided to provide an education to some students but not to others, the decision likely would have been different.

The Court was presented with just this situation in a 1982 case from Texas, *Plyler v. Doe,* 457 U.S. 202. In this case, the Court ruled that the state could not refuse to educate the children of undocumented immigrants. Although the justices acknowledged that the parents of such children had broken the law, they argued that it would be unjust to punish children whose parents had illegally entered the country. Indeed, the Court found education to be of such value that to deny it to undocumented children "imposes a lifetime hardship" on them. Additionally, by not providing these children an education, "we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."

This case would seem finally to have established a right to education for all Americans, but the Court did not go quite that far. In spite of this, it is clear that the Supreme Court still believes, as it said in *Brown,* that education "is the very foundation of good citizenship." It is possible that a future case will present an opportunity for the Court finally to declare that every American has a right to education. Until then, however, people must rely on the states for this right.

Ryane McAuliffe Straus

See also: San Antonio Independent School District v. Rodriguez; Suspect Classifications.

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Right to Petition

The right to petition government for redress of grievances is so ingrained in the U.S. social and political culture that it is easy to take for granted. Yet the First Amendment freedoms of speech, press, religion, and assembly would be diminished were it not for the

right to petition. A petition is a formal request to a government authority requesting relief or action on an issue or problem of public concern. Although the methods by which petitions are presented to government vary, there are two general ways for individuals and groups to petition government: either directly or by petition drives aimed at gathering signatures on petitions to present to government.

The right to petition originated in Great Britain. It evolved from the Magna Carta, signed in 1215, and its antecedents and eventually found its way into English common law. From the fifteenth through the seventeenth centuries, the right expanded, and with it the power of the English Parliament. Exercise of the right to petition, however, sometimes met with royal retaliation. For example, in the Trial of the Seven Bishops in 1688, King James II sued the archbishop of Canterbury and six other bishops for seditious libel for requesting to be exempt from a royal decree. The bishops were acquitted. The English Bill of Rights, enacted in 1689, affirmed the right of subjects to petition the king.

The right to petition also has a long history in the United States, and its uses evolved in conjunction with the development of the nation's constitutional democracy. When the English colonies in America were settled, the colonists brought with them the common law practices of Great Britain, including the right to petition. In 1641, Massachusetts became the first colony to affirm the right. Petitions were the principal means for colonists to express their concerns to government. Colonial assemblies accepted and read petitions, not merely from enfranchised white males but also from women, slaves, free blacks, Native Americans, and even children. This is not to say, however, that officials acted upon all petitions. Many were denied, and some were ignored. In fact, one of the grievances in the Declaration of Independence was that King George III ignored the colonists' petitions.

Although the framers did not include it in the Constitution, the right to petition was discussed during the revolutionary era and the period leading up to the 1787 Constitutional Convention. One of the major grievances of the Antifederalists during the ratification debates was that the proposed Constitution lacked protection of specific rights, including the right to petition government for redress of grievances. During the first Congress, James Madison proposed the Bill of Rights (the first ten amendments to the Constitution), which included protection of the rights of assembly and petition.

During the first few Congresses, petitioning was the primary means for individuals and groups to relate their needs and demands to Congress. It also allowed members of Congress to keep abreast of developments in their home states. During the early 1800s, however, political, economic, and social changes led to problems with the use of petitions. The expansion of democracy during the two-term presidency of Andrew Jackson (1829–1837), the rise of political parties as intermediaries between citizens and government, and the escalating antislavery movement placed severe strains on the traditional method in which Congress handled petitions. In the 1830s, the American Anti-Slavery Society's organized petition drives flooded the House of Representatives with antislavery petitions, creating a backlog. The House responded by issuing a gag rule on these petitions. In 1844, John Quincy Adams succeeded in getting the gag rule repealed.

Many of the major political movements of the nineteenth and early twentieth centuries involved use of petitions, including creation of the Bank of the United States, passage of the Sixteenth, Eighteenth, and Nineteenth Amendments, and adoption of the antitrust movement of the late 1800s. Yet petitioning efforts through mass demonstrations, picketing, and marches on Washington sometimes were met with arrest, imprisonment, and other forms of official retaliation.

Although it is a separate and distinct right in the First Amendment, the right to petition is closely linked to the right of assembly. In *United States v. Cruikshank,* 92 U.S. 542 (1876), the U.S. Supreme Court formally articulated the connection between the right to petition and the right of assembly. In the 1930s, the Supreme Court's interpretations of the First Amendment rights of assembly and petition broadened their scope, secured their constitutional status within the context of other constitutional rights, and defined the conditions under which assembly and petition could take place. In *DeJonge v. Oregon,* 299 U.S. 353 (1937), the Court declared that

the First Amendment right of assembly had an independent significance equal to that of freedom of speech, press, and religion. In *Hague v. Congress of Industrial Organizations,* 307 U.S. 496 (1939), the Court protected the right of petition from state action through the Due Process Clause of the Fourteenth Amendment.

During the civil rights, antiwar, and other protest movements of the 1960s, the First Amendment rights of assembly and petition took on new meaning, as civil rights activists used sit-ins and other forms of civil disobedience to draw attention to racial discrimination and other social and political problems. In a long series of cases, the Court sanctioned such activities, declaring them symbolic conduct protected by the First Amendment.

Since then, interest groups have become better organized, and government officials more accommodating to demonstrators. Today individuals and groups across the political spectrum conduct petition drives for a variety of reasons. For example, in 1997 the National Committee to Protect Social Security and Medicare generated over 890,000 petitions urging Congress to kill a balanced-budget amendment that would not protect the Social Security Trust Fund. The same year forty-nine state legislatures petitioned Congress to consider a constitutional amendment to prohibit physical desecration of the flag.

Although these forms of mass participation have constitutional sanction, petitioning government can still result in official retaliation. Particularly troublesome are libel suits filed by government against citizens exercising their First Amendment rights. These lawsuits are called "strategic lawsuits against public participation" (SLAPPs). The acronym is new, but the practice dates at least to the days of King James II and his libel suit against the seven bishops. SLAPPs are prevalent at all levels of government, but local governments use them most frequently to suppress citizen participation in the political process. Some states have enacted anti-SLAPP legislation, and concerned interest groups are fighting SLAPPs in state and federal courts across the country.

Freedom to petition goes hand in hand with other constitutional rights and liberties, for it places them within the context of a democratic society exercising its right to make the United States a "more perfect Union."

Judith Haydel

See also: English Roots of Civil Liberties; First Amendment; Magna Carta.

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Right to Privacy

The right to privacy is a judicially crafted constitutional right protecting individuals from government interference with important personal choices they make regarding their private lives. The right to privacy includes in many cases protection from unwanted government searches, use of birth control, decisions regarding the termination of a pregnancy, sexual relations, and the right to withhold unwanted medical treatment. Privacy is an important constitutional protection that affords individuals a zone of freedom against government interference.

Neither the Constitution nor the Bill of Rights explicitly mentions or references a right to privacy. Instead, privacy is considered to be an individual right found not expressly but implicitly within several provisions of the Constitution.

The historical legal origins of the concept of a right to privacy are often credited to Samuel Warren and Louis Brandeis's famous 1890 article, "The Right to Privacy." The article grew out the authors' concern that the media had improperly taken pictures of Warren's daughter at her wedding; the authors articulated the view that the "right to be left alone" was the cornerstone of a right to privacy. More broadly, Warren and Brandeis were troubled that the media were improperly circulating unauthorized portraits of private persons, made possible by new technological innovations such as cameras. As a result, they called for a tort action for invasions of privacy. They contended that individuals had the right to be left alone, a right not to have one's personal space or life invaded without consent. This right to be left alone was a right to privacy.

The first two instances of privacy being employed as a legal concept occurred at the federal level in dissents. First, in *Olmstead v. United States,* 277 U.S. 438 (1928), Brandeis, by then a justice on the U.S. Supreme Court, dissented from the majority's holding that use of evidence obtained from an illegal wiretap did not violate the defendant's Fourth Amendment rights. For Brandeis, the Fourth and Fifth Amendments conferred a general right to "privacy rather than mere protection of material things." Second, in *Poe v. Ullman,* 367 U.S. 497 (1961), Justice John Marshall Harlan dissented from a majority ruling that examined the constitutionality of a Connecticut law that made it illegal for married couples to use birth control. To him, the state law was "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."

Both of these dissents laid fertile ground for subsequent incorporation of privacy into the federal Constitution. First, in *Griswold v. Connecticut,* 381 U.S. 479 (1965), the Court eventually struck down the state law that criminalized the use of birth control by married couples. In the majority opinion, Justice William O. Douglas contended that the penumbras of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments created a "zone of privacy" that placed certain actions beyond the reach of state laws. Second, in *Katz v. United States,* 389 U.S. 347 (1967), the Court, in reversing an earlier decision permitting warrantless wiretaps and defining the circumstances under which police would need a warrant to undertake a search, created a two-part test to define what areas were constitutionally protected. The test asked, first, if individuals had an expectation of privacy in that area or activity, and then, whether society recognized that expectation as reasonable. In fashioning this test, Justice Harlan and the majority seemed to recognize that society was the final arbiter of privacy, holding out perhaps the possibility of an evolving conception of privacy as circumstances changed. In taking this approach, the Court followed Warren and Brandeis's original arguments that changing social, political, and economic developments should drive the creation and recognition of new rights such as privacy.

From *Griswold* and *Katz,* federal construction of a right to privacy traveled many disparate directions. Privacy now protects the right of unmarried couples to use birth control, *Eisenstadt v. Baird,* 405 U.S. 438 (1972); the sale of birth control to minors, *Carey v. Population Services International,* 431 U.S. 678 (1977); most abortions, *Roe v. Wade,* 410 U.S. 113 (1973); the right to die, *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261 (1990), albeit not, as yet, the right to physician-assisted suicide, *Washington v. Glucksberg,* 521 U.S. 702 (1997); and the right to view obscenity in one's home, *Stanley v. Georgia,* 394 U.S. 557 (1969). Although originally holding in *Bowers v. Hardwick,* 478 U.S. 186 (1986), that privacy did not protect the right to engage in homosexual sodomy, subsequently in *Lawrence v. Texas,* 539 U.S. 558 (2003), the Supreme Court extended its interpretation of the right to privacy to protect this type of activity. Also recently, in *Kyllo v. United States,* 533 U.S. 27 (2001), the Court seemed to say that privacy builds a wall around homes, precluding the police from using thermal heat detectors without a warrant to search the interior.

In addition to the federal courts, state courts have also interpreted their constitutions to address right-to-privacy issues. For example, the New Jersey Supreme Court's *In re Quinlan* holding, 70 N.J. 10, 355 A.2d

647 (1976), broke important ground in using privacy arguments to uphold the right to remove adults from life support. In *Ravin v. State,* 537 P.2d 494 (Alaska 1975), the Alaska Supreme Court interpreted the state constitution's right-to-privacy clause as protecting the right of adults to possess and use marijuana in their own homes. The Hawaii Supreme Court in *State v. Kam,* 748 P.2d 372 (Haw. 1988), used the privacy clause of its state constitution to invalidate the state's obscenity statute. In *Commonwealth v. Wasson,* 842 S.W.2d 487 (Ky. 1993), the Kentucky Supreme Court broke with the U.S. Supreme Court's decision in *Bowers* and held that the Kentucky constitution created a zone of privacy that protected consensual homosexual activity. Finally, in *State v. Casino Marketing Group, Inc.,* 491 N.W.2d 882 (Minn. 1992), the Minnesota Supreme Court used privacy arguments to prohibit the use of automatic-dialing announcing devices that did not disconnect, labeling these telephone calls a significant intrusion into the home and applying the state constitution to protect residential privacy.

The right to privacy has been defended as critical to the protection of individual freedom and as important to fostering intellectual growth or protecting free inquiry. Yet as important as the right to privacy is, the legal recognition of the concept has generated significant controversy. Specifically, because privacy is nowhere mentioned in the Constitution, some critics, such as former federal judge Robert Bork, do not believe the courts should have been creating this or any other type of rights; instead, any right to privacy should have been fashioned by Congress or state legislatures. In response, defenders of privacy rights, such as abortion, see judicial creation of privacy and defense of this right as essential to protecting individuals from the tyranny of the majority.

Despite some criticisms of how the right to privacy was created and what exactly it protects, there is no question that such a right is now a constitutional cornerstone of American law and that it has become an important concept protecting individual civil liberties.

David Schultz

See also: Birth Control and Contraception; *Bowers v. Hardwick;* Brandeis, Louis Dembitz; Fourth Amendment; *Griswold v. Connecticut; Katz v. United States; Lawrence v. Texas; Olmstead v. United States;* Right to Die; *Roe v. Wade;* Wiretapping.

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Right to Travel

The right to travel is the right to move into, out of, among, and within states, foreign nations, and lesser political and geographic entities. The right to travel has been long recognized in Anglo-American law; it is referred to explicitly in England's Magna Carta and the Articles of Confederation, the document that governed the United States prior to the Constitution. Although the right to travel remains implicit in the U.S. Constitution rather than being explicitly stated there, the founders of the Constitution were very concerned that citizens would be allowed to move freely from state to state.

PRIOR TO THE TWENTIETH CENTURY

For much of U.S. history, issues surrounding the right to travel were linked to the enslavement of African Americans. Before the Civil War, slave owners claimed the right to travel with their slaves to states and territories where slavery was prohibited but still to retain full property rights to their slaves. The U.S. Supreme Court upheld this right in *Scott v. Sandford,* 60 U.S. 393 (1857).

The modern right to travel has its roots in the Supreme Court's interpretation of the Commerce Clause of the Constitution in the nineteenth century. In *Crandall v. Nevada,* 73 U.S. 35 (1868), the Court invalidated a law that taxed owners of for-hire vehicles for each passenger they transported out of state. It ruled that the right to travel from state to state came with national citizenship. The Court noted that the federal government was formed so that those living in the United States could be one people in one common country, thus giving members of this one com-

munity the right to pass through every part of it without interference. In the *Slaughterhouse Cases,* 83 U.S. 36 (1873), the right to travel, as a right of national citizenship, was strengthened when the Court brought it under the protection of the Privileges or Immunities Clause of the Fourteenth Amendment.

IMPERMISSIBLE STATE RESIDENCY REQUIREMENTS

In the twentieth century the Supreme Court interpreted the right to travel to apply to important questions of whether newly arrived state citizens could vote and receive welfare and other benefits, without first being residents of states (or the District of Columbia) for a specified period of time. As emphasized in *Zobel v. Williams,* 457 U.S. 55 (1982), at the core of the modern definition of the right to travel was the notion that states could not have classes of citizens made subject to different state benefits based on the time when they became citizens of a state.

In *Edwards v. California,* 314 U.S. 160 (1941), the Supreme Court used the Commerce Clause to invalidate a California law that prohibited any person from bringing into the state any indigent person who was not a resident of that state; Justice Robert H. Jackson sought in a concurring opinion to tie this right to the Privileges or Immunities Clause of the Fourteenth Amendment. The Court significantly expanded the right to travel in *Shapiro v. Thompson,* 394 U.S. 618 (1969), viewing it as a fundamental right under the Equal Protection Clause of the Fourteenth Amendment. The Court ruled that the right to travel prohibited a state from setting durational residency requirements that must be met before new arrivals could receive welfare payments. Durational residency requirements required persons to show that in addition to being bona fide residents of a state, they had lived in the location for a specific period of time. The Court reasoned that the nature of the federal union and the guarantee of personal liberty gave each citizen the right to travel throughout the United States without unreasonable restrictions.

In later cases, the Court struck down other durational residency requirements as violations of the fundamental right to travel. In *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974), the Court invalidated laws requiring new arrivals to meet durational residency requirements before receiving basic medical services. The Court noted that medical services were a basic necessity of life; if they were denied to a new resident when they were available to other residents who were similarly situated, this disparate treatment effectively would penalize a person's right to travel.

In 1999 the Court again affirmed the right to travel in *Saenz v. Roe,* 526 U.S. 489 (1999), a holding that invalidated the Personal Responsibility and Work Opportunity Act of 1996, which expressly authorized any state to pay a new arrival welfare benefits based on the amount received in the state from which the new resident came for up to one year. The Court noted that the right to travel embraced three different components: the right to enter and leave another state; the right to be treated as a welcome visitor while temporarily present in another state; and for those residents who elected to become permanent residents, the right to be treated as were other citizens of that state.

Most important in *Saenz,* the Court returned to the *Slaughterhouse Cases* to say that the rights of newly arrived citizens were protected by their status as both state and U.S. citizens, as plainly identified in the Fourteenth Amendment's Privileges or Immunities Clause. The Court emphasized that because the right to travel embraced the right of citizens to be treated equally in their new state of residence, a discriminatory classification was itself a penalty.

PERMITTED DURATIONAL RESIDENCY REQUIREMENTS

State durational residency requirements are permitted if a compelling governmental interest exists. In *Dunn v. Blumstein,* 405 U.S. 330 (1972), the Court found that a long state durational residency requirement for voting was unconstitutional because such requirements interfered with the fundamental right to vote and penalized the right to travel, although shorter time periods were permissible. In *Sosna v. Iowa,* 419 U.S. 393 (1975), the Court did not view a one-year residency requirement before a new resident could get a divorce as a denial of the right to travel. The Court noted that unlike the welfare recipients in *Shapiro,* the voters in *Dunn,* or the indigent patients in *Maricopa,*

the new arrivals in *Sosna* were not irretrievably foreclosed from getting a divorce. In the 1990s scholars attempted, without success, to apply the right to travel in challenging tightened airline security, limits on intrastate travel from police enforcement tactics, and restrictions on movement among the states to secure abortions.

INTERNATIONAL TRAVEL

The right to travel is also involved in questions of whether citizens are allowed to travel freely to and from foreign nations. The Court has decided that the right to travel internationally is more limited, and the government may limit an individual's travel for national security reasons. The government may seek to restrict citizens from traveling between the United States and specified foreign nations if the restrictions are not based on the beliefs of the citizens seeking to travel. In *Aptheker v. Secretary of State,* 378 U.S. 500 (1964), the Court invalidated a section of the Subversive Activities Control Act of 1950 that made it unlawful for any "knowing" member of a communist organization to use a passport.

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See also: First Amendment; *Shapiro v. Thompson; Slaughterhouse Cases.*

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Right to Vote

Although some people might regard the right to vote as virtually inseparable from citizenship, the franchise has been expanded and contracted during American history by a variety of federal and state laws and constitutional provisions. As one of the most important "fundamental rights," the ability to vote freely lies at the heart of civil liberties in the United States.

On the eve of the American Revolution, most of the colonies based suffrage (the right to vote) on wealth, just as England did. Wealth was measured by ownership of a certain number of acres of land, the value of real or personal property, or the rental value of that property. Because of the different opportunities for accumulation of wealth in the mother country and the colonies, the right to suffrage extended to only about 15 percent of English adult males but ranged from 40 percent to 97 percent of free adult males in various colonies. The South and New England tended to have the largest percentage of eligible voters. Many colonies also limited the vote to Protestants.

During the Revolution and through to the end of the eighteenth century, most of the states changed to a requirement that a free adult male who paid a tax of a fixed amount (called a head tax or poll tax) could vote. This had the effect of simplifying and broadening suffrage requirements.

The U.S. Constitution, adopted in 1789, made no mention of who could vote except to provide that the House of Representatives would be elected by the same voters as the most numerous body of each state's legislature. During the first half of the nineteenth century, most states gradually moved toward universal suffrage among white adult males while eliminating or restricting the franchise for free blacks. Most states that had allowed free blacks to vote immediately after the Revolution restricted or eliminated black suffrage before 1820. The constitution of every new state admitted to the Union from 1820 to 1861 provided for universal white adult male suffrage.

The Civil War and the efforts of Reconstruction policy to rehabilitate the South after the war changed the legal framework for suffrage. The Republican-controlled Congress enfranchised blacks in the District of Columbia, federal territories, and each occupied southern state in 1867. In early 1869, Congress adopted the Fifteenth Amendment, which was ratified within fifteen months. Its backers intended that this amendment would permanently enfranchise blacks in both the South and the North (where it was allowed in only a few states).

Suffragists marching, probably in New York City, in 1913. After the Civil War, the women's suffrage movement tried but failed to have Congress adopt suffrage for women, as well as blacks, in the Fifteenth Amendment. The number of states with women's suffrage increased gradually and sporadically until Congress proposed and the states ratified the Nineteenth Amendment in 1919. *(Library of Congress)*

The women's suffrage movement tried to have Congress adopt suffrage for women, as well as blacks, in the Fifteenth Amendment but was unsuccessful. Women's suffrage groups kept up the fight, both in Congress and the state legislatures, during the next half century. Wyoming adopted women's suffrage as part of its constitution upon being admitted as a state in 1890. The number of states with women's suffrage increased gradually and sporadically until Congress adopted the Nineteenth Amendment in 1919. By August 1920 it was ratified, and women voted in the elections that fall.

Meanwhile, the enfranchisement of blacks proved to be less permanent than the backers of the Fifteenth Amendment had hoped. With the end of Reconstruction, Democrats regained control in the South—often through violence, intimidation, and fraud. Beginning about 1880, southern legislatures adopted laws making it more difficult for blacks to vote. The new laws included registration laws (previously unknown in most places), secret ballots (combined with confusing ballot layouts and restrictions on who could assist the illiterate voter), literacy tests (with exclusions for those who owned a certain amount of property or who had served in the Confederate or U.S. Army), poll taxes (for which no effort was made at collection and which were due several months before candidates even qualified), and restrictions on voting by those convicted of certain crimes (usually chosen for their racial impact). From 1890 to 1910, most of the southern states held constitutional conventions to continue and institutionalize the disfranchisement. The federal government gave tacit approval to these laws by failing to pass legislation to prevent the disenfranchisement

of blacks or to reduce southern representation in Congress (a sanction provided in the Fourteenth Amendment).

The Democratic Party in the South did its part to minimize black voting by adopting primaries in place of conventions and restricting voting in those primaries to whites. During the 1930s and 1940s, the National Association for the Advancement of Colored People (NAACP) attacked the white primaries and succeeded in finally abolishing them in the 1944 U.S. Supreme Court case of *Smith v. Allwright,* 321 U.S. 649 (1944). Nevertheless, southern states still managed to keep most blacks off the voter rolls through a variety of subterfuges and barriers.

As previously noted, poll taxes were used in the early republic to expand the franchise and in the late nineteenth and early twentieth centuries to restrict it. Over the first two-thirds of the twentieth century, the "poll tax" became synonymous with restriction of the franchise in southern states. Because many whites as well as blacks were poor and lived as sharecroppers with little or no cash money, the poll tax became an economic barrier for both poor blacks and poor whites. Southerners and northerners alike formed organizations to press for its repeal—either by the states or by federal legislation. The movement had a limited success when (from 1942 to 1956) Congress outlawed poll taxes as a condition for voting by members of the armed forces in time of war. After many unsuccessful attempts to pass other federal legislation (while the number of states using the poll tax dwindled), Congress adopted the Twenty-fourth Amendment in 1962. Within seventeen months, it had been ratified. The amendment forbade the imposition of a poll tax only for federal elections but allowed states to collect it for registration for state and local elections. The Supreme Court finally struck down the poll tax in *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966).

About this same time, the movement to lower the voting age to eighteen was reaching its goal. Georgia had been the first to lower the voting age shortly after World War II, and only three states had followed suit over the next two decades: Kentucky, Alaska (age nineteen), and Hawaii (age twenty). Congress amended the Voting Rights Act in 1970 to include an extension of the franchise to eighteen-year-olds in all elections. The Supreme Court quickly held in *Oregon v. Mitchell,* 400 U.S. 112 (1970), that Congress had no authority to extend the franchise for state and local elections but could do so for federal elections. On March 23, 1971, Congress proposed a constitutional amendment to require all states to allow eighteen-year-olds to vote in state and federal elections. By July 5 of that year, enough states had ratified it to make it the Twenty-sixth Amendment.

The passage of the Voting Rights Act of 1965 resulted in a large increase in the number of blacks registered to vote. The act outlawed certain restrictive practices used by southern states to hinder black registration, sent federal registrars to many southern counties to register blacks and whites without discriminatory practices, and required several states (mostly in the South) to prove any new election laws would not discriminate before they could go into effect.

The National Voter Registration Act of 1993 also advanced the right to vote by requiring states to make voter registration available through public benefits, motor vehicle, and driver licensing offices (thus its popular name the "Motor Voter Act"). The act also required states to accept a simple half-page application form published by the Federal Election Commission. This legislation did not extend the franchise, but as a practical matter it made it easier for people to register to vote.

The most recent federal act to affect voter registration and balloting is the Help America Vote Act of 2002. Under this act, states must establish provisional voting (to allow votes by those who claim to be erroneously omitted from the voter rolls), require improved access to the polls for voters with disabilities, and require some voters to produce identification at the polls. The legislation also encouraged states to adopt electronic voting systems (such as touch screens or optical-scan ballots) by providing funds for their purchase.

The right to vote is now widely available in the United States. The only major groups still remaining disenfranchised are those convicted of a felony and residents of the District of Columbia. Thirty-two states prohibit felons from voting while they are on parole, and fifteen states disenfranchise some or all ex-offenders who have completed their criminal sentence. An estimated 3.9 million Americans, or one in fifty

adults, currently have no voting rights as a result of a felony conviction. Residents of the District of Columbia may vote for local officials and the president, but have no member of Congress with full voting rights.

Edward Still

See also: Felon Disenfranchisement; Fifteenth Amendment; First Amendment; *Richardson v. Ramirez;* Twenty-sixth Amendment.

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Rights of Aliens

Although the Bill of Rights, the first ten amendments to the U.S. Constitution, addresses the rights of both citizens and persons, it does not offer an identifiable theory of the rights of aliens. After years of rejecting any status for resident aliens under the Constitution, the courts have gradually extended most constitutional rights and protections to aliens based on their status as "persons." The U.S. Supreme Court has held for more than a century now that aliens within the territorial jurisdiction of the United States are, in principle, covered by the Constitution. The expansion of alien rights has further included aliens who entered U.S. territory illegally or who remain unlawfully present. Human rights and international treaties have also extended the scope of protection for aliens by creating additional judicial forums within which they can pursue and justify their claims. Nevertheless, concern that U.S. citizenship should carry with it some unique rights and privileges has led to a movement recently to restrict the rights of aliens. Recent Supreme Court holdings seem to indicate that as long as restrictions on rights derive from the democratic process and proper legislative enactments, most decisions to limit welfare entitlements and other rights will be upheld as legitimate.

The discussion about alien rights generally concerns the rights of long-term permanent residents to the protections of the U.S. Constitution. Aliens may have other rights through statutory law, common law, human rights, and international treaties and may have moral or natural rights as human beings. Only constitutional rights protect aliens fully within a constitutional democracy such as the United States. An alien, according to the Immigration and Naturalization Act of 1990, is "any person not a citizen or national of the United States." U.S. immigration law further distinguishes between immigrant aliens and resident aliens. Whereas resident aliens have already passed an initial threshold of membership and are expected to proceed to citizenship, nonimmigrant aliens—such as students, tourists, diplomats, and temporary workers—are admitted only for temporary periods and are expected to return to their countries of origin. The discussion of alien rights generally concerns the expansion and contraction of rights of resident aliens.

Alien rights pertain to the residence, employment, and welfare interests of immigrants. This definition of alien rights excludes the right of asylum, the rights of temporary visitors, the right to citizenship, and ethnic minority rights. Aliens outside of U.S. territory have virtually no protection under the Constitution to cover their initial claim of entry. During the twentieth century, rights advocates fought to gain for immigrants many attributes of citizenship status and to remove discrimination on the basis of immigrant status. They sought to apply the guarantees of due process and equal protection of the Fourteenth Amendment to distinctions based on citizenship and nationality. In the United States, therefore, residency and not national citizenship has provided the enjoyment of a comprehensive constitutional status. The only rights held exclusively for citizens have been the core political rights such as suffrage and the holding of certain political offices. There has been little controversy in extending procedural rights and context-specific protections, such as protection of their property in the country, to long-term resident aliens. Substantive rights such as employment and welfare have resulted in some hard-fought battles to preserve these national recourses for citizens.

There are two main viewpoints pertaining to alien rights. The first sees the state and thereby the Constitution as established for the citizenry. Under this "political" view, aliens are not part of the "social contract" and therefore are not entitled to rights. Factors of whether they may or may not enter the country, enjoy a more or less rich status of rights, and eventually become citizens depend on the will of the state and are largely matters of political discretion. The "societal" viewpoint states that the Constitution extends to all those who have become part of the population. Aliens who have established ties, raised families, and exist in the social networks of society ought to be part of and share in the rights and responsibilities that bind citizens. In the United States, permanent resident aliens were traditionally excluded from the core political rights of voting and holding office, although they have been granted access to social and economic rights.

Under the "plenary power" principle, Congress and the president have absolute authority regarding the entry, stay, exclusion, and naturalization of immigrant aliens. Long-term resident aliens, however, have become part of the population and are protected by the Constitution. Over time, the Court has recognized the rights of aliens who have entered the territory to include rights under the Constitution. Applying the logic of race discrimination, the Court has found alienage to be a "suspect classification," which triggers a "strict-scrutiny test" for analyzing the constitutionality of restrictive laws. Through this logic, most rights in the Constitution have been held to apply to resident aliens. Only the rights to vote and hold office have been denied. Commentators have pointed out that if alienage classification is as suspect as race, it should follow that aliens should be allowed to vote to remedy their "political powerlessness."

Although recognizing that nonimmigrant aliens and illegal aliens are even more powerless than resident aliens and in need of constitutional protection, the Court has not been willing to extend citizenship rights to them. The exclusion of resident aliens from constitutional equality may relate to the fact that citizenship has been easily accessible in the United States. Naturalization has been open to almost everyone who fulfills the minimal criteria. The increasing presence of resident aliens who have chosen not to naturalize has brought the issue of alien rights to the fore as a question of community and the continuing relevance of citizenship.

In *Graham v. Richardson,* 403 U.S. 365 (1971), the Supreme Court invoked the Equal Protection Clause of the Fourteenth Amendment to strike down state statutes that withheld welfare benefits from resident aliens. The Court stated that "aliens, like citizens, pay taxes and may be called into the armed forces. . . . [A]liens may live within a state for many years, work in the state and contribute to the economic growth of the state." The Court has recognized aliens as constituting a "discrete and insular minority" against which government was not allowed to discriminate. Following *Graham,* the Supreme Court and lower courts struck down most existing state restrictions against resident aliens regarding professional licenses, civil service employment, welfare programs, and scholarships.

In *Sugarman v. Dougall,* 413 U.S. 634 (1973), the Supreme Court used the "political function exception" to reserve to citizens state jobs that are closely tied to the formulation, execution, or review of broad public policy. Through this doctrine, the courts have upheld state statutes that have made citizenship a condition for being a police officer, a public school teacher, or a deputy probation officer.

Unlike state jobs that ostensibly require a level of attachment to the state that comes only with citizenship, the Court has stated that welfare benefits cannot be denied to noncitizens. In the seminal case *Plyler v. Doe,* 457 U.S. 202 (1982), the Court invalidated a Texas statute that withheld a free public school education from the children of illegal immigrants. *Plyler* is the apogee of constitutionally sanctioned alien rights. After *Plyler,* fears of uncontrolled illegal immigration became a highly charged public issue. California adopted Proposition 187 in November 1994 that barred illegal aliens from most state-provided services, including nonemergency health care and school education. Although Proposition 187 seemed to challenge both the Court's holding in *Plyler* and the federal government's absolute power over immigration, a conservative Congress enacted similar legislation through the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The act confirmed the restrictive campaign against illegal im-

migrants and went even further in excluding aliens from virtually all federal cash assistance programs.

The war on terrorism launched in the aftermath of the September 11, 2001, terrorist attacks in New York City and Washington, D.C. (and the failed effort in Pennsylvania) has called into question the extent to which the U.S. Constitution applies to the rights of aliens in times of crisis. Although the Supreme Court will likely uphold the procedural rights of aliens within U.S. territory, it is less clear whether substantive decisions by the legislature and the executive branch to restrict alien rights will be invalidated or be upheld as legitimate national security measures.

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See also: Due Process of Law; Immigration Law.

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Rights of Minors

Children under the age of majority—generally, age eighteen—are invested with the same basic constitutional rights as are adults, but those rights are limited and enhanced in many ways to take into consideration youth, immaturity, and inexperience. The nature of childhood requires that adults protect children and act in their best interests, and this obligation translates into special rules and circumstances regarding the constitutional rights enjoyed by minors.

The Fourteenth Amendment to the U.S. Constitution guarantees citizenship to all children born in the United States. Subsequent legislation has given citizenship to children with at least one parent who is a citizen, even if a child is born outside the United States. Citizens of the United States have guaranteed constitutional rights, regardless of age. The Fourteenth Amendment also grants to children, as citizens, equal protection of the laws and the right to due process, although in some states a parent or guardian must exercise these rights on behalf of a minor child.

Like adults, children are guaranteed the Fourth Amendment right to be free from unreasonable search and seizure. The definition of what constitutes an unreasonable search is somewhat different for children, because in many cases a parent can consent to a warrantless search of the child's property on the basis of ownership or parental authority. In *State v. Moreno,* 556 P.2d 14 (Ariz. App. 1976), a court held that police could search a child's bedroom when a parent gave consent because the room was in the parent's home and owned by the parent. In *People v. Daniel,* 606 N.E.2d 94 (Ill. App. 1992), a court held that a parent could consent to a search of a child's property as an exercise of parental authority, and that the presence of the child on the scene did not affect this consent. In some states, the parent can even give consent to a search after the child has refused to give consent; however, in other states courts have held that a person cannot give consent to search the personal effects of another, even a minor.

Minors have the same rights as adults when being questioned for a crime. Fifth Amendment rights are protected in the interrogation room by the *Miranda* warnings, derived from *Miranda v. Arizona,* 384 U.S. 436 (1966). Among the warnings the police must give is that the minor suspect has the right to remain silent and the right to an attorney. Competent adults must specifically and unambiguously request an attorney or refuse to answer questions in order to invoke their *Miranda* rights. This rule is different for minors. If a child being interrogated asks for a parent, police must construe this as a request for an attorney unless they have good reason to draw a different conclusion. The logic is that a child may not know what to do to secure an attorney, and it is natural to think that a child would ask for one or more parents in such circumstances. On some occasions, however, police may have reason to believe that a request to see a parent is not an invocation of Fifth Amendment rights, such

as when the child has specifically denied wanting an attorney.

The minor child has the same right to representation as does the adult, but what happens when the interests of the child are different from those of the parent who presumably acquires legal representation? The court has the duty to ensure that the interests of a child are secured, whether or not the child is represented by counsel. If the parent does not acquire counsel for the child, if the child's interests are not otherwise represented, or if the interests of the child are different from those of the parents, the court must act. The court can appoint legal counsel for the child or can appoint a *guardian ad litem* to represent the interests of the child in a court proceeding.

The child also has a right to jury trial in criminal proceedings, but this right does not extend to matters heard in juvenile court. In *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), the U.S. Supreme Court held that it was constitutionally valid to try minors "from the bench" (by the judge) in juvenile court because the aim of juvenile court is not primarily to punish but to rehabilitate minors in order to help them lead productive law-abiding lives as adults. As such, the judge in a juvenile court is presumed to act in the best interests of the child.

Although it might seem that a liberty interest is infringed by requiring a parent to consent to medical care for a child, the requirement is designed to protect children who cannot make informed decisions about their own medical care. In order further to protect children, there are several exceptions to the requirement of parental consent. In life-threatening emergency situations where a parent is unavailable and cannot give consent, or where a child will die without treatment, doctors can perform medical procedures to save the child's life. When a child is a victim of sexual abuse, doctors can treat the child without the consent of a parent, recognizing that a parent or guardian may refuse to consent in order to conceal sexual abuse. Married or pregnant minors are also able to make medical treatment decisions for themselves.

When a parent refuses consent for a medical procedure that a medical professional thinks is in a child's best interest, a court order can be sought to authorize treatment. A court will then decide whether the treatment is in the child's best interests. This is the usual procedure when parents refuse treatment for their child on the basis of religious beliefs. This situation often arises in cases involving a Jehovah's Witness parent who refuses a blood transfusion on behalf of the child. If the blood transfusion would prevent death or serious or permanent disability, courts have ruled that it is the state's duty to protect a child and ensure medical treatment until the child reaches an age at which the child can make such religious decisions.

Minors have the right to decide to bear or beget children (or not to do so), which translates into a right to procure contraceptives. Further, courts have held that contraceptives can be distributed to minors without informing parents or obtaining their consent, thereby preserving a minor's right to privacy. These same reproductive and privacy rights apply to abortion rights. Although most states have a law that requires notification of at least one parent before a minor can receive an abortion, the Supreme Court ruled in *Lambert v. Wicklund,* 520 U.S. 292 (1997), that such a statute must have a judicial bypass procedure whereby a minor can receive an abortion if she shows the court that it is in her best interest to have one, that she is mature enough to make the decision alone, or that it is not in her best interest for her parents to receive notice of her abortion.

Brandi Snow Bozarth

See also: Gault, In re; Juvenile Justice System; Parental Rights; Search of Student Lockers; Student Rights; Student Searches.

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Rights of Witnesses

Through the years, witnesses before Congress have raised certain civil liberties issues on constitutional grounds. Some witnesses have cited the First Amend-

ment to justify a refusal to answer, on the theory that the right to speak includes a right to remain silent or, at the very least, to edit the contents of speech. Courts have generally refused to accept this rationale. Witnesses have been more successful in claiming the protection of the Fifth Amendment right against compulsory self-incrimination. The U.S. Supreme Court has held that this right can be invoked during congressional hearings if the purpose is to keep the witness from uttering words that a prosecutor could take down and use later in criminal court proceedings. The words must incriminate the witness, however; there is no right to keep silent to protect some third party from being prosecuted.

If the Fifth Amendment is invoked, Congress may either excuse the witness or offer immunity. In a broad sense, a grant of immunity (which the witness may not refuse) can supplant the Fifth Amendment. The witness must then answer the questions. But in return, if federal prosecutors put the witness on trial, they are forbidden to use the information provided by the witness. Immunity has been described as a practical compromise, giving Congress access to necessary information but for the price of making it more difficult to bring some offenders to justice.

In theory, prosecutors can still prosecute immunized individuals, but it has become extremely difficult for them to do so. Oliver North, a U.S. Marines officer who worked in the White House, had unique information about the Iran-contra scandal, which involved secret weapons deals between U.S. officials and Iran during President Ronald Reagan's presidency, with profits generated being diverted to fund the U.S.-backed contra (rebel) effort in Nicaragua to unseat its Marxist government. When North testified before Congress under a grant of immunity, the prosecutor took elaborate precautions to avoid using the information he provided, even ordering staff members not to watch the televised hearings or read about them in the newspapers. He successfully prosecuted North for felonies arising out of the scandal. But an appellate court reversed, holding that there was no way to be sure that information from North's congressional testimony did not find its way into the prosecutor's files.

Finally, the power of Congress to investigate is limited by certain procedural protections. Witnesses are entitled to be told the questions, to know in at least general terms the purpose of the inquiry, and to have access to counsel. Though hearings are not adversary proceedings and witnesses have no right to question the members of Congress or their staffs, some witnesses have been allowed to make exculpatory statements and even to produce exculpatory or explanatory witnesses of their own. Some congressional committees have recognized such common law rights as attorney-client privilege, but others have not. As is typical of congressional procedures, there are few rules but many precedents. Although the Supreme Court has suggested that the Bill of Rights broadly applies to hostile questioning, it has provided few details.

Paul Lermack

See also: Bill of Rights; Fifth Amendment and Self-Incrimination; First Amendment; Immunity; *Payne v. Tennessee.*

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Ring v. Arizona (2002)

In *Ring v. Arizona,* 536 U.S. 584 (2002), the U.S. Supreme Court ended the practice of judges deciding the critical sentencing issues in a death penalty case. The Court held that the sentencing procedure in a capital trial of having a judge, rather than a jury, determine the aggravating factors necessary for a death sentence violated the defendant's constitutional right to a trial by jury. Under the Sixth Amendment to the Constitution, defendants are entitled to a jury trial, and the Court determined that right extended to the sentencing phase of a capital case as well.

Timothy Ring was tried in Arizona for murder, and although the jurors deadlocked on premeditated mur-

der, they found Ring guilty of felony-murder occurring in the course of an armed robbery. Under Arizona law, Ring could not be sentenced to death unless further findings were made by a judge conducting a separate sentencing hearing. Following the hearing, the trial judge sentenced Ring to death. Ring appealed, arguing that Arizona's capital sentencing scheme violated the Sixth Amendment jury trial guarantee by entrusting to a judge the finding of facts that could raise the defendant's maximum penalty. Justice Ruth Bader Ginsburg, in delivering the seven–two opinion of the Court finding for Ring, turned to the dissent in *Walton v. Arizona,* 497 U.S. 639 (1990), and used the precedent of *Duncan v. Louisiana,* 391 U.S. 145 (1968). In overruling *Walton*, Ginsburg wrote:

> We see no reason to differentiate capital crimes from all others in this regard. Arizona suggests that judicial authority over the finding of aggravating factors "may . . . be a better way to guarantee against the arbitrary imposition of the death penalty." The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be "an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. . . . The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free."

Ring underscored the importance of trial by jury, but questions have arisen about its applicability. Death-row inmates in various states have begun to raise appeals based on *Ring* arguing that their sentences were unconstitutional. The answer to those appeals remains an open issue. The circumstances are somewhat similar to those arising after *Furman v. Georgia,* 408 U.S. 238 (1972), in which the Court struck down the death penalty on procedural grounds. Thus, it is more likely that petitioners pursuant to *Ring* will have their sentences reduced to life in prison rather than be granted new trials.

Justice Sandra Day O'Connor, joined by Chief Justice William H. Rehnquist, dissented, centering on the effect of *Ring.* She argued that it would greatly burden the states that allowed judges to decide sentencing in separate hearings. Further, she said the 529 inmates then on death row in the five affected states would be greatly inconvenienced by the massive appeals.

The impact of *Ring* on the criminal justice system has yet to be determined. Regardless, the importance of juries remains an issue for constitutional scholars. As Justice Byron R. White wrote in *Duncan* in 1968, "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."

Aaron R. S. Lorenz

See also: Capital Punishment; Effective Death Penalty Act of 1996; *Furman v. Georgia; Gregg v. Georgia.*

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Ripeness

The concept of "ripeness" refers to a judicial constraint that the U.S. Supreme Court imposed upon itself in the historic case of *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 (1936). In this case, Justice Louis D. Brandeis explained the gist of the ripeness doctrine: "The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it." Usually, the Court has interpreted ripeness to mean that an individual must demonstrate that there is an actual "case or controversy" and/or that an injury has occurred. The Court has applied the ripeness doctrine in several important civil liberties cases.

Most notably, the Court turned away a challenge to a state's prohibition on contraception in *Poe v. Ullman,* 367 U.S. 497 (1961). In this "test case" (a case

in which the parties intentionally try to get to the U.S. Supreme Court), a married couple in the state of Connecticut challenged the constitutionality of that state's ban on birth control. The Court declined to review the case because the justices observed that although this law had been on the books since 1879, it was not being prosecuted. Thus, the majority thought that the fear of being punished for using birth control was unfounded.

The majority's decision in *Poe* brought strident dissent from the justices in the minority. They thought the Court was using the doctrine to dodge important civil liberties issues. Indeed, their view prevailed only four years later when challengers again brought a test case in the same state but achieved a different result. In *Griswold v. Connecticut,* 381 U.S. 479 (1965), the Court overcame its ripeness concerns and overturned the state's prohibition on contraception. This time, though, the petitioners made sure they were actually penalized before bringing suit. The *Griswold* case, which established a federally protected right to privacy, was the precursor to the much more controversial *Roe v. Wade* decision, 410 U.S. 113 (1973), which lifted most restrictions on access to abortion.

Another illustration of the Court's use of the ripeness doctrine dealt with the Hatch Act of 1939. This legislation prohibited federal employees from participating in political campaigns. Several federal employees wanted to be involved politically and thought this was their First Amendment right, but they feared losing their jobs and asked the Supreme Court to rule on the constitutionality of the Hatch Act. The Court again decided that this case was not yet ripe for review because the employees' fear of being fired was merely "hypothetical." Many civil libertarians have said the Court's reliance on the ripeness doctrine denied federal employees their First Amendment freedoms of speech and assembly. Essentially, the obstacle of ripeness forced employees to be prosecuted for their political activity before they could question the constitutionality of the Hatch Act.

In sum, the Court has used ripeness to avoid deciding controversial civil liberties cases—some of which the justices eventually faced in spite of their earlier reservations.

Lori M. Maxwell

See also: Standing.

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Rivera, Diego (1886–1957)

In 1933, Nelson Rockefeller of the famous Rockefeller oil family (and U.S. vice president in the 1970s) and Mexican artist Diego Rivera engaged in a standoff over freedom of artistic expression and the rights of artistic patronage. At the time, Rockefeller maintained offices in the new Rockefeller Center in New York City and was heavily involved in the city's construction boom.

His sister, Abby, an avid art collector, recommended Rivera to paint a mural for Rockefeller Center. The mural was to be an expression of man's choice between continued capitalist development and a more humane future under socialism. It was to be entitled "Man at the Crossroads." It seemed odd subject matter for an art piece that would grace the lobby of the RCA building in Rockefeller Center in downtown Manhattan, but Nelson Rockefeller approved preliminary sketches and bypassed famous painters Pablo Picasso and Henri Matisse in favor of having Rivera do the mural.

Rockefeller was aware of Rivera's leftist politics, but when V. I. Lenin showed up in the painting, Rockefeller asked Rivera to reconsider. Given the economic and political situation in the United States at the time, Rockefeller feared that inclusion of the Soviet leader would prove inflammatory to potential tenants. Rockefeller asked Rivera to substitute a worker for Lenin. Rivera responded with an offer to balance Lenin's portrait with one of Lincoln, which Rockefeller rejected. Rivera's assistants threatened to strike if he gave in to Rockefeller. The artist agreed with his assistants and refused to change the painting, saying he would rather see the mural destroyed.

Rockefeller Center management—and there is

some debate whether Rockefeller himself was involved in this decision—immediately paid the balance of Rivera's fee and asked him to vacate the premises. For almost a year, the mural remained intact but covered. Rockefeller faced a barrage of criticism in the art world as artists, led by Rivera, decried the intrusion on Rivera's freedom of artistic expression. The Rockefellers searched, in vain, for a more appropriate home for the mural. It was destroyed in 1934.

Rivera re-created the mural in Mexico City, but he never had another opportunity for such a public stage in the United States again. In fact, by the turn of the century, most of Rivera's murals in the United States had been destroyed. Rockefeller's reputation as a patron of the arts was temporarily tarnished, but it recovered. Today, Abby Rockefeller's collection of Diego Rivera paintings belongs to the Museum of Modern Art in New York. Rivera's mural can be seen at the Museo del Palacio de Bellas Artes in Mexico City under the title "Man, Controller of the Universe." Included in the new mural was a portrait of Rockefeller in a nightclub.

Rockefeller is rumored to have paid Rivera's fee, and Rivera later reproduced the work in an arena where he had full artistic freedom. Ultimately, however, this conflict between the rights of artists and their patrons left bitter questions for both sides to answer.

Tim Hundsdorfer

See also: Censorship; First Amendment.

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Roadblocks

In certain circumstances, the government may constitutionally set up roadblocks. A roadblock is a form of seizure, even if it results in nothing more than a brief stop. That action in itself interferes with freedom of movement and as such raises civil liberties issues under the Fourth Amendment to the U.S. Constitution. Under the Fourth Amendment, people are protected against "unreasonable searches and seizures." Thus, whether a roadblock is constitutional depends on its reasonableness. The U.S. Supreme Court has upheld as reasonable, and therefore constitutional, roadblocks designed for three purposes: (1) ensuring the safety of driving as an activity; (2) preventing illegal immigration; and (3) protecting the integrity of U.S. national borders. It has also hinted that a fourth purpose, carrying out emergency crime control, is constitutional.

Under the Fourth Amendment, the government may seize someone or something only if it is reasonable to do so. Courts ordinarily determine whether roadblock seizures are reasonable by balancing the government's interest against the intrusion on individual liberty and by considering the purpose of the roadblock. The term "ordinarily" is an important qualifier. Courts do not perform a balancing test when it comes to "routine" customs searches at the border because of the government's special power to protect the integrity of the nation's borders; the Court held in *United States v. Montoya de Hernandez,* 473 U.S. 531 (1985), that these searches are per se reasonable.

There are two parts to the balancing portion of the test: (1) the government's interest and (2) the individual's interest. In considering the government's interest, courts look at the importance of the problem at which the seizure is aimed and the degree to which the seizure advances the public interest. When investigating a roadblock's interference with individual liberty, courts look at both its objective intrusion (the length of the stop and the intensity of the officer's scrutiny) and subjective intrusion (the fear and surprise engendered in law-abiding motorists).

A roadblock's purpose usually must be something other than the mere advancement of a general interest in crime control. For example, the Court established in *City of Indianapolis v. Edmond,* 531 U.S. 32 (2000), that police cannot set up roadblocks simply to look for drug traffickers. In contrast, the Court decided in *Michigan Department of State Police v. Sitz,* 496 U.S. 444 (1990), that roadblocks designed to find drunk and unlicensed drivers were constitutional, because although they may lead to criminal convictions, they also protect the safety of others on the road. Similarly, the previously noted *Montoya de Hernandez* decision

Officers in Colorado inspect cars at gunpoint at a roadblock set up to search for three suspected cop killers, June 4, 1998. *(© Nancy Richmond/The Image Works)*

held that roadblocks aimed at preventing illegal immigration were constitutional because they did more than enable the government to prosecute violators of immigration laws; they also supported the government's sovereign power over citizenship and immigration by facilitating the deportation of illegal immigrants. Protecting the integrity of the border is an important sovereign interest, and roadblocks to advance that interest are constitutional. Finally, as an exception to the general rule, the Supreme Court has indicated that it would uphold roadblocks aimed at crime control in emergency situations—for example, to catch a dangerous suspect who is likely to flee by a particular route or to thwart an imminent terrorist attack.

In sum, a roadblock is legal if it is reasonable. Reasonableness is measured by balancing the government's interest against the interference with individual freedom and by analyzing the roadblock's purpose to ensure that it is not merely a general governmental interest in crime control.

Justin M. Sandberg

See also: Balancing Test; Exclusionary Rule; Fourth Amendment; *Mapp v. Ohio;* Search; Seizure.

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Rochin v. California (1952)

The U.S. Supreme Court in *Rochin v. California,* 342 U.S. 165 (1952), established that some law enforcement methods can be so intrusive that they are irreconcilable with the requirements of due process guaranteed under the Fifth and Fourteenth Amendments to the U.S. Constitution.

By 1952, the Supreme Court had required that federal courts apply the exclusionary rule to illegally obtained evidence for almost forty years. Under the exclusionary rule, any physical evidence obtained as a result of police conduct that violates a defendant's constitutional rights (for example, the Fourth Amendment's protection against unreasonable search and seizure), or that is otherwise unlawful, cannot be used as primary evidence against the defendant in a criminal trial. At the time, state courts were not bound by the exclusionary rule, and despite the opportunity provided in *Wolf v. Colorado,* 338 U.S. 25 (1949), the Supreme Court declined to hold that they were likewise bound to exclude illegally obtained evidence.

The Court was then presented with the egregious police misconduct that was the basis of a constitutional challenge in *Rochin.* Three Los Angeles deputy sheriffs, having been informed about an individual dealing drugs, made a warrantless entry of his home through an open outside door and forced their way into the bedroom occupied by the individual and his wife. One of the deputies spied two capsules on the bedside table and asked "Whose stuff is this?" whereupon the suspect grabbed the capsules and put them in his mouth. Following a struggle in which the deputies tried forcibly to extract the capsules, they handcuffed him and took him to the hospital, where he was subjected to an involuntary stomach-pumping. The contents of his stomach included two capsules of morphine.

Justice Felix Frankfurter, the author of the *Wolf* opinion, relied on a Fourteenth Amendment substantive due process argument in concluding that the individual's conviction must be set aside. Although acknowledging the dangers of relying on the vague concepts of fairness and decency that underlie the Due Process Clause, Justice Frankfurter held that police be-

havior that "shocks the conscience" could not pass constitutional muster. The forcible stomach-pumping to which the suspect was subjected was "too close to the rack and the screw" to be permissible as a crime control practice in a civilized society.

Nine years later in 1961, the Court overruled *Wolf* in *Mapp v. Ohio,* 367 U.S. 643 (1961), and held that evidence obtained in violation of the Fourth Amendment was inadmissible in state court. Taken in conjunction with a previous bar on the use in state criminal proceedings of coerced confessions obtained in violation of the Fifth Amendment, much of the conduct that could presumably trigger a substantive due process claim in the criminal procedure context was covered under other constitutional proscriptions. Frankfurter's shock-the-conscience test with its potential for subjectivity mostly disappeared from constitutional analysis. However, in *County of Sacramento v. Lewis,* 532 U.S. 833 (1998), the Court, while noting that today *Rochin* would be considered an illegal search and seizure case, showed that the shock-the-conscience test had life in it yet and was the proper standard by which to determine whether a high-speed police chase, resulting in a civilian death, constituted a violation of the Fourteenth Amendment's substantive due process guarantee.

Virginia Mellema

See also: Mapp v. Ohio; Schmerber v. California; Weeks v. Ohio.

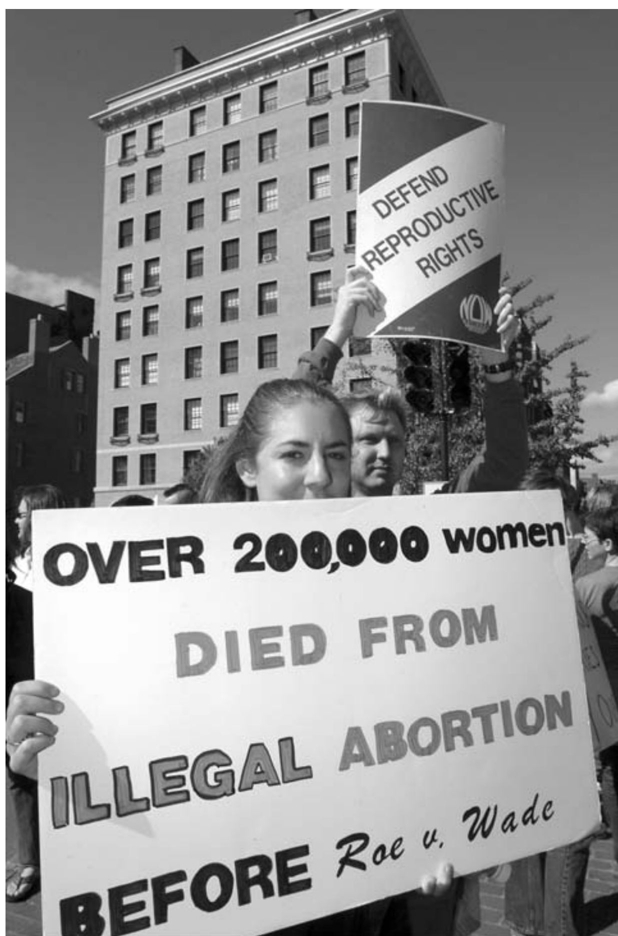
Roe v. Wade (1973)

In 1973 the U.S. Supreme Court held in *Roe v. Wade,* 410 U.S. 113, that the Constitution afforded women a qualified right to obtain an abortion. The seven–two decision rendered unconstitutional most states' laws prohibiting abortion. *Roe* sits at the center of fundamental debates in the United States—debates about the limits of individual rights, about when fetal life begins and when it deserves state protection, and about the propriety of the Court's deciding such momentous questions. As a result, *Roe* remains one of the most controversial decisions in the Court's history and is a source of constant comment and conflict in the nation's legal, political, cultural, moral, and religious life.

Abortion had long been illegal at English common law, but only after "quickening," the point at which the fetus could be felt to move in the womb. Prior to quickening, abortion was not deemed a criminal act. Because only the pregnant woman herself could know when the fetus was quick, the state rarely prosecuted cases of abortion, focusing its attention instead on infanticide. The newly independent states of America adopted the English quickening rule, either through the receipt of the English common law or by codifying it in their early statutes. Beginning in the middle of the nineteenth century, however, states began to enact statutes prohibiting abortion at any time during the pregnancy and imposing prison terms and fines on people who performed them or, in some cases, on the women themselves. By the end of the century, elective abortion was illegal in almost all states.

Scholars seeking to explain this movement to outlaw abortion have pointed to several explanations. Americans in the nineteenth century witnessed dramatic demographic and societal changes in their lifetimes. Rising immigration and changes in traditional gender roles brought on by urbanization and industrialization led to anxiety among upper- and middle-class whites. Many of these people feared that high birthrates among immigrants and blacks would fundamentally alter the nature of American society, especially in the face of dramatically declining fertility rates among native-born white women. Easy access to abortion, it was argued, allowed native-born white women to shirk their womanly responsibility to produce the next generation of white Americans. It also allowed them to pursue unwomanly activities, such as obtaining higher education; agitating on behalf of political causes such as equal rights for women, abolition of slavery, and temperance; and enjoying the fruits of the growing consumer society—all of which undermined traditional female gender roles.

The newly founded (1847) American Medical Association (AMA) tapped into this anxiety and was the driving organizational force behind the nationwide campaign to outlaw abortion. The AMA's member-



Abortion rights supporters held a counterdemonstration at the annual antiabortion "Respect Life Walk" sponsored by the Massachusetts Citizens for Life in October 2002.
(© Marilyn Humphries/The Image Works)

ship was composed of scientifically trained doctors eager to differentiate themselves from the diverse range of healers and midwives practicing medicine at the time and popular with ordinary people. The "regular" physicians, as they called themselves, opposed abortion on moral grounds and argued that it was dangerous when performed by nonregular physicians. They used their opposition to abortion to increase their moral and professional standing in society while at the same time tarring alternative practitioners with the accusation that they performed the lion's share of the procedure.

Despite legal prohibitions, women continued to seek and obtain abortions. In some states abortions were legally obtainable when the woman could show a threat to health or life, in cases when there was severe fetal defect, or when the pregnancy was the product of rape or incest. Many women obtained illegal abortions from sympathetic doctors, others turned to nonphysician abortionists, and still others traveled to states or countries where abortions were legal. Some women suffered injury at the hands of their abortionists and some died—usually as a result of infection or uncontrolled bleeding following a botched procedure. Beginning in the 1960s, feminists who saw access to abortion as crucial to women's sexual and physical autonomy, as well as some physicians angry about the states interfering with their medical judgments, began to challenge state abortion laws. On the eve of the *Roe* decision, several states had liberalized or repealed their abortion laws either by statute or state-court decisions.

Roe was a challenge to a Texas law that prohibited abortion except in cases necessary to save the life of the mother and imposed a prison sentence on persons convicted of performing the procedure. The petitioners were a single pregnant woman, Norma McCorvey, (aka Jane Roe); a married couple, David and Marsha King (aka John and Mary Doe), who had been instructed by their doctor that a pregnancy would endanger Marsha King's health; and a Texas doctor, James Hallford, who faced prosecution in state court for performing abortions in violation of the Texas law.

Justice Harry A. Blackmun wrote the majority opinion. All the parties faced a threshold problem of "justiciability" (whether the Court should hear the case). The married couple's claim was purely speculative, as the wife was not pregnant at the time she and her husband brought their challenge. Hallford had not yet been tried by Texas, and the Court was loath to intervene before the state courts had entered a final judgment in his case. As a result, these parties' claims were dismissed by the Court. Jane Roe faced standing problems, since she had long since delivered her baby and given the girl up for adoption. Justice Blackmun noted that given the short period of human gestation, it was unlikely that any woman ever would be able to see a challenge to an abortion law through the appellate stage if the Court adhered too rigidly to

its standing rules. Finding such challenges to abortion laws by pregnant women "capable of repetition, yet evading review," Justice Blackmun ruled that Roe had standing to challenge the Texas law.

He next turned to the substantive question raised by Roe's challenge: Was the Texas law unconstitutional? Roe had challenged the law on a variety of grounds—that it violated her liberty interests under the Due Process Clause of the Fourteenth Amendment; that it violated her right to privacy protected by various portions of the Bill of Rights; or that it intruded on those rights protected from government interference by the Ninth Amendment. Roe's scattershot approach reflected the fact that the Bill of Rights, the Fourteenth Amendment, and their respective legislative histories were silent on the matter of abortion. In addition, the dearth of explicit textual support for a right to privacy caused the Court to locate the right in a variety of constitutional provisions or to describe its origins in the "penumbras" and "emanations" from the Bill of Rights, as it suggested in *Griswold v. Connecticut,* 381 U.S. 479 (1965). This imprecision thus gave little guidance for litigants like Roe seeking a more expansive definition of the privacy right.

Justice Blackmun began by reviewing historical attitudes toward abortion down through Western history, finding that the ancient Greeks and Romans were ambivalent on the question of the morality and legality of abortion. He then turned to the common law, concluding that abortion prior to quickening had not been an indictable offense and that even after quickening there were few examples of prosecutions for abortion in either England or the United States. Justice Blackmun saw as significant to his analysis that it was only as a result of statutory action in the mid-nineteenth century that abortion both before and after quickening became a prosecutable offense in the vast majority of states. He then reviewed the policies of the American Medical Association, the American Bar Association, and the American Public Health Association, all of which had recently offered either qualified or unqualified support for the liberalization of state abortion laws.

Justice Blackmun reviewed the three reasons advanced to justify the state's interest in restricting abortion—an attempt, grounded in Victorian sexual mores, to restrict illicit sexual conduct; a desire to regulate a medically dangerous procedure; and an effort to protect fetal life. He rejected the first reason out of hand; Texas had not even asserted it as a justification for its abortion law. Protecting women from medical malpractice and protecting the fetus were valid concerns, but only when balanced against what Blackmun determined was a woman's constitutionally protected privacy right to obtain an abortion free from state interference. Justice Blackmun noted that the privacy right was not explicitly mentioned in the Constitution, but he asserted that various Court decisions or decisions written by individual justices had found such a right to be contained in portions of the Bill of Rights and in the Fourteenth Amendment's Due Process Clause. He concluded that regardless of where one located such a privacy right, it was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," and that the detriments to the woman caused by the state's denying her the ability to terminate her pregnancy were apparent. They included medical and psychological damage resulting from pregnancy and unwanted child-rearing, the "distress, for all concerned, associated with the unwanted child," the inability of the family to care for it once born, and the stigma of unmarried motherhood. These concerns were for the woman and her doctor to take into account in determining whether or not an abortion should be performed.

Having determined that a constitutional right to an abortion existed, Justice Blackmun next turned to the limitations the state could impose upon it. He ruled that prior to the end of the first trimester, the state could not interfere in any way with a doctor's decision to perform an abortion. After that point, the state had a legitimate interest in protecting maternal health through reasonable regulation of the medical procedure in such areas as licensing of facilities and practitioners. And, after determining that the fetus was not a "person" for purposes of constitutional analysis, he did conclude that the state's interest in protecting "potential life" became compelling after viability. At this point, the state's interest in protecting potential life could override the right of a woman to an abortion, and states could completely prohibit post-viability abortions except to save the life or health

of the mother, although this point was retracted in a companion case issued the same day as *Roe.*

In the companion case to *Roe, Doe v. Bolton,* 410 U.S. 179 (1973), Justice Blackmun, for the same seven-member majority, struck down portions of Georgia's more modern abortion law. The law permitted abortions only when pregnancy would endanger the life of the mother or seriously and permanently injure her health; when the fetus would be born with severe physical or mental defect; or when the pregnancy resulted from rape. The law required that even first-trimester abortions be performed in an accredited hospital; that a committee of physicians on the hospital staff sign off on the abortion decision; that two other physicians examine the patient and concur with her own doctor that the abortion complied with Georgia law prior to the procedure; and that the woman be a resident of Georgia. In striking down all of these requirements, the Court held that the decision to have an abortion was solely up to the woman and her doctor in all cases. *Doe* effectively vitiated that part of the *Roe* decision that allowed states to prohibit post-viability abortions. Since such prohibitions were subject to an exception when the mother's health, including psychological health, was at stake, and since *Doe* left such decisions wholly to the discretion of the doctor, the medical exception rendered post-viability bans ineffective.

Chief Justice Warren E. Burger and Justices Potter Stewart and William O. Douglas filed concurrences to the opinions in *Roe* and *Doe.* Chief Justice Burger agreed that a woman had a constitutional right to obtain an abortion, but did not believe that Georgia's requirement of certification by two physicians before the abortion could be performed was "unduly burdensome." Justice Stewart agreed that the Due Process Clause of the Fourteenth Amendment protected a woman's right to an abortion, but made clear that the right was based on a substantive due process interpretation of the amendment—even though the Court had claimed to have rejected substantive due process years before. Justice Douglas reiterated the development of the notion of the right of privacy in family, procreative, and medical affairs first spelled out in his opinion in *Griswold* as well as the disabilities that forced pregnancy imposed on a woman, agreeing that the Georgia statute's accreditation and medical necessity requirements impermissibly interfered with the woman's liberty interest in choosing an abortion.

Justices William H. Rehnquist and Byron R. White dissented from both decisions. Justice White was clearly bothered by what he saw as the majority's privileging of the pregnant woman's "convenience, whim, or caprice" over the life or potential life of the fetus, thus overturning the judgment of democratically elected state legislatures. And the majority had done so, according to Justice White, in the absence of any constitutional authority. To him, this was nothing but "an exercise of raw judicial power." Justice Rehnquist too was troubled by the absence of authority for the majority's determination that abortion was a right protected by the Due Process Clause of the Fourteenth Amendment. Ordinarily, only rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental" had been protected from state interference by the Court. But he demonstrated that at the time of ratification of the Fourteenth Amendment, thirty-six states had laws prohibiting abortion. Thus, according to Justice Rehnquist, "[t]he only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter."

The decision in *Roe* has cheered the feminist movement and civil libertarians for three decades. Civil libertarians argue that personal decisions such as whether to have a baby should be made free from government interference. Feminists see the right of a woman to make reproductive decisions as essential to her autonomy. Preserving *Roe* and expanding on it are central efforts of the feminist movement, which retains a strong voice in the national Democratic Party. Those opposed to abortion on moral and religious grounds denounce the decision. They argue that abortion terminates a human life and that *Roe* elevated the killing of the unborn to a constitutional principle. This opposition has expressed itself in a well-organized antiabortion movement with strong ties to the national Republican Party. Some legal scholars have also been critical of *Roe,* arguing that the decision lacks constitutional and historical authority and that it was the product of an activist Court that substituted its judgment for that of the people, thus undermining democratic principles.

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, the Supreme Court reaffirmed the basic holding in *Roe* while at the same time rejecting *Roe's* trimester approach in favor of a pre-viability/post-viability framework and permitting greater state regulation of the abortion procedure. Prior to viability, the state may impose some restrictions on the right, such as waiting periods and mandatory informational presentations on the medical risks of abortion and the development of fetal life, so long as these restrictions do not constitute an "undue burden" on the woman's right to an abortion. The ability to bar abortions post-viability remains, but continues subject to the health exception first announced in *Roe* and *Doe,* thus essentially barring the state from prohibiting such abortions. *Casey* did little to solve the conflict over abortion among the justices or in American society. Debates between supporters and opponents of *Roe* continue to play out in society and manifest themselves in all aspects of American political life—in local, state, and national elections, in the courts, and in battles over appointments to federal executive and judicial offices.

In 1995, Norma McCorvey, whose challenge to Texas's abortion law had started the controversy, renounced the decision in *Roe* and joined the antiabortion movement. In June 2003 she petitioned the U.S. District Court for the Northern District of Texas, the court that had originally heard her case, to reopen *Roe* and reverse the decision. As of 2004, the court had not decided the case. McCorvey's change of heart and return to court symbolize the ongoing moral and legal intractability of abortion in U.S. society.

Hal Goldman

See also: Birth Control and Contraception; *Griswold v. Connecticut; Planned Parenthood of Southeastern Pennsylvania v. Casey;* Right to Privacy.

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Romer v. Evans (1996)

In *Romer v. Evans,* 517 U.S. 620 (1996), the U.S. Supreme Court held that the voters of Colorado could not amend the state constitution to prohibit antidiscrimination ordinances protecting gay and lesbian people. After a number of Colorado municipalities adopted statutes outlawing discrimination based on sexual orientation in areas such as housing, employment, education, public accommodations, and health and welfare services, voters in 1992 approved a referendum, Amendment 2, to the state constitution. The amendment prohibited legislative, executive, or judicial action that would protect people based on their "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships." The referendum was approved 53 percent to 47 percent. Colorado briefly acquired a reputation of being "the hate state."

The amendment was challenged in court. At trial, Colorado argued that Amendment 2 served a compelling state interest that was narrowly tailored to meet important objectives because it deterred factionalism; preserved the integrity of the state's political functions; preserved the ability of the state to remedy discrimination against suspect classes; prevented the government from interfering with personal, familial, and religious privacy; prevented the government from subsidizing the political objectives of a special interest group; and promoted the physical and psychological well-being of children. The Colorado Supreme Court rejected these claims and held that the amendment violated the strict-scrutiny test that applied when the Equal Protection Clause of the Fourteenth Amendment was implicated. The state high court found that the amendment infringed on the fundamental rights of gays and lesbians to participate in the political process.

The U.S. Supreme Court, in a six–three decision, agreed with the Colorado Supreme Court's decision but used a different standard for reviewing the state's justification of the amendment. The Court said there was no "rational basis" for the amendment. Amendment 2 could not be justified under the premise of simply denying "special rights" to gays and lesbians, and it could not be justified under other citizens' freedom of association. Writing for the majority, Justice

Anthony M. Kennedy stated that this initiative petition went beyond prohibiting special rights: "[I]t imposes a broad disability upon those [gay and lesbian] persons alone, forbidding them, but no others, to seek specific legal protection from injuries caused by discrimination in a wide range of public and private transactions." The Court concluded that this state constitutional amendment was actually based on a dislike for gay and lesbian people, and that a "State cannot so deem a class of persons a stranger to its laws."

Justice Antonin Scalia, writing in dissent for himself and Chief Justice William H. Rehnquist and Justice Clarence Thomas, wrote scathing commentary that the "Court has mistaken a *Kulturkampf* [cultural war] for a fit of spite." Scalia called Colorado voters "tolerant" and out "to preserve traditional sexual mores against the efforts of a politically powerful minority." Scalia argued that the Court should not overturn precedent lightly, and constitutional principles should not be modified by cultural trends. Since the Constitution does not mention homosexuality, these issues should be addressed by the legislative process. Also, since homosexual conduct could be criminalized, it was "permissible for a state to enact a law merely disfavoring homosexual conduct." It must be noted, however, that the Court in 2003 overturned sodomy statutes criminalizing homosexual conduct in *Lawrence v. Texas,* 539 U.S. 558 (2003).

Gay and lesbian rights groups hailed the *Romer v. Evans* decision for its strong statement supporting equal rights and for its prohibition of statutes that discriminated against gays and lesbians. Supporters of Amendment 2 derided the opinion as an example of judicial activism by a liberal Court. Scholars have debated the impact of the case. Although the Court struck down Amendment 2, the majority opinion did not outline which of the three constitutional standards (rational basis, heightened scrutiny, or strict scrutiny) should be applied to gay and lesbian rights claims. The Court explicitly distanced itself from the state court's analysis using the strict-scrutiny test and concluded that the amendment did not pass even the rational-basis test. Consequently, no new rights or greater constitutional protections were afforded to gay and lesbian citizens. The case did signal, however, that gays and lesbians would not be strangers to the constitutional protections of the law and did generate a great deal of awareness of gay and lesbian issues. The Court addressed some of these issues seven years later in the *Lawrence* decision in finding that the right to privacy included gay and lesbian conduct.

Martin Dupuis

See also: Bowers v. Hardwick; Lawrence v. Texas; Rational-Basis Test; Strict Scrutiny; Transgender Legal Issues in the United States.

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Rosenberg, Ethel (1915–1953) and Julius (1918–1953)

In the late 1940s a fear of communism swept through the United States. This phenomenon, reminiscent of a similar hysteria that permeated American society after World War I, became known as the "second red scare." The fear was that communism would spread to the United States and destroy democracy and capitalism. The U.S. government was willing to do whatever was necessary to stop individuals who would help communism take over the United States. Among the actions the government took were the trial and execution of Ethel and Julius Rosenberg for espionage and treason.

Julius Rosenberg and Ethel Greenglass were born in the same poor New York City neighborhood. Each was the child of Jewish immigrants from Europe—Julius's parents were from Poland, Ethel's from Austria and Russia. They graduated from the same high school, but did not know each other during their school days because she was nearly three years older than he.

After high school, Ethel became a clerk at a shipping company. By the mid-1930s she had helped to organize a union and had led a strike. She met Julius

at a labor rally in 1936. He was an engineering student at City College of New York where he had become actively involved in radical political causes and an engineering union. By the time he and Ethel met, both were members of the Communist Party. They married in 1939.

In 1940 Julius became an engineer with the U.S. Army Signal Corps. When the first of the Rosenbergs' two sons was born in 1943, Ethel quit her job and settled down to domestic affairs in the couple's housing project apartment. They supported the war effort and in 1943 quit the Communist Party. In 1945, however, the U.S. government fired Julius when it learned of his past political affiliations.

Meanwhile, Ethel's brother, David Greenglass, worked as a machinist for the U.S. government in Los Alamos, New Mexico, helping to perfect the atomic bomb. He later alleged that he gave Julius Rosenberg diagrams and other information that would help the Soviet Union copy U.S. technology. When the Soviets built their first atomic bomb in 1949, the fear of communism that existed in the United States increased dramatically. The government arrested Julius for violating the Espionage Act of 1917; Ethel was later arrested for allegedly typing the information that her brother had given her husband.

Julius and Ethel Rosenberg, separated by heavy wire screen as they leave the federal courthouse after being found guilty by a jury in 1951 of providing government secrets to the Soviet Union. *(Library of Congress)*

The Rosenbergs were tried in March 1951. Many observers believed that the government would drop charges against Ethel if she would convince Julius to plead guilty. She refused to cooperate, however, and both steadfastly maintained their innocence. David Greenglass made a deal for a limited prison sentence and became the government's star witness. Both Rosenbergs were convicted and sentenced to death. Appeals and pleas for presidential pardons were rejected, and they were executed at Sing-Sing prison in Ossining, New York, on June 19, 1953.

The Rosenberg case has been controversial since it occurred. Many people argued at the time of the trial that the government was framing the couple, and others—though in favor of prosecuting Julius—agreed that the case against Ethel was weak. Their sons crusaded for years to prove their parents' innocence. One conclusion that almost everyone agrees upon is that because the Rosenbergs were the only people executed for espionage and treason during the Cold War era, the government was making examples of them. The case has long been cited as an example of overweening government power gone unchecked in an atmosphere of hysteria over communism.

Roger D. Hardaway

See also: Communists; Espionage Act of 1917; Treason.

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Rosenberger v. University of Virginia (1995)

In *Rosenberger v. University of Virginia,* 515 U.S. 819 (1995), the U.S. Supreme Court ruled that the University of Virginia's denial of student activity funds to a campus religious organization violated the students' right of free speech guaranteed by the First Amendment to the U.S. Constitution.

Using funds generated by student activity fees, the University of Virginia paid printing costs to an outside printer for the publications of selected student organizations. The publications included disclaimers that they did not represent official university views. University officials refused this funding for the university-approved student group Wide Awake Productions (WAP) to print its magazine, *Wide Awake: A Christian Perspective at the University of Virginia.* The university, as a public institution, defended its position as necessary to maintain separation of church and state, whereas WAP believed its rights to free exercise of religion, free speech, and free press were being denied. In a five–four decision, the Supreme Court in 1995 ruled in favor of WAP.

The Court majority relied primarily on the free speech argument. It focused on the university's stated intent that student activity funds should go to groups that enhanced its educational purpose, including groups involved in disseminating news, information, and opinion. The Court concluded that the university was practicing "viewpoint discrimination" and found its refusal to fund publications that "primarily promote or manifest a particular belief in or about a deity or ultimate reality" to have a stifling effect on the exchange of ideas. In fact, argued Justice Anthony M. Kennedy in his majority opinion, even a great thinker like Plato would have trouble getting funded under the university's restrictions unless he chose to write about "making pasta or peanut butter cookies."

The Court did not find that the Establishment Clause posed any problems for university funding of WAP because viewed as part of the overall funding policy, such support would place the university in the appropriate neutral position required by the First Amendment. Justice Kennedy also distinguished the student activity fee from public tax money and found the use of an outside printer to be a sufficient safeguard against misuse of funds,

In his dissenting opinion, Justice David H. Souter denounced the Court's decision as allowing for the first time "direct funding of core religious activities by an arm of the State." Unlike the Court majority, he focused on the portion of the university's guidelines forbidding funding of religious activities, and he concluded that this plus the Establishment Clause should prevent university funding of WAP. He found WAP's magazine to be unabashedly religious, filled with exhortations to repent and seek salvation. Even articles on what appeared to be secular themes such as racism or eating disorders used these topics as vehicles for discussions of sin and salvation.

The two sides of the Court disagreed on whether there was a difference between providing funding and providing facilities for religious groups. The majority, relying on earlier Court rulings, saw no significant difference. The dissent, relying heavily on James Madison's admonition in his *Memorial and Remonstrance* that government not provide even "three pence" to support religion, saw a major difference that was central to its opposition stance.

There were two concurring opinions. Justice Sandra Day O'Connor preferred to state her support in more narrow ad hoc terms than did Justice Kennedy, and Justice Clarence Thomas used the opportunity to disagree with Justice Souter's interpretation of James Madison's views on church and state.

Jane G. Rainey

See also: Establishment Clause; First Amendment; Free Exercise Clause; Separation of Church and State; Student Rights.

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Rostker v. Goldberg (1981)

The issue in *Rostker v. Goldberg,* 453 U.S. 57 (1981), was whether a military registration law applicable only

to men violated the Constitution under provisions guaranteeing equal protection of the laws or due process of law. The U.S. Supreme Court held that it did not. Because of a crisis in Southwest Asia, President Jimmy Carter decided in 1980 to reactivate the draft registration process and asked Congress to allocate funds for the universal registration of young men and women. Congress budgeted the funds for registration of men age eighteen to twenty-six but declined to give the president the authority to extend registration to women.

Several men sued Bernard Rostker, the director of the Selective Service System (draft board), arguing that male-only registration violated the Due Process Clause of the Fifth Amendment. That clause had been held by the Court to prohibit the national government from denying anyone the equal protection of the laws. The young men claimed that the government was nonetheless discriminating by imposing a burden only on them when it reasonably should be placed on all people their age.

Justice William H. Rehnquist declared for a six-justice Court majority that the decision to register only men was well within the powers of Congress. The Court had traditionally been loath to interfere with congressional power over military matters, he wrote. "Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked," he said, explaining the Court's "healthy" deference to Congress.

The plaintiffs claimed that in excluding women from the draft registration program, Congress acted "reflexively and not for any considered reason" and on the basis of narrow, outmoded stereotypes about women. Justice Thurgood Marshall, one of the three dissenters from the Court's decision, added that the Court was "plac[ing] its imprimatur on one of the most potent remaining public expressions of 'ancient canards about the proper role of women.' " Not at all, Justice Rehnquist replied; Congress had excluded women because the purpose of the registration was to maintain records of people who could be called for combat duty. Congress, charged with the "important governmental interest" of raising and supporting armies, had long prohibited women from serving in combat. It was reasonable for the legislators, after their extensive hearings and discussions, to conclude that no purpose would be served by registering people who could not be called for combat duty.

Justices Marshall, Byron R. White and William J. Brennan noted that military officials' testimony before Congress indicated that in the event of a draft of 650,000 individuals, 80,000 women would be needed to fill noncombat positions. There was no indication that those slots would be filled by volunteers, and the government had not demonstrated that its gender-based classification bore " 'a close and substantial relationship to [the achievement of] important government objectives" or that its purposes could not be achieved by a gender-neutral method.

None of the justices, however, questioned the prohibition against women serving in combat. Whether such a decision would be upheld today is an open question, in light of the role of women in combat during the 1991 Gulf War and in Iraq in 2003 and given the Court's decision in *United States v. Virginia,* 518 U.S. 515 (1996), holding that it was unconstitutional for the state to deny women admission to a previously all-male military academy.

Philippa Strum

See also: First Amendment; Strict Scrutiny.

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Roth Test

In the companion cases of *Roth v. United States* and *Alberts v. California,* 354 U.S. 476 (1957), the U.S. Supreme Court for the first time formulated a test to be applied to determine whether sexually oriented material could be judged legally obscene and thus excluded from constitutional protection under the First Amendment clauses that provide freedom of speech and freedom of the press. According to the majority

opinion written by Justice William J. Brennan Jr., sexually oriented material was obscene only if it dealt with sex "in a manner appealing to prurient interest," that is, "material having a tendency to excite lustful thoughts." Thus, the appropriate standard to be applied by the courts in obscenity cases was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Various elements of this test can be traced to the obscenity section of the *Model Penal Code* formulated by the American Law Institute and the numerous obscenity decisions of state and federal courts cited in Justice Brennan's opinion, but the actual wording of the *Roth* test apparently was original. Although the majority ruled that the trial courts in the cases under review had applied the standard properly and thus affirmed the obscenity convictions of both defendants, the *Roth* test could also be used to loosen the censor's hold on sexually oriented works. In his opinion, Justice Brennan cited historical evidence supporting the conclusion that obscenity was not protected speech, but he also stressed that the First Amendment guarantees were adopted primarily to protect speech on important social and political issues and that "all ideas having even the slightest social importance" were fully protected. Indeed, he explicitly acknowledged that sex had been "a subject of absorbing interest to mankind through the ages." In adopting the "average person" and "dominant theme" approach of the *Roth* test, Justice Brennan explicitly rejected the use by U.S. courts of the repressive English standard examined in *Hicklin v. Orbeck,* 437 U.S. 518 (1978), which allowed material to be judged "merely by the effect of an isolated excerpt upon particularly susceptible persons."

From the time the case was decided, the *Roth* test became an easy mark for critics who decried everything from its lack of certainty to the circular quality of its definition of obscenity in terms of material that tended to incite lustful thoughts. Nonetheless, as the Earl Warren and Warren E. Burger Courts further refined the test of obscenity over the years, the original *Roth* test was almost always included as one part of a multilayered test of obscenity. In *Miller v. California,* 413 U.S. 115 (1973), Chief Justice Burger invoked the logic of the *Roth* opinion as the basis for applying First Amendment standards to sexually oriented materials and adopted language taken directly from *Roth* as the first prong of a revised three-part test that remains the keystone of the contemporary Supreme Court's approach to obscenity. Thus, the *Roth* test survives as one element of the constitutional law of obscenity in the twenty-first century.

Edward V. Heck

See also: Censorship; First Amendment; *Miller v. California;* Obscenity; Pornography.

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Rust v. Sullivan (1991)

Rust v. Sullivan, 500 U.S. 173 (1991), sits at the intersection of free speech, abortion rights, and the government's power to set conditions on grants of federal funds. At issue was an interpretation of Section 1008 of Title X of the Public Health Service Act of 1970, legislation designed to provide funding for family planning services. Under Section 1008, no government funds "shall be used in programs where abortion is a method of family planning." In 1988 the Reagan administration, relying on that provision, issued a regulation that barred any recipients of Title X funds from advocating, giving referrals for, or even counseling patients on abortion. Outraged at what they regarded as interference with the right to abortion and the free speech right of physicians to advise their patients fully, a group of doctors and clinics sued to have the "gag rule" voided.

In a five–four decision written by Chief Justice William H. Rehnquist, the U.S. Supreme Court upheld the regulation. Arguing that the statute was ambiguous regarding the questions of abortion advocacy, referral, or counseling, the Court ruled that the secretary of health and human services was within his discretion in enacting the regulation, and the courts should defer to him. In regard to the First Amendment issue, the majority pointed to *Maher v. Roe,* 432

U.S. 464 (1977), in which the Court held that government had the right to prefer childbirth to abortion; thus in *Rust,* Chief Justice Rehnquist wrote, "the government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another." With regard to the right to abortion, the Court went on to note, "The government has no constitutional duty to subsidize an activity merely because it is constitutionally protected. . . . [The regulation] places no governmental obstacle in the path of a woman seeking to terminate her pregnancy, and leaves her with the same choices as if the government has chosen not to fund family planning services at all."

Although acknowledging that most Title X recipients would not have access to abortion-related services under the regulations, the majority dismissed that fact as a consequence of poverty, not governmental restrictions.

The dissenters in *Rust* argued that the regulation was a new interpretation of the statute, which had always been read as affecting only the practice of abortion. They further argued that the regulation was inconsistent with the statute as a whole, that it was a content-based ban on speech that interfered with physicians providing their patients with medically necessary information, and that by limiting information, it effectively limited access to abortion.

Although the gag rule was rescinded in the opening days of President William Clinton's administration, *Rust v. Sullivan* remains significant on two counts. First, it left open the possibility that a similar regulation could be reinstated. More broadly, it raised an as yet unanswered question of what restrictions on free speech the government can enforce on those who accept government grants. As Justice Harry A. Blackmun noted in his dissent, "[u]nder the majority's reasoning, the First Amendment could be read to tolerate any governmental restriction upon an employee's speech so long as that restriction is limited to the funded workplace."

Stephen L. Robertson

See also: First Amendment; *Planned Parenthood of Southeastern Pennsylvania v. Casey;* Right to Privacy; *Roe v. Wade.*

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San Antonio Independent School District v. Rodriguez (1973)

In *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), the U.S. Supreme Court upheld the constitutionality of a Texas school funding system that resulted in wide differences in how much could be spent in a school district based on the wealth of a district's real estate that was subject to taxation. Parents who had won their case in a three-judge U.S. district court claimed that this system discriminated against children in tax-poor districts by denying them an education equal to that of children in wealthy districts. The Court addressed two strands of constitutional law that are important in analysis of the Equal Protection Clause of the Fourteenth Amendment. It did so both by asserting that, although important, education did not represent a fundamental right, and by deciding that it would not consider wealth to be a "suspect" classification.

Furthermore, Justice Lewis F. Powell Jr., writing for the five–four majority, found that if discrimination was occurring, it was not necessarily occurring against poor children. Poor families did not invariably live in areas with low property taxes; many lived in commercial and industrial areas that had high property tax incomes. Therefore, if discrimination occurred, it was based not upon wealth but upon the area in which a student lived.

However, the Court denied that discrimination even was taking place. Not only did the justices not consider education to be a fundamental right and interest under the Equal Protection Clause, but the justices also emphasized that Texas had not denied education absolutely to any student. All students received a minimum basic free education, regardless of their income or their location. To argue that education was such a basic right that all people ought to receive a completely equal education, the Court argued, would bring into question whether the state might be forced to fund equal housing and food for the poor.

Additionally, the Court ruled that the Texas plan was constitutional because it helped preserve local control. Just as other local resources such as hospitals and police may be funded in part by property taxes, the funding of schools should remain at least in part up to individual communities. Different communities might decide to allocate resources in different ways, resulting in varying amounts of money being available for schools.

Opponents of the law argued that the right to education was implicit in the Constitution for several reasons. A satisfactory education was necessary for citizens to exercise their First Amendment speech rights, for example, because they must be able to read and write in order to communicate their ideas and to learn about the ideas of others. Furthermore, the Texas education system disenfranchised voters by limiting the quality of their participation in the political process. Because the right to an equal education was so related to fundamental rights explicitly listed in the Constitution, the minority argued that it was an implicit right—that is, a right not listed but still inherent in the Constitution. Moreover, by limiting the amount a school district could tax itself, the dissent argued, this system of school funding did not allow local control of schools.

In a related case, *Plyler v. Doe,* 457 U.S. 202 (1982), the Court ruled that Texas could not deny education to any student if it was provided to all. At issue was a Texas law that denied admission to Texas public schools to the children of illegal aliens. Although education was not such a fundamental right that equal access was guaranteed, it was nonetheless important enough that the government could not refuse it to any student absolutely. This case became an important precedent in restricting government from denying public primary and secondary education to children no matter how they arrived in a state. Moreover, a number of state courts, including those in New Jersey, California, Tennessee, and Kentucky, have ruled that their constitutions do regard education as a fundamental right and have accordingly struck down

state educational funding programs similar to those that the Supreme Court upheld in *Rodriguez.*

Ronald Kahn and Steven A. Peterson

See also: Education; Fundamental Rights; Suspect Classifications.

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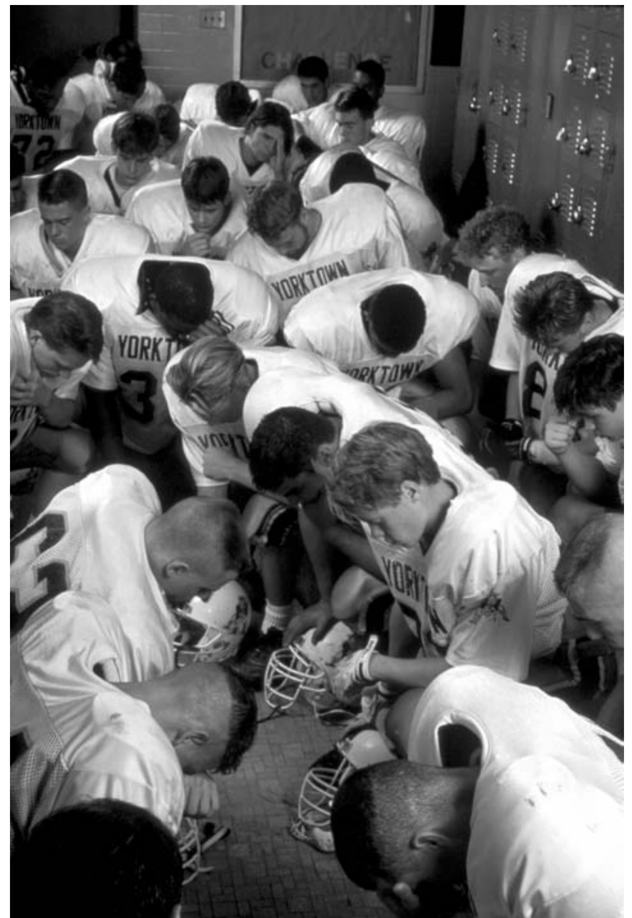
Santa Fe Independent School District v. Doe (2000)

In *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), the U.S. Supreme Court yet again struck down a scheme enabling prayer in a public school in a decision that embodied the two interlocking developments prevalent in the Court's work in this area: the Court's consistent warnings to school officials to keep prayer out, and the insistent attempts by school officials to keep prayer in. With each order from the Court to excise prayer from public education, school districts have creatively tried to find ways to evade the directives and usher prayer in through a side door, be it a "moment of silence" at the start of the school day or a nonsectarian prayer delivered at a graduation ceremony. The Court's decisions on prayer in school have been grounded in the Establishment Clause of the First Amendment to the Constitution. Pursuant to that clause, government cannot engage in activity that would constitute "establishment of religion."

In 2000, the Court's school-prayer jurisprudence ran headlong into a Texas tradition that for many people was nearly as sacred an experience as church worship: high school football. Santa Fe, a small town thirty miles southeast of Houston, had recently introduced a policy placing the decision to have a prayer read over a loudspeaker before the start of games—as a means of "solemnizing" the event—in the hands of the student body via a two-step vote. The first vote would be whether to have a pregame "invocation or benediction." If that vote succeeded, a second vote would select one student as that season's pregame speaker; that student would be able choose the materials to read without any input from school officials. Although the policy was carefully worded to omit the word "prayer," the school superintendent left no uncertainty as to the district's intentions: "Our policy is to allow unrestricted prayer. By that I mean, it's not restricted to nonproselytizing, nonsectarian language." Two local families, one Catholic and one Mormon,



Members of the Yorktown Patriots High School football team have a religious moment of silence, Arlington, Virginia. In the *Santa Fe* case (2000), the Supreme Court reinforced its earlier decisions, stating that the school's scheme to include a prayer at the beginning of a football game violated the Establishment Clause of the First Amendment. *(© Rob Crandall/The Image Works)*

immediately sought an injunction. Fearing retribution from their community, they requested to remain anonymous.

The Supreme Court struck the policy before it was implemented, coloring the policy as governmental coercion. Although student attendance at football games was mostly voluntary, some students' attendance was mandatory; players and cheerleaders did not have the option of leaving the premises during the reading of a pregame invocation. More important, although the school district insisted the voting mechanism made the prayer entirely voluntary and bereft of any official involvement, the six–three Court majority saw the student vote as a ruse concocted to end-run the Court's clearly articulated mandates: "An objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval," noted Justice John Paul Stevens. "The text and history of this policy, moreover, reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school."

In a remarkably trenchant dissent, Chief Justice William H. Rehnquist excoriated the majority for an opinion that "bristles with hostility to all things religious in public life" and criticized its depiction of the process as state-run. But the following September, in a gesture that perhaps unwittingly disproved Rehnquist's point about the voluntary nature of the invalidated policy, fans at Santa Fe High's opening game recited the Lord's Prayer just before kickoff, without any official policy organizing the prayer or any prompting over a loudspeaker.

Steven B. Lichtman

See also: Establishment Clause; *Lemon v. Kurtzman;* Prayer in Schools.

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Sattazahn v. Pennsylvania (2003)

In a narrow (five–four) decision in *Sattazahn v. Pennsylvania,* 537 U.S. 101 (2003), the U.S. Supreme Court held that a jury's imposition of a capital sentence in a second trial did not violate the double jeopardy provision of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment when a previous jury had deadlocked on the appropriate sentence and the trial judge had imposed a mandatory life sentence. David Allen Sattazahn and an accomplice had killed a restaurant manager during the commission of a robbery. After he was convicted, Sattazahn appealed, and the Pennsylvania appellate court ordered a new trial after finding the trial judge's instructions in the first trial were defective. At the new trial, the state introduced a new second aggravating factor. This time the jury imposed the death sentence, which both the Pennsylvania Supreme Court and the U.S. Supreme Court affirmed.

Justice Antonin Scalia pointed out that Sattazahn had initiated the appeal of his first conviction and that in this case the jury had not imposed the original life sentence in the sentencing phase of the trial; rather the sentence was a default judgment based on the hung jury. Citing *Richardson v. United States,* 468 U.S. 317 (1984), for the proposition that ordinarily "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause," Justice Scalia saw no reason to impose a different principle in death penalty cases. Juries have unique roles in capital cases, and had a jury imposed a life sentence in Sattazahn's first trial, it would stand, but that had not happened. Justice Scalia argued that the second sentencing did not implicate "any of the perils against which the Double Jeopardy Clause seeks to protect." Two justices joined his arguments, relating this case to precedents in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Ring v. Arizona,* 536 U.S. 584 (2002). Justice Sandra Day O'Connor wrote a concurring opinion joined by Justice Anthony M. Kennedy.

Justice Ruth Bader Ginsburg wrote a dissent joined by Justices John Paul Stevens, David H. Souter, and Stephen G. Breyer. Acknowledging that the specific issue in the case was "genuinely debatable," Justice Ginsburg believed that the double jeopardy provision should have protected Sattazahn. She argued that the ordeal of a second life-and-death penalty was a peril that the Fifth Amendment was designed to prevent. She was further concerned that the majority decision effectively punished an individual for pursuing his rights, and she pointed to precedents indicating the uniqueness and severity of capital punishment. She believed the judge's first sentence should have been final.

John R. Vile

See also: Capital Punishment; Double Jeopardy; Fifth Amendment and Self-Incrimination.

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Scales v. United States (1961)

Scales v. United States, 367 U.S. 203 (1961), is the only Supreme Court case in which an individual was convicted solely under the membership clause of the Smith Act of 1940, the major antisubversive legislation used against the Communist Party's leadership during the Cold War. Whereas all other individuals convicted under the Smith Act were charged with organizing the American Communist Party, Junius Scales was charged because of his ongoing operations as a party activist in his native North Carolina and the South. *Scales* is also distinctive because the Court upheld his conviction several years after it had seemingly made Smith Act convictions far more difficult to obtain in *Yates v. United States,* 354 U.S. 298 (1957).

The key to the Court's decision lies in Junius Scales's longtime party activism. Writing for the Court, Justice John M. Harlan relied on a series of previous Court cases that distinguished between "nominal" and "active" party membership. From *Yates,* in particular, the Court derived a two-step test to be implemented in the jury instructions for any trial under the Smith Act. The first question was whether the Communist Party itself advocated the forcible overthrow of the U.S. government. The second question was whether the defendant was an active party member who understood and agreed with the party's goal of violent revolution. The jury instructions given during Scales's trial made such a distinction and required the jury to find that Scales had devoted substantial time to furthering the party's goal of violent revolution. This instruction also distinguished *Scales* from *Noto v. United States,* 367 U.S. 290 (1961), decided the same day, in which the Court found that the defendants had engaged in advocating Communist doctrine but had not actively promoted the doctrine of violent revolution.

In dissent in *Scales,* Justice William J. Brennan Jr., joined by Chief Justice Earl Warren and Justice William O. Douglas, argued that the Internal Security Act of 1950 (ISA), which specifically declared that "neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of [the ISA] . . . or of any other criminal statute," had made the membership clause of the Smith Act unenforceable. Justice Hugo L. Black and Justice Douglas wrote separately to emphasize their belief that the First Amendment prohibited any such prosecution.

Scales repudiated the Communist Party long before all of his legal troubles ended and was pardoned by President John F. Kennedy after the Court ruled against him.

Daniel A. Levin

See also: Communists; *Dennis v. United States;* First Amendment; Smith Act Cases.

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Scalia, Antonin G. (b. 1936)

The first justice of the U.S. Supreme Court of Italian American ancestry, Antonin Scalia has advanced constitutional interpretations grounded in late-twentieth-century conservatism. Reflecting his conservative political objectives, he has endeavored to promote moral order through restrictions on expressive liberties, criminal defendants' rights, and policies designed to promote racial equality.

Born in 1936, Scalia attended public schools in Queens, New York, and a Jesuit preparatory school. He earned his bachelor's degree at Georgetown University in 1957 and his law degree at Harvard in 1960. After several years of practice in Cleveland, Ohio, he joined the faculty of the law school at the University of Virginia. In 1972, Scalia became general counsel of the Office of Telecommunications Policy in the Executive Office of the President. The next year he was named chairman of the Administrative Conference of the United States. In 1974, President Gerald Ford appointed him as assistant attorney general in charge of the Office of Legal Counsel. Beginning in 1977, Scalia was a scholar in residence at the American Enterprise Institute, a conservative think tank, and that fall he became a law professor at the University of Chicago. At Chicago he served as chairman of the American Bar Association section on administrative law and as editor of the journal *Regulation.* In July 1982, President Ronald Reagan nominated Scalia to serve as a judge on the U.S. Court of Appeals for the District of Columbia. He wrote opinions in 133 cases, of which 90 addressed the statutory powers of federal agencies.

In 1986, President Reagan selected Justice William H. Rehnquist to serve as chief justice. Scalia was nominated to fill Rehnquist's associate seat. The Senate voted 98–0 to confirm Scalia. Scalia soon voiced a distinctive jurisprudence. Drawing on "legal process" legal theory, Scalia has supported judicial deference to legislative decisions and limits on judicial inquiry into new forms of rights claims. He has become a frequent participant in oral argument, and he has written opinions that contain biting commentary on the opinions of other justices.

FIRST AMENDMENT ISSUES

Scalia's controversial opinion for the Court in *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), restricted a claim of religious liberty and proposed an interpretation of the Free Exercise Clause and other First Amendment rights that would enhance governmental regulation of religious expression. However, in several issues involving freedom of expression, he sought to defend the constitutionality of expressive actions that were contrary to restrictive legislation or injunctions. These actions include his vote permitting flag burning as a protest in *Texas v. Johnson,* 491 U.S. 397 (1989); his dissenting opinions critical of decisions that restricted protests at abortion clinics, as in *Madsen v. Woman's Health Center,* 512 U.S. 753 (1994); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); and *Hill v. Colorado,* 530 U.S. 703 (2000); his opposition to campaign finance regulation as a hindrance of expression, as he outlined in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990); his refusal in *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997), to vote to curtail indecent transmissions on the Internet; and his opinion in *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992), allowing cross burning. In *Edwards v. Aguillard,* 482 U.S. 578 (1987), and *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), he proposed an interpretation of the Establishment Clause that would permit far greater governmental support for religious organizations and religious practices.

CRIMINAL JUSTICE RIGHTS

Justice Scalia's opinions in cases involving defendants' rights have been marked by reluctance to expand those rights. He refused to augment defendants' rights pertaining to search and seizure in *Vernonia School District v. Acton,* 515 U.S. 646 (1995); to self-incrimination in *Dickerson v. United States,* 530 U.S. 428 (2000); and to capital punishment in *Payne v. Tennessee,* 501 U.S. 808 (1991) and *Morgan v. Illinois,* 504 U.S. 719 (1992). Also, he has adopted a literalist reading of the Confrontation Clause, as he set out in *Coy v. Iowa,* 487 U.S. 1012 (1988).

EQUAL PROTECTION OF THE LAWS

Scalia's opinions on matters of racial equality frequently have impeded uses of judicial and legislative power to eliminate racial discrimination. An opponent of affirmative action programs to increase racial diversity in employment—as signaled by his dissenting opinion in *Johnson v. Transportation Agency of Santa Clara County,* 480 U.S. 646 (1987), and his concurring opinion in *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200 (1995)—he has consistently voted against such programs. He has dissented against extending judicial relief for racial discrimination in higher education, and he has written a concurring opinion to support an end to judicial supervision of a school system in which racial discrimination persisted. Many of his opinions about legislation designed to end discrimination in employment and voting have opposed the government's remedies. Also, in *United States v. Virginia,* 518 U.S. 515 (1996), he dissented and argued that male-only state-supported education did not violate the Equal Protection Clause. In *Romer v. Evans,* 517 U.S. 620 (1996), he dissented from the Court's conclusion that a Colorado referendum disqualifying homosexuals from special disability status violated the Equal Protection Clause. Especially in his opinions on abortion and the right to die, he has criticized the development of privacy rights under the Due Process Clause. His abortion decisions, particularly his dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), have been marked by an impassioned hostility to constitutional arguments for the protection of abortion.

Richard Brisbin

See also: Conservatism.

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Schenck v. United States (1919)

In *Schenck v. United States,* 249 U.S. 47 (1919), one of the U.S. Supreme Court's earliest free speech cases, the Court upheld a conspiracy conviction under the 1917 Espionage Act of a prominent member of the Socialist Party who had distributed leaflets that urged people to oppose the draft instituted during World War I. In doing so, however, Justice Oliver Wendell Holmes Jr. issued an opinion that laid the foundation for the development of greater free speech protections under the First Amendment to the U.S. Constitution. The case is now famous as the source of what was to become known as the "clear and present danger" test.

Prior to *Schenck*, it was unclear to what extent, if at all, the First Amendment protected individuals from punishment based on their speech. Earlier Supreme Court opinions, including Holmes's own opinion in *Patterson v. Colorado,* 205 U.S. 454 (1907), indicated that the primary purpose of the First Amendment was to prevent prior restraints (prohibiting expression from being published at all) on speech and not necessarily to prevent subsequent punishment based on speech. In *Schenck,* Justice Holmes acknowledged that "the prohibition of laws abridging speech is not confined to previous restraints" and even noted that the defendant's distribution of antidraft leaflets may have been constitutionally protected "in many places and in ordinary times."

However, Justice Holmes said that the question of whether individuals could be punished for their speech depended on the circumstances under which the speech took place, and he illustrated with his now famous example that the First Amendment "would not protect a man in falsely shouting fire in a theater." For Justice Holmes, the question was whether the speech at issue created a "clear and present danger" of a harm the government had a right to prevent. In ruling that the government could punish Charles Schenck for encouraging people to resist the draft, Justice Holmes concluded that speech during wartime may be curtailed to a greater extent than might be permissible during a time of peace. Further, since the government could outlaw actual obstruction of military recruiting, it could outlaw attempts to obstruct recruiting whether or not they succeeded.

In addition to his opinion in *Schenck*, Justice Holmes authored two other opinions, *Debs v. United States,* 249 U.S. 211 (1919), and *Frohwerk v. United States,* 249 U.S. 204 (1919), during the same month that upheld convictions for speech that was said to obstruct military recruiting. Thus, although *Schenck* contained language that acknowledged certain free speech rights, in reality very little protection was afforded to controversial speech. Indeed, in practice, the Court apparently applied the common law "bad tendency" test, which allowed government to punish speech that had a reasonable tendency to produce a bad result.

Toward the end of 1919, however, Justice Holmes grew more concerned about growing government intolerance of free speech. In this he was influenced by a number of legal scholars who criticized the Court's failure to provide adequate protections under the First Amendment. Chief among these scholars was Zechariah Chafee Jr., who published an article in *Harvard Law Review* arguing that the First Amendment provided greater protection of the right to criticize the government than the Court had recognized under the common law rule. As a result, Justice Holmes moved toward a more speech-protective interpretation of the First Amendment. In *Abrams v. United States,* 250 U.S. 616 (1919), Justice Holmes, along with Justice Louis D. Brandeis, dissented from the Court's opinion upholding a conviction for distributing leaflets that advocated a general strike to protest U.S. actions during the war.

In the dissent, Justice Holmes asserted that the appropriate question was still whether a clear and present danger of harm existed, but he argued that the Court failed to apply the standard correctly. For him, the clear-and-present-danger standard protected opinions unless they imminently threatened immediate interference with vital government purposes. More important, Justice Holmes's dissent in *Abrams* introduced into Supreme Court cases the philosophy that society was ultimately made better when all speech, however unpopular, was allowed to be heard in the marketplace of ideas and that truth was best found from this competition of ideas.

The speech-protective qualities of the clear-and-present-danger test were further developed by both Justices Holmes and Brandeis in a dissenting opinion in *Gitlow v. New York,* 268 U.S. 652 (1925), and in a concurring opinion in *Whitney v. California,* 274 U.S. 357 (1927). The Supreme Court sporadically applied the clear-and-present-danger test to protect free speech, while allowing speech-based prosecutions at other times, until it decided *Brandenburg v. Ohio,* 395 U.S. 444 (1969). In *Brandenburg,* the Court relied, in part, on the clear-and-present-danger test in announcing that speech was protected by the First Amendment unless it was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

J. C. Salyer

See also: Abrams v. United States; Brandeis, Louis Dembitz; Clear and Present Danger.

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Schlup v. Delo (1995)

In *Schlup v. Delo,* 513 U.S. 298 (1995), the U.S. Supreme Court clarified the appropriate standard for overcoming procedural bars on the filing of successive habeas corpus petitions in death penalty cases. *Schlup* involved a state prison inmate who was convicted and sentenced to death for murdering a fellow prisoner. The inmate filed a petition for a writ of habeas corpus (petition for release from unlawful confinement) and was denied relief in his first round of federal proceedings. After obtaining new counsel, he filed a successive federal habeas petition alleging that due to prior ineffective counsel and the state's improper withholding of evidence at trial, he had been wrongly convicted. The lower federal courts denied review of these constitutional claims, applying standards set forth in *Sawyer v. Whitley,* 505 U.S. 333 (1992), which had required "clear and convincing evidence that but for

a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty."

Writing for a five-member majority, Justice John Paul Stevens explained that in the interest of finality and comity (respect for decisions by state courts), the Supreme Court had long upheld procedural bars against multiple filings and abuse of the writ. Given the severity of capital proceedings and the limited function of the "miscarriage of justice" exception as only a trigger for additional review, however, Stevens believed that the lower courts should have applied the test in *Murray v. Carrier,* 477 U.S. 478 (1986). Using this test, the inmate in *Schlup* was entitled to consideration of claims raised in a successive petition if he could demonstrate that a "constitutional violation has probably resulted in the conviction of one who is actually innocent," thereby creating a "miscarriage of justice." Because the lower courts had mistakenly relied on *Sawyer* in denying review of the inmate's second petition, the Court vacated and remanded (returned to the lower court) the matter for reconsideration under the *Carrier* standard.

In concurrence, Justice Sandra Day O'Connor reiterated that the miscarriage-of-justice exception in *Carrier* was a narrow one, available only in extraordinary cases. Chief Justice William H. Rehnquist dissented, arguing to retain the *Sawyer* standard. Joined by Justices Anthony M. Kennedy and Clarence Thomas, he chastised the majority for weakening and further confusing the Court's already complicated habeas jurisprudence. Justice Antonin Scalia also wrote in dissent, emphasizing that under existing federal statutes the courts were not required under any circumstances to entertain successive or abusive petitions.

Federal laws governing the filing of successive habeas petitions were subsequently revised with the passage of the Antiterrorism and Effective Death Penalty Act of 1996.

Lisa K. Parshall

See also: Capital Punishment; Habeas Corpus.

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Schmerber v. California (1966)

Just five years after its decision in *Mapp v. Ohio,* 367 U.S. 643 (1961), extending the application of the exclusionary rule to all state criminal court proceedings, the U.S. Supreme Court significantly limited the rule's reach in the context of drunk driving investigations and rejected constitutional challenges to an involuntary blood-alcohol test. Under the exclusionary rule, any statements or physical evidence obtained as a result of police conduct that violates a defendant's constitutional rights (for example, the Fourth Amendment's protection against unreasonable search and seizure), or that is otherwise unlawful, cannot be used as primary evidence against the defendant in a criminal trial. Further, an involuntary blood-alcohol test raised several constitutional issues.

The petitioner/defendant in *Schmerber v. California,* 384 U.S. 757 (1966), was taken to the hospital after sustaining injuries when the car he was driving struck a tree. At the hospital, he was placed under arrest and subjected to a blood test over his objection. He was convicted of driving under the influence based largely on the fact that his blood-alcohol exceeded the legally permissible level. On appeal, he argued that the blood test was illegally performed and the results therefore should have been excluded at trial.

In a five–four decision, Justice William J. Brennan Jr., writing for the majority, held that the defendant's involuntary blood test did not violate the Fourth, Fifth, or Fourteenth Amendments and thus the results were not subject to the exclusionary rule. Turning to the substantive due process issue, he found that the blood extraction, made by a physician in a hygienic hospital environment, did not offend that "sense of justice" underlying a Fourteenth Amendment claim. With regard to the defendant's contention that his Fifth Amendment privilege against self-incrimination had been violated, the Court held that the withdrawal of blood did not involve "evidence of a testimonial or communicative nature," and, as with the taking of fingerprints, the Fifth Amendment does not exclude the use of the defendant's physical person when it is the source of evidence.

The Fourth Amendment claim, however, proved more troublesome for the Court. Brennan acknowl-

edged that the warrantless invasion of the defendant's body implicated the proscription against "unreasonable" searches and seizures. Although the police officer had probable cause to arrest the defendant in light of his conduct at the scene of the accident and later at the hospital, the "search incident to arrest" exception to the warrant requirement was inapplicable. That exception is based on the need for officers to protect themselves and to prevent the imminent destruction of evidence; however, such concerns are unlikely to be relevant to searches below the body surface.

Nevertheless, the Court found the search was reasonable under the circumstances. First, because of the evanescent nature of alcohol in the bloodstream, the officer did not have time to take the accused to the hospital, investigate the scene of the accident, and then seek out a judicial officer and secure a warrant. Second, citing the commonplace nature of blood tests and the medically acceptable circumstances under which the extraction was performed, Brennan held that this minor intrusion into the defendant's body did not constitute an unreasonable search and seizure.

Legal commentators widely considered *Schmerber* to be the death knell for self-incrimination claims involving physical evidence obtained from the suspect's person and a major retreat in exclusionary rule application. However, subsequent case law indicated that the Court's emphasis on the "minimally intrusive" nature of the physical invasion was to be taken seriously; in *Winston v. Lee,* 470 U.S. 753 (1985), the Court refused to allow nonconsensual surgery under general anesthesia to remove a bullet from a defendant for forensic purposes.

Virginia Mellema

See also: Fourth Amendment; *Mapp v. Ohio; Rochin v. California.*

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Scopes v. State of Tennessee (1927)

Scopes v. State of Tennessee, 154 Tenn. 105, 289 S.W. 363 (1927), is the seminal case in the ongoing public school debate between scientists following evolutionary theory and religious fundamentalists who accept Genesis as set out in the Christian Bible as the explanation for the origin of human beings. It became known famously as the "monkey trial."

In 1925, the Tennessee legislature passed the Butler Act outlawing the teaching of evolution in the "Universities, Normals and public schools of the state." Tennessee was not the only state to pass such a bill; fourteen others had as well. The Tennessee act did, however, generate a conspiracy hatched in Fred Robinson's drugstore in the city of Dayton in the eastern hill country of that state. Some citizens were convinced that the churches controlled too much of civic life and only a direct challenge to the law could correct the predicament. The collision of the plan to dramatize the conflict between the law and science made headlines around the world. The trial of John T. Scopes also represented a demarcation between mainline Protestant churches that accepted the biblical creation story as allegorical and evangelical and Pentecostal churches and others that held as factual the creation story in the Christian Bible.

The Dayton trial was prepared as a test case of statutes such as the Butler Act. As early as July 1923, Clarence Darrow had propounded fifty-five questions to William Jennings Bryan on justifications for teaching the biblical version of creation rather than the Darwinian version. These questions represented the challenge by science to religion. Both men were famous in their own right. Darrow was well known as a defender of liberal causes and criminal defendants. Bryan was a politician who had run for the U.S. presidency on three separate occasions, primarily supporting populist causes. Neither was chief counsel during the trial, but the outside world saw them as the lead attorneys.

As a biology teacher, Scopes was urged by some townspeople to have Dayton be the site of the test of the Butler Act rather than Chattanooga, which had been thought to be the likely venue. Scopes brought George W. Hunter's *Civic Biology* to class on May 4,

1925, and he was arrested three days later for violation of the Butler Act. After preliminary legal proceedings, including a grand jury indictment, Bryan announced his willingness to serve as a prosecutor in the case. John Randolph Neal, a former law professor and dean at the University of Tennessee, who had been forced out by fundamentalists for his support of evolution, became Scopes's trial counsel but quickly contacted the American Civil Liberties Union (ACLU). The ACLU brought in Darrow to conduct the defense. Darrow arrived one day before the trial began.

On July 10, 1925, the "monkey trial" opened with Judge John T. Raulston presiding. Trial opened with prayer, over the objection of defense counsel. The grand jury was again called to reindict Scopes, which the jurors did. After prayer, a petit (trial) jury was selected by the second day of trial. Following prayer, on the third day the indictment was read to the jury, and Scopes entered a plea of not guilty. No testimony was heard until the fourth day of trial because of various objections by the defense.

On that day and subsequent to prayer, testimony was heard from several students that Scopes had taught evolution from the textbook known as Hunter's *Civic Biology* in the Rhea County High School. A copy of the King James Version of the Bible was introduced into evidence. The prosecution then rested.

Over the course of the next six days of the trial, the defense, with much difficulty, added the testimony of a variety of expert witnesses and affidavits from others. The pattern of daily prayer continued.

Clarence Darrow at the trial of John Scopes for teaching evolution, Dayton, Tennessee, July 1925. *(Library of Congress)*

The jury eventually convicted Scopes, but the Supreme Court of Tennessee reversed the decision based merely upon a judicial error in assessing the fine (the Tennessee Constitution required that juries impose fines). Still, the Tennessee court worked through an extensive analysis that included the thought that the Butler Act did not violate the First Amendment of the U.S. Constitution or the analogous section of the Tennessee Constitution. The court stated, "We are not able to see how the prohibition of teaching the theory that man has descended from a lower order of animals gives preference to any religious establishment or mode of worship."

The controversy continued to rage. After a variety of cases had been tried and appealed, the U.S. Supreme Court decided in *Epperson v. Arkansas,* 393 U.S. 97 (1968), that the teaching of the biblical creation story did violate the U.S. Constitution. Yet the Kansas State Board of Education, as recently as August 1999, decided that the study of evolution was to be deleted from the science curriculum of all Kansas schools, leaving the subject of evolution versus creationism to resolution by local school boards. That policy was reversed two years later by a newly elected board. Similarly, in February 2004 the state superintendent of education in Georgia reversed an evolution decision to replace the word "evolution" with the phrase "biological changes over time" after this proposal drew intense criticism.

Charles C. Howard

See also: Creation Science; Darrow, Clarence; Evolution; Student Rights.

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Search

The Fourth Amendment to the U.S. Constitution seeks to protect "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The legal definition of a "search" has evolved dramatically since its first meaning in the English common law. Originally understood to include the physical intrusion upon a private residence in the pursuit of evidence, the term "search" has been expanded to include any breach of an individual's reasonable expectation of privacy.

Early jurisprudence concerning the meaning of a search drew heavily from the common law understanding of trespassing. As a result, early courts defined a search in terms of physical intrusions upon private property. Whereas the unwelcome invasion of a personal residence constituted a search, an observation made from a distance was considered mere surveillance. From this legal perspective, the position of the observer, not the location of the evidence, provides the critical line of demarcation.

Courts were eventually forced to reexamine the meaning of a search in light of important technological innovations. By the early twentieth century, it was possible for the first time to monitor ostensibly private behavior without setting foot on traditionally protected space.

In *Olmstead v. United States,* 277 U.S. 438 (1928), the Supreme Court upheld traditional conceptualizations when it ruled that tapping a suspect's telephone line did not constitute a search as defined by the Fourth Amendment, because the intercepted communications were transmitted over wires that extended well beyond the security of the home. "The language of the [Fourth] Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched."

The Supreme Court eventually reversed this long-established precedent in *Katz v. United States,* 389 U.S. 347 (1967). Ruling that listening devices placed outside of a phone booth constituted a breach of a defendant's Fourth Amendment rights, the Supreme

Court radically changed how a search was defined. "We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine they enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Katz* established a Fourth Amendment protection based on an *expectation of privacy.* So long as citizens take reasonable steps to guard their behavior from outside observers, any attempt to pierce this veil of privacy constitutes a search.

Although *Katz* moved the Court away from the property-centered trespass doctrine, the legal definition of a search has not remained entirely independent of the privacy venue. Indeed, the Supreme Court regards a personal residence as a special sanctuary, deserving a higher degree of constitutional protection than an open field, automobile, or place of business. As a result, observations defined as a search in one setting might be considered mere surveillance in another. This subtle distinction is exemplified by a pair of decisions concerning the valid use of sensory-enhancing technology.

After being refused entry into a Dow Chemical manufacturing plant, the Environmental Protection Agency (EPA) contracted with a commercial aerial photography firm to gather photographic evidence against the suspect facility. In *Dow Chemical Co. v. United States,* 476 U.S. 227 (1986), Dow Chemical argued that this use of high-powered photographic equipment to see inside the secure perimeter of the 2,000-acre facility constituted a search under the privacy expectation doctrine established in *Katz.* Reiterating elements of venue-specific privacy doctrine, Chief Justice Warren E. Burger held that the government's actions did not constitute a search, as a manufacturing plant did not necessarily enjoy the same degree of protection as a private residence. "The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant."

This notion was reinforced by the Supreme Court when it decided that heat measurements taken off of a private residence with thermal-imaging equipment constituted a search under the Fourth Amendment. The Court in *Kyllo v. United States,* 533 U.S. 27 (2001), distinguished the *Dow Chemical* case: "*Dow Chemical,* however, involved enhanced aerial photography of an industrial complex, which does not share the Fourth Amendment sanctity of the home. . . . In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes."

With few exceptions, the Supreme Court has continued to uphold *Katz*, even as it places specific limits on the privacy expectation doctrine. Although the modern definition of a search is not exclusively bound to the physical intrusions upon private property, the Court applies the term most aggressively to potential threats to the privacy of the home.

Matthew Woessner

See also: Fourth Amendment; *Katz v. United States; Olmstead v. United States.*

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Search Incident to Arrest

The general requirement under the Fourth Amendment to the U.S. Constitution is that police must obtain prior judicial approval to make searches, but this requirement has never been absolute. Among the established exceptions is the rule, first suggested in *Weeks v. United States,* 232 U.S. 383 (1914), that neither a warrant nor probable cause is necessary when police conduct a search, at the time of arrest, of a suspect's person and immediate surroundings. In a line of rulings since *Weeks,* the U.S. Supreme Court has offered two primary reasons for maintaining this exception to general Fourth Amendment standards.

The first is the law enforcement interest in having police discover and preserve any evidence in an arrestee's possession. The second is the need for police to ensure that suspects in their custody are not secretly harboring weapons or tools useful in inflicting harm or fashioning an escape.

For many years, controversy in this field of law centered on how far a "search incident to arrest" could properly extend into an arrestee's physical environment. Inconsistent Supreme Court rulings on the question left the Fourth Amendment waters muddy for decades. In *Harris v. United States,* 331 U.S. 145 (1947), for instance, the Court read the search-incident-to-arrest exception so broadly as to authorize a top-to-bottom search of a four-room apartment—including a sealed envelope in a closed desk drawer—following an arrest in the living room. In *Marron v. United States,* 275 U.S. 192 (1927), and *United States v. Rabinowitz,* 339 U.S. 56 (1950), the Court likewise approved extensive warrantless searches of private offices and storage areas in the wake of valid on-premises arrests. Meanwhile, rulings such as *Go-Bart Importing Co. v. United States,* 282 U.S. 344 (1931), and *Trupiano v. United States,* 334 U.S. 699 (1948), suggested that searches incidental to arrest had to remain quite narrow in scope. In *Go-Bart,* the Court held that the act of arresting a suspect at his workplace did not, in itself, license police officers to search his desk and office safe. Similarly in *Trupiano,* the Court invalidated a warrantless seizure of an illegal distillery because federal agents in the case, after arresting the distillery operator, failed to secure a search warrant despite having ample time to do so.

After a half century of such legal uncertainty, the Court in *Chimel v. California,* 395 U.S. 752 (1969), finally established a single limiting standard for incidental searches under the Fourth Amendment: Contemporaneous with a valid arrest, police may search only an arrestee's person and the area "within his immediate control." Ample justification is generally present for searches of areas from which an arrestee "might gain possession of a weapon or destructible evidence." But casual police sweeps of entire dwellings (as in *Chimel*) go too far in the absence of a warrant and probable cause; so, too, do comprehensive searches of closed containers or concealed spaces in the immediate vicinity but beyond the reach of the arrestee.

For over three decades, the *Chimel* formulation has remained the leading standard for judging the constitutionality of searches carried out incident to a valid arrest. As a result, some of the most aggressive uses of warrantless searches by police have been reined in; *Vale v. Louisiana,* 399 U.S. 30 (1970), for instance, established that a house's interior may not be considered "within the immediate control" of a drug suspect arrested on the front porch. More commonly, however, Court challenges since *Chimel* have ended up expanding rather than constraining the recognized scope of police authority in the field. In *United States v. Robinson,* 414 U.S. 218 (1973), for instance, the Court declared that police may conduct a full search under *Chimel* even when, in the particular circumstances, there is no suspicion that the arrestee may be concealing evidence or a weapon. Under *United States v. Edwards,* 415 U.S. 800 (1974), a search may be considered "incidental" even if delayed by several hours. The Court in *Michigan v. Defillippo,* 443 U.S. 31 (1979), held an incidental search to be valid although the underlying arrest was illegal but was carried out in "good faith." In the same vein, the Court in *Maryland v. Buie,* 494 U.S. 325 (1990), recognized the authority of police to conduct a warrantless "protective sweep" when making an arrest inside a suspect's own house.

Critics suggest that such decisions have gravely undermined the Fourth Amendment's protections against abuse of governmental authority. Recent rulings by the Supreme Court, however, suggest that little dramatic change is forthcoming in this doctrinal field.

John P. Forren

See also: Exclusionary Rule; Search.

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Search of Student Lockers

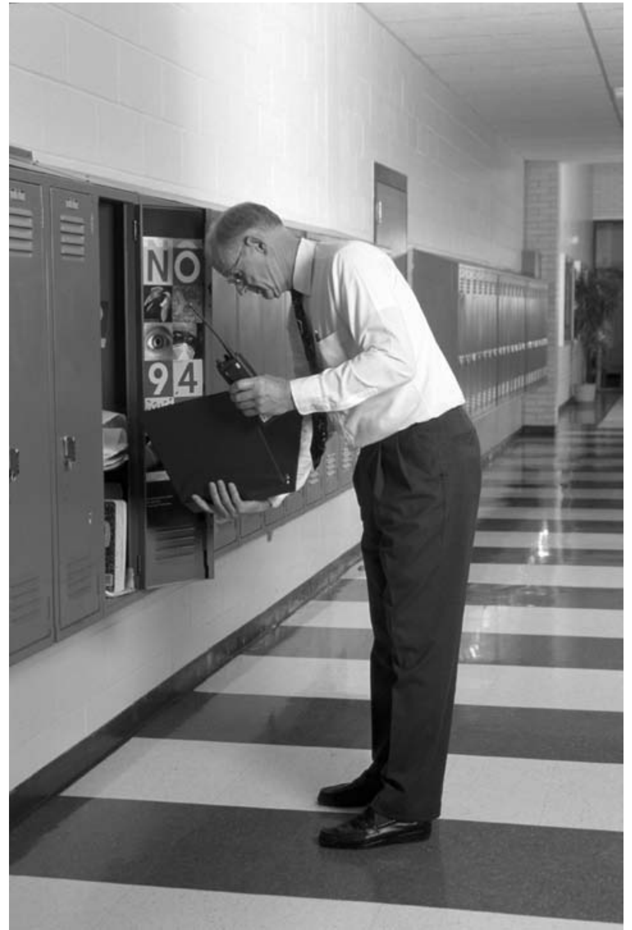
School officials who have a reasonable suspicion of improper activity can search the lockers of U.S. public

school students. The U.S. Supreme Court has ruled that the prohibition against unreasonable search and seizure provided by the Fourth Amendment to the Constitution does not fully protect belongings stored in student lockers. To conduct a search, school authorities need have only a "reasonable suspicion," based in fact, that the search will produce evidence that a law or school rule has been violated. Policies vary from district to district, dependent on state laws, court rulings, and school board rules. In practice, there are few constitutional limitations on school officials who wish to have access to lockers.

In *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), the Supreme Court ruled that school officials have the authority to search the personal belongings of school children without a warrant. When a high school assistant principal found a student smoking in the bathroom, he searched her purse for cigarettes and discovered marijuana. The student was convicted of delinquency and appealed the search as a violation of her Fourth Amendment rights. Balancing students' legitimate expectation of privacy with the need for discipline, the Court ruled that school officials need only a reasonable suspicion of wrongdoing, not probable cause, before searching student property. Violations of school rules alone can create a reasonable suspicion, even if the subsequent search discovers unlawful conduct. A student caught for smoking can be searched for drugs. Searches cannot be based on hunches or speculation. Courts have denied searches based on odd lumps in a backpack or on frequent trips to the bathroom. Suspicions based on information from another student have been held to be reasonable.

The *T.L.O.* decision in some ways expanded student rights. The Court rejected previous rulings that schools were private parties acting *in loco parentis* (in place of a parent), and defined relations between student and school in terms of constitutional rights. Yet the Court, heeding the rising presence of narcotics and weapons in schools, also acknowledged that the "swift and informal disciplinary procedures needed in the schools" made search warrants impractical. An unintended consequence of the decision was to place school officials in a relationship to students that resembled the police more than parents.

The years since *T.L.O.* have seen a gradual erosion of Fourth Amendment protections in the schools.



The Supreme Court has ruled that the Fourth Amendment does not fully protect belongings stored in student lockers. To conduct a search, school authorities need only have a reasonable suspicion, based in fact, that the search will produce evidence that a law or school rule has been violated. *(© Bob Daemmrich/The Image Works)*

Many districts, supported by state legislatures, have asserted the right to search lockers without constitutional impediment. Proponents of privacy rights claim that students have a reasonable expectation of privacy in their lockers, which are given to them for exclusive personal use, are equipped with locks, and hold private belongings. School officials respond that students have no expectation of privacy because the officials have a master key, lockers are school property, and they are located in public places with their contents in public view when opened. The expectation of privacy can be nullified when the school posts notice that lockers are subject to search. Many states have passed laws declaring that lockers are the property of schools,

which can open and search them at any time. Such issues have been decided in state courts since *T.L.O.*, and jurisdictions have been inconsistent.

Do students have a legitimate expectation of privacy in their lockers? What limits does the Fourth Amendment place on locker searches in states that declare them school property? Courts as a rule have not allowed officials to conduct general or random locker searches without individualized suspicion, and most jurisdictions still require reasonable suspicion before any search can take place. Courts have not allowed police narcotics dogs to sniff around locker areas. Police officers must adhere to Fourth Amendment constraints when they are in schools. Schools nevertheless find themselves acting more as police officials than as parents in their relations to students.

James von Geldern

See also: Student Rights; Student Searches.

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Search Warrants

It is a long-standing legal principle of Anglo-American jurisprudence that an individual's home is that individual's castle. Search warrants are among the protections that the framers of the U.S. Constitution designed to protect homes and other places where individuals are entitled to privacy against unreasonable searches and seizures.

FOURTH AMENDMENT: APPLICATION AND ENFORCEMENT

The Fourth Amendment to the U.S. Constitution, part of the Bill of Rights (the first ten amendments to the Constitution) ratified in 1791, specifies: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The U.S. Supreme Court in *Weeks v. United States,* 232 U.S. 383 (1914), developed the exclusionary rule as a means to enforce the provisions of the Fourth Amendment against the national government. Under the exclusionary rule, illegally obtained evidence was to be excluded from use at trial in federal criminal cases. In *Wolf v. Colorado,* 338 U.S. 25 (1949), the Court extended the Fourth Amendment to the states without also applying the exclusionary rule, but it subsequently applied this rule as well in *Mapp v. Ohio,* 367 U.S. 643 (1961). Exceptions developed, however, one of which was the "good faith" exception, identified in *United States v. Leon,* 468 U.S. 897 (1984), in which the Court upheld admission of evidence secured by a search conducted under a facially valid warrant that later was found to lack probable cause.

LINKING THE REASONABLENESS AND WARRANT CLAUSES

The two primary clauses of the Fourth Amendment—the Reasonableness and Warrant Clauses—leave room for ambiguity. One reading of the amendment, which closely links the two clauses, suggests that all searches and seizures are "unreasonable" if they do not follow the provisions of the second clause providing for search warrants supported by evidence given under oath and describing "the place to be searched, and the person or things to be seized." Although some scholars adhere to this view and would thus invalidate all warrantless searches, U.S. courts have generally followed the reasoning that although the Fourth Amendment calls for the issuance of a warrant as a way of assuring reasonableness, searches may sometimes be reasonable in the absence of such warrants. In this view, the primary purpose of the Warrant Clause was to prohibit "general warrants," or writs of assistance, giving public officials wide discretion to conduct searches. The British had abused privacy rights by using such writs in the colonies prior to the American Revolution.

WARRANT REQUIREMENTS

Although the Fourth Amendment does not specifically so state, court decisions have established that police officers are expected to apply to a judicial magistrate to obtain a search warrant. An applicant should not have a vested interest in the search. The standard of probable cause requires a "fair probability, or substantial chance, that evidence of criminal activity or contraband will be found in the place to be searched" but does not require absolute certainty.

Police may seize evidence found in a search if the evidence, although not described in the warrant, is found during the regular course of the investigation. The exclusionary rule, however, prohibits police from using evidence found in places not described by, or authorized in, a warrant. For example, police who sift through a sugar jar in search of a machine gun cannot introduce as evidence illegal drugs found in the jar, whereas police searching a sugar jar for illegal drugs may use evidence of a dead body over which they stumble in the process of finding the jar. Police are generally expected to knock and identify themselves prior to a search, but exceptions may be recognized when destruction of evidence is perceived to be imminent.

SEARCH WARRANTS AND ELECTRONIC SURVEILLANCE

Because the language of the Fourth Amendment specifically identifies the searches of "persons, houses, papers, and effects," the Court initially ruled in *Olmstead v. United States,* 277 U.S. 438 (1928), that police were not required to obtain a search warrant prior to engaging in wiretapping, as long as they did not trespass or physically penetrate the individual's house. The Court theorized that unlike the objects specified in the Fourth Amendment, conversations could not be "seized." The Court later reversed *Olmstead* in *Katz v. United States,* 389 U.S. 347 (1967), indicating that the provision was designed more broadly to protect people rather than places and establishing what was to become a two-part test. Under this test, the inquiry is whether a person had an expectation of privacy, and whether this expectation was reasonable.

JUDICIALLY RECOGNIZED EXCEPTIONS TO THE WARRANT REQUIREMENT

Two scholars have delineated nine circumstances under which the Supreme Court has recognized the reasonableness of searches conducted without search warrants. These include searches incident to lawful arrests, items in "plain view," searches of vehicles, searches to which consent has been given, searches within school settings, searches undertaken when officers are in "hot pursuit," so-called stop-and-frisk searches, certain drug testing, and highway checkpoints.

The Supreme Court significantly narrowed the scope of a search incident to an arrest in *Chimel v. California,* 395 U.S. 752 (1969), when it restricted the search largely to the area within an arrestee's immediate control rather than allowing the search to encompass an entire house. The plain-view exception, which covers routine police observations, has been extended to cover aerial surveillance, most notably in *California v. Ciraolo,* 476 U.S. 207 (1986), which involved law enforcement's use of a plane and camera to secure evidence that a suspect was growing plants to make illegal drugs.

The Court first recognized the warrantless exception for searches of movable vehicles in *Carroll v. United States,* 267 U.S. 132 (1925), and this doctrine was subsequently widened to include even searches of closed containers in vehicles when police had probable cause to suspect criminal activity. This exception to the warrant requirement almost appears to have swallowed the general rule, although the Court ruled in *Knowles v. Iowa,* 525 U.S. 113 (1998), that a citation for speeding did not provide probable cause for a full search of a car. In *United States v. Drayton,* 536 U.S. 194 (2002), the Court upheld a search to which a bus passenger had consented, even though the police had not cautioned him that he could refuse.

Schools provide special circumstances when searches are at issue. In *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), the Court granted school officials power to conduct a warrantless search of a student's pocketbook, though this would not be permitted outside the school setting. In *Board of Education v. Earls,* 436 U.S. 822 (2002), the Court widened its earlier decision in *Vernonia School District v. Acton,* 515 U.S. 646

(1995), to permit warrantless random drug testing not only of student athletes—who might pose a harm to themselves or others—but of all school students participating in extracurricular activities. The Court has applied similar permissiveness to other administrative searches when the discovery of criminal activity is not the primary function being served.

In *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294 (1967), the Court established that police officers in "hot pursuit" of a fleeing criminal suspect did not have to get a warrant, reasoning that the delay might result in escape, harm to others, or the destruction of evidence. The stop-and-frisk search upheld in *Terry v. Ohio,* 392 U.S. 1 (1968), was conducted by a police officer who had reason to suspect that a crime was about to be committed and that his physical safety might be endangered.

Just as warrantless drug testing is permitted in the school setting, so too it may be applied in other contexts. Thus, in *Skinner v. Railway Labor Executives Association,* 489 U.S. 602 (1989), the Court upheld the testing of railroad employees who were involved in train accidents. In *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989), it further upheld such tests for individuals within the U.S. Customs Service who were seeking promotion or whose job required them to carry firearms.

The Supreme Court has permitted road checkpoints at which police officers test all drivers for sobriety. The Court limited the scope of such roadblocks, however, in *City of Indianapolis v. Edmond,* 531 U.S. 32 (2000), when it decided that police could not stop all cars in the hope of finding illegal drugs or evidence of other crimes.

John R. Vile

See also: Administrative Searches; Bill of Rights; *Board of Education v. Earls; Carroll v. United States;* Exclusionary Rule; *Mapp v. Ohio; New Jersey v. T.L.O.;* No-Knock Warrant; Open-Fields Exception; Plain-Sight Doctrine; Search; Seizure; Stop-and-Frisk; Student Rights; *United States v. Leon; Vernonia School District v. Acton;* Wiretapping; *Wolf v. Colorado.*

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Second Amendment

The Second Amendment, like each of the original ten constitutional amendments (the Bill of Rights), was ratified December 15, 1791. The Second Amendment reads: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." The amendment has become part of the U.S. Supreme Court's history because of the difficulty in interpreting its exact meaning and intention. Briefly, gun rights activists focus on the prohibition against infringing on the "right of the people to keep and bear arms." In contrast, individuals who support the passage and enforcement of firearms legislation argue that the right to bear arms is collective. Moreover, opponents of the Second Amendment argue that the militia, as understood by the framers, is no longer relevant and therefore restrictions governing types of firearms and gun buyers are constitutional.

The battles over the understanding of this contentious amendment have been fought in the Supreme Court, albeit infrequently. Despite the historical controversy, the Supreme Court has ruled in, at most, six cases that dealt directly with Second Amendment issues. Significantly, in none of these cases did the Supreme Court incorporate the amendment against the states—that is, require the prohibition of firearms by individual states.

In *United States v. Cruikshank,* 92 U.S. 542 (1876), a case in which William Cruikshank was charged with interfering with two men's right to bear arms, the Court ruled that the Second Amendment's constraints were applicable only to Congress and could not be

understood as limitations on individuals to interfere with rights of firearm ownership. In *Presser v. Illinois,* 116 U.S. 252 (1886), a case involving a state law that prohibited nonmilitia members from carrying firearms in public, the Supreme Court again ruled that the Second Amendment was a limitation only on the federal government and not a limit on state action. Finally, in *United States v. Miller,* 307 U.S. 174 (1939), a case in which the constitutionality of the National Firearms Act of 1934 was questioned, the Court not only failed to incorporate the Second Amendment against the states, but also ruled unanimously that the Second Amendment was intended to guarantee the continuation and effectiveness of militias and therefore should be understood as protecting a collective right rather than an individual right to bear arms. *Miller* was the last time the Supreme Court heard a Second Amendment case, which might lead one to conclude that the interpretation that the Second Amendment is a collective protection is settled. However, the controversy surrounding it continues.

Since the late 1990s, the battle for the legal extension of the Second Amendment to include the rights of individuals has been renewed and expanded. In *Printz v. United States,* 521 U.S. 898 (1997), a case in which the background-check provision of the Handgun Violence Prevention Act of 1993 (the Brady bill) was called into question, Justice Clarence Thomas argued that according to the historical record, the right to keep and bear arms was in fact an individual right. Likewise, in *United States v. Emerson,* 46 F. Supp. 2d 598 (1999), the U.S. District Court for the Northern District of Texas ruled that the Second Amendment was intended to protect the rights of individuals. On appeal, the U.S. Court of Appeals for the Fifth Circuit seconded this interpretation, at 270 F.3d 203 (2001), although arguing that some restrictions were permissible. The case was appealed to the Supreme Court, but the justices declined to hear *Emerson.*

Perhaps the most powerful advocate for the individual rights argument is Attorney General John Ashcroft. In an open letter dated May 17, 2001, to James Jay Baker, the former executive director for the National Rifle Association's (NRA's) Institute for Legislative Action, Ashcroft proclaimed his belief that "it is clear that the Constitution protects the private ownership of firearms for lawful purposes."

In short, there clearly is no settled interpretation of the Second Amendment. Both gun advocacy groups such as the NRA and gun control groups, including the Brady Center to Prevent Gun Violence, continue to press for support for their interpretation of the amendment. However, until the Supreme Court agrees to hear a case in which it announces its interpretation, there will not be a generally accepted understanding of the meaning of the Second Amendment.

Tobias T. Gibson

See also: National Firearms Act of 1934.

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Section 1983 Actions

See Bivens and Section 1983 Actions

Sedition Act of 1918

Passed in connection with U.S. involvement in World War I, the Sedition Act of 1918 severely limited free speech rights. The Sedition Act contained several provisions, applicable only when the United States was at war. One provision criminalized the making of false reports with the intention to interfere with U.S. military operations or with U.S. sale of bonds or other financing instruments. A second provision criminalized any action that caused or attempted to cause disloyalty or insubordination in the U.S. military. A third provision criminalized the speaking, publishing, or writing of any language "disloyal, profane, scurrilous, or abusive" to the United States, its form of government, its Constitution, its flag, or its military or any

language intended to bring the United States, its form of government, its Constitution, its flag, or its military into contempt or scorn. A fourth provision criminalized the opposition, by word or act, of the cause of the United States and the favoring, by word or act, the cause of a country at war with the United States. A fifth provision criminalized the teaching and advocacy of any of these acts. Conviction of any of these offenses was punishable by a fine of up to $10,000 or twenty years' imprisonment.

Passed May 16, 1918, the Sedition Act was technically an amendment to the Espionage Act of 1917 (passed June 15, 1917). Although the Espionage Act of 1917 contained provisions limiting free speech rights during war, the Sedition Act of 1918 substantially expanded these limitations. With these expanded powers, the U.S. government prosecuted not only legitimate acts of espionage that involved both conduct and speech but also individuals whom it viewed as obstructing the war effort. Thus, under these two laws, the government prosecuted pacifists and anarchists as well as trade union and Socialist Party leaders who made antiwar speeches or who were critical of the government's wartime policies. These prosecutions helped the government significantly weaken the large Socialist Party movement that existed in the United States at the time. According to Stephen Kohn, the government filed approximately 2,000 cases under these two acts. Of these 2,000 prosecutions, approximately half resulted in convictions. After World War I ended, the government began gradually releasing individuals convicted under these acts—some as a result of the completion of their sentence, others as a result of government pardons or sentence commutations. By June 1924, all persons convicted under these two acts had been released.

Two of the most famous convictions under the Sedition Act of 1918 were those of Eugene Debs and Jacob Abrams. Debs, the leader of the Socialist Party and its presidential candidate in 1904, 1908, 1912, and 1920, was convicted of obstructing enlistment in the military and sentenced to ten years in prison. Abrams, along with four others, was convicted of uttering language abusive to the form of government of the United States and sentenced to twenty years in prison. Both men appealed their convictions all the way to the U.S. Supreme Court.

In *Debs v. United States,* 249 U.S. 211 (1919), a unanimous Court upheld Debs's conviction. In *Abrams v. United States,* 250 U.S. 616 (1919), a divided Court upheld the convictions of Abrams and his four coconspirators. *Abrams* is significant because the Court's holding in that case rejected the clear-and-present-danger test, adopted by the Court in *Schenck v. United States,* 249 U.S. 47 (1919), just eight months earlier, in favor of the bad-tendency test for determining whether speech was protected by the First Amendment or could be regulated by the government. *Abrams* is also significant because the Court's decision in that case inspired Justice Oliver Wendell Holmes Jr. to write one of the most famous dissenting opinions in Supreme Court history. Both Debs and Abrams were eventually released—Debs was pardoned and released in 1921; Abrams's sentence was commuted in 1921. Abrams was deported to Russia and prohibited from ever returning to the United States.

After the war, the limitations on freedom of expression reflected in the Sedition Act of 1918 did not immediately end. The "red scare" of 1919–1920 resulted in the arrest and holding of thousands of individuals who were suspected Communist sympathizers. Some of these individuals were deported, and many others were eventually released after being held for lengthy periods with no trial. The hysteria surrounding the red scare eventually subsided, and in March 1921, Congress repealed the Sedition Act of 1918.

Scott A. Hendrickson

See also: Abrams v. United States; Bad-Tendency Test; Clear and Present Danger; Debs, Eugene Victor; Espionage Act of 1917; Holmes, Oliver Wendell, Jr.; *Schenck v. United States.*

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Seditious Libel

A common law offense, seditious libel criminalizes political criticism directed at the government (in the broad sense, the state) and its officials. Seditious libel rests on the premise that criticism harms a state by discrediting it in the eyes of its citizens. As such, seditious libel is a subset of sedition, which refers to all speech that harms, or threatens to harm, a state for whatever reason. Seditious libel came to the United States through England, where the concept dates back to the Star Chamber of the seventeenth century. From England, seditious libel prosecutions spread to the American colonies. In these early cases, a judge decided the major issues of the case, including whether the statement was libelous. Nor was it a defense to assert the truth of the libelous statement; to the contrary, seditious libels that were true had an even greater potential to discredit the rulers.

In the eighteenth century there was an effort to introduce libertarian reforms into the law of seditious libel. The trial of John Peter Zenger (1735), a New York publisher, marked a turning point. In the Zenger trial, a jury disregarded the judge's instructions and acquitted Zenger, even though he admitted making the statement. Spurred on by Zenger's trial, eighteenth-century libertarians argued that truth should be a defense to a seditious libel charge, one that should be assessed by a jury. Even these libertarians, however, did not criticize seditious libel, especially when the target of the criticism was not the crown but the popularly elected colonial assemblies. Nevertheless, the eighteenth-century libertarians had a major impact. When Congress passed the 1798 Sedition Act—which made it illegal to criticize the government through false and scandalous writings—it provided both truth as a defense and jury trials.

It is uncertain whether Congress, when it enacted the First Amendment to the U.S. Constitution (1791), intended to outlaw seditious libel, but the passage of the Sedition Act seven years later acted as a further impetus to libertarianism. The Sedition Act came at a time of intense partisan struggle between the Hamiltonian Federalists and the Jeffersonian Republicans. The Federalists proceeded to use the law to harass the Republican Party. That a law adopting the libertarian reforms of the day could be used for politically motivated prosecutions pushed Republicans to reject the Sedition Act even after they took over Congress after the election of 1800. Instead, Congress let the act lapse and repaid the fines administered under it, in the process depriving the U.S. Supreme Court of the opportunity to rule on its constitutionality.

Because the legislation never received Supreme Court scrutiny, throughout the nineteenth and early twentieth centuries lawyers debated whether the Sedition Act had been unconstitutional or merely unwise. On the answer to this question turned the constitutionality of seditious libel more generally. In *Abrams v. United States,* 250 U.S. 616 (1919), which took up the constitutionality of a World War I–era Sedition Act, both the majority and Justice Oliver Wendell Holmes Jr.'s dissent sidestepped the issue. In the 1920s, Zechariah Chafee Jr. argued that the First Amendment had outlawed seditious libel and that therefore Justice Holmes's "clear and present danger" test should apply. By contrast, in *Beauharnais v. Illinois,* 343 U.S. 250 (1952), Justice Felix Frankfurter suggested that all libels—including seditious libel—lacked constitutional protection.

The issue finally came to a head in 1964 in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). Faced with a case involving criticism of a public official, Justice William J. Brennan Jr. took the opportunity to state that even if the constitutional status of the Sedition Act was uncertain when passed in 1798, it had become unconstitutional with time. In making this point, he stressed the wide-open, robust debate that characterizes a democracy. Although Justice Brennan declared seditious libel unconstitutional, he did not rule out the possibility that public officials could sue if they were libeled. But they would have to show that the person who made the statement acted with "actual malice"—in other words, that he or she deliberately, or recklessly, lied. This limitation was criticized by Justices Hugo L. Black and William O.

Douglas, who would have preferred to immunize all criticism of public officials. Nevertheless, they agreed with Justice Brennan that seditious libel was unconstitutional, and since 1964 there has been no attempt to revive seditious libel.

Robert A. Kahn

See also: Alien and Sedition Acts; *Beauharnais v. Illinois; New York Times Co. v. Sullivan;* Zenger, John Peter.

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Seizure

A seizure is a taking of a person's liberty, life, or property usually by the government. The legal concept of "seizure" is governed primarily by the Fourth Amendment to the U.S. Constitution, to some extent by the Fifth and Fourteenth Amendments, and by certain decisions of the U.S. Supreme Court. The relevant portion of the Fourth Amendment that governs seizures states: The right of the people to be *secure in their persons, houses, papers, and effects, against unreasonable . . . seizures, shall not be violated"* (emphasis added).

A taking or seizure of a person by the government can occur in a number of circumstances and can vary in degree, severity, and complexity. All seizures are subject to the requirement that they cannot be "unreasonable." The government may briefly detain, arrest, imprison, or ultimately execute a person. In the least severe seizure of a person, commonly known as a "*Terry* stop," after the Supreme Court decision in *Terry v. Ohio,* 392 U.S. 1 (1968), the government may briefly seize or detain a person based on a reasonable, articulable suspicion of criminal activity. In *Terry,* the Supreme Court ruled that a police officer could briefly detain or seize the defendant without probable cause to arrest him provided the officer had a reasonable, articulable suspicion that the defendant was up to no good. The *Terry* stop must be limited in duration and scope. In the interest of officer safety, an officer conducting a *Terry* stop can conduct a "pat-down" search to check for weapons that may endanger the officer, if the officer has a reason to believe the person may be armed.

The government can seize a person pursuant to an arrest made based upon probable cause and can take that person into custody pending criminal proceedings and a bail hearing. After conviction, the government can imprison someone, seizing that person's liberty potentially for a life term in order to prevent recidivism, as the Court noted in *Ewing v. California,* 538 U.S. 11 (2003).

The government can execute a person, seizing the person's life, upon conviction of a capital offense. Through civil commitment, the government can detain or seize persons adjudged to be a danger to themselves or others for a period as long as the persons remain such a danger. The government can seize or detain a person as a material witness and if the witness is a flight risk can keep the witness in custody until after the witness's testimony is secured in court. The government can seize or detain a person whom the nation's president has designated an "enemy combatant," and even U.S. citizens may be denied their constitutional rights if so designated; the constitutionality of this "enemy combatant" rationale, however, is dubious, and is being questioned in cases challenging the Patriot Act.

Property (real estate or personal) can also be seized or taken, again, usually by the government. Seizure of property can vary in degree, severity, and complexity. The government has the police power to seize contraband, evidence, and ill-gotten property. Sometimes the state seizes property through regulation. The state has the power to regulate the use of property for the public good, and sometimes this regulation means that property owners will not be allowed to use the property in a way that harms society. This type of taking through regulation does not typically require compensation by the state, as does the Takings Clause of the Fifth Amendment when government takes property for public use.

Ultimately, as one of its sovereign powers, the state

has the power of "eminent domain," by which the government can seize private property for public use, usually real estate. The Fifth and Fourteenth Amendments require that property cannot be taken without providing the deprived property owner due process (substantive and procedural) and, in eminent domain cases, just compensation pursuant to the Fifth Amendment's Takings Clause. Often there is much litigation in cases of eminent domain regarding the fair market value (to satisfy "just" compensation) of property taken by the government. There is also much litigation over definitions of property and exactly what constitutes a compensable taking.

Some jurisdictions allow an individual to seize or take the real estate of another through the doctrine of "adverse possession." If a person openly and notoriously exercises dominion and control over another's real estate continuously for a period of many years (states vary, but twenty years is common), the squatter may gain legal title to the real estate. Courts typically do not like the doctrine of adverse possession and usually hold the squatter to very strict compliance with all of the doctrine's requirements.

The Fifth and Fourteenth Amendments each require due process by the state in order to deprive a person of life, liberty, or property. Both substantive due process and procedural due process are required by the Constitution. This means that seizures of people and property and all hearings and proceedings regarding seizures by the state must be actually and procedurally fair. A person can consent to a seizure if the person does so knowingly, intelligently, and voluntarily.

James E. Headley

See also: Due Process of Law; Search; Takings Clause.

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Selective Incorporation

Selective incorporation refers to the application of most core protections in the Bill of Rights to state governments through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Originally, the U.S. Supreme Court ruled that the Bill of Rights (the first ten amendments to the Constitution) placed restrictions only on the actions of the federal government. The framers of the U.S. Constitution reasoned that state governments, being closer to the people, would be less likely to infringe on or take away their rights. Also, many states had their own bill of rights, and the framers expected others would adopt protections for their citizens. Accordingly, the Court, not fully appreciating that states could be more oppressive than the federal government, applied the Bill of Rights only to federal government actions.

Some years after the ratification of the Fourteenth Amendment in 1868, the Court began to interpret its Due Process Clause as placing some of the same limitations on state and local governments that already applied to the national government. This interpretation was the precursor to the doctrine of "selective incorporation" by which selected Bill of Rights provisions were made applicable to the states.

The Fourteenth Amendment's due process provision says that states may not deprive any person of life, liberty, or property without due process of law—clearly marking state governments as possible oppressors. This is significant because, for the first time, the Court interpreted this to mean that state governments—not just the federal government—must protect and provide most liberties specified in the Bill of Rights. In *Chicago, Burlington, and Quincy Railroad Co. v. Chicago,* 166 U.S. 226 (1897), the Court used the Due Process Clause to prevent state governments from taking private property without just compensation; thereafter, the justices were hesitant to incorporate other Bill of Rights provisions for decades. The application of the Bill of Rights to state and local government actions occurred gradually, and not all of its provisions were incorporated.

In 1925, the U.S. Supreme Court ruled in *Gitlow v. New York,* 268 U.S. 652 (1925), that safeguards in the Bill of Rights essential to liberty, such as free speech, must be protected not only by the national government but by state governments as well. By the early 1940s, all provisions in the First Amendment, including freedom of speech, religion, press, assembly, and right to petition government, were incorporated

as applicable against state and local governments. The Supreme Court justices who questioned whether the rest of the provisions of the Bill of Rights should also be incorporated largely won the debate. Most, though not all, provisions of the Bill of Rights have been incorporated as applicable against the states as well.

The doctrine of selective incorporation actually came about in *Palko v. Connecticut,* 302 U.S. 319 (1937), referred to as the *Palko* test. Justice Benjamin N. Cardozo wrote that the Fourteenth Amendment's Due Process Clause did not provide specific instructions on how to administer justice or carry out executive actions. Instead, it prohibited states from enacting procedures that would violate a fundamental principle of justice or deprive the people of rights essential to ordered liberty. This doctrine was used from the 1930s and up until 1972, resulting in the selective incorporation of almost all provisions in the Bill of Rights.

Among the provisions not incorporated is the Fifth Amendment's requirement that the federal government must use indictment by grand jury to charge persons with a capital or infamous crime (usually interpreted to mean a felony). Although the Court agreed that this procedure furthers justice, it stated that other procedures could accomplish the same objective. For example, states may indict persons, charging them with a crime and placing them in a position to stand trial, by what is called an "information"—a formal accusation charging someone with a crime signed by the prosecuting attorney. Thus, a procedure other than grand jury indictment may be used to secure a fundamental principle of justice.

The Court has refused to incorporate or make applicable to the states the following Bill of Rights provisions, indicating that these provisions are not fundamental to justice or ordered liberty or that their objectives are achievable by other means: the right to bear arms (Second Amendment); the right to indictment by grand jury (Fifth Amendment); the right to trial by jury in civil cases involving more than twenty dollars (Seventh Amendment); and protection against excessive bail and fines (Eighth Amendment). In addition, the Court has ruled that rights not specifically listed in the Bill of Rights could still receive protection. For example, in *Griswold v. Connecticut,* 381 U.S. 479 (1965), the Court invoked the penumbras, or shadows, of provisions in the Bill of Rights, including the Ninth Amendment, to protect the right of privacy. The Ninth Amendment states that the enumeration in the Constitution of certain rights should not be interpreted to mean that other rights would be denied. Therefore, the Court believes that the Due Process Clauses in the Fifth and Fourteenth Amendments may place additional limits on the national and state governments beyond those specified in the Bill of Rights.

The process of selective incorporation is often referred to as the "nationalization of the Bill of Rights." This has occurred primarily through the U.S. Supreme Court's review of cases involving Bill of Rights protections as the justices attempt to provide guidelines on how these provisions should be applied by local, state, and national authorities. Nationalization of the Bill of Rights has not ended constitutional debates over what constitutes an unreasonable search and seizure, what is cruel and unusual punishment, what police action leads to involuntary self-incrimination, what constitutes establishment of religion, what types of free speech are permissible, and so on. Selective incorporation has had a significant impact by placing limits on state and local government officials that the framers of the Constitution had not deemed necessary.

Ruth Ann Strickland

See also: Adamson v. California; Barron v. City of Baltimore; Duncan v. Louisiana; Incorporation Doctrine; *Palko v. Connecticut.*

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Self-Incrimination

See Fifth Amendment and Self-Incrimination

Sell v. United States (2003)

In *Sell v. United States,* 539 U.S. 166 (2003), a six–three decision authored by Justice Stephen G. Breyer, the U.S. Supreme Court held that an individual's Fifth Amendment liberty interest precluded the government from involuntarily administering antipsychotic drugs simply for the purpose of rendering the defendant capable of standing trial for nonviolent offenses.

The defendant, Dr. Charles Sell, a dentist, had suffered with mental illness for almost twenty years. He was charged with a variety of offenses, from making fictitious insurance claims to attempting to murder an agent of the Federal Bureau of Investigation, and a psychiatrist where Sell was institutionalized had authorized the administration of drugs to enable him to stand trial. The medical center, a U.S. federal magistrate, a U.S. District Court, and a U.S. Court of Appeals had all approved this decision. Although accepting the involuntary administration of drugs, the district and appellate Courts had found "clearly erroneous" the lower-level findings that Sell, who was not kept in solitary confinement, was a danger to himself and to others.

Justice Breyer accepted jurisdiction in the case prior to trial on the ground that the harm Sell sought to prevent (involuntary administration of drugs) could otherwise be addressed only after it occurred. Justice Breyer turned to decisions in *Riggins v. Nevada,* 504 U.S. 127 (1992), and *Washington v. Harper,* 494 U.S. 210 (1990), to establish standards for forced medication in cases where the purpose was simply to render a defendant competent to stand trial for nonviolent offenses.

The Court focused on a four-part test. The government should establish "that *important* governmental interests are at stake"; "that involuntary medication will *significantly further* those concomitant state interests"; that such "involuntary medication is *necessary* to further those interests"; and that such medications are "*medically appropriate*," that is, "in the patient's best medical interest in light of his medical condition" (emphasis in original).

Perhaps because lower-level decision-makers had based their conclusions on the danger Sell posed to others, they had given inadequate attention to how antipsychotic might affect his own defense. Justice Breyer raised the possibility that such drugs could "sedate" a defendant, interfere with his ability to communicate with counsel, prevent "rapid reaction to trial developments," or diminish his ability to "express emotions" appropriately. Moreover, because the defendant was in a mental institution, there was little danger to the public. If such danger presented itself, and the Court acknowledged that Sell's medical condition may have changed since the initial determinations, a different calculus might be in order, but absent such danger, the government's interest in a conviction was inadequate to permit involuntary medication of Sell.

In dissent, Justice Antonin Scalia, joined by Justices Sandra Day O'Connor and Clarence Thomas, focused on what they believed to be the Supreme Court's lack of jurisdiction. They feared that opening pretrial-stage cases to collateral attacks would lead to "a breathtaking expansion of appellate jurisdiction over interlocutory [provisional] orders."

John R. Vile

See also: Due Process of Law.

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Separation of Church and State

The separation of church and state as a fundamental principle of American democracy is guaranteed by the Establishment Clause of the First Amendment to the

U.S. Constitution. The clause states "Congress shall make no law respecting an establishment of religion," a directive that applied to the federal government when it was ratified in 1791. The U.S. Supreme Court subsequently applied the Establishment Clause to the states by holding it was incorporated into the Due Process Clause of the Fourteenth Amendment.

Historically, two different primary interpretations of the Establishment Clause have been advanced. Under one approach, the Establishment Clause is viewed as prohibiting the establishment of a national religion but allowing government involvement with and regulation of all religions as long as none is favored over others. Under the other approach, the Establishment Clause is interpreted to mean that there must be a "wall of separation" between church and state such that there is no interaction between government and religion at all.

Establishment Clause issues have been raised in many different forums, including the workplace, schools, government bodies, and the public square. Throughout the history of its decisions in this area, the Supreme Court has analyzed Establishment Clause cases primarily by using a modified "wall of separation" approach. For example, throughout its opinion in *Everson v. Board of Education,* 330 U.S. 1 (1947), the Court made clear its position that the "wall between church and state . . . must be kept high and impregnable" even as it upheld a New Jersey law authorizing school districts to pay for the transportation of students to and from religious schools. A resident of New Jersey had challenged this law on the basis that using tax money to pay for the students' transportation to religious schools violated the Establishment Clause. The Supreme Court disagreed, stating that New Jersey was not supporting religious schools by this legislation but rather was simply providing a "general program to help parents get their children, regardless of religion," to and from school.

In Establishment Clause cases since *Everson,* however, the Court has retreated somewhat from a strict separationist approach. For example, in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the Court advanced a three-part test to determine when laws violate the Establishment Clause: They must have a "secular religious purpose"; their primary effect "neither advances or inhibits religion"; and they cannot create "an excessive government entanglement with religion." The Court used this three-pronged test in *Lemon* to hold that a state may not reimburse private religious schools for such items as teachers' salaries and textbooks. According to the Court, even though such a practice might have a secular purpose and not operate to advance religion, such a practice would create an excessive entanglement between government and religion.

Although the *Lemon* test created a clear framework for analyzing Establishment Clause cases, the Court has moved away from that test over time, partly because of concerns that such a strict test could lead to violation of the Free Exercise Clause of the First Amendment, which further prohibits governmental interference in the individual's right to free exercise of religion. Accordingly, the Court must examine each Establishment Clause case anew, tailoring its analysis to fit the specifics of each case. Although the Court does not adhere to a strict test, *Lemon, Everson,* and similar cases serve as precedents to ensure that a wall of separation (although not impregnable) continues to exist between church and state. Only by maintaining such a wall of separation can freedom of religion continue to flourish.

The Establishment Clause and the corresponding doctrine of church-state separation pose controversial constitutional issues for the Court. Ironically, the individuals most protected by this doctrine—those who have strong religious convictions and/or participate in identifiable religious groups—historically have opposed the Court's strict interpretation of the Establishment Clause. Some of this opposition seems to be due to the mistaken idea that strict enforcement of it implies government hostility toward religion rather than neutrality.

In addition, other individuals think that even neutrality toward religion is unacceptable. They argue that the United States was founded as a religious nation, a Christian nation, and so cannot act neutral. Even if the argument is correct that the founders intended the country to be Christian (and there is ample historical evidence to suggest otherwise), the religious diversity of the country today makes it impossible for the government to endorse one religion over another. Even among Christians, there are so many different types of Christianity that for the government to es-

pouse one Christian doctrine over another not only would be unjust but also would encroach on free exercise of religion for all.

Martha M. Lafferty

See also: Establishment Clause; *Everson v. Board of Education;* Free Exercise Clause; *Lemon v. Kurtzman.*

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"Seven Dirty Words"

In *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726 (1978), the U.S. Supreme Court ruled on the constitutionality of government regulation of offensive, but not legally obscene, speech on the radio. The Pacifica, California, radio station aired a speech by comedian George Carlin called "Filthy Words," a piece of social satire that addressed the seven words that can never be said on the airwaves. The father of a young boy heard the broadcast with his son and wrote to the Federal Communications Commission (FCC) to complain. The FCC defined the speech as "patently offensive" and put a comment in the Pacifica Foundation's file, noting that the complaint would be taken into consideration when the radio station's license was up for renewal. The station appealed. In response, the Court ruled that such speech could be regulated due to content, though not altogether prohibited.

Although offensive speech is generally protected under the free speech right extended under the First Amendment to the Constitution, the Court here cited the special nature of the radio as a limited resource that had long been under governmental regulation, and ruled that speech that was broadcast could therefore be limited. It recommended that stations broadcast offensive or indecent speech at a time when children would likely not be listening (late at night), a recommendation that the station followed. Traditionally, the Supreme Court has protected political speech at its highest level. Many scholars have suggested that Carlin's presentation should have been protected as political speech, but the Court refused to recognize the speech as protected political expression.

Under the First Amendment, the mere categorization of speech as offensive does not automatically permit the government to limit it. Although in this case the Court permitted the government to limit speech on public airwaves, such limitations are not necessarily permitted in other forms of media, such as the Internet. In *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997), the Supreme Court struck down the 1996 Communications Decency Act wherein Congress had prohibited the knowing transmission of obscene or indecent messages to any recipient under age eighteen. The act was already problematic as a criminal law because it was impermissibly vague and overbroad. The Supreme Court decided that the law was invalid under free speech doctrine because the nature of the Internet makes this sort of regulation much more restrictive than it would be if it were applied to other sorts of media.

Comparing *Reno* with *Pacifica,* the Court found that the radio, unlike the Internet, is intrusive. Since it is a broadcast medium, listeners have no way of knowing what they will hear before tuning to a certain channel. In contrast, Internet users must "click on" to access different sites, and they generally have a good idea of whether they will be likely to view objectionable material. Additionally, radio stations, unlike sites on the Internet, are scarce, one of the reasons the government is able to justify regulation of radio. Last, radio programs are broadcast at a specific time. Since many children might be listening in the afternoon, a radio station must air indecent programs late at night. Conversely, Web sites are "on" all the time. These fundamental differences mean that a regulation on Internet indecency amounts to a greater restriction of speech.

The protection of children from offensive speech must be weighed against First Amendment concerns, such as the right of adults to speak and to raise their children as they wish, and against the requirement that government must show specific conditions justifying regulation of speech, such as the Court found in *Pacifica.* As the Court affirmed in *Butler v. Michigan,* 352 U.S. 380 (1957), the state may not restrict

the adult population to reading material that is only fit for children.

Ronald Kahn

See also: Federal Communications Commission v. Pacifica Foundation; Obscenity.

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Seventeenth Amendment

The Seventeenth Amendment, adopted in 1913, altered the method for choosing senators from selection by state legislatures to direct election by the people of each state. This amendment to the Constitution effected one of the most fundamental transformations of U.S. governmental institutions and strengthened participation by individuals in the political process. Other amendments protected civil rights, combined the ballot for the president and vice president, clarified succession to the presidency, and expanded suffrage, but no other amendment shifted the electoral base of a major organ of government from one institution directly to the people. Similarly, no other amendment so significantly altered the federal balance between the national and state governments.

Selection by state legislatures was an integral part of the constitutional design. The delegates at the Constitutional Convention of 1787 unanimously rejected a motion to consider electing senators directly by the people and then voted unanimously in favor of appointment by state legislatures. The delegates thought this mode of selecting senators was consistent with the principles of bicameralism and federalism. A bicameral (two-house) legislature diminished the ability of factions to capture control of the legislative process. Providing the separate chambers of the legislature with two distinct foundations of power made this principle more effective while also maintaining a due dependence on the people. The delegates were unwilling to create an entirely national government after having suffered under the central authority of the British system. They believed the state governments should be given a means of self-defense by making them "constituent parts" of the national government.

An amendment calling for the popular election of senators was introduced in Congress as early as 1826, but there was little interest in such proposals until the 1880s and 1890s. The House of Representatives first approved a bill calling for direct election by the required two-thirds vote in 1893, but resistance in the Senate proved to be insurmountable for nearly two more decades. The Seventeenth Amendment was referred to the states after passing the Senate on June 12, 1911, and the House on May 13, 1912. The states acted quickly on the amendment, ratifying it in less than a year. The amendment achieved constitutional status when Connecticut became the thirty-sixth state to approve it April 8, 1913.

There is no clear scholarly consensus on the reasons for the change. At least four distinct perspectives have been offered. The most common view argues that amendments usually occur in clusters as the result of the influence of a successful social movement, the progressive movement in the case of the Seventeenth Amendment. The progressives believed that common people had superior judgment and had the capacity to take a more direct role in governance due to the increased information available through newspapers and the telegraph. The movement championed the initiative, recall, direct primaries, and the popular election of senators as means to overcome corruption and give people a greater voice in government. Progressive insurgents in the Republican Party were key to the Senate's capitulation to the change. These rebellious types were senators mostly from midwestern or western states who became disillusioned with the influence of corporations in the Republican Party. They were particularly concerned with regional issues such as unfair railroad shipping rates and the domination of their party by railroad interests. These insurgents guided the proposal through the Senate and forced the first roll call on direct election, even though

the old-guard Republican leadership opposed the action.

Another view describes the Seventeenth Amendment as the result of partisan politics. This perspective argues that constitutional change can best be understood in terms of strategic democratization to achieve partisan electoral advantages. Prior to the Seventeenth Amendment, Republicans enjoyed electoral advantages in the Senate compared with the popularly elected House as the result of malapportioned state legislatures. The Democrats used the democratic appeal of popular election as a way to break the Republican juggernaut in the Senate.

A similar view sees the Seventeenth Amendment as the result of interest group activity. This perspective characterizes the western insurgents in the Senate as an interest group rather than as part of the progressive movement. Goals of the insurgents were limited to overcoming sectional economic disadvantages suffered by western states. They were not interested in the social reforms usually identified with the progressives, such as minimum-wage laws and old-age pensions. Western senators typically had shorter tenure in office than their eastern counterparts, and this limited their ability to influence policy on railroad regulations and tariffs. They championed the Seventeenth Amendment as a means of increasing the length of their service to achieve greater influence in the seniority-based system for distributing power in the Senate.

Yet another view attributes the Seventeenth Amendment to incremental changes over time. The Constitution did not specify how state legislatures should elect senators, and the lack of a uniform system sometimes was exploited for personal or partisan advantage. In many states, lower and upper chambers of the legislature voted separately to select senators, and deadlocks between chambers were not uncommon. Sometimes the impasse resulted in vacancies in Senate delegations. Congress enacted a law in 1866 that imposed a uniform system for selecting senators. Upper and lower chambers voted separately, and if no candidate obtained a majority in both chambers, the legislature was required to vote in a joint session every day until a candidate won a majority vote. The regulations only worsened the deadlocks, holding up legislative business and creating more vacancies in the Senate.

With the Senate's resistance to direct election, states experimented with a number of innovations to increase public participation in the selection of senators. In 1904 Oregon began holding a direct senatorial primary. Although members of the legislature could not be forced to vote for the winner of the senatorial primary, ballots for state legislative candidates indicated whether the candidate had taken a pledge to elect the people's choice for the U.S. Senate. Even in many states without such innovations, Senate candidates had adopted the practice of canvassing the public to win support, and state legislative candidates often made campaign pledges supporting a particular Senate candidate. The Seventeenth Amendment merely acknowledged in constitutional language the conventions that already governed the process of selecting senators.

Owen Abbe

See also: Constitutional Amending Process; Constitutional Amendments.

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Seventh Amendment

Whereas the Fifth and Sixth Amendments to the U.S. Constitution deal primarily with the rights of individuals accused of or on trial for crimes, the Seventh Amendment deals with civil cases, that is, with disputes between private individuals or their claims for damages. Specifically, the amendment provides, "In suits at common law, where the value in controversy

shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law." With the exception of the term "common law," which may not be universally familiar, this amendment appears fairly clear on its face, but its application is more complicated than the language would suggest.

Common law is the system of law that developed in Great Britain based on judicial decisions made in cases over hundreds of years. The system of trial by jury had roots that dated at least as far back as the Norman conquest of 1066. Jurors replaced previous systems of "trial by ordeal" or "trial by battle," and evolved from a group of twelve men of the local area who served largely as witnesses into twelve men who could judge a case among their fellows without bias. In the Magna Carta of 1215, the right to "judgment by one's peers" was limited primarily to the nobility, but by 1689 the English Bill of Rights recognized this right as one shared by all Englishmen.

Americans in the New World believed they had carried their rights as Englishmen to the new continent, and they criticized the British both in the Declaration of Rights of 1774 and in the Declaration of Independence for what they believed to be violations of this right, as in cases where Americans were taken to England for trial before judges sympathetic to the crown. When the colonies declared their independence of England, all provided for trial by jury, with ten states specifically doing so in their constitutions.

Although the Constitutional Convention of 1787 made provision for trial by jury in criminal cases, it failed to do so in civil cases. In the only discussion of the issue, delegates decided that this right would be adequately protected at the state level. The omission of this guarantee was a major concern of Antifederalist opponents of the new Constitution, and six states that ratified the Constitution specifically recommended a proposal for civil juries along with their ratifications. James Madison subsequently took the lead in getting this proposal incorporated into the first ten amendments to the Constitution, known as the Bill of Rights. His original proposal was that "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." This language was transformed during debates in congressional committees into the current wording of the Seventh Amendment.

A number of U.S. Supreme Court decisions subsequently interpreted and, arguably, narrowed the language of the amendment. In a federal circuit court decision that Justice Joseph Story authored in *United States v. Wonson,* 28 F. Cas. 745 (1812), the Court developed the principle that the Seventh Amendment did not intend to apply the common law of individual states but rather the common law that was in place in England. In *Thompson v. Utah,* 170 U.S. 343 (1898), the Court further ruled that one would ascertain this law not by looking at contemporary developments but by examining the law as it stood in 1791. These decisions thus established what has become known as the "historical test."

Consistent with the British view that the sovereign cannot be sued without its consent (a view that was incorporated into the Eleventh Amendment of the U.S. Constitution), the Supreme Court has limited the use of juries in civil cases in which individuals bring suits for damages against the government. Congress has been given wide leeway in providing for alternate procedures, often involving decisions by a judge, in establishing the U.S. Court of Claims in 1855 and in adopting the Tort Claims Act of 1946. This exception is generally known as the "public rights" exception and has been increasingly applied in the area of administrative law. For example, in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission,* 430 U.S. 442 (1977), the Court decided that jury trials were not necessary in reviewing occupational safety regulations as enforced under the Occupational Safety and Health Act. In general, legislation permitting suits against the government is not interpreted to require jury trials unless it so specifies.

Other decisions have also ruled that the right does not generally apply to issues involving either maritime law or patent infringements, where courts have decided that issues primarily involve interpretation of the law rather than of the facts. Similarly, because English law distinguished between cases involving law and equity, contemporary courts have ruled that the guarantee of a civil jury comes into play only in cases involving monetary damages, not in equitable cases where individuals are seeking an injunction or some

other measure to prevent a future harm from being done.

The guarantee of a right to a jury in a civil case is one of the few provisions in the Bill of Rights (originally interpreted to limit actions of the national government) that the Court has not applied to the states via the Due Process Clause of the Fourteenth Amendment. *Hardware Dealers Mutual Fire Insurance Co. of Wisconsin v. Glidden Co.,* 284 U.S. 151 (1931), reaffirmed an earlier decision to this effect. As was the case prior to the adoption of the Seventh Amendment, however, many states continue to protect this right with guarantees in their own state constitutions.

Although juries in Great Britain in 1791 consisted of twelve men, the U.S. Supreme Court decided in *Colgrove v. Battin,* 413 U.S. 149 (1973), that juries of six individuals were permissible in civil cases. The Court majority determined that smaller juries performed the same functions as larger ones.

John R. Vile

See also: Jury Size; Trial by Jury.

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Sexual Harassment

Sexual harassment is defined as a form of sex discrimination prohibited under the Civil Rights Act of 1964. That law makes it illegal to discriminate against an employee with respect to "terms, conditions, or privileges of employment because of such an individual's race, color, religion, sex, or national origin." The statute is an example of congressional enactment of laws that address civil liberties in the United States.

Although women have probably experienced sexual harassment as long as they have been in schools or workplaces, the behavior did not have a formal name or a legal definition until the latter part of the twentieth century. The U.S. Supreme Court first recognized sexual harassment as a form of discrimination in *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986). The justices read the Civil Rights Act as an attempt by Congress to eliminate the whole range of unequal treatment of men and women in the workplace. They defined two types of harassment that could constitute this disparate treatment. The first is what many people envision as sexual harassment, the *quid pro quo* type. In this instance, a supervisor, employer, or colleague offers or threatens some tangible consequence in exchange for sex. A woman might be promised a raise or a promotion, or she might be threatened with a negative report or even with being fired. To force a female employee into such a "bargain" is clearly a form of discrimination based on sex. The second type of harassment recognized by the Court is the *hostile environment.* In this situation, a worker is exposed to "severe and pervasive" abusive behavior. In the eyes of the Court, such an offensive atmosphere is comparable to being exposed to constant and demeaning racial slurs. It is unreasonable to expect anyone to endure that mistreatment in exchange for the privilege of being allowed to work and earn a living.

The Court revisited the issue of sexual harassment in *Harris v. Forklift Systems Inc.,* 510 U.S. 17 (1993). Teresa Harris worked in a nontraditional job as rental manager and sales coordinator at a heavy equipment company. Under the guise of humor, her boss made incessant comments about her body and her clothing, as well as demeaning sexual suggestions. The lower courts denied her claim of sexual harassment because her employer was "just joking" and because Harris had not suffered "serious psychological harm." A unanimous Supreme Court, however, reversed and provided a definition of hostile environment as conduct a "reasonable person" would find hostile or abusive. The victim did not need to demonstrate that she had suffered either physical or psychological harm, but only that the behavior detracted from her job performance. Since this decision, courts have attempted to define this "reasonable person." Is it a man or a woman? Do men and women have different standards for what constitutes tolerable workplace behavior? If a "reasonable" man thinks his conduct is funny, is it

Male executive harassing a female office worker. Sexual harassment is defined as a form of sex discrimination prohibited under the Civil Rights Act of 1964. That law makes it illegal to discriminate against an employee with respect to "terms, conditions, or privileges of employment because of such an individual's race, color, religion, sex, or national origin." *(© Esbin-Anderson/The Image Works)*

"reasonable" for a woman to find it threatening or abusive? Some scholars have suggested that in sexual harassment claims the courts should ask, "Would a reasonable person *the same sex as the victim* be offended?"

One of the most famous sexual harassment allegations occurred when Professor Anita Hill accused Supreme Court nominee Clarence Thomas during his confirmation hearings before the United States Senate. Hill had worked for Thomas when he served as assistant secretary for civil rights in the Department of Education and as chairman of the Equal Employment Opportunity Commission. Hill told humiliating stories that provided graphic examples of behavior that surely met the test for a hostile environment. A reasonable person the same sex as the victim would definitely be offended, as the reaction of women around the country demonstrated. Yet the members of the Senate did not focus on Thomas's alleged behavior but wondered instead, "Why didn't she quit?" At the very least, those televised hearings revealed the gap between men's and women's experiences and perceptions and, perhaps, opened the door to a more thorough examination of the problem.

The Court issued opinions in several significant sexual harassment cases in 1998. In *Oncale v. Sundowner Offshore Services,* 523 U.S. 75 (1998), the Supreme Court addressed the issue of whether a man could be sexually harassed by other men, even if none of them were homosexual. Joseph Oncale was a member of an eight-man crew on an offshore oil rig. His colleagues repeatedly subjected him to humiliating, sex-related actions, including assault and the threat of rape, apparently because Oncale was small in stature and, in their eyes, "feminine." The tormenters claimed it was just horseplay, but the Court found sexual harassment. They held that a hostile environment need not be caused by sexual desire but could be a general hostility expressed in sexual and derogatory terms, such that a reasonable person would find it abusive. In this case, the Court seemed to assume that the reasonable person would be the same sex as the victim.

Several times the Supreme Court has addressed the question of employer liability for employees who engage in sexual harassment. Who should be responsible for compensating the victim? In *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), the Court found that lifeguard Beth Ann Faragher had experienced sexual harassment when her supervisors engaged in uninvited touching, lewd remarks, and speaking of women in offensive terms, thereby creating a hostile work environment for her and the other female lifeguards. The Court held the city responsible and said other employers would be similarly liable unless they could demonstrate that they had taken *reasonable* care to prevent and correct harassing behavior and that the complaining employee had *reasonably* failed to take advantage of opportunities to report.

Educational institutions can also be the setting for sexual harassment. The quid pro quo, where a professor offers a student a better grade in exchange for sexual favors, is a familiar example. Hostile environment can be a concern in schools and colleges. Adding a sexual dimension to the teacher-student relationship is an abuse of power. It can interfere with the learning experience. When professors or teachers treat certain students in sexually inappropriate ways, those students are likely to find that their peers distrust them. In order to demonstrate that they have taken reasonable care to prevent such behavior, schools and colleges have developed a variety of policies. Some prohibit

any romantic or sexual relationships between faculty and students. Others limit the prohibition to students currently under a faculty member's supervision. At issue in such relationships is the clear power differential, the potential for coercion, and the vulnerability of students in dealing with someone who can control their future prospects.

Sexual harassment is similar to other gender-based offenses in that, like domestic violence and stalking, it is seldom an isolated act. Rather, it is usually a pattern of behavior involving repeated, and often escalating, confrontations. Like other crimes against women, it tends to grow out of unequal power relationships—supervisors and employees, professors and students. Sexual harassment has real consequences, as it may limit women's and some men's opportunities in the workplace or the school. Yet despite a number of significant Supreme Court decisions supporting action against sexual harassment, only a small percentage of victims lodge formal complaints. Although most women are not passive victims—many avoid the harasser, tell him to stop, or confide in friends and family—most feel their complaints will not be taken seriously, they will face reprisals, or they will be publicly humiliated. Some studies have shown that women who complained experienced worse treatment. Anita Hill's experience illustrated the hazards of coming forward to claim sexual harassment and the difficulty in establishing its seriousness.

Mary Atwell

See also: Harris v. Forklift Systems, Inc.

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Shapiro v. Thompson (1969)

In *Shapiro v. Thompson,* 394 U.S. 618 (1969), the U.S. Supreme Court declared unconstitutional a one-year state residency requirement for receipt of welfare benefits. Under Chief Justice Earl Warren, the Court substantially expanded the scope of the Constitution's equal protection guarantee. Traditionally, discriminatory laws had been upheld if reasonably related to a legitimate governmental objective. Building on isolated earlier opinions, however, the Warren Court erected a two-tiered equal protection doctrine. Under that "new" standard, most discriminatory laws were subject to "rational-basis" review, whereas laws based on "suspect categories" of classification or that infringed upon "fundamental rights" were declared unconstitutional unless found necessary to a legitimate and compelling state interest, called the "strict-scrutiny test." A majority of justices not only deemed racial and related classifications inherently suspect, but also suggested that discrimination based on wealth and illegitimacy were subject to strict scrutiny. Among "fundamental rights" given strict review, moreover, were not only those stated elsewhere in the Constitution, such as First Amendment freedoms, but others mentioned nowhere in the constitutional text, including the right to interstate travel, fairly apportioned governmental bodies, and the necessities of life.

Shapiro v. Thompson was the most significant of Warren Court cases applying the fundamental-rights branch of modern equal protection doctrine. In *Shapiro* and two companion cases, the Court struck down Connecticut, Pennsylvania, and District of Columbia regulations conditioning receipt of Aid to Families with Dependent Children (AFDC) benefits on a one-year residency requirement. Such laws creating two classes of needy citizens, Justice William J. Brennan Jr. declared for a six–three majority, deterred people from exercising their fundamental right to interstate travel and were thus subject to strict judicial review. Yet the governmental interests asserted in support of the residency requirement were either constitutionally impermissible or served no compelling interest that could not be furthered through means less restrictive of interstate travel. A policy designed to limit migra-

tion into states generally, or by those seeking more generous welfare benefits, Justice Brennan concluded, was constitutionally forbidden, as were governmental attempts to reserve benefits for those who had previously contributed to a state's tax revenues. Administrative and related objectives were equally unavailing. There was no evidence that the residency requirement actually facilitated budget planning, as the appellees claimed. Moreover, other regulations were used to determine legal residency; less drastic means were available for preventing the fraudulent receipt of benefits; and any desire to encourage newcomers promptly to join the labor force logically should also be applied to long-term residents.

The federal Social Security Act stipulated that states could impose no more than a year's residency requirement for receipt of AFDC benefits. But Justice Brennan refused to read that provision as authorizing such a restriction and held that, in any event, Congress could not authorize states to violate equal protection.

In dissent, Chief Justice Warren, joined by Justice Hugo L. Black, contended that Congress had the authority, under its power over interstate commerce, to impose the challenged residency requirement or authorize states to do so. Justice John M. Harlan's dissent was more far-reaching. He contended that the Court, through the fundamental-rights branch of modern equal protection philosophy, was acting as a "super-legislature," creating rights that were not grounded in the Constitution and subjecting them to broad judicial protection. He agreed that a right of interstate travel was part of the liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. But he argued that such freedoms were subject to regulation under any law rationally related to legitimate governmental objectives, such as those raised in defense of the challenged residency requirement.

Tinsley E. Yarbrough

See also: Compelling Governmental Interest; Rational-Basis Test; Right to Travel; Strict Scrutiny; Suspect Classifications.

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Sheppard v. Maxwell (1966)

On July 3, 1954, pregnant housewife Marilyn Sheppard was brutally beaten to death in a suburb of Cleveland, Ohio. The police focused on her husband Sam as the main suspect, ignoring Sam's insistence that a "bushy-haired intruder" had broken into their home and knocked him unconscious before attacking his wife. The case pointed to the way in which untrammeled press coverage of criminal trials could undermine the rights of criminal defendants.

The lurid nature of the crime—it later emerged that Sam Sheppard had been having an extramarital affair—provoked a frenzy in the Cleveland media. After a flurry of front-page editorials demanded Sheppard's arrest, the coroner convened an inquest. To accommodate the widespread interest in the case, the inquest was held in a high school gymnasium and broadcast live on radio and television. At one point, Sheppard's attorney (who was allowed to be present only as an observer) attempted to introduce documents into evidence, prompting the coroner and some burly assistants physically to remove the attorney from the room.

The trial itself, though not broadcast, was nevertheless a media circus. All three Cleveland newspapers printed the names and addresses of the seventy-five people in the pool of potential jurors. Photographs of the impaneled jury were published over forty times during the trial, and both the jury and the judge were filmed entering and leaving the courthouse every day. The judge, who was running for reelection, even gave a staged interview on the courthouse steps. Additionally, the courthouse was virtually commandeered by the press: Print and broadcast reporters occupied

rooms on every floor of the building and took up three of the four rows of seats in the courtroom, which was swarming with wires and cameras.

On December 21, 1954, Sheppard was convicted. Within a month of the verdict, both of his parents were dead; his mother committed suicide, and his father died of a stress-induced hemorrhaging ulcer.

It took over a decade for redemption to arrive, but in *Sheppard v. Maxwell,* 384 U.S. 333 (1966), the U.S. Supreme Court threw out his conviction. Focusing on "the totality of the circumstances"—the intensity of the pretrial media coverage, the outrageousness of the coroner's inquest, and the "carnival atmosphere" resulting from the media's takeover of the courthouse—Justice Tom C. Clark concluded that the overwhelming publicity had deprived Sheppard of his Fourteenth Amendment due process rights and ordered a new trial. The second time around, aided by new counsel (a young attorney named F. Lee Bailey), Sheppard was acquitted. Sadly, he enjoyed his vindication only for four years; in April 1970, Sheppard died of liver failure at the age of forty-six.

The Sheppard case retains a prominent place in American culture. It served as the inspiration for the 1960s television show *The Fugitive* (subsequently made into a feature film and remade into another television series). Several books on the case pointed to a local handyman named Richard Eberling as the likely killer. Additionally, the quest of the Sheppards' son to clear his father's name became a celebrated case in its own right, culminating in a 2000 civil verdict that Ohio had not committed misconduct in pursuing the original charges.

Steven B. Lichtman

See also: Due Process of Law; First Amendment.

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Sherbert v. Verner (1963)

In *Sherbert v. Verner,* 374 U.S. 398 (1963), the U.S. Supreme Court held that it was unconstitutional for the state of South Carolina to deny unemployment compensation to a Seventh-Day Adventist woman who was fired from her job for refusing to work on Saturdays. The Court's expansive interpretation of the Free Exercise Clause contained in the First Amendment to the Constitution set an important but controversial precedent for how cases involving religious freedom ought to be decided.

The First Amendment guarantees that "Congress shall make no law respecting an establishment of religion" (the Establishment Clause) "or prohibiting the free exercise thereof" (the Free Exercise Clause). In *Sherbert,* the Court ruled that the state could not infringe upon a person's right to free exercise of religion unless it had a "compelling interest" that could not otherwise be satisfied. However, the Court's interpretation of the First Amendment in *Sherbert* was regarded by some constitutional scholars as bringing the Free Exercise Clause into tension with the Establishment Clause—a concern that led the Court effectively to overrule the *Sherbert* doctrine nearly thirty years later.

The case originated when Adell Sherbert, a member of the Seventh-Day Adventist Church, was discharged by her employer for refusing to work on Saturday, the Sabbath day of her faith. When, for the same reason, she was unable to find work elsewhere, Sherbert sought unemployment compensation from the state of South Carolina. However, the state Employment Security Commission rejected her application under a state law according to which a claimant was ineligible for employment benefits if she had "failed, without good cause . . . to accept available suitable work when offered." The commission's ruling was upheld by the South Carolina Supreme Court but reversed by the U.S. Supreme Court, which found that it abridged Sherbert's right to the free exercise of her religion as guaranteed by the First Amendment and applied to the states under the Fourteenth Amendment.

Writing on behalf of a seven-member majority, Jus-

tice William J. Brennan Jr. endorsed a three-part test that aimed to balance an individual's right to free exercise against the interests of the state. According to this test, which later came to be known as the "*Sherbert* test," the plaintiff must first show that the law under review constitutes a substantial burden to her right to free exercise of religion. If so, the state must show that it has a "compelling interest" that would outweigh this burden. Finally, it is incumbent on the state to demonstrate that "no alternative forms of regulation" could be used to satisfy the same interest without infringing First Amendment rights.

The majority found that the ruling of the commission forced Sherbert "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand," and that this effectively penalized the free exercise of her constitutional liberties. It also found no compelling state interest that would justify such a penalty. In overturning the decision of the lower court, the majority noted that its ruling "plainly" did not foster the establishment of the Seventh-Day Adventist religion.

Interestingly, *Sherbert* was decided the same day as *Abington School District v. Schempp,* 374 U.S. 203 (1963), in which the Court reaffirmed the government's obligation under the Establishment Clause to "maintain strict neutrality, neither aiding nor opposing religion." Justice Potter Stewart, the lone voice of dissent in *Schempp,* concurred with the majority's result in *Sherbert* but expressed concern that the Court's expansive interpretation of the Free Exercise Clause effectively privileged religious reasons for being "unavailable for work" over secular ones, thereby pitting the Court's interpretation of the Free Exercise Clause against its interpretation of the Establishment Clause in *Schempp.* In dissent in *Sherbert,* Justice John M. Harlan, joined by Justice Byron R. White, raised the same objection, arguing that according to the precedent set by the majority, the state "must *single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior . . . is not religiously motivated."

Based in part on such concerns, a series of increasingly restrictive interpretations of the Free Exercise Clause culminated in the overruling of the *Sherbert* test in 1990 in *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990). Writing for the majority, Justice Antonin Scalia argued that to require the state to demonstrate a "compelling interest" in enforcing generally applicable laws "contradicts both constitutional tradition and common sense," and that "any society adopting such a system would be courting anarchy." However, critics of *Smith* have worried that the rejection of the *Sherbert* test could impose special burdens on members of minority religions.

Richard Amesbury

See also: Abington School District v. Schempp; Compelling Governmental Interest; *Employment Division, Department of Human Resources of Oregon v. Smith.*

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Sixth Amendment

As one of the amendments within the Bill of Rights, the first ten amendments to the U.S. Constitution, the Sixth Amendment protects a variety of criminal defense rights. It provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which shall have

> been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The U.S. Supreme Court is the government body that interprets the Sixth Amendment. Therefore, understanding the rights conferred by the Sixth Amendment depends in large measure on Supreme Court case law.

RIGHT TO SPEEDY TRIAL

In *Klopfer v. North Carolina,* 386 U.S. 213 (1967), the Supreme Court held that the right to speedy trial was so fundamental that it applied to state courts through the Due Process Clause of the Fourteenth Amendment to the Constitution. The Court traced this protection all the way back to England's 1215 Magna Carta, which provided "We will sell to no man, we will not deny or defer to any man either justice or right." The Court in *Barker v. Wingo,* 407 U.S. 514 (1972), deemed the Sixth Amendment right to a speedy trial to be "generically different" from any other constitutional right, for it had a "societal interest" existing separately from, "and at times, in opposition to, the interests of the accused." For instance, this right is meant to protect the public from criminal defendants who, seeing large case backlogs in courtrooms caused by delay, "manipulate the system" to negotiate for guilty pleas to lesser offenses.

At the same time, the Court in *Smith v. Hooey,* 393 U.S. 374 (1969), recognized that a speedy trial may aid a defendant by preventing "undue and oppressive" pretrial incarceration, "minimize anxiety and concern accompanying public accusation," and limit harm to the defendant's ability to present a defense. To guard against delay constituting violation of this right, courts should weigh four factors: (1) length of delay, (2) reason for delay, (3) whether and how the defendant asserts his or her speedy-trial right, and (4) prejudice to the defendant. If the combined weights of these factors show a violation, the court must dismiss the charges facing the defendant.

RIGHT TO PUBLIC TRIAL

Although characterizing the "exact date of its origin" as "obscure," the Court recognized in *In re Oliver,* 333 U.S. 257 (1947), that the right to public trial "has its roots in our English common law heritage." This right grew out of the "distrust for secret trials" fostered by such infamous tribunals as the Spanish Inquisition and England's Star Chamber. The public nature of a trial is therefore meant to act as a safeguard against courts becoming "instruments of persecution." Public trial, however, is a personal right of the individual defendant and cannot be exercised by the public or press. Media access to courtrooms therefore involves consideration not of the Sixth Amendment but of the First Amendment.

RIGHT TO JURY TRIAL

In *Duncan v. Louisiana,* 391 U.S. 145 (1968), the famous "selective incorporation" case, the Court recognized that the right to jury trial was so fundamental to ordered liberty that it was applicable to the states through the Due Process Clause of the Fourteenth Amendment. The jury, envisioned as composed of laypersons from the community, was to act as a buffer between the individual and government officials and therefore protect defendants from government oppression. The right to a jury trial, however, is not available for every case. A criminal defendant is guaranteed a jury only when charged with a "serious" crime, one that exposes the defendant to more than six months' imprisonment. Petty offenses can be tried by court trials.

The number of jurors for a trial is no longer fixed at twelve, for the Court in *Williams v. Florida,* 399 U.S. 78 (1970), held that juries with as few as six members could still perform meaningful deliberation and possess the common sense of the entire community. Moreover, in *Apodaca v. Oregon,* 406 U.S. 404 (1972), the Court determined that unanimity in the verdict was not constitutionally required. Every jury, however, must be drawn from a group that represents a fair cross-section of the community. Moreover, in *Burch v. Louisiana,* 441 U.S. 130 (1979), the Court

decided that a six-member jury verdict must be unanimous.

RIGHT TO NOTICE OF ACCUSATION

The Sixth Amendment also includes the right to receive adequate notice of the crimes being charged. In *United States v. Cruikshank,* 92 U.S. 542 (1876), the Court interpreted this right to mean that the indictment, or charging document, should provide a description of every charge not only to enable the defendant to present a defense in the case but also to protect against "double jeopardy," or further prosecutions on the same matter. The Court has also connected the right to notice with other Sixth Amendment rights. In the case of *In re Oliver,* 333 U.S. 257 (1947), the Court thus stated: "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine witnesses against him, to offer testimony, and to be represented by counsel."

As with the other rights in the Sixth Amendment, the right to notice is so fundamental that it also applies to state courts through the Fourteenth Amendment.

RIGHT OF CONFRONTATION

One of the main goals of confrontation of witnesses is to provide protection against convictions based on unreliable evidence. In *Maryland v. Craig,* 497 U.S. 836 (1990), the Court explained that confrontation promoted reliability by causing witnesses to testify under oath, be subject to cross-examination, and expose their demeanor to the jury. "Hearsay" evidence, testimony that presents an assertion made by someone who is not subject to these three tests of reliability, is potentially violative of the Sixth Amendment. The

Group portrait of the jury that cleared Frank James, brother of notorious outlaw Jesse James and coleader of the James Gang, at Gallatin, Missouri, September 1883. A criminal defendant is guaranteed a jury only when charged with a "serious" crime, one that exposes the defendant to more than six months' imprisonment. *(Library of Congress)*

Court therefore developed a confrontation test for hearsay in *Ohio v. Roberts,* 448 U.S. 56 (1980), requiring (1) either the appearance of the hearsay declarant, or a showing that the declarant is "unavailable" to appear at trial, and (2) if the declarant is unavailable, that the hearsay be shown to be reliable.

Even when a witness is present for testimony, confrontation issues may arise. In *Maryland v. Craig,* 497 U.S. 836 (1990), the Court considered whether confrontation was satisfied when a child-abuse victim testified over closed-circuit television. The Court carefully limited such proceedings to situations in which actual physical presence would impair a child's ability to communicate and the setting preserved the reliability of the testimony.

RIGHT TO COMPULSORY PROCESS

The Sixth Amendment also guarantees the right of compulsory process, meaning that criminal defendants may use the court's subpoena power to, if need be, force witnesses to appear and testify in court. In *Washington v. Texas,* 388 U.S. 14 (1967), the Court explained this right: "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."

The right to confrontation may be violated not only by refusing the defendant the power to call a witness but also by evidence statutes deeming such a witness ineligible to testify. The Court has found this right so fundamental that, again, it has been incorporated and made applicable to the states in their court proceedings through the Fourteenth Amendment.

RIGHT TO ASSISTANCE OF COUNSEL

In *Gideon v. Wainwright,* 372 U.S. 335 (1963), the Court ruled that the right to counsel was so important that criminal defendants could have a lawyer represent them, even if they could not afford to hire one. This right has been limited to those who are genuinely indigent and who are facing a criminal charge that will result in even one day's imprisonment. This right to counsel is so vital that it attaches even before trial. In *Massiah v. United States,* 377 U.S. 201 (1964), the Court held that upon indictment or other formal charge, defendants have the right to have an attorney present during police questioning.

The lawyer supplied to a defendant must be competent. In *Strickland v. Washington,* 466 U.S. 668 (1984), the Court crafted a test with two prongs a defendant must prove to prevail on a claim of incompetence of counsel. The defendant must show that (1) counsel's errors were so serious that the attorney failed to function as Sixth Amendment counsel in the adversary system and (2) the error was so prejudicial that it affected the trial's outcome.

Even though the Court has seen the right to counsel as crucial, this assistance cannot be foisted upon defendants against their wishes. In *Faretta v. California,* 422 U.S. 806 (1975), the Court interpreted the Sixth Amendment's "assistance of counsel" phrase as enabling the defendant to forgo appointment of counsel for self-representation. In certain circumstances, however, a trial court can appoint "standby counsel" to aid the defendant if need be.

The Sixth Amendment thus provides criminal defendants with an array of rights. Each right is so crucial that all of them apply in state as well as federal courts.

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See also: Bill of Rights; *Gideon v. Wainwright;* Right of Confrontation; Right to Counsel; Speedy Trial, Right to; Trial by Jury.

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Skinner v. Oklahoma (1942)

In *Skinner v. Oklahoma,* 316 U.S. 535 (1942), the U.S. Supreme Court laid the jurisprudential foundation for extending constitutional protection to indi-

vidual liberty relating to sexual activity, holding that sterilization of convicted felons violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The question before the Court in *Skinner* was whether Oklahoma's Habitual Criminal Sterilization Act—mandating that persons convicted at least twice of designated felonies be involuntarily sterilized—violated the Equal Protection Clause. Skinner had been convicted of and imprisoned for committing felonies on three separate occasions: larceny once (stealing chickens) and armed robbery twice. During Skinner's third incarceration, the state of Oklahoma enacted the statute imposing an additional penalty triggered by multiple convictions of specified felonies. Since Skinner's criminal record triggered the recidivist penalty, the state began proceedings to effect the sterilization. Skinner unsuccessfully fought the constitutionality of the statute in state court. He pursued his legal battle in federal court, ultimately reaching the Supreme Court.

Writing for the majority, Justice William O. Douglas concluded that Oklahoma's statute constituted invidious discrimination repugnant to the Constitution. The statute failed to survive strict-scrutiny analysis; the arbitrarily constructed recidivist penalty did not promote a compelling governmental interest. Providing differential punishment for some felonies but not others arbitrarily designated as "involving moral turpitude" exacerbated the Court's skepticism. Justice Douglas underscored the class bias embodied in the measure, illustrating his point by comparing similar felonies carrying dissimilar punishment: Embezzlement (a white-collar crime) was explicitly exempted, whereas larceny (a working-class crime) was specifically targeted by the statute.

Moreover, the nature of the penalty was particularly problematic for the Court. Justice Douglas asserted that it

> involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize . . . may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.

Justice William O. Douglas wrote the majority opinion for the Supreme Court's decision in *Skinner v. Oklahoma* (1942), in which the Court concluded that Oklahoma's Habitual Criminal Sterilization Act constituted invidious discrimination repugnant to the Constitution.
(Library of Congress)

The disparate treatment mandated by the recidivist sterilization statute, the Court recognized, irreversibly vitiated the individual dignity and bodily autonomy protected by the Constitution. Imposing such heinous punishment on those lacking social influence while specifically precluding its imposition on society's most privileged was irreconcilable with the principle of equal protection of the law.

The Supreme Court's opinion in *Skinner* established the doctrinal foundation for extending constitutional protection to more specific facets of individual liberty relating to sexual activity, including access to contraception and abortion. Since the right

to procreate is fundamental, statutes infringing upon this liberty attract the most rigorous judicial scrutiny. Therefore, this liberty is afforded the strongest constitutional protection.

Melanie K. Morris

See also: Buck v. Bell; Right to Privacy.

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Slander

Both slander and libel are forms of defamation. Libel is defamation expressed in a form that is visible, such as writing, print, pictures, or effigies. Slander, on the other hand, is defamation by spoken communication. Defamation has the potential to damage a person's reputation, by the communicator disseminating hostile or disparaging opinions or aiding in the generation of bad feelings toward someone. Defamation may cause others to refuse to associate with the person, may cause financial harm, and may damage the person's good name, subjecting the person to ridicule, shame, scorn, disrespect, and contempt. Still, people's interest in protecting their reputation must be weighed against the social interest in free speech and a vibrant press, rights granted by the First Amendment to the U.S. Constitution.

The distinction between slander and libel is one more of historical circumstance rather than of legal principle. English common law did not distinguish between slander and libel until the 1660s. Most early defamation cases concerned slander, as would be expected in a society without widespread literacy or printing. Slander and libel raise slightly different legal issues. Libel has been considered the more serious offense, since the defamation is more permanent, with a greater opportunity for being widely disseminated. There is also a greater likelihood that the libelous defamation was premeditated and therefore more serious than a burst of angry speech.

Because courts have deemed libel to be of greater social and individual harm, they have made it easier for the plaintiff to win damages, as compared with slander suits. In most libel suits, the plaintiff need only prove that the communication was libel per se (libel in and of itself) to recover damages; the person is not required to prove actual damages. It is more difficult for the plaintiff to win slander suits. Typically, the plaintiff must prove "special damages," actual proof of financial damage or loss of society and companionship, with a degree of precision and exactitude. There are, however, four exceptions, in which it is not necessary to prove actual damages in order to prevail in a slander suit. These four exceptions, considered slanderous per se, concern the imputation of (1) criminal behavior (such that it is either punishable by imprisonment or reflects moral turpitude); (2) having a "loathsome" disease (considered communicable, like AIDS, STD [sexually transmitted disease], leprosy); (3) unfitness for business or profession (due to lack of ability or ethics); or (4) sexual misconduct (typically a category that has been applied only to women, although there have been exceptions).

Changes in the technology of communication have rendered the distinction between libel and slander more difficult to maintain. There is no uniform national standard, but most courts have concluded that statements on radio and television should be considered libel, not slander. The view taken in *Second Restatement of Torts* (sec. 568) is that the distinction can no longer be defined as one of medium (written versus spoken). Rather, the critical difference concerns the premeditated character of the statement and the persistence of the defamation. If it is ephemeral or transitory, in no fixed form, then the utterance is defined as slander. If it is fixed in a more permanent form, including radio and television broadcasts, it will likely be classified as libel. The most common forms of slander remain unrecorded speech.

Before 1964, all defamation laws were handled through the common law on a state-by-state basis. In *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), the U.S. Supreme Court announced that libel and defamation were not constitutionally protected categories of speech. State libel laws, in this era, tended to favor the plaintiff. The plaintiff usually did not have to prove harm (it was presupposed by the nature of the statement), strict liability was the standard used,

the defendant had the burden of proving that the statement was true, and the punitive damages were unlimited. That situation changed radically with *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), in which the Court placed some libelous speech under the protection of the First Amendment and imposed uniform federal rules for defamation suits. Under *Sullivan,* before pubic officials can recover for damages from defamation, it must first be proved that the defendant (typically the press) acted with "actual malice," meaning purposeful lying or a reckless disregard for the truth. The core significance of *Sullivan* is that the Court brought libel of public officials under the protection of the First Amendment. Until this case, libel claims were often used by states as the equivalent of seditious libel, the defamation of the government, in order to punish and silence critics.

The Court subsequently expanded the protection from libel suits in the years after *Sullivan.* The key issues in these cases have been the characteristics of the plaintiff and the nature of the subject matter. The Court has expanded First Amendment coverage to defamation cases involving public figures, persons who are in positions of influence or importance, or persons who have sought to place themselves in the spotlight. Such persons are more likely to be in a position of access to the media to respond to falsehoods or defamation. The Court has also expanded *Sullivan* to cover even defamation of private figures if the issues involved are of public concern, for example, child abuse. In more recent cases, the Supreme Court has used the term "defamation" generally, blurring further the distinction between libel and slander. Many commentators have called for the erasure of the distinction, but the differing rules for recovery of damages requires the perpetuation of the two terms.

Douglas C. Dow

See also: Chaplinsky v. New Hampshire; Libel; *New York Times Co. v. Sullivan.*

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Slaughterhouse Cases (1873)

In the famous *Slaughterhouse Cases,* 83 U.S. 36 (1873), Justice Samuel F. Miller wrote the opinion for the five–four majority, holding that the Fourteenth Amendment to the U.S. Constitution had to be considered in light of the original purpose of its framers—to guarantee the freedom of former black slaves. As such, the amendment was inapplicable to state regulation of slaughtering facilities.

The *Slaughterhouse Cases* combined three suits involving a Louisiana law that regulated the Crescent City Live-Stock Landing and Slaughtering Company and required that all slaughtering of animals be done at the New Orleans facility. The case brought the recently passed Fourteenth Amendment (1868) before the U.S. Supreme Court for review for the first time.

The law involved the need for stricter health regulations. Since modern refrigeration techniques had not yet been implemented, there was grave concern about serious health risks surrounding improperly slaughtered meat. Louisiana lawmakers sought to regulate slaughterhouse sites as a way of controlling the risks. States had the choice to build centralized slaughterhouses or allow private businesses to operate public slaughterhouses.

The slaughterhouse laws enraged butchers who had historically slaughtered animals on their own property and then moved the carcasses. Various butchers filed lawsuits challenging the constitutionality of the legislation, arguing that they were protected by the Due Process Clause of the Fourteenth Amendment. However, during the 1870s the amendment was not envisioned as primarily applicable to white citizens but chiefly to the freed slaves. The butchers lost in state courts, and their counsel, former associate justice of the Supreme Court John A. Campbell, took their argument through federal appellate court and finally to the Supreme Court.

In affirming the lower courts, Justice Miller gave a history of the Civil War–era constitutional amendments, including the Fourteenth, and held:

> We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

Thus, the majority interpreted the Privileges and Immunities Clause narrowly, holding that the only privileges and immunities protected were those that owed their existence to the federal government. Under this interpretation, freedom of enterprise and occupation was not included.

Justice Miller's opinion focused on the limitations of the Fourteenth Amendment. He argued that the term "privileges and immunities of citizens of the United States" called for a separation between rights associated with state citizenship and rights associated with national citizenship. According to Miller, the Fourteenth Amendment forbade states to abridge rights associated with U.S. citizenship.

The four dissenting justices penned three different opinions. Justice Stephen J. Field argued that the Fourteenth Amendment was not designed solely to protect the rights of blacks. Two other justices added that the slaughterhouse legislation in fact violated the Fourteenth Amendment because it deprived the butchers of property without due process of law.

The *Slaughterhouse Cases* have historically been viewed as an example of the Court narrowing the scope of the Privileges and Immunities Clause. Critics have complained that the *Slaughterhouse* decision severely restrained the ability of courts to protect the rights of blacks in the 1870s. Although this claim does have arguable legitimacy, scholars counter that *Slaughterhouse* did not involve the rights of black Louisianans. In many senses, Justice Miller's opinion remains deeply rooted in its historical context.

The real significance of the *Slaughterhouse Cases*, Justice Field wrote, was that monopolies were unconstitutional infringements on the fundamental right of people to sustain their lives through labor. Noting that monopolies had been illegal under the common law of England, Field demonstrated that the antimonopoly attitude epitomized the United States as well.

Aaron R. S. Lorenz

See also: Citizenship; Fourteenth Amendment.

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Smith Act Cases

The Smith Act of 1940 "made it a crime to teach or advocate the violent overthrow of any government in the United States, to set up an organization to engage in such teaching or advocacy, or to conspire to teach, advocate, or organize the violent overthrow of any government in the United States." Passed as war was looming, the legislation was in constant tension with the rights of expression and assembly protected by the First Amendment to the U.S. Constitution.

The Smith Act was the brainchild of Representative Howard W. Smith of Virginia. Known as Judge Smith because of his prior service on the bench in Virginia, Smith was the powerful Republican chairman of the House Rules Committee during the 1950s. He was also a fervent anti-Communist. Though the Smith Act was passed during the period leading up to World War II, the legislation was not aggressively used until the "red scare" of the late 1940s and early 1950s. At that time, the United States was gripped by Communist hysteria urged on by Senator Joseph McCarthy (R-WI) and his special investigative committee in the Senate and the House Un-American Activities Committee (HUAC) under the direction of Representative Richard Nixon (R-CA). It was in this atmosphere that individuals were aggressively prosecuted for their al-

leged Communist ties, the most famous being Alger Hiss and Julius and Ethel Rosenberg.

The U.S. Supreme Court was also grappling with this sense of fear in the country as the justices reviewed Smith Act prosecutions that reached their bench. From 1951 to 1961, the Court reviewed many Smith Act convictions; however, four major Smith Act cases demonstrate how the Court shaped its analysis of incitement precedent to address the public's anxiety about the perceived Communist threat.

Dennis v. United States, 341 U.S. 494 (1951), concerned an indictment brought against the leaders of the Communist Party in the United States for conspiracy to overthrow the U.S. government. The trial lasted nine months before the twelve Communist leaders were convicted, and it resulted in 16,000 pages of court record. In Chief Justice Frederick M. Vinson's opinion for the fractured Court, he stated that "[s]peech is not an absolute, above and beyond control of the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction." But these words hid Vinson's true fear—the overt menace of communism. His opinion showed that the Court was willing to let the government take whatever steps it felt necessary to stop the Communists, even if the threat was not imminent: "If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added." Vinson's beliefs, however, were not shared by a number of other justices. Justices Felix Frankfurter and Robert H. Jackson concurred with Vinson's opinion but grounded their analysis on the historical origins of the First Amendment. Justices Hugo L. Black and William O. Douglas dissented strongly. In fact, Justice Douglas's refrain that "free speech is the rule, not the exception" would eventually become the tenor of later Smith Act cases.

By the time of the second major Smith Act case, *Yates v. United States,* 354 U.S. 298 (1957), the composition of the Court had changed. Vinson—the fervent anti-Communist—was dead, and Earl Warren had taken his place as chief justice. Other new faces included William J. Brennan Jr. and John Marshall Harlan II, the grandson of the great dissenter on the Court at the end of the nineteenth century. Harlan would return the Court to the incitement test that was established during the World War I era by Oliver Wendell Holmes Jr. in *Schenck v. United States,* 249 U.S. 47 (1919), and by Learned Hand in *Masses Publishing Co. v. Patten,* 244 F. 535 (S.D.N.Y. 1917).

Yates concerned the conspiracy aspects of the Smith Act, but Justice Harlan ruled that, unlike in *Dennis*, the defendants could not be prosecuted for organizing a group to overthrow the government because the statute of limitations had run (the Communist Party was formed in 1945) before the government garnered an indictment in 1951. Harlan also reaffirmed the principle that the mere teaching of communism was insufficient for a prosecution; there must be incitement to immediate lawless action. In fact, Harlan stated, "We recognize that distinctions between advocacy or teaching of abstract doctrines, with evil intent, and that which is directed to stirring people to action, are often subtle and difficult to grasp." Yet the Court ordered retrial of nine of the individuals in question. Again, Justices Black and Douglas argued for all the convictions to be reversed.

Decided the same day in 1961, *Scales v. United States,* 367 U.S. 203 (1961), and *Noto v. United States,* 367 U.S. 290 (1961), spelled the end to Smith Act prosecutions. Justice Harlan again penned the Court's opinions. *Scales* and *Noto* concerned the membership clause of the Smith Act. In *Scales,* the convictions were affirmed; in *Noto,* they were reversed. In *Scales,* Harlan stated that the membership "clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant 'specifically intend(s) to accomplish (the aims of the organization) by resort to violence.' " In fact, if the member does not have the specific intent to overthrow the government, "[s]uch a person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal." Dissenting again were Justices Black and Douglas; this time they were joined by Justice Brennan and Chief Justice Warren. In *Noto,* however, the Court was united, finding the advocacy to lawless action in the future was too amorphic and the evidence too weak. As Harlan stated, "To permit an inference of present advocacy from evidence showing at best only a purpose or conspiracy to advocate in the future would be to allow the jury to blur the lines of distinction between the various offenses punishable under the Smith Act." The Smith Act was for all intents

and purposes dead. The red scare that brought it to dominance was over.

David T. Harold

See also: Abrams v. United States; Communists; *Dennis v. United States.*

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Smith v. Collin (1978)

Frank Collin, the leader of the National Socialist Party of America (NSPA), a self-described Nazi group of two or three dozen members, managed to acquire a media footprint out of all proportion to his real significance. In the 1970s, the American Nazi movement was microscopic, and Collin's NSPA was a small faction within that movement. The NSPA carved out a place in the nation's memory by the shocking tactic of planning a demonstration in Skokie, Illinois—a community with a large Jewish population and an unusually high concentration of Holocaust survivors. Prevented from demonstrating, the NSPA took legal action, which eventually succeeded. Even among civil libertarians, the case was extremely divisive. The American Civil Liberties Union (ACLU), which agreed to take the case, reportedly lost thirty thousand members as a result and still must frequently defend this decision. For the foreseeable future, any discussion of hypothetical limits to First Amendment rights must inevitably include this case.

In 1976, the Chicago Park District had tried to stop the NSPA (and the Martin Luther King Jr. Coalition) from demonstrating in Marquette Park, a racially divided neighborhood in Chicago, by requiring $250,000 in insurance against damages from any groups wishing to do so. The ACLU agreed to help the NSPA to fight this requirement. In early 1977, however, before the matter was resolved, Collin asked several Chicago suburbs for permits to demonstrate. Most did not reply; representatives of Skokie wrote that they would require $350,000 in insurance. Collin wrote the Skokie Park District on March 20 to announce a planned demonstration against the insurance requirement, to be held May 1 in front of the village hall (visible from people's homes nearby) and centered on the theme "White Free Speech." Participants would wear Nazi uniforms, including swastikas. The NSPA voluntarily offered several restrictions on their activity: Participants would obey all laws and refrain from derogatory speech or slogans.

In late April, an injunction was obtained to stop the NSPA from demonstrating in Skokie. The city passed three ordinances clearly designed to prevent the NSPA from demonstrating or parading. These included a formalization of the insurance requirement, (waivable by a unanimous vote) and bans on demonstrations with content insulting to or hostile toward individuals or groups or involving political parties wearing military-style uniforms. Collin sought help from the ACLU again, appealing, as in the Marquette Park case, on grounds of freedom of speech and assembly. The ACLU took the case, and a long series of trials and appeals began, some initiated by Skokie Mayor Albert Smith, some by Collin and the NSPA.

In the first case, Collin v. Smith, 447 F. Supp. 676 (1978), the District Court for the Northern District of Illinois voided the three ordinances intended to deny the NSPA a permit, a decision upheld by the Seventh Circuit Court of Appeals. Skokie was then compelled to issue a demonstration permit. Smith tried to take the case to the Supreme Court, but the Court denied certiorari in *Smith v. Collin,* 439 U.S. 916 (1978), meaning that the lower court decision was upheld, thus permitting the march.

A separate case, *Village of Skokie v. National Socialist Party,* was filed in state court in response to an injunction prohibiting the NSPA from parading in Nazi uniforms and regalia. This case also went to the Supreme Court, but was sent back to the Illinois appellate court; it finally ended with the injunction reversed. Skokie officials then tried to have the Supreme

Court reverse some of these results, but the Court denied them.

In the end, all cases were resolved in favor of Collin and the NSPA. The march was finally allowed—but it was canceled. Marquette Park meanwhile had become available, and the Skokie march was expected to draw many more counterprotesters than Nazis, possibly by as much as a thousand to one. The NSPA marched in Marquette Park on June 24 and July 9, 1978.

Smith v. Collin remains controversial. Critics often claim that, in some sense, Nazis should have only limited rights—that as opponents of freedom as a political principle, they have forfeited protections deriving from that principle. Many argue that reasonable limits to free speech are consistent with the First Amendment. Some say that the proposed demonstration was a threat or assault, specifically targeting Jewish residents of Skokie, especially Holocaust survivors, and therefore not a protected form of expression, or that the promotion of Nazism constitutes "clear and present danger," or falls under the scope of cases involving hate speech, fighting words, or group libel.

For some, *Smith v. Collin* typifies everything wrong with single-minded pursuit of First Amendment rights, but for others it represents a high point in the application of those rights, which are easy to apply to noncontroversial speech but require great commitment to apply evenhandedly, even to opponents of liberty. Aryeh Neier, a Jew, a survivor of World War II and part of the ACLU's efforts on behalf of the NSPA, strikingly related his reaction to the question "How can you, a Jew, defend freedom for Nazis?" He replied, "How can I, a Jew, refuse to defend freedom, even for Nazis?"

Victor Greeson

See also: Hate Speech; Symbolic Speech.

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Solicitor General

The U.S. Solicitor General's Office is headed by the fourth-highest-ranking lawyer in the United States, and he is the official representative of the executive branch before the U.S. Supreme Court. He has a highly salient, unique, and special relationship with the nation's highest court. Congress established the Solicitor General's Office in 1870 when the Department of Justice was created.

The solicitor general has four central functions at the Supreme Court level. First, the office determines whether the federal government should appeal cases lost in lower federal courts to the Supreme Court. Second, the solicitor general acts as a gatekeeper, who argues for or against full review of cases appealed to the Court. Third, he argues cases as a direct party. Fourth, he files amici curiae (friend of the court) briefs as a third party, especially when the Supreme Court requests his opinion on important constitutional and statutory issues.

Since he is the only lawyer to have an office at the Supreme Court, it is little surprise that the solicitor general is not only the most frequent litigator before the Court; his success rates are among the highest as well. Whereas the Court grants less than 5 percent of all discretionary appeals (writs of certiorari), it accepts over 60 percent of the solicitor general's appeals as a direct or third party. As a litigant or amicus curiae at the full review stage, the solicitor general wins more frequently than other litigants.

Several reasons have been offered to explain this success. First, the Solicitor General's Office is a special kind of repeat player. The office has a small attrition rate and unparalleled expertise. Second, unlike many other parties, the solicitor general is not constrained by as many of the financial pressures other litigants face. The office can usually afford many of the start-up costs of litigation and can continue a lengthy appeal process. Third, the office generally enjoys an

Solicitor General William Mitchell, 1925. The solicitor general is the fourth-highest-ranking lawyer in the United States and the official representative of the executive branch before the Supreme Court. *(Library of Congress)*

excellent reputation with the Court, as the office has the country's most talented lawyers and is well respected for the quality of briefs filed and the presentation of oral arguments. The solicitor general understands the internal dynamics of Supreme Court decision-making and knows which arguments to forward and which will fall on deaf ears. As a general rule, the office chooses the cases it wishes to appeal, weighing its chances of winning before the Court. Of course, this is not possible in cases where the Court invites the solicitor general to file an amicus curiae brief.

Perhaps the most important reason for the solicitor general's success results from the special relationship between the executive and judicial branches. The framers intended to create a harmonious relationship between the Court and the chief executive to offset the most powerful branch, Congress. As presidential appointees, the solicitor general and the Court's justices often represent the prerogatives of the chief executive.

Many Court watchers question whether the Solicitor General's Office has an undue influence over the Supreme Court. This issue will continue to be debated, but it is important to understand the office's functions and role before the nation's high court.

John R. Hermann

See also: Attorney General; Department of Justice.

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Souter, David H. (b. 1939)

When David H. Souter was named in 1990 by the first President George Bush to succeed Justice William J. Brennan Jr. on the U.S. Supreme Court, there was alarm in some quarters that a leading liberal jurist would be replaced by a staunch conservative.

There was no doubt that Souter was bright. He was Phi Beta Kappa at Harvard, had been a Rhodes Scholar, and graduated from Harvard Law School. He served as assistant and deputy attorney general in New Hampshire and was appointed state attorney general (serving 1976–1978), succeeding his mentor, Warren Rudman, who went on to be U.S. senator. Souter was attorney general under an ultraconservative governor and argued a conservative position before the courts. Then he served on the state's Superior Court (1978–1983) and Supreme Court (1983–1990). As a New Hampshire judge, he was known for his strict construction of the Constitution. Souter was briefly on the U.S. Court of Appeals (1990) before being nominated for the U.S. Supreme Court. (Another of his backers was John Sununu, former New Hampshire governor and President Bush's White House chief of staff.)

Souter was called a "stealth candidate." Unlike the

rejected Supreme Court nominee Robert Bork, Souter had left no "paper trail." He was an enigma. Some, like the National Organization for Women, feared the worst and campaigned against his confirmation, believing he might be a likely vote to overturn *Roe v. Wade.* (He refused to tell the Senate Judiciary Committee how he might vote on issues likely to come before the Supreme Court.) Others were suspicious that he was cloistered from the hurly-burly world. (This fiftyish bachelor still lived in his parents' rural home.) Perhaps all that could be deduced was that he was a workaholic.

Souter was comfortably confirmed. Initially regarded as a conservative, he has emerged as a member of the Court's moderate bloc. In his first year on the Court, he voted 90 percent of the time with Justice Sandra Day O'Connor. Justices Souter, O'Connor, and Anthony M. Kennedy were the swing votes, positioned between Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas and the Court's moderate left wing of Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen G. Breyer. An example of the trio's centrist balancing occurred in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), in which they upheld the state's restrictions on abortion but would not condone overruling *Roe v. Wade,* 410 U.S. 113 (1973). Justices O'Connor, Kennedy, and Souter felt that states could not impose any "undue burden" on a woman's decision to obtain an abortion prior to viability. In 2000 the three joined in the seven–two decision upholding the *Miranda* rule in *Dickerson v. United States,* 530 U.S. 428 (2000). *Stare decisis* (pronounced *STAR-ry de-SI-sis*), or precedent, was to be followed.

In *Rust v. Sullivan,* 500 U.S. 173 (1991), Justice Souter cast the deciding vote to uphold Health and Human Services regulations preventing federal funds for programs in which abortion was a method of family planning.

However, over time Justice Souter has moved away from Justices O'Connor and Kennedy to form a fourth vote in the minority (with Justices Stevens, Ginsburg, and Breyer) in race-based reapportionment that created majority-minority districts, for example, in *Shaw v. Reno,* 509 U.S. 630 (1993); in gun control cases; and in the controversial *Bush v. Gore* decision, 531 U.S. 98 (2000), about the 2000 presidential election. Justice Souter votes approximately 70 percent of the time with Justice Stevens and about 80 percent with Justices Breyer and Ginsburg. In *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), he dissented from the decision that the Scouts not be required to accept gay scoutmasters. He authored the opinion in *Board of Education v. Grumet,* 512 U.S. 687 (1994), striking down creation of a separate school district in New York state composed exclusively of members of a particular religious community.

Justice Souter was in the majority in the 1991 *Johnson Controls* case (*International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.,* 499 U.S. 187), which barred employers from excluding fertile employees from jobs that might harm fetuses they might conceive. He was the lone dissent in *National Endowment for the Arts v. Findley,* 524 U.S. 569 (1998), disagreeing that Congress could constrain the NEA's ability to fund certain categories of artistic expression. In his view, Congress may not use its power of the purse to suppress offensive ideas.

Justice Souter has emerged as a defender of juries and an opponent of cameras in the courtroom. He is a pragmatic jurist. He is willing to respect traditional community values but is highly suspicious of governmental intrusion on personal rights.

Martin Gruberg

See also: Bush, George H. W.; *Planned Parenthood of Southeastern Pennsylvania v. Casey.*

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Special-Needs Doctrine

See Fourth Amendment

Speedy Trial, Right to

The right to a speedy trial is one of the most fundamental liberties protected by the U.S. Constitution. The right is established by the Sixth Amendment, which provides a check on government powers that relate to government's capacity to accuse an individual of violating the law, initiate court proceedings, or incarcerate an accused individual. According to the Sixth Amendment, an accused person has the right to legal counsel, notification and delineation of charges, a speedy and public trial, an impartial jury, the opportunity to confront the accusers, and the obligatory acquisition by subpoena of favorable witnesses. The accused also has the right to have the trial conducted in the geographical area where the crime occurred.

The Due Process Clause of the Fourteenth Amendment allowed the U.S. Supreme Court to extend the rights of the Sixth Amendment to apply in state criminal proceedings. The Speedy Trial Act of 1974 established time limits for completing the steps associated with a federal criminal prosecution. Whether or not the accused is represented by an attorney at arraignment (when charges are made), the right to a speedy trial by jury is to be preserved unless the defendant decides to waive that right. A judge should not assume that this right has been waived if the accused does not initiate a discussion about it. A judge may advise the defendant of the right to a speedy trial by letter or oral communication. It is not required that a written waiver of a speedy trial by jury be signed by the accused, but it is a preferred practice.

The right to a speedy trial protects the accused from a lengthy period of incarceration prior to trial, minimizes the anxiety and stress for the accused, and reduces the possibility of losing witnesses as time progresses, as well as the possibility of critical evidence becoming contaminated or lost. Delays may also hinder rehabilitation efforts for the accused. The right to a speedy trial is available not only to the accused but also to the prosecution. Both are entitled to the disposition of a case without unnecessary delays that may hinder the administration of justice. If the accused is in jail, a speedy trial minimizes the public cost for sustenance. If the accused is out on bail, a speedy trial reduces the opportunity for the commitment of other crimes by the defendant, as well as the chance of jumping bail.

Although a speedy trial protects the rights of the accused, delays are sometimes necessary. If so, an inquiry should be convened to consider the length of delay, the reason for delay, any harm caused to the defendant by a delay, and whether the defendant waived the right to a speedy trial. Situations in which a delay is warranted include when an important witness is unavailable or when the court schedule is too full. If it is determined that a defendant has been denied the right to a speedy trial, the indictment is dismissed. However, if the delay was devised by the defense to give an unfair advantage to the defendant, it will most likely be construed as a waiver by the accused of the right to a speedy trial.

Alvin K. Benson

See also: Arraignment; Bail, Right to; Fundamental Rights; Right of Confrontation; Right to Counsel; Subpoena; Trial by Jury.

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Standing

Before the U.S. Supreme Court will agree to accept a case, the petitioners must convince the justices that they have standing—that is, that they are the appropriate persons to bring the suit and that they have suffered or will suffer actual injury unless the Court intervenes. Standing cases have coalesced around several key civil liberties issues: economic freedoms, the right to protest and other First Amendment freedoms, and environmental protection.

In the area of economic freedoms, the Supreme Court for many years did not allow individuals to claim standing to challenge taxes. However, the Court

under Chief Justice Earl Warren, known for safeguarding civil liberties, did allow limited standing in *Flast v. Cohen,* 392 U.S. 83 (1968). In this case the Court extended standing to individuals who were challenging tax appropriations to private religious schools on First Amendment Establishment Clause grounds.

The more conservative Warren E. Burger Court sought to limit the expansion of civil liberties granted by the *Flast* decision. In *United States v. Richardson,* 418 U.S. 166 (1974), the Court denied standing to a taxpayer who sought to challenge the exemption given to the Central Intelligence Agency regarding public disclosure of funding. In a second case, the Burger Court justices denied standing to taxpayers who challenged a transfer of public property to a Christian college.

With respect to the right to protest, the Warren Court held in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), that parents had standing to challenge a school's authority to regulate the wearing of black armbands to protest the Vietnam War. The Warren Court also broadened standing for citizens in the area of free speech in *Dombrowski v. Pfister,* 380 U.S. 499 (1965). Here the Court allowed judges to declare unconstitutional laws that have a "chilling effect" on free speech. This case led to a deluge of challenges that threatened state laws against pornography, obscenity, and vagrancy. Wanting to stop this burgeoning caseload, the Burger Court replaced the lenient chilling-effect standard with a more stringent "irreparable injury" standard that forced citizens to demonstrate that they were being harassed by the state.

As for environmental protections, the Burger Court received mixed reviews from civil libertarians. The justices denied standing to a group protesting the building of a ski resort in a national park. However, they granted standing to students who opposed a freight surcharge on recycled goods in *United States v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669 (1973), just one year later. The Court under William H. Rehnquist, though, limited the standing precedent established in that decision, nicknamed *SCRAP.* In *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992), the Rehnquist Court denied standing to environmentalists who feared that a foreign building project would threaten endangered wildlife.

In conclusion, the Supreme Court has indicated that individuals must be the appropriate parties to the case or controversy and must have suffered an actual injury. In the areas of economic freedoms, First Amendment freedoms such as the right to protest, and environmental concerns, more liberal Courts have been willing to grant standing, whereas conservative justices tend to limit individuals' access to the Court.

Lori M. Maxwell

See also: Judicial Review; Ripeness.

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Stanley v. Georgia (1969)

The U.S. Supreme Court in *Stanley v. Georgia,* 394 U.S. 557 (1969), declared that individuals have a right under the Free Speech Clause of the First Amendment to the U.S. Constitution to possess sexually obscene material in the privacy of their own home. Prior to *Stanley,* the Court had ruled in decisions later reaffirmed in *Miller v. California,* 413 U.S. 15 (1973), that obscene material was not protected as free speech by the First Amendment, so cities or states could outlaw its sale and distribution.

In *Stanley,* police searching a man's home found obscene films. He was arrested and convicted for violation of a Georgia statute that outlawed the possession of obscene material. He appealed to the U.S. Supreme Court, which overturned his conviction. The Court noted that despite the government's interest in outlawing the public distribution of obscene material, those justifications did not apply to mere private pos-

session in the home. Moreover, any such justifications were outweighed by the individual's interest in being free from unwanted governmental intrusions into one's privacy, especially one's private thoughts in the privacy of one's own home. The Court's ruling is perhaps best summed up by this quotation from the decision: "If the first amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."

The Supreme Court, however, has never extended the ruling in *Stanley v. Georgia* to include a right to possess other materials in the privacy of one's home. For example, the Court in *Stanley* declared its ruling would not extend to drugs, firearms, or stolen goods. In *Osborne v. Ohio,* 495 U.S. 103 (1990), the Court declined to extend *Stanley* and instead announced there was no First Amendment right to possess child pornography in one's home. In short, the *Stanley* ruling regarding when illegal conduct is protected in the privacy of one's home currently applies exclusively to the possession of obscene material portraying adult participants.

Rick A. Swanson

See also: Obscenity; Right to Privacy.

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State Action

"State action" refers to governmental legislation or conduct done "under the color" of law. The "state" can refer to any level of government, from the federal level to the states to local governmental entities. For purposes of the Fourteenth Amendment to the Constitution, "state" obviously refers to any one of the fifty states and each of their subunits of government (counties, cities, villages, special districts, boards of education, and so on). A more difficult issue is whether certain actions of private individuals or entities are such that their conduct can be "under the color of law" as well and thus constitute "state action."

The Fourteenth Amendment of the U.S. Constitution guarantees that "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Fundamental to realizing the reach of the Fourteenth Amendment is the question, who is the state? The obvious answer is the government itself. But what about institutions that are fundamental to the daily lives of citizens and whose practices are regulated by the government? Do they, in effect, act with the color of authority to make them the state? Can the Fourteenth Amendment reach private actors who discriminate?

Section 5 of the amendment authorizes Congress to enforce it with "appropriate legislation." Using this clause, Congress has sought to provide remedial measures to individuals denied equal protection at the hand of the state. The Civil Rights Act of 1866 and the Civil Rights Act of 1875 sought to end racial discrimination in private contractual arrangements and in places of public accommodation. The U.S. Supreme Court, however, in the *Civil Rights Cases,* 109 U.S. 3 (1883), ruled eight–one that the enforcement provision of the Fourteenth Amendment barred only discrimination that was a result of state action; the justices found the Civil Rights Act of 1875 unconstitutional. This ruling, in conjunction with *Plessy v. Ferguson,* 163 U.S. 537 (1896), gave rise to the doctrine of separate-but-equal facilities for blacks and whites.

It was not until the post–World War II era that the Court used the state-action doctrine to eliminate racial discrimination. In *Shelley v. Kraemer,* 334 U.S. 1 (1948), the Court ruled that racially restrictive covenants in land deeds violated the Fourteenth Amendment. A white couple living in Saint Louis, Missouri, went to court to enforce a racially restrictive covenant against a black couple who wanted to purchase a home in an otherwise all-white neighborhood. The Court ruled that because the covenant required the state to enforce it, the covenant was "under the color" of the law and therefore violated the Fourteenth Amendment. *Shelley v. Kraemer* was the first of many cases in which the Court used the state-action principle to reach seemingly private discrimination. The Court used the doctrine to regulate whites-only res-

taurants, city parks, prisons, housing, and ultimately the very public facility of elementary schools in *Brown v. Board of Education,* 347 U.S. 483 (1954), in which the Court ended segregation in the Topeka, Kansas, public schools.

Reminiscent of the Civil Rights Act of 1875 was a law Congress enacted to end racial discrimination in places of public accommodation. Title II of the Civil Rights Act of 1964 extended the reach of the Fourteenth Amendment to employment and public facilities. In addition, in *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968), the Court ruled that the Civil Rights Act of 1866 was valid, giving support to the power of Congress to prohibit "racial discrimination in the making and enforcement of private contracts."

The scope of the doctrine of state action evolved as the Court personnel changed. In *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972), the Supreme Court held that a facility that refused to serve blacks could not be reached by the Fourteenth Amendment merely because its liquor license was granted by the state. The majority reasoned that the state regulated and licensed numerous businesses and that the act of licensing alone did not create the "color of state law" or a meshed relationship that triggered the state-action doctrine. Rulings such as *Moose Lodge* allowed many private activities to remain beyond the reach of Fourteenth Amendment scrutiny. Other rulings, however, such as race-based challenges in the selection of juries, indicated that the doctrine of state action could still be used to combat discrimination. In *Batson v. Kentucky,* 476 U.S. 79 (1986), the Court found that the use of peremptory challenges (challenges without cause) to eliminate blacks from a jury pool were subject to review if the use of challenges seemed to be on the basis of race alone.

Justice John Marshall Harlan said in his dissent in *Plessy v. Ferguson,* "The Constitution is color blind." The history of the doctrine of state action illustrates that was not always the case.

Priscilla H. M. Zotti

See also: Bill of Rights; Fourteenth Amendment.

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State Bills of Rights

In the federal system of government in the United States, the nation exists under fifty-one constitutions, one national document and one for each state. The U.S. Constitution and separate state constitutions, both designed to create governments and set out the scope of their powers, share many features, including the protection of individual rights. The U.S. Constitution does this through the Bill of Rights, made up of the first ten amendments to the Constitution; these are designed to protect individual rights from infringement by the national government. The state constitutions contain similar bills of rights (often referred to as "declarations of rights") to protect individual rights from infringement by the state government.

In May 1776, the Second Continental Congress adopted a resolution urging the various colonies to set up their own governments. Congress provided no direction, but common experiences and historical tradition resulted in similarities among the state constitutions ultimately adopted to construct these governments. Virginia was the first colony to give effect to the resolution, ratifying a constitution that set forth both a framework for a new state government as well as a separate declaration of rights for its citizens. The provisions of the Virginia Declaration of Rights drew from early English documents that addressed rights of citizens, including the Magna Carta, the Petition of Right, and the English Bill of Rights, as well as colonial charters and legislation. Over time, similar protections were adopted by other colonies and eventually all states, generally appearing as the initial article of the state constitution, a place of prominence evidencing their importance in the state constitutional system. These declarations had many similarities, as drafters often used language of

other states' provisions as a template for their own protections.

State constitutions with bills of rights predated the ratification of the federal Bill of Rights in 1791. Consequently, until these federal protections took effect, the state charters provided the only explicit protections of citizens' rights and liberties in the governmental system. Indeed, many framers of the national Constitution argued against the inclusion of a bill of rights in that document, recognizing that state constitutional guarantees would serve as the primary protections of citizens' rights because they applied against the government that would have the most influence on everyday life—the individual states.

After the push for inclusion of a bill of rights in the U.S. Constitution to provide the same guarantees against the federal government that citizens had against their state governments, the First Congress, at the insistence of James Madison, began considering amendments to the Constitution setting out rights of the citizens. The overwhelming majority of provisions considered came from states' suggestions, and thus the proposed new amendments were heavily influenced by the protections and language in existing state bills of rights. Except for the retained rights of the people protected under the Ninth Amendment, all of the rights protected in the first ten amendments to the Constitution were taken from one or more of the state constitutions.

Although the rights protected in a state's bill of rights today in large part mirror those protected in the federal Bill of Rights and other state constitutions, the specific language of a state provision often differs from the federal language and the language of other state constitutions. For example, the First Amendment to the U.S. Constitution notes, "Congress shall make no law . . . abridging freedom of speech." Some state bills of rights contain language that is substantially similar; others, although protecting the same fundamental right, contain very different language. For instance, Article I, Section 4 of the Hawaii constitution mirrors the federal protection, providing, "No law shall be enacted . . . abridging freedom of speech." However, Article II, Section 6 of the Arizona constitution provides, "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Beyond language differences, many state bills of rights protect certain rights not explicitly protected in the federal Bill of Rights. For example, eleven states contain specific privacy protections not contained in the federal document.

One major difference between state bills of rights and the federal Bill of Rights is the greater frequency of amendments to the state bills of rights. The federal Bill of Rights has never been amended since its ratification in 1791 (there have been constitutional amendments), whereas most state bills of rights have been subjected to numerous amendments. Often these amendments modify the language of the state provisions to make the wording more consistent with the language of the federal counterparts.

Since the U.S. Supreme Court's application of most of the federal Bill of Rights to the states through the Fourteenth Amendment (in a process called "selective incorporation"), these federal provisions, not provisions in the state bills of rights, have served as the primary protections of individual rights. There has been a movement since the early 1970s to give more recognition to state-based rights and use state provisions to provide more expansive protections than guaranteed under the federal Bill of Rights. These state constitutional decisions often have been in issue areas in which the U.S. Supreme Court has taken a conservative turn and modified or reversed earlier holdings. For example, numerous state supreme courts have used their state constitutions to recognize greater protections in search and seizure in response to conservative decisions of the Supreme Court carving out exceptions to Fourth Amendment protections. However, more often than not, state-court interpretation of state bills of rights has followed the U.S. Supreme Court's interpretation of the analogous federal provisions, even in the face of significant differences in constitutional language.

James N. G. Cauthen

See also: Bill of Rights; Federalism; Madison, James; State Constitutional Rights; Virginia Declaration of Rights.

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State Constitutional Rights

In the federal system used in the United States, each of the fifty states was created and exercises powers under a constitution. Like the federal Bill of Rights, the first ten amendments to the U.S. Constitution, these state constitutions have their own provisions protecting individual liberties from infringement by the state governments. During the early years of the country when states exercised significantly more governmental power than the national government, these state constitutional rights provided the primary protections of individual rights against governmental abuse. However, with the incorporation movement beginning in the early 1900s, through which the U.S. Supreme Court used the Due Process Clause of the Fourteenth Amendment to apply most of the provisions of the federal Bill of Rights to limit actions by the state governments, the significance of state constitutional rights has diminished, although a movement began in the 1970s toward greater reliance on state constitutional rights to protect individual liberties.

State constitutions guarantee individual liberties from infringement by the state government, generally through a declaration of rights included as a separate article in the state constitution. The rights guaranteed in these articles for the most part mirror those guaranteed in the federal Bill of Rights, not because they are taken from the federal document but because the drafters of the Bill of Rights relied heavily on previously adopted state constitutions to construct the federal guarantees. Except for the retained rights of the people protected under the Ninth Amendment, all of the rights protected in the first ten amendments to the U.S. Constitution were taken from one or more of the state constitutions. As a result, the state constitutions guarantee such rights as freedom of speech, freedom of the press, free exercise of religion, and protections afforded the criminally accused. However, the specific language of state provisions protecting the same right covered by the federal Bill of Rights often differs from the federal language and the language of other state constitutions. In addition, there are some rights guaranteed under state constitutions that are not explicitly included in the federal Bill of Rights. For instance, many state constitutions include a specific right of privacy.

The incorporation movement that began in the early 1900s increased federal dominance in civil liberties litigation and served to retard the historical participation of state courts in constitutional decision-making using state-based rights. The period of incorporation generally led to broad, national rights through the 1960s, but with a change in membership on the U.S. Supreme Court and under the leadership of Chief Justice Warren E. Burger, the decision-making in civil liberties cases became significantly more conservative, retreating from the Earl Warren Court's more expansive view of the federal Bill of Rights. Since the early 1970s, and in reaction to this conservative trend, state courts have increased their use of state constitutions to resolve constitutional law claims, a period that has been referred to as the "new judicial federalism." Litigants began to seek refuge in state constitutions, arguing that state courts should reassert their historical function and develop an independent body of state constitutional law, as opposed to consistently relying on the federal Bill of Rights to resolve civil liberties claims. A significant boost to this movement came from Justice William J. Brennan Jr., who argued in a law review article that state courts interpreting their state constitutions should not blindly follow federal decisions interpreting the analogous provisions of the Bill of Rights.

As the U.S. Supreme Court has recognized, state courts are the final arbiters of their state constitutional law. Consequently, a state court's interpretation of state constitutional rights will not be reviewed by the U.S. Supreme Court, even though the same right may be included in the federal Bill of Rights. In interpreting state constitutional rights, state courts may choose to interpret the state provisions more expansively than

the U.S. Supreme Court interprets the analogous provisions of the federal Bill of Rights.

The increase of state constitutional decision-making in recent years has resulted in more decisions expanding rights under state constitutions beyond the levels afforded under the federal Bill of Rights. For example, although the U.S. Supreme Court has ruled that a private shopping center owner could prohibit free speech activities on its premises consistent with the First Amendment of the federal Bill of Rights, numerous state courts have found that such free speech activities are protected under the analogous provisions of their state constitutions. In addition, many state supreme courts have used their state constitutions to expand rights of the criminally accused, especially in areas in which the U.S. Supreme Court has modified or overturned earlier decisions. In these cases, state courts, through their constitutions, may be restoring a right previously recognized under the federal Bill of Rights.

State court expansion of rights beyond federal levels is not only in reaction to U.S. Supreme Court decisions. For example, numerous state supreme courts have found that their citizens are entitled to jury trials in more types of cases than they are under the federal Bill of Rights, decisions not reached in response to a decision of the U.S. Supreme Court retracting rights. In the end, however, most state court decisions interpreting state constitutional rights have generally chosen to follow the U.S. Supreme Court's interpretation of the analogous provision in the federal Bill of Rights.

James N. G. Cauthen

See also: Bill of Rights; Incorporation Doctrine; State Bills of Rights.

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State Courts

The fifty states in the United States have unique and independent court systems. As in the federal system, each of the fifty states has its own constitution that sets forth the powers and authority of its trial and appellate courts. Whereas the federal courts hear cases that involve the federal government as a party, that involve issues of "diversity" (cases in which a person from one state sues a person from another state for more than $50,000), or that constitute "federal questions" (related to U.S. statutes or the Constitution), state courts deal with issues of state law and state policies. Since state laws differ, the jurisdictions, powers, policy-making abilities, and rulings of each state court also differ.

Although the U.S. Supreme Court receives a majority of public and media attention, decisions by state jurists have a far greater immediate impact on public policy. The influence of state courts stems from three factors. First, a vast majority of all criminal violations are violations of state law, and thus decisions are rendered by the state courts. For instance, the federal courts in the early 1990s heard approximately 1 million cases each year, but the state courts combined decided well over 100 million cases. Numerically, most of the country's legal business is litigated in state courts. Second, state courts are most likely the final arbiters of any given case. Although issues raising federal constitutional questions can be appealed to the U.S. Supreme Court following a ruling in the state's highest court, cases raising only issues of state law or the state constitution cannot be appealed to the U.S. Supreme Court. As such, the highest appellate court within each state is the final arbiter on all issues relating to state law and the state constitution. Moreover, even cases containing federal constitutional questions are rarely heard by the U.S. Supreme Court. Indeed, the Court receives 7,000–8,000 case petitions annually but grants certiorari to (accepts) only 75–100.

Finally, interest groups and other national organi-

zations have used the differences in the state court systems to engage in a process of choosing the court system most likely to result in a desired outcome. Interest groups, for example, might consider the ideological leanings of state court members as well as whether the judges are elected and the timing of elections before bringing lawsuits. This process of "forum shopping" has resulted in numerous liberal decisions at the state level that the current conservative U.S. Supreme Court most likely would not have rendered.

STATE COURT ORGANIZATION

Although the structure of the court systems differ, some general similarities emerge. Cases usually start in trial courts of either general or limited jurisdiction. Trial courts of general jurisdiction typically deal with the most serious criminal violations (those classified as felonies) and the largest civil suits. General jurisdiction courts are considered courts of record in which clerks maintain proceedings on cases. In all states, judges presiding over general jurisdiction courts are required to have law degrees and exhibit a degree of professionalism lacking in limited jurisdiction courts. Indeed, in many states, general jurisdiction courts can retry cases on appeal from courts of limited jurisdiction.

Trial courts of limited jurisdiction, although less professional, poorly staffed, and often using part-time judges or judges with no formal legal training, deal with a bulk of litigation in the United States. In fact, about 90 percent of all cases originate in trial courts of limited jurisdiction. These cases deal most often with less serious crimes like infractions and misdemeanors as well as civil lawsuits involving smaller sums of moneys, usually less than a few thousand dollars. In addition, limited jurisdiction courts can be highly specialized, like traffic court, small claims court, or juvenile crime court. Typically, limited jurisdiction courts are not courts of record; that is, cases are handled informally with no written record of the proceedings kept. In some states, limited jurisdiction courts do not even meet in courthouses, instead conducting business in private homes, restaurants, and grocery stores. As noted, appeals from limited jurisdiction courts usually go to general jurisdiction courts.

Following a ruling by a general jurisdiction court, a case can be appealed to a state appellate court. The state's highest appeals court is usually called the supreme court. Before the supreme court, however, most states have intermediate courts of appeals. Most cases end at the intermediate appellate court, reaching the state supreme court only if the state supreme court, under its discretionary jurisdiction, decides to hear a case, or if it is required to hear a case because of the severity of the charges and punishment (death penalty and life imprisonment).

RECRUITMENT METHODS

In comparison to the relatively uncomplicated system for the selection of federal court judges (presidential nomination and Senate confirmation), there are five types of selection methods used for judges on state courts: partisan election, nonpartisan election, selection by governor, selection by state legislature, and merit system. The two electoral systems require judicial candidates to raise money and campaign, as is similarly required of other politicians. Jurists selected under the merit system are initially appointed by the governor but then face retention elections. Finally, jurists can be appointed by either the governor or the state legislature. Most state judges do not have life tenure.

Given the political pressures potentially inherent in electoral recruitment methods, the lack of life tenure for state court jurists, and the ability of state courts to engage in significant policy-making, the decision-making practices of state court jurists have garnered much attention. In specific, research tends to indicate elected state court judges render more conservative rulings in criminal justice cases than do appointed justices, and they are most conservative just before an election. These findings hold among highly liberal state courts as well. Moreover, in some states elected judges must raise money and thus may be influenced by campaign contributions. Research reveals judicial races have become increasingly expensive. For instance, during the 2000 elections, judicial candidates for state supreme courts alone spent over $45 million, representing a full 61 percent increase from the 1998 election cycle. In addition, some evidence suggests state court judges tend to rule more consistently with the policy desires of campaign contributors. As long

as state courts remain important in the creation and implementation of public policy, scholars will continue to scrutinize methods of state judicial selection and retention.

Madhavi McCall

See also: Federalism; State Constitutional Rights.

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Statute of Limitations

A statute of limitations specifies a time limit for filing a civil or criminal action. These statutes prevent civil lawsuits and criminal prosecutions in which the lapse of time, death of witnesses, failure of memory, and destruction of physical evidence may obscure the facts. They serve to preserve the individual's right to due process under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Three questions arise when deciding if a statute of limitations bars (prohibits) a particular action. First, what is the statutory time limit for the specific action? Second, when does the time limit begin to run? Third, has either party done anything to extend the time for filing the action?

CIVIL ACTIONS

Each state has its own statutes of limitations, as does the federal government. The specific time limits for filing claims will vary, but the following is a general framework applicable to civil suits.

- Ten years: Each state usually has a statute of limitations for those actions not otherwise covered by a specific statute. Often this statute may be the longest among the statutes of limitations. Actions on any writing or calling for the payment of money or property and actions on any covenant or warranty contained in a deed must be brought within this time. The ten-year statute also cuts off the right to recover on any judgment or its revival and actions to recover land. Actions against architects, engineers, or contractors to recover damages for personal injury or property damages arising out of defective or unsafe conditions of any property improvement must be brought within ten years of the completion of the improvement.
- Five years: Actions for fraud, damage to person or property, actions for trespass to real estate, and all actions upon contracts must be brought within five years.
- Four years: Contracts for sale under the Uniform Commercial Code must be brought within four years.
- Three years: Actions for wrongful death and actions against a public official for liability for an act in an official capacity must be brought within three years.
- Two years: Actions for personal injuries against health care providers; for certain harms to person or reputation, such as libel, slander, assault, battery, false imprisonment, and malicious prosecution; or for payment of minimum wages or overtime compensation must be brought within two years.
- Six months: Actions that have a statute of limitations as short as six months include bulk sales actions under the Uniform Commercial Code.

The second issue in analyzing a statute of limitations for a specific action is to determine the point at which the prescribed statute of limitations begins to run. This is specified by some statutes. Court decisions determine when others start to run. Typically, a statute begins to run either when the wrongful event occurs, when the wrongful event is discovered, or when the last item of damage resulting from the wrong may be ascertained.

The third issue in analyzing a statute of limitations for a specific case is to determine whether any condition of the plaintiff or defendant may extend ("toll")

the statute. For instance, when the person having a cause of action is a child, insane, or imprisoned for less than life, the statute does not begin to run (it is tolled) until the disability has been removed. Fraud or absence of the potential defendant from the state also extends the operation of the statute until, respectively, the fraud is discovered or the absent person returns.

CRIMINAL ACTIONS

Similarly, the criminal code in the several states sets the time within which the prosecution must bring a criminal charge. Murder and the most serious felonies often have no statute of limitations and may be filed at any time. Typical statutes for other felonies are three years, whereas misdemeanors must be filed within one year, and minor offenses within six months.

As in civil cases, the first task is to determine the time length provided in the criminal statute and then when the statute begins to run. Quite often, the criminal statute specifies when the statute begins to run. Other times this has been specified by judicial decision.

Statutes of limitations may be extended by the amount of time defendants are absent from the state but for no more than three years. Statutes do not run while defendants are concealing themselves from justice within or outside the state.

Patrick K. Roberts

See also: Due Process of Law.

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Stevens, John Paul (b. 1920)

John Paul Stevens was appointed to the U.S. Supreme Court by President Gerald R. Ford in 1975 to replace retiring Justice William O. Douglas. Court watchers initially thought Stevens would be a moderate, but he gradually become one of the Court's most liberal members during the 1990s after William H. Rehnquist became chief justice in 1986. Justice Stevens consistently supported the rights of women and civil rights issues and became an opponent of the death penalty later in his tenure on the Court.

Born in Chicago, Stevens was the youngest of four sons of Ernest and Elizabeth Stevens. The Stevens children grew up near the University of Chicago around parents who had amassed significant wealth in the hotel and insurance business, with the family at one time owning what is now the Hilton Hotel, located on Michigan Avenue. After attending a preparatory school, young John graduated magna cum laude and first in his class from the University of Chicago in 1941. He married Elizabeth Jane Sheeran a year later, and the marriage lasted until their divorce in 1979.

Stevens served in the Navy from 1942 to 1945, engaged in efforts to intercept and break Japanese code. After the war, he graduated in 1947 from Northwestern University Law School, again magna cum laude and first in his class while also editing the law review. From law school he went on to clerk for Supreme Court Justice Wiley B. Rutledge. In 1949, Stevens began practicing with the firm of Poppenhusen, Johnston, Thompson, and Raymond where he developed expertise in antitrust law. In 1951 he was associate counsel for a U.S. House of Representatives committee studying monopoly power, and he subsequently became a partner in his own Chicago law firm.

Because of his superb legal skills and his highly respected integrity, the Illinois Supreme Court in 1969 named him to be chief counsel to a commission studying judicial misconduct in the state. His work there brought Stevens significant exposure, and soon U.S. Senator Charles Percy (R-IL) contacted him about his interest in serving on the Seventh Circuit Court of Appeals. In 1970, President Richard M. Nixon nominated Stevens to serve on that court, and from then until 1975 he authored nearly 200 opinions, all noted for their scholarship, style, and political moderation. His swift confirmation to the Supreme Court—three days of hearings and only thirteen days after being nominated—came on a 98-0 Senate vote.

In his first year on the bench, Justice Stevens voted

with Justices Thurgood Marshall and William J. Brennan Jr. 60 percent of the time. Women's and civil liberty groups were initially concerned about how Justice Stevens would vote, but quickly were assured when he dissented in *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), in which the majority had held that the exclusion of pregnancy from health insurance was not discrimination. He also supported women's rights in *Craig v. Boren,* 429 U.S. 190 (1976), in which the Court struck down different minimum drinking ages for men and women, and he quickly became a supporter of abortion rights, voting to support a woman's right to choose in cases such as *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989), and *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992).

Initially, Justice Stevens was not a supporter of affirmative action, voting against the use of racial preferences in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), and *Fullilove v. Klutznick,* 448 U.S. 448 (1980), but beginning in the early 1990s, with *Metro Broadcasting Co. v. Federal Communications Commission,* 497 U.S. 547 (1990), he shifted course and became a supporter of such programs.

In First Amendment jurisprudence, Justice Stevens has produced a mixed record. He dissented from both Supreme Court decisions that upheld flag burning as a free speech right, and in *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726 (1978), he wrote the majority opinion that upheld government decency laws that prevented broadcast of George Carlin's "seven dirty words" comedy skit. Stevens has also consistently supported campaign finance reform over the objection of First Amendment advocates, writing, for example, the majority opinion in *McConnell v. Federal Election Commission,* 124 S. Ct. 619 (2003), upholding the McCain-Feingold Act. He has consistently argued that money is not speech and it can be regulated. In other First Amendment areas, however, Stevens has supported commercial free speech rights and the rights of individuals to practice their religion.

In the course of his tenure, it appeared Justice Stevens moved from being moderately liberal to perhaps the most liberal member of the Court. For example, he has become increasingly opposed to the death penalty, and he has become more supportive of defendants' rights. Yet the "liberal" label is somewhat misleading: Perhaps it is more accurate to note that the departure of Justices Brennan and Marshall, the appointment of more conservative and moderate justices, and the ascension of Rehnquist to chief justice all brought increasing conservatism to the Court. By sheer longevity and shift in the Court's makeup, Stevens now seems to be the most liberal justice on the Court.

David Schultz

See also: Brennan, William J., Jr.; *Federal Communications Commission v. Pacifica Foundation; McConnell v. Federal Election Commission; Planned Parenthood of Southeastern Pennsylvania v. Casey.*

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Stewart, Potter (1915–1985)

Justice Potter Stewart was born in Jackson, Michigan, in 1915, the son of an Ohio Supreme Court justice. The younger Stewart was an excellent student and attended Yale for both his undergraduate work and a law degree, interrupted by a year at Cambridge University. Stewart attended Yale on scholarship and paid his expenses from summer employment at a Cincinnati newspaper. He received his law degree in 1941, and after practicing law in a prestigious New York firm for only a year, he left the firm to join the Navy during World War II.

After the war Stewart was elected to the Cincinnati city council, where he was one of the most vocal accusers of the "Cincinnati Trio," a group of two other council members and a city planning director accused of being Communists. The accusations proved largely without basis (at least as to the council members) and led to an electoral backlash that cost Stewart his seat

on the council. After this defeat, President Eisenhower appointed Stewart to the U.S. Court of Appeals for the Sixth Circuit and, only four years later, nominated him to the Supreme Court during a congressional recess. At forty-three, he was the second-youngest member of the Court since the Civil War. His record on school desegregation as an appellate judge drew the ire of Southern Democrats during his confirmation.

Stewart gained a reputation as an effective writer with a knack for summing up the issues of cases in catchy phrases. His attitude in opposition to judicial activism was clearly on display in *Sherbert v. Verner,* 374 U.S. 398 (1963): "But my views as to the correctness of the Court's decisions in these cases are beside the point here. The point is that the decisions are on the books."

Stewart's civil rights record continued with his appointment to the Supreme Court, and in *Shelton v. Tucker,* 364 U.S. 479 (1960), Stewart wrote the Court's opinion that a Texas law requiring teachers to divulge associations could not be used to expose membership in groups like the National Association for the Advancement of Colored People. In *United States v. Guest,* 383 U.S. 745 (1966), and *Loving v. Virginia,* 388 U.S. 1 (1967), Stewart's decisions reflected his earlier philosophy on minority rights: As he wrote in *McLaughlin v. Florida,* 379 U.S. 184 (1964), "It is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act dependent upon the race of the actor."

Stewart was consistently in favor of allowing free exercise of religion, as opposed to restricting it as government establishment, as in school prayer. In *Engel v. Vitale,* 370 U.S. 421 (1962), Stewart expressed this attitude succinctly: "I cannot see how an 'official religion' is established by letting those who want to say a prayer say it."

Although generally a centrist on criminal justice issues, Stewart displayed a conservative attitude on some evidentiary issues, as in *Escobedo v. Illinois,* 378 U.S. 478 (1964). Concerned about the sweeping impact of *Miranda v. Arizona,* 384 U.S. 436 (1966), which gave rise to the famous *Miranda* warnings and other protections, Stewart dissented and argued that the law should make a distinction between when an investigation was under way and when an adversarial relationship was established. Stewart's ruling in *Katz v. United States,* 389 U.S. 347 (1967), overturned earlier decisions and determined that warrantless wiretaps violated a defendant's Fifth Amendment rights against self-incrimination. *Katz,* perhaps Stewart's most notable decision, is laced with these internal contradictions, and it is notable that there were no fewer than four concurrences. Stewart rejected privacy (sparking most of the concurring opinions) as a basis for striking down the government's wiretap. Instead, he supported the principle of "the procedure of antecedent justification . . . that is central to the Fourth Amendment." In other words, Stewart supported placing the burden of proof upon the government to show that someone was committing a crime before it could intrude on the Fifth Amendment right against self-incrimination.

Perhaps Stewart's most memorable quotation appeared in *Jacobellis v. Ohio,* 378 U.S. 184 (1964), a case that established the role of the courts in settling on community standards on pornography: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." Stewart should not be construed as a liberal on privacy issues, however. Only a year following *Jacobellis,* Stewart dissented in one of the more important cases concerned with the privacy of sexual relations, *Griswold v. Connecticut,* 381 U.S. 479 (1965). Although Stewart suggested that the Connecticut law banning contraceptives for married couples was "an uncommonly silly law," he did not believe that there was anything unconstitutional about it. He explicitly rejected a constitutional right to privacy: "What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy 'created by several fundamental constitutional guarantees.' With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."

Stewart resigned from the Court in good health in 1981. No doubt he will be remembered as an articulate and quotable justice and as the justice replaced by the first woman on the U.S. Supreme Court (Sandra Day O'Connor). Stewart's incisive decision-making and writing skills will likely remain overshadowed by

his moderate positions and ability to provide a quotable decision. He continued to be active as an appellate judge until his death in 1985.

Tim Hundsdorfer

See also: Burger, Warren Earl; Obscenity; Pornography.

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Stone v. Graham (1980)

In *Stone v. Graham,* 449 U.S. 39 (1980), the U.S. Supreme Court addressed whether a Kentucky statute that required the posting of a copy of the Ten Commandments on the wall of each public school classroom in the state violated the Establishment Clause of the First Amendment to the Constitution as applied to the states through the Fourteenth Amendment. The inquiry was whether this posting constituted governmental "establishment of religion" prohibited by the First Amendment. The statute required that each posting contain a small notation below the last commandment as follows: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western civilization and the common law of the United States." The statute further provided that the required copies be purchased with voluntary contributions to the state treasury.

The Supreme Court issued only a per curiam decision, a procedural device by which the Court simultaneously grants review and reaches the merits of the case without giving the parties the opportunity to file briefs or to argue orally before the Court. The Court then issues a decision without identifying the individual judge who wrote it.

In analyzing whether the Kentucky statute violated the Establishment Clause, the Court used the three-part test from *Lemon v. Kurtzman,* 403 U.S. 602 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally the statute must not foster an excessive government entanglement with religion." The Court struck down the statute, concluding that it served no secular legislative purpose. Kentucky argued that the statute did have such a purpose, citing the legislature's requirement that the purpose be specifically noted at the bottom of each copy of the Ten Commandments. The Supreme Court stated that such "avowed" secular purposes were insufficient to avoid conflict with the First Amendment and that the statute's purpose was "plainly religious in nature."

In reaching its conclusion, the Court focused on several features of the statute. First, the Court concluded that the "Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." The Court specifically noted that the first part of the Commandments relates specifically to religious duties rather than secular matters. Next, the Court noted that although the Ten Commandments could be permissibly integrated into a school curriculum to advance study, a display had no such purpose except to "induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." Finally, even though the statute provided that the copies were to be financed by private contributions, the Court held that the mere posting of the display "under the auspices of the legislature" constituted the official support that the Establishment Clause of the First Amendment forbids.

Justice William H. Rehnquist dissented, arguing that the Court's summary rejection of a secular purpose had no support beyond its own *ipse dixit* (a statement that is asserted but not proved). Rather, Justice Rehnquist contended that the Court should have given deference to the secular purpose articulated by the Kentucky legislature and found to have existed by the trial court. Although agreeing with the majority that the Ten Commandments constitute a sacred text, Justice Rehnquist stated that it is "equally undeniable . . . that the Ten Commandments have had a significant impact on the development of the secular legal codes of the Western world." Furthermore, drawing an analogy to constitutionally permissible Sunday-closing laws, Justice Rehnquist argued that "the fact

that the asserted secular purpose may overlap with what some may see as a religious objective does not render it unconstitutional."

Since the *Stone* decision, courts have struggled with the question of whether it is ever permissible to display the Ten Commandments on public property.

Elizabeth M. Rhea

See also: Lemon v. Kurtzman; Ten Commandments, Posting.

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Stone, Harlan Fiske (1872–1946)

The son of a New England farm family, Harlan Fiske Stone graduated from Amherst College as a Phi Beta Kappa scholar and a football athlete. After starting his career as a high school teacher and football coach in Massachusetts, he embarked upon a legal career in 1895 by enrolling in Columbia Law School in New York City. Stone graduated and was admitted to the New York bar in 1898. He began his legal career as a law clerk for the prestigious Wall Street law firm Sullivan and Cromwell and at the same time became an instructor of law at Columbia Law School. During the first ten years of his professional career, Stone married his childhood sweetheart, Agnes Harvey, with whom he had two sons, and he continued to teach and produce scholarly publications while conducting a part-time legal practice. From 1905 until 1910, he left academia and became a full-time partner, practicing law with Wilmer, Canfield, and Stone.

From 1910 until 1923, he was a professor at Columbia University, which had lured him to return, and he eventually rose to become the dean of Columbia Law School. In 1924, after Stone had returned to Sullivan and Cromwell and again reached partnership, President Calvin Coolidge appointed him first as U.S. attorney general and then as an associate justice to the U.S. Supreme Court to replace retiring Justice Joseph McKenna. Stone was the first Supreme Court appointee to appear and testify before the U.S. Senate, and on February 5, 1924, the Senate confirmed him by a vote of seventy-one to six. On June 12, 1941, President Franklin D. Roosevelt appointed Stone to lead the Court to replace retired Chief Justice Charles E. Hughes; Stone served until his death in 1946.

JUDICIAL PHILOSOPHY

Stone was a strong advocate of adherence to the doctrine of precedent (*stare decisis,* pronounced *STAR-ry de-SI-sis*), insisting that two cases must be decided in the same way if their "material" facts are the same. The reasoning for the doctrine is based upon fairness, rational decision-making, predictability, stability in the law, and efficiency. Adherence to precedent tends to make the law change slowly, a step at a time, incrementally, thus limiting sudden changes of direction or adoption of new doctrines without the aid of significant discourse. According to Stone, "the rule of *'stare decisis'* embodies a wise policy because it is often more important that a rule of law be settled rather than it be settled right."

Stone believed that *stare decisis* created the necessary limiting borders that would curtail judicial power. He stated that the only check on the justices' "exercise of power is their own self-restraint." Stone was acutely aware that the Supreme Court was constitutionally removed from the democratic process, especially because, aside from the appointment and confirmation process, there is little connection between the voters and the Supreme Court.

Activism and restraint refer to opposing views of the deference the Court should show toward the other branches of the government. Judicial restraint holds that the Court should approach its duties fully cognizant that (1) the Court is not an elected body; (2) the other elected branches of the federal government are coequal with the Supreme Court; and (3) the

Court lacks institutional capacities enjoyed by the other branches, such as congressional investigative fact-finding commissions or executive oversight resources. A proponent of judicial restraint advocates that the Court must use its power of judicial review to strike down as unconstitutional the laws, policies, and actions of the other branches only when the violations are clear and plain, deferring to the executive and legislative branches in other cases.

In contrast, supporters of activism for the Court would expand its role by rejecting the need to defer to the other branches, especially when the majority voting structures, the representatives, and special interest groups threatened to overwhelm and in some cases undermine fundamental individual rights. Because Stone recognized that judicial restraint would create major gaps and uncertainties in the law, he suggested that the Court adopt the "preferred-position doctrine," a double standard affording economic cases greater deference or lower scrutiny, but subjecting fundamental rights cases (speech, press, and the like) to stricter judicial scrutiny.

Former Attorney General Harlan F. Stone in the office of the Supreme Court of the United States. *(Library of Congress)*

COMMITMENT TO CIVIL LIBERTIES

In 1938, Stone presented his preferred-position doctrine in his famous footnote four in the opinion in *United States v. Carolene Products,* 304 U.S. 144, a case involving the regulation of skim milk. He urged the Court to monitor and overturn laws that disadvantaged individuals and groups who lacked access to the representative process. He suggested that deference might not be appropriate in cases involving legislation that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or that represents "prejudice against discrete and insular minorities."

Stone's tenure on the Court marked the beginning of the period in which the justices deemphasized the protection of property and contract rights and began to guard other civil rights and civil liberties, especially in First Amendment speech and religion cases. Eventually, during Stone's tenure as chief justice, the Court took a more active role in scrutinizing laws that distorted the voting process and in promoting antidiscrimination principles under the Fourteenth Amendment.

In *Minersville School District v. Gobitis,* 310 U.S. 586 (1940), in which children who were Jehovah's Witnesses challenged on religious grounds state laws requiring salute to the flag and the Pledge of Allegiance in the public schools, Stone dissented from the majority and proclaimed his commitment to individual civil liberties: "The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist." Three years later Stone's dissent became the majority view in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943).

Stone's achievements have been overshadowed by the fact that, as chief justice, he was unable to keep the Court from fragmenting. Of course, the intellec-

tually powerful individuals who dominated the Court during that period would have been a monumental challenge for any chief justice to have led the nation's high court.

J. David Golub

See also: Carolene Products, Footnote 4.

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Stop-and-Frisk

The concepts of search and seizure are important to the understanding of civil liberties in the United States, because they present significant parameters for permissible conduct by law enforcement officials in keeping with the protections afforded by the Fourth Amendment to the U.S. Constitution. Those protections include the right to be free from "unreasonable" search and seizure and free from arrest except upon "probable cause."

In general, a *seizure* by a law enforcement officer or authorized police officer is defined as the taking into legal custody any objects relating to or believed to relate to criminal activity. A *search* refers to the examination or inspection of a location, vehicle, or person by a law enforcement officer for the purpose of locating objects believed to relate to criminal activities or wanted persons.

A *stop-and-frisk* is a special category of police activity that is less than the thorough examination of a person or premises that would constitute a search. A stop-and-frisk is intended to serve objectives of law enforcement but to stop short of a violation of a citizen's constitutional rights. The stop-and-frisk is defined as the detaining of a person by a law enforcement officer for the purpose of investigation, accompanied by a superficial examination by the officer of the person's body surface or clothing—known as a "pat-down" or "frisk"—to discover concealed weapons, contraband, or other paraphernalia relating to criminal activity. Thus, the stop-and-frisk concept represents an exception to the requirements for probable cause or a search warrant under the Fourth Amendment of the Constitution.

In *Terry v. Ohio,* 392 U.S. 1 (1968), the U.S. Supreme Court recognized for the first time that a police stop-and-frisk might be constitutional on the basis of "reasonable suspicion" rather than probable cause. In this case a detective with thirty years of police work experience noticed that the defendant and an accomplice were loitering on a street corner for a considerable length of time. The detective observed their conduct and behavioral patterns, especially their deliberate pacing and their focus on a specific store window. There were conferences with a third party who exited and returned to the scene on numerous occasions. The detective surmised that the men planned a daytime robbery, and he questioned them about their presence on the street corner. After receiving ambiguous and confused responses to specific questions, the detective, who had identified himself as a police official, performed a pat-down of the defendant's clothing, which revealed a revolver. The detective arrested the defendant and charged him with carrying a concealed weapon.

The Court in *Terry* established the precedent that certain categories of police conduct, typically called a "stop," may be undertaken upon less evidence than is needed for arrest because a stop is a lesser intrusion. The so-called *Terry* stop applies to crime prevention and crime detection. Thus, an officer who is conducting an investigation immediately after the perpetration of a crime may make inquiry of individuals on the basis of suspicion—about location, identification, unusual conduct, articles of dress, physical behavior, and the like—in connection with the facts and circumstances of the case. For example, the mere fact that individuals congregated at or near the scene of the crime may justify a stop. Alternatively, the identification by another credible witness or informant, even if vague, may justify a *Terry* stop-and-frisk. Police interrogation of such individuals followed by a

Seven men line up against a fence as they are frisked by a policeman in Brooklyn, New York, 1956. *(Library of Congress)*

search of the person would be considered constitutionally valid action. Because the police must exercise discretion in each particular situation, courts must often ascertain on review whether the conduct was a stop-and-frisk or an actual arrest.

If the police initially stop and frisk a suspect on the basis of reasonable suspicion, and further inquiry and investigation provide grounds for arrest, then continued restraint and detention of the person may be justified. However, if the police employ the wrong investigative technique, the stop may be converted to an illegal arrest. Moreover, if the individual who is temporarily detained believes that under the particular circumstances he or she is not free to leave after the police confrontation has occurred, that person's liberty interests have been compromised. The critical legal issue is at what point the stop-and-frisk became a search and seizure, which would require a higher level of justification and afforded the suspect a greater level of constitutional protection.

J. David Golub

See also: Fourth Amendment; *Terry v. Ohio.*

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Story, Joseph (1779–1845)

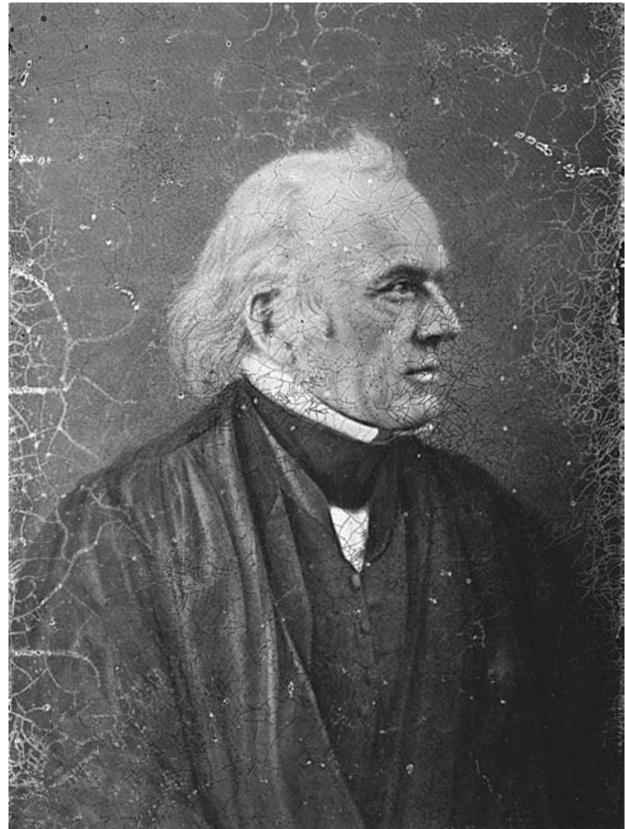
Joseph Story served as an associate justice of the U.S. Supreme Court from 1812 until his death in 1845. Prior to his promotion to the nation's highest court, Story had been both a Massachusetts state representative and a member of the U.S. House of Representatives. In addition to his roles in these public offices, Story was also a reputable lawyer and esteemed scholar. A graduate of Harvard College, Story had an intimate association with his alma mater, later serving as an overseer, fellow, and professor of law. He led the charge in establishing Harvard's law school.

The death in September 1810 of William Cushing, the sole remaining justice appointed to the Court by President George Washington and a staunch New England Federalist, left a vacancy on the Court and gave President James Madison, a Jeffersonian Republican, his first opportunity to appoint a justice. To maintain a regional balance on the Court, Madison wanted to find a sound Republican in the Federalist-dominated New England region to succeed Cushing. When his first few choices fell through, Madison offered the position to Joseph Story against the advice of Thomas Jefferson, who had labeled Story a "pseudo-republican."

Jefferson's fears came to fruition as Justice Story, after taking his seat in early 1812, quickly aligned himself with the Court's Federalist bloc headed by Chief Justice John Marshall. Like Marshall, Justice Story became a leading constitutional nationalist and a conservative in the tradition of Britain's Edmund Burke (1729–1797), who stressed the value of adhering to precedents that embodied a nation's collective wisdom. Together with Marshall and Justice Bushrod Washington, Story sought to limit states' power while expanding the scope of the national government's authority. He often justified this position by distinguishing between popular sovereignty and state sovereignty, holding that the former trumped the latter because the *people* in the several states had ratified the Constitution.

Also like Marshall, Story sought to enhance the authority of the Court in the nation's early years. As such, he objected to delivering dissenting opinions because they undermined the Court's authority and served no public benefit. Add to this norm of consensus the fact that Marshall himself authored a majority of the Court's opinions (and an even higher percentage in constitutional cases), and it is easy to understand how and why many of the justices who served on the Marshall Court—Story included—have been obscured in the annals of history due to the domineering presence of the great chief justice. Yet, of Marshall's associates, Story wrote a plurality of the Supreme Court's opinions in the remaining cases.

Justice Story's greatest impact on the development of the law may have been his opinions while he rode circuit (presiding over lower courts). His opinion in *United States v. Coolidge,* 25 F. Cas. 619 (No. 14, 857) (C.C.D. Mass. 1813), skillfully argued for a broad adoption of the common law, thereby providing more



Supreme Court Associate Justice Joseph Story. Story's moral opposition to slavery directly conflicted with his profound concern for the protection of private property.
(Library of Congress)

discretionary authority for federal judges, and his opinion on circuit in *Terrett v. Taylor,* 13 U.S. 43 (1815), served as the framework for Marshall's later enunciations in the landmark case of *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819).

Justice Story's opinion for the Court in *Martin v. Hunter's Lessee,* 14 U.S. 304 (1816), was his greatest constitutional opinion. It derived from a politically charged case in which Virginia essentially challenged the whole structure of the federal judiciary by arguing that federal matters decided by state courts could not be reviewed. Assembling an "unanswerable and conclusive" constitutional argument, Story admonished the state of Virginia and held that even though some constitutional questions had been permitted to be heard in state courts, the Constitution had given such authority to the federal courts in Article III of the Constitution. As such, if a uniform federal law was to be established, it was absolutely imperative that those state court decisions be reviewable by the U.S. Supreme Court.

On the controversial issue of slavery, Story's moral opposition to the practice directly conflicted with his profound concern for the protection of private property. Before a federal grand jury in 1819, Story condemned slavery, declaring it "repugnant to the natural rights of man and the dictates of justice." Yet when the two principles collided, Justice Story upheld the property rights of slave owners in *Prigg v. Pennsylvania,* 41 U.S. 539 (1842), a case involving the Fugitive Slave Act of 1793. Writing for the Court, he ruled that a state could not impede the just rights of an owner to repossess his slave and thus reclaim his property. Although contemporaries viewed this decision as a victory for slavery, Justice Story saw it as a victory for property rights and as a limit on state powers.

After Marshall's death in 1835, Justice Story was often the lone nationalist voice on the Court for his remaining ten years. He died in September 1845, having served for thirty-three years on the Supreme Court. He had planned to retire at the end of the year.

Chris McCloskey

See also: Federalism; Madison, James; Marshall, John.

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Strickland v. Washington (1984)

In *Strickland v. Washington,* 466 U.S. 668 (1984), the U.S. Supreme Court set standards for determining the circumstances under which ineffective representation by defense counsel would require that a conviction or death sentence be overturned. The Court had established, in such cases as *Powell v. Alabama,* 287 U.S. 45 (1932), dealing with a capital offense, and *Gideon v. Wainwright,* 372 U.S. 335 (1963), extending to all felonies, that criminal defendants enjoyed a right to counsel under the Sixth Amendment, that this right was necessary to ensure the fairness of trials, and that this right encompassed a right to effective assistance of counsel at trial and capital sentencing proceedings. Without some kind of effectiveness requirement, the Sixth Amendment's guarantees could be rendered a mere formality. But the question of what constituted a sufficient level of effectiveness remained, and the frequency with which convicted criminal defendants were raising claims of ineffective assistance of counsel on appeal highlighted the need to establish uniform standards.

The particular claim at issue in *Strickland* centered around the capital sentencing of David Leroy Washington, a man who was sentenced to death after pleading guilty to three murders and several lesser offenses. Washington challenged his death sentence on the ground that his counsel had failed to provide effective assistance at the sentencing proceeding. More specifi-

cally, Washington's counsel failed to request a psychiatric evaluation or to investigate character witnesses, either of which might have introduced mitigating factors that could have lessened Washington's sentence. A federal district court rejected this claim, but the Eleventh Circuit Court of Appeals set forth new standards for determining effectiveness of counsel and remanded to the district court for fact-finding related to counsel's performance.

In a seven–two decision, the Court, led by Justice Sandra Day O'Connor, reversed the Circuit Court of Appeals and held that to set aside a conviction or death sentence based on ineffectiveness of counsel, a defendant would have to demonstrate not only that counsel performed poorly but also that such poor representation so adversely affected the defense that the defendant was effectively denied a fair trial. In other words, the appellate court must determine, based on the totality of circumstances, whether there existed a reasonable probability that the outcome of the proceeding would have been different had counsel not performed in substandard fashion. Counsel's performance should be evaluated in relation to a baseline "objective standard of reasonableness" based on prevailing professional standards, and under the presumption that counsel did properly represent the defendant's best interests. At the same time, judicial inquiries should be flexible and avoid reliance on hindsight, so as to avoid creating incentives for every losing defendant to claim ineffectiveness.

Courts could avoid thorny inquiries into the adequacy of representation by first conducting what is usually the more tractable inquiry into whether confidence in the trial outcome had been sufficiently undermined by the alleged flaws in counsel's performance. If the fairness of the proceedings was not called into question by these alleged defects, then the no-harm, no-foul principle would govern. Washington's particular claim, said the majority, fell short on both counts: His counsel's actions represented strategic choices falling within the range of acceptable practice, and presenting the evidence requested by Washington would not have affected the sentencing decision measurably.

Writing in dissent, Justice Thurgood Marshall argued that the majority purported to clarify the determination of ineffectiveness of counsel but instead offered vague, intuitive guidelines where more specific standards were available. Furthermore, expecting defendants to demonstrate a reasonable probability that the outcome would have differed had counsel performed more effectively raised an unreasonably difficult barrier to overcome.

On one level, *Strickland* appeared to preclude frivolous claims of ineffective assistance of counsel without jeopardizing criminal defendants' right to a fair trial. But given current shortfalls in funding for indigent defense, especially in capital cases, in practice *Strickland* has erected substantial barriers to those who believe their criminal defense representation was substandard.

Jeremy Buchman

See also: Gideon v. Wainwright; Ineffective Assistance of Counsel; Right to Counsel.

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Strict Scrutiny

The phrase "strict scrutiny" refers to the highest degree of examination that the courts give to particular types of legislation or actions of the executive branch. The concept of strict scrutiny is important because this high level of judicial analysis has become critical to the protection of individual rights in the United States.

In general, courts must give wide deference to legislation passed by Congress or other legislative bodies or to decisions made by the president or other executive-branch officials at the federal, state, or local level. This judicial deference is part of the respect the courts are supposed to show to those branches of government that are directly elected by the people and that in a democracy have primary responsibility for making policy and law. When actions of the other branches of government are challenged in most rou-

tine matters, the level of examination is referred to as "rational-basis" review.

Under a rational-basis test, legislation is presumed to be valid, and the burden is upon the person challenging it to show why it is illegal or unconstitutional. Here, all that must be shown is that the legislature had some reason—some rational basis—for enacting the law. If some reason can be shown, the law or policy will be upheld. Thus, if Congress passed a law making it illegal to possess narcotics or a law mandating clean air standards and someone challenged these laws, the courts would use a rational-basis test and uphold both laws so long as some reason could be offered for why Congress wanted to make narcotics illegal or water cleaner.

The origins of the concept of strict scrutiny perhaps may be found in *McCulloch v. Maryland,* 17 U.S. 316 (1819), which involved the issue of whether Congress had constitutional authority to create a national bank. In finding Congress had that authority, Chief Justice John Marshall was required to interpret the last clause of Article I, Section 8 of the Constitution (giving Congress authority to make all laws that are "necessary and proper" for executing its powers). He acknowledged that the Constitution did not specifically authorize Congress to charter the bank, but he was willing to grant broad deference to Congress to legislate provided it had some reason to act and there was no specific constitutional prohibition against such action. Thus, *McCulloch v. Maryland* is a good example of how the Court has used the rational-basis test in analyzing legislation.

In general, the judiciary should defer to the other branches of government to act and make policy, but there are some circumstances when it should not. The concept of judicial review, or the power of the courts to declare laws unconstitutional, also means that in some circumstances, the judiciary may decline to extend the usual deference and instead rule that a specific piece of legislation (or a particular executive action) is unconstitutional, illegal, or beyond the powers of that body to adopt. For example, in *Marbury v. Madison,* 5 U.S. 137 (1803), perhaps the most important case in U.S. constitutional law, Chief Justice Marshall used the power of judicial review to declare a law unconstitutional. The case established that the Supreme Court was the ultimate arbiter of the Constitution, and the concept of strict scrutiny grew out of that power of judicial review.

Some legal scholars argue that strict scrutiny as a tool of judicial analysis emerged in the late nineteenth century when the Supreme Court used its power of judicial review to examine economic legislation and strike down laws that regulated the economy, but the modern conceptualization of that power first emerged in *United States v. Carolene Products Co.,* 304 U.S. 144 (1938). In examining the power of Congress to regulate adulterated milk, the Court announced that although it would give the legislature broad, rational-basis deference to engage in economic regulation, Justice Harlan Fiske Stone cautioned in footnote four that rational-basis presumption of constitutionality would not be given in certain matters. These included legislation that appeared to be in violation of the Bill of Rights, that restricted access to the political process, or that was directed against "discrete and insular minorities." In such cases, Stone stated, the Court should instead use some form of more exacting judicial scrutiny.

The Court later elaborated upon footnote four, holding, for example, in *Skinner v. Oklahoma,* 316 U.S. 535 (1942), that the right to procreate was a fundamental right that would be examined with strict scrutiny. Similarly, although it upheld restrictive policies excluding Japanese Americans from the West Coast, in *Korematsu v. United States,* 323 U.S. 214 (1944), the Court declared that policies or actions that categorized individuals by race created suspect classifications and would be subject to the strict-scrutiny test.

As a result of *Carolene Products, Skinner,* and *Korematsu,* courts now adopt differing standards of review depending on the type of legislation. In economic and most other legislation, the courts will employ a rational-basis test that presumes the constitutionality of laws. However, in cases involving fundamental rights (such as procreation, privacy, voting) or suspect classifications (race, ethnicity), the judiciary will reject the presumption of constitutionality and instead require Congress, for example, to show that the law is necessary to accomplish a compelling governmental interest and that the law uses the least restrictive means available to fulfill that interest. Legislation that can meet this demanding standard of

review will be upheld, but few laws can survive such a test, which has led some skeptics, such as former Justice Thurgood Marshall, to state that strict scrutiny is "strict in theory but fatal in fact."

Strict scrutiny is an important tool of judicial analysis in American democracy. It gives the courts the power to review legislation and protect minority rights against abuse by majority rule. Today there are varying levels of scrutiny given to different types of action—for example, gender classifications are subject to intermediate-level scrutiny—but the dichotomous tests of rational basis and strict scrutiny remain the basis of most judicial examination of legislation and government action.

Dale Mineshima and David Schultz

See also: Carolene Products, Footnote 4; Due Process of Law; *Korematsu v. United States;* Marshall, John; Rational-Basis Test; *Skinner v. Oklahoma.*

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Strikes and Arbitration

The ability of workers to use the power of an organized strike to express workplace grievances is considered an important civil liberty. This right is tied to workers' rights of association under the First Amendment to the U.S. Constitution and, more generally, to the nation's historical commitment to a free enterprise system. But this liberty is not unfettered; indeed, it has been curtailed by a host of statutory and judicial limitations. The most significant limitation has been legislative and judicial approval of mandatory arbitration clauses that, in effect, substitute for the "right to strike" a guaranteed forum to resolve labor disputes by a neutral third party.

POWER OF A RIGHT TO STRIKE

The threat of a strike is the most potent weapon in labor's arsenal. This weapon not only has the power to cripple an individual business but has the potential to shut down an entire industry or region as well. For example, in 1934, the International Longshoremen's Association (ILA) called for a strike of all West Coast dock workers. Other unions joined in the strike, effectively shutting down waterfront commerce along the entire western coast and bringing San Francisco to a standstill. The demands of the workers were eventually met after the union agreed to negotiate the dispute.

ARBITRATION CLAUSES

During World War II, the War Labor Board (1941–1946), which had been established to minimize strikes and to administer wage controls in key industries, was instrumental in efforts to insert mandatory arbitration clauses into collective bargaining agreements. These clauses were designed to prevent workers from leaving their work station and joining a picket line. A grievance subject to the arbitration clause could be brought before an arbitrator (a neutral third party) who would make a decision based on that person's interpretation of the collective bargaining agreement. Whether the arbitrator's decision was binding and whether a court could intervene if a party decided not to respect the decision were matters initially open to question. Although this framework for resolving labor disputes resulted in less disruption at the workplace, it potentially restricted a union's ability to express the raw power of a strike.

PRESUMPTION OF ARBITRABILITY

It did not take long for Congress and the U.S. Supreme Court to weigh in on whether arbitration clauses were in harmony with laws governing labor relations. Congressional reports explaining amendments to federal labor law in 1947 indicated a concern that if unions could break collective bargaining agreements with relative impunity, then such agreements would fail to stabilize industrial relations.

The Supreme Court took cues from this legislative

history in elevating the achievement of industrial peace over the protection of the right to strike. In *Textile Workers Union v. Lincoln Mills of Alabama,* 353 U.S. 448 (1957), the Court held that the federal judiciary could enforce an arbitration clause in a collective bargaining agreement. Once parties agreed to arbitrate a type of dispute, either party could request that a court compel a party to submit to arbitration or to abide by the arbitrator's decision. Whatever the decision, a union could not strike in protest of a decision without facing judicial sanctions.

In the seminal *Steelworkers* trilogy of cases—*United Steelworkers v. Enterprise Wheel and Car Corp.,* 363 U.S. 593 (1960), *United Steelworkers v. Warrior and Gulf Navigation Co.,* 363 U.S. 574 (1960), and *United Steelworkers v. American Manufacturing Co.,* 363 U.S. 564 (1960)—the Supreme Court expanded the reach of arbitration clauses. The issue posed in these cases was what situations called for applying an arbitration clause to a labor grievance. The Court ruled that in determining whether a particular dispute was subject to an arbitration clause, courts must resolve any doubts in favor of arbitration. In applying this "presumption of arbitrability," a court must order a party to arbitrate a dispute unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. In situations involving broad arbitration clauses, the Court found the presumption of arbitrability "particularly applicable," and only an

United Air Lines pilots form a picket line as they march past the airline's entrance at Chicago Midway Airport, 1951. *(Library of Congress)*

express provision excluding a particular grievance from arbitration or the most forceful evidence of a purpose to exclude the claim from arbitration would overcome the presumption. This presumption of arbitrability curbs the instances in which members of a union agreeing to arbitrate some disputes will be able to drop their tools and express their sentiments through a strike.

FUTURE IMPACT OF MANDATORY ARBITRATION

Although there is no necessary connection between accepting arbitration and forfeiting the right to strike, the Supreme Court has insisted on one, characterizing the arbitration clause in *Textile Workers Union,* for example, as a "quid pro quo" for the union's agreement not to strike. This view has fundamentally altered the relationship between unions and employers. The debate persists, however, over whether this change in the relationship has weakened the foundational strength of unionization or instead merely reoriented labor relations while preserving the balance of power between a union and the employer.

Ion B. Meyn

See also: Labor Union Rights.

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Stromberg v. California (1931)

In *Stromberg v. California,* 283 U.S. 359 (1931), an important turning point in the history of free speech, the U.S. Supreme Court struck down a state law that made it illegal to display a red flag. Notwithstanding the free speech protections provided under the First Amendment to the U.S. Constitution, the Supreme Court during the 1920s routinely upheld laws aimed at suppressing Communist and anarchist speech, although Justices Oliver Wendell Holmes Jr. and Louis D. Brandeis often dissented. They argued that the Court should restrict only speech that posed a "clear and present danger" of a harm that Congress had a right to prevent. In *Stromberg* the liberals won. For the first time, the Court used the clear-and-present-danger test to strike down a restriction on speech. *Stromberg* was also the first time the Court extended the First Amendment to cover symbolic speech.

The state law in *Stromberg* dated from 1919 when, in the immediate aftermath of the Bolshevik Revolution in Russia, fears about anarchism and communism ran high in the United States. The California state legislature made it illegal to display a "red flag" to express anarchist views, to incite sedition, or to serve as a symbol of "opposition to organized government." The case arose when Yetta Stromberg, a nineteen-year-old counselor at a Socialist summer camp, flew a red flag over the campgrounds. The San Bernardino authorities argued that the flag violated California law because it was seditious, incited anarchism, and symbolized "opposition to organized government." The jury found Stromberg guilty.

The Supreme Court, in a seven–two opinion by Chief Justice Charles E. Hughes, reversed. Justice Hughes found that the "opposition to organized government" prong of the statute violated Stromberg's right of free speech. He stressed that the prong could cover a broad range of innocent activity, such as a flag directed against an opposition party. Foreshadowing the overbreadth doctrine, which is designed to ensure that regulations of speech are narrowly tailored to suppress only that which is illegal, he noted that such a broad law prevented the "fair use" of citizen rights. Justices James C. McReynolds and Pierce Butler dissented on technical grounds related to the jury verdict. However, Justice Butler, reaching the merits, suggested that the state had the power to prohibit "opposition to organized government."

Stromberg was significant for two reasons. First, although it was a victory for free speech, the victory came on what one scholar called "ultra-technical" grounds. Justice Hughes said surprisingly little about the red flag itself. And he conceded that the parts of the California law targeting anarchism and sedition were constitutional. If *Stromberg* lacked the ringing endorsement of public debate present in the earlier

dissents by Justices Holmes and Brandeis, it showed how the Court could defend speech in an unfavorable political climate.

Second, *Stromberg* was the first time the Court recognized that speech encompassed symbols as well as words. In taking this step, the Court was helped by the law itself, which banned red flags for explicitly expressive reasons. Later the Court would struggle to apply this to situations in which the link between symbolic action and expression was less clear, as was true in *United States v. O'Brien,* 391 U.S. 367 (1968), a case involving the burning of draft cards.

Robert A. Kahn

See also: First Amendment; Flag Burning; Symbolic Speech.

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Student Newspapers

Student newspapers within a public school setting involve two competing yet compelling interests. First, the schools have an interest as institutions to control the expressive content students create, distribute, and read. Second, the students have interests in exercising their freedom of speech rights granted through the First Amendment to the Constitution. The issue, then, is which side will prevail when these interests conflict.

The U.S. Supreme Court created a special grouping of speech entitled "school-sponsored" speech in *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988), defined as speech that is expressed through a medium closely affiliated with the school. This closeness may make the speech appear to be endorsed by the school. Examples of school-sponsored speech include student artwork, school assemblies, and student newspapers.

Schools are permitted to establish reasonable rules regulating the time, place, and manner of distribution of publications. For instance, educators can require publications to be reviewed by the administration prior to distribution. Further, schools can forbid students to distribute newspapers at a time and place where distribution might cause a disturbance.

Schools are entitled to regulate what is printed in student newspapers provided the regulation is reasonably related to legitimate pedagogical concerns. In practice, this gives broad deference to the school—it may regulate a school newspaper in any manner if it can point to a pedagogical matter. Some pedagogical concerns include promoting societal values and educating students in an effective manner. For example, in *Hazelwood* a school principal stopped the publication of an article about several pregnant students because he believed references to sexual activity and birth control might be inappropriate for younger students, and the "anonymous" pregnant students would be identifiable by the text of the article.

A school may censor a student's written article based on that student's gross disobedience of school regulations, so long as those regulations are constitutional. For example, in *Sullivan v. Houston Independent School District,* 475 F.2d 1071 (5th Cir. 1973), a federal appeals court held that when a student openly disregarded a school requirement to obtain the principal's approval prior to distribution of the paper and subsequently used profanity when told of school policies, the school could prohibit further distribution of the paper. A school may also refuse to allow a student to distribute libelous or obscene material.

A school is allowed to protect its students from defamatory press. *Draudt v. Wooster City School District,* 246 F. Supp. 2d 860 (N.D. Ohio 2003), involved editors of a school newspaper in Ohio who planned to distribute an article describing the school board's practice of giving preferential treatment to student athletes caught drinking underage. The article named and quoted two students as admitting to drinking at a party and being caught. Because the named students had earlier denied drinking, the principal and superintendent found the statements potentially defamatory and pulled the newspaper from publication. This was found to be a permissible form of censorship.

Underground newspapers create their own special circumstances. Because they are not subsidized by the school or supervised by faculty members, under-

ground newspapers do not constitute the pure school-sponsored speech defined in *Hazelwood.* However, courts still grant schools some discretion when they forcibly end distribution of an underground newspaper. For instance, in *Bystrom v. Fridley High School,* 686 F. Supp. 1387 (D. Minn. 1987), the trial court upheld a suspension handed down to students who distributed a newspaper that, among other things, praised the vandalism of a teacher's home.

Newspapers distributed at colleges receive more free speech protection than newspapers at elementary, middle, or high schools. In general, courts believe that college-age students are more resilient to offensive material than high school students. This distinction does not rest with newspapers alone; freedom of speech gains more protection on college campuses in many other contexts as well.

Journalists in a private school do not receive the same protections as their public school counterparts. The relationship between a private school and its students is based on contract rather than regarded as a right generated by the public school system. Therefore, the private school may make rules as it sees fit when regulating its students and the management of its institution.

Zachary Crain

See also: First Amendment; *Hazelwood School District v. Kuhlmeier; Tinker v. Des Moines Independent Community School District.*

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Student Rights

When the constitutional rights of minors attending public elementary and secondary schools conflict with school administrators' pursuit of a regulated educational environment, the U.S. Supreme Court typically rules that the students do not wholly forfeit the rights they enjoy outside of school, but that the scope of those rights is limited. This pattern arises in cases involving free speech, due process, and search and seizure. The only area in which public school students may have a stronger claim to constitutional protection is in regard to freedom from state-established religion.

SPEECH

Student Expression

The U.S. Supreme Court case setting the pattern for most modern student rights cases is the famous *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). A group of Des Moines, Iowa, junior high and high school students opposed to the war in Vietnam decided to wear black armbands to school as a silent statement of protest. Learning of the plan, the school district enacted a rule banning all armbands, a measure the families challenged with the help of the American Civil Liberties Union (ACLU).

The Supreme Court began its constitutional analysis with the frequently quoted statement "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The scope of a student's speech rights within the school may nonetheless be tempered to ensure the state's ability to conduct classes effectively. In *Tinker* the Court concluded that school discipline could be imposed for a student's on-campus speech only if the speech would "materially" and "substantially" disrupt the work and discipline of the school or if the speech invaded the rights of others. Although this standard allows for more governmental control over student speech than would be allowed outside of school, it is more protective of speech than were some alternatives debated at the time, such as a standard allowing schools to forbid

speech that would cause any disruption of school, whether or not it was substantial.

In *Bethel School District v. Fraser,* 478 U.S. 675 (1986), the Court upheld a school's five-day suspension of a high school student for delivering a sexually suggestive speech at a school assembly. The discipline was upheld in part because the speech could be viewed as a material and substantial disruption of the educational process, and in part because the school has a valid interest "in teaching students the boundaries of socially appropriate behavior." *Bethel* has been widely viewed as a partial retreat from *Tinker,* and it has been used to justify discipline of students' oral or written communications or controversial T-shirts that school administrators consider socially inappropriate.

Student Publications

Following *Tinker,* many cases from the 1970s upheld the right of students to be free of school discipline for writing and distributing their own underground newspapers outside of school, even if the papers contained speech that might lead to punishment if it had been uttered in class. As cyberspace became a popular medium for speech at the turn of the twenty-first century, the reasoning used in the underground newspaper cases has begun to be applied to students' independent speech on the Internet and World Wide Web.

The same freedom does not extend to school-sponsored newspapers. In *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988), the Court ruled that a school principal did not violate the First Amendment by deleting articles from a school-sponsored student newspaper, as long as the newspaper had not been designated a limited public forum and the editorial decision was "reasonably related to legitimate pedagogical concerns." Some states or school districts responded with "anti-*Hazelwood*" laws that designated student newspapers as public forums or otherwise restricted the censorship powers of school principals.

SCHOOL DISCIPLINE

School administrators have great leeway to impose discipline on students for infractions of school rules, but this authority is not without limits. *Goss v. Lopez,* 419

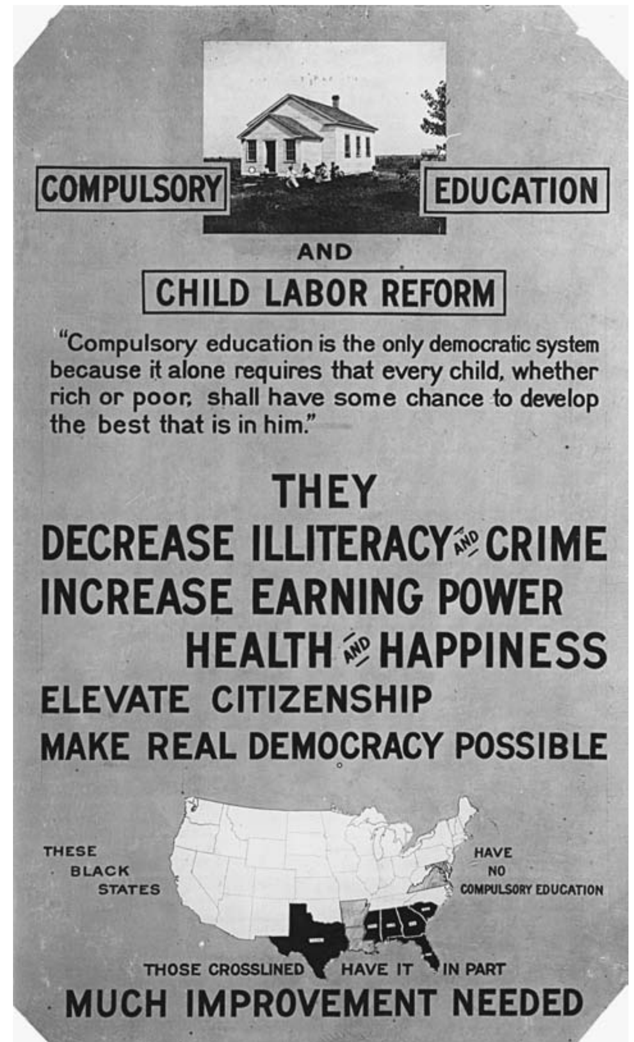

Exhibit panel for compulsory education and child labor reform. All states have compulsory education laws requiring some minimum amount of formal education. Although a state may require compulsory education, it cannot require that the education occur at a public school. *(Library of Congress)*

U.S. 565 (1975), recognized that students' right to a public education was a form of "liberty" or "property" under the Fourteenth Amendment that could not be deprived without due process. In the school setting, due process does not require proof beyond a reasonable doubt, trial by jury, or a right to counsel. Instead, a short-term suspension of ten days or less need be accompanied only by what the Court in *Goss* termed "rudimentary" due process: The student "must be told what he is accused of doing and what the basis of the accusation is," after which he must have "an oppor-

tunity to present his side of the story." This abbreviated process may occur after the imposition of suspension in cases of emergency.

Ingraham v. Wright, 430 U.S. 651 (1977), established that school discipline—even when it involves corporal punishment—is not subject to the Eighth Amendment ban on cruel and unusual punishment, which is limited to the criminal justice system. State or local laws, however, may limit public schools' ability to impose corporal punishment.

SEARCH AND SEIZURE

The Fourth Amendment right against unreasonable search and seizure protects public school students against searches by school administrators to a lesser extent than it protects them from searches by police outside of school. In *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), the Court ruled that a search of a student's purse or backpack did not require a search warrant or probable cause. Instead, a search by school personnel may be justified under a relaxed test of reasonableness: There must be reasonable grounds to suspect that the search will uncover evidence that the student has violated the law or the school rules, and the manner of search must be reasonably related to the objectives of the search and not "excessively intrusive" in light of the age and sex of the student and the nature of the infraction. When school officials conduct searches at the behest of the police for law enforcement purposes, however, the usual Fourth Amendment standards apply.

The Supreme Court has approved as reasonable school policies requiring students enrolled in extracurricular activities to take drug tests. The process began with *Vernonia School District v. Acton,* 515 U.S. 646 (1995), which upheld urine testing for student athletes when the school had demonstrated a rampant drug problem centered on the athletes themselves. Although there was much language in *Vernonia* explaining that the search was justified by the scope of the drug problem in the individual school, the role of athletes in the drug culture, the physical dangers of the sports field, and the fact that athletes are accustomed to having their bodies under scrutiny by the coach and in the locker room, none of these limitations was important to the Court in *Board of Education v. Earls,* 536 U.S. 822 (2002), which upheld urine testing for students in all extracurricular activities, whether or not there was a demonstrated drug problem, safety concern, or bodily scrutiny.

COMPULSORY EDUCATION

Minors unquestionably have far less freedom than adults in their choice of whether to pursue education in the first place. All states have compulsory education laws requiring some minimum amount of formal education, which is deemed a societal interest outweighing any purported interest of children or parents to avoid education. A state may require compulsory education, but it cannot require that the education occur at a public school; under *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), states must allow students to attend religious schools that meet minimum educational requirements. Similarly, in *Meyer v. Nebraska,* 262 U.S. 390 (1923), the Court struck down a state law prohibiting the teaching of modern foreign languages in such schools.

RELIGION

Public school students may have stronger constitutional protection than the public at large with regard to protection from state establishment of religion. Courts have recognized that religious upbringing and indoctrination are the province of the family rather than the state. Because young children subject to the daily authority and instruction of teachers are more likely to view religious messages from school officials as being legally required or officially endorsed, schools must be vigilant against conveying a message of sponsorship or endorsement of religion. For this reason, public schools may not require readings of the Bible or the Lord's Prayer, *Abington School District v. Schempp,* 374 U.S. 203 (1963), lead supposedly "nondenominational" prayers, *Engel v. Vitale,* 370 U.S. 421 (1962), or have moments of silence for the express purpose of prayer, *Wallace v. Jaffree,* 472 U.S. 38 (1985). Public schools may not post images of the Ten Commandments, *Stone v. Graham,* 449 U.S. 39 (1980), or hold official prayers at graduation cere-

monies, *Lee v. Weisman,* 505 U.S. 577 (1992), or sporting events, *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000). Curricula in public schools must also be religiously neutral, a concern that arises most often in conjunction with state laws that restrict the teaching of evolution, *Epperson v. Arkansas,* 393 U.S. 97 (1968), or mandate the teaching of creationism, *Edwards v. Aguillard,* 482 U.S. 578 (1987).

The mandate of religious neutrality is to ensure freedom of religion, not inhibit it. Schools must accommodate nondisruptive student behavior compelled by the student's faith. This principle was firmly cemented in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), which upheld the right of a Jehovah's Witness to remain silently seated while the class recited the Pledge of Allegiance. In a frequently quoted phrase, the Court, speaking through Justice Robert H. Jackson, stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Aaron H. Caplan

See also: Abington School District v. Schempp; Bethel School District v. Fraser; Engel v. Vitale; Flag Salute; *Hazelwood School District v. Kuhlmeier; Lee v. Weisman; Meyer v. Nebraska; Pierce v. Society of Sisters;* Prayer in Schools; Random Drug Testing; Search of Student Lockers; Student Newspapers; Student Searches; *Tinker v. Des Moines Independent Community School District.*

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Student Searches

Student searches are subject to the Fourth Amendment's protections against unreasonable searches and seizures. Determining whether a search or seizure is permissible under any circumstances depends on determining its reasonableness. What constitutes "reasonable" in the public school setting, however, is not necessarily the same as what constitutes "reasonable" in other settings, as the U.S. Supreme Court made clear in *New Jersey v. T.L.O.,* 469 U.S. 325 (1985). In this case, an assistant vice principal searched a student's purse after the student was caught smoking in the bathroom, in violation of school policy. That search yielded marijuana and other items implicating the student in drug dealing, which led to delinquency charges brought by the state. In finding the search permissible, the Court reasoned that school officials had a responsibility to maintain discipline to foster a safe educational environment, and requiring probable cause for student searches such as this one (the requirement that would have been necessary to obtain a search warrant) would compromise school officials' ability to meet that responsibility. In the school context, Fourth Amendment protections may be met by a reasonableness standard instead, in which the circumstances of the search (for example, nature of the infraction, intrusiveness of the search) are considered, rather than the more stringent probable-cause standard required of typical criminal investigations.

The Court has not directly addressed what this means in the context of school locker searches. Some lower courts require reasonable suspicion that illegal items are stored in a locker prior to a search; others permit school officials unfettered authority to search student lockers on the premise that lockers are jointly controlled by schools and students. Likewise, the Court has not expressly ruled on the permissibility of metal detectors in schools, though it is unlikely the Court would find them to pose a threat to constitutionally protected rights under the Fourth Amendment. The Court has, however, explicitly dealt with the issue of student drug tests under the Fourth Amendment.

In 1995 the Court upheld a school policy requiring

students to submit to urinalysis prior to participation in school sports in *Vernonia School District v. Acton,* 515 U.S. 646 (1995). The policy was instituted to combat a student culture in which drug use was prevalent in the Vernonia, Oregon, schools. Student athletes, in particular, were found to be leaders in this drug culture, which raised concerns about increases in the risks of sports-related injuries. Finding in favor of the school district, the majority opinion focused, first, on the fact that the expectation of privacy school students have is necessarily limited to some degree, since students are subject to physical exams and vaccinations in the interests of maintaining a healthy school environment. Further, student athletes have an even more circumscribed expectation of privacy given that they voluntarily choose to participate in sports and such participation involves communal undressing and showering. As the Court opined, "School sports are not for the bashful." In evaluating the drug testing policy, the Court also considered the degree of intrusion necessary to collect the urine specimens, finding the intrusion to be minimal. Female students were permitted to provide their urine samples in a closed bathroom stall with a monitor listening for the normal sounds of urination. Males produced their samples at a urinal with a monitor positioned at least twelve feet behind them.

The Court revisited the issue in *Board of Education v. Earls,* 536 U.S. 822 (2002), granting school authorities even greater latitude with regard to student drug testing. The drug policy in this case required all middle and high school students wishing to participate in any extracurricular activity, whether sports-related or otherwise, to consent to drug testing. In disposing of this case, the Court reiterated the limitations on a student's privacy interests imposed by virtue of the public school environment. The majority asserted that participation in any extracurricular activity is voluntary, and most activities involve the same sorts of intrusions to which student athletes are subject. Despite being a member of the majority in *Vernonia,* Justice Ruth Bader Ginsburg dissented on this point, arguing that athletics involve greater intrusions into student privacy than participation in other extracurricular activities and that this distinction was crucial for the outcome in *Vernonia.* The Court majority further argued that the procedure used to collect urine samples was even less intrusive than that used in the Vernonia schools, since both male and female students were allowed to produce their samples in a closed bathroom stall. And, despite the absence of a clear demonstration of a drug problem of "epidemic proportions," as was the case in the Vernonia schools, the drug policy in *Earls* was deemed constitutionally permissible given that schools have an important interest in preventing drug use among students.

Wendy L. Martinek

See also: Board of Education v. Earls; Random Drug Testing; *Vernonia School District v. Acton.*

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Subpoena

A subpoena is a written order, issued by a tribunal (for example, a court, a legislative body, a regulatory agency if it has subpoena power), that requires a person to appear before and provide testimony to it. The term *subpoena* is derived from two Latin words, *sub* (meaning *under*) and *poena* (*penalty*). This is because a person who receives a subpoena must obey it *under penalty* of being found in contempt of the issuing tribunal. Although a subpoena is typically used to compel a person to testify before a tribunal, one can also be compelled to produce books, files, records, and other documents through a *subpoena duces tecum* (Latin for *bring with you under penalty*), a variant of the subpoena. The subpoena power as it is understood today originated in medieval England, and its existence has evolved in the United States within the con-

text of the Bill of Rights, the first ten amendments to the Constitution.

Subpoenas gain their compulsive force through the possibility of contempt and the consequences that contempt entails. In this context, contempt is the willful disregard or disobedience of a public authority, such as a court or a legislative assembly (thus, contempt of court or contempt of Congress). In order to discourage such disrespect of the government's tribunals, those who commit contempt may be subject to fine or imprisonment. Thus, a person risks being severely penalized for failing to appear before the tribunal and provide testimony as required by a subpoena.

The goal of the subpoena, when it is used in the legislative arena, is to gain information that will be useful in the conduct of legislative affairs. A classic example is the use of the subpoena by the House Un-American Activities Committee (HUAC) during the 1950s in its attempts to gauge the spread of communism in the United States. Scores of citizens were compelled to testify before HUAC through the use of subpoenas. Those who refused to appear were often charged with contempt of Congress, and courts upheld convictions stemming from those charges with impressive regularity.

Within the judicial context, the subpoena is typically used to elicit testimony or documents from less-than-willing witnesses. The subpoena is not without controversy when it is used in this fashion, because issuance of a subpoena may give rise to a conflict between information-gathering efforts and civil liberties. The use of the subpoena power aids a tribunal significantly in its efforts to obtain vital information from unwilling sources. This information-gathering function, however, can easily touch upon evidence that is protected by the Fifth Amendment's freedom from self-incrimination, and it might also have a chilling effect on First Amendment rights of speech and association.

There are ways in which the tension between information-gathering and self-incrimination concerns can be alleviated. Most notable among these is through a grant of immunity, which prevents the government from using any incriminating testimony obtained from subpoenaed witnesses against them. With the possibility of self-incrimination removed, the tribunal can compel and fully develop the testimony of an unwilling, subpoenaed witness. A classic example of this occurs when a prosecutor offers a plea bargain and immunity to a member of a conspiracy in exchange for testimony against coconspirators.

Persons who have received a subpoena, however, may invoke their Fifth Amendment protection from self-incrimination only with regard to any oral testimony that is being demanded of them. In a series of cases during the 1970s, the Supreme Court established that the freedom from self-incrimination applies only to testimonial evidence. Physical evidence, including papers and documents, are outside the scope of the Fifth Amendment's protection. Thus, a recipient of a subpoena duces tecum may generally not withhold personal papers and documents from the court solely on the grounds that they are self-incriminating.

The Sixth Amendment also implicates the subpoena power as a form of compulsory process. In particular, the Sixth Amendment grants a criminal defendant the right "to have compulsory process for obtaining witnesses in his favor." This Sixth Amendment right affords the criminal defendant the right to present a defense in court through the testimony of witnesses, even to the extent that the defendant may have to drag recalcitrant defense witnesses into court. Use of the court's subpoena power is the primary method by which unwilling defense witnesses may be compelled to appear before the court. Although a defendant's use of compulsory process may appear to conflict with the prosecution's use of subpoenas to build the case against the defendant, the two uses serve the same purpose of bringing necessary information before the tribunal.

In whichever occasion it is applied, the subpoena aims to bring as much information to the tribunal as possible, compelling those who are unwilling to provide evidence or testimony. Courts have, however, placed certain limitations on the subpoena power to protect other civil liberties.

Keith Wesolowski

See also: Congressional Investigations; Contempt Powers; Immunity.

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Substantive Due Process

Under the legal concept known as "substantive due process," courts may void government action and policies, even though the action or policy does not violate an explicit constitutional provision. Throughout the history of civil liberties in the United States, the standard the U.S. Supreme Court uses when reviewing the procedure a government followed in adopting a policy or interacting with a citizen must be one of "fairness"; this standard is central to the principle of "procedural due process." In contrast, courts have used "substantive due process" to review the actual content—the substance—of the government action or policy, particularly in economic and social policy.

Under the Fifth and Fourteenth Amendments to the U.S. Constitution, citizens have the right not to "be deprived of life, liberty, or property, without due process of law." The meaning behind these Due Process Clauses is that neither the national nor a state government may arbitrarily deprive or deny an individual of fairness and justice within government procedures. Within the doctrine of substantive due process, courts will scrutinize the content of the government policy, even though it may have been enacted with the required procedures of fairness.

As with most American law and legal concepts, the doctrine of substantive due process originated from the English tradition of guaranteed fundamental freedoms and rights, which existed even without a written constitutional document. With this basis, a written constitution simply reaffirmed preexisting rights and liberties, and rights not explicitly stated in the document were still protected. Substantive due process was articulated in an early case before the U.S. Supreme Court. In *Calder v. Bull,* 3 U.S. 386 (1798), the Court's majority wrote that no government authority was omnipotent, and that even though government authority may not be expressly prohibited in a written constitution, the actions and substance of government acts could be declared illegal. In the same case, however, Justice James Iredell challenged this approach, saying that judges could not pronounce a law void simply because it violated an unwritten principle as determined by judges themselves.

Most of the subsequent early U.S. Supreme Court cases followed Justice Iredell's approach and were linked to specific constitutional provisions. It was at the state level that courts began to strike down laws due to their substance, most notably New York's liquor-prohibition law in *Wynehamer v. People,* 13 N.Y. 378 (1856). Yet one infamous case at the national level signaled the reemergence of substantive due process on the controversial policy of slavery in the nineteenth century. In *Scott v. Sandford,* 60 U.S. 393 (1857), Chief Justice Roger B. Taney ruled that the Missouri Compromise (which admitted Missouri to the Union as a slave state but Maine as a free one and prohibited slavery in states formed from the Louisiana Purchase north of latitude 36°30') unconstitutionally deprived southerners of their property in slaves, thus violating the Due Process Clause by its substance.

In the aftermath of the Civil War, another infamous case involving federal protections of rights for newly freed black Americans brought substantive due process back to the judicial forefront. Under the Due Process Clause of the Fourteenth Amendment, state governments were now prohibited from denying due process for their citizens. In the *Slaughterhouse Cases,* 83 U.S. 36 (1873), however, the U.S. Supreme Court narrowly interpreted the due process guarantee against state government actions to pertain chiefly to newly

freed slaves. Yet, according to Justice Stephen J. Field's dissent in the case, the Due Process Clause protected a God-given liberty "to pursue a lawful employment in a lawful manner." Given the nation's growing industrialization and philosophical adherence to a free-market capitalistic economy, the U.S. Supreme Court, through substantive due process, embarked on a path of what many critics considered to be judicial activism, in support of laissez-faire economics.

ECONOMIC SUBSTANTIVE DUE PROCESS

With the Industrial Revolution and the expansion of government regulatory efforts, economic matters became subject to the Supreme Court's use of substantive due process. Under this approach, the Court reviewed regulatory laws, such as those regulating rates charged by grain elevators and railroads as well as state prohibition of liquor, to determine whether the regulations were "reasonable" or if they violated an individual's constitutionally protected rights, particularly the right to determine one's employment. In *Mugler v. Kansas,* 123 U.S. 623 (1887), the Court declared unconstitutional the substance of a Kansas law prohibiting intoxicating beverages. Ten years later, in *Allgeyer v. Louisiana,* 165 U.S. 578 (1897), the Court struck down a state law requiring all corporations to pay Louisiana a fee if they did any business with a state citizen. The Court held that the law interfered with an individual's ability to freely contract his livelihood and employment.

The high point of economic substantive due process came with *Lochner v. New York,* 198 U.S. 45 (1905), in which the Court invalidated a New York law regulating the employment of bakery employees, based on an infringement of the right to contract between an employer and employee. The court came to its judgment by questioning if the state law was a "fair, reasonable and appropriate exercise" of its power, deciding instead that the law's substance violated an individual's freedom to contract his employment. This case heralded the beginning of the Court's activism in striking down government regulations (minimum-wage laws, for example), a proactive Court position that continued until the New Deal, with some notable exceptions.

The antagonism between the Court and the New Deal administration came to a head with the Supreme Court striking down New Deal regulations of the economy and President Franklin D. Roosevelt proposing his "Court-packing" plan to gain acceptance of government regulatory power in 1937. The Court, recognizing that the use of substantive due process to strike down government regulation was losing favor, ruled in two important cases (one dealing with a state minimum-wage law for women, the other concerning the constitutionality of a government regulatory agency) that legislatures could protect those who were unable to protect themselves in contracting their work. With the "switch in time that saved nine," the Court allowed government economic regulations to stand and thus ended the practice of scrutinizing the substance of legislation in economic matters.

SOCIAL POLICY AND SUBSTANTIVE DUE PROCESS

Nevertheless, the doctrine of substantive due process was not abandoned with the Court's acceptance of economic regulations. The Court subsequently turned its attention to matters regarding social policy. The basis of this new intervention into the substance of legislation could be traced to footnote four of Justice Harlan F. Stone's majority opinion in *United States v. Carolene Products Co.,* 304 U.S. 144 (1938). In it, Justice Stone argued that the Court could review the substance of legislation dealing with such issues as religious, racial, and political discrimination. This led later Courts to determine the validity of many social issues, using substantive due process to read unexpressed liberties into constitutional provisions, most notably the right of privacy.

For example, a Connecticut law restricting the ability of married couples to receive contraceptive devices from their physicians was declared unconstitutional, due to the fact that "various guarantees create zones of privacy" within the U.S. Constitution, as the Court expressed it in *Griswold v. Connecticut,* 381 U.S. 479 (1965). The most famous use of substantive due process was in *Roe v. Wade,* 410 U.S. 113 (1973), in which the Court used the right of privacy to strike down the substantive restrictions of state abortion laws regulating a woman's right to terminate a pregnancy, particularly in the first three months.

Nevertheless, on occasion the Court has been unwilling to strike down laws that interfere with sexual activities and the perceived right to die. In *Bowers v. Hardwick,* 478 U.S. 186 (1986), the Court upheld a Georgia statute that outlawed sodomy (the Georgia Supreme Court later declared the statute a violation of the state constitution), but the Court later reversed itself in *Lawrence v. Texas,* 539 U.S. 558 (2003). In *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261 (1990), the Supreme Court allowed the state to regulate how and when someone could declare a desire to terminate medical procedures. Continued controversies over the Court's power to review the substance of legislation will continue to make substantive due process an integral concept to understanding civil liberties in the United States.

J. Michael Bitzer

See also: Due Process of Law; *Lochner v. New York;* Right to Privacy; *Slaughterhouse Cases.*

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Subversive Speech

Governments have an inherent right to survive, a corollary of which is that they have the right to take action against subversive action, including subversive speech. The term "subversive speech" is ambiguous, for it contains two ideas: speech and action. Although speech and action are obviously not coextensive, neither are they necessarily mutually exclusive. Despite the fact that the First Amendment generally protects speech but not action, both rules are subject to exception. For example, some action, like burning the U.S. flag, can be so intimately connected to expression that the First Amendment protects it, as the U.S. Supreme Court held in *Texas v. Johnson,* 491 U.S. 397 (1989), and *United States v. Eichman,* 496 U.S. 310 (1990). Pure speech at one end becomes so inextricably linked to action that the two are indistinguishable. Subversive speech is of that type.

The old adage "Sticks and stones may break my bones, but words will never hurt me" captures the distinction between words and actions, but when words are likely to produce an imminent and unlawful act—"hurting one's bones"—the First Amendment does not protect the words. The Court made this distinction in *United States v. O'Brien,* 391 U.S. 367 (1968): "[W]hen 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest can justify incidental limitations on [speech]." Courts have been very quick to find such an important governmental interest in matters involving national security, especially in times of war.

Subversive acts include treason, espionage, sabotage, sedition, terrorism, and insurrection. Of the group, sedition is the most likely to involve subversive speech, for it involves inciting others—usually by speech—to commit overt acts of subversion. The U.S. government proscribed subversive expression as early as 1798 with enactment of the alien and sedition laws, which prohibited any person from writing, printing, uttering, or publishing any false or scandalous and malicious statements about the government of the United States, including both houses of Congress and the president. The 1798 act (1 Stat. 596) was a response to perceived insurrection by French sympathizers during a period when the United States faced a possible war against France.

Later Congress enacted measures to promote national security by curtailing subversive speech either during wartime or in response to the perceived post–World War II Communist threat. These included the Espionage Act of 1917 and the Sedition Act of 1918, both enacted during World War I; the Alien Registration (Smith) Act of 1940, enacted on the eve of World War II; and the Internal Security (McCarran) Act of

1950 and the Communist Control Act of 1955, which Congress enacted in the early stages of the Cold War with the Soviet Union. These acts dealt with subjects from obtaining and using national defense information and interfering with the war efforts in various ways to prohibiting speech that advocated or advised the violent overthrow of the U.S. government.

One of the earliest Supreme Court decisions dealing with subversive speech was *Schenck v. United States,* 249 U.S. 47 (1919), which involved the prosecution of Charles Schenck, general secretary of the Socialist Party, and others for distributing antidraft materials to men the government was recruiting for military service. Justice Oliver Wendell Holmes Jr., speaking for a unanimous Court in upholding the constitutionality of the 1917 Espionage Act and Schenck's conviction, enunciated the now famous "clear and present danger" test. The test, according to Justice Holmes, depends on whether one's words are "used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Although the clear-and-present-danger test underwent some changes after 1919, it has remained essentially intact. The Court addressed it more recently in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), and altered the wording somewhat. Clarence Brandenburg had been found guilty of violating Ohio's criminal syndicalism statute by speaking at a Ku Klux Klan rally where he made a threat of revenge against the president, Congress, and the Supreme Court. The author of the per curiam opinion in the decision that reversed his conviction stated that expression is within the protection of the First Amendment unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

After the nation sustained the major terrorist attack on September 11, 2001, in New York City, Washington, D.C., and Pennsylvania, Congress quickly acted to broaden the scope of antiterrorism laws to include a new category, which it called "domestic terrorism." Section 802 of the USA Patriot Act of 2001 (*U.S. Code,* Vol. 18, sec. 2332) defines "domestic terrorism" to include "acts dangerous to human life that are a violation of the criminal laws" if they "appear to be intended . . . to influence the policy of a government by intimidation or coercion" and if they "occur primarily within the territorial jurisdiction of the United States." The practical implications for the tension between civil liberties and national security under such legislation must await more definitive decisions by the courts.

Clyde E. Willis

See also: Alien and Sedition Acts; Clear and Present Danger; Espionage Act of 1917; Patriot Act; *Schenck v. United States;* Sedition Act of 1918; Smith Act Cases.

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Suicide

See Physician-Assisted Suicide; Right to Die

Summary Judgment

A civil lawsuit is a proceeding in the courts between private parties to enforce private rights or remedy private wrongs. The party initiating the lawsuit, the *plaintiff,* files a document stating the claims, a *complaint,* against one or more other persons, the *defendants.* Although plaintiffs file lawsuits with the presumption that the claims will result in a trial before a judge (bench trial) or a jury (jury trial), most civil lawsuits terminate before trial. Summary judgment is one of the ways in which this pretrial termination may occur. In federal courts, summary judgment is governed by Rule 56 of the *Federal Rules of Civil Procedure.* State courts have procedural rules governing summary judgment as well.

Summary judgment is a procedural device that allows a court to grant a judgment on the merits for a

party as to part or all of the claims asserted. The basic requirement for a court to grant a party's motion for summary judgment is that there is no genuine issue as to any material fact and that, based on these undisputed facts, the moving party is entitled to judgment as a matter of law. The essence of the motion for summary judgment is that a trial is unnecessary because the important (or *material*) facts underlying the plaintiff's complaint are not in dispute and the law as applied to these facts shows that the party filing (typically the defendant) is entitled to judgment as a matter of law.

Before considering a motion for summary judgment, parties are usually allowed to develop the relevant facts and present those facts to the court. This process of developing the facts is called *discovery* and usually involves an exchange of documents between the parties, responses to written questions proposed by the opposing party, and even sworn oral testimony outside of the courtroom context (*depositions*). After the parties have engaged in whatever discovery they deem necessary, either or both of them may move for summary judgment as to some or all of the plaintiff's claims.

In order to grant a motion for summary judgment, the court must conclude that all of the material facts related to the plaintiff's claim are undisputed. Applying the law to these undisputed facts, the court reaches a determination that one party or the other is entitled to judgment, and the claims in the lawsuit challenged by the summary judgment motion are dismissed, subject to appeal to a higher court.

Granting a summary judgment motion might seem at odds with the right to a trial by jury provided in the Seventh Amendment of the U.S. Constitution. This concern is more superficial than real, since a jury's job primarily is to resolve factual disputes. By definition, the motion for summary judgment will be granted only if there are no material facts in dispute—there is nothing for the jury to resolve. Recognizing, however, the potential for summary judgment to impose on the province of the jury, courts grant motions for summary judgment sparingly.

One benefit of summary judgment is that it disposes of litigation before a possible costly and time-consuming trial, conserving the parties' and the court's resources. The potential for losing the case at this pretrial stage arguably encourages the parties to determine actively all of the underlying material facts and be prepared to challenge the motion should it be brought. This active exploration of the facts also may enlighten the parties as to the strength of their claims and defenses, which may encourage settlement negotiations and ultimate pretrial settlement.

Other examples of disposition before trial are default judgment, dismissal for failure to state a claim, and settlement. Once a plaintiff serves a complaint, the defendant has a set time, for example, twenty days, to answer the complaint. If a defendant fails to respond to the complaint within the designated time period, the defendant "defaults" and a court may grant the plaintiff a "default judgment." This terminates the litigation, unless the defendant successfully can vacate the judgment. A default judgment is the penalty for not showing up in court.

A defendant also may challenge the legal sufficiency of the plaintiff's claim by filing a motion to dismiss for failure to state a claim. Assuming everything that the complaint sets out is true, this pleading challenges whether the law can recognize any legal violation based on the facts. For example, if a complaint alleges that the plaintiff was not invited to dinner by the defendant when a number of mutual friends were, the defendant's motion to dismiss for failure to state a claim will prevail. Discourteous behavior is not the type of conduct for which the law generally provides a remedy. People may not like the behavior, but it does not give rise to a legal claim.

A party may file a lawsuit and then decide that the time and expense of pursuing judicial relief is not worth it. For this and for many other reasons, the parties to a lawsuit may *settle* their dispute before trial by some negotiated compromise. Settlement is the most common form of disposition of civil litigation before trial.

John H. Matheson

See also: Seventh Amendment.

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Suspect Classifications

Suspect classifications involve laws enacted or presumed to be enacted with an intent to discriminate against a specific class or group of people. Most laws are enacted to achieve reasonable public policy goals. However, because of the legacy of slavery and the history of race relations in the United States, laws classifying people based on race are presumed to be discriminatory, or suspect, under the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The U.S. Supreme Court identifies the groups protected by the Equal Protection Clause and develops standards of review for laws alleged to violate it.

Ratified in 1868, the Fourteenth Amendment was designed to protect the rights of the newly freed slaves, but the wording of the amendment is broad. States cannot enact laws that abridge the privileges or immunities of citizens; deny persons life, liberty, or property without due process; or deny persons the equal protection of the laws. The Equal Protection Clause limits the policy-making authority of the states by making sure that state laws are applied evenhandedly, so that the same rules apply to everyone.

After the Civil War, southern states enacted laws that discriminated against blacks. These laws were grounded in prejudice and were intended to discriminate. Yet the Supreme Court did not initially interpret the Equal Protection Clause in a way that protected blacks. In *Plessy v. Ferguson,* 163 U.S. 537 (1896), the U.S. Supreme Court ruled that "separate but equal" accommodations for blacks and whites did not violate the Equal Protection Clause. Thus, laws segregating people by race received constitutional protection that did not begin to erode until almost a half century later.

A fundamental shift in constitutional perspective occurred during the 1930s. Between the end of the Civil War and the late 1930s, the Court focused much of its attention on cases involving federalism and government regulation of business. The country was undergoing social and political changes, and people were demanding protection of their civil rights and liberties under the Bill of Rights (the first ten amendments to the Constitution) and the Fourteenth Amendment. Members of the Court, notably Justices Oliver Wendell Holmes Jr. and Louis D. Brandeis, articulated new approaches to interpreting First Amendment freedoms. The Court rendered landmark decisions involving the First Amendment and applied First Amendment freedoms to state action through the Due Process Clause of the Fourteenth Amendment.

The concept of suspect classifications also evolved during this time, from perhaps the most famous footnote in constitutional history. In his majority opinion in *United States v. Carolene Products Co.,* 304 U.S. 144 (1938), Justice Harlan Fiske Stone suggested in footnote four that judges pay closer attention to cases involving legislation affecting fundamental rights, such as the rights protected by the Bill of Rights and the Fourteenth Amendment; laws restricting political processes; and laws singling out "discrete and insular minorities." Justice Stone's suggestion steered the Court down the path of accepting and deciding cases involving individual rights and liberties, including those protected by the Equal Protection Clause.

In *Korematsu v. United States,* 323 U.S. 214 (1944), Justice Hugo L. Black declared that laws singling out particular ethnic-racial groups would be subject to a higher level of judicial scrutiny than other laws. This concept later evolved into the strict-scrutiny test. To survive strict scrutiny, a law must serve a compelling government interest and use the least restrictive means possible to achieve that compelling interest. Ironically, the *Korematsu* Court upheld the internment of Japanese Americans during World War II.

The Court defined the criteria for inclusion in a suspect classification in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). Writing for the Court, Justice Lewis F. Powell Jr. declared the criteria for inclusion to be "an immutable characteristic determined solely by the accident of birth, or a class saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or regulated to such a political powerlessness as to command extraordinary protection from the majoritarian political process."

The protection extended suspect classifications requires proof of intent to discriminate, which is difficult if not impossible to prove. It is much easier to prove that the burden of some laws, regardless of intent, falls more heavily on certain groups. In *Village*

of Arlington Heights v. Metropolitan Development Corp., 429 U.S. 252 (1977), the Court held that discriminatory intent could be proved by showing a law had highly disparate impact.

The Court's equal protection jurisprudence is controversial, and over the years, groups have tried to move under the protective umbrella of suspect classifications. In the 1960s, the Court under Chief Justice Earl Warren added alienage to the category of suspect classifications, but the Court does not always use the strict-scrutiny test for this category of cases. Religion is also considered a suspect classification, although there have been no Supreme Court cases defining it as such. Although they have not met with total success, other groups have succeeded in getting the Court to create an intermediate category, "disfavored" classifications. This category applies to a greater or lesser degree to state laws that classify on the basis of gender, age, disability, poverty, and illegitimacy. The applicable standard of review for such classifications is generally called intermediate-level scrutiny.

Judith Haydel

See also: Fundamental Rights; Intermediate-Level Scrutiny; *Skinner v. Oklahoma;* Strict Scrutiny.

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Symbolic Speech

Symbolic speech is communication that is expressed through conduct and is usually nonverbal and nonwritten. The U.S. Supreme Court has generally afforded protection for such expression under the right to free speech contained in the First Amendment to the U.S. Constitution. Examples of protected symbolic speech include the wearing of armbands and the burning of flags. When symbolic speech is peaceful and neither poses a threat to the community nor intrudes upon an important government interest, it is protected as being comparable to traditional forms of political speech, such as demonstrations, leafleting, and public speeches; otherwise, it may be regulated in various ways. The Court has said that symbolic acts will be protected except when they cause harm that is specific or direct in nature.

BURNING DRAFT CARDS

In *United States v. O'Brien,* 391 U.S. 367 (1968), the Supreme Court set the standard by which symbolic speech would be tested in examining a law, passed during the Vietnam War, that prohibited the burning of draft cards. David O'Brien burned his card in opposition to the war, claiming that this act amounted to symbolic speech. The government disagreed, arguing that there was a legitimate government interest in preventing the destruction of draft cards that was separate and distinct from the regulation of speech: Draft cards revealed draft status and information that easily and efficiently allowed communication between the citizen and the government during a time of war.

The Court accepted the government's reason as a neutral interest that was sufficiently removed from the individual's right of free expression and viewed its possible effect on speech as secondary and justified. In so ruling, the Court established the four-part "*O'Brien* test" to determine when laws regarding limitations on expressive conduct were to be permitted:

1. Is the law within the constitutional power of the government?
2. Does the law further a substantial or important government interest?
3. Is the interest unrelated to the suppression of free expression?
4. If the conduct is related to speech, are the means used by government to meet important government interests the least restrictive possible with regard to free speech?

ARMBANDS IN PUBLIC SCHOOLS

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), also decided during the Vietnam War, affirmed the right of students to wear black armbands in protest of the war. Although the school argued it had a legitimate interest in maintaining order, the Court did not believe this interest had been threatened here, and it held that the rule banning the armbands constituted suppression of the students' right to expression. In so ruling, the Court began the process of more evenly balancing the right to symbolic speech as against governmental interests, such as preservation of order.

FLAG BURNING

Although *O'Brien* established that the burning of draft cards implicated a legitimate government interest, in *Texas v. Johnson,* 491 U.S. 397 (1989), the Supreme Court found that flag burning and desecration did not implicate an important government interest that was distinct from the expression the conduct was meant to convey. Prior to *Johnson,* the Court had done everything it could to avoid addressing the constitutionality of flag burning directly. In *Spence v. Washington,* 418 U.S. 405 (1974), for example, the Supreme Court specifically stated that the *O'Brien* test was not applicable because "the Court for decades has recognized the communicative connotations of the use of flags." In *Spence* a flag was affixed with a removable peace sign and then displayed in a window. In a ruling that rested narrowly on the grounds that the taped-on symbol did not threaten the physical integrity of the flag, the Court overturned the petitioner's conviction.

In *Texas v. Johnson* (1989), the Court addressed flag burning directly. The Texas law specified not only that the actor had to deface or damage the flag, but also that the actor must know that such action would seriously offend one or more persons likely to observe or discover the action. In overturning Gregory Johnson's conviction, the Court found that the statute turned standard thinking about symbolic speech on its head. Instead of permitting the conduct because of its political or otherwise expressive content, the law banned the burning of a flag *because* it was expressive. Texas argued that its interest in the law was in preserving the flag as a symbol of nationhood and national unity. The Court replied that this interest was related to suppressing free expression; that is, it was content-based because any reason the government might have to ban this form of symbolic speech would necessarily be based on the content of that speech and therefore constitutionally invalid. Although many people find flag burning and the message it communicates to be offensive, the Court wrote that this was not enough to permit the government to prohibit the behavior. Rather, the First Amendment was designed to protect especially that speech with which others disagree.

In fact, the Texas law, as well as the similar Flag Protection Act of 1989 passed by Congress shortly after *Johnson*—and invalidated in *United States v. Eichman,* 496 U.S. 310 (1990)—would have prohibited the use of the symbol of the flag by some speakers and not others, because the law limited only speakers with a particular viewpoint. A person owning an old, tattered flag could respectfully burn it in a ceremony in order to dispose of it; a protester could not perform essentially the same action in opposition to a government policy.

CROSS BURNING

In *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992), the Court addressed cross burning and the use of other symbols that might be considered symbolic speech or expressive conduct. Saint Paul, Minnesota, had a hate-crime ordinance (the Bias-Motivated Crime Ordinance) that banned the use of Nazi swastikas, burning crosses, and similar symbols to arouse fear or anger on the basis of race, color, creed, religion, or gender. The city argued that the law merely prohibited the use of fighting words—that is, speech that in a specific context is directed at specific individuals and is likely to bring about a breach of peace, usually by speech that is threatening or intimidating. Fighting words are not constitutionally protected speech under First Amendment principles.

Nevertheless, the Supreme Court found Saint Paul's antibias law unconstitutional because it banned the offensive symbols only when used by the proponents of racial and religious hatred. Speakers who had other intentions, such as opposing racial intolerance,

could use the symbols as they pleased. The ordinance prevented the use of these fighting words only by specific groups, therefore creating an unconstitutional content-based restriction on speech.

The Supreme Court was willing to prohibit cross burning when the action was directly tied to a specific threat. The Court again dealt with a cross-burning law in *Virginia v. Black,* 538 U.S. 343 (2003), stating that the law was permissible only when the action was carried out with an attempt to intimidate. The ruling was consistent with *R.A.V.* because it dealt specifically with cross burning, with the Court noting that this particular act had a long history in the United States and that in certain circumstances, burning a cross could become a truly threatening action rather than being simply speech. When used in situations of intimidation, with the perpetrator using the symbol to cause fear, the state may regulate the conduct because it would be a "true threat," a threat in which the speaker was communicating a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. Because the Ku Klux Klan historically often used the burning of crosses to relay this message, the conduct still holds the same threat today and is therefore not protected when used to intimidate in this manner. The place in U.S. history of a burning cross as a particularly dangerous form of intimidation made it legal for the state to single it out for prohibition. When the act of burning a cross is a specific threat directed toward an individual, it is no longer protected symbolic speech and has become action that is not protected by the First Amendment.

Ronald Kahn

See also: First Amendment; *R.A.V. v. City of St. Paul; Texas v. Johnson; Tinker v. Des Moines Independent Community School District.*

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T

Taft, William Howard (1857–1930)

The only man to serve as the nation's president (1909–1913) and as chief justice of the U.S. Supreme Court (1921–1930), William Howard Taft had remarkably varied experience in public service. Yet every office he held was appointive except for the one term when he was elected president as the hand-picked candidate of predecessor Theodore Roosevelt. Taft proved an ineffective and unhappy campaigner and much preferred the Court to the White House.

Today, Taft is primarily remembered as the leading advocate of judicial reform in the early years of the twentieth century and as a conservative president. He is considered the leader of a conservative, probusiness Court during the presidencies of Warren G. Harding and Calvin Coolidge in the 1920s. Yet Taft's conservatism is often overestimated; as both president and chief justice, he produced a record that had more progressive aspects than is commonly recognized.

PRESIDENT OF THE UNITED STATES

When Theodore Roosevelt left the White House, Secretary of War Taft was his choice as a successor. The two men had developed a close relationship over the years, although they were a study in contrasts. Roosevelt loved the political world; Taft detested campaigning. Roosevelt was a dynamic personality; Taft was a plodder. Roosevelt was an orator; Taft was a poor public speaker. Roosevelt was a bundle of energy and activity; Taft was grossly overweight and lethargic.

As president, Taft had a more cautious and restrained view of the presidency than did Roosevelt. Taft's presidency was limited to one term due to a break with Roosevelt precipitated by Roosevelt's ambition and sense that his brand of progressivism had been betrayed by Taft. Particularly disturbing, from the perspective of progressives, was Taft's support for high tariffs and for his Department of Interior secretary, who was accused of favoring private interests over Roosevelt's conservation policies. Taft also refused openly to support the revolt against the dictatorial control of the House of Representatives by Speaker Joseph Cannon. Yet Taft's antitrust efforts surpassed those of Roosevelt. About seventy antitrust suits were pursued in the four years of the Taft administration compared with about forty in Roosevelt's seven years as president. The Mann-Elkins Act of 1910, which strengthened railroad rate regulation by the Interstate Commerce Commission, was also passed during the Taft administration, as was postal savings bank legislation, both strongly supported by progressives.

Although Taft's presidency was a progressive-conservative one, the split with Roosevelt led to a split in the Republican Party. The result was the election of Democrat Woodrow Wilson in 1912.

CHIEF JUSTICE OF THE COURT

In keeping with his long-standing interest in the judiciary, President Taft had significant impact on the composition of the federal courts. In his term in office, he named 45 percent of all federal judges and named six justices to the Supreme Court. One of Taft's judicial appointments was Chief Justice Edward E. White. Court observers often claimed that Taft appointed him calculating that White's advanced age would give Taft a chance to be appointed chief justice. Indeed, Taft was appointed chief justice in 1921 upon White's death.

Taft proved to be an activist chief justice. He recommended judicial appointments to the president and lobbied Congress for judicial reforms. Although Taft's years on the Court produced conservative judicial activism through which the Court promoted a pro–property rights agenda against the social legislation of both the states and national government, Taft was not always on the conservative side. In *Stafford v. Wallace,* 258 U.S. 495 (1922), for example, Taft showed a broad view of the power to regulate interstate commerce. In his dissent in *Adkins v. Children's Hospital,* 261 U.S. 525 (1923), he rejected the majority's liberty-of-contract argument in favor of a minimum wage for women in the District of Columbia. How-

Although William Howard Taft's years on the Supreme Court are remembered as an era of conservative judicial activism, during which the Court promoted a pro–property rights agenda against the social legislation of both the states and national government, Taft was not always on the conservative side. *(Library of Congress)*

ever, Taft would not accept the social engineering involved in taxing child labor and struck down the Child Labor Tax Law of 1919 in *Bailey v. Drexel Furniture Co.,* 259 U.S. 20 (1922).

In noneconomic regulation cases, Taft's votes were generally conservative. He voted to uphold the sterilization of the mentally retarded in *Buck v. Bell,* 274 U.S. 200 (1927). In *Olmstead v. United States,* 277 U.S. 438 (1928), he wrote the majority opinion holding that the tapping of telephone lines did not violate the Fourth Amendment (Burton 1998). His judicial record, much like his presidency, was mixed. However, as a skillful social leader—as opposed to intellectual leader—of the Court, he excelled and proved his great strength in judicial administration.

Anthony Champagne

See also: Judicial Review; *Olmstead v. United States.*

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Takings Clause

The Takings Clause of the Fifth Amendment to the U.S. Constitution provides that the government cannot take private property for public use without paying the property owner "just compensation." One of the many complaints the revolting colonists had about the British crown was the royal prerogative to seize, or "take," the privately owned property of individuals or businesses for almost any reason, usually without any compensation.

There are two forms of takings. One is by the government's right of eminent domain. Under *eminent domain,* or condemnation, the government may take private property for a public use or purpose. But it must first legally condemn the property and then pay the owner for the fair market value of the property. The other type of taking occurs when a government regulation or action has the effect of depriving a property owner of any viable economic use of that property. This is sometimes referred to as a *regulatory taking.*

The Takings Clause originally applied only to actions of the federal government, as did all of the original Bill of Rights (the first ten amendments to the Constitution). The clause did not apply to actions of the several state governments. This hands-off approach regarding the states reflected not only the distrust the framers of the Constitution had of a very powerful central government but also the demands of the states for autonomy. These sentiments also were reflected in the Ninth and Tenth Amendments.

It was not until after passage of the Fourteenth

Amendment, ratified July 9, 1868, that the Takings Clause of the Fifth Amendment was extended by the U.S. Supreme Court to the actions of individual states. This was accomplished by a doctrine known as "incorporation." The Supreme Court reasoned that the Fourteenth Amendment, by declaring all citizens of the various states also to be citizens of the United States, provided that any individual state action that abridged the rights of citizens of the United States under the federal Constitution was unlawful. The Fourteenth Amendment "incorporates" certain rights provided in the U.S. Constitution and applies them to the states under the Due Process Clause. This interpretation provided a powerful new tool for challenging the actions of individual states that discriminated against one or more individuals or groups.

Federal, state, and local governments engage in many activities that require the use of land, for example, for buildings, parks, water facilities, reclamation projects, and the like. These needs can be met by exercising the government's power of eminent domain. The tract, right-of-way, or parcel needed by the government must be condemned according to well-established procedures. Once the property is condemned, its fair market value is determined, and the government must pay the private owner for the property.

The issue of a "taking" outside the exercise of eminent domain arises when a property owner establishes that some government action not part of a formal condemnation proceeding nevertheless has "taken" property without the consent of the owner and without compensation. These claims normally arise from some type of regulation of the use of land. This may include forbidding or limiting construction on or other uses of land that is environmentally sensitive or aesthetically desirable, for example. Regulatory takings frequently involve the use of zoning as an urban-planning tool, which has the effect of limiting the economic uses to which privately owned land can be put, thus diminishing its value. It should be noted, however, that zoning frequently can have the effect of increasing the value of land.

Court cases concerned with alleged takings proliferated over the decades, as the scope and complexity of government regulation of land use grew. This was especially true with the growth of densely populated urban areas. With increasing congestion and stress on the environment, plus the growing desire for quiet, tranquil residential areas, the number of complaints alleging a governmental taking grew apace.

What precisely constitutes a regulatory taking requiring government compensation to an affected property owner is a complicated question. Federal and state courts have wrestled with this question in thousands of court cases. Public regulation for the "health, morals, safety, and welfare" of the community was accepted throughout the nineteenth century as necessary and beneficial and permitted in the exercise of the government's police power. Also not questioned was the fact that government's exercise of the police power might have the necessary consequence of limiting the property rights of some individuals and businesses. Where the issue was joined was to what extent government regulation could be imposed without going so far as to violate the constitutional rights of affected parties within the meaning of the Takings Clause.

One of the pioneering cases to address the takings issue was *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922). In the early 1900s, Pennsylvania, underlain with vast deposits of anthracite coal, was so heavily mined that parts of the state were suffering severe subsidence. Sections of the surface area literally were collapsing into the voids left by the empty mine shafts.

In an effort to control the problem, Pennsylvania passed the Kohler Act, which prohibited the mining of coal if it would result in the subsidence of any housing units. The Mahon family, owners of the surface rights to land for which the coal company held the mineral rights, sued to prevent the company from mining beneath their dwelling. The coal company claimed the act was unconstitutional and violated its Fifth Amendment rights.

Chief Justice Oliver Wendell Holmes Jr., writing for the Court, found that Pennsylvania's statute went too far and constituted a taking in violation of the Fifth Amendment. The opinion did not elaborate on what would constitute "too far" so as to constitute a taking, thus requiring that subsequent takings decisions had to be made on a case-by-case basis.

Later Supreme Court decisions did little to improve the precision with which takings determinations could

be made. The Court issued numerous subsequent decisions, but each addressed a particular situation, and collectively they failed to develop a coherent body of Takings Clause law. The cases included *Penn Central Transportation v. City of New York,* 438 U.S. 104 (1978), which used a multifactor balancing test, including investor-backed expectations; *Agins v. Tiburon,* 447 U.S. 255 (1980), holding that substantial advancement of a legitimate state interest through residential zoning laws did not deny an owner all economically viable use of his land; *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), noting that the alleged taking must bear a reasonable relation (nexus) to the government interest advanced; *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), finding a taking per se (in itself) when government deprived the owner of all economically viable use of the land; and the most recent, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002), holding that a temporary moratorium on development was not a taking.

In addition to requiring that government compensate property owners, the Fifth Amendment requires that lands appropriated by the government shall be devoted to public use. The Supreme Court has interpreted this provision liberally, allowing the government in *Berman v. Parker,* 348 U.S. 26 (1954), to condemn land that would be sold to private developers for slum clearance; and upholding in *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984), a state plan to condemn rental housing in Hawaii to break an oligopoly on the part of a small number of landowners.

James V. Cornehls

See also: Eminent Domain; Fifth Amendment and Self-Incrimination; Selective Incorporation.

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Taney, Roger Brooke (1777–1864)

Roger Brooke Taney, who served from 1836 to 1864 as the fifth chief justice of the Supreme Court of the United States, had the difficult task of succeeding the legendary John Marshall. Although he never equaled his predecessor's brilliant performance or longevity on the high court, Taney traditionally has been ranked among its top dozen greatest justices. He achieved this rank despite his responsibility for the *Dred Scott* decision, *Scott v. Sandford,* 60 U.S. 393 (1857), often viewed as judicial blight—not only the worst decision in Supreme Court history but also a contributing factor to the outbreak of the Civil War.

ORIGINS

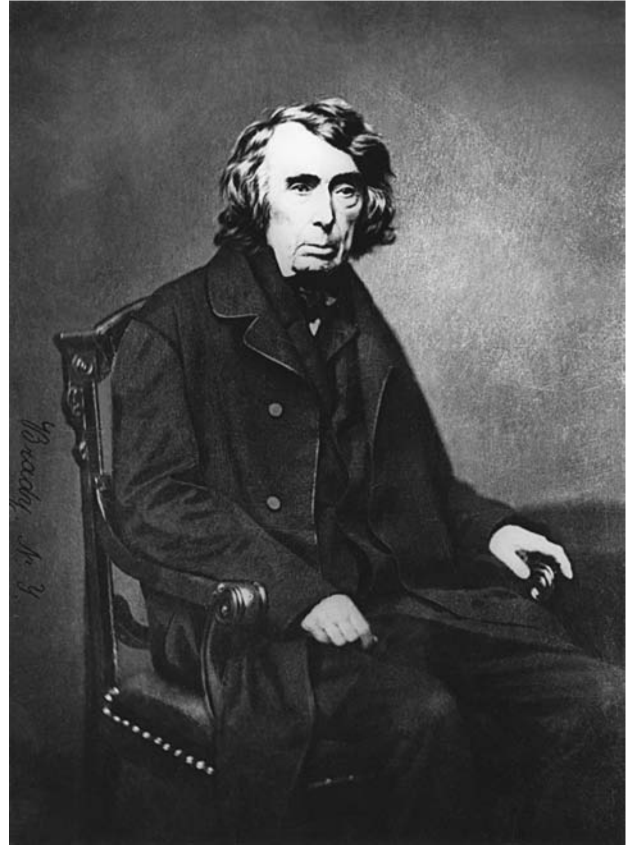
A border-state provincial born on Saint Patrick's Day in 1777, Taney was the third of seven children born into a Roman Catholic family in Calvert County, Maryland. He lived a privileged life in the same tidewater area of Maryland where his family roots extended back to the 1660s. He maintained his family's religious, social, and economic status quo, but the reputations of both Taney and his father were compromised in their later lives. Taney's father experienced late-life disgrace after killing someone during an argument and died a fugitive. Taney's *Dred Scott* decision, declaring that African Americans could never be citizens, permanently marred his otherwise great legal career.

Taney's father, an eldest son who had inherited the family estate, continued to support the practice of primogeniture even after it was abolished in Maryland. As a consequence, the elder Taney decided that second son, Roger, would become a lawyer. His decision even

extended to choosing the college and subsequent clerkship for his son. The dutiful son won his father's approval at Dickinson College in Carlisle, Pennsylvania, and then began a clerkship with a prominent judge in Annapolis. Taney was admitted to the bar in 1799, and that same year, at age twenty-two, he was elected to the Federalist seat formerly held by his father in the Maryland Legislature. He was defeated for reelection during the Jeffersonian landslide in Maryland.

Taney practiced briefly in Annapolis before moving to Frederick in 1800. He remained there until he moved to Baltimore in 1823. In 1806, Taney solidified his social status by marrying Elizabeth Key, daughter of another wealthy plantation family and sister of Francis Scott Key, who later composed "The Star-Spangled Banner." During their lengthy marriage, the couple had six daughters and one son who died in infancy.

Unlike many New England Federalists, Taney supported the War of 1812 that transformed Andrew Jackson into a national hero and converted Taney into a Jacksonian Democrat. Taney reentered the political arena and was elected Maryland's attorney general in 1827. Both Jackson and Taney favored economic growth by small entrepreneurs over commercial monopolies. Both sympathized with slaveholders, although Taney had manumitted (freed) his slaves. Jackson rewarded the ever-loyal Taney by appointing him to his Cabinet, first as attorney general, then briefly as secretary of war, and temporarily as secretary of the treasury. Taney supported Jackson by engineering legal justifications for actions taken by the charismatic president. After Chief Justice John Marshall died in 1835, the Jackson revolution on the Court began. Jackson's first appointment was to name the loyal Taney as chief justice. The provincial Marylander became the first Catholic on the Supreme Court.



In 1857, Chief Justice Roger B. Taney wrote the majority opinion in *Scott v. Sandford,* a controversial ruling that neither the federal government nor territorial governments could prohibit slavery in the territories. *(Library of Congress)*

JACKSON JURISPRUDENCE

Both Jackson and Taney exhibited border-state personalities and favored less federal government intervention in the economy, except as related to the protection of slaveholders. Jackson's political philosophy of majority rule among whites—Indians were considered incidental—was echoed in the legal positivism of Taney's jurisprudence. Because he rejected the natural law found in the Declaration of Independence, Taney could justify whatever white majorities wanted. His approach worked well relative to banking, commerce, transportation, and other economic issues, but was disastrous for human rights. His ultimate solution for slavery was to encourage colonization abroad. His *Dred Scott* ruling reflected his fundamental hierarchical and provincial view of social life, but its judicial activism was atypical for Taney.

Taney and sixteenth president Abraham Lincoln conflicted over presidential actions during the Civil War. Some scholars praise Taney for his criticism of Lincoln's suspension of the writ of habeas corpus (a petition for release from unlawful confinement), but the same critics overlook Andrew Jackson's even more egregious behavior after the battle of New Orleans just

as they overlook Jefferson Davis's widespread suspension of the same basic legal right.

On one level, Taney did introduce several democratic, if superficial, institutional changes in the Court. For example, he ended the custom among the brethren of wearing formal knee breeches, the practice of having the Court issue a single opinion, and the expectation that all justices live in the same boardinghouse.

He could abandon those external behaviors, but he could not abandon his fundamental elitism, ingrained by his aristocratic Southern upbringing, to embrace the democratic values of the Lincoln administration.

William D. Pederson

See also: Civil War and Civil Liberties.

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Taxation and Civil Liberties

The American Revolution will always be remembered for the slogan of "no taxation without representation," a rallying cry that has deep roots in English history. The war challenged the British Parliament over its right to tax the colonists, who had no political representation in that body. The Declaration of Independence noted that fundamental injustice: "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States. . . . He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws, giving his assent to their acts of pretended legislation: . . . [f]or imposing taxes on us without our consent."

CONSTITUTIONAL PROVISIONS RELATED TO TAXATION

Remembering this grievance, the authors of the U.S. Constitution vested the taxing power in the people's representatives in Congress, who exercise the "power of the purse." Article I, Section 8 of the U.S. Constitution provides that Congress has the "power to lay and collect taxes, duties, imposts and excises" and that "all duties, imposts and excises shall be uniform throughout the United States." The uniformity criterion imposes a restriction upon Congress that prohibits taxing the states differently or imposing taxes on some while exempting others, unless some specific constitutionally legitimate policy can be demonstrated. Congress has the power to regulate indirectly by taxation, as long as the measure bears some relationship to the production of government revenues.

The Sixteenth Amendment has further extended congressional power to tax incomes, a power the Supreme Court had originally denied in *Pollock v. Farmers Loan and Trust Co.,* 158 U.S. 601 (1895). The Sixteenth Amendment, ratified in 1913, specified that "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." Section 61(a) of the Internal Revenue Code provides that, except as otherwise provided by law, gross income means all income from whatever source derived. Therefore, Congress intends to tax all gains or undeniable accessions to wealth, clearly realized and required to be recognized, over which taxpayers have complete dominion, as the U.S. Supreme Court held in *Commissioner v. Glenshaw Glass Co.,* 348 U.S. 426 (1955). It also means that Congress does not intend to tax wealth that was confiscated or expropriated and later returned or compensated through war, police action, or litigation, such as reparations to Nazi Holocaust survivors, or stolen assets that were returned or restored to the original rightful property owners. Nor does Congress intend to tax contributions to corporate capital, or the original cost of investments. Also, Congress does not intend to tax the distribution or return

of original capital investments, held by shareholders, in contrast to or as distinguished from accretions to wealth. Even direct local government grants to corporate businesses, given as incentives to attract economic activity to enhance employment, may not be taxed.

Article I, Section 8 of the Constitution further grants Congress the power "to pay the debts and provide for the common defense and general welfare of the United States." Therefore, Congress is vested with the power to impose uniform taxes throughout the United States and to spend revenues accumulated from its taxing power. Congress has the power to spend revenues to promote any objective that it deems worthy, so long as it does not violate the Bill of Rights (the first ten amendments to the Constitution) or other specific constitutional limitations. The contours of the congressional power and reach to impose a tax was challenged in *United States v. Butler,* 297 U.S. 1 (1936), which dealt with a 1933 tax on agriculture levied to pay for the extraordinary expenses incurred by reason of a national emergency relating to deflationary pressure on farmers and farm prices. The U.S. Supreme Court reiterated the Hamiltonian position that Congress had a substantive power to tax and appropriate, limited only by the requirement that it must be exercised to provide for the *general welfare* of the United States. However, the Court affirmed the reversal of the lower-court decision and opined that aggregating a large number of local agricultural issues into one large national problem did not solve the general welfare requirement, which must have a comprehensive broad and sweeping overall objective and not merely a local purpose. Such legislation may also not interfere with the states' regulatory powers under the Tenth Amendment to the U.S. Constitution.

TAXPAYER SUITS AND EXEMPTIONS

The limitation on Congress to meddle in the areas reserved for the states may not be transformed into an argument about tracing the specific benefit at the individual citizen level. In *Massachusetts v. Mellon,* 262 U.S. 447 (1923), the state, as representative of its citizenry, challenged the 1921 Maternity Act, and in this consolidated action, an individual citizen, Mrs. Frothingham, challenged the act because the statute represented a taking of or tax on her property without due process. The Supreme Court rejected the state's claim that this matter was reserved to the states and a usurpation of state power, because the federal appropriations were made optional, subject to state acceptance or rejection. Frothingham's claim was rejected because she had no "standing" to sue, since her personal interest in the case was comparatively so small. The Court reasoned that if every citizen taxpayer could challenge the congressional purpose and appropriation of every dollar of tax revenue, which is commingled in the treasury with those paid by millions of Americans, the result would be political anarchy, gridlock, and chaos.

The contours of this judicial precedent were somewhat refined in *Flast v. Cohen,* 392 U.S. 83 (1968), a case involving the Establishment Clause of the First Amendment, which prohibits government from engaging in activity that would constitute establishment of religion. The Court in *Flast* held that taxpayers could satisfy the standing requirement if they could demonstrate a personal stake in the outcome that would assure concrete adverse consequences. Thus taxpayers must show that the exercises of congressional power under the taxing and spending clause are unconstitutional because the expenditures directly affected the taxpayer and a strong nexus existed between the taxpayer's status and the alleged constitutional infringement.

The clash between the freedom of religion and the power to tax was further clarified in *Walz v. Tax Commission of the City of New York,* 397 U.S. 664 (1970), a case in which a taxpayer who owned Staten Island real property challenged the tax exemption afforded religious organizations for properties dedicated to religious use and worship. The taxpayer argued that the New York State Constitution that authorized this exemption to church property indirectly required the petitioner to make a contribution to religious bodies. This policy, he claimed, violated the First Amendment prohibition on the establishment of religion. The Court held that the tax exemption was not sponsorship because there was no physical transfer of money to the church; rather, the exemption meant the state abstained from collecting a tax. Moreover, it restricted the fiscal relationship between church and state and tended to complement and reinforce the desired sep-

aration insulating each from the other. In contrast, such an exemption will be restricted when the policies of the institution violate other constitutional provisions, such as racial discrimination. In *Bob Jones University v. United States,* 461 U.S. 574 (1983), for example, the Internal Revenue Service denied tax-exempt status to an educational institution that denied admission to applicants who participated in or advocated interracial marriages.

TAXATION AND FIRST AMENDMENT RIGHTS

The role of the judiciary as the ultimate interpreter of the liberties and rights protected in the Constitution is especially pertinent in the head-to-head confrontation and convergence between the constitutional power to tax versus the First Amendment's guarantee of freedom of the press. Thus, in *Grosjean v. American Press Co.,* 297 U.S. 233 (1936), the Supreme Court invalidated a tax on large newspapers that appeared to be directed against critics of Huey Long, a former powerful, populist-style governor of Louisiana and then U.S. senator. In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983), the Court struck down a state tax on the ink and paper used in publishing newspapers because a special exemption within the statute was given to smaller newspapers, thus shifting the entire tax burden to the larger in-state newspapers. The Court balanced censorship against revenue raising and disallowed the tax as a potential suppression on critical commentary contrary to the First Amendment. In *Arkansas Writers Project, Inc. v. Ragland,* 481 U.S. 221 (1987), a general sales tax was held unconstitutional because it discriminated among a group of newspapers, exempting some but taxing others. Once again, the potential for censorship overwhelmed the taxing power.

The clash between taxation and rights emerges when a tax measure creates imbalances among competing interests or rights—that is, it disfavors or burdens some conduct or behavior that is alleged or deemed to be a constraint on a fundamental right of one group of citizens at the expense of another group.

STATE TAXATION VERSUS CONSTITUTIONAL RIGHTS

There is a body of state cases holding that the taxing power may not be exercised for private purposes but may only be exercised to serve public purposes. The Equal Protection Clause of the Fourteenth Amendment provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The Supreme Court has generally applied a rational-basis test in determining whether a nonfederal classification or taxing scheme has met a legitimate state purpose and thus does not violate equal protection. Therefore, states can divide and tax all forms of property into different groups at varying rates. In one case a New York state tax violated equal protection because it artificially singled out taxpayers who operated in-house refrigerated warehouses and categorized them as utilities. Ultimately, the highest state court in *Merchants Refrigerating Co. v. Taylor,* 275 N.Y. 113, 9 N.E.2d 799 (1937), recognized that such warehouses were not regulated by the public service commission, and thus the tax was upheld on the receipts derived from refrigeration furnished to persons outside the taxpayer's building.

Furthermore, the states have attempted to regulate the growth of chain stores within their boundaries via tax classification schemes. In *A&P v. Grosjean,* 301 U.S. 412 (1937), the Supreme Court upheld an incremental regressive tax on the number of stores owned by the taxpayer irrespective of in-state or out-of-state location. The national grocery chain was taxed at $550 per store but the local in-state Louisiana grocery chain was taxed at $30 per store. The classification of the number of stores was held to be reasonable, and the Court struck down the argument that only A&P stores located in Louisiana should be counted in the license tax. By contrast, the adoption of Proposition 13 in 1978 limiting property taxes in California gave rise to *Nordlinger v. Hahn,* 505 U.S. 1 (1992), in which the Court permitted the state to set property tax rates for senior citizens and longtime residents that differed from rates for other taxpayers.

However, state tax discrimination against foreign nonprofit entities conducting charitable, educational, or other activities within the state under a state grant

that would confer tax exemption to the domestic entity providing similar services would not withstand equal protection challenge. Thus, in *WHYY v. Borough of Glassboro,* 393 U.S. 117 (1968), a foreign corporation engaged in noncommercial educational television, which owned and maintained a station and transmittal tower in New Jersey that shared a 70 percent out-of-state audience, successfully challenged a New Jersey Supreme Court decision denying an exemption on state property taxes.

The bulk of the controversies in these tax cases usually arise when a state is attempting to favor in-state resident taxpayers by taxing out-of-state or nonresident taxpayers at higher rates. Generally, the federal goals of preserving an integrated efficient national economy must be weighed against the rights of the states to impose taxation policy to promote economic growth within the state while protecting the respective citizenry domiciled within the state. In *Metropolitan Life Insurance Company v. Ward,* 470 U.S. 869 (1985), the majority opinion by the Court ruled that Alabama's declared purpose for taxing foreign insurance companies at higher rates was unconstitutional because the use of a taxing power to promote a domestic insurance industry and encourage capital investment within its state borders violated the Equal Protection Clause. In *Wyoming v. Oklahoma,* 502 U.S. 437 (1992), the state of Wyoming had standing to challenge another state's legislation requiring all power plants, public or private, to use Oklahoma coal, which created an overall reduction in specific Wyoming severance taxes that it collected on coal mined within its territorial boundaries. This was found to violate the dormant Commerce Clause. In general, taxation that does not affect interstate commerce, other than incidentally, does not fall within the broad constitutional doctrine that direct taxes that unduly burden interstate commerce will be overturned under the Commerce Clause.

Finally, governments use taxation as an instrument to promote favored economic and social policy. An example is the taxation of gun manufacturers that allow their guns to be acquired by those members of society who intend to do evil with the weapons. Here the Second Amendment right to bear arms clashes with government power through pending litigation to tax or penalize the gun-production industry. The result presents another showdown between competing rights.

J. David Golub

See also: Due Process of Law; Establishment Clause; Exclusionary Rule; Fundamental Rights; Standing.

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Ten Commandments: Posting

According to the book of Exodus in the Bible, when Moses descended Mount Sinai, he brought with him the Ten Commandments. Many displays of and references to the Ten Commandments are found throughout U.S. history. In fact, an image of Moses and the Ten Commandments currently adorns the wall of the U.S. Supreme Court. Nonetheless, in recent years some critics have claimed that posting the Ten Commandments on government property violates the Establishment Clause of the First Amendment to the U.S. Constitution. According to that clause, "Congress shall make no law respecting an establishment of religion."

The Supreme Court has not yet definitively ruled on whether the posting of the Ten Commandments on government property violates the Establishment Clause. In *Stone v. Graham,* 449 U.S. 39 (1980), the Court addressed the very narrow question of the constitutionality of a Kentucky state law requiring the

posting of the Ten Commandments in schoolrooms. In a five–four decision, the Court found the Kentucky law violated the Establishment Clause. *Stone,* however, concerned only a schoolroom posting and left unanswered the broader question of the constitutionality of the display of the Ten Commandments in other contexts.

In 2001, the Supreme Court had the opportunity to consider that broader question in *City of Elkhart v. Books,* 532 U.S. 1058 (2001), which involved a Ten Commandments monument resting outside the Elkhart, Indiana, courthouse. The lower court held that displaying the monument on government property violated the Establishment Clause, relying on the three-part test created by the U.S. Supreme Court in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), to address Establishment Clause challenges. Applying the *Lemon* test, the court asked whether the monument (1) had a secular (nonreligious) purpose; (2) had the principal effect of advancing or inhibiting religion; or (3) created an excessive entanglement with religion. The *Books* court concluded that because the Ten Commandments referenced God—"I am the Lord thy God" and "Thou shalt not take the name of the Lord thy God in vain"—the monument had a religious purpose. The court concluded that the monument violated the second part of the *Lemon* test because its presence on government property suggested an endorsement of religion and thus had the effect of advancing religion. As such, the display was unconstitutional. The city of Elkhart unsuccessfully sought Supreme Court review, although three justices asserted the Court should have heard the appeal and indicated they viewed the display as constitutional. That view, however, did not prevail, which left intact the lower court's decision in *Books.*

Several other courts have followed similar reasoning, holding that the posting of the Ten Commandments on government property is unconstitutional. Recently, and indeed famously, a federal district court judge in *Glassroth v. Moore,* 229 F. Supp. 2d 1290 (M.D. Ala. 2002), held that the chief justice of the Alabama Supreme Court, Roy S. Moore, violated the Establishment Clause by placing in the courthouse rotunda a 5,280-pound granite monument that had engraved upon it, among other things, the Ten Commandments. The district court ordered the monument to be removed but stayed its ruling pending appeal to the U.S. Court of Appeals for the Eleventh Circuit. On July 1, 2003, the Eleventh Circuit affirmed the district court, holding that Judge Moore violated the Establishment Clause by placing the monument in the courthouse. Moore's fellow judges refused to support him, and his monument was removed.

In contrast to the *Books* and *Glassroth* courts, the Colorado Supreme Court in *State of Colorado v. Freedom from Religion Foundation, Inc.,* 898 P.2d 1013 (Colo. 1995), concluded that a Ten Commandments monument placed in a state park was constitutional. The court noted that the monument served a secular purpose—namely, recognition of the Ten Commandments as the foundation for the U.S. legal system. The court also concluded that the mere placement of the monument on government property did not constitute a governmental endorsement of religion. Following similar reasoning, in 2003 the U.S. Court of Appeals for the Third Circuit in *Freethought Society v. Chester County,* 334 F.3d 247 (2003), held that a Pennsylvania county did not violate the Establishment Clause by refusing to remove a bronze Ten Commandments plaque placed on the courthouse facade in 1920.

Several judges, legal scholars, and lawmakers have supported the views expressed in the Colorado and Pennsylvania cases, comparing the posting of the Ten Commandments to constitutionally permissible holiday displays of religious symbols. The Supreme Court has held that nativity scenes and menorahs may be placed on government property without violating the Establishment Clause, even under the Supreme Court's formulation of that clause in *Lemon.* Specifically, the Court has reasoned that even though nativity scenes and menorahs are religious symbols, such displays serve the secular purpose of celebrating the nation's cultural heritage and the holiday season. The Court has also recognized that when religious symbols are but one aspect of a holiday display that also includes other nonreligious symbols, no inference can be drawn that the government is endorsing religion. Therefore, the Court has upheld such religious displays under the three-part *Lemon* test.

By analogy, many believe that the posting of the Ten Commandments on government property passes the *Lemon* test when the display also includes other

historical documents. For instance, several governments have created displays that include the Ten Commandments, the Constitution, and the Declaration of Independence, the latter of which also references God. To date, however, most courts have concluded that these attempts to display the Ten Commandments on government property are unconstitutional. Until the Supreme Court resolves the conflict—for example, the variant opinions of the Third and Eleventh Circuits—the constitutionality of such displays will remain open to debate.

Margot O'Brien

See also: Establishment Clause; *Lemon v. Kurtzman;* Religious Symbols and Displays.

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Terry v. Ohio (1968)

In *Terry v. Ohio,* 392 U.S. 1 (1968), the U.S. Supreme Court upheld the conviction of an individual who was arrested for the possession of concealed firearms after being searched by a police officer who suspected him of preparing to rob a store. The case is important because it not only upheld an important exception to the Fourth Amendment exclusionary rule—under which evidence illegally seized by police cannot be used to convict a person at trial—but it also appeared to give police broad discretion to stop and frisk individuals whom they suspect of committing a crime.

Under the Fourth Amendment to the U.S. Constitution, police generally are required to obtain warrants to search and seize individuals. This means the government cannot randomly stop people and search them for evidence of a crime. Instead, the Constitution requires that there be some probable cause or "particularized suspicion" that a person has violated the law, and generally then a judge must issue a warrant that identifies the person or place to be searched and the items that are sought.

The exclusionary rule prohibiting use of illegally obtained evidence at trial was developed partly to forestall overzealous, illegal police activity. In *Weeks v. United States,* 232 U.S. 383 (1914), the Supreme Court applied this rule against the federal government, and then in *Mapp v. Ohio,* 367 U.S. 643 (1961), the Court applied it to state and local governments. As a result of these decisions, police officers are generally required to have a warrant or some other good reason to stop people and search them. Nevertheless, there are certain exceptions to the warrant requirement, and one known as the stop-and-frisk exception arose from the *Terry* case.

Terry involved a thirty-year police veteran in Cleveland, Ohio, who observed two individuals pacing back and forth in front of a convenience store, occasionally and repeatedly looking in the window while talking to themselves and another party. Suspecting that they were planning on robbing the store, the officer approached them, and, believing they were armed, he frisked them and found concealed weapons. The two individuals were convicted; one (Terry) appealed his case to the Supreme Court, which upheld his conviction.

Writing for the Court, Chief Justice Earl Warren contended that the search was perfectly legal, ruling that the officer had articulable suspicion to stop the defendant, and that once the officer approached him, he could stop and frisk him to assure the officer's personal safety. In upholding the stop, the chief justice seemed willing to defer to a police hunch or suspicion that the suspect was contemplating some illegal action, and he argued that the stop-and-frisk could be considered a narrow, reasonable exception to the Fourth Amendment's warrant and exclusionary rule requirements.

Supporters of the police consider *Terry v. Ohio* an important case defending and upholding the ability and discretion of officers to stop and search individuals whom they suspect of breaking the law. However, critics of the decision claim that it has opened up such wide discretion for police to stop people that it has led to abuses. For example, some commentators argue that *Terry v. Ohio* seems to endorse the stopping of people on the basis of race or other personal biases of

the police, if such characteristics form the basis of the officer's hunch, and this, they contend, allows police to engage in racial profiling. In fact, the *Terry* defendant was African American, and some critics contend that had he been white, the Court would not have allowed the stop-and-frisk.

David Schultz

See also: Exclusionary Rule; Fourth Amendment; *Mapp v. Ohio.*

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Texas v. Johnson (1989)

Texas v. Johnson, 491 U.S. 397 (1989), was the controversial U.S. Supreme Court decision that overturned on free speech grounds the conviction of an outspoken political activist and self-styled Communist who had burned an American flag as part of a protest at the 1984 Republican National Convention. The decision unleashed a firestorm of political protest and ignited an effort to amend the U.S. Constitution to overturn it.

The case began at the 1984 Republican gathering in Dallas, Texas. Gregory Lee Johnson and a number of other protesters staged a series of demonstrations and "die-ins" to protest policies of President Ronald Reagan's administration on nuclear arms and Central America. During one demonstration, a fellow protester handed Johnson a flag that had been taken from in front of a local bank. Johnson doused the flag with lighter fluid and set it on fire. Johnson and eighteen other demonstrators were arrested, and Johnson was charged under a Texas statute for desecration of a venerated object. He was found guilty and sentenced to one year's imprisonment and a $2,000 fine.

The Texas Court of Criminal Appeals reversed Johnson's conviction by a five–four decision. The U.S. Supreme Court agreed to hear the case and set oral arguments for March 1989. Noted litigator William Kunstler represented Johnson before the Court. On June 21, 1989, the Supreme Court issued its narrow five–four decision upholding the Texas court's reversal of Johnson's conviction.

In the majority opinion, Justice William J. Brennan Jr. stressed that Johnson's act was clearly one of political speech and that no evidence of a breach of peace was present. He stated, "We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today." Justices Thurgood Marshall, Harry A. Blackmun, Antonin Scalia, and Anthony M. Kennedy, who wrote a concurring opinion, joined Justice Brennan.

Chief Justice William H. Rehnquist, joined by Justices Byron R. White and Sandra Day O'Connor, filed a long and fervent dissent in which he recited flag history and quoted extensively from poems praising the flag. Justice John Paul Stevens also dissented, arguing that Texas had not prosecuted Johnson for the content of his message but only his means.

Public and political reaction to the decision was vitriolic and emotional. Nine days after the decision was released, President George H. W. Bush made a speech in front of the Iwo Jima Memorial endorsing a constitutional amendment to outlaw flag desecration. Many members of Congress also supported the amendment. Supporters of the flag amendment said the flag was a symbol of national unity and permitting its desecration dishonored veterans. Opponents of the amendment supported freedom of speech and argued that an amendment would lead to a weakened Constitution.

On June 26, 1990, the U.S. Senate defeated a constitutional amendment that would have overturned the *Johnson* decision. The issue played no role in subsequent elections and quickly dropped off the political landscape. The case remains an important one for symbolic speech and served as a catalyst for a national debate on the meaning of the First Amendment. The Supreme Court reaffirmed this decision in *United States v. Eichman,* 496 U.S. 310 (1990), when it struck down the 1989 Flag Protection Act that the U.S. Congress had adopted in reaction to the *Texas v. Johnson* decision.

Charles C. Howard

See also: Flag Burning; Symbolic Speech; *United States v. Eichman.*

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Third Amendment

The Third Amendment to the U.S. Constitution reads: "No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." The amendment reflects the concerns the framers of the Constitution had about past abuses committed by British soldiers, including the famous Boston Massacre.

HISTORICAL ORIGINS

The Third Amendment traces its origins to early Anglo-Saxon law. Beginning around the twelfth century, soldiers of various armies were making use of English homes, and many English towns began amending their charters to declare a right of citizens against the involuntary quartering of soldiers in their homes. This right eventually spread throughout England, Ireland, and Scotland but did not initially take serious root outside Britain. Despite this right, English citizens frequently were forced to quarter soldiers in their homes from the thirteenth through the seventeenth centuries. Citizens were constantly angered by this practice and frequently declared that it violated their rights. The 1689 English Bill of Rights, for example, included a statement declaring that the citizens' liberties had been infringed by this practice.

English colonization of North America continued the practice of quartering, which similarly brought continued public objections. Quartering became a major problem in the colonies during the French and Indian War (1754–1763). In 1765, the British Parliament passed the Quartering Act, which required the colonists to provide barracks, food, and other supplies to British soldiers. If enough barracks were not available, citizens were required to provide shelter to the troops in private buildings, such as barns. Under the act, limited compensation was supposed to be provided to private citizens for the food, supplies, and shelter given to the troops. However, the citizens were often paid less than what they were owed or were not paid at all.

As tensions between England and the American colonies increased, the British Parliament passed a second Quartering Act in 1774. This new act additionally authorized the quartering of troops in private homes, not just private buildings. This practice of quartering soldiers in private homes without the consent of citizens was listed in the U.S. Declaration of Independence as one of the abuses committed by King George against the colonies. Upon independence, most states included in their state constitutions a right against involuntary quartering of soldiers. When the new U.S. Constitution was proposed in 1787, the lack of a Bill of Rights was one of the key Antifederalist arguments against the ratification of the Constitution. As a result, the Federalists agreed to add a Bill of Rights to the Constitution after its ratification. Thereafter, James Madison submitted a proposed list of rights to the first Congress, one of which was a right against the involuntary quartering of soldiers. Congress passed this proposal, and the states ratified it; it became the Third Amendment to the Constitution.

The final wording of the amendment as it was adopted essentially means that government cannot house soldiers in private homes during peacetime without homeowners' consent. In time of war, however, the government may house soldiers in private homes but only subject to express preexisting guidelines written into law. This wartime exception was probably enacted to allow the government to engage in this practice in case of crisis or emergency, probably during a time of war.

LEGAL DEVELOPMENT

Despite the Third Amendment's protections, the U.S. government has disregarded these on more than one

occasion. American troops were quartered in private residences during the War of 1812. During the Civil War, the Union army extensively quartered troops in residences in both loyal states in the North and rebellious states in the South, although most quartering occurred in southern states. Congress did eventually pay several hundred thousand dollars in claims based on quartering during the Civil War, but this was only a fraction of the potential total, and Congress did not provide any further compensation for such claims.

Since its adoption, the Third Amendment has come to be known as the "forgotten" amendment, because not a single case in U.S. history has ever been resolved based on the amendment; indeed, only a handful of cases have ever involved a direct Third Amendment claim. The most direct discussion of the Third Amendment came in *Engblom v. Carey,* 677 F.2d 1957 (2d Cir. 1982), which involved a claim by striking prison workers against the state of New York. The workers had been provided apartments on the prison site but were locked out of their residences by the prison superintendent when they went on strike. In response to the strike, the governor called out National Guard troops and housed them in what had been the workers' residences. The workers filed a lawsuit claiming violation of their Third Amendment right. Eventually the case was decided on other grounds, but both the trial court and the court of appeals noted the workers arguably had presented a legitimate Third Amendment claim.

The U.S. Supreme Court has only rarely cited the Third Amendment. Probably the most significant citation was in *Griswold v. Connecticut,* 381 U.S 479 (1965), in which the Court identified the Third Amendment as one of several amendments included in the Bill of Rights that together demonstrated the existence of a right of privacy in the Constitution. However, the Court later declared the right of privacy was instead found in the word "liberty" as included in the Due Process Clause of the Fourteenth Amendment.

In short, absent any possible direct future violation of the language of the Third Amendment, it has little legal relevance today. Some people may deem the Third Amendment obsolete, but it nevertheless stands as part of the important and enduring principle of limited military power, particularly the foundational principle of ultimate civilian control over the military as found in the U.S. democratic system of government.

Rick A. Swanson

See also: Bill of Rights.

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Thomas, Clarence (b. 1948)

Clarence Thomas was born June 23, 1948, in Pinpoint, Georgia, just outside Savannah, to M. C. Thomas and Leola (Anderson) Thomas. When Thomas was only two years old, his father left the family and moved north to Philadelphia to find work, leaving behind two young children and a pregnant wife. Thomas's mother provided for the family by picking crabmeat and working as a housekeeper, until their house burned down when Thomas was only age seven. At this time, the family was split, with Thomas's mother and sister going to live with an aunt in Savannah. Thomas and his brother went to live with their grandparents, Christine and Myers Anderson, in Savannah, where they owned and operated an ice and fuel delivery business.

Thomas was raised in a religious household that emphasized the importance of education. His grandfather made sure that Thomas and his brother attended Saint Benedict the Moor, an all-black Roman Catholic school operated by white nuns. Thomas went to the all-black Saint Pius X High School for the ninth and tenth grades, before enrolling as one of the first two black students at Saint John Vianney Minor Seminary, a Catholic boarding school in rural Georgia. Because of the legal segregation that existed at the time, Thomas was able to attend integrated

Judge Clarence Thomas at the Senate Judiciary Committee's confirmation hearings. *(© M. Reinstein/The Image Works)*

institutions only in the final two years of his secondary education.

By the time Thomas finished high school, he was considering a career in the priesthood and enrolled in the Immaculate Conception Seminary in Conception, Missouri, in 1967. He was one of only four black students in his class. Thomas later recalled, during his Supreme Court nomination hearings, an incident at the seminary that would change his life. When Thomas learned that Martin Luther King Jr. had been shot, a fellow white student, unaware of Thomas's presence, remarked, "That's good, I hope the son of a bitch dies." According to Thomas, it was at that moment that he decided to leave the seminary. He transferred to Holy Cross College in Worcester, Massachusetts, in 1968 and graduated cum laude in 1971. From there he entered Yale Law School and received his law degree in 1974.

As a conservative Republican, Thomas began work as a prosecutor for the Missouri Republican attorney general, John C. Danforth, a fellow Yale alumnus. Later, when Danforth was elected to the United States Senate, Thomas continued to work for him as a legislative assistant. After Ronald Reagan was elected to the presidency in 1980, Thomas joined the administration in May 1981 as assistant secretary for civil rights in the Department of Education. In 1982, Thomas was nominated to chair the Equal Employment Opportunity Commission, where he served until 1989. He was nominated to the U.S. Court of Appeals in 1989 and confirmed in 1990. In 1991, when Justice Thurgood Marshall announced his retirement from the Supreme Court, President George H. W. Bush nominated Thomas as his replacement.

Thomas's confirmation hearings were marred by sexual harassment allegations by law professor and former employee Anita Hill. Thomas's nomination presented blacks with a dilemma: Although his judicial philosophy was inconsistent with the views of many civil rights organizations, if Thomas were not confirmed to the Supreme Court, it would have no black representation. He was confirmed by a small Senate majority vote of 52-48.

Thomas quickly aligned himself with the Court's most conservative justices and was branded as a "Scalia clone" because of his close philosophical ties with Justice Antonin Scalia. Although often silent during oral arguments, Justice Thomas has developed a reputation for writing numerous opinions and dissents. He appears to follow strictly the original intent of the framers of the U.S. Constitution. He believes in maintaining the theory of federalism and the Tenth Amendment to the U.S. Constitution in which all powers not given to the federal government by the Constitution are reserved to the states. In *Missouri v. Jenkins,* 515 U.S. 70 (1995), Justice Thomas concurred with the majority and in a separate opinion criticized federal courts for overstepping their equitable powers to remedy segregation. Another benchmark of his views on civil liberties is his penchant for judicial activism, which stands in sharp contrast with the typical "classic conservative" justice. Curiously, Justice Thomas exercises judicial restraint through fed-

eralism while promoting judicial activism in many other areas. One such example is his use of the Commerce Clause by which he has practically invited parties to bring litigation to the Supreme Court.

In *Grutter v. Bollinger,* 539 U.S. 306 (2003), Justice Thomas authored a dissent objecting to the use of race in university admissions. In *Lawrence v. Texas,* 539 U.S. 558 (2003), he dissented in the opinion that struck down a Texas sodomy statute, not because he thought the law was wise—he called it "uncommonly silly"—but because he found nothing in the Constitution prohibiting such laws.

Thomas is married to Virginia Bess Lamp and has a son, Jamal Adeen, from a previous marriage to Kathy Grace Ambush.

Dewey Clayton

See also: Rehnquist, William Hubbs; Scalia, Antonin G.

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Thoreau, Henry David

See "Civil Disobedience"

Thornburgh v. American College of Obstetricians and Gynecologists (1986)

In *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986), the U.S. Supreme Court overturned six provisions of the Pennsylvania Abortion Control Act of 1982 that gave the state enormous leeway in preventing the termination of a pregnancy on the grounds that it was protecting the mother's health and the potential life of the unborn child. The Court rejected Pennsylvania's argument that it had a compelling interest in preserving life under both circumstances even if it meant overriding the mother's right to privacy as guaranteed under *Roe v. Wade,* 410 U.S. 113 (1973).

The Pennsylvania law contained an informed-consent provision that required any woman wishing to obtain an abortion to be given information geared toward convincing her that she should continue the pregnancy. This printed material included medical analysis concerning the dangers of abortion as opposed to carrying a child to full term and offered support for the belief that the psychological effects of an abortion were likely to be lasting. Detailed information was given about the development of the fetus from the moment of conception until full term. Under the guise of informed consent, Pennsylvania offered a number of alternatives to abortion and promised that help would be forthcoming from specific agencies if the woman chose to continue the pregnancy. The information also assured a pregnant woman that medical benefits were available for prenatal care, childbirth, and neonatal care and reminded her that the baby's father was legally liable for financial support.

Additionally, the Pennsylvania law enforced mandatory counseling and a waiting period before an abortion could be obtained. A controversial spousal-consent provision required that a married woman obtain the permission of her husband before she could have an abortion. If the pregnancy had progressed past the first trimester, the Pennsylvania law required that a physician determine the issue of viability (whether a fetus had a medical chance of surviving outside the mother's womb). If viability were established, the presence of a second physician was required during all abortion procedures.

The majority of the Court determined in *Thornburgh* that no state was "free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." The Court rejected the entire concept of informed consent as an

attempt to violate a woman's right to privacy and viewed the reminder of the father's liability as "poorly disguised elements of discouragement for the abortion decision," calling the attempt to point out the "detrimental physical and psychological effects" of legal abortions the "antithesis of informed consent."

In a ringing dissent to *Thornburgh,* Justices Sandra Day O'Connor and William H. Rehnquist insisted that the Court had distorted its constitutional jurisdiction. O'Connor and Rehnquist contended that *Thornburgh* made it "painfully clear that no legal rule or doctrine is safe from ad hoc nullification by the Court when an occasion for its implementation arises in a case involving state regulation of abortion."

The five–four decision in *Thornburgh* indicated that the Court was heavily divided on the abortion issue and suggested that President Ronald Reagan's administration might be close to achieving its goal of overturning *Roe v. Wade.* In a complete reversal of *Thornburgh,* six years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), the Supreme Court upheld the provisions it had rejected in 1986 except for the spousal-notification provision. In *Casey,* a still-divided Court accepted that a state did have a "legitimate interest in promoting the life or potential life of the unborn" even to the extent of overriding a woman's right to privacy. However, *Casey* stopped short of overturning *Roe v. Wade.*

Elizabeth Purdy

See also: Planned Parenthood of Southeastern Pennsylvania v. Casey; Roe v. Wade.

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Three-Strikes Laws

Three-strikes laws, commonly referred to as "three strikes and you're out" legislation, consist of a series of laws, passed by state legislatures, that mandate either life in prison or severe prison sentences for offenders convicted of three major offenses, usually felonies. These laws, designed to target career criminals, have been challenged on various constitutional grounds, especially under the Eighth Amendment to the U.S. Constitution prohibiting cruel and unusual punishment.

The 1993 kidnapping and murder of Polly Klaas in California focused national attention on Richard Davis, a repeat offender, who was later arrested for her murder. As a result, public concerns about the effectiveness of the criminal justice system were heightened, and support for "get tough on crime" legislation increased. This event paved the way for California's passage of the first three-strikes law in the United States and also the toughest in the country.

Twenty-six states and the federal government passed three-strikes laws between 1993 and 2003. State statutes vary according to (1) who has the power to invoke the third strike, a judge or a prosecutor; (2) the number of prior felonies required to bring about sentence enhancement; (3) the type of felony—violent versus nonviolent—required to trigger a third strike; (4) whether a third-strike offense must be recent or if any prior conviction may count; (5) the period of incarceration for violent crimes; and (6) whether parole is a possibility. The federal three-strikes provision targeted a narrow set of offenders who had three strikes and had also substantially injured their victims.

Proponents of three-strikes laws argue that the criminal justice system should place repeat offenders in prison and throw away the key, as they have demonstrated that they are dangerous to society and unwilling to change. Furthermore, supporters of these laws claim that harsh penalties (even life sentences) will fulfill the goal of specific deterrence because the repeat offenders will be off the streets. Supporters also assert that three-strikes laws will save money in the long term by reducing victimization and the costs that crime inflicts on society as a whole. Advocates further argue that anecdotal evidence shows the laws are

having an impact, claiming that some offenders have migrated out of states that have such laws to avoid conviction under them and that offenders in prison attend workshops on three-strikes provisions to learn how to avoid being subject to them. In a cost-benefit analysis, proponents argue that individual repeat offenders are responsible for the majority of crime, and that if their crime rates are reduced or eliminated by a third strike, costs associated with their crimes will be prevented and the benefits of reduced crime and victimization will justify the costs of imprisonment.

Opponents of three-strikes laws argue that the increased incarceration of repeat offenders will have little effect on violent crime rates. Moreover, life terms for three-strikes offenders means that prison space is allocated to a population of offenders who are beyond their peak ages for criminal conduct. As a result, three-strikes laws incarcerate offenders who are at the lowest risk of reoffending and therefore waste valuable societal resources. There is an enormous drain on resources resulting not only from aging prisoners but also from costs of having to build and operate new prisons. Also, the justice system must consider how three-strikes laws will affect the criminal mind-set: To reduce chances of being apprehended and caught, offenders with two strikes and facing a third-strike conviction might kill victims, witnesses, and police officers to avoid the harsher third-strike penalty. In addition, the courts face new costs: The burden on criminal courts increases exponentially as three-strikes defendants demand jury trials and as costs for defending the indigent rise.

Other opponents of three-strikes laws point to the effects of these laws on the African American community. Although drug usage is not significantly greater in the African American community than among other groups, drug enforcement efforts are more intense in these communities. As a result, African Americans have been incarcerated by three-strikes laws at thirteen times the rate of whites. For civil liberties advocates, this result of the laws represents an unintended consequence that violates the principle of equal treatment under the law. Opponents of three-strikes laws argue that tax money could be spent more effectively in areas that address the root causes of crime rather than only its end result.

In 2003, the U.S. Supreme Court was petitioned by two shoplifters, Gary Ewing and Leandro Andrade—who were prosecuted under California's three-strikes law—to declare the law unconstitutional as a violation of the Eighth Amendment's protection against cruel and unusual punishment. In *Ewing v. California,* 538 U.S. 11 (2003), and *Lockyer v. Andrade,* 538 U.S. 63 (2003), however, the Court upheld the law and the imposition of life sentences, stating that three-strikes laws were a legitimate response to address crime and that life sentences were not disproportionate when applied to career criminals. Thus, the Court held that California's three-strikes law did not constitute cruel and unusual punishment. Although these laws will continue to generate controversy, challenges to their constitutionality will probably not be successful.

Ruth Ann Strickland

See also: Cruel and Unusual Punishments; Eighth Amendment; *Ewing v. California.*

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Tillman Act of 1907

The Tillman Act of 1907 was named after populist Senator Benjamin R. Tillman (D-SC), commonly referred to as "Pitchfork Ben." As a southern agrarian, he was highly suspicious of industrial power and attacked President Theodore Roosevelt for accepting corporate contributions in 1904 despite the president's trust-busting reputation.

Tillman's legislation prohibited corporations from contributing to political campaigns, but Congress did not pass it until January 1907 because the leadership did not want to harm potential corporate contributions in the 1906 midterm elections. Once enacted, the law proved relatively easy to evade. Companies instead awarded bonuses to their executives, expecting them to contribute to political campaigns and political parties.

The Tillman Act arguably had implications for civil liberties because it extended a degree of constitutional rights to corporations. Although a corporation is a creation of the state and can limit stockholder liability, the U.S. Supreme Court in the nineteenth century in *Santa Clara County v. Southern Pacific Railroad Co.,* 118 U.S. 394 (1886), and other cases used the Fourteenth Amendment to secure a corporation rights as a "person" that the same Court did not initially provide to blacks, the group the Fourteenth Amendment was most designed to protect. The issue became whether corporations were entitled to equal protection and freedom of expression in the same manner as individuals. Federal courts will almost certainly continue to grapple with determining how corporate campaign finance activities can be regulated in the aftermath of the passage of the Bipartisan Campaign Reform Act of 2002, popularly known as McCain-Feingold (after its sponsors, Republican Senator John McCain of Arizona and Democratic Senator Russell Feingold of Wisconsin).

The Supreme Court reiterated the equation of money with speech in *Buckley v. Valeo,* 424 U.S. 1 (1976), which upheld most of the Federal Election Campaign Act of 1974, but struck down limits on campaign expenditures and how much one could spend on one's own campaign. In its aftermath, Steve Forbes, Frank Lautenberg (NJ), Michael Huffington (CA), and Ross Perot all conducted lavish, largely self-financed campaigns for political office.

The holding in *Buckley* thus raises the issue of the relationship between equality and civil liberties. Students of democracy as far back as the Greeks have maintained that a large middle class is necessary for democracy to flourish and that vast inequities in wealth are problematic at best for the successful functioning of democracy. Similarly, Robert A. Dahl, professor emeritus of political science at Yale University,

Senator Benjamin R. Tillman's legislation prohibited corporations from contributing to political campaigns. Once enacted, it proved relatively easy to evade as companies awarded bonuses to executives who were expected to contribute to political campaigns and political parties. *(Library of Congress)*

has maintained that "The justices failed to view campaign expenditures and contributions in the context of a democratic system that derives its legitimacy from the principles of political equality." The Supreme Court's recent decision in *McConnell v. Federal Election Commission,* 124 S. Ct. 619 (2003), upholding limits on "soft money" expenditures (those not directly made by the candidates), will further impact campaign finance laws.

Henry B. Sirgo

See also: McConnell v. Federal Election Commission.

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Time, Place, and Manner Restrictions

Time, place, and manner (TPM) restrictions are a balancing test created by the U.S. Supreme Court to clarify the extent to which government can legitimately regulate speech, which is in general a fundamental liberty protected under the First Amendment to the U.S. Constitution. The test is used in freedom of speech cases and designed to regulate the trappings of the expression rather than the speech itself. The doctrine holds that the government can protect society from the harmful effects of expression as long as the regulation is narrow and content-neutral. The Court recognizes the authority of the state to impose reasonable restrictions on the time, place, and manner of constitutionally protected speech occurring in a public forum.

TPM restrictions are designed to preserve public order, respect privacy and property rights, accommodate public convenience, and protect the administration of justice through reasonable regulations. The Court has used the restrictions to deal with cases involving licensing requirements, access to public places, solicitation of funds, and zoning laws. The restrictions are designed to focus on the behavior (time, place, manner) that animates the expression rather than on the speech itself. They seek to distinguish the medium from the message. The test permits the government to regulate the context of the message but not the content of the message.

Prior to the late 1930s, the Supreme Court permitted states and localities to control and even prevent expression on public property. After the Court opened the public streets to free speech, there was a need to develop a standard to determine which restrictions on speech were tolerable. In the first set of cases (1939–1943) to create the roots of the test, the Court began applying the time, place, and manner restrictions in cases that involved the Jehovah's Witnesses and state and local ordinances that forbade parades or required licenses for organizing. In *Cox v. New Hampshire,* 312 U.S. 569 (1941), the Court limited the licensing discretion of the state for the first time on the basis of a time, place, and manner restriction. These decisions were used as precedent for similar cases during the Earl Warren Court years. In these subsequent cases, many of which involved civil rights protests such as *Cox v. Louisiana,* 379 U.S. 536 (1965), the Court refined this doctrine. The standard was rekindled during the tenure of Chief Justice Warren E. Burger, as a function of the more conservative nature of the Court and cases that often involved elements of public protest combined with conduct. In the late 1970s, the Court began to articulate the standard explicitly, culminating in its decision in *Ward v. Rock Against Racism,* 491 U.S. 781 (1989), in which the Court upheld New York City guidelines requiring sponsors of bandshell concerts in Central Park to use sound-amplification equipment and a sound technician provided by the city.

The Court in *Rock Against Racism* created a four-prong test to determine whether the time, place, and manner restrictions were legitimate. In order for the government to restrict speech, it must prevail on all four prongs. First, the regulation must be made without regard to the content. Thus, in *Police Department of Chicago v. Mosely,* 408 U.S. 92 (1972), the Supreme Court ruled that a law that forbade all picketing except labor picketing favored some types of speech at the expense of others and was unconstitutional because it was a content-based restriction. Second, the regulation must further a significant state interest. Thus, the state cannot restrict a public protest simply to stop littering. Third, the regulation must be narrowly tailored to achieve that state interest. This prong is a variant of the least-restrictive-means test. The state must assert its interest in the manner that will be the

least burdensome to the constitutional right in question. In *Madsen v. Women's Health Center,* 512 U.S. 753 (1994), which involved a buffer zone to prohibit abortion protesters from interfering with women seeking to exercise their reproductive rights, the Court ruled that a thirty-six-foot buffer zone was permissible around entrances and driveways, but a 300-foot "no approach" zone was not narrow enough. Finally, the state's regulation must leave open alternative channels of communication. If the expression could be communicated in other places, then the burden on speech would not be overly burdensome. But if the regulation would effectively leave the individual or group without any means of exercising its freedom of expression, the regulation would be unconstitutional. For example, the Court has upheld zoning regulations designed to limit the placement of adult theaters because they can be moved to other parts of the city.

"Time" restrictions might permit a municipality to ban parades during rush hour. Decisions regarding "place" involve the forum or location in which the speech takes place and are tied to the Court's guidelines for forum-based restrictions. For instance, in *Adderley v. Florida,* 385 U.S. 39 (1966), the Court ruled that a jail was not an appropriate place for a demonstration and there were alternative places suitable for the communication of ideas. "Manner" refers to the means by which the expression takes place. For instance, the Court ruled in *Brown v. Louisiana,* 383 U.S. 131 (1966), that a silent protest against segregation in the Clinton, Louisiana, library was protected, but a demonstration that would disrupt its patrons would not be.

Attempts to use TPM restrictions to limit allegedly objectionable or indecent material have often run afoul of the first prong of the test requiring content-neutrality.

Time, place, and manner restrictions have served as a guide for other special tests, such as those used in commercial speech, articulated in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980); and for symbolic speech, as outlined in *United States v. O'Brien,* 391 U.S. 367 (1968), involving the burning of draft cards. Many of these tests have provisions similar to the TPM restrictions.

Because this is a balancing test, it requires the justices to determine whether the regulation is content-neutral, whether it is narrowly tailored, whether the government's interest is substantial, and whether there are adequate alternative means of communication. Thus, there is an ad hoc nature to the test. Critics have argued that the test has not been applied consistently. As the Court has become more conservative, it has changed the definition of what constitutes a public forum and, in doing so, made it easier for the state and local governments to limit the "place" for expression and still avoid violating the prongs of the time, place, and manner test.

Richard L. Pacelle Jr.

See also: Adderley v. Florida; First Amendment; Pure-Speech Doctrine; Symbolic Speech.

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Timmons v. Twin Cities Area New Party (1997)

In *Timmons v. Twin Cities Area New Party,* 520 U.S. 351 (1997), the U.S. Supreme Court upheld a 1901 Minnesota law prohibiting candidates for elected office from running under more than one party banner. The case involved a challenge to the law based on the right to freedom of association provided by the First Amendment to the U.S. Constitution; this amendment and others in the Bill of Rights have been made applicable to the states through the Due Process Clause of the Fourteenth Amendment. The Court had to address whether the state prohibition against multiparty candidates violated their right to free association.

So-called fusion, or multiple-party, candidacies are currently outlawed in most states (New York being a prominent exception). For minor parties, fusion candidacies provide an opportunity to garner political in-

fluence. Single-member-district plurality elections favor the two largest parties because of their winner-take-all nature. As a result, minor parties fall prey to the "wasted vote" phenomenon: Voters and donors are reluctant to support candidates whose chances of winning are marginal at best, and potential minor-party candidates are reluctant to run when they know that voters who might favor them have incentives to vote for a less favored candidate who has a better shot at winning. Where fusion candidacies are permitted, voters can express support for their favored party while still supporting an electorally viable candidate.

Timmons was the result of a legal challenge brought by a chapter of the national New Party, which had been denied the opportunity to nominate a state legislative candidate who had already been nominated by another party. The New Party chapter claimed that the Minnesota law violated its right of association under the First Amendment, as applied to the states under the Due Process Clause of the Fourteenth Amendment. The state defended its law as important to furthering the stability of its political system and preventing voter confusion. Candidates, the state feared, could effectively use the ballot for political advertising by running under the banners of shadow parties consisting only of promotional slogans. In addition, minor parties could evade nominating-petition requirements by nominating major-party candidates; as a result, such parties could obtain ballot access in future elections by virtue not of their own popularity but of a prominent candidate's popularity.

The U.S. Supreme Court, by a six–three margin, upheld the Minnesota statute. Writing for the majority, Chief Justice William H. Rehnquist held that the law did not excessively burden citizens' associational rights under the First and Fourteenth Amendments. Had it done so, the state would have had to demonstrate that the law was narrowly tailored to furthering a compelling state interest. Since, in the majority's view, the law was not excessively burdensome, the state had to show only that its reasonable policy interests outweighed the asserted associational rights.

According to the majority, the law did not excessively burden associational rights because it did not prevent individuals from supporting or endorsing any particular candidate, nor did it deny any candidate access to the ballot. It did limit the range of candidates who could appear under a party's banner and did inhibit parties from expressing support for candidates already nominated by another party, but the Court held that the primary purpose of ballots was to enable orderly elections, not to promote political expression. Chief Justice Rehnquist wrote that Minnesota's interest in "protecting the integrity, fairness, and efficiency of [its] ballots and election processes" was sufficiently weighty to justify upholding the statute. Although states may not use such requirements to entrench the two major parties at the expense of outside competitors, they may enact reasonable electoral laws that effectively favor the two-party system.

Jeremy Buchman

See also: First Amendment; Minor Political Parties; Political Parties.

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Tinker v. Des Moines Independent Community School District (1969)

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), marked the first time the U.S. Supreme Court formally established the doctrine of symbolic free speech. Previously, the Court had made clear distinctions between speech and action, limiting the protection that action received under the First Amendment to the Constitution. *Tinker* also was the first major case in which the Supreme Court agreed to consider cases of public elementary and secondary school student disciplinary cases. Accordingly, the Court indicated a willingness to consider cases that previously had been solely matters of state and local control.

The *Tinker* case involved the suspension of five students who violated a Des Moines, Iowa, school district regulation by wearing black armbands to school in protest against U.S. military involvement in Vietnam. On appeal, the Supreme Court, through Justice Abe Fortas for the majority, ruled the suspensions unconstitutional because the wearing of an armband was a symbolic act, which was "closely akin to 'pure speech' " and thus a constitutionally protected right. Furthermore, Justice Fortas added that students do not lose their constitutional right of freedom of speech "at the schoolhouse gate."

Justice Hugo L. Black registered a vigorous dissent, arguing that the opinion had severe implications for federalism because the majority took away from elected local and state officials the power to control the discipline of pupils and in effect transferred that power to the Supreme Court. He stated:

> I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 states. . . . One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. . . . It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases.

Justice Black's dissent surprised some Court observers, given his previous strong support of free speech in First Amendment cases. In fact, he had maintained his traditional distinction between speech and action, arguing that wearing an armband was action and not speech. His dissent was also consistent with his absolutist position on finding First Amendment protection for pure speech cases but not for the symbolic speech cited in *Tinker.*

Many unresolved questions remain concerning the long-term impact of *Tinker* on how far school officials may go in student disciplinary matters. Will courts sustain bans on wearing street gang symbols and clothing? What about bans on buttons or T-shirts with Confederate flags or other racist or political cause symbols? What about explicit slogans on T-shirts or jackets that might be considered obscene or sexual harassment? May teachers wearing armbands or other overt political symbols be suspended or dismissed? Although the Supreme Court has not provided any clear answers, the debate continues. In *Warren Hills Regional Board of Education v. Sypniewski,* 538 U.S. 1033 (2003), however, it did refuse to hear an appeal from the U.S. Court of Appeals for the Third Circuit that had overturned a suspension of a Warren Hills, New Jersey, high school student for wearing a T-shirt with the slogan "Top Ten Reasons You Might be a Redneck Sports Fan." Among the reasons were "You wear a baseball cap to bed," and "You know the Hooter's menu by heart."

Warren R. Wade

See also: Student Rights; Symbolic Speech; *United States v. O'Brien.*

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Tolerance

Tolerance is a very demanding concept, because it entails making allowances for what one finds distasteful or even worse. To be tolerant seems to cede the power of an unequal advantage that presupposes for oneself or one's group a liberty to restrict something disliked in or about another person or group. Tolerance, as such, is not mentioned in the U.S. Constitution, though it is an implication of First Amendment freedoms of religion, disestablishment, speech, assembly, and press and the Fourteenth Amendment principle of equality in citizenship. Protected by the constitutional guarantees in place, American citizens can presume that the state must meet a very high bar before official intolerance can manifest itself regarding their conscientious beliefs, unruly speech, or questionable voluntary association, if ever it can.

The constitutionally ordered republic implicitly relies on a principle of toleration in order to achieve civic stability, if not compatriotism, among a diverse

citizenry; many people otherwise would not be reconciled to one another as equal members participating in the same society. The constitutional guarantee of religion, in particular, reinforces the liberal move to privatize belief, such that in America's marketplace of ideas there is a wide diversity of beliefs alongside nonbelief, with all but the most intolerant individuals capable of enjoying the higher good of peaceably pursuing their truths in the company of both the like-minded and the vehemently opposed.

Toleration is a modern concept, though its roots date to early and medieval Christianity. Tolerance was an early Christian concern, when defenders of this new faith were on the defensive, competing for adherents in the religiously plural Roman Empire. Once Catholicism's ascension to dominance was achieved during the medieval period, its primary thinkers such as Thomas Aquinas were decidedly less than tolerant of rival religions, and they rationalized brutal treatment of their recalcitrant adherents—though not if assertion of the Christian faith would in kind arouse the intolerance of a more powerful pagan regime. The tolerant humanism of the Renaissance, echoing its Roman sources, reintroduced the language and practice of civil discourse, which itself later was overtaken by the metaphor of a marketplace of ideas, wherein all individuals were equally free to advance and defend their most worthy and reprehensible ideas.

Unfortunately, the political climate of the early modern period was fraught with religious wars, accelerated by the Protestant Reformation, such that only for the sake of a higher worldly good—namely, peace—would the two opposing sides desist. This period prompted John Locke to write "A Letter on Toleration" (1689), which linked his epistemology (people assent to knowledge, it cannot be coerced) to his political philosophy (the state's legitimacy rests on the free consent of the people) such that tolerance is grounded in prudence, it being irrational to attempt to compel another's beliefs and foolish to believe one's attempt had been successful. The later liberal John Stuart Mill linked tolerance to human progress and was of the view that intolerance was the greatest threat to the rational pursuit of truth that could occur, and the greatest boon for untruth.

In modern usage, tolerance may find its grounds in either prudence or rationality, or find itself affirmed as an independent moral principle in its own right, far beyond the sense that tolerance is a public indulgence when one does not truly have to endure the dislikable. The concept can be said to have a dual nature: In the negative view, toleration is a necessary evil in an imperfect world, though a minimal entitlement one has a right to expect from others. More positively, toleration is a genuine good and a duty one has toward others whereby people affirm their equal standing for legal and political rights and the other benefits of membership in society.

Analysis of American constitutionalism through the lens of the concept of tolerance helps to give meaning to and put into perspective unpopular claims to equality and exercise of basic rights and liberties. Notably, toleration reflects not indifference but commitment to broader liberal values that also are ensconced in the Constitution's fundamental guarantees to all citizens, and in the nature of the regime where there is equality before the law.

Gordon A. Babst

See also: First Amendment.

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Torture

Torture is the infliction of physical or psychological pain on a victim to serve as punishment, to elicit information, or to compel assent to a statement issued by the torturer. Typically torture is used in the context

of an interrogation, hence the Latin term for torture *quaestio*—to question. Although the history of torture dates to the ancient world, the purposes of the practice have changed with time. In ancient Athens, torture was used by parties in civil lawsuits to verify the testimony of slaves. In this instance, torture was designed to counterbalance what was believed to be the slave's natural proclivity to testify on the owner's behalf. Torture of slaves was also common in the Roman world, where during the late stage of empire the practice was extended to the poor.

MEDIEVAL TORTURE

After a brief respite following the fall of the Roman Empire, torture emerged again in the High Middle Ages (1100–1300). During this time, the papacy and most secular states adopted strict rules of proof, including the requirement of a confession to establish guilt. These rules gave the accused protections that were lacking in earlier periods, but they had a downside—to obtain the necessary confession, medieval judges routinely turned to torture. Over the next several hundred years, torture was used against those accused of heresy and witchcraft as well as against common criminals. It also played a prominent role in the Medieval and Spanish Inquisitions.

Medieval torture was strictly governed by legal rules. Torture could not be used unless there was some evidence against the accused. In addition, torture was only a final resort, to be used after interrogation had failed and after the mere sight of the torture implements failed to compel a confession. If that failed, suspects would be tortured for a specific period of time. After victims confessed, they would have to confirm their confession a day later in writing. Despite these rules, medieval judges did not worry about the possibility that victims would make false confessions. In part this came from the repeated use of torture against suspected heretics and witches; to the torturers, the victim's earthly pain could not compare to the torment that awaited in the afterlife.

By the eighteenth century, a movement for the abolition of judicial torture gathered steam. Prussia abolished torture in 1754, the first European state to do so. By 1830 judicial torture was abolished in most of Europe. The reasons for this were twofold: On the one hand, the association of torture with religious persecution—most notably the Spanish Inquisition—made it a natural target for Enlightenment reformers, especially those who began to grow skeptical of the veracity of confessions obtained by torture. Second, the rigid norms of proof eased. It was now possible to convict the accused without a confession. Because a confession was no longer necessary, neither was torture.

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MODERN TORTURE

The victory of the abolitionists, however, was short-lived. Although judges no longer needed torture to secure confessions, the police, army, and other security agencies used torture during the nineteenth century to obtain information to help prevent future crimes. Many of the early cases involved national security and spies, but over time torture spread to encompass routine law enforcement activities. More recently, torture has been debated as a means to combat international terrorism.

Because modern torturers are often concerned

about the quality of the information they obtain, they are more sensitive than their medieval counterparts to the possibility that victims will lie to avoid extreme physical pain. As a result, modern torture has evolved from strictly physical means to measures such as sleep deprivation that compel the victim to talk.

Like its medieval counterpart, modern torture has spawned a strong abolitionist movement. Torture was outlawed by the United Nations (UN) Declaration of Human Rights (1948) and by the International Convention on Civil and Political Rights. In 1975 the UN adopted the Convention Against Torture (CAT), which bans torture among member states even under exceptional circumstances such as war. The CAT also makes it illegal for a state to return refugees to countries where they will face torture. Most countries adopted the CAT, including the United States, which signed the CAT in 1988 and ratified it in 1994.

The CAT defines torture broadly to include psychological as well as physical means and compels member states to offer refuge to torture victims. Today no state admits to using torture. Yet it remains a widespread practice, in part because it is performed by independent agents (guerrillas, paramilitary groups) over which the state claims to have no control and in part because states define their own interrogation practices as constituting something less than torture.

THE UNITED STATES AND TORTURE

In the United States torture is outlawed by the Eighth Amendment, which prohibits the use of "cruel and unusual punishments." The Supreme Court has consistently used the Eighth Amendment to outlaw inhumane forms of executions. But the Court has not argued that execution itself is a "cruel and unusual" punishment.

Torture has also been an issue in the context of police interrogations of criminal suspects. In *Brown v. Mississippi,* 297 U.S. 278 (1936), the U.S. Supreme Court held that a confession obtained by torture was invalid under the Due Process Clause of the Fourteenth Amendment. Despite this, reports of police brutality during interrogations of criminal suspects were common up to the early 1960s and led in part to the Supreme Court's ruling in *Miranda v. Arizona,* 384 U.S. 436 (1966), giving the accused the right to have an attorney present during questioning. Despite *Miranda,* the problems of police torture and false confessions remain serious, as demonstrated by the brutal police assault on Abner Louima in New York City in 1997 and by the considerable number of confessions later proved false by DNA evidence.

As a signatory to the CAT, the United States offers refuge to victims of torture. In addition, torture victims have used the Alien Torts Claims Act to sue their torturers in U.S. courts. In 1995 a lower federal court held that Radovan Karadzic, the former president of the Bosnian Serb Republic, could stand trial for human rights violations committed in Bosnia. This followed a previous case, *Filártiga v. Peña-Irala,* 630 F.2d 876 (1980), in which a Paraguayan couple successfully sued their torturer in the United States.

The September 11, 2001, attacks on the World Trade Center in New York City and the Pentagon in Washington, D.C., and the unsuccessful attempt in Pennsylvania have brought the question of torture to the forefront: Is it justifiable to use torture to prevent a terrorist attack? International law clearly forbids torture under any circumstances, but whether a majority of Americans would take this position in the immediate aftermath of a terrorist attack is an open question.

Robert A. Kahn

See also: Eighth Amendment; Fifth Amendment and Self-Incrimination; *Miranda v. Arizona*.

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Totality-of-Circumstances Test

Law enforcement officers who are unable to establish a basis for probable cause from an anonymous tip may overcome that deficiency if they can present information gathered from the entire set of circumstances that bear out the contents of the anonymous tip. In such instances, they can receive valid search

and/or arrest warrants from the magistrate and be in compliance with the Fourth Amendment to the Constitution.

The Fourth Amendment states that searches and seizures may not be conducted without probable cause and benefit of a search warrant and, further, that probable cause must be determined by a neutral and detached magistrate. The U.S. Supreme Court in *Aguilar v. Texas,* 378 U.S. 108 (1964), and *Spinelli v. United States,* 393 U.S. 410 (1969), stated that the magistrate reviewing the application for the warrant must be able to determine independently that if the information it contains came from an informant, (1) the informant's tip must provide information establishing how the informant knew about the information furnished in the tip and (2) the information related to the current case, as provided by the informant, is either truthful or otherwise reliable. In cases where the informant's identity is known by law enforcement officers, there is normally not a problem. But when the information tip has come from an unknown informant (an unsigned letter, an anonymous telephone message or e-mail message), it is much more difficult to establish probable cause to procure the search warrant. This situation prompted the Court to respond to the issue in *Illinois v. Gates,* 462 U.S. 213 (1983).

The totality of the circumstances allows the magistrate to verify that the information contained in an anonymous tip is reliable, based upon such matters as observation by law enforcement officers fulfilling their duty to investigate the alleged illegal activity. This is true even when the officers are operating in a jurisdiction different from where the suspected person(s) resides. The totality of the circumstances will allow the magistrate to issue the requested warrant, and all evidence uncovered during the course of a search conducted under the auspices of that warrant is completely admissible. As the Court said in *Gates,* "the deficiency in one prong may be offset by a stronger than usual set of information in the other prong, thereby meeting the Fourth Amendment requirements."

Sam W. McKinstry

See also: Fourth Amendment; Illinois v. Gates.

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Trademark

See Copyright, Patent, and Trademark

Transgender Legal Issues in the United States

Transgender individuals face numerous civil liberties issues that affect their legal rights and freedoms in the United States. This analysis requires understanding, first, the terms *transgender, transsexual,* and *cross-dresser* and, second, the importance the legal system places on a person's sex. Some legal rights, obligations, and protections are dependent on whether an individual is labeled male or female. For example, a person's legal sex is relevant in the following situations:

- A man and a woman can marry. In general, two men or two women cannot. (Massachusetts extended an exception in 2004, and a few cities and states have attempted to extend marriage to same-sex unions; the validity of these is not yet known.)
- Men and women are separated in the U.S. penal system.
- Only men must register for military service.
- The sex of an individual is recorded by the state after birth.
- Access to restrooms, locker rooms, and other gender-segregated facilities may be restricted based on a person's sex.

At birth, individuals are identified as male or female according to their external genitalia. Secondary sex characteristics (breasts, facial hair, musculature), hormone levels, reproductive organs, and DNA provide additional information regarding an individual's sex. "Gender identity," a person's internal psychological identification (a continuum between male and female), is another important characteristic. In the vast

majority of individuals, these differentiating characteristics are in agreement: A person might have female genitalia, her DNA says she is female, and her gender identity is female. For some people, these differentiating characteristics are not in agreement. When a person's gender identity is not congruent with the other characteristics, the individual is often referred to as *transgender.*

Transgender is an informal term used to refer to any person with any type of gender-identity issue. This includes people who cross-dress (transvestites) and transsexuals. It does not include intersexed individuals, those born with chromosomal or genital ambiguities. *Cross-dressers* are people who periodically take the role of the other sex. *Transsexuals* are those who wish to change or have changed their primary or secondary sex characteristics. A postoperative transsexual person is one who has completed sex-reassignment surgery.

How to classify transgender individuals is difficult because of the complex nature of a transgender person's sex. Important legal issues arise in matters such as official identification documents (and amendments to them); family law (marriage and parental rights); employment (including discrimination); health insurance coverage and claims; and criminal behavior such as hate crimes.

The legal system has been more willing to recognize the preferred sex of transgender individuals if they have undergone sex-reassignment surgery. Postoperative transsexuals benefit from having acquired "new anatomy." Sex-reassignment surgery is generally a necessary but not alone sufficient condition for an individual to be legally recognized as the sex of choice; even the postoperative individual faces uncertain legal situations. States have contradictory laws and court decisions, and some federal and state statutes exempt transsexuals from coverage. The legal framework for changing sex is "very thin, heterogeneous, and ad hoc." The outcome is dependent on the particular judge, the jurisdiction, and the legal context in which the issue is raised.

AMENDING OFFICIAL DOCUMENTS

Most states allow postoperative transsexual individuals to amend their birth certificate. Some of these states allow this via administrative procedure; others require a court order. States requiring a court order create additional hardship for the transsexual person who is no longer a resident. The problem stems from court jurisdictional concerns in the transsexual's adopted state of residence. In 2003, however, a Maryland appeals court held that Maryland circuit courts did have jurisdiction to confirm a nonnative citizen's sex change.

Some states do not allow birth certificates to be amended. Tennessee by statute explicitly forbids birth certificate amendments in the event of a sex change. Absent statutory language, some state courts, such those in Ohio, have refused to amend birth certificates, citing a lack of statutory authority. Transsexuals who are able to amend their birth certificates still face obstacles in having the document recognized in other states.

FAMILY LAW

Transsexual individuals may face legal hurdles relating to marriage. State courts have issued contradictory opinions on the validity of marriages entered into by transsexuals. Texas and Kansas courts have rejected arguments that postoperative male-to-female transsexuals are female for the purposes of marriage. In contrast, New Jersey, California, and Florida courts have upheld the validity of marriages involving postoperative transsexuals. Much of the legal analysis in these cases has focused on laws prohibiting same-sex marriages and on how to determine a person's legal sex. As a result of these differing court decisions, a transsexual person might be able to marry a male in one state or a female in another. Marriages entered into by a postoperative transsexual person may face legal scrutiny regardless of the sex of the partner. The intersection of transphobia and homophobia creates a void in the rights of transsexuals.

Another uncertain situation exists in the legality of an existing marriage when a partner changes sex. Few entities outside of the married couple have legal standing to challenge the validity of an existing marriage. However, problems may arise when a spouse attempts to seek the legal benefits of marriage. These benefits include but are not limited to inheritance, rights of survivorship, ownership status of real estate and se-

curities, health insurance, or tax benefits. There have been no published rulings on this type of situation.

Parental rights are another uncertain area. Transsexuals face additional scrutiny when trying to adopt. Additionally, transgender parents can face difficult custody fights in divorces when children are involved. Given the questions about the legality of marriages involving postoperative transsexuals, their parental status can also be challenged. Some courts have terminated parental rights because of a sex change, but courts in Florida and Colorado have upheld the parental rights of transsexuals in custody issues.

EMPLOYMENT LAW AND DISCRIMINATION

Transgender people (especially those who are transsexual) face tremendous discrimination in the workplace. Often these individuals are stigmatized and face chronic underemployment or unemployment. Transsexuals have lost jobs after beginning a gender transition, although there has been some movement to include transgender individuals under antidiscrimination statutes. As of March 2003, more than fifty U.S. cities and counties protected individuals from employment discrimination based on gender identity.

On the state level, except in Minnesota and Rhode Island, transsexuals and other transgender people are not a protected class in terms of employment discrimination. Transgender individuals are not explicitly protected under Title VII of the Civil Rights Act of 1964 prohibiting sex discrimination. However, a federal district court has upheld the rights of a transsexual person to proceed with a sexual harassment case under Title IX of the Education Amendments of 1972. Finally, many jurisdictions include sexual orientation under prohibited forms of employment discrimination. However, transgender individuals are often not covered under this language because sexual orientation and gender identity are different concepts.

HEALTH INSURANCE

Sex reassignment is always an expensive and often cost-prohibitive process. The cost of surgeries, hormones, psychotherapy, and other related procedures can reach upward of $100,000. Cosmetic procedures, hormones, and surgeries related to sex reassignment are almost always excluded from coverage under private health insurance. Additionally, future complications, even those remotely related to such procedures, may be excluded from coverage. Such exclusions are often so broadly constructed that the transsexual might have difficulty getting any medical treatment covered. However, a recent decision by the Superior Court of Massachusetts ruled that a transsexual could not be excluded from necessary breast-reconstruction surgery because of her sex change.

A few successful cases have established transsexuals' right to have sex reassignment covered under Medicaid, but many states ban such coverage. Some courts have overturned such bans, citing inconsistency with federal guidelines on medical necessity. In these states, decisions are determined on a case-by-case basis. However, there are some medical and social questions as to whether sex-reassignment surgery is medically necessary. Sex reassignment also may be defined as cosmetic surgery and thus excluded from coverage.

CRIMINAL JUSTICE AND HATE CRIMES

Men and women are segregated in prison based on anatomical sex. Therefore, transsexual individuals are generally placed in prisons corresponding to their genitalia. This places a preoperative male-to-female transsexual in either a dangerous situation or in a situation where the individual must be segregated from the general prison population. Courts have denied transfers to prisons based on psychological rather than anatomical identities.

Transgender individuals face greater risks of violence than do most members of society. The highly publicized murders of Gwen Araujo and Brandon Teena illustrate the safety risks of being transgender. Araujo was killed in Newark, Pennsylvania, in 2002 after her male companions discovered that she was biologically male. Teena was murdered in 1993 in Falls City, Nebraska, when it was discovered that he was biologically female. At present, only five states (California, Minnesota, Missouri, Pennsylvania, Vermont) include transgender people under hate-crimes legislation. Federal hate-crime laws do not currently protect transgender people.

The transgender community includes a wide variety of gender-questioning individuals and presents

complicated legal questions. Postoperative transsexuals have been the most successful transgender group in integrating their gender identity into the legal system, although they still face an uncertain legal climate.

Jami Kathleen Taylor

See also: Marriage, Right to; Sexual Harassment.

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Treason

Treason is an act that undermines or usurps the authority of the state to which one owes allegiance. Although treason charges can function legitimately to protect the state, they can also function to limit or deny civil liberties. The primary challenge for any conception of treason is to secure a balance between security and liberty.

The Statute of 25, Edward III (1350), distinguished *petty* treason from *high* treason. Petty (*petit*) treason concerned threats to fellow citizens, whereas high treason concerned threats to the king and the state. "Treason" is now short for what was called high treason.

The U.S. Constitution addresses treason in Article III, Section 3:

> Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
>
> The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

Treason applies to only three behaviors: levying war against the United States; adhering to enemies, such as by devoting oneself to enemy doctrines; and giving enemies aid and comfort. Only Congress declares the punishment for treason, which stands as death, or imprisonment for five years minimum and a fine of no less than $10,000, and the person cannot hold office in the United States (*U.S. Code,* Title 18, Part 1, ch. 115, sec. 2381). If the defendant does not admit to treason in open court, the state must justify its charge with two or more witnesses who testify to the same overt act. The Constitution forbids "corruption of blood," meaning that punishment cannot extend to family.

How one interprets the key phrases in the Constitution determines whether any particular behavior is treason. English legal commentaries demonstrate two approaches to drafting and interpreting treason legislation: A *constructive* interpretation of treason argues to broaden the scope of treason and to protect the state. A *restrictive* interpretation, in contrast, argues to narrow the scope of treason and to protect civil liberties.

Two English laws are especially relevant to the U.S. Constitution on treason, Statute of 25, Edward III, and Statute of 7, William III (1694). The Constitution retains some phrases from these statutes, but it omits key terms in Statute of 25, Edward III, which defines treason as "where a man doth compass or imagine the death of our lord the King, the Queen, or their heir." The charges of "compassing," or imag-

ining the king's death, were constructively interpreted to silence political opposition of any kind. Thomas Jefferson's letter to Virginia's Chancellor George Wythe (November 1, 1778), a prominent attorney who had taught Jefferson at the College of William and Mary, shows that Jefferson knew well the dangers of the constructive interpretation. In that letter, he commented on his drafts of treason legislation as follows: "I pray you to be as watchful over what I have not said, as what is said; for the omissions of this bill have all their positive meaning." The Constitution omits the terms "compass" and "imagine." In drafting the Constitution, the framers endorsed a restrictive interpretation.

The Federalist Papers No. 43 reads:

> But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.

This *Federalist* discussion offered a restrictive interpretation of treason, to guard against abuse of the charge by majority factions against minority factions. Subsequently, *Federalist No. 74* argued that the presidential power of pardon (U.S. Constitution, Article 2, Section 2) concerning treason achieved the same end.

After ratification of the Constitution, the leaders of the Whiskey Rebellion (1795), which was a protest against federal taxation of spirits that Pennsylvania farmers made from their grain, were convicted of treason; President George Washington (1732–1799) subsequently pardoned them. Some participants in another protest on property tax in Pennsylvania (1799), led by John Fries (circa 1750–1818), were convicted of treason; subsequently, President John Adams (1735–1826) pardoned Fries. Former Vice President Aaron Burr (1756–1836) also was charged with treason for intriguing with Spain over America's West but was acquitted (1807). In famous state trials, Thomas Wilson Dorr (1805–1854) was convicted of attempting to overthrow the government of Rhode Island but was eventually pardoned (1844); whereas John Brown (1800–1859) was convicted and executed for capturing a federal arsenal and attempting to foment a slave rebellion at Harpers Ferry, West Virginia (1859).

World War II generated the first treason case reviewed by the U.S. Supreme Court. In *Cramer v. United States,* 325 U.S. 1 (1945), the Court restrictively interpreted treason by narrowly construing the term "overt act." The Court held that an overt act was not proof of treasonous intent and that such intent required separate proof by two witnesses. Two other decisions from this period were influential. In *Haupt v. United States,* 330 U.S. 631 (1947), the Supreme Court upheld a conviction of treason for the first time. The decision offered a constructive interpretation of treason by holding that a series of overt acts in aiding an enemy agent demonstrated treasonous intent to give aid and comfort to the enemy. In *Kawakita v. United States,* 343 U.S. 717 (1952), the Supreme Court again upheld a conviction of treason. The Court used a constructive interpretation of treason by holding that the statements and actions of a defendant who had attempted to renounce his U.S. citizenship and who had abused U.S. prisoners of war in Japan proved treasonous intent, despite the prosecution's failure to produce two witnesses to the overt acts.

Of all the treason charges filed, the federal government has completed prosecution on the charge fewer than forty times. No one has been executed on a federal conviction of treason. The military may not prosecute treason; however, military and civil codes sometimes prosecute treasonous crimes under different names. The Sedition Act of 1798 was among the first attempts to do so. After the September 11, 2001, terrorist attacks, the U.S. government again held citizens as "enemy combatants," to be denied their civil rights and to be tried in closed military tribunals. President George W. Bush's administration cited *Ex parte Quirin,* 317 U.S. 1 (1942), as support for this action. In *Quirin,* the Court held that a U.S. citizen lost his citizenship by joining the German military.

When the citizen was captured in the United States where he was planning sabotage, he was tried in a military tribunal.

Also after the 2001 terrorist attacks, two U.S. citizens (John Walker Lindh and Jose Padilla) were held as "enemy combatants" after Lindh was captured in fighting against the United States in Afghanistan and Padilla was accused of conspiring with the al-Qaeda network to set off a "dirty bomb." Both men were denied their civil rights; neither was prosecuted for treason. Prosecuting treasonous behavior under different names assumes a constructive interpretation of treason. Such prosecutions circumvent civil rights, the two-witness rule, and other burdens of a federal civil prosecution on treason.

When the security of the state is at the forefront of concern, the constructive interpretation of treason gains ground. When civil rights seem to be impermissibly threatened, the restrictive interpretation gains ground. In the coming years, Congress and the Supreme Court will continue to weigh these competing interests.

Kirk Fitzpatrick

See also: Alien and Sedition Acts.

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Trial by Jury

The right to trial by jury, which the Sixth Amendment to the Constitution guarantees to all criminal defendants except those prosecuted for only trivial offenses, is meant to inject a degree of popular control into criminal trials. As the U.S. Supreme Court noted in *Williams v. Florida,* 399 U.S. 78 (1970), the jury "prevent[s] oppression by the government [by the] interposition between the accused and his accuser of the commonsense judgment of a group of laymen and [by] the community participation and shared responsibility that result from that group's determination of guilt or innocence." The jury operates as a constraint on the government's power to prosecute and punish and serves as a needed balance in a democratic society to protect the rights of the accused.

The jury thus protects defendants from biased, corrupt, or overzealous officials by resting ultimate power in the hands of ordinary citizens who have nothing to gain or lose by their verdicts. Jurors are "anonymous" in the sense that they come together for only one decision. They do not seek career advancement, preferment, or financial gain from making any particular decision.

The jury counters the tendency of power to corrupt a single decision-maker by putting a veto over the official decision in the hands of a group. Though jury proceedings are kept secret from outsiders, the jurors must deliberate with one another. They must give reasons for their views, and they must use reason and logic to persuade one another. Therefore, a jury must be small enough that each member can participate and large enough—no fewer than six—that diverse views are likely to emerge. The opinion of each juror must be considered because most states require juries to be unanimous to convict. (A few states allow conviction on a three-quarters or larger majority.)

Finally, juries legitimize decisions and make them more acceptable by emphasizing that they come from the people themselves. Juror selection procedure must be pervasive enough to maximize the likelihood that different elements of the community will be represented. Although no community subgroup is guaranteed a seat, governments are forbidden to structure the process of recruiting jurors in such a way as to prevent any politically cognizable subgroup from serving. To this end, legislatures have repealed, or courts have overturned, bans that formerly prevented women, African Americans, and various other subgroups from serving on juries.

It is this perception of juries representing the judgment of the community (as apart from that of the government) that requires the use of juries in death penalty cases. In other serious cases, individual defendants can waive the right to trial by jury and opt instead for a bench trial (trial by a judge) or for a plea

bargain. Most defendants do one or the other. Juries are thus statistically rare in practice. But because they are typically used in the most visible cases, and because they are always available to protect defendants who want them, juries are more important than their numbers would warrant.

Lawyers have long studied jury decision-making in hopes of learning how to influence and control it. Journalists have satisfied public curiosity by reporting on individual trials, sometimes interviewing former jurors. And in recent years, as legal proceedings became increasingly technical and complex, social scientists have studied juries to determine if the ordinary people who serve on them are intellectually and temperamentally capable of making the extremely complex decisions that the courts demand of them. For all these reasons, the jury system has become the most studied U.S. political institution. The backgrounds, capabilities, and behavior of jurors have been studied more empirically than the behavior of bureaucrats, legislators, or indeed any other people who exercise power. On the whole, the research findings have been positive. Jurors do not always behave the way the civics textbooks say they should, but they are generally capable of making good decisions and seem to do so most of the time.

Juries have also been studied to answer the normative question of whether they are too expensive for the benefits they convey. Since jurors must be recruited, paid, and supervised (and, if sequestered, even guarded against outside influences), and since the use of jurors slows court proceedings and thus increases the cost to the public of judges and other professionals, it is clear that jury trials are more expensive than the bench trials that would replace them. Communities have tried to reduce the cost through various reforms, including the use of six-member or nonunanimous juries, reduced voir dire proceedings (the questioning of prospective jurors), computerized scheduling (which reduces the time between proceedings and thus theoretically reduces the time for which jurors must be paid), plain-language scripts and jury instructions, and many others. But studies have shown that most of these reforms have saved little public money.

At the same time, critics have pointed to other safeguards that now protect defendants from government oppression. Defense attorneys, procedural safeguards such as *Miranda* warnings, universal public education, independent mass media, and appellate courts did not exist or were not as protective when the Sixth Amendment was adopted. Now that all these institutions vigorously protect defendants, have they made juries superfluous? Opinion is divided on that question. In a sense, the jury on juries is still out. But public opinion generally supports juries, wants to see them in high-profile cases, and sometimes feels vaguely cheated when important decisions are made by a judge alone—or worse, by a negotiated plea.

Since the public retains confidence in juries, they are used for purposes other than criminal trials. Juries are available in all nontrivial federal civil trials and in many state ones. States may also use them for such purposes as fixing the value of real estate in eminent domain seizures and, under the supervision of coroners, determining the cause of death.

Paul Lermack

See also: Fifth Amendment and Self-Incrimination; Fourth Amendment; Grand Jury; Jury Size; Jury Unanimity.

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Trop v. Dulles (1957)

Trop v. Dulles, 356 U.S. 86 (1958), involved the involuntary removal of U.S. citizenship from a native-born citizen. In 1944 a twenty-year-old soldier born in Ohio was court-martialed and given a dishonorable discharge for a one-day desertion from his post in Casablanca, Morocco, during World War II. Eight years later when he applied for a passport, the appli-

cation was denied on the ground that his previous court-martial and dishonorable discharge for wartime desertion resulted in a loss of citizenship under the Nationality Act of 1940, section 401(g). The Supreme Court's decision in the case was noteworthy in two respects: The first was the Court's consideration of the national government's role in denationalizing citizens, and the second was the Court's views on interpreting the Eighth Amendment and its prohibition against cruel and unusual punishment.

On the denationalization issue, a five-member plurality of the Court agreed that section 401(g) was unconstitutional but for different reasons. Chief Justice Earl Warren—joined by Justices Hugo L. Black, William O. Douglas, and Charles E. Whittaker—stated that citizenship could not be removed unilaterally by the government, although an individual could voluntarily renounce citizenship either expressly or by language or conduct that showed relinquishment. The government, especially the military, could not forfeit the person's citizenship as punishment for a crime, even one as reprehensible as desertion. Justice William J. Brennan Jr. compared the relationship between the war powers of Congress and a deserting soldier to the taxing powers of Congress and a tax evader. In each instance, the nexus was too weak to sustain the forfeiture of citizenship, especially when other penalties existed; therefore the statute was invalid.

The Eighth Amendment came into play in the controversy when the Court classified the forfeiture of nationality as punishment. While recognizing that the contours of "cruel and unusual punishments" had never been clearly defined, the Court indicated that any punishment other than fines, imprisonment, or death was subject to close scrutiny and interpretation by the judiciary as the arbiters of the meaning of the Constitution. Chief Justice Warren wrote, "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In other words, society's ideas as to the appropriateness of punishments shift over time; for example, punishments such as public whippings and hangings have been discarded.

The pronouncements about the two key aspects of *Trop v. Dulles* have proved to be durable. The Court continued to whittle away at the statutory attempts to authorize involuntary termination of citizenship until finally, in *Afroyim v. Rusk,* 387 U.S.253 (1967), the Court resolved the issue by bluntly announcing that the government cannot cancel citizenship without the individual's consent. Still, Chief Justice Warren's statement in *Trop* about the nature of punishment and its changing character has become a staple in litigation about punishment and prisoners' rights.

Susan Coleman

See also: Citizenship; Cruel and Unusual Punishments; Evolving Standards of Decency.

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Trustees of Dartmouth College v. Woodward (1819)

The vested-rights doctrine is rooted in the idea that property is the cornerstone of individual rights; property sets boundaries beyond which government authority may not be exercised. The *Dartmouth College* case tested the doctrine through a struggle for control of the college. In *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819), the U.S. Supreme Court held that the Contracts Clause of the Constitution prevented a state from infringing on the property rights of an institution chartered by the crown.

Dartmouth College trustees, a group of private persons, based their claim of governing authority on a 1769 charter from King George III. In 1816, the Jeffersonian-controlled legislature of New Hampshire enacted a law amending the original charter to give the state authority to select trustees and govern the college. To regain control, the original trustees, who were represented by Daniel Webster, brought an unsuccessful suit in the state courts against the state-appointed trustee. The Supreme Court subsequently reversed the state courts in a five–one decision (Justice Gabriel Duvall dissented).

Chief Justice John Marshall spoke for the Court and divided the case into two issues: whether the king's charter was constitutionally protected through the Contracts Clause, under which states cannot pass laws "impairing the obligation of contracts," and if so, whether the legislative enactments of New Hampshire impaired the charter's obligations. The Court concluded that the character of civil institutions grows out of the "manner in which they are formed, and the objects for which they are created." This made the Dartmouth charter a "contract within the letter of the Constitution, and within its spirit also." Dartmouth College was chartered to be a "private eleemosynary" (charitable) institution, and the charter included establishment of a perpetual succession of trustees to act on behalf of the original donors and ensure its private status. That the government initially recognized use of the property in this way did not give government the "consequent right substantially to change that form, or to vary the purposes to which the property is applied." The Court further concluded that New Hampshire impaired the charter provisions. The "whole power of governing the college is transferred from trustees appointed according to the will of the founder" to the state, and its will is substituted for that of the donors "in every essential operation of the college." Such a change is not "immaterial." Even if the change brought about by the legislation "may be for the advantage of the college" and the public good, it interfered with the "will of the donors."

The *Dartmouth* decision represented the Court's most expansive interpretation of the Contracts Clause, and its most significant consequences fell on business corporations. Private corporations were brought within the scope of the Contracts Clause and seemed to be fully insulated from legislative regulation. The decision tightly joined contract and natural law concepts, and the Contracts Clause became an impenetrable shield for private property rights. Contracts were used to preserve interests, and if a charter was ambiguous, Marshall said, the benefit of the doubt should go to the private party rather than to the state. This position was subsequently modified in *Charles River Bridge Co. v. Warren Bridge Co.,* 36 U.S. 420 (1837). The corporate charter became less effective as a means of insulating private property when, as Justice Joseph Story suggested in his *Dartmouth* concurrence, states could reserve options for future modification of or even the repeal of charters granted by the state.

Peter G. Renstrom

See also: Contract, Freedom of; Contracts Clause; Property Rights.

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Twenty-sixth Amendment

The Twenty-sixth Amendment to the U.S. Constitution provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." Adopted in 1971, this amendment marks the most recent alteration to the Constitution to provide political equality to U.S. citizens. It adds to the provisions of the Fifteenth Amendment (1870), prohibiting male citizens from being denied the right to vote regardless of race, and the Nineteenth Amendment (1920), which prohibited women from being denied the right to vote in 1920. Enfranchisement is, of course, one of the most fundamental liberties in a democracy.

The Twenty-sixth Amendment was ratified during Richard M. Nixon's presidency in 1971 at the time of the controversial Vietnam War. Indeed, part of the controversy surrounding the war prior to the passage of this amendment was that in most states, young men were eligible to be drafted into the military at age eighteen, but they could not vote until they were twenty-one years old.

Similar public opposition to this seeming injustice

during World War II had prompted two states, Kentucky and Georgia, to lower their voting age to eighteen, but other states declined to follow suit. Thus, when the issue resurfaced during the Vietnam conflict, Congress attempted to force a uniform voting age by adding a provision to the Voting Rights Act of 1965 when Congress extended it in 1970. This provision lowered the age qualification to eighteen in all federal, state, and local elections. President Nixon, however, had U.S. Attorney General John Mitchell challenge whether this could be accomplished through legislation or would require a constitutional amendment.

The U.S. Supreme Court struck down this congressional legislation in *Oregon v. Mitchell,* 400 U.S. 112 (1970). The Court's opinion was badly divided. Part of the controversy surrounded the appropriate interpretation of the "time, place, and manner" restrictions of the first paragraph of Article I, Section 4 of the federal Constitution. Ultimately, the Supreme Court, in an opinion written by Justice Hugo L. Black, decided that Congress was within its legislative authority in determining the appropriate voting age for federal elections, but that it could not regulate the age of voters in state and local elections.

The ruling left the states in a quandary. Complying would require copious recordkeeping at the state level to allow eighteen-year-olds to vote in federal elections but only twenty-one-year-olds to vote in state and local elections. Accordingly, most of the states were quite receptive to the Twenty-sixth Amendment, proposed by Senator Jennings Randolph of West Virginia. Also, some politicians hoped the amendment would help to quell the political unrest that surrounded the Vietnam War. As a result, the amendment, supported strongly by the public interest group Common Cause, was ratified by the states in record time—less than five months after Congress proposed it. Another reason for its swift passage was that most people thought that teenagers of the time were better educated than ever before in the nation's history and therefore were capable of making informed electoral decisions. Passage of the amendment effectively overturned the Supreme Court's decision in *Oregon v. Mitchell.*

Unfortunately, however, the freedoms provided by the Twenty-sixth Amendment have not been fully realized by America's young people. The amendment did establish a legal precedent for proof of adulthood and secured the ability of eighteen-year-olds to enter into legal contracts. However, although there is racial and gender diversity in voting, eighteen- to twenty-five-year-olds are the least likely to vote of any age group in the country. Congress tried to improve turnout through the National Voter Registration Act of 1993 (the Motor Voter Law), but it has proved to be largely ineffective. Because of problems surrounding the presidential election of 2000, many states have undertaken electoral improvements.

Some civil libertarians suggest that full voter equality would be assured only by a national election day in which people have a day off from work, as in some European countries. Others hope that technological advances such as online voting may be especially appealing to young voters. Regardless of what the electoral future may hold, it was made a bit brighter for the enfranchised youth of the United States by virtue of the adoption of the Twenty-sixth Amendment in 1971.

Lori M. Maxwell

See also: Nixon, Richard M.; Vietnam War.

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Tyranny of the Majority

Numerical strength does not necessarily connote moral supremacy. This is why Alexis de Tocqueville, the acute French observer who authored *Democracy in America* in 1835, expressed concern over what he described as the "tyranny of the majority." Tocqueville believed that the power of the majority, as expressed in reverence for public opinion and as sometimes translated into laws promoting conformity, grew out

of the relative "equality of conditions" in America. He believed this equality prevented the sustained development of formally hierarchical relations in America. Democratic man was thus independent, sovereign, self-interested, and enfranchised.

Although these equalities taken separately are socially and politically benign, collectively they present a subtle threat to democratic liberty. Power is held by all and by no one because men "are all perfectly equal because they are all entirely free." With little faith in individual opinions and no despot's opinion to revere, the democratic individual exhibits an "almost unlimited confidence in the judgment of the public." According to Tocqueville, "This is because it does not seem likely that truth would not be found on the side of the greatest number, since everyone has a similar perspective on it." The tyranny of the majority can ensue as members of the public tailor their opinions to those of the majority and as the majority attempts to enact its views into law.

Tocqueville took some comfort from his observation that in America "[s]carcely any political question arises . . . that is not resolved, sooner or later, into a judicial question." Tocqueville viewed lawyers and judges, who helped instruct individuals serving on juries or otherwise appearing in court, as an aristocracy of talent and training that could overbalance public opinion and instruct individuals on the value of individual rights. Tocqueville thus observed that "all parties are resolved to borrow in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings."

The longevity and exceptionalism of America's liberal democracy, for Tocqueville, rested not only in the deference paid to the American legal system but also in the societal and institutional protections afforded to minorities and designed to divert democracy from its own excesses. Political associations and civil associations were vehicles for collective protection and "resistance against tyranny and oppression," but these supports were strengthened by institutional protections, including federalism; separation of powers; forced majority—and even supermajority—consensus on legislation (brought about in part by bicameralism); limited government; and judicial assent.

Although Tocqueville's terminology may have been new, concerns about majority rule were not. Institutional protections that could balance majority rule against minority rights were at the heart of Federalist and Antifederalist debates over ratification of the U.S. Constitution. James Madison thus observed in *Federalist No. 10* (1787–88) that human nature made it inevitable that societies would develop factions, "whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion or of interest, adverse to the rights of other citizens, or the permanent and aggregate interests of the community." He further feared that if uncontrolled, the effects of such faction would enable it "to sacrifice to its ruling passion or interests both the public good and the rights of other citizens." The Federalists thus advocated representative democracy, and a republic extending over a large land area with multiple factions, none of which would be dominant, as mechanisms for dealing with the adverse effects of factions. Thomas Jefferson later advocated what became the Bill of Rights (the first ten amendments to the Constitution) with the argument that such rights would provide a tool by which the judiciary could protect individual liberties. Over time, the judiciary has applied rights that once applied only to the national government to the states as well. In so doing, American courts have widened protections against oppressive state majorities and inconsistent applications of justice at both the state and national levels. Fundamental to these adjudications, as well as to the institutional supports for minority rights, lies recognition that, to quote Lani Guinier, perhaps echoing John Stuart Mill (a mid-nineteenth-century English theorist who further elaborated on the tyranny of the majority), "Majority rule, which presents an efficient opportunity for determining the public good, suffers when it is not constrained by the need to bargain with minority interests."

Tyson King-Meadows

See also: Bill of Rights; Ely, John Hart; United States Constitution.

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United States Constitution

Apart from the Constitution of Massachusetts, the Constitution of the United States, drafted in 1787 and ratified the following year, is the world's oldest written constitution. It created a republican government based on the sovereignty of the people. The framers of the Constitution endeavored to "to secure the blessings of liberty" while simultaneously establishing a national government sufficiently strong to maintain order, establish justice, defend the nation against attack, and promote the general welfare. The Constitution also allows the people to shape national policies through regular elections to the House of Representatives, the Senate, and the presidency.

Although the body of the original plan of government contained numerous protections for civil liberties, including the right to trial by jury, opponents of ratification succeeded in obtaining a promise from its supporters to add a Bill of Rights as soon as possible. The bill took the form of ten amendments ratified in 1791. The Supreme Court nationalized the Bill of Rights in the twentieth century, applying its provisions nearly equally to the national and state governments through a process known as "selective incorporation." The Constitution provides for widespread personal, political, artistic, scientific, religious, and economic freedom and has served as a model for more than one hundred constitutions subsequently adopted throughout the world.

DRAFTING

In February 1787, the Congress, meeting under the authority of the Articles of Confederation, put out a call to the states for delegates to a convention. Each state was asked to send at least four delegates to Philadelphia in May to revise the Articles of Confederation. Twelve states selected delegates. Rhode Island refused to participate, concerned that wealthy creditors and landowners would dominate the meeting. Some of those chosen by their state governments did not attend, including Patrick Henry of Virginia, who feared that a new, strong central government would too easily threaten civil liberties and the sovereignty of the states. Described by Thomas Jefferson as "an assembly of demi-gods," the convention numbered among its members some of the most distinguished leaders and brightest political minds in the country, including George Washington, James Madison, Alexander Hamilton, Rufus King, Benjamin Franklin, Gouverneur Morris, John Dickinson, Roger Sherman, and James Wilson. Jefferson and John Adams did not attend because they were serving as envoys overseas.

Thirty-nine of the forty-two delegates present signed the document on September 17, 1787. The three who withheld their signature, George Mason, Edmund Randolph, and Elbridge Gerry, did so largely because it lacked a bill of rights. The proposed Constitution was sent to special state ratifying conventions. Several states approved the plan without difficulty, but during the Massachusetts ratifying convention, the supporters of the Constitution, called Federalists, encountered effective resistance from its opponents, known as Antifederalists. The latter argued that in the absence of a bill of rights, the national government would trample on the rights for which the Revolution had been fought, including freedom of speech, freedom of assembly, freedom of the press, freedom to worship as one chooses, freedom to acquire property, and freedom from arbitrary arrest and imprisonment.

The supporters of the Constitution replied that, unlike the British Parliament, which enjoyed unlimited power, Congress would have only those powers enumerated in Article I, Section 8. Nowhere in the document was Congress given the authority to suppress speech, the press, or religion. Moreover, the framers included several protections for civil liberties in the plan. Article I, Section 9, guaranteed the privilege of habeas corpus (a petition for release from unlawful confinement), prohibited titles of nobility, and banned congressional enactment of bills of attainder (providing punishment without trial, usually for political expression) and ex post facto laws (laws applied with retroactive effect). Article I, Section 10 imposed similar limits on the states. Article III granted to all

George Washington presiding at the signing of the Constitution of the United States in Philadelphia on September 17, 1787. *(Library of Congress)*

defendants in federal criminal trials the right to trial by jury and confined treason to levying war against the United States or providing aid and comfort to the enemy. The Antifederalists, however, were not convinced by these assertions. Only by promising to add a bill of rights at the first opportunity did the Federalists obtain assent from Massachusetts, the sixth state to ratify. Each subsequent ratifying convention exacted the same promise.

On June 8, 1789, Madison introduced the proposed bill of rights to the House of Representatives in the form of a series of amendments. Congress subsequently approved twelve amendments on September 25 and sent them to the states for approval. Ten of the amendments were ratified by three-quarters of the states on December 15, 1791, and these ten became known as the Bill of Rights. The Constitution has been amended seventeen more times, but, at under 5,000 words, it is still the shortest constitution of any government in the world.

PHILOSOPHICAL FOUNDATIONS

In the design of the fundamental law, Madison, who was most responsible for the Virginia plan, which Randolph introduced at the beginning of the Constitutional Convention, drew upon the state constitutions, especially the Virginia Constitution, and the Virginia Declaration of Rights of 1776. He based the Constitution on the political theory expressed in John Locke's *Second Treatise of Government* (1690) and David Hume's *Political Discourses* (1752). Madison be-

lieved that the highest goal of government was to secure individual liberty. There are two major threats to freedom—one's fellow citizens and one's rulers. The Constitution is grounded in Locke's and Hume's view of human nature, namely, that human beings are selfish and motivated largely by greed, vanity, and fear. They are also rational and form governments in order to establish a power to arbitrate disputes by peaceful means. The purpose of government is not, as the ancient Greeks and Romans thought, to make people more virtuous but to protect them from each other. Under conditions of peace and security, individuals can exercise their natural rights to live freely, to acquire property, and to pursue happiness.

Madison knew that it was not enough to establish a powerful government able to control individuals; it was equally important to control the government itself. He relied primarily on the principles of separation of powers and checks and balances to do this. The Constitution divides the powers of the national government among three branches (with Congress itself being divided into two houses), each of which has the means and the motivation to defend itself against the encroachments of the others. Because all government is based on the consent of the governed, sovereignty lay in the people. Madison, however, did not trust the people to rule themselves directly as they did in ancient Athens. The Constitution establishes a representative democracy, or republic, in which the people select others to govern, accountable to the people in regular elections. Madison thought a political union of the thirteen states under a strong central government solved the problem of the tyranny of the majority. In a diverse country like the United States, with an extended territory, no one group, or faction, could impose its will on Congress. All laws, therefore, must be compromises put together by a coalition of various and competing interest groups. Such compromises, claimed Madison, would approximate "justice and the general good."

Baron de Montesquieu's *The Spirit of Laws* (1748) strongly influenced the Antifederalists. The French philosopher contended that liberty was safe only in small countries with homogeneous populations. Otherwise the people would lack a common interest. Moreover, Montesquieu pointed out, all large countries must be ruled despotically because they are constantly at war. Only a dictatorship could raise taxes and govern a large territory with a substantial population. When citizens live far away from the seat of government and when government becomes complex, the people lose interest in politics. Rulers, he said, would take advantage of the public's apathy to destroy the liberties of the people. One of the Constitution's major principles, federalism—the division of powers between the states and the federal government—bears the stamp of Montesquieu's teachings.

PROVISIONS

The first words of the fundamental law are "we the people," a phrase that makes clear that sovereignty rests in the people, not in the states, as the Articles of Confederation had specified, or in the national government. The Constitution divides powers of government among three branches. Article I enumerates the powers of Congress, Article II those of the president, and Article III the powers of the judiciary. Congress is limited to those powers listed or implied in Article I, Section 8. Congress has "the power of the purse" as well as the power to impeach and remove from office the president and the justices of the Supreme Court. The president has the power to appoint the heads of departments and the justices, with the advice and consent of the Senate. The president is also the commander-in-chief of the armed forces. The legislature must present all bills to the president for signature, but Congress can override a presidential veto by a two-thirds vote in both houses. The president makes treaties, but to become effective they must be approved by a two-thirds vote in the Senate.

Article III authorizes the establishment of a supreme court and such lower federal courts as Congress decides are necessary for the administration of justice. Article III does not explicitly grant to the federal courts judicial review, the power to declare acts of Congress or the state legislatures unconstitutional. Chief Justice John Marshall claimed this power for the Supreme Court in *Marbury v. Madison,* 5 U.S. 137 (1803), largely on the basis of Article VI, which makes the Constitution and laws of the United States "made in pursuance thereof" the "supreme law of the land." Article V lays out the process for amending the Constitution. Two-thirds majorities of both houses of

Congress, or a convention called by two-thirds of the states, must propose an amendment, which is then submitted to the state legislatures or special state ratifying conventions. Three-fourths of the states must approve an amendment before it can go into effect.

The most important amendments for civil liberties are the ten in the Bill of Rights (1791) and the Fourteenth Amendment (1868). The First Amendment protects the freedoms of speech, assembly, press, and religion and bans a congressional establishment of religion. The Second Amendment guarantees the state militias' right to keep and bear arms. Amendments Four, Five, Six, and Eight contain protections for the criminally accused. Property rights are protected by the Fifth Amendment requirements that government compensate owners when taking their property for a public use and that no person be deprived of his property without due process of law.

The Fourteenth Amendment dramatically reversed responsibility for civil liberties from the states to the federal government. Section 1 made the former slaves citizens of the United States and the state where they resided and prohibited the states from depriving anyone of life, liberty, or property without due process of law or denying to any person the equal protection of the laws. The Supreme Court, beginning in 1925 with a series of cases, selectively incorporated the first eight amendments of the Constitution into the Due Process Clause of the Fourteenth, effectively nationalizing the Bill of Rights. Nearly all the cases in which the Court struck down a state law or judicial proceeding as an unconstitutional infringement on civil liberties were decided after 1925 and especially after Earl Warren assumed the office of chief justice in 1953.

Kenneth Holland

See also: Bill of Rights; Constitutional Amending Process; Constitutional Amendments; Constitutionalism; Judicial Review.

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United States Court System

The United States court system is an integral component of American government. Eventually, courts comment on most important political issues. They have had an important say in issues such as racial segregation, abortion, affirmative action, the limits of free speech, the rights of criminal defendants, the death penalty, and how voting districts are drawn. It is important to remember that although the court system is often less visible than other political institutions, courts are very much a part of the political process.

The court system in the United States is divided into two main parts—the federal-court system and the state-court system. Law in the United States is not a single set of rules but rather comes from a complex set of sources including the U.S. Constitution, U.S. Supreme Court decisions, Congress, state legislatures and high courts, local legislatures, administrative agencies, and legal customs. Both state and federal courts must interpret and implement information from these sources when making their decisions.

Court systems in the United States are organized in a hierarchical structure. This hierarchy is based on the jurisdiction of each court. Jurisdiction is the authority of a court to hear and decide a certain type of case. It is determined by either the state or federal legislature. Generally, federal courts hear cases involv-

All judges in the federal courts are appointed by the president and confirmed by the Senate. Pictured is Judge James B. Parsons, the first black judge appointed to the U.S. District Court for the Northern District of Illinois. When Parsons became senior judge of the district in April 1975, he also became the first black senior judge in the country. *(National Archives)*

ing constitutional issues, federal laws, treaties, disputes between states, disputes between citizens of different states, and cases in which the United States is a party. State courts hear some of these as well and also handle cases that involve state laws.

There are two types of jurisdiction—original and appellate. Courts of original jurisdiction hear a case for the first time. This is the type of court where a trial takes place. District courts in the federal system, they are often called district or circuit courts in the states. Appellate jurisdiction refers to a court's ability to hear appeals. Appellate courts can review lower-court decisions, overturn those that are necessary, and, under the doctrine of judicial review, even review actions of the legislature to determine their constitutionality.

FEDERAL SYSTEM: OVERVIEW

The U.S. Constitution establishes the general outline of the federal-court system, but it was the Judiciary Act of 1789 that fleshed out the details. In the Judiciary Act, Congress established the structure of the U.S. Supreme Court and created federal district courts and federal circuit courts (now called Circuit Courts of Appeals). There are also several types of special legislative federal courts, including the United States Court of Military Appeals, bankruptcy courts, and the Court of Federal Claims (which hears cases dealing with patent and trademark issues).

United States Supreme Court

The United States Supreme Court is perhaps the most famous court, especially since the election of 2000 when it decided the outcome of the presidential race. It is composed of nine justices. This number is not set by the Constitution. It can be, and has been, changed by Congress. The Supreme Court is often referred to as the least understood government institution in the United States. Much of its business is conducted in secrecy. The public may attend oral arguments, but its decisions are made in private conference.

The Supreme Court has both original and appellate jurisdiction. It has original jurisdiction for a limited number of cases, including cases that involve states suing each other and cases against ambassadors or other diplomatic personnel. Its appellate jurisdiction is discretionary. This means that it can decide whether or not to take appellate cases. The justices vote on whether to issue certiorari (agreeing to review a case); four justices must vote to hear the appeal. The chief justice and other justices prepare a list of cases they would like to hear and discuss the list in conference. If a case is not discussed in conference, it is automatically denied. Any case that cannot garner the necessary four votes is not heard; rather, the decision of the last court stands.

The Court hears about 100 cases per year, less than 2 percent of the 8,000 petitions for certiorari it receives. There is no set rule to explain why the Court selects the cases it does, but it is more likely to hear a case if one or more factors are present: The case

involves important political issues; the federal government is a party in the case; or different circuit courts of appeals are in disagreement and the Court wants to clear up the inconsistency.

The Supreme Court sits from the first Monday in October until late June. Generally, the Court sits for two weeks of each month. It hears oral arguments Mondays, Tuesdays, and Wednesdays. Each participant is given thirty minutes to present its side, during which justices may engage in sharp questioning. Fridays and Wednesdays the justices sit in conference and vote on the cases they have heard. After the conference vote, the most senior justice in the majority (or the chief justice if he is in the majority) can either assign the opinion or write the opinion. These conferences are secret, and only the justices are present. When the Court is not sitting, the justices write opinions, review memos on cases, and review pending petitions.

United States Courts of Appeals

United States Courts of Appeals were created by Congress in 1891 to relieve the caseload pressure on the U.S. Supreme Court. There are eleven regional courts of appeals (one each for the First through Eleventh Circuits, each encompassing a geographical area of states); one Court of Appeals for the District of Columbia; and one Court of Appeals for the Federal Circuit, which hears cases previously adjudicated by the Court of Claims and the Court of Customs and Patents Appeals. Many cases on their dockets are mandatory; that is, they may not choose which cases to hear. Unlike the Supreme Court, which has a constitutionally protected sphere of jurisdiction, the courts of appeals are statutory in nature. They exercise only the jurisdiction that Congress grants them. Congress may limit the jurisdiction of these courts or may broaden it, as it has in the past.

These courts are very important in that they will often have the last word on federal issues. The Supreme Court will review only 0.5 percent of their decisions. Most of the caseload for the federal courts of appeals comes from United States district courts. Other cases come from administrative appeals. These cases usually are heard in three-judge panels, but occasionally an entire circuit (from four to twenty-eight judges) sit together to hear an appeal *en banc. En banc* reviews, however, are extremely rare.

Federal District Courts

The federal district courts are the trial courts of the federal judicial system. They are organized into districts—ninety-four in all. Federal district courts hear both civil and criminal matters arising under federal law or involving diversity cases. Diversity cases are those in which citizens of different states are suing each other (subject to some monetary restrictions). These courts may also hear cases in which the federal government is a party to the lawsuit.

There are also two special district courts that have jurisdiction nationwide. These are the Court of International Trade (which hears cases involving trade and customs issues) and the Court of Federal Claims (which hears cases involving federal contracts, governmental taking of private property, and damages against the United States).

STATE SYSTEM: OVERVIEW

There is no single mold for organization of state courts in the United States. Rather, states have implemented individualized systems over time. But state courts are extremely important as part of the overall court system. Most cases tried in the United States are tried in state courts and end in state courts. The U.S. Supreme Court has recognized the authority of state courts to interpret their own state laws. As long as state law does not conflict with the Constitution or federal laws, state law rules supreme in each state.

Trial Courts

States have two basic types of trial courts—those of limited jurisdiction and those of general jurisdiction. Trial courts of limited jurisdiction make up a majority of courts and are where most litigation takes place. They are created to hear particular types of cases, usually misdemeanor criminal cases and small-claims civil cases.

Most of these courts were created after the industrial revolution. Industrialization, population growth, and urbanization led to more people using the court system than ever before. Legislatures created limited jurisdiction trial courts to help take the caseload pressure off more traditional courts.

Trial courts of limited jurisdiction do not resemble "regular" trial courts in that they often are more informal and use abbreviated procedures. For example, they generally do not use juries, often are not courts of record (they do not keep verbatim records by tape or transcript), and sometimes do not provide a right to appeal. In addition, the participants often are not represented by attorneys but rather represent themselves. These parties may be in court for traffic violations, disagreements with neighbors, or other ordinance violations.

Trial courts of general jurisdiction are the major civil and criminal courts. This is where the more serious criminal and civil cases are tried. Contrary to popular belief, trial courts hear more civil cases than criminal cases. The most common types of civil cases heard include those involving domestic relations, personal injury, and estates. Trial courts of general jurisdiction are courts of record and may operate with a judge and a jury or only a judge. Attorneys often represent participants.

It is important to remember, however, that most cases will never get to the trial stage. In criminal cases, the parties often plea bargain. In civil cases, the rules of procedure are designed partly to help ensure that most cases can be resolved before trial. These rules set out the specifics of pleadings, discovery, motions, and pretrial conferences. For example, in a civil case either side may file a motion for summary judgment. A motion for summary judgment means a judge is asked to determine that one side should win the case as a matter of law, without trial, based solely on the pleadings and supplemental information supplied thus far in the suit. This tool encourages lawyers to do extensive pretrial work and attempt to resolve as many issues as possible before trial.

In addition, many states are now using forms of alternative dispute resolution (ADR) during the trial process or often before trial as a means to cut the number of cases coming into the court system. ADR can take the form of informal mediation, forced mediation, arbitration, or private judging. Most states that use ADR use it for domestic relations cases and more minor civil cases.

Intermediate Appellate Courts

Roughly two-thirds of all states have intermediate appellate courts, which are usually referred to as courts of appeals. The cases they hear originate in trial courts. Because these courts have mandatory dockets, they play a major role in siphoning appeals because fewer cases need to be heard by the highest state court.

Some states divide their intermediate appeals courts into two courts—civil and criminal. Other states combine civil and criminal cases into one court of appeals. Either way, intermediate appellate courts do not use juries, and cases are usually heard by panels of judges. The number of judges on the panel varies, depending on the state, but three is average. As with the federal courts of appeals, occasionally these courts can sit *en banc,* depending on the rules of the state, but this occurs only infrequently.

State Courts of Last Resort

Most states refer to their court of last resort as a supreme court. However, New York, for example, refers to its highest court as the court of appeals, whereas the state supreme courts are the trial-level tribunals. State supreme courts hear cases *en banc.* The number of judges ranges from five to nine, with the average being seven. These courts are very important because they have the last word on state law. Unless a party alleges a federal violation (either statutory or constitutional), state courts of last resort are the final arbiters of state law.

State courts of last resort primarily hear cases already heard by lower courts. In states with intermediate appellate courts, the docket of the court of last resort is discretionary. In states without intermediate appellate courts, generally at least part of the docket is mandatory. State courts of last resort also have some original jurisdiction. For example, these courts have original jurisdiction over such matters as attorney discipline.

As with intermediate appellate courts, courts of last resort do not use juries. Rather, cases are decided using the record from the lower court and by using the entire set of judges on the court. Appellate opinions are generally issued *en banc,* but if a court of last resort decides an issue using its original jurisdiction, one judge or a panel of judges may determine the issue.

SPECIAL ISSUES IN BOTH SYSTEMS

Rights of Defendants in Criminal Cases

Criminal defendants have the right to an attorney. In *Gideon v. Wainwright,* 372 U.S. 335 (1963), the U.S. Supreme Court held that states must provide attorneys to indigent clients in felony cases. *Argersinger v. Hamlin,* 407 U.S. 25 (1972), expanded this ruling to cover misdemeanors for which incarceration was the sentence. States are not, however, required to provide counsel to individuals who can afford their own attorney.

States have various ways of providing counsel to indigent defendants. Some communities choose an assigned counsel system, under which lawyers who wish to provide indigent defense sign up with the state court and the court assigns them indigent cases on a rotating basis. The attorneys are paid on a case-by-case or hourly basis. Other communities have chosen to use public defenders. Public defenders are attorneys salaried by the state who handle indigent defense full-time. Still other communities choose to use a contract system in which a community contracts with a law firm to provide legal services for a set amount of time for a set amount of money. Most states use a combination of all of these methods in providing legal services for the poor. Studies are mixed as to which system provides the best and most effective services.

The right to an attorney in criminal cases has been hotly debated and is a politically charged issue. Arguments have arisen over who exactly should have the right to an attorney, when the state should have to pay (who qualifies as indigent), and what type of representation is guaranteed. For example, one famous case centered on whether an attorney who slept during part of a trial had provided adequate representation for his indigent client. Both state courts of last resort and the U.S. Supreme Court have ruled on these issues.

Selection of Judges

All judges in the federal courts are appointed by the president and confirmed by the Senate. They serve for "good behavior," which essentially equates to life, as they can be removed only by impeachment. Generally, for lower-court judges, the president will consult with the senator of the nominee's state. Supreme Court appointments, however, are different. These are considered the prerogative of the president. Either way, these appointments are rife with political infighting because some of these judges will serve for decades.

Both senators and the president fight to appoint individuals who will uphold their political beliefs. Legislators try to determine a potential nominee's stance on controversial issues such as affirmative action, abortion, religion in schools, and the death penalty. In addition, politicians often try to make appointments based on particular characteristics of judges—sometimes these appointments are reserved for minority groups. For example, the U.S. Supreme Court generally is believed to have an African American seat and a Jewish seat. Although informal, these seats are meant to address concerns that the judiciary should reflect the diversity of the population in order to ensure that it is truly representative and that it maintains its legitimacy.

Judges in state courts are selected according to state law. States have chosen various ways of selecting judges. Some states elect all of their judges, on either a partisan or nonpartisan basis. Other states choose to appoint their judges, generally by the governor but in some states by the legislature. Finally, other states use what has been called the merit system, under which the legislature or governor appoints a judge from a list provided by a nonpartisan commission. After a couple of years of service, these judges must face a retention election. In practice, however, these judges almost never are defeated once appointed.

Regardless of how a state selects its judges, politics usually plays a major role in the choice. Under most systems, the tendency has been for the same type of individual to become a judge. Judges are overwhelmingly white, middle-class, and Protestant, al-

though this profile has been changing somewhat since the 1980s.

Joy A. Willis

See also: Judicial Review; United States Supreme Court.

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United States Supreme Court

The Supreme Court defines the authority and powers of the national government and the states and their subdivisions and the nature of individual rights. Individual rights, such as freedom of speech and the right to privacy, protect citizens from the abuses of government authority. The Supreme Court, the highest court in the United States, is the final interpreter of whether the laws and actions of the U.S. government, states, subdivisions, and its citizens are permissible under the U.S. Constitution. The U.S. Congress set the present size of the Supreme Court, nine justices, in 1869.

POWER OF JUDICIAL REVIEW

The most important power of the Supreme Court is its power of judicial review, through which its justices determine whether actions of executive officials or state and federal laws violate the Constitution. Judicial review is also its most controversial power, because in exercising it, nine justices can nullify the decisions of government bodies that are democratically elected. One of the Supreme Court's most controversial decisions was *Roe v. Wade,* 410 U.S. 113 (1973), which protected women's right to abortion choice as part of the right to privacy. Thus, the Supreme Court declared most state criminal abortion laws to be unconstitutional. *Brown v. Board of Education,* 347 U.S. 483 (1954), which outlawed racial segregation in the public schools, was another case that was quite controversial when it was decided, because a number of states in the South and North had segregated schools.

Critics often react to Supreme Court decisions based on whether they think such decisions are prudent or wise; whether they are firmly rooted in the text and/or in the intentions of those who wrote and ratified the Constitution; or whether they think the Court has a responsibility to adapt the Constitution to the times or to enforce certain constitutionally rooted principles. In addition to exercising judicial review of legislative and executive actions, the Supreme Court exercises the power of statutory interpretation to determine what laws mean.

APPOINTMENT OF JUSTICES

The president appoints Supreme Court justices and other federal judges subject to the advice and consent of the U.S. Senate. Periodically, presidents are forced to withdraw nominees from consideration when opposition in the Senate is great. At times the Senate formally rejects a nominee. Justices leave the Court only through resignation, death, or impeachment by the U.S. House of Representatives and trial and conviction by the Senate. Only one justice has been formally impeached.

JURISDICTION

Article III of the Constitution specifies that the Supreme Court has original and appellate jurisdiction. It has original and exclusive jurisdiction—that is, it is the court of first resort—in controversies between two or more states. It has original but not exclusive jurisdiction in cases involving public ministers and consuls, and in all actions by a state against citizens of another state or against aliens. All other cases are taken on appeal from federal district and circuit courts or the highest-level state appellate courts, with the Court having full discretion whether to take a case. Since the 1990s, however, the distinction between original and appellate jurisdiction has been of little note, because Congress passed laws giving the Supreme Court full

Contemplation of Justice statue at the U.S. Supreme Court, Washington, D.C. *(Library of Congress)*

discretion whether to hear a case, no matter the nature of the parties involved.

PROCEDURAL MATTERS

Writs of Certiorari and Court Selection of Cases

Parties seeking Supreme Court action request the Court to reply positively to petitions for writs of certiorari; if a petition is granted, the Court directs the lower court(s) to supply it with the records in a case. Law clerks, individually or in pools, review the "cert petitions" for the constitutional questions they raise for the justices to consider. The Supreme Court has complete discretion as to whether it hears cases. For the Court to agree to hear a case, four justices must agree to take it; this is known as the "rule of four." For a case to be taken on appeal from a state court, it must present a substantial federal question. For example, a party must argue that a right or principle in the Constitution or a federal law has been violated. The Court often decides to hear cases in which lower federal courts have made conflicting decisions with regard to interpreting the Constitution, laws of the United States, or prior cases of the Supreme Court.

Caseload

The caseload, or workload, of the Supreme Court can be measured in part by the number of filings, or cases it is asked to decide. Filings have continued to increase over the years, and in 1999 the number of cases topped 8,000. Despite the thousands of petitions it receives each year, the Court has not for more than a

decade given full review (listening to oral arguments and writing full opinions) to more than 130 cases a year. The Court reviews another 75 to 125 cases each year through brief decisions without hearing oral arguments. The workload may also be measured by the expanded burdens and responsibilities of each of the associate justices and the chief justice.

The number of filings increased because of population growth; the greater complexity of U.S. political, economic, and social systems; and congressional legislation that provided new bases on which individuals, interest groups, and governments could bring legal actions to federal courts, subject to appeal to the Supreme Court. The Court's work has also expanded with its definition of new individual rights and its expansion on limits on government power through interpretation of the Constitution and its amendments.

Briefs

All cases require that there be actual controversies between parties seeking a decision from the Court. Parties may include individuals, states, cities, corporations, and legal advocacy groups, such as the American Civil Liberties Union, and groups supporting or opposing controversial rights, such as the rights of criminal defendants or the right of abortion choice. The opposing parties must present detailed legal briefs. These documents marshal all possible relevant legal principles and precedents. On matters of broad public policy, the Supreme Court allows amicus curiae (friend of the Court) briefs. Legal advocacy groups, public and private institutions, and at times other interested parties are permitted to file such briefs, ostensibly on behalf of one of the parties but actually to provide a line of argument or rationale consistent with their interests.

Oral Argument, Conferences, and Court Voting

After the justices have read the briefs filed by the opposing sides in a case, they set a date to hear oral arguments. In oral arguments, the attorneys for each party present their side of the case for an allotted period of time, usually thirty minutes. The Court may sit for a longer period of oral arguments on the most important cases. In oral argument, the justices often interrupt the attorneys with questions and discuss legal issues among themselves. In most cases oral argument plays a minor role in the final decision, though it may be crucial in some landmark decisions. On the most significant cases, the Court has allowed radio communication of oral arguments. A few days after hearing oral argument, the justices confer to discuss and vote on cases. Conferences are secret. At times the notes of justices offer a clue to conference proceedings. Only occasionally do these conferences win over an undecided justice to a particular position.

MAJORITY, CONCURRING, AND DISSENTING OPINIONS

After the justices vote on a case in conference, if the chief justice has voted with the majority, he writes or assigns the majority opinion, which states the legal findings of the Court. If the chief justice is not in the majority, the judge with the most seniority who has voted with the majority decides who will write the majority opinion. The majority opinion is the most important written opinion in each case because it usually states what the law is; it is always printed first. Any justice may decide to affirm the majority decision or to dissent. Members of the Court who agree with the majority decision may choose to write a concurring opinion. They may agree with the majority decision but disagree with the legal principles that were used to support it. Or, justices might agree with both the majority decision and its reasoning but wish to clarify their own views on the case or respond to one or more issues raised by a dissenting opinion. In some cases justices may write an opinion that concurs with the majority opinion in some respects but dissents from it in some aspect with which they disagree. Concurring opinions were rare for most of the Court's history. They became more common in the mid-twentieth century and have been especially prevalent since the 1960s.

During the drafting stage, justices circulate drafts of written opinions for comment. Any justice might contribute to the draft of a colleague's opinion, make suggestions for revisions, or, in rare cases, even switch

sides. Compromises over the language in opinions are common. They result from justices' efforts to win support for their views. For example, a justice writing an opinion may tone down language or add or subtract a principle to win over another justice. Despite the role that such compromise can play in Supreme Court decision-making, justices change their initial conference votes in less than 10 percent of the cases they hear.

Usually, dissenting opinions are not as legally significant as the majority opinion, for they do not form a precedent that justices feel obliged to follow in later cases. However, dissenting opinions can prove to be more important than even some majority opinions. Such opinions might be unusually forceful or eloquent, or might advance a novel or influential method of interpretation, as did Justice Thurgood Marshall's unique "sliding-scale" principle in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), a case dealing with the level of constitutional scrutiny (rational basis, strict scrutiny, or intermediate level) that should be extended to different classifications of individuals under principles of equal protection. A dissenting opinion might subsequently prove so influential that it informs the majority opinion in later cases, giving justices who are not in the majority a chance to have great influence on future Court decision-making.

Ronald Kahn

See also: Judicial Review; United States Court System.

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United States v. American Library Association, Inc. (2003)

In *United States v. American Library Association, Inc.,* 539 U.S. 194 (2003), the U.S. Supreme Court ruled that the national government could use its power over spending to require that public libraries accepting federal funds install removable filters to block access to pornographic sites. A three-judge district court in Pennsylvania had struck the blocking provision in the Children's Internet Protection Act (CIPA) as an improper content-based restriction on access to a legitimate public forum that was protected by the free speech rights provided in the First Amendment to the U.S. Constitution. In a six–three decision, Chief Justice William H. Rehnquist ruled otherwise.

Rehnquist pointed to the worthy roles of libraries in "facilitating learning and cultural enrichment." Such libraries must necessarily choose materials that best meet the needs of their clientele. Rehnquist cited both *Arkansas Educational Television Commission v. Forbes,* 523 U.S. 666 (1998), and *National Endowment for the Arts v. Finley,* 524 U.S. 569 (1998), to note that in analogous circumstances, the Court had accepted some content-based judgments as to the appropriateness of speech in given settings. Rehnquist argued that Internet access had developed too recently to be considered a traditional public forum, and he argued that the Internet was designed to be little more "than a technological extension of the book stack." Libraries are not obligated to examine every individual image or message when deciding to exclude categories of speech that are illegal or pornographic. Although Internet filters might initially block materials that might otherwise be available to adults, the law allows adults to request that such blocking devices be disabled. When the government appropriates funds, it has the right to set conditions for their expenditure, and it is under no obligation to fund pornographic expression.

In a concurring opinion, Justice Anthony M. Kennedy left open the possibility that the ability of adults to unblock access could be so restrictive as to permit them to bring a suit challenging the law as actually applied. In another concurrence, Justice Stephen F. Breyer argued for the application of "heightened scru-

tiny" to this case but believed that the state had a "compelling" interest in preventing children from accessing pornography. He likened blocking access to juveniles to library policies involving closed stacks or interlibrary loans.

Justice John Paul Stevens's dissent focused on the concern that filtering mechanisms would block some materials that were not illegal or pornographic. Although he argued that local libraries had the right to use such blocking mechanisms, he did not believe Congress had the right to make this decision. He further argued that use of federal funds as an incentive was the equivalent of penalizing the exercise of freedom of speech.

Justice David H. Souter's dissent, joined by Justice Ruth Bader Ginsburg, expressed concern that a law ostensibly designed to protect children actually had the effect of blocking adult access as well. Comparing the policy required by CIPA to the Library Bill of Rights, Souter argued that the law effectively provided for censorship in violation of the First Amendment.

John R. Vile

See also: First Amendment; *National Endowment for the Arts v. Finley;* Pornography.

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United States v. Drayton (2002)

United States v. Drayton, 536 U.S. 194 (2002), involved the scope of police authority to search public buses and their passengers absent prior judicial approval or clear evidence of crime. Christopher Drayton and a companion had been en route from Florida to Michigan in early 1999 when, during a scheduled stop in Tallahassee, three plain-clothed police officers boarded their bus to conduct a random sweep for illegal drugs and weapons. Approaching the men at their seats, officers first sought and gained their permission to search an overhead bag. Finding no contraband there, officers then asked, "Mind if I check you?" Both men agreed, which led to pat-down searches that revealed several bundles of powdered cocaine concealed in their pants. Drayton and his companion were arrested and charged with violating federal drug trafficking statutes. At trial and on appeal, they challenged the admissibility of the drug evidence on the grounds that they were effectively forced to cooperate with unjustified police searches and were never informed of their right to refuse under the Fourth Amendment prohibition against unreasonable search and seizure.

Justice Anthony M. Kennedy's majority opinion upheld the constitutionality of the officers' conduct by stressing the broad authority of law enforcement officials to investigate and deter crimes even in the absence of any specific suspicion or evidence of illegal acts. Citizens were frequently asked to aid in criminal investigations, Kennedy wrote, and a public encounter with police amounted to a Fourth Amendment "seizure" only when a reasonable person in the circumstances would have felt unable to terminate it at will. Drayton and his companion, however, faced "no application of force, no intimidating movement . . . not even an authoritative tone of voice." In any event, Kennedy continued, the two men had effectively waived any Fourth Amendment objections to the encounter when they consented to the searches at the scene—even though police had failed to provide any explicit notice of their right to refuse. The touchstone for valid consent, Kennedy concluded, was *voluntariness* rather than explicit notice and waiver of the right to deny cooperation. And although a failure by officers to advise a suspect of his rights certainly would be relevant to that issue, any judicial determination about the nature of an encounter with police ultimately required a careful case-specific weighing of all the particular circumstances.

All nine justices in *Drayton* endorsed the majority's "reasonable person" and voluntariness standards for judging the validity of police investigatory actions under the Fourth Amendment. Yet three dissenters (Justices David H. Souter, John Paul Stevens, and Ruth Bader Ginsburg) disputed the majority's application of those standards to the particular facts at hand. Justice Souter wrote that Drayton's arresting officers, by displaying their badges and engaging pas-

sengers in close quarters, inevitably fostered an "atmosphere of obligatory participation" on the bus. Accordingly, officers were constitutionally required to provide adequate procedural safeguards—including notice of the right to refuse cooperation—so as to preserve passengers' effective freedom of choice.

John P. Forren

See also: Fourth Amendment; Search; Search Warrants.

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United States v. Eichman (1990)

In *United States v. Eichman,* 496 U.S. 310 (1990), the U.S. Supreme Court reiterated its controversial decision of the year before in *Texas v. Johnson,* 491 U.S. 397 (1989), upholding First Amendment protection for symbolic speech that gave individuals the right to burn American flags as a form of political protest. In the wake of angry protests over the *Johnson* decision, Congress passed the Flag Protection Act of 1989 that made it a federal crime to intentionally "mutilate, deface, physically defile, burn, maintain on the floor or ground, or trample upon the United States flag, except conduct related to the disposal of a 'worn or soiled' flag." Shawn Eichman and some of his friends, including Mark John Haggerty, whose case was heard along with Eichman's, and Gregory Johnson of *Texas v. Johnson* decided to challenge the new law by publicly burning an American flag outside a post office in Seattle, Washington, on October 29, 1989, the day the new flag law went into effect. In a press conference, the lawyer for Eichman and Haggerty stated that congressional attempts to glorify the flag ignored the fact that it had flown over the massacres of Native Americans early in the history of the United States and over the bodies of slaughtered villagers in My Lai, Vietnam (1968). To the dismay of many Americans, particularly those on the right of the political spectrum, the conservative Court maintained its position that burning or otherwise defacing the flag was protected by the U.S. Constitution.

By a slim five–four decision, the Supreme Court held the Flag Protection Act of 1989 unconstitutional because it was a clear effort on the part of Congress to violate the right to free expression guaranteed by the First Amendment. Writing for the majority, Justice William J. Brennan Jr. maintained that despite its stated intent, the congressional language embodied in the act was specifically content-based rather than content-neutral, which called for an "exacting" level of scrutiny by the Court. Reiterating an entrenched respect for First Amendment protections, Brennan wrote, "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

Justice Brennan further insisted that denying individuals the constitutional right to desecrate the American flag diluted "the very freedom that makes this emblem so revered, and worth revering." Arguing that destroying or disfiguring a symbol did nothing to change the symbol itself, the majority determined in *Eichman* that "[t]he Government's interest is implicated only when a person's treatment of the flag communicates a message to others that is inconsistent with the identified ideals."

In a separate dissent written by Justice John Paul Stevens and supported by Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor and Byron R. White, the minority agreed with the majority position that the government had no right to restrict speech simply because it disagreed with the message. However, the minority argued that the government was within its rights to prohibit speech that was "supported by a legitimate societal interest that is unrelated to suppression of the ideas the speaker desires to express as long as the prohibition does not entail any interference with the speaker's freedom to express those ideas by other means."

After determining in *Spence v. Washington* (418 U.S. 405) in 1974 that an individual had the right to hang a flag upside down as a protest against the Vietnam War, the Supreme Court for several years refused to hear a number of flag burning or defacement cases. Then in 1989 the Court agreed to decide whether

Gregory Johnson's burning of the American flag in protest of the economic policies of President Ronald Reagan's administration was constitutionally protected. At the time Johnson burned the American flag, forty-eight states and the federal government prohibited such acts by law.

In the aftermath of *Eichman,* which was announced June 11, 1990, pressure was put on Congress to propose a constitutional amendment that would have made it a violation of the Constitution to burn an American flag. On June 21, by a vote of 254 to 177, the House of Representatives defeated the proposed amendment, ensuring that the flag amendment would not be sent to the states for ratification.

Elizabeth Purdy

See also: First Amendment; Symbolic Speech; *Texas v. Johnson.*

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United States v. Kirschenblatt (1926)

In *United States v. Kirschenblatt,* 16 F.2d 202 (2d Cir. 1926), Judge Learned Hand helped rein in federal abuse of search warrants by making it clear that the existence of a warrant could not be used as a pretext to gather up a person's papers when such papers were unspecified in the warrant and were not the means to illegal acts. The case represented an early precursor for later Supreme Court decisions that would give individuals more protection against illegal searches by the police.

Police had sought and obtained a warrant for Kirschenblatt's house allowing for the seizure of "liquor, the containers thereof" and "property designed for the manufacture of liquor." They had arrested him at his residence and used their warrant and arrest to seize a variety of incriminating documents that they discovered at the time but that were not listed on the warrant.

Although acknowledging that "strict consistency" might give to a search of the premises incident to arrest "the same scope as to the search of the person" (then recognized as fairly extensive), Judge Hand feared that such an interpretation would result in approving the very kinds of general warrants, or writs of assistance, that the Fourth Amendment had been designed to prevent. Hand said that "it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." Granting that the power to rummage among a person's papers after arresting him at home would not exist if the person were not there, Hand observed that "it is small consolation to know that one's papers are safe only so long as one is not at home." Moreover, in words that would have special significance for later cases involving First Amendment freedoms of expression, Hand observed that "what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition."

Acknowledging that the propriety of seizing "the fruits, or the tools of the crime, itself" upon arrest had ancient roots, Hand denied that search warrants could rightfully be used as means simply to gain access to a person's home, office, or papers "solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding." If police needed papers, they first should have to establish probable cause to specify them on the warrants themselves. Although police might have cause to seize "[t]he forged note, the fraudulent prospectus, the policy slip, the written contract, if that be forbidden, [or] the seditious broadside," Hand denied that either the arrest or the warrant justified seizing "the whole of a man's correspondence, his books of account, the records of his business, in general, the sum of his documentary property."

Subsequent decisions demonstrated that Hand did not uniformly favor the rights of the defendant over the prosecutor. Thus, in *United States v. Sherman,* 171 F.2d 619 (2d Cir. 1948), he observed that "No prosecution is tried with flawless perfection; if every slip is to result in reversal, we shall never succeed in enforcing the criminal law at all." Similarly, in *United States v. Wexler,* 79 F.2d 526 (2d Cir. 1935), he ruled that it was improper to tie the hands of a prosecutor during closing arguments while allowing defense attorneys free rein.

Likewise, Hand's concern for freedom of expression in *Kirschenblatt* had been reflected earlier in *Masses Publishing Co. v. Patten,* 244 F. 535 (S.D.N.Y. 1917), in which he overturned a postmaster's refusal to circulate in the mails a magazine that spoke out against the government, especially as related to conscription. Although Hand is better known for formulating the "gravity of the evil test," which reflected intervening Supreme Court decisions and which the U.S. Supreme Court employed in *Dennis v. United States,* 341 U.S. 494 (1951), to convict leading U.S. Communists of organizing the Communist Party, the Supreme Court's opinion in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), arguably came closer to protecting the concerns for free expression that Hand had expressed in *Masses* and in *Kirschenblatt.* Similarly, *Kirschenblatt* appears to be a precursor to the Supreme Court's decision in *Chimel v. California,* 395 U.S. 752 (1969), restricting the scope of a search that could be conducted in conjunction with an arrest of a person in his home.

David T. Harold

See also: Dennis v. United States; Fourth Amendment; Hand, Learned; *Masses Publishing Co. v. Patten;* Search Warrants.

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United States v. Leon (1984)

In *United States v. Leon,* 468 U.S. 897 (1984), the U.S. Supreme Court tackled the difficult question of whether evidence resulting from a faulty search warrant should be admissible in a criminal trial if the police officer obtained the warrant in good faith. An informant, who had not been established as reliable, tipped off police that two individuals he knew were dealing drugs. Police began a thorough investigation of the pair and, based upon the tip and surveillance information, sought and obtained a warrant for the search of several residences and automobiles. The searches produced large quantities of drugs, and Alberto Leon and a companion were indicted on drug charges. The case raised issues pertaining to use of the exclusionary rule, under which evidence obtained as a result of an illegal search—here the faulty warrant made the search illegal—cannot be admitted at trial.

The attorneys for the defendants sought to suppress the admission of the drugs into evidence on the basis that because the original informant's credibility was not set forth in the affidavit, use of the affidavit to obtain the warrant was insufficient to establish probable cause, and thus the warrant was invalid. The prosecution admitted that the warrant was defective but claimed that because the police officers believed they had a valid warrant, and acted in good faith reliance on it, the evidence should be admissible. The trial court granted a defense motion to suppress evidence obtained from the warrant on the basis that police had not established probable cause, and rejected the government's argument that good faith reliance on a defective warrant constituted an exception to the exclusionary rule. The court of appeals affirmed the exclusion of the evidence, but the Supreme Court chose to review the case to decide the question of whether a good faith exception to the exclusionary rule should be recognized.

In a six–three decision, the Court reversed the de-

cision of the lower court and held in favor of the government. Justice Byron R. White wrote the majority opinion, stating that the exclusionary rule was not a Fourth Amendment right for criminal defendants but rather a judicially created remedy designed to deter police misconduct. Justice White declared that in deciding whether the exclusionary rule should be imposed in a case as a deterrent to police misconduct, courts must weigh the costs and benefits of denying the admission of the evidence. Applying this standard, Justice White concluded that the cost of excluding the evidence in this case was too great, and the benefit was too small. He stated that penalizing an officer for the mistake of a judge would not deter police misconduct, and it could generate disrespect for the law and the administration of justice. Justice White reasoned further that excluding the evidence resulting from a defective warrant would also not have a deterrent effect on the issuing judge or magistrate. Only when a warrant was based on a knowingly or recklessly false police affidavit, Justice White asserted, would there be reason for excluding the evidence.

Justice William J. Brennan Jr., joined by Justice Thurgood Marshall, dissented from the majority opinion and asserted that the evidence from an invalid search warrant should be suppressed regardless of whether the officers acted in good faith. Justice Brennan argued that the judiciary is responsible for ensuring Fourth Amendment rights are respected, and that the Fourth Amendment condemns not only the initial illegal invasion of privacy stemming from the invalid search but also the use of the evidence at trial. Because the purpose of the search is to introduce evidence at trial, the invasion and admission of evidence should be regarded as two aspects of one illegal government act. He argued that the drafters of the Fourth Amendment knew that some evidence would be lost to the government but also knew this was a necessary result to protect the privacy of citizens. Justice Brennan also stated that applying the exclusionary rule strictly would force police departments to train officers better. In his view, however, the majority opinion removed any incentive for judges to be careful, since their mistakes would have no consequences, and the decision would encourage ignorance among police because they would be trained that as long as they had a signed warrant, they could rely on it. The long-run effect of this decision, Brennan predicted, would be an undermining of the integrity of the warrant process.

The *Leon* case carved out a significant exception to the exclusionary rule, which had been interpreted as a constitutional protection by the Supreme Court in *Mapp v. Ohio,* 367 U.S. 643 (1961). In *Mapp,* the Court suggested that the exclusionary rule was a constitutionally protected right that should be broadly enforced, whereas in *Leon* the Court recast the exclusionary rule as a tool, peripheral to the Fourth Amendment, for deterring police misconduct. This shift in precedent in 1984 reflected that the Supreme Court under Chief Justice Warren Burger was more conservative in its criminal procedure decisions than was the Court under Chief Justice Earl Warren when its members decided *Mapp* twenty-three years earlier.

Keith Rollin Eakins

See also: Exclusionary Rule; Good Faith Exception; *Mapp v. Ohio;* Search Warrants.

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United States v. National Treasury Employees Union (1995)

In *United States v. National Treasury Employees Union,* 513 U.S. 454 (1995), a split (six–three) U.S. Supreme Court struck down the honoraria ban in section 501(b) of the Ethics in Government Act of 1978. The divided Court held that the ban on federal employees accepting compensation for activities outside the scope of their employment, such as speechmaking or publishing, violated employees' freedom of expression under the First Amendment to the Constitution.

In 1989 Congress amended the Ethics in Govern-

ment Act to prohibit federal officials, members of Congress, and other government employees from accepting compensation for making an appearance, giving a speech, or writing an article. The language of the honoraria prohibition provided "An individual may not receive any honorarium while that individual is a [m]ember [of Congress], officer, or employee." The ban applied to nearly all employees of the federal government as well as to Congress. The ban was imposed on activities even unrelated to a worker's employment with the government, "such as religion, history, dance and the environment." The Court cited as an example a postal worker in Arlington, Virginia, who had given lectures on the Quaker religion, earning him a modest but useful amount of supplemental income.

The U.S. District Court for the District of Columbia held 501(b) unconstitutional, as did the D.C. Circuit Court of Appeals. A major concern of both courts was the lack of a nexus between the employee's specific job responsibilities and duties and the skill for which the individual received an honorarium. In other words, it did not appear that employees were personally profiting from their connection to the government, and the government failed to show how the honoraria ban was in the best interest of the public.

In upholding the lower courts and outlawing the honoraria ban, the majority opinion, written by Justice John Paul Stevens, noted the significant contributions to the marketplace of ideas made by federal employees writing in their spare time. He noted that authors Nathaniel Hawthorne and Herman Melville were employed by the Customs Service and that poet Walt Whitman worked for both the Justice and Interior Departments. Stevens argued that federal workers did not surrender their First Amendment right of free expression by working in the public sector, a right they would otherwise retain. Nor did the extracurricular endeavors of federal employees compromise the public's trust in their job performance.

The dissenters, Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas, argued that the majority exaggerated the amount of speech deterred by the ban and overstated the necessary justifications the government must make in support of such a ban. The dissenters argued that the government must have broad authority in regulating the activities of its employees, such as controlling their partisan political activity. The honoraria ban, they argued, was content-neutral and did not deny federal employees speech rights, only compensation. The balance between the interests of the government and the right of its employees to be compensated for their free expression was a reasonable control on speech.

Priscilla H. M. Zotti

See also: First Amendment.

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United States v. O'Brien (1968)

In *United States v. O'Brien,* 391 U.S. 367 (1968), the U.S. Supreme Court upheld the conviction of an individual who burned his draft card in violation of federal law. The significance of this case rests in the important issues of free speech it raised under the First Amendment to the U.S. Constitution, and in the test the Court formulated for what has come to be called "symbolic speech."

David Paul O'Brien burned his Selective Service registration certificate (draft card) on the steps of a South Boston courthouse to protest against the war in Vietnam and the draft. For this action, he was indicted, tried, and convicted under a federal statute prohibiting the intentional destruction or mutilation of such certificates. O'Brien appealed his conviction, arguing that the statute was unconstitutional, both facially and as applied, because it abridged his right to freedom of expression under the First Amendment. The case eventually made its way to the Supreme Court, and on May 27, 1968, the Court upheld the constitutionality of the statute.

Writing for the majority, Chief Justice Earl Warren

noted that there was "nothing necessarily expressive" about the knowing destruction of a draft card because "[a] law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records."

The Court rejected O'Brien's argument that his act of burning a draft card on the steps of a courthouse was protected "symbolic speech" under the First Amendment, reasoning "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." The Court also emphasized that even if the burning of a draft card in this manner was sufficient to implicate First Amendment interests, it did not necessarily follow that this form of expression was constitutionally protected, because "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

The Court then delineated a four-part analytical framework that has become a key pillar of its First Amendment jurisprudence. Under the *O'Brien* test, a governmental regulation is sufficiently justified, despite its incidental impact upon expressive conduct implicating First Amendment interests, if (1) the regulation is within the constitutional power of the government; (2) the regulation furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. The *O'Brien* Court found that the federal statute prohibiting the intentional destruction of draft cards easily met these requirements, and therefore upheld the constitutionality of the statute and O'Brien's conviction.

The *O'Brien* test has had broad application in First Amendment issues and in civil liberties. The "important or substantial interest" prong of the test would later be used as a baseline for other Court attempts to finesse what would otherwise be hard-and-fast distinctions. Most notably, in *Craig v. Boren,* 429 U.S. 190 (1976), the Court adopted this language as the test to evaluate gender-discrimination claims. Unwilling to elevate gender discrimination to the level of race discrimination (which would require the use of the "compelling-interest" test inherent in strict scrutiny), yet also unwilling to relegate gender discrimination to the undemanding requirements of the rational-basis test, the Court fell back on the *O'Brien* language and required that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."

Stephen Louis A. Dillard and Steven B. Lichtman

See also: First Amendment; Symbolic Speech; *Texas v. Johnson.*

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United States v. Playboy Entertainment Group (2000)

In *United States v. Playboy Entertainment Group,* 529 U.S. 803 (2000), the U.S. Supreme Court addressed the constitutionality of a content-based restriction on broadcasting contained in section 505 of the Telecommunications Act of 1996 and held the law violated the rights of free speech protected by the First Amendment to the U.S. Constitution. Section 505 required that cable operators either (1) provide a complete scramble of certain types of adult-oriented content, such as the sexually explicit films broadcast by Playboy Entertainment Group, or (2) limit such content to the "safe harbor" hours of 10:00 P.M. to 6:00 A.M. In a complete (full) scramble, both audio and visual content is totally blocked such that no signal other than visual snow and audio static can be dis-

cerned. The complete-scramble requirement was intended to address the claim that conventional scrambling occasionally permitted bleed-through of signals that allowed children to overhear or catch momentary glimpses of sexually explicit entertainment. Because the technological modifications necessary to inhibit any possibility of signal bleed were costly, most cable operators instead chose the safe-harbor option. This restriction of opportunity to sell adult-oriented programming directly reduced the possibility of generating income through those sales.

Playboy Entertainment Group filed suit in federal court in Delaware seeking an injunction to block enforcement of section 505 as unconstitutional under the First Amendment. The three-judge panel held for Playboy and determined the law was an overly broad content-based restriction that might restrict more than was intended by the government. The government appealed to the Supreme Court, which was sharply divided in its five–four opinion. In the majority opinion, written by Justice Anthony M. Kennedy, the Court agreed that addressing the problem of the inadvertent exposure of children to sexually explicit images was legitimate governmental activity, but the government had not narrowly tailored the solution to the problem. In other words, a permissible government solution could not also violate the Constitution. Justices John Paul Stevens, David H. Souter, Clarence Thomas, and Ruth Bader Ginsburg joined in the majority opinion.

Chief Justice William H. Rehnquist and Justices Stephen G. Breyer, Antonin Scalia, and Sandra Day O'Connor dissented. They argued that the law was indeed narrowly tailored and served the purpose of protecting children from exposure to sex on cable television. The underlying premise of the dissent was that the government was entitled to dictate reasonable time, place, and manner restrictions on commercial speech. In interesting dicta (nonbinding analysis) in his separate dissent, however, Justice Scalia inadvertently undermined the dissenters' argument that the law was narrowly tailored when he asserted that "It is not only children who can be protected from occasional uninvited exposure to what [Playboy] calls 'adult-oriented programming'; we can all be."

Charles Anthony Smith

See also: Pornography; "Seven Dirty Words"; *United States v. American Library Association, Inc.*

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United States v. The Progressive, Inc. (1979)

The effort by the liberal-oriented *Progressive* magazine to publish antinuclear activist Howard Morland's freelance article, "The H-Bomb Secret: How We Got It, Why We're Telling It," kindled a firestorm of debate over the government's exercise of prior restraint, the practice of quashing expression even before its publication. This use of prior restraint raised major issues pertaining to freedom of the press as protected under the First Amendment to the U.S. Constitution.

The Cold War arms race was still hot in March 1979, and *United States v. The Progressive, Inc.,* 486 F. Supp. 5 (1979), was heard and decided by U.S. District Judge Robert Warren of Milwaukee, Wisconsin, that year. Judge Warren blocked publication of what the government contended was "restricted data" under the Atomic Energy Act, a law that automatically treated virtually all nuclear information as classified.

Yet author Morland had gathered all his information from publicly accessible sources, including the *Encyclopedia Americana,* government documents, and his college physics textbook. His intent in the article was to show how easy it was for any nation to design—though not necessarily build—its own bomb. In an interview years later, he noted that his initial goal was political criticism, "a sort of in-your-face piece of guerrilla theater to cause a commotion, to get people thinking and break down the wall of secrecy," which he considered to be a sham. He successfully caused that commotion.

Without Morland's knowledge, the magazine had sent the manuscript for prepublication review to a Massachusetts Institute of Technology scientist, who

then forwarded it to the U.S. Department of Energy; later, the magazine also sent a copy directly to the department. The government demanded deletion of technical details. When the magazine refused, the government sought an injunction blocking publication, arguing that not all the data were publicly accessible and that the substantially accurate article included concepts outside the public realm.

Judge Warren's decision acknowledged that prior restraints on publication carried a heavy presumption of unconstitutionality, but he ruled that the article fell into a narrow exception for national security matters. "The Morland piece could accelerate the membership of a candidate nation in the thermonuclear club," he speculated in his opinion, rejecting the magazine's argument that the article would merely alert readers to their false illusion of security and to the government's futile attempts at secrecy. In balancing the First Amendment against national security concerns, he found a "disparity of risks" and concluded that allowing publication "could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot."

The reach of the decision as precedent was limited because the ultimate issue of censorship of public domain information under the Atomic Energy Act was never decided on appeal. During the six months the injunction remained in effect, a variety of publications printed similar information, culminating in an alternative newspaper's detailed story. After such disclosures and after arguing the appeal before three openly skeptical appellate judges, the government dropped the case before a final decision. That cleared the way for the *Progressive* itself to publish Morland's original article.

Subsequently, Morland noted that it was "still hard to pry information out of the government, but I don't see any indication that the government would again reach out and censor private authors and journalists who are speculating on this subject."

Eric Freedman

See also: Censorship; First Amendment; *Near v. Minnesota; New York Times Co. v. United States.*

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United States v. Santana (1976)

At issue in *United States v. Santana,* 427 U.S. 38 (1976), was the scope of Fourth Amendment restrictions on warrantless arrests and searches within private residences. In August 1974 Philadelphia police officers approached "Mom" Santana's house with probable cause—but no warrant—to arrest her on felony drug distribution charges. Seeing the officers, Santana quickly retreated from the front doorway—where she had been standing with a brown paper bag in hand—to the interior of the house. Officers followed through the open door and arrested her in the vestibule, seizing two packets of heroin and a small cache of previously marked money as well. A U.S. district court granted Santana's motion to suppress the evidence, and the Third Circuit Court of Appeals affirmed. The U.S. government appealed. Santana continued to assert that absent a warrant or dire emergency, the Fourth Amendment barred police officers from entering her private dwelling and arresting her inside.

In a seven–two opinion by Justice William H. Rehnquist, the U.S. Supreme Court rejected Santana's argument and expanded the "hot pursuit" exception to the Fourth Amendment's general warrant requirements. Upon probable cause to suspect a crime, the *Santana* majority explained, police officers clearly may execute a warrantless arrest in a public place. Along with that power must come the ability to thwart a suspect who flees from such an arrest by retreating into her own home. Within private dwellings, the Court emphasized, individuals generally do enjoy strong privacy protections under the Fourth Amendment; in most instances, police may not enter without an owner's permission or prior judicial authorization.

Yet, as here, when a valid "hot pursuit" begins in a public area, law enforcement officials need not end the chase—and thereby allow the suspect to escape or destroy evidence—simply because the suspect succeeded in reaching a private place.

In a concurring opinion, Justice Byron R. White endorsed the majority's expansion of the hot-pursuit exception, though suggested that a warrant may indeed be required if police must enter a private dwelling by force. Justices John Paul Stevens and Potter Stewart, also concurring, emphasized that a warrant requirement in these circumstances would have created a "significant risk" that critical evidence of crime would be lost. Dissenting Justices Thurgood Marshall and William J. Brennan Jr. objected to the majority's characterization of an open doorway as a "public place." More fundamentally, they also urged the Court to adopt stricter constitutional standards for warrantless arrests. In their view, the Fourth Amendment required warrants for *all* arrests—in public and private areas alike—except when the police can demonstrate the presence of exigent circumstances not created by their own behavior.

John P. Forren

See also: Exclusionary Rule; Fourth Amendment; Hot Pursuit; Search Warrants.

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United States v. Sokolow (1989)

In *United States v. Sokolow,* 490 U.S. 1 (1989)—commonly referred to as the "drug-courier profile" case—the U.S. Supreme Court upheld a search of a suspect in an airport on the grounds that agents had a "reasonable suspicion" that he was engaged in drug trafficking. At issue was whether the search violated the prohibition on unreasonable search and seizure provided in the Fourth Amendment to the Constitution.

When Andrew Sokolow approached the United Airlines ticket counter in Honolulu in July 1984, he purchased two round-trip tickets from Honolulu to Miami totaling $2,100, paying for them from a roll of twenty-dollar bills. Sokolow also was traveling under an assumed name, and despite the fact that travel from Honolulu to Miami took twenty hours, he scheduled his stay in Miami (a source city for drugs) for only forty-eight hours. The ticket agent was suspicious: The twenty-five-year-old Sokolow appeared nervous, was dressed in a black jumpsuit, and wore gold jewelry; and neither he nor his companion checked any of the four pieces of luggage in their possession. The ticket agent informed the Honolulu Police Department of the unusual cash purchase, and the Drug Enforcement Administration (DEA) was notified. Upon his return to Honolulu, Sokolow was approached by DEA officials, who had narcotics-detecting dogs that responded positively to several pieces of luggage. Sokolow was arrested and a warrant was obtained to search his luggage. Agents found 1,063 grams of cocaine in his carry-on items.

After Sokolow was indicted for possession with the intent to distribute cocaine under federal drug law, he sought to have the cocaine declared inadmissible, claiming it was obtained in violation of his Fourth Amendment rights against unreasonable search and seizure. The trial court disagreed and ruled that the officers had reasonable suspicion to believe Sokolow was involved in drug trafficking. The U.S. Court of Appeals for the Ninth Circuit reversed Sokolow's conviction on the grounds that the search was unreasonable. The U.S. Supreme Court reversed, agreeing with the trial court that the DEA did have reasonable suspicion to stop and search Sokolow. Chief Justice William H. Rehnquist wrote the seven–two majority opinion. Without fully commenting on the "profile" used, the majority ruled that the factors present and articulated by the searching agents amounted to reasonable suspicion.

Justices Thurgood Marshall and William J. Brennan Jr. dissented. Marshall argued that the facts surrounding Sokolow did not amount to reasonable suspicion but seemed more to be stereotyping by DEA. Merely because Sokolow "matched one of the DEA's 'profiles' of a paradigmatic drug courier" was not sufficient grounds to conclude he was engaged in criminal activity. Marshall feared that allowing police to depend on broad categories of stereotypical behav-

ior would result in more searches of innocent citizens in the name of fighting the war on drugs.

In the continuing war on drugs, the United States has increased enforcement programs at places of public transportation. The Fourth Amendment protects citizens from unreasonable searches and seizures, but the expectation of privacy for commercial travelers is very low. Because commercial transportation is inherently public, programs to interdict drugs have been ruled constitutional despite their effect on personal privacy rights. If the *Sokolow* ruling is extended, civil libertarians contend, the Court's rationale could be used to uphold other forms of profiling. Although racial profiling may be less linked to a policy goal of the government, profiling in support of the war on terror may adopt the *Sokolow* reasoning to support a major government agenda item. A "terrorism profile" much like the drug-courier profile could be integrated into the totality-of-the-circumstances argument to support its use, particularly for commercial travelers like Andrew Sokolow.

Priscilla H. M. Zotti

See also: Fourth Amendment; Exclusionary Rule; *Terry v. Ohio.*

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United States v. United States District Court (1972)

In *United States v. United States District Court,* 407 U.S. 297 (1972), the U.S. Supreme Court unanimously ruled that the executive branch, although acting in the name of national security, did not have the inherent power to use electronic surveillance to monitor domestic organizations without first acquiring a warrant. In other words, the executive branch could not sidestep protections guaranteed by the Fourth Amendment to the Constitution by claiming national security as justification.

The debate over the war in Vietnam escalated in the early 1970s following President Richard Nixon's excursion into Cambodia and the deaths of four students at a demonstration at Kent State University in Ohio. As protests engulfed the nation, some radicals took the increasingly militant rhetoric of the antiwar movement to an extreme by bombing college facilities housing government research. Citing national security, Nixon and Attorney General John Mitchell authorized the use of wiretaps to investigate domestic organizations they believed were trying to undermine the government. In approving the wiretaps, however, Mitchell did not follow the procedure outlined in the Fourth Amendment, which required the government to present evidence of probable cause to a court in order to obtain a warrant allowing for surveillance. Instead, Mitchell justified his action as part of the executive branch's inherent responsibility to protect the government from attack and subversion.

In a unanimous eight-justice decision (Justice William H. Rehnquist did not participate) written by Justice Lewis F. Powell Jr., the Court ruled the executive branch did not have the power to authorize electronic surveillance without first obtaining a warrant. Powell noted a historical connection between the First and Fourth Amendments in national security cases. The government may have an interest in monitoring those who pose a threat to national security, but the government also has a tendency to suspect its most outspoken opponents of subversion. An unrestrained executive power of eavesdropping, Powell argued, should not discourage constitutionally protected political dissent or infringe on personal privacy. It was therefore necessary for the executive to appeal to the judicial branch when it came time to justify an investigation on constitutional grounds.

Although recognizing the pragmatic concerns involved in an issue as important as national security, the Court found the executive did not present reasonable evidence to justify its need to use warrantless wiretaps. First, Powell found the executive's conception of domestic security and its means of surveillance were too broad in scope. Second, he dismissed the claim that federal courts did not have the expertise needed to understand domestic security issues. Finally, Powell rejected the argument that warrant applica-

Citing national security, President Richard Nixon and Attorney General John Mitchell (far left) authorized the use of wiretaps during the 1970s to investigate domestic organizations they believed were trying to undermine the government. In approving the wiretaps, however, Mitchell did not follow the procedure outlined in the Fourth Amendment, which required the government to present to a court evidence of probable cause of suspicion in order to obtain a warrant allowing for surveillance. *(National Archives)*

tions jeopardized the secrecy that law enforcement officers needed in order to pursue their objectives.

A final note: The same week the Court handed down its decision in *United States v. United States District Court,* five men with electronic surveillance devices were apprehended breaking into Democratic National Committee headquarters in the Watergate Hotel complex in Washington, D.C. Their connections to the Nixon White House ultimately led to the president's resignation in summer 1974.

Jason Stonerook

See also: Electronic Eavesdropping; *Katz v. United States;* Search Warrants; Wiretapping.

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USA Patriot Act

See Patriot Act

V

Vagueness

In "vagueness" cases, the plaintiffs argue that a law suffers from such imprecision and ambiguity that it should not be enforceable. The vagueness doctrine finds its roots in the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution and may be applied to cases involving criminal law or freedom of speech. In *Connally v. General Construction Co.,* 269 U.S. 385 (1926), the U.S. Supreme Court expressed concern about statutes that were so vague that they required people of common intelligence to guess at their meaning, and that differed as to how they were applied. Thus both a law against "vagrancy" or one against "obscenity" could fail to warn an individual in advance of precisely what kind of behavior was being prohibited.

In *Grayned v. City of Rockford,* 408 U.S. 104 (1972), the Court explained the policy considerations underlying the vagueness doctrine: "First, [vague laws] may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

Vagueness challenges can involve either a "facial" challenge to a law—a claim that the law is unconstitutional on its face and should be struck down in its entirety—or an "as-applied" challenge—an assertion that the law does not on its face appear vague but is nonetheless applied in a completely arbitrary manner. The facial challenge is especially controversial because the party before the court may not be arguing that a particular law is vague as to the party or the party's conduct, but may instead be asking the court to strike down the law because of its effect on others. In other words, the party may be seeking to raise the rights of others not before the court.

Courts are generally reluctant to let individuals assert the rights of others. When constitutional rights are involved, the courts have typically required plaintiffs to establish "standing." In other words, they must show that their own rights are being or may be violated. For example, in *New York v. Ferber,* 458 U.S. 747 (1982), the Court referred to the "traditional rule" that prohibited litigants from defending their actions on the basis that a law might be unconstitutionally applied to others. Likewise, in *Gooding v. Wilson,* 405 U.S. 518 (1972), the Court referred to facial challenges as "strong medicine," since they allowed a defendant to escape punishment because legislators did not draft a law with sufficient precision.

In general, the Court prefers to deal with the case before it, not with some hypothetical case that the parties might construct. As the Court noted in *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), it is better to work from a developed record that has the facts needed for an "informed judgment." This approach allows the Court to see whether it can narrowly construe a law "to avoid constitutional infirmities."

Despite its reluctance, the Court sometimes permits facial challenges, particularly when free speech is implicated. As the Court noted in *Grayned,* "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."

Illustrative cases include *Cox v. Louisiana,* 379 U.S. 536 (1965), and *Coates v. Cincinnati,* 402 U.S. 611 (1971). In *Cox,* a state court construed a breach-of-the-peace ordinance to mean "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." The Court struck down the law on vagueness grounds because it could be used to punish individuals merely for expressing unpopular views. In *Coates,* an ordinance punished the sidewalk assembly of three or more persons who "conduct themselves in a manner annoying to persons passing by." The Court struck down the ordinance as "im-

permissibly vague" because it regarded the word "annoying" as completely subjective.

Russell L. Weaver

See also: Due Process of Law; First Amendment; Overbreadth Doctrine.

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V-Chip

A V-chip (V is for violence) is a microprocessor in a television receiver that responds to a ratings signal embedded in the programs broadcast to the receiver. The V-chip permits a viewer to program the receiver to screen programming so that it displays only programs with selected ratings. In particular, a programmed V-chip can screen out reception of programs containing violence and sexuality. The device was one attempt to reconcile the tension between the right of free expression protected by the First Amendment and government's legitimate interest in restricting children's access to material unsuitable for their age.

During the early 1990s, Timothy Collings of Simon Fraser University developed the V-chip from devices that screen outgoing telephone calls. His work came to the attention of the Canadian parliament during debates about television violence. Tests of the system by Canadian cable firms in 1995 proved satisfactory and resulted in its inclusion in Canadian television receivers. In 1993 Rep. Edward Markey (D-MA) proposed the V-chip be a mandatory component of U.S. television sets. During debate on the Telecommunications Act of 1996, Markey mustered supporters from both political parties to secure the production of receivers with V-chips or equivalent technology after February 1998 and to require the rating of broadcasts, except for commercials and sports and news programs.

The Telecommunications Act required Federal Communications Commission (FCC) approval of ratings voluntarily adopted by the broadcasting industry. After a White House summit attended by broadcasters, the industry agreed to adopt a set of age-based ratings of broadcasts: TV-G, for general audience including unattended children; TV-PG, to suggest parental guidance in viewing of the program by younger children because of moderate violence, sexual situations, coarse language, or suggestive dialogue; TV-14, to "strongly caution" parents that material in the program should not be viewed by children under age fourteen because of "intense" violence, sexual situations, coarse language, or suggestive dialogue; and TV-MA for "mature audience only" because the show contained "graphic violence, explicit sexual activity, or crude indecent language." The ratings scheme also added distinctions for programs designed for children: TV-Y for all children and TV-Y7 for children age seven and older because of mild fantasy or comedic violence. Also, the industry agreed that broadcasters would assign ratings, include publication of the rating in programming guides, and display the rating on-screen in the upper left-hand corner as a small identifier for the first fifteen seconds of a program. If the program is longer than one hour, the rating symbol is to be repeated at the start of the new hour. The rating symbol electronically activates a V-chip so that a parent can program the television set to block access to programs of a particular ratings category. Unedited movies carry the age-based rating assigned by the Motion Picture Association of America, and subscription cable services provide additional ratings of violence, nudity, and content.

Although the inclusion of ratings in programming began January 1, 1997, criticism of the lack of specificity of the age-based ratings came immediately from concerned interest groups. On July 10, 1997, participants in informal discussions to revise ratings—except NBC and Black Entertainment Television (BET)—agreed to add content ratings in smaller letters below the six-category age-based rating. For TV-PG, the letters could be S for "some sexual situations," L for "infrequent coarse language," D for "some suggestive dialogue," and V for "moderate violence." For TV-14, an S indicated "intense sexual situations," L "strong coarse language," D "intensely suggestive dialogue," and V "intense violence." For TV-MA, an S indicated "explicit sexual activity," L

Senator Joseph I. Lieberman talks about the V-chip and the blocking of inappropriate television programming and other media topics during a visit with students at Morgan High School in Connecticut and, through videoconferencing, with students in other area schools, April 1996.
(© Peter Hvizdak/The Image Works)

"crude indecent language," and V "graphic violence." They also agreed to a new rating, TV-Y7 FV, for "more combative programs" with fantasy violence recommended for children age seven and older.

In terms of consumer viewing, the V-chip has had minimal impact. A survey indicated that only 7 percent of parents employed the V-chip to control their children's access to television programming and only 5 percent knew what the rating "D" meant. Several studies have concluded that broadcasters often inaccurately rate many programs, so viewers might receive programming they do not desire.

Politically, the V-chip requirement represents a major change in the censorship of televised violence and sexuality. Far-reaching congressional and FCC regulation of indecent and offensive content of programs and the time of broadcast of programs with violence and sexuality, which had existed since the passage of the Radio Act of 1927, was abandoned. Other than a general ban on obscenity—as defined by the U.S. Supreme Court—and a requirement for the electronic scrambling of "sexually explicit" programs provided by cable, the FCC no longer censors program content for violence and sexuality. In place of governmental television censorship, presumably enlightened viewers must practice self-censorship through decisions to program their V-chip not to accept certain programming or not to view programs with certain ratings. In this marketplace of programs, broadcasters assist viewers' choices by assigning the rating and producing a range of programs with violence and sexuality to accommodate their diverse tastes. This programming is designed, censored, and rated within the broadcasting firm in order to maximize the audience and the broadcaster's advertising revenue, and to prevent interest group or political criticism that might threaten profits. It does not have to satisfy legislated moral criteria.

Richard Brisbin

See also: First Amendment.

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Vernonia School District v. Acton (1995)

In a six–three decision authored by Justice Antonin Scalia, the U.S. Supreme Court ruled in *Vernonia School District v. Acton,* 515 U.S. 646 (1995), that an Oregon school district's policy of warrantless, suspicionless, random drug testing of high school athletes

did not violate the prohibition against unreasonable search and seizure as provided by the Fourth Amendment to the Constitution. Although the Court generally interprets this Amendment to require a warrant supported by probable cause indicating that criminal activity is afoot, this decision is one of a line of cases in which the Court has held that "special needs" may justify warrantless, suspicionless administrative searches, subject to reasonableness analysis.

Vernonia school officials began drug testing after observing a significant increase in disciplinary problems, including drug use, in the high school. An investigation concluded that high school athletes participated in illicit drug use and that such drug use increased the risk of sports-related injury. James Acton, a student, challenged the policy after he was barred from his school's football program when he refused to be tested.

Justice Scalia acknowledged that state-mandated collection and testing of urine constituted a search under the Fourth Amendment, but he believed such administrative searches were "reasonable" when the promotion of legitimate governmental interests outweighed the intrusion on the individual's Fourth Amendment rights. The Court found no reason to doubt the gravity and immediacy of the district's concern about illegal drug use by students. It also observed that the efficacy of the policy was essentially "self-evident," since "a drug problem largely caused by athletes, and of particular danger to athletes, is effectively addressed by ensuring that athletes do not use drugs."

Scalia noted that the privacy interest of students was diminished by the fact that schoolchildren are committed to the temporary custody of the state, which was expected to exercise more supervision and control than it exercised over free adults. School students already submitted to physical examinations and vaccinations and thus had a lesser privacy expectation with regard to medical procedures than the general population. The privacy interest of student athletes was further diminished by the fact that they commonly undressed while using showers and locker rooms and were subject to regular physical exams and to other rules regulating their conduct.

The Court found the privacy loss in the actual process of collecting the urine to be negligible, since students were given essentially the same level of privacy as in a public restroom, with test monitors standing nearby and listening "for normal sounds of urination." Intrusions into privacy were further limited because the tests looked only for standard drugs, not medical conditions, and the results were released to a limited group and not communicated to the police. The majority feared that testing based on individualized suspicion would be more likely to shame students who were selected and would impose unreasonable duties on teachers.

Three justices dissented. They believed that because teachers were constantly observing students, they should base searches only on individualized suspicion. Noting that the Court had previously dispensed with the standards for warrants and probable cause in school settings, they feared that further eliminating individualized suspicion would undermine Court claims that student rights did not end at the schoolhouse door.

Schools with much less evidence of drug problems relied on *Vernonia* as a basis for testing all students participating in extracurricular activities. The Court upheld these policies in *Board of Education v. Earls,* 536 U.S. 822 (2002).

Justin M. Sandberg and Ronald Steiner

See also: Board of Education v. Earls; Ferguson v. Skrupta; Fourth Amendment; *New Jersey v. T.L.O.;* Random Drug Testing; Search; Seizure; *Skinner v. Oklahoma.*

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Vested Rights

See Property Rights

Victim-Impact Statement

A victim-impact statement (VIS) allows individuals emotionally close to the victims of capital crimes to testify in front of a jury or through written testimony during the sentencing phase, which may result in a death sentence for the defendant. The purpose of the VIS is to explain the emotional impact of the crime on the victim's family, friends, or other emotionally vested parties and to inform the sentencing parties about the outstanding character of the victim. The VIS may also include statements about how the families and friends feel about the accused and the circumstances of the crime. The determination of whether to allow the use of victim-impact statements in the sentencing stage has added an additional controversial element to the already acrimonious debate over capital punishment.

Supporters of victim-impact statements insist that the testimony of family and friends gives voices to victims who can no longer speak for themselves, and that it is important for those imposing death sentences to be in command of all relevant facts in the case. Critics of VISs argue that permitting emotionally charged testimony to sway the emotions of judges and juries is a denial of the constitutional rights of the defendant and is more likely to incite retribution than justice. Victim-impact statements, in essence, weigh the character of the victim against the character of the accused in situations where no cross-examination of the witnesses is possible.

In *Booth v. Maryland,* 482 U.S. 496 (1987), the U.S. Supreme Court agreed to hear a Maryland case in which a jury sentenced a defendant to death after finding him guilty on two counts of first-degree murder. Under Maryland law, the report given to the jury included VISs composed of interviews with the victims' families detailing the severe emotional impact of the crime on the families, including a ruined wedding, sleeplessness, anxiety, loss of trust, and other emotions common among those who suffer from post-traumatic stress disorder (PTSD). In statements referring to the victims as being "butchered like animals," family members asserted that the accused could never be "forgiven" or "rehabilitated."

By the barest majority (five–four), the Court decided in *Booth* that victim-impact statements violated the Eighth Amendment (prohibiting cruel and unusual punishment) and were "irrelevant" to the sentencing process. Justice Lewis F. Powell Jr., joined by Justices William J. Brennan Jr., Thurgood Marshall, Harry A. Blackmun, and John Paul Stevens, acknowledged the legitimacy of the trauma experienced by the families but held that sentencing hearings should focus not on the emotions of a victim's family and friends but on the specific crime(s) committed and on the criminal whose life was at stake. Powell also argued that emotional testimony in the courtroom tended to favor the socially connected defendant or victim whose relatives and friends were likely to be more articulate and savvy over those of a defendant or victim whose family and friends were poor and ignorant and less likely to make favorable impressions on juries. The result of victim-impact statements, in Powell's view, was that they established an environment that posed an "unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."

Two years after *Booth,* the Court reiterated its position in *South Carolina v. Gathers,* 490 U.S. 805 (1989). In a capital murder case, a South Carolina prosecutor had read a religious tract in its entirety as part of his closing argument during the sentencing phase. Because the victim had been carrying the tract and a voter registration card when he was murdered, the prosecutor argued that the items gave witness to the victim's sterling character. In banning the use of victim-impact statements, the Court held that "punishment must be tailored to . . . [the] personal responsibility and moral guilt" of the accused rather than to the emotional impact of the crime on the victim's family.

The majority in *Gathers* determined that the tract and the voter registration card were of no use because neither could "provide any information relevant to respondent's moral culpability." Dissenting in *Gathers,*

Justice Sandra Day O'Connor, joined by Chief Justice William H. Rehnquist and Justice Anthony M. Kennedy, opted to "reject a rigid Eighth Amendment rule which prohibits a sentencing jury from hearing argument or considering evidence concerning the personal characteristics of the victim."

Two years later in *Payne v. Tennessee,* 501 U.S. 808 (1991), the Court backtracked and allowed victim-impact statements to be introduced into the sentencing phase of a capital case. In *Payne,* the defendant was sentenced to death for the murder of Charisse Christopher and her two-year-old daughter in the course of attempted rape. The defendant had also been charged with the attempted murder of Christopher's three-year-old son. In the victim-impact statements, the jury was asked to weigh testimony that pitted the impact of the murder of his mother and sister on three-year-old Nicholas against the mitigating circumstances of the defendant's background offered by his relatives and friends in their testimony.

Writing for the majority in *Payne,* Chief Justice Rehnquist cast aside the Court's decisions in *Booth* and *Gathers* to argue that victim-impact statements did serve legitimate purposes by bringing additional information into the decision-making process. With his tendency toward deviating from *stare decisis* (precedent, pronounced *STAR-ry de-SI-sis*), Rehnquist insisted that "when governing decisions are unworkable or are badly reasoned," the Court was not bound by them. In citing the Court's decisions in *Lockett v. Ohio,* 438 U.S. 586 (1978), and *Eddings v. Oklahoma,* 455 U.S. 104 (1982), the Court maintained that the Eighth and Fourteenth Amendments did not prohibit a sentencing party from "considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Therefore, sentencing should "reflect the moral judgment of the community regarding the proper penalty to be inflicted on a particular individual for his or her actions."

In his last opinion before his retirement, Justice Thurgood Marshall offered a strongly critical dissent to *Payne,* informing the conservative majority that "power, not reason is the new currency of the Court's decision making." Marshall argued that victim-impact statements were just as irrelevant and unconstitutional in 1991 as they had been in 1987 (*Booth*) and 1989 (*Gathers*), insisting that rationality, not emotion, should take precedence in a court of law. The retiring civil rights pioneer warned his colleagues on the Court that "an even more extensive upheaval of this Court's precedents may be in store" that would place individual rights on shifting ground. After the session ended, Justice Stevens added his voice to Marshall's, warning that in *Payne* the Court had "placed its stamp of approval on the use of victim-impact evidence to facilitate the imposition of the death penalty."

Elizabeth Purdy

See also: Payne v. Tennessee.

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Victimless Crimes

Although many writers have argued that governments should not prosecute "victimless crimes," there is no consensus on which crimes are victimless and whether such offenses should be punished by the criminal justice system. If certain conduct—for example, drug use or sexual activity—that is forbidden by the law is engaged in willingly by the participants without harm to third parties, should there be prosecutions? Or do these offenses interfere with the orderly flow of social life?

Some prohibitions have a biblical basis. Some have become dead letters or have been revived for different reasons than initially intended. Among crimes that have been identified as victimless are homosexuality, nudism, pornography, prostitution, polygamy, incest, transvestism, public urinating and copulating, gambling, jaywalking, loitering and vagrancy (so long as these don't become trespassing or disturbing the peace), desecration of the Sabbath, vulgarity, cursing,

selling oneself or members of one's family or body parts, circumcision, dueling, unorthodox medical practices, suicide, use of drugs, gluttony, and violent or degrading entertainment.

Some regulations are calculated to protect consenting persons from physical injury (for example, laws addressing seatbelts, helmets, and speed limits). Some scholars claim that laws against consensual crimes discriminate against the poor and minorities, and that prohibitions often have been enacted by those influenced by racism and xenophobia. (Historically, critics maintained that African Americans, Hispanics, Germans, Asians, Catholics, and other groups were undermining American virtues with their indulgence in alcohol and drugs.) Cigarettes do more damage and cause more deaths than all of the consensual crimes combined, yet their use is not usually treated as criminal. The punishment for drug crimes is more severe in the United States than in other industrialized nations. Roughly half of the arrests and court cases in the United States each year involve consensual crimes.

In *Stanley v. Georgia,* 394 U.S. 557 (1969), the U.S. Supreme Court ruled that an individual could not be prosecuted for the private possession of pornography in one's home, but in *Osborne v. Ohio,* 495 U.S. 103 (1990), the Court decided that individuals could be prosecuted for such possession of child pornography. In decisions moving in the opposite direction, however, the Court first ruled in *Bowers v. Hardwick,* 478 U.S. 186 (1986), that states could criminalize private consensual acts of sodomy, but then it reversed course in *Lawrence v. Texas,* 539 U.S. 558 (2003).

Prosecution of victimless crimes may lead a populace that does not see the behavior as criminal to develop a disrespect for the law and to see the police as the enemy, not as protectors. Those prosecuted for such offenses garner criminal records that result in a stigma that limits opportunities to pursue noncriminal vocations. Incarceration puts such persons in proximity with other criminals and may result in their being schooled for other crimes and/or being preyed on by fellow criminals.

The individual who is probably most frequently associated with the doctrine of a "private right to private harm" is the English philosopher John Stuart Mill (1806–1873), but many philosophers who preceded him had made similar arguments. Earlier thinkers who expressed similar sentiments include Dutch philosopher Benedict de Spinoza (1632–1677); Mill's English utilitarian predecessor, Jeremy Bentham (1748–1832); American essayist Ralph Waldo Emerson (1803–1882); and French social-contract philosopher Jean-Jacques Rousseau (1712–1778). The French Declaration of the Rights of Man and of Citizens (1789), adopted at the start of the French Revolution, decreed that persons were to have "the power of doing whatever does not injure another." This was the basis for the Napoleonic Code, which imposed no criminal sanctions on consensual adult sexual acts, such as homosexuality and prostitution.

In countries like the United States, however, government intervenes to prohibit some behavior for ethical, aesthetic, or pragmatic reasons. The police powers granted to government and recognized by the Tenth Amendment enable authorities to regulate on behalf of the public safety, health, and morals.

The supporters of governmental sanctions argue that society is the victim—that sanctions are important to prevent social disintegration and to protect children and women. Even if it is difficult to identify the victims of such behavior or the nature of the harm done, criminalization performs an educational function for society by indicating behaviors of which it disapproves. Lord Patrick Devlin (1905–1992), author of *The Enforcement of Morals* (1959), urged acting to restrict practices that any "right-minded man" would find so offensive as to threaten the moral fabric of society.

The community may be the other victim of the supposedly victimless crime. Families suffer from neglect, impoverishment, and so on. Sexually transmitted diseases such as AIDS create a chain of victims. Those indulging in so-called victimless crimes such as drug use may resort to other crimes to obtain money to support these activities. Law-abiding neighbors may have to flee their neighborhoods to protect their families.

Drug use breaks up families, harms businesses, and results in injuries and property damage to those in the vicinity of those acting under the influence. Suicides may also harm third parties, especially if other lives are ended during the suicide. The military assumes

that active homosexuality disrupts service performance. Individuals who are severely injured in accidents while riding motorcycles without wearing helmets or while driving cars without wearing safety belts may increase health insurance costs for everyone.

Justice David Souter's concurrence in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991), in which the Court upheld a ban on completely nude dancing in public establishments, agreed with the prohibition because of the secondary effects created by these businesses, such as prostitution, sexual assault, or other criminal activity.

Martin Gruberg

See also: Lawrence v. Texas; Mill, John Stuart; Right to Privacy.

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Victims' Rights

Victims can be defined to include any innocent party affected by an endless array of crimes, everything from homicide to elder abuse, identity theft to terrorism, rape to hate crimes, and stalking to domestic or child abuse. The common theme for all such victims is the same: A criminal act has occurred and an innocent party exists. Virtually every state has passed laws to create rights for victims, and most states have amended their constitutions for the same purpose. Some states, for example, require registration of sex offenders. Others have provisions for DNA testing to facilitate genetic identification of repeat offenders. Still others have compensation programs aimed at providing financial remuneration to individuals who, through no fault of their own, suffer a loss at the hands of a criminal. Specialized programs exist, such as rape crisis centers and peer harassment groups in schools. Increasing numbers of community and professional groups offer antistalking seminars, identity-protection training, and practical legal guides for individuals who want to interact with the criminal justice system. Advocacy groups such as Mothers Against Drunk Driving are evidence of the growing interest in the public policy issues affecting crime victims and the available remedies.

VICTIMS OF CRIME

The rights of crime victims were the subject of the President's Task Force on Victims of Crime in 1982. The task force concluded that there was a serious imbalance between the rights of criminal defendants and the rights of crime victims. Although victims are often protected by statutory remedies enacted by the states, the protection is not always consistent. The limitation of resources to fund victim programs and the failure of victims to report crimes contribute to the inconsistent application of remedies. Courts are often monitored by victims and victims' rights groups such as Mothers Against Drunk Driving. This monitoring tends to ensure some protection for victims. Some courts allow for victim participation in sentencing, plea agreements, and case dismissals. Most states provide for notice to victims and their families on post-conviction action, such as parole hearings, release dates, and clemency. In *Payne v. Tennessee,* 501 U.S. 808 (1991), the Supreme Court overturned earlier precedents to allow for the introduction of victim-impact statements in the sentencing phase of capital-crime hearings.

VICTIMS' REMEDIES

A majority of the states have some form of a victim compensation fund. Compensatory actions may be limited to violent crimes and may require actual physical harm or death for eligibility. Some funds are restitution-funded, meaning the criminal has or will

Most states have passed state constitutional amendments protecting the rights of victims. Some states, for example, require registration of sex offenders. Here, Robert Briggs, chief of police for the East Syracuse Police Department, holds a copy of the New York State directory of registered sex offenders. *(© Syracuse Newspapers/The Image Works)*

be ordered to pay restitution to the court or an agency that will then disburse funds to victims. These funds are often the product of "Son of Sam" laws, named after the New York Son of Sam killer, David Berkowitz. Berkowitz obtained hundreds of thousands of dollars for the rights to his story of his random killing of innocent young women and their companions. Under these laws, criminals cannot profit by the retelling of their crimes through books, movies, or other media. These and other funds generally have some limits on the amount of compensation allowed to the victims. Limitations are usually categorized by reasonableness and typically include costs for medical bills, lost wages, and funeral and legal expenses.

RAPE AND DOMESTIC VIOLENCE

The increase in the number of reported rape and domestic violence cases has led to changes in arrest and prosecution criteria. Most states do not require corroborating information in order to arrest an individual accused of rape or domestic violence. Victims are no longer required to testify or request a petition for protection as evidence of the crime. Some states keep the name of the victim of a sexual assault confidential. Most states will pay for the health care costs of examination and treatment for sexual assaults reported to law enforcement agencies. Some states make it illegal to identify the name or other identifying information of a victim in the news. All states have some provisions for protection against intimidation and obstruction of justice. In all states, there is a duty to notify victims of these crimes of the assistance available.

CHILDREN AS VICTIMS

Increased publicity about child abuse and victimization has helped to promote stricter laws to ensure that children are well protected against ongoing abuse. Child and family service agencies routinely act on behalf of children. Educators and health care providers are trained to recognize signs of abuse and are required to report them to the appropriate authorities. Since criminal prosecutions and trials are public, most states allow for a child's testimony by videotape. Laws dealing with specific issues for children have been developed. In states that have a "Megan's law" (so named for one victim of a sex predator), sex offenders must register their addresses when they move into a neighborhood, thus notifying the residents of an offender's presence nearby. The Amber Plan is a program between broadcasters and law enforcement authorities; created in 1996, this plan uses the Emergency Alert System to broadcast the description of an abducted child and a suspected abductor. The National Center for Missing and Exploited Children, established in 1981, serves as a focal point for relatives, law enforcement, and communities in recovering missing children. As an organization that raises public awareness to help prevent children from becoming victims, this nonprofit organization is recognized as the nation's resource center for child protection.

CONSUMER PROTECTION

The Federal Trade Commission (FTC) is the regulatory body responsible for most consumer protection. As a department of the U.S. government, the FTC has regulations on everything from automobile purchases to telemarketing. The agency's primary goal is to educate consumers and to bring about responsible change. The FTC protects the buyer of products that cost more than $25. The commission offers tips on identity theft, telemarketing fraud, investment scams,

and travel deception, among other things, to assist in protecting the consumer from deception. Most states have "lemon laws" intended to protect consumers against fraudulent vehicle sales. These laws protect the manufacturer's written warranty and require repair of the vehicle during the warranty period. Contract law dealing with the sale of products is regulated by the *Uniform Commercial Code,* which has been adopted (with some variations) in all fifty states.

Civil laws often provide remedies for individuals who have been harmed by defective products that cause personal injuries, or for the negligent actions of others that have led to accidents. The Environmental Protection Agency is one of a number of governmental agencies that may fine industries whose activities result in collective harm to the environment.

Darlene Evans McCoy

See also: Payne v. Tennessee; Victim-Impact Statement.

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Vietnam War

The Vietnam War during the 1960s and early 1970s raised a series of civil liberties issues unlike those in any other major military conflict in the United States up to that time. The issues ranged from contesting the very constitutionality of the war, to the draft, and then to the political rights of demonstrators to protest the war and the government's reaction to these protests. In a few cases these issues made it to the courts, but many of the disputes remained political and took place in the news, on the streets, and in university campuses across the nation.

The power to engage in war or defend the United States from foreign attacks is located both in Congress and the president. Article I, Section 8 of the Constitution grants to Congress the power to declare war, whereas Article II, Section 2 makes the president "commander in chief" of the armed forces. The Constitution makes Congress responsible for the formal declaration of war (and vests in Congress numerous powers to raise and maintain armed forces), and such declarations were issued in the cases of World War I and II. Yet the president's commander-in-chief powers also suggest that the executive branch has significant military authority to act, especially to defend the United States from attacks, and prior to Vietnam there were many examples of when the president used this authority to defend the country.

Vietnam, however, tested exactly where the power of Congress ends and the president's power begins. In response to an alleged attack on U.S. ships off the coast of North Vietnam in 1964, President Lyndon B. Johnson sought from Congress the authority to "take all necessary steps, including the use of armed force," to repel the attack and assist South Vietnam in its defense. The resolution of Congress on August 10, 1964, known as the Gulf of Tonkin Resolution, became the supposed legal or constitutional basis for Presidents Johnson and Richard Nixon to deploy about a half million troops in Vietnam through 1972.

But because this resolution did not constitute a formal declaration of war, many critics contended that the Vietnam War was unconstitutional and that the president of the United States did not have the authority to engage in this military action. In *Katz v. Tyler,* 386 U.S. 942 (1967), *Mitchell v. United States,* 386 U.S. 972 (1967), and *Mora v. McNamara,* 389 U.S. 934 (1967), individuals who had been drafted into the military sought to have the Supreme Court adjudicate the constitutionality of the war in an effort to halt their deployment to Vietnam. The Court refused to hear these cases, however, claiming that matters of war were "political questions" best left to Congress and the president to resolve.

Even though the judiciary refused to address the constitutionality of the war, criticism persisted that the president was exceeding his authority as commander in chief. In 1973 Congress passed, over President Nixon's veto, the War Powers Act, a law intended to place limits on how long the president could deploy troops without congressional approval. The law also required presidential notification to Con-

gress when the law was being invoked, and it allowed for Congress, by a vote of both houses, to require withdrawal of troops. Since its passage, the act has been invoked only once by the president, and many scholars claim the law is unconstitutional, citing two grounds: Either it intrudes upon presidential power, or the two-house resolution to mandate withdrawal of troops is an impermissible use of legislative power.

A second civil liberties issue growing out of the Vietnam War surrounded the draft. While some people argued that the war was illegal and therefore the draft for that purpose was illegitimate, others contended that the draft as it was implemented for that purpose was unfair. Specifically, the draft laws in place at the time gave deferments from conscription to individuals who were married and had young children or were expecting a child or who were in college. Many individuals opted to attend college and therefore received deferments from the draft. This meant, in many cases, that more affluent individuals who could afford college did not fight, which left poorer people to be drafted. The result was that draftees were generally people of color and from poor families. Thus, the class and racial divide in those drafted versus those deferred was seen as unfair.

Similarly, many who were drafted but refused to go to Vietnam or fight either fled to Canada or claimed conscientious-objector status. Conscientious objectors had to show religious or moral reasons for being opposed to all wars, not just the conflict in Vietnam. As with the debate over the fairness of the draft along racial and class lines, some critics claimed that those who fled to Canada or objected to the war on religious grounds either were given special privileges or that local draft boards did not sufficiently respect the moral and political disagreements individuals had against the war.

Across the United States, college students and those opposed to the war engaged in protests. These protests led to another set of civil liberties problems—specifically, the right of free speech to protest. In *United States v. O'Brien,* 391 U.S. 367 (1968), the Supreme Court upheld the conviction of an individual who burned his draft card in protest against the war. The Court rejected arguments that such an act was a form of protected speech under the First Amendment. In contrast, in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), the Court upheld the First Amendment right of high school students to wear black armbands in school to protest the war.

Yet many other protests occurred in the streets, and the results were violent. In 1968, Chicago police beat individuals protesting the war when they sought to demonstrate outside the Democratic National Convention. On May 4, 1970, during a protest against the war at Kent State University in Ohio, National Guard soldiers shot and killed four students and wounded another nine. President Nixon called the protesters "bums," and in sympathy for those who had died, over 700 colleges closed.

During the antiwar protests, the Federal Bureau of Investigation, under the guidance of its chief, J. Edgar Hoover, and the Nixon White House engaged in surveillance of the demonstrators. They secretly and illegally wiretapped phones and followed individuals. In addition, Nixon maintained a so-called enemies list, composed mostly of media personalities, and he had these people followed and investigated. All of these actions constituted violations of the Fourth Amendment.

Finally, debates over the reason for U.S. entry into Vietnam reached a major First Amendment confrontation when, in 1971, the *New York Times* sought to publish the *Pentagon Papers.* These papers, released to the media by Daniel Ellsberg, contained secret and confidential information pertaining to U.S. involvement in the war, and the government sought to prevent their publication. However, in *New York Times Co. v. United States,* 403 U.S. 713 (1971), the Supreme Court rejected the government's demand for prior restraint to halt their publication and instead defended the freedom of the press to print the papers.

The issues raised during the Vietnam War have had an enduring impact upon the United States. After the war ended, the draft was halted and has not yet been reinstituted. This arrangement has led some critics to claim that an all-volunteer army is unfair because it still discriminates against the poor who join to find a job, whereas others say that an all-volunteer army respects rights of conscience. Especially since the September 11, 2001, terrorist attacks on the United

States, many scholars note that presidential power to deploy troops and the problems of dissent remain unresolved political and legal issues.

David Schultz

See also: New York Times Co. v. United States; United States v. O'Brien; War Powers Act.

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Village of Belle Terre v. Boraas (1974)

In *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974), the U.S. Supreme Court upheld the right of local governments to enact ordinances that have the effect of defining what constitutes a "single family" and of limiting the number of persons unrelated by blood or marriage who may live together in a single residence. The Court ruled that such an ordinance did not violate the constitutional protections of the Equal Protection Clause of the Fourteenth Amendment and did not infringe legitimate privacy rights.

Belle Terre arose when a group of unrelated students from the State University of New York campus at Stony Brook rented a dwelling in a very small, exclusive neighborhood near the campus on Long Island. The Stony Brook campus had received considerable notoriety when local law enforcement made one or more drug raids there in the late 1960s. The students owned several automobiles, some painted in gaudy colors popular during the 1960s, lived communally, were not married, and engaged in activities on the premises considered undesirable by their tonier neighbors.

The applicable ordinance forbade more than two persons not related by blood or marriage to share a dwelling. Thus, a residence could be occupied by any number of related or married persons but not by three or more unrelated or unmarried persons. It seemed clearly directed at the "hippie" lifestyle of the town's unwanted neighbors.

In a surprising majority opinion, Justice William O. Douglas, long a champion of individual rights when weighed against government regulation, opined that the Belle Terre ordinance was not unconstitutional, as claimed by the plaintiffs, but instead merely reflected the legitimate preferences of the community.

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

In a forceful dissent, Justice Thurgood Marshall argued that

> The instant ordinance discriminates on the basis of . . . a personal lifestyle choice as to household companions. It permits any number of persons related by blood or marriage, be it two or twenty, to live in a single household. . . . Belle Terre imposes upon those who deviate from the community norm in their choice of living companions significantly greater restrictions than are applied to residential groups who are related by blood or marriage, and compose the established order within the community.

Belle Terre generally is regarded as limiting challenges to local ordinances that constitute what is commonly referred to as "exclusionary zoning." Though generally directed at racial minorities or lower-income groups, exclusionary zoning can be used to keep out many socially unpopular groups and activities when these are thought to violate some community standard of decency or to have the alleged potential to decrease property values.

The principal issues *Belle Terre* raises, however, are whether limitations on the civil rights of individuals to associate freely (live with whomever they choose) constitute a violation of the right to privacy or of the equal protection provision of the Fourteenth Amendment. One result of *Belle Terre* has been a split between the federal courts and some state courts on the

definition of "family." A number of state courts, interpreting their own state constitutions, have given a broader definition to "family unit," so as to include more than two unrelated individuals.

James V. Cornehls

See also: Fourteenth Amendment; Right of Unmarried People to Live Together; Right to Privacy; Zoning.

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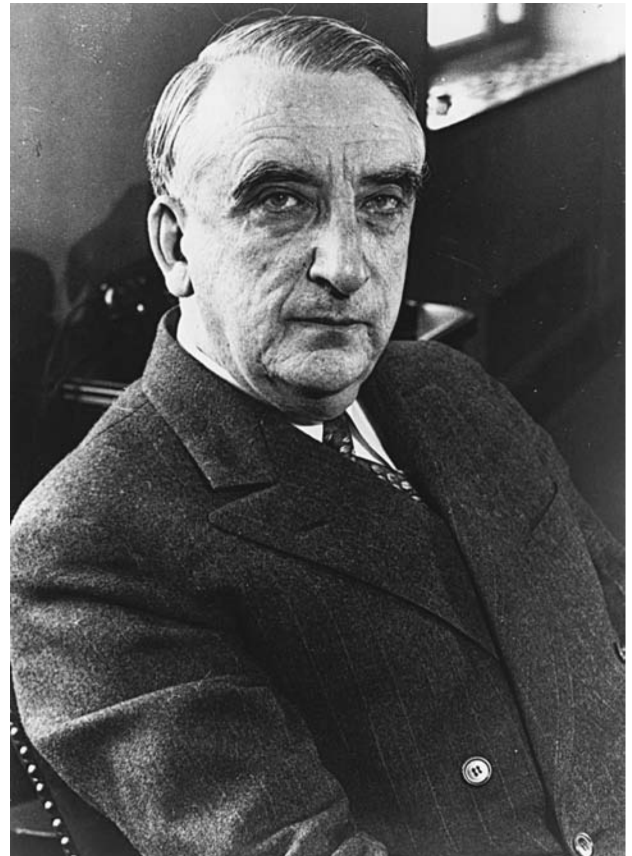
Vinson, Frederick Moore (1890–1953)

Frederick Moore Vinson, the thirteenth chief justice of the United States, was born in Louisa, Kentucky, on January 22, 1890. He began his public career as a city attorney and was elected to Congress as a Democrat in 1922. After serving six uneventful years in a Republican-controlled House, Vinson was defeated in 1928, largely because of his support of Democrat Al Smith for the presidency. Reelected in 1930, Vinson played a leading role during Franklin D. Roosevelt's New Deal in shaping the Social Security Act and in supporting the president's Court-packing plan. In 1938, FDR rewarded Vinson by appointing him to the District of Columbia Court of Appeals, and five years later, the president appointed him director of the Office of Economic Stabilization and, thereafter, director of War Mobilization and Reconversion. President Harry Truman chose Vinson first as his secretary of treasury in 1945 and, after Chief Justice Harlan Fiske Stone died, named Vinson chief justice in June 1946. During his seven-year tenure, Vinson and the Court struggled with constitutional issues raised by the Cold War and the civil rights revolution.

The Cold War and the fear of communism dominated the Supreme Court's docket during this period. Vinson's two major opinions documented his support for the government's loyalty and security programs and revealed his lukewarm sensitivity to claims of individual liberty. In *American Communications Association v. Douds,* 339 U.S. 382 (1950), he avoided the free speech issue and upheld the constitutionality of section 9 of the Taft-Hartley Act, requiring labor union officers to sign non-Communist affidavits, because the statute was reasonably related to a congressional interest in protecting interstate commerce from the consequences of politically motivated strikes. Then in *Dennis v. United States,* 341 U.S. 494 (1951), he directly confronted the First Amendment and affirmed the convictions of eleven Communist Party leaders for violating the Smith Act. In his opinion for the Court, he broadened the clear-and-present-danger test to extend to a conspiracy to advocate the violent overthrow of government and to permit speech to be proscribed, no matter how remote, because the gravity of that evil was so great.

Vinson's commitment to a strong federal govern-



Frederick Moore Vinson, thirteenth chief justice of the United States, 1945. *(Library of Congress)*

ment included a vigorous conception of the presidency, a view reflected in his dissent in *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 (1952). In it he rejected the majority's view that President Truman's seizure of the steel mills was an unconstitutional encroachment on the power of Congress to make law. The president's seizure, he argued, responded to a genuine emergency, avoiding a strike that would have imperiled the conduct of the Korean War, and was a legitimate exercise of his power as commander-in-chief and his duty to enforce congressional statutes authorizing seizure.

During Vinson's tenure, the Supreme Court took decisive action against racial discrimination in education, housing, transportation, criminal justice, voting rights, and labor relations. A moderate on race relations, Vinson made a distinctive contribution to the struggle for racial equality with his unanimous opinions in three major cases. In *Shelley v. Kraemer,* 334 U.S. 1 (1948), he held that judicial enforcement of racially restrictive covenants violated the Fourteenth Amendment's Equal Protection Clause. Two years later, he handed down *Sweatt v. Painter,* 339 U.S. 629 (1950), and *McLaurin v. Oklahoma Board of Regents,* 339 U.S. 637 (1950), on the same day. In *Sweatt* he acknowledged that the white University of Texas Law School and the state's African American law school were not physically equal, but he declined to follow *Plessy v. Ferguson,* 163 U.S. 537 (1896), and require the admission of African Americans. Instead, Vinson crafted a new equal protection standard based on intangible differences and then found that racial segregation in legal education violated the Equal Protection Clause. His *McLaurin* opinion applied his *Sweatt* definition of equality to physical racial barriers created within a formerly all-white graduate school and found that separate classroom, cafeteria, and library seating were inequalities that would handicap the ability of African Americans to receive an effective education.

In 1952 the Court turned its attention to segregation in the public elementary and secondary schools and heard oral argument in five cases, now known by the title of the Kansas case, *Brown v. Board of Education,* 347 U.S. 483 (1954). Instead of deciding them, Vinson announced in June 1953 that the cases would be reargued the following term, but he died of a massive heart attack that September. When the Court reheard the cases, Earl Warren, the new chief justice, presided and handed down in May 1954 a unanimous opinion that relied upon Vinson's *Sweatt* and *McLaurin* opinions to hold that "separate educational facilities are inherently unequal."

William Crawford Green

See also: Dennis v. United States; Stone, Harlan Fiske; Warren, Earl.

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Violence Against Women Act

Congress passed the Violence Against Women Act (VAWA) as a part of the Violent Crime Control and Law Enforcement Act of 1996. The law contained a number of noncontroversial items, such as providing funding for shelters for battered women and for antiviolence education programs, making interstate stalking a federal offense, and providing for the enforcement of protective orders outside the state where they were issued.

The VAWA provision that ultimately became the subject of a Supreme Court case was section 13,981, which proclaimed that "all persons within the United States shall have the right to be free from crimes of violence motivated by gender." It thus defined freedom from gender-based violence as a civil right, a right entitled to federal protection. Victims of crimes animated by gender animus were, under VAWA, entitled to sue their assailants in federal court. The law was modeled on nineteenth-century legislation designed to protect African Americans from racially motivated violence as well as on twentieth-century civil rights laws. As with those laws, VAWA offered the alternative of federal protection against civil rights vi-

olations when states were unwilling or unable to afford that protection, even if the violations were committed by private individuals. The legislation was based on two constitutional grounds—the authority of Congress to regulate interstate commerce and section 5, the enforcement provision, of the Fourteenth Amendment.

The law's framers held hearings over a period of three years during which they collected evidence of the impact of gender-based violence on women's health, education, employment, and general mobility. They found this evidence showed that violence against women had a substantial impact on the national economy. Thus, they believed the law could be enacted within the congressional power to regulate interstate commerce as provided in Article I, Section 8 of the Constitution. The congressional committees also heard testimony, including statements from forty-one state attorneys general, that at least in part based on traditional stereotypes about men and women, states failed to adequately protect women who were raped or battered. Supporters of the legislation thus argued that the failure to afford safety to women was a violation of the Equal Protection Clause of the Fourteenth Amendment. Under section 5 of that amendment, Congress had the power to "enforce by appropriate legislation" the equal protection guarantee.

The court test of section 13,981 developed from the case of Christy Brzonkala, who was allegedly raped by Antonio Morrison and James Crawford when she was a freshman at Virginia Polytechnical Institute and State University. When she sued her attackers in federal court, as provided in VAWA, the lower courts found the law unconstitutional. Both the district court and the Fourth Circuit Court of Appeals held that Congress had exceeded its power under the Commerce Clause and that the law was not a legitimate application of section 5 of the Fourteenth Amendment. Brzonkala appealed to the Supreme Court, and the Justice Department joined her suit.

In a five–four opinion in *United States v. Morrison,* 529 U.S. 598 (2000), Chief Justice William H. Rehnquist (joined by Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas) found the law unconstitutional on both Commerce Clause and Fourteenth Amendment grounds. The majority opinion determined that Congress had exceeded its authority—that violence against women did not fall under the Commerce Clause as it was not an economic activity. In effect, the Court narrowed congressional authority to define what fell into the category of interstate commerce, although courts had deferred to congressional definitions of commerce since the 1930s. In addition, the majority rejected the argument that the law could be upheld under the Fourteenth Amendment, holding that it prohibited equal protection violations by states, but the VAWA remedy dealt with conduct by private individuals.

Some commentators found that although *Morrison* removed the opportunity for victims of gender-motivated violence to sue in federal court, the defeat was mostly symbolic because the remedy would have been used by only a few victims. The remaining provisions of VAWA would affect many more women. Others were troubled by the decision as it seemed to reveal the Court's misunderstanding of violence against women. Supporters of the law had argued that violence against women was deeply embedded in a social structure based on gender inequality. The recognition of a civil right to be free from such violence would have been a step toward full equality for women.

Mary Atwell

See also: Victims' Rights.

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Virginia Declaration of Rights

In June 1776, Virginia's constitutional convention adopted the Virginia Declaration of Rights. Authored by George Mason (1725–1792), it was the first bill of rights adopted in the United States and became

one of the world's most influential documents in the development of civil liberties. Thomas Jefferson borrowed from it the following month in drafting the Declaration of Independence, and James Madison drew from it when he wrote the U.S. Bill of Rights in 1789. French revolutionary Emmanuel-Joseph Sieyès in the same year based the French Declaration of the Rights of Man and of the Citizen on the Virginia Declaration. By 1783, all but two states, Rhode Island and Connecticut, had adopted a bill of rights in some form.

The declaration explicitly protected civil liberties against governmental intrusion, including rights of the criminally accused, right to trial by jury in civil suits, bans on unreasonable searches and seizures, freedom of the press, freedom of religion, and the right to bear arms. The Virginia Declaration contributed greatly to the development of constitutionalism, the notion that written documents ratified by the sovereign people limit the power of government.

PHILOSOPHICAL FOUNDATION

Faced with armed resistance from the colonial militia, the royal governor of Virginia fled to a British warship in 1775, marking the end of British rule in the colony. On May 15, 1776, the Virginia Convention instructed its delegates to the Second Continental Congress in Philadelphia to support independence from Great Britain and voted to establish a committee to prepare a declaration of rights and a constitution for the new state. Mason drafted the declaration between May 20 and 26. He also wrote much of the Virginia constitution. Jefferson penned the constitution's preamble, accusing King George III of tyranny. The convention added sections 10, condemning general warrants, and 14, outlawing the colonial government, to Mason's draft of the declaration. The convention unanimously adopted the declaration on June 12 and the constitution on June 29. These documents became models for subsequent state constitutional conventions.

Mason drew from earlier documents limiting the power of government in the name of liberty, including the Magna Carta (1215), the English Bill of Rights (1689), and his own Fairfax Resolves (1774). He based the declaration on the political theory expressed in John Locke's *Second Treatise of Government* (1690) and William Blackstone's *Commentaries on the Laws of England* (1769). Sections 1–3 of the Virginia Declaration express the social-contract theory of government, under which men are born equal, possessed of inalienable rights to life, liberty, property, and the pursuit of happiness. The purpose of government is to secure these natural rights, and all legitimate government is based on the people's consent. When government fails in its purpose, the people have a right to abolish it. The second paragraph of the Declaration of Independence expresses the same theory, in many of Mason's exact words. Although he owned slaves, Mason condemned slavery as inconsistent with these principles, blaming the institution on English colonial policy.

Mason tempered his emphasis on individual rights with provisions designed to link freedom with responsibility. Section 15 reminds the people that they cannot long enjoy the blessings of liberty unless they firmly adhere "to justice, moderation, temperance, frugality, and virtue." In section 16, he proclaims it to be "the mutual duty of all to practice Christian forbearance, love, and charity toward each other."

ENUMERATION OF RIGHTS

Sections 5 and 6 exalt the separation of powers, periodic and frequent election of legislators and executive officers, term limits, and universal suffrage, as means of preventing tyranny. The Constitutional Convention in 1787, to which Mason was a delegate, incorporated most of these institutions in the plan for the new national government.

Sections 8–13 and 16 of the Virginia Declaration of Rights enumerate the rights of individuals. Section 8 guarantees to persons charged with crimes the right to know the nature of the charges against them, to confront witnesses, to a speedy trial by an impartial jury, to remain silent, and to due process of law. Section 9 contains a ban on excessive bail and fines and cruel and unusual punishments. Section 10 prohibits searches and seizures unless they are authorized by warrants, based on evidence of wrongdoing, specifically describing the place to be searched or the person to be seized. The right to trial by jury is extended to civil suits in Section 11. Section 12 guarantees free-

dom of the press, "one of the great bulwarks of liberty." Mason, in section 13, called standing armies in time of peace "dangerous to liberty" and mandated "a well-regulated militia . . . trained to arms." Mason's initial draft of section 16 spoke of "the fullest toleration in the exercise of religion." James Madison successfully amended this language to read "all men are equally entitled to the free exercise of religion."

Some civil liberties, which were later to be considered fundamental, are missing from the Virginia Declaration of Rights, most notably freedom of speech and a prohibition on government support for religious sects. The Episcopal Church was not disestablished until 1786 when the Virginia legislature passed Thomas Jefferson's Bill for Establishing Religious Freedom.

Toward the end of the Constitutional Convention's deliberations, Mason introduced a motion to include a declaration of rights, seconded by Elbridge Gerry of Massachusetts. Not a single state, however, voted in favor of the motion. Mason and Gerry, in protest, refused to sign the proposed constitution. Mason was vindicated four years later when a bill of rights, in the form of ten amendments, was added to the document.

Kenneth Holland

See also: Bill of Rights; Constitutionalism; Declaration of Independence.

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Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (1976)

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), the U.S. Supreme Court provided some resolution to the confusion it had previously created in commercial speech (advertising) cases and made clear that such speech enjoyed First Amendment protection. In *Valentine v. Chrestensen,* 316 U.S. 52 (1942), the Supreme Court had held that "purely commercial advertising" was not protected by the First Amendment's guarantees of free speech and press. More than three decades later, however, in *Bigelow v. Virginia,* 421 U.S. 809 (1975), the Court, in an opinion by Justice Harry A. Blackmun, concluded that commercial speech that "contained factual material of clear public interest" had some constitutional protection. Although *Bigelow* appeared to extend, in Blackmun's words, "some degree" of First Amendment protection to commercial speech, the Court did not overturn its decision in *Valentine* and emphasized that commercial speech was not protected to the same extent as political speech, although the Court's opinion did not specify the degree of protection to which commercial speech was entitled.

In the *Board of Pharmacy* case, the Court, again in an opinion by Justice Blackmun, attempted to reconcile these two previous decisions. At issue in the case was a Virginia statute that prohibited pharmacists from advertising their prices or credit terms for prescription drugs. A consumer group challenged the law as violating both the pharmacists' right to speak and the public's right to receive information. In a seven–one decision, with only Justice William H. Rehnquist dissenting, the Court held the law violated the First Amendment's protections of speech and press.

On the First Amendment side of the balance, Justice Blackmun noted that individuals have a keen interest in the prices of prescription drugs so that they may make informed decisions regarding allocation of their personal finances. Furthermore, society in general has an interest in the free flow of this information in order to make intelligent decisions concerning im-

portant public policy questions, such as the adequacy of health care or the practices of pharmaceutical companies. Although the state had legitimate countervailing interests in protecting the professionalism of pharmacists and protecting consumers from fraudulent or misleading advertising, the justices held that Virginia could do so by measures less destructive of First Amendment freedoms than an absolute ban on prescription drug price advertising.

The *Board of Pharmacy* case stands for the proposition that the First Amendment forbids the government to prohibit truthful speech about legal products and services. In later commercial speech cases—for example, *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico,* 478 U.S. 328 (1986), and *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996)—the Court's justices were in disagreement over this absolutist position, but all agreed with the statement in *Board of Pharmacy* that, consistent with First Amendment protections of free speech and press, false or fraudulent speech could be prohibited, as could speech advertising illegal products or services.

Michael W. Bowers

See also: Bigelow v. Virginia; Commercial Speech; First Amendment; *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico.*

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Virginia Statute for Religious Freedom

The Virginia Statute for Religious Freedom of 1786, drafted by Thomas Jefferson and pushed through the Virginia legislature by James Madison, outlawed the taxing of individuals to support local churches. The statute is considered a major milestone in the push for separation of church and state and has been called the inspiration for what eventually would become the Establishment Clause of the First Amendment to the U.S. Constitution.

The established church was a fact of life in the American colonies prior to the Revolutionary War. When the colonies formed the United States, establishment of churches was in the forefront of political issues harking back to the founding of each colony. The Puritans who had fled England and its established church to practice their religion wanted that religion to be established. As they developed and spread throughout New England, they were concerned about the "wrong" church being established and became intolerant themselves.

One famous example of such intolerance was the trial of a former Anglican clergyman who found that the Puritans' example of religious freedom did not measure up to his radical ideas. Expelled from the Massachusetts Bay Colony, Roger Williams founded the colony of Rhode Island and Providence Plantations in 1636 as a refuge for people persecuted for their religious beliefs. Anabaptists, Quakers, and Jews settled in Rhode Island. Various other denominations built churches elsewhere in the colonies—Catholics in Maryland, Anglicans in Virginia, and Methodists in Georgia. All practiced varying levels of toleration of other faiths and religions.

Although each sect had ideas of spreading its distinct faith throughout the New World, that possibility was prevented by the variety of religious organizations and the vivid memories of religious wars in the European homelands. Many colonists were refugees from the conflicts of the Reformation and Counter-Reformation or were their first- or second-generation descendants.

In Virginia Colony, the established Church of England (Episcopal) was firmly entrenched. Its mission included a requirement that individuals pay taxes to support local churches, a provision against which the Virginia Statute for Religious Freedom was directed.

Jefferson's draft of the Virginia statute had three sections. The longest, the first, set forth his views on established religion and the woes it had foisted on individuals of every belief and denomination. The third section recognized that the bill would be a mere piece of legislation subject to repeal, but he asserted that rescinding the law would violate what would, in modern terms, be called human rights. The statute

led to the wording of the First Amendment that "Congress shall make no law regarding the establishment of religion, or prohibiting the free exercise thereof."

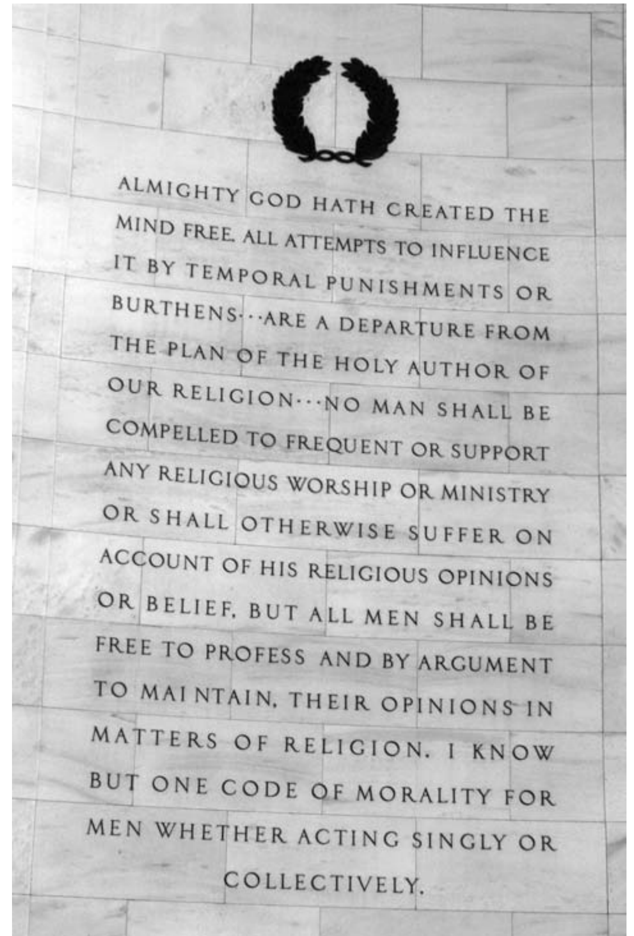
The second section of the Virginia statute contained the rationale that served as foundation for the two religion clauses of the First Amendment:

> We the General Assembly of Virginia do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or [burdened] in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil rights.

The bill initially was submitted to the Virginia General Assembly in 1779 but was defeated by the efforts of the Episcopal Church. That established denomination began losing ground to other sects when the legislature that year denied further tax support for the church. When the act finally passed in 1786, it was despite opposition of the established churches and political leaders, including George Washington, who wanted, as a compromise measure, to establish all Christian churches and support them with tax dollars.

While the religious-freedom bill was still being debated in the legislature, Jefferson and James Madison started the process to have the College of William and Mary in Williamsburg cease granting degrees in divinity. Progress on that front, as with the religious-freedom bill, was incremental. Amid these political battles in Virginia and the other states, Jefferson's ideas became integral to the Constitution, adopted in 1789 and amended with the first ten amendments called the Bill of Rights in 1791. Among these, of course, was the First Amendment. This move was somewhat at odds with nine state constitutions. Rhode Island, New Jersey, Delaware, and Pennsylvania never established religions, but other states did. The last state to disestablish its church was Massachusetts in 1833.

Jefferson remained adamant and wrote to the Baptist Assembly of Danbury, Connecticut, January 1,



Passage from the Virginia Statute for Religious Freedom, Jefferson Memorial, Washington, D.C.
(© North Wind Picture Archives)

1802: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." This use of the metaphor of a wall has continued to resonate throughout U.S. history and law.

In the meantime, there were continuing echoes of the two attitudes that churches needed to be either protected or disfavored. In Virginia as recently as 2001, the U.S. Supreme Court found itself in *Brown v. Gilmore,* 533 U.S. 1301 (2001), dealing with the issue of a statute mandating time for a moment of silence in the state's public schools. The Court in this instance refused to issue an injunction after lower

courts had found a "clear secular purpose" in upholding the statute, even though similar statutes had been struck down. At about the same time, Reverend Jerry Falwell and his Thomas Road Baptist Church successfully challenged the Virginia Constitution in federal court and were granted incorporation papers, the first for a church since the Revolutionary War. In these instances, the courts succeeded in treating religion and its churches like any other organization, thus carrying out Jefferson's intent when he drafted his original bill.

Stanley Morris

See also: Establishment Clause; First Amendment; Jefferson, Thomas; Madison, James; Separation of Church and State.

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Virginia v. Black (2003)

In *Virginia v. Black,* 538 U.S. 343 (2003), the U.S. Supreme Court considered the constitutionality of a Virginia law banning cross burning. The case required the justices to examine the perplexing line between permissible "symbolic speech" protected by the First Amendment to the U.S. Constitution and impermissible conduct. In *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992), the Supreme Court struck down a conviction for cross burning on the basis that it was content-based, since the Saint Paul, Minnesota, ordinance prohibited symbolic acts intended to intimidate but limited only to grounds of "race, color, creed, religion, or gender." By contrast, Virginia's law made cross burning for the purpose of intimidating any "person or group of persons" illegal and specified that an act of cross burning was itself "prima facie evidence of intent to intimidate."

The Virginia law had been applied in two cases. Barry Black had been charged on the basis of a cross that had been burned at a Ku Klux Klan rally in Carroll County, Virginia. Richard Elliott, Jonathan O'Mara, and an unnamed individual were charged with attempting to burn a cross on the lawn of an African American neighbor in Virginia Beach. The Virginia Court of Appeals had affirmed the convictions, but the state Supreme Court held the statute to be unconstitutional on its face.

In her opinion for the majority, Justice Sandra Day O'Connor traced cross burnings to fourteenth-century Scotland and then described how the Klan had taken on this practice in the United States. She concluded that cross burnings had become both "potent symbols of shared group identity and ideology" and "a symbol of hate," often designed to intimidate others. The protection for free speech in the First Amendment was designed to promote a "free trade in ideas," but it did not provide for absolute protection for free speech. Thus, O'Connor and five other justices agreed that laws against cross burnings that were designed to intimidate others, as in the case of Elliot and O'Mara, were permissible, but the lower court should review the case. O'Connor and four other justices further decided that the provision of the law specifying that cross burning was itself prima facie evidence of intimidation, however, rendered Black's conviction unconstitutional, since the ritual could also be used as "a statement of ideology, a symbol of group solidarity," which would be constitutionally permissible.

In a concurring opinion, Justice John Paul Stevens agreed that the First Amendment was not designed to allow for intimidation. In dissent, Justice Clarence Thomas argued that "a page of history is worth a volume of logic." Describing the Klan as "the world's oldest, most persistent terrorist organization," Thomas argued that Virginia had adopted the cross-burning law during the heyday of segregation, making it implausible that it was designed to suppress speech. Given the history of cross burning in America, Justice Antonin Scalia believed it was quite rational for Virginia to conclude that cross burning per se was designed to intimidate. In his partial dissent, Scalia voted to uphold the law on the basis that the law's presumption that cross burning was designed to intimidate was not absolute but was rebuttable by the defendant in court. Justice David H. Souter argued that the Virginia statute was not content-neutral be-

cause it singled out cross burning for special treatment.

John R. Vile

See also: First Amendment; Hate Crimes; Hate Speech; *R.A.V. v. City of St. Paul;* Symbolic Speech.

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Voir Dire

The term "voir dire" is a French phrase that literally means "to see, to say," or "to speak the truth." The term found its way into American legal procedure, and modern usage of it usually refers to the process of jury selection at the beginning of most civil and criminal trials. Whenever a jury is employed as a fact-finding body in a trial, the attorneys have the right to question potential members in order to choose those they feel would best respond to their role as juror. The first mention of a jury dates back to the Greek play *The Eumenides* by Aeschylus in 458 B.C.E. These early juries consisted of between 500 and 6,000 citizens who would hear the cases and determine sentences. By the late 1100s, Henry II had implemented the use of juries in criminal disputes. The jury became a fixed element in the judicial system with the Magna Carta, which stated that a person could not be deprived of his freedom without a jury's consent.

The jury is an important factor in the U.S. justice system. The founding fathers held the institution in high regard and cited the lack of its use as a grievance against Great Britain in the Declaration of Independence. Furthermore, the framers of the Constitution guaranteed criminal defendants the right to a trial by jury in Article III, Section 2, "The trial of all crimes . . . shall be by a jury." The Bill of Rights (the first ten amendments to the Constitution) also addresses juries: The Seventh Amendment assures that civil plaintiffs and defendants will be granted the right to a trial by jury when the trial involves an amount of over twenty dollars. Finally, the Sixth Amendment promises criminal defendants an impartial jury.

The procedure of voir dire is an attempt by the justice system to obtain an "impartial jury." Attorneys are allowed to question and remove jurors they feel are partial or would obstruct the justice system in some way. A portion of society may not serve as members of the jury. For example, excluded from serving on a federal criminal jury are citizens who have a felony charge pending, have been convicted of a felony charge, are unable physically or mentally to perform the duties required, are not a U.S. citizen, are under age eighteen, are not a resident of the district for more than one year, or are unable to read, write, and understand English.

If lawyers feel that a potential juror is clearly partial or biased, they may attempt to use a "challenge for cause." A challenge for cause is an objection to a prospective juror because of obvious bias or other factors that would impede that person's ability to view the case fairly, as the U.S. Supreme Court noted in *Irvin v. Dowd,* 366 U.S. 717 (1961). Other such factors could include kinship or employment relationships with an individual on trial. Attorneys have an unlimited number of challenges for cause, but the judge must sustain, or support, each challenge. Jurors who could be excluded on a challenge for cause include those who lie and those who purposely conceal facts pertinent to the trial. Other prospective jurors who could be excused for cause include individuals who have been victims of crimes similar to the crime charged or who have political or social opinions relating to the case or knowledge of certain factors of the case, such as the defendant's prior criminal record.

Finally, attorneys are entitled to "peremptory challenges" (or strikes). Each side is given a limited number of peremptory strikes that enable the lawyers to exclude a certain number of jurors from service. The number of peremptory strikes allowed varies among individual state courts and federal courts. More peremptory challenges are permitted for death penalty cases than for lesser felonies and misdemeanor trials. From the perspective of attorneys, the benefit of the peremptory challenge is that they are free to strike any

juror they choose without having to establish a good reason. In 1965, in *Swain v. Alabama,* 380 U.S. 202, the Supreme Court's ruling made it difficult to challenge the racially discriminatory use of peremptory strikes. This case was overruled in 1986 when the Supreme Court decided in *Batson v. Kentucky,* 476 U.S. 79, that it was unlawful to strike a potential juror on the basis of race. This decision was extended to prohibit peremptory challenges on the basis of gender in *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127 (1994).

Today many types of juries are used throughout the country. They vary in many ways, including size, type of offense, and court level. The jury remains an integral part of the American justice system, however. It is a clear example of direct democracy at work. In fact, Thomas Jefferson believed the right to trial by jury was more precious to the maintenance of a democracy than even the vote. The process of voir dire greatly affects the jury. Because of this, it is crucial to the maintenance of justice that the jury is representative of the larger community.

Maureen E. Foley

See also: Batson v. Kentucky; Trial by Jury.

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Volstead Act

The U.S. Congress passed the Volstead Act on October 28, 1919, in order to implement the Eighteenth Amendment prohibiting the manufacture, sale, and transportation of alcoholic beverages. The law assigned responsibility for enforcement of prohibition to the federal government. Confronted with widespread disobedience, the U.S. Department of the Treasury and other federal law enforcement agencies engaged in surveillance and in searches and seizures affecting ordinary citizens that led to repeated complaints about violations of civil liberties. Concern about protecting individual freedom contributed to ratification of the Twenty-first Amendment, repealing prohibition, in 1933.

EIGHTEENTH AMENDMENT

In 1916 more than half the candidates elected to the U.S. Congress pledged to support alcoholic prohibition. U.S. entry into World War I the following year provided the opportunity for them to act. The war produced a shortage of grain, and Congress, in order to protect the nutritional uses of grain and the morals of soldiers, passed a wartime prohibition on the production of alcoholic beverages. Republicans in Congress, faced with demobilization and a return to a peacetime economy, proposed the Eighteenth Amendment on December 18, 1917.

The final state ratification of the Eighteenth Amendment occurred January 16, 1919. The amendment, however, was not self-enforcing and needed enabling legislation. A Republican member of the House of Representatives, Andrew Joseph Volstead of Minnesota, proposed the needed law. A reformer, he also advocated, unsuccessfully, a federal antilynching law. President Woodrow Wilson, a Democrat, vetoed the prohibition bill, but Congress overrode the veto by a two-thirds vote in both chambers. The National Prohibition Enforcement Act, as it was officially named, took effect January 17, 1920.

In section 1, the law simply continued the wartime prohibition on the production of intoxicating drink. Section 3 banned the possession of intoxicating liquor as well as its manufacture, sale, and transportation. The law defined a banned beverage as one that contained more than 0.5 percent alcohol. It set the penalties and fines for violation. The act did permit physicians to prescribe the use of alcohol for medicinal purposes and churches to use wine in sacraments. It also allowed private persons to possess and consume liquor in their homes. Congress assigned responsibility

Florence Prag Kahn (R-CA), John Phillip Hill (R-MD), and Mary Teresa Norton (D-NJ), members of the unofficial committee on the modification of the Volstead Act, 1926. The 1919 law had ushered in the Prohibition era.
(Library of Congress)

for enforcement to the commissioner of the Bureau of Internal Revenue, an officer within the Department of the Treasury. The U.S. attorneys located in federal judicial districts under the direction of the U.S. attorney general were responsible for prosecutions under the act. The law did not outlaw the consumption of intoxicating liquors but only their manufacture, sale, transportation, import, or export.

ENFORCEMENT

In 1920 Congress appropriated funds to hire special inspectors who reported to a prohibition commissioner. Congress took further efforts in 1927 to bolster enforcement by establishing the Bureau of Prohibition. In 1930 Congress transferred responsibility for enforcement to the Department of Justice, an agency under the control of the attorney general. There were never enough agents, investigators, or Customs Bureau employees to stem the illegal manufacture, sale, and importation of liquor. There were only 1,520 prohibition agents in 1920 and 2,836 in 1930. The highest-paid agent earned $50 a week. Cooperation from state and local law enforcement officers was minimal. In 1925 there were an estimated 100,000 "speakeasies," clubs that illegally served liquor, in New York City alone. Congress lacked the will to provide the funds necessary for effective enforcement.

The term "Volsteadism" came to mean the intolerable searches, seizures, and shootings by police who seemed to threaten intrusion into the private lives of law-respecting persons. In response to gangland shootings and widespread corruption of law enforcement

officers, President Herbert Hoover created the National Commission on Law Observance and Enforcement, chaired by George Wickersham, in 1929. The Wickersham Commission report acknowledged the lack of enforcement of the Volstead Act but refused to support expanding the federal government's power to conduct warrantless searches and seizures. It called for substantially higher appropriations from Congress for enforcement.

The Volstead Act had unintended consequences not only for Fourth Amendment rights against unreasonable searches and seizures but also for the Second Amendment right to keep and bear arms. Criminal gangs, led by such ruthless men as Al Capone, attempted to monopolize the supply of intoxicating beverages. In 1929 alone, Capone is estimated to have earned $60 million from the illegal sale of liquor. Violent armed conflicts between gang members and law enforcement agents in their efforts to subdue the gangs led to legislation restricting the use of guns. In 1924, Congress held hearings on "Firearms and Intoxicants in the District of Columbia" in response to an incident in which a stray bullet had wounded Senator Frank Greene of Vermont in a shootout between police and bootleggers. Congress imposed a permit requirement for carrying handguns in the nation's capital and a ban on mail-order handguns, the first federal legislation regulating firearms.

The Volstead Act, according to its critics, also restrained religious liberty. Attorney Clarence Darrow compared prohibition to the Spanish Inquisition. The advocates of prohibition were overwhelmingly Protestant. Roman Catholics complained that the law deprived them of the free exercise of their religion as guaranteed by the First Amendment. Immigrants from Catholic regions such as Ireland, Italy, southern Germany, and Poland said Congress singled them out, because the consumption of alcoholic beverages was a deeply rooted custom in their native lands.

REPEAL

Republican presidential nominee Herbert Hoover referred to prohibition as a noble experiment during the 1928 campaign. He easily defeated his Democratic opponent, Alfred E. Smith, a Roman Catholic who opposed prohibition. By 1931, however, public opinion had shifted dramatically. The Association Against the Prohibition Amendment (AAPA) led the campaign to repeal the Eighteenth Amendment. The AAPA was nonpartisan, well organized, and well funded. Its members were wealthy and influential citizens in all states who feared that the federal government, by means of prohibition, might permanently compromise the tradition of individual liberty. In 1932 the Democratic Party came out clearly in favor of repealing prohibition and won a large majority of seats in Congress. On February 20, 1933, Congress approved a constitutional amendment repealing prohibition. On March 22 Congress amended the Volstead Act to permit the sale of 3.2 percent beer and wine. Special state ratifying conventions approved the Twenty-first Amendment in December 1933, thus voiding the Volstead Act.

Kenneth Holland

See also: First Amendment; Fourth Amendment; Second Amendment; Victimless Crimes.

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Vulgar Speech

The U.S. Supreme Court has held that except in very limited circumstances, the First Amendment to the

Constitution prohibits government from censoring speech simply because it is vulgar or offensive. Although "vulgar speech" is not technically a legal term, states and the federal government have often claimed that certain censorship or punishment of speech is permissible, even under the Free Speech Clause of the First Amendment, because the speech at issue is vulgar or otherwise offensive. The Supreme Court has generally rejected these arguments except in limited circumstances involving schools or a particular likelihood that children will be exposed to vulgar speech being broadcast, such as by radio.

The Court most clearly addressed the issue of whether certain speech could be prohibited simply because it was vulgar in *Cohen v. California,* 403 U.S. 15 (1971). In that case, Paul Cohen was sentenced to thirty days' imprisonment for the "offensive conduct" of wearing a jacket emblazoned with the words "Fuck the Draft" in a county courthouse. The Court first noted that under the First Amendment government generally may not dictate the form or content of speech except in the case of very limited categories of expression that do not receive First Amendment protection, such as "obscenity" or "fighting words." The Court held that Cohen's jacket did not meet the legal test for obscene speech since it was in no way erotic, nor did it meet the test for fighting words because it was not a personal insult directed at provoking a particular individual to commit an immediate breach of the peace.

The Court considered California's main claim that there was a state interest in protecting the public from particularly offensive words and rejected it for three reasons. First, the state's argument was boundless, since it would be difficult to define what words could be considered criminally offensive. Second, the Court held that the emotive impact of speech was protected just as much as the cognitive content of the words chosen, and Cohen's jacket conveyed "otherwise inexpressible emotions." Finally, the Court reasoned that censoring particular disfavored words could be used a pretext for censoring disfavored ideas. In upholding Cohen's right to speak, the Court remarked that although offensive speech may sometimes be part of the "verbal cacophony" created by the First Amendment, such speech was a sign of the strength of the commitment to peaceful exchange of ideas and must be tolerated because it is "often true that one man's vulgarity is another's lyric."

In the public school setting, however, the Court has been willing to give school officials greater latitude in restricting speech because it is vulgar, lewd, or plainly offensive. In *Bethel School District v. Fraser,* 478 U.S. 675 (1986), the Court held that it was permissible to punish a student for making a speech at a school assembly that was rife with sexual innuendo and that school officials considered vulgar and offensive. The Court's previous precedent recognized that students maintained certain First Amendment rights and could not be punished unless their speech caused disruption, but in *Fraser,* the Court held that the schools also had a duty to teach students to be civil, including teaching students not to use vulgar and offensive terms in public discourse. Likewise, in *Board of Education v. Pico,* 457 U.S. 853 (1982), the Court rejected the claim by school officials that they could remove books from a school library because they contained unorthodox or controversial ideas, but the Court seemed to assume that school officials could remove books that were pervasively vulgar.

In *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726 (1978), the Court allowed greater regulation of offensive or vulgar speech in the context of broadcast, based on the concern that unsupervised children would have access to the speech, at least when such broadcast took place during the day. Interestingly, however, six of the nine justices rejected the suggestion that vulgar speech occupied a lower rank in the First Amendment hierarchy and could therefore be subject to greater regulation. Thus, the *Pacifica* case appears to stand for the proposition that the FCC may require broadcasters to channel vulgar speech into time slots when children are less likely to be exposed to it, but the case does not support the claim that such speech could be banned outright.

In *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997), the Court rejected a further expansion of this sort of regulation of vulgar or offensive speech that had been upheld in *Pacifica* when it held that a federal law that made it a crime to make "indecent" and "patently offensive" speech available to minors on the Internet violated the First Amendment. The Court held that the Internet was not as intrusive as

broadcast and therefore speech on the Internet was fully protected by the First Amendment. Since it was impossible to know if an individual accessing a Web site was a minor, the law would impermissibly limit the level of speech available to adults to only speech that was appropriate for children.

J. C. Salyer

See also: Bethel School District v. Fraser; Board of Education v. Pico; Cohen v. California; Federal Communications Commission v. Pacifica Foundation; First Amendment; *Reno v. American Civil Liberties Union.*

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Waite, Morrison Remick (1816–1888)

Morrison Remick Waite—the seventh chief justice of the United States, serving 1874–1888—was born in Lyme, Connecticut. A competent administrator, Waite proved to be essentially an economic and constitutional conservative (as were many justices during his time) when deciding property rights cases as well as issues involving civil liberties.

After graduating from Yale College in 1837, Waite moved to Ohio where he read law and was admitted to the bar in 1839. He was elected to the Ohio legislature as a Whig in 1849 and served one term. After unsuccessful campaigns for Congress in 1846 and 1862, he declined an appointment to the Ohio Supreme Court.

Waite gained national prominence in 1871 when President Ulysses S. Grant appointed him to serve as one of three U.S. counselors at the Geneva Arbitration Tribunal established to settle claims against Great Britain arising out of that nation's assistance to the Confederacy during the Civil War. Upon the death of Chief Justice Salmon P. Chase, Waite was nominated for the post by President Grant—though only after six other individuals either declined the nomination or had their nomination withdrawn.

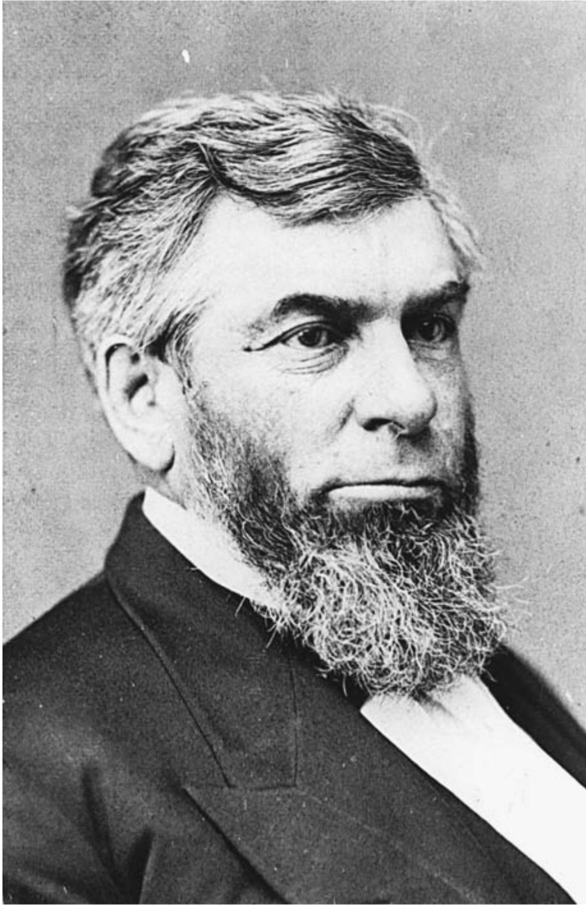
In *Minor v. Happersett,* 88 U.S. 162 (1875), he wrote for a unanimous Court that the Fourteenth Amendment did not grant suffrage to women, because suffrage was not a right of citizenship. He asserted that "the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage . . . the constitutions and laws of the several states which commit that important trust to men alone are not necessarily void."

Two 1876 decisions—*United States v. Reese,* 92 U.S. 214 (1876), and *United States v. Cruikshank,* 92 U.S. 542 (1876)—narrowed the protection of the newly freed slaves. Both cases dealt with the Fifteenth Amendment, passed after the Civil War, which provided that neither the federal nor any state government could infringe on the individual's right to vote on grounds of race or previous status as a slave.

Waite wrote for an eight–one Court in *Reese* that "The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude." This opinion voided a portion of the Enforcement Act of 1870 and narrowed the scope of the Fifteenth Amendment.

In *Cruikshank,* a unanimous Court weakened the Fifteenth Amendment by holding that punishment for offenses committed in the Reconstruction Louisiana "Colfax massacre" (over a disputed gubernatorial election) lay with the state, not the federal government. White men had been arrested for breaking up an African American political meeting and were indicted under a section of the congressional Enforcement Act of 1870 that disallowed interference with a person's federal rights. Chief Justice Waite, writing for a unanimous Court, held that the Fifteenth Amendment had not granted the suffrage to African Americans. Consequently, the defendants had not violated any federal right. Waite's opinion concluded that the right of suffrage was not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race was. The right to vote in the states came from the states, but the right of exemption from the prohibited discrimination came from the United States.

Another case in which Waite was indifferent to protecting the rights of African Americans was *Neal v. Delaware,* 103 U.S. 370 (1880). An African American had been convicted of rape by an all-white jury in New Castle County, Delaware. The Court found that William Neal was deprived of equal protection of the law on the basis that African Americans had been excluded from the jury. Waite dissented, believing the



The nation's seventh chief justice, Morrison Remick Waite served from 1874 to 1888. He generally favored the states in the areas of economic regulation and civil liberties and rights and was less sympathetic to the plight of African Americans. *(Library of Congress)*

exclusion of African Americans from the jury did not deprive Neal of equal protection.

In the first church-state case to come before the Court as a result of the Grant administration's effort to eliminate Mormon polygamy, *Reynolds v. United States,* 98 U.S. 145 (1879), Waite wrote for a unanimous Court to uphold the conviction of a Mormon in such a marriage. The Court held that federal statutes constitutionally could punish criminal activity regardless of religious beliefs. The polygamist was free to believe that he ought to have multiple wives, but he was not free to act on this belief. Waite wrote that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."

In the *Civil Rights Cases,* 109 U.S. 3 (1883), Waite was with an eight–one majority declaring unconstitutional provisions of the Civil Rights Act of 1875 that prohibited racial discrimination in hotels and other public accommodations. This decision discouraged federal efforts to protect African Americans from private discrimination and cast constitutional doubts on the ability of Congress to legislate in the area of civil rights.

An effective judicial administrator, Waite wrote for the Court 872 times during his fourteen years on the Court. He generally favored the states in the areas of economic regulation and civil liberties and rights—areas that showed him to be unsympathetic to the plight of blacks in the United States.

Mark Alcorn

See also: Judicial Review; *Reynolds v. United States;* State Action.

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Wallace v. Jaffree (1985)

In *Wallace v. Jaffree,* 472 U.S. 38 (1985), the U.S. Supreme Court struck down an Alabama law providing for a daily minute of silence in public school classrooms "for meditation or voluntary prayer." At issue was whether this practice infringed the Establishment Clause of the First Amendment to the U.S. Constitution; under that clause, government cannot engage in activity that would constitute "establishment of religion."

Alabama enacted three laws between 1978 and 1982 on school prayer. The first required a minute of silence for meditation; the second authorized a moment of silence "for meditation or voluntary prayer"; the third allowed teachers to lead students in spoken prayer. Ishmael Jaffree, a father of three schoolchildren, challenged the laws. *Wallace v. Jaffree* involved the second law.

A federal district court upheld the law on the grounds that nothing in the U.S. Constitution prohibited Alabama from establishing a state religion. The federal appellate court, however, ruled the law unconstitutional as being a violation of the Establishment Clause of the First Amendment. In a six–three decision, the Supreme Court agreed.

Justice John Paul Stevens, writing for the majority, invoked *Lemon v. Kurtzman,* 403 U.S. 602 (1971), which had provided a guide for deciding Establishment Clause cases. Under the *Lemon* test, legislation must have a valid secular purpose. By examining legislative intent, including insertion of the phrase "or voluntary prayer" and a statement by the bill's sponsor that it was "an effort to return voluntary prayer" to the schools, Stevens concluded that the Alabama law failed the test. He explained that Alabama's intent was an unconstitutional state endorsement of prayer and not the same as "merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence."

Justice Lewis F. Powell Jr. in a concurring opinion defended the *Lemon* test as a useful guide. He noted that both lower courts agreed the law had no secular purpose though disagreed on whether this rendered the law unconstitutional. He thought a plain moment of silence might be justified in secular terms and could pass the *Lemon* test.

Justice Sandra Day O'Connor in her concurring opinion defended the *Lemon* test but also called for its refinement by means of the "endorsement test" she had proposed in *Lynch v. Donnelly,* 465 U.S. 668 (1984). Using this test, the Court's job was not just to apply the *Lemon* criteria but to determine "whether the government's purpose is to endorse religion and whether the statute actually carries a message of endorsement." This, she believed, would prevent courts from reaching absurd conclusions about impermissible interactions between government and religion. O'Connor also speculated that a law mandating a simple moment of silence would not face constitutional obstacles: "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren."

Chief Justice Warren E. Burger and Justices Byron R. White and William H. Rehnquist dissented. Burger disagreed with the Court's assessment of legislative intent. He said the statute was meant to clarify children's right to pray voluntarily at school, and rather than moving toward an established religion, it promoted religious freedom. White posed a question: How would a teacher respond if a student asked whether prayer was allowed during the moment of silence? He thought the teacher would have to answer affirmatively. Thus the Alabama legislature had simply addressed this issue before it arose. Rehnquist used his dissent to offer historical support for his view that neither the "wall of separation" metaphor nor the *Lemon* test reflected the original intent of the authors of the Establishment Clause.

Jaffree broke no new ground because the Court had already forbidden government promotion of prayer in school. Nor did it entirely resolve the moment-of-silence issue, since the justices, despite hints, avoided ruling definitively on whether a plain moment of silence was constitutional.

Jane G. Rainey

See also: Establishment Clause; Free Exercise Clause; *Lemon v. Kurtzman.*

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War on Drugs

The "war on drugs" began during the presidency of Richard M. Nixon and has played a role in every pres-

idential administration since. Its impact has had a ripple effect throughout the United States, not only for the large increase in law enforcement expenditures and incarcerations but also for its widespread effect on civil liberties.

When the war on drugs began under President Nixon, antidrug policies were separated into two general camps, one focused on reducing supply, the other on reducing demand. Supply-reduction strategies sought to decrease the availability of drugs by limiting access to drug sources and increasing punishment for possession and distribution. Demand-reduction strategies sought to lower demand for illegal drugs through drug use prevention and treatment.

President Nixon's initial drug policy reserved a large place, and more than half of the drug control budget, for drug treatment. The treatment focus was soon abandoned and U.S. drug policy thereafter shifted the focus to supply reduction. Presidents Gerald Ford and Jimmy Carter did not make the war on drugs a centerpiece of their agenda, but President Reagan revamped the effort with his "Just Say No" campaign (also promoted by his wife, Nancy). He also primarily embraced a supply-reduction strategy by focusing on interdiction, seizure, and criminal prosecution.

President George H. W. Bush then established a national office of drug policy, appointed a drug "czar," increased antidrug spending, and intensified drug law enforcement efforts. His Department of Justice also adopted tough anticrime policies that required federal prosecutors to push for lengthy drug sentences, and Congress established mandatory prison sentences for many federal drug offenders. As a result, the average federal drug sentence increased from about four and a half years in 1980 to more than seven years in 1992.

President William J. Clinton then increased the antidrug budget by 25 percent, proposed expanded drug testing rules, and intensified efforts toward drug interdiction and prosecution. The war on drugs continued into the presidency of George W. Bush. In 2004, almost one quarter of America's 2 million inmates (and 61 percent of federal prisoners) were in prison for drug offenses, costing the states alone $5 billion annually.

Many of the various administrations' efforts to curtail drugs and drug use have raised major issues pertaining to civil liberties. Confinement is only one weapon deployed against drug offenders. Under federal law, many offenders who have served their sentences find they are ineligible for health benefits, food stamps, college loans, and public housing. Indeed, in *Department of Housing and Urban Development v. Rucker,* 535 U.S. 125 (2002), the U.S. Supreme Court even ruled that a drug user's parents could be constitutionally evicted from public housing on the basis of their child's use of drugs.

First lady Nancy Reagan speaking at a "Just Say No" rally in Los Angeles, May 1987. *(National Archives)*

Many of the liberties protected under the Bill of Rights (the first ten amendments to the Constitution) have been affected by the war on drugs. The Fourth Amendment's restriction on search and seizure has been implicated because in order to unearth drug crimes, the police often engage in wiretapping, surveillance, and undercover operations. They also offer

reduced sentences to drug users who provide information on suppliers. Police most often search individuals and their automobiles if probable cause exists to justify a search. The determination of whether probable cause existed to justify an individual's arrest for drug possession is debated countless times every day between prosecutors and defense attorneys in courtrooms across America. The Fourth Amendment requires an officer to have "reasonable suspicion" before stopping an individual to search for drugs. The reasonable-suspicion test requires the police officer to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant that intrusion. In *United States v. Arvizu,* 534 U.S. 266 (2002), the Court held that whether a police officer's inferences were justified required consideration of the "totality of the circumstances," not just one aspect.

In *Katz v. United States,* 389 U.S. 347 (1967), the Court held that warrants were required for wiretapping, but the Court subsequently has held that Fourth Amendment protections do not apply in nonwiretapping cases to circumstances in which an individual does not have a reasonable expectation of privacy. Businesses, schools, and government agencies now increasingly require intrusive drug tests. In *Vernonia School District v. Acton,* 515 U.S. 646 (1995), the Supreme Court approved a high school's requirement of drug testing for students to participate in athletics, a requirement subsequently approved in *Board of Education v. Earls,* 536 U.S. 822 (2002), for all students engaged in extracurricular activities.

The war on drugs has also raised issues under the Fifth Amendment, particularly the Takings Clause. The Takings Clause, which forbids government seizure of private property without compensation to the owner, does not apply to contraband—illegal goods such as drugs. However, the asset-forfeiture laws that were created as part of the war on drugs permit the seizure of goods if police assert they have reason to believe the property facilitated a drug crime. If any drugs are found on any property, that property is considered to have facilitated a drug offense, and the seizure of perfectly legal goods often results. The burden of proof for demonstrating the property's innocence falls upon the rightful owner.

Recent decisions of the Supreme Court have focused on the Eighth Amendment's provision prohibiting cruel and unusual punishment. Tough anticrime measures such as "three strikes and you're out" have been enacted in part to fight the war on drugs. In *Ewing v. California,* 538 U.S. 11 (2003), the Court held five–four that these policies did not constitute cruel and unusual punishment. Similar laws have been enacted to enhance punishment for possession of weapons or selling drugs near schools. These laws have increased the proportion of convicted drug dealers sentenced to prison and increased the length of their sentences.

Another core right to come under attack has been freedom of speech. In 1996, California passed Proposition 215 providing protection from state prosecution to patients who chose to use marijuana for medical purposes upon the recommendation of their doctors. Federal officials responded by pledging to punish doctors who recommended medical marijuana. The threats included revocation of the doctor's prescription drug license, loss of Medicare/Medicaid provider status, and criminal prosecutions.

The war on drugs has been an ongoing feature of U.S. law and politics for more than three decades. After the September 11, 2001, terrorist attacks in New York City and Washington, D.C., and the failed attempt in Pennsylvania, the public exhibited some willingness to forgo a degree of privacy in return for added safety, but the focus of the war on drugs shifted slightly from supply reduction to demand reduction. This shift may lessen the war's impact on civil liberties. Ballot initiatives to legalize small amounts of drugs, especially marijuana, continue to find public support, and some states have begun requiring that first-time drug offenders be placed on probation and afforded drug treatment. A continued shift to reduce demand and prison sentences for small amounts of drugs will likely result in less governmental intrusion and litigation.

James Barger

See also: Board of Education v. Earls; Ewing v. California; Takings Clause; Three-Strikes Laws; *Vernonia School District v. Acton.*

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War Powers Act

In 1973 the Vietnam War continued raging even as citizens were engaging in ever-stronger protests against it. In response to actions ordered by the president that were inconsistent with the tone of public opinion about the ongoing war and specifically the bombing of enemy positions in Cambodia, Congress enacted the War Powers Act of 1973. Passed over the veto of President Richard M. Nixon, the law called on the commander-in-chief to consult with Congress before placing military forces in a position of imminent hostility.

Although the Constitution provides a separation of powers between the president's ability to "make war" and the ability of Congress to "declare war" and control the funds needed by the president (the power of the purse), there have been about 230 instances of the use of the U.S. military abroad. Congress has declared war only five times. In other instances, local military commanders have taken actions on behalf of the United States; in most other occurrences, the actions were ordered by the president. As early as 1798, local commanders at times must have acted independently, simply because of the inability then to communicate with higher authority. This explanation could have accounted for military actions before the development of rapid communications, but nearly half the incidents occurred after World War I. In the post–World War II era, there have been over eighty U.S. interventions abroad, including in Grenada (1983), Panama (1989), the Gulf War (1991), the former Yugoslavia (1999), and Iraq (2003).

The 1973 legislation requires the president to report to Congress on any action that places the military at risk, and without the approval of Congress, the president must withdraw forces in sixty days. This mechanism by which lack of consent by Congress triggers an event has been termed a "legislative veto." The legislative veto included in the War Powers Act has not been directly challenged, but the Supreme Court in *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919 (1983), considered a legislative veto in the immigration context (by which either house could invalidate an executive branch decision to allow a deportable alien to remain in the country) and found it unconstitutional. *Chadha* could be an important precedent in any challenge to the legislative veto of the War Powers Act.

There have been attempts to evaluate the compliance and value of the legislation. U.S. Department of State and congressional evaluations of the policy revealed that of the seventy-six reports submitted under the act, only the 1975 *Mayaquez* seizure off of Cambodia cited the section that triggered the time-frame requirements. In all other reports, the actions precipitated congressional action, but this came often in the form of support resolutions.

Critics of such legislation point out that the modern-day president must have immediate control of military forces to permit quick and adequate response to security threats. Supporting this contention is the example President Gerald Ford discussed in his memoirs about the 1975 evacuation of Saigon, Vietnam, when Congress was in recess and the senior members quite literally were spread across the globe. The final days of the war in Vietnam exemplifies the problems with the act. In 1975, President Ford ordered the evacuation of U.S. citizens and foreign nationals from Vietnam and Cambodia. These events and the *Mayaquez* rescue were reported in accordance with the War Powers Act. The executive branch contended that the consultation requirement was met through the notification process. Congressional leaders argued that consultation demanded the offering

and the consideration of congressional opinion before the president used armed forces.

The impact of the War Powers Act on civil liberties is multifaceted. It can have a direct and devastating impact on the citizen-soldier, who is placed at risk by actions the president orders without the consent of the Congress. Concerns over the extent of presidential powers have been expressed by political scientists and public representatives to the extent that thirty-one members of the House of Representatives brought suit against President William J. Clinton in 1999 to discontinue military operations in the Balkans, at least partly to have a court decide the constitutionality of the War Powers Act. The court held that the plaintiffs lacked "standing" (no right to bring suit) on the issue; this holding was later affirmed by the U.S. Supreme Court. Further, the case was considered moot; the operations were complete by the time the case was brought by Representative Tom Campbell (R-CA) and his House colleagues.

The balance of power between the legislative and executive branches is in constant flux. The experiment known as the War Powers Act was an attempt to increase the communication between Congress and the president but without eliminating the president's ability to react to a military crisis. The policy failed to meet that objective in several instances, however, and the result was additional strife between the branches of government.

The political conflict between the executive branch and the legislative branch was designed into the Constitution. The level of conflict between the branches of government has varied with the dynamics of national and international activity. Overall, however, the congressional effort to curtail the president's power via the War Powers Act has been circumvented by the manner of reporting used by the last six presidents.

Important questions regarding the War Powers Act remain after thirty years: Is the act consistent with the concept of separation of powers? Does the act weaken the presumed power structure of government where an adverse impact on civil rights could result? There are three potential answers: First, the act should be repealed as unconstitutional and as encroaching on the powers of the presidency; second, the act has been functional and achieved the goal of increased consultation between the president and Congress; third, the act should be strengthened through removal of time constraints in the legislative veto clause or the addition of a joint resolution clause.

The policy options are complex, but the need for a commander-in-chief to anticipate or react to military conflict should remain unencumbered. Congress has other means to prevent the country from becoming mired in another Vietnam. Still, changes in the modern world have often left the United States in the position of providing a peacekeeping function; U.S. military personnel remained in the Balkans, Afghanistan, and Iraq for months or years after cessation of direct hostilities. The War Powers Act may be outmoded, but even if the legislation remains unchanged, it will have far-reaching effects on performance of the United States in international politics.

Kevin G. Pearce

See also: Checks and Balances; Vietnam War.

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Warren, Earl (1891–1974)

Earl Warren was the fourteenth chief justice of the United States, serving from 1953 to 1969. Born in Los Angeles, California, in 1891, Warren grew up in Bakersfield and graduated from the University of California School of Law in Berkeley. He left private law practice in 1920 and over the next half century served in a variety of public offices. He was a district attorney for fourteen years, winning reelection three times after his initial appointment. Warren served as California attorney general (1939–1943) and was elected governor in 1943, the only California governor to be elected three successive times. In his last reelection, the popular incumbent ran unopposed, having won both the Democratic and Republican nominations.

Warren was nominated as the candidate for vice

Chief Justice Earl Warren is escorted through a crowd of protesters, 1963. *(Library of Congress)*

president on the Republican ticket with Thomas Dewey in 1948, the only election he would ever lose. The ambitious Warren was interested in the Republican nomination for president in 1952, but the nod went to popular war hero General Dwight D. Eisenhower.

Warren's pre-Court experience contrasted sharply with some of his decisions on the Court. During World War II, he helped orchestrate the removal of Japanese American citizens to internment camps, one of the darkest chapters in U.S. history. Warren repeatedly defended the decision, saying that it was a reasonable response to the times. In his autobiography, however, he expressed great regret for the policy. On the Court, Warren was a strong defender of equal rights. As a prosecutor, he was considered tough on crime, but the Warren Court was unparalleled in protecting the rights of criminal defendants. Finally, Warren made part of his reputation in California opposing nominations and candidacies by engaging in red baiting, but on the Court he sought to protect the rights of alleged Communists. In general, the moderate-conservative governor became the liberal chief justice.

President Eisenhower was reported to have promised Warren the first vacancy on the Supreme Court in part because Warren helped deliver California to Eisenhower at the 1952 Republican convention. At the outset of the administration, Eisenhower considered Warren for the position of solicitor general. The sudden death of Chief Justice Frederick M. Vinson

created a vacancy on the Court, and Eisenhower reportedly was set to renege on the promise because he did not want Warren to be chief justice. Eisenhower's hand was forced, however, and he offered the position to Warren. After some opposition, directed more at delaying the vote than rejecting the nomination, Warren was confirmed March 1, 1954, and took over as chief justice in the middle of the *Brown v. Board of Education* desegregation case, which was already on the Court's docket. Warren was credited for providing the leadership that helped the Court achieve unanimity in *Brown,* 347 U.S. 483 (1954). His opinion in the case was a precursor to his jurisprudence in that it was not based solely on traditional legal analysis or precedent but incorporated social science data and psychological research as well.

The Supreme Court had drifted under the leadership of Vinson and was facing many unprecedented civil rights and civil liberties issues. Eisenhower assumed that he appointed a moderate conservative who reflected his brand of Republicanism when he chose Warren, but he was ultimately disappointed. In one of his final press conferences as president, Eisenhower reportedly claimed that the appointments of Warren and Justice William J. Brennan Jr. to the Court were the two biggest mistakes of his presidency. After a moderate voting record in his first term, Warren turned dramatically to the liberal side over the remainder of his career on the Court. Warren's apparent change from a moderate to a progressive Republican is often cited as the classic example of why presidents should be reluctant to appoint elected officials to the Supreme Court.

Warren presided over a constitutional revolution that dramatically expanded civil rights and civil liberties. Under his leadership, the Court incorporated many provisions of the Bill of Rights and applied them to the states via the Due Process Clause of the Fourteenth Amendment. The Warren Court also continued the expansion of civil rights, extended the reach of the First Amendment, and created the right to privacy. Among the most important and controversial decisions of the Warren Court were *Engel v. Vitale,* 370 U.S. 421 (1962), banning organized state written prayer in the classroom; *Roth v. United States,* 354 U.S. 476 (1957), narrowing the definition of what was obscene; *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), doing likewise for what was libelous; *Mapp v. Ohio,* 367 U.S. 643 (1961), extending the exclusionary rule to the states; *Miranda v. Arizona,* 384 U.S. 436 (1966), requiring police to give *Miranda* warnings; *Gideon v. Wainwright,* 372 U.S. 335 (1963), extending the right to counsel for indigents in all felony cases; *Reynolds v. Sims,* 377 U.S. 533 (1964), mandating one person, one vote in apportioning legislative districts; and *Griswold v. Connecticut,* 381 U.S. 479 (1965), striking down a Connecticut birth control law on the basis of a judicially crafted right of privacy.

Warren guided the Court during a period of great judicial activism. The Court finally fulfilled the potential of footnote four of *United States v. Carolene Products Co.,* 304 U.S. 144 (1938), and the preferred-position doctrine that promised the protection of individuals and insular minorities. He helped redefine the role of the Supreme Court as the protector of individual rights and liberties.

Despite the major landmark decisions such as *Brown, Mapp,* and *Miranda,* Warren claimed that the reapportionment decisions, such as *Reynolds v. Sims,* were the most important of his stewardship. Warren felt that equal representation in Congress and the state legislature would help the poor acquire political muscle that would be translated into favorable public policies.

Warren was undoubtedly the most liberal chief justice in Supreme Court history. Historians generally regard him as second only to John Marshall among the great chief justices. Warren's excellence was more a function of his leadership than his constitutional philosophy. Warren came to symbolize a result-oriented jurisprudence that stretched constitutional provisions and legislation, such as the Civil Rights Act and the Voting Rights Act, to reach the intended results.

During his tenure as chief justice, he headed the Warren Commission to investigate the assassination of President John F. Kennedy. At first, Warren declined Attorney General Robert Kennedy's request that he lead the commission because he feared it would interfere with the Court's business and affect its legitimacy. But President Lyndon Johnson persuaded him to do so for the good of the nation. The commission concluded that Lee Harvey Oswald had acted alone

and there was no conspiracy, though the report was widely criticized for being superficial.

Warren became the symbol of his controversial Court. The Warren Court's civil rights decisions rankled the South, but the decisions that protected the rights of the accused and freed alleged Communists angered the entire nation. "Impeach Earl Warren" kits and bumper stickers were circulated, and billboards sprang up across the nation. Presidential candidates like Richard Nixon made the Warren Court a campaign issue. Congress threatened the Court with attempts to overturn its decisions and limit its jurisdiction and even considered impeachment of individual justices.

Warren decided to retire from the Court late in 1968 to allow the Democratic president to choose his successor. He told Johnson he would resign at the president's pleasure. Warren heartily endorsed Johnson's decision to promote Abe Fortas from associate to chief justice. Johnson then selected his friend Homer Thornberry to fill Fortas's seat on the Court. But with the calendar close to the 1968 election, Johnson's unpopularity at an all-time high, and charges of cronyism, Republicans in Congress were encouraged to fight and delay the nomination. An angry Warren rescinded his resignation, deciding to retire instead at the end of the 1968 Court term. This timing provided Nixon with his first appointment, Warren E. Burger. Earl Warren died July 9, 1974, in Washington, D.C.

Richard L. Pacelle Jr.

See also: Burger, Warren Earl; *Engel v. Vitale; Gideon v. Wainwright; Griswold v. Connecticut; Mapp v. Ohio; Miranda v. Arizona; New York Times Co. v. Sullivan; Roth* Test; Vinson, Frederick Moore.

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Washington v. Glucksberg (1997)

In *Washington v. Glucksberg,* 521 U.S. 702 (1997), the U.S. Supreme Court unanimously rejected a constitutional challenge to a Washington state law that made it a felony for physicians to assist in the suicide of mentally competent, terminally ill patients. This unanimity, however, was belied by the number of concurring opinions that left open the possibility of finding some constitutionally protected right of the terminally ill to die in a time and manner of their choosing. The right to physician-assisted suicide for terminally ill patients has been but one part of the larger ongoing right-to-die debate. When the Court found a liberty interest to refuse life-sustaining treatment in *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261 (1990), it left unanswered the question of a right to active assistance in terminating one's life.

Glucksberg involved a Washington state criminal code that made it a felony for anyone knowingly to aid someone in committing suicide. Most states had such a law, traditionally deemed an element of the state's police power. Four doctors filed suit on their own behalf and on the behalf of three terminally ill, mentally competent patients who wanted the doctors' aid in prescribing drugs meant to bring about their death. Dr. Harold Glucksberg argued that there was a liberty interest found in the Due Process Clause of the Fourteenth Amendment for competent terminally ill patients to have physician assistance to end their life, and that interest was violated by the application of the Washington law. The Court historically had argued that for a substantive due process claim to be validated, the liberty interest must be carefully described and be found in the history and traditions of the nation.

In the majority opinion, Chief Justice William H. Rehnquist argued that the "right to commit suicide which itself included a right to assistance in doing so" was not such a fundamental right. He stressed that most states had laws, dating back to their founding and beyond, forbidding assisted suicide. Rehnquist also enumerated a number of state interests in banning fully assisted suicide, including to prevent coer-

cion by family or doctors worried about expense and to protect depressed patients. Ultimately, Rehnquist concluded, the states should be allowed to decide this matter through the democratic process.

A number of the concurrences, Justice Sandra Day O'Connor's most forcefully, argued that there might be a liberty interest in obtaining relief from physical suffering even at the expense of hastening death. Justice Stephen G. Breyer also challenged what he took to be the Court's overly narrow definition of the liberty interest, arguing instead that it properly concerned the "right to die with dignity."

Justice David H. Souter argued that state legislatures had greater institutional competencies than courts for determining the tricky balance between one's right to autonomy over one's body and the state's interest in preventing potential cases of involuntary euthanasia. Nevertheless, he suggested a method of determining a substantive liberty interest much more amenable to protecting a right to physician assistance to determine the time and manner of one's death. Both he and Justice John Paul Stevens offered a more narrowly defined scope of the state's legitimate interests in interfering in the patient-physician relationship than what Rehnquist proffered.

Rehnquist in his opinion rejected the analogy between the right to terminate treatment when the known result would be death and the right to a physician's active assistance to such an end. Nevertheless, given the number of justices who held open the door to finding a possible liberty interest in physician-assisted suicide, it is almost certain that *Glucksberg* will not be the Court's final word on this matter.

Douglas C. Dow

See also: Cruzan v. Director, Missouri Department of Health; Physician-Assisted Suicide; Right to Die.

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Watkins v. United States (1957)

Watkins v. United States, 354 U.S. 178 (1957), presented the Supreme Court with the related questions of the breadth of congressional power to investigate and whether individuals subpoenaed by Congress to discuss their political beliefs and associations were protected by the First Amendment to the U.S. Constitution. *Watkins* significantly restricted congressional power to investigate, but the holding was effectively reversed only two years later.

John Watkins, an organizer for the United Automobile Workers (UAW), was called in 1954 to testify before the House Committee on Un-American Activities (HUAC). Watkins did not invoke his Fifth Amendment right against self-incrimination and agreed to answer questions about himself and about individuals he believed to be past, as well as continuing, members of the Communist Party. However, Watkins refused to answer any questions concerning individuals he believed had left the party. He testified that he had never been a party member, although he had previously associated with many party members as part of his union work. He also argued that his identification of others no longer associated with the party would not serve any legislative purpose and that any questions regarding former Communists were not pertinent to the purposes of the investigation.

Chief Justice Earl Warren's opinion in *Watkins* had two major components. The first was founded in the requirement that Congress could compel only testimony pertinent to its legislative purposes. Those purposes were defined by the resolutions establishing a committee's power to investigate. Warren found that the resolution establishing HUAC was far too vague in defining the committee's jurisdiction, asking "Who can define the meaning of 'un-American?' " The second component, which was far weaker, was Warren's requirement that the jurisdiction of the committee needed to be particularly well-defined when the subject of inquiry involved the rights of free speech and association.

In dissent, Justice Tom C. Clark argued that the authorizations for committee hearings were often

broad of necessity and that many of the other standing committees in Congress had equally broad jurisdictions. Clark was most outraged that Watkins had deigned to answer some questions but not others in order to clear himself of the charges against him yet to maintain his credibility in the labor movement by refusing to act the stool pigeon. Clark wrote that "remote and indirect disadvantages such as 'public stigma, scorn and obloquy' may be related to the First Amendment, but they are not enough to block investigation."

The *Watkins* opinion was handed down June 17, 1957—"Red Monday"—with three other controversial Supreme Court decisions, *Yates v. United States,* 354 U.S. 298 (1957), *Sweezy v. New Hampshire,* 354 U.S. 234 (1957), and *Service v. Dulles,* 354 U.S. 363 (1957), all of which affirmed the rights of suspected subversives against the government and encountered significant criticism. Warren's challenge to the broad grant of investigative authority to HUAC became a particular target in Congress, where numerous resolutions were offered to strip the courts of the power to review congressional contempt citations. Only two years later, in *Barenblatt v. United States,* 360 U.S. 109 (1959), the Court reversed course, finding that Congress properly had broad authority to investigate subversion and requiring that Barenblatt's First Amendment rights be balanced against congressional interest in preserving national security.

Daniel A. Levin

See also: Barenblatt v. United States; Congressional Investigations; House Un-American Activities Committee.

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Web

See Internet and the World Wide Web

Webster v. Reproductive Health Services (1989)

Webster v. Reproductive Health Services, 492 U.S. 490 (1989), was among a long line of challenges undermining the trimester analysis of *Roe v. Wade,* 410 U.S. 113 (1973), in which the U.S. Supreme Court balanced women's privacy rights and the state's interest in protecting potential life. *Webster* generated enormous public attention: Abortion foes and advocates rallied in Washington, D.C., in January and April 1989, sent thousands of letters to the Court, flooded its switchboard, launched significant advertising campaigns, and wrote a record number of amicus (friend of the Court) briefs (seventy-eight). Why such fury? President Ronald Reagan's 1987 appointment of Justice Anthony M. Kennedy (who replaced Justice Lewis F. Powell Jr., member of the *Roe* majority) buoyed the spirits of abortion foes that he would provide the crucial fifth vote to overturn *Roe* and return abortion policy-making to state legislatures.

Reproductive Health Services, an abortion provider in Saint Louis, and other plaintiffs challenged several provisions of a 1986 Missouri abortion law. Missouri's attorney general, William Webster, defended the law, the preamble of which declared "life begins at conception." The law also required doctors to determine the viability of fetuses more than twenty weeks old by performing tests to determine fetal age, weight, and lung maturity. It restricted public employees and facilities from performing abortions not necessary to save a mother's life. Finally, the law prohibited public funds, employees, and facilities from encouraging or counseling women to secure abortions, unless necessary to save their lives.

In a five–four decision, the Court upheld the viability testing requirements and the ban on public employees and facilities performing abortions. Because the preamble did not directly restrict abortion access or regulate medical practice, the Court did not rule on the constitutionality of that portion. The Court unanimously declared the counseling provisions moot because Missouri agreed not to prosecute doctors who violated it.

The justices issued five separate opinions in the case. Writing for a plurality, Chief Justice William H.

Rehnquist (joined by Justices Byron R. White and Anthony M. Kennedy) abandoned *Roe*'s trimester analysis, which previously had been used to strike most provisions such as those at issue in *Webster.* Rather, Rehnquist said the state had a compelling interest to protect life throughout pregnancy. Employing this revised jurisprudence, the plurality allowed for substantial regulation of abortion, but did not believe the issues presented in *Webster* required the Court to overrule *Roe.* In a concurring opinion that provided more constitutional protection for women seeking abortions than did the plurality, Justice Sandra Day O'Connor upheld Missouri's provisions because they did not present an "undue burden" to women seeking abortions. Justice Antonin Scalia wrote a blistering concurrence calling for *Roe* to be overturned.

Justice Harry A. Blackmun wrote an impassioned dissent, joined by Justices William J. Brennan Jr. and Thurgood Marshall, arguing that the Court's decision repudiated *Roe,* diluted women's rights, and issued an invitation to state legislatures to restrict abortion. In a separate dissent, Justice John Paul Stevens argued the preamble infringed on reproductive choices, including birth control, and constituted an establishment of religion.

Webster served as the prelude to the current controlling precedent in abortion law, *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992).

Glen Halva-Neubauer

See also: Planned Parenthood of Southeastern Pennsylvania v. Casey; Roe v. Wade.

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Weeks v. United States (1914)

In *Weeks v. United States,* 232 U.S. 383 (1914), the U.S. Supreme Court issued two important holdings. First, the Court held that the Fourth Amendment's guarantee against unreasonable searches and seizures prohibited the use at trial of evidence seized by *federal* officials in violation of the Fourth Amendment to the Constitution. Thus, *Weeks* represented one of the first applications of the exclusionary rule—a judicially created doctrine prohibiting the use of evidence obtained in violation of the Fourth Amendment against an individual at trial. Second, the Court held that the limitations on government action provided by the Fourth Amendment did not apply to *state and local* officials. Thus, evidence seized by state and local officials in violation of the Fourth Amendment was not subject to the exclusionary rule and could be used at trial.

Fremont Weeks was convicted on federal criminal charges involving the improper use of the U.S. mail to deliver lottery tickets. His conviction was based on evidence seized from his home by local police officers and, later, the U.S. marshal. Neither the marshal nor the local police officers possessed a search warrant at the time they seized the evidence in question. At trial, Weeks objected that the evidence had been obtained in violation of his Fourth Amendment rights, but the trial court overruled his objection.

In reversing Weeks's conviction, the Supreme Court distinguished between the evidence obtained by the two different law enforcement agencies. The Court held that the evidence obtained by the U.S. marshal had been obtained in violation of the Fourth Amendment and therefore could not be used as evidence against Weeks at trial. However, because the Court had not yet begun the process of selectively incorporating the guarantees provided by the Bill of Rights into the Due Process Clause of the Fourteenth Amendment (and thus making them applicable to the states), the Court refused to apply the Fourth Amendment to the actions of the local police officers. Thus, the evidence the local police obtained could be used as evidence against Weeks at trial, even if it had been procured in violation of the Fourth Amendment. The Court overturned Weeks's initial conviction and returned the case to the lower court for a new trial based only on the evidence obtained by the local police officers.

The effect of the Court's holdings in *Weeks* was to create a loophole by which federal officials could use evidence obtained in violation of the Fourth Amend-

ment—if it had been obtained by state or local officials and not federal officials. Thus, after *Weeks,* federal prosecutors often obtained convictions based on evidence illegally obtained by state or local officials. *Wolf v. Colorado,* 338 U.S. 25 (1949), provides an excellent example of this practice. Not until *Mapp v. Ohio,* 367 U.S. 643 (1964), did the Court apply the exclusionary rule to evidence obtained through the illegal actions of state and local officials.

Scott A. Hendrickson

See also: Exclusionary Rule; Incorporation Doctrine; *Mapp v. Ohio; Wolf v. Colorado.*

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Welsh v. United States (1970)

Welsh v. United States, 398 U.S. 333 (1970), was a landmark ruling of the U.S. Supreme Court that upheld the right of an individual to receive conscientious-objector status to military service under federal law, even though his objection to service in the armed forces did not stem from orthodox or traditional religious sources. The Court managed to avoid dealing with the two religion clauses of the First Amendment to the Constitution while finding a right to claim status as a conscientious objector on grounds beyond the parameters of traditional religion.

Elliott Ashton Welsh II applied for exemption from military service by seeking conscientious-objector status under section 6(j) of the Universal Military Training and Service Act, which exempted from combat and noncombat service a person who, "by reason of religious training and belief, is conscientiously opposed to participation in war in any form." The law defined religious training and belief as "an individual's belief in relation to a Supreme Being" and not merely the person's own ethical or moral code of conduct. On his exemption application, Welsh struck out "my religious training" and neither affirmed nor denied belief in a Supreme Being. His exemption application was denied, and later he was convicted for failure to report for induction into the armed services. A federal court of appeals upheld his conviction, finding that although his beliefs were legitimate and serious, they were insufficiently religious to meet the standard set by section 6(j).

The U.S. Supreme Court, speaking through the plurality opinion of Justice Hugo L. Black, decided that 6(j) was not limited to individuals whose opposition to war was based on traditional or orthodox religious beliefs. According to Black, a person's opposition to war and military service was religious within the meaning of the law if the opposition derived from the person's moral, ethical, or philosophical beliefs about right and wrong, and if those beliefs were held with the same devoutness or intensity as traditional religious convictions. The key question for Black, which he answered affirmatively, was whether Welsh's beliefs occupied the same or equivalent role of religion and functioned as a religion in his life; if so, Black argued, Welsh was covered by the law and deserved the exemption for which he applied.

Justice Black, over the objections of Justice John Marshall Harlan in his concurring opinion, chose to avoid ruling on the constitutionality of 6(j) under the Establishment Clause of the First Amendment; Black both saved the statute and legitimated the exemption by choosing to construe the meaning of the statute as he did. Justice Harlan argued the law violated the Establishment Clause (which prohibits government from engaging in action that would constitute "establishment of religion"), and Welsh therefore deserved his exemption under the principle of state neutrality between religious and nonreligious beliefs. Justice Byron R. White dissented and was joined by Chief Justice Warren E. Burger and Justice Potter Stewart. White accused the Court of making draft exemption policy and concluded that Welsh, under the plain meaning of the statute, had no First Amendment right to avoid military service.

In *Welsh,* the Court adopted a functional definition of religion, similar to previous rulings concerning the

two religion clauses. Even as it tried to avoid this theological thicket, the Court planted itself there by elevating conscience to the status of religion. To this day, the Court still struggles mightily with—one might say is bedeviled by—the meaning of the religion clauses of the First Amendment.

Stephen K. Shaw

See also: Conscientious Objectors; Establishment Clause; Free Exercise Clause; Vietnam War.

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West Virginia Board of Education v. Barnette (1943)

In *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), the U.S. Supreme Court ruled that a state cannot enforce on public school pupils the civic ritual of saluting the American flag. This decision overturned the ruling in *Minersville School District v. Gobitis,* 310 U.S. 586 (1940), that the Court had issued a mere three years earlier. *Barnette* stands as one of the Court's most famous First Amendment cases, one continuing to be significant given the ongoing relevance to many Americans of the flag of the United States and decorum surrounding it. The Supreme Court struck down the West Virginia State Board of Education's regulation requiring pupils to recite the Pledge of Allegiance and salute the flag. The Court found the rules were unduly burdensome on

In *West Virginia Board of Education v. Barnette* (1943), the Supreme Court ruled that a state could not enforce on school pupils the civic ritual of saluting the American flag. One of the most famous First Amendment cases, *Barnette* continues to be significant given the ongoing relevance to many Americans of the flag and decorum surrounding it. *(Library of Congress)*

the freedom of religious expression of persons such as Jehovah's Witnesses (who considered the flag salute to be a form of idolatry) and thus in violation of the Free Exercise Clause and the free speech provision of the First Amendment to the Constitution. Children who refused the compulsory flag salute would have been expelled for unlawful behavior, and they and their parents or guardians prosecuted for causing delinquency.

West Virginia believed that the flag was the nation's unique common symbol, and that participating in patriotic acts such as the flag salute during the regular activities of the school day was an appropriate means to the end of inculcating loyalty to country in the nation's youth. The state was seeking by this regulation to promote the "ideals, principles, and spirit of Americanism," against which a dissenting pupil was to be considered guilty of insubordination and subject to expulsion. The flag salute, then, compelled West Virginia pupils to declare a belief, precisely the act proscribed by some religious faiths. For all the justices, *Barnette* presented the fundamental issue of the use of state power against the individual, with historical precedent of "such attempts to compel adherence" revealing an "ultimate futility" and possibly constituting a pivotal step on the route toward "exterminating dissenters."

Justice Robert H. Jackson, writing for the eight–one Court, opined that not to rely on voluntary and spontaneous endorsements made "an unflattering estimate of the appeal of our institutions to free minds." He also argued that the state could not enforce an orthodoxy on its citizens, even when government and citizens differed fundamentally as regarding "things that touch the heart of the existing order." Justice Frank Murphy's concurring opinion stressed the importance of seeing "spiritual freedom to its farthest reaches" for all Americans.

In the lone dissent, Justice Felix Frankfurter admonished his fellow justices for their apparent "writing into the Constitution the subordination of the general civil authority of the state to sectarian scruples"—for having prioritized religious scruples above a civic measure of general applicability, such as the measure in question, albeit unartfully designed, to train children in good citizenship. Justice Frankfurter thought that West Virginia had left individuals free to believe or disbelieve what they wanted. The *Barnette* opinion foundered by subjecting lawmaking authority to the bar of "an almost numberless variety of doctrines and beliefs," because the "validity of secular laws cannot be measured by their conformity to religious doctrines." Justice Frankfurter also was sensitive to the Court's tilt toward acting as a superlegislature, substituting its wisdom for that of lawmakers of the legislative branch.

Gordon A. Babst

See also: First Amendment; Flag Salute; Free Exercise Clause.

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White, Byron R. (1917–2002)

Byron R. White, associate justice of the U.S. Supreme Court (1962–1993), was born in Fort Collins, Colorado, in 1917. Growing up in rural Wellington, Colorado, the six-year-old began work in the sugar beet fields for $1.50 a day. White was an All-American halfback at the University of Colorado and later played football professionally; he was also a Rhodes scholar. His football (and basketball) career was significant because it brought him notoriety his entire life, which White seemed to loathe. White's jealously guarded privacy and terse media style were hallmarks of his relations with members of the national press.

White's tenure as a naval intelligence officer during World War II was remarkable chiefly because he wrote the report on the loss of the PT-109 torpedo boat and subsequent heroism of Lt. John F. Kennedy. After the war, White returned to Yale University Law School, where he graduated magna cum laude in 1946. The excellence of White's football career combined with

his obvious legal talents landed him a clerkship with U.S. Chief Justice Frederick M. Vinson. As a clerk, White showed a parallel tendency strictly to apply rules of due process while displaying sympathy for racial justice. After a single term, White left Vinson and returned to Denver to practice law.

Although White was active in the local Democratic Party upon his return to Denver, and he served on many campaign committees, he rebuffed attempts to draft him to run for office. His social, family, and athletic contacts in Colorado, coupled with a personal history, made White an easy choice for running Kennedy's presidential campaign in Colorado. Although the state went for Republican Richard M. Nixon, White gained the admiration of Kennedy and an appointment as a deputy attorney general.

White's years at the Department of Justice were notable chiefly because of the role he played in diffusing an explosive civil rights situation. Following the 1961 Mother's Day riot in Alabama, in which a Freedom Ride bus (a bus commissioned by civil rights advocates who traveled through the South to challenge policies of racial segregation) was burned and a number of Freedom Riders were beaten, White developed a plan of action to ensure their further safety. White flew to Montgomery in command of an ad hoc force deputized as federal marshals and stood up to Alabama Governor John Patterson, while emphasizing publicly that the Justice Department's role was to ensure the safety of interstate bus routes rather than to enforce civil rights. With the situation diffused, White returned to Washington, his status greatly raised with the Kennedy brothers and clearly destined for a higher appointment. When Justice Charles E. Whittaker retired, there was an impulse to appoint the first African American to the Court. Politically, however, the appointment of an African American in 1962 was impossible; White's name was formally delivered to the Senate on April 4 and he was confirmed a week later.

White's civil liberties record as a justice was decidedly conservative. His logic in concurring in *Furman v. Georgia,* 408 U.S. 238 (1972), in which he suggested that capital punishment was not used frequently enough to act as a deterrent and therefore did not serve the social purposes for which it was imposed, underscored that even when White sided with liberals on civil liberties, it often was on terms that made them uncomfortable.

On issues of due process, he consistently sided with conservatives, as in his dissent in *Miranda v. Arizona,* 384 U.S. 436 (1966), in which he stated: "The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of privilege or in the language of the Fifth Amendment."

On privacy issues, White rigorously defended a strict interpretation of the Constitution, almost universally voting to uphold states' rights to pass legislation affecting private moral issues, as he showed in his dissent to abortion rights in *Roe v. Wade,* 410 U.S. 113 (1973). No opinion White ever delivered was as controversial as *Bowers v. Hardwick,* 478 U.S. 186 (1986), in which the Court upheld Georgia's sodomy laws. He stated, "[R]espondent . . . insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 states should be invalidated on this basis." The Supreme Court subsequently overturned this decision in *Lawrence v. Texas,* 539 U.S. 558 (2003).

Given Justice White's personal background of individual achievement, it is not surprising he took an individualist, conformist view of civil liberties. White's legacy in relation to civil liberties, based on his strict view of due process and inability to acknowledge the legal concept of privacy within the constitutional system, must be judged as consistently conservative.

Justice White retired in 1993 and died at his home in Denver in 2002.

Tim Hundsdorfer

See also: Bowers v. Hardwick; Furman v. Georgia; Miranda v. Arizona; Roe v. Wade.

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Whitney v. California (1927)

Anita Whitney, a social worker, was convicted by California of organizing, assisting in organizing, and being a member of the Communist Labor Party. The party advocated the use of unlawful force, although Whitney herself was opposed to the use of violence. At issue in *Whitney v. California,* 274 U.S. 357 (1927), was the constitutionality of California's criminal syndicalism law in light of the free speech protection applicable to Whitney under the First Amendment to the U.S. Constitution, as applied to the states through the Due Process Clause of the Fourteenth Amendment.

When Whitney's appeal reached the U.S. Supreme Court in 1927, Justice Edward Sanford held that the kind of "united and joint action" implicit in the existence of the Communist Labor Party was much more dangerous than individual speech and could legitimately be punished for the "danger to the public peace and security" it presented to the state. Advocacy of violence, Justice Sanford declared, was the equivalent of a criminal conspiracy that the state had a right to forbid.

Justice Louis D. Brandeis wrote separately, indicating his disagreement with the Court's reasoning and fashioning what may be the most eloquent statement of the approach to free speech in the United States. The Constitution's framers, he declared, "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." Citizens of a democracy had an obligation to participate in "public discussion" of political issues, in order to find the "political truth" that would be the basis for good public policy. There could be no meaningful discussion of such issues, however, without free speech.

The writers of the Constitution, Brandeis said, knew that speech could be dangerous, but they believed "in the power of reason as applied through public discussion." They knew it was "hazardous to discourage thought" through "fear of punishment." "Fear breeds repression," he wrote; "repression breeds hate," and "hate menaces stable government." The safe thing for a democracy to do was to ensure citizens the "opportunity to discuss freely supposed grievances and proposed remedies." "The fitting remedy for evil counsels is good ones," he continued, for open discussion would ensure that wiser and cooler heads would ultimately prevail.

That was the reason the framers of the First Amendment prohibited Congress (and, by extension, the states) from abridging speech. Advocacy of something that might or might not happen was not sufficient reason to stifle speech, which could be suppressed only if it presented a clear and present danger: "reasonable ground to fear that serious evil will result if free speech is practiced" and that "the danger apprehended is imminent" and will be "immediately acted on."

The importance of the Brandeis approach, which the Court would adopt four decades later in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), was its articulation of the reasons for free speech and its alteration of the clear-and-present-danger doctrine that had been enunciated by Justice Oliver Wendell Holmes Jr. in *Schenck v. United States,* 249 U.S. 47 (1919). Holmes's formulation had seemed to permit punishment of advocacy. Brandeis in *Whitney* changed that to differentiate advocacy from incitement to imminent action, so that the only permissible limit was on speech that presented an immediate threat of extremely serious danger. The great breadth of the speech right articulated by Brandeis continues to differentiate U.S. speech law from that of any other country in the world.

Philippa Strum

See also: Brandeis, Louis Dembitz; *Brandenburg v. Ohio;* First Amendment; *Schenck v. United States.*

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Widmar v. Vincent (1981)

In *Widmar v. Vincent,* 454 U.S. 263 (1981), the U.S. Supreme Court upheld the right of student religious organizations to meet on public university campuses. The case raised issues pertaining both to free speech rights and to free exercise of religion as protected under the First Amendment to the U.S. Constitution.

From 1973 to 1977, Cornerstone, a religious organization, was one of more than a hundred student groups approved to meet on the campus of the University of Missouri at Kansas City. In 1977, however, the university denied Cornerstone this privilege because of a prohibition against use of university facilities "for purposes of religious worship or religious teaching." University officials argued that such meetings on campus violated the First Amendment's Establishment Clause, which prohibits government from engaging in activity that would constitute "establishment of religion." Cornerstone claimed that the new policy denied its rights to free speech and free exercise of religion.

The university position prevailed at trial, but the appellate court ruled in favor of Cornerstone. In an eight–one decision, the Supreme Court, in an opinion by Justice Lewis F. Powell Jr., affirmed that ruling on the basis that the university had created a "public forum" by allowing numerous groups to meet on campus. Having created this forum, the university could not then deny the use of campus facilities to a group simply because it wished to engage in religious speech. Such a denial was "content discrimination," which the Court had long held to be in violation of the First Amendment. The Court acknowledged that extending public-forum rights to religious groups would benefit these groups, but the policy also benefited secular groups. To include religious organizations in no way conferred state approval on any religion. The university could thus claim no particular justification for restricting student religious speech in order to be in compliance with the Establishment Clause. It could, of course, make reasonable regulations about when and where student groups could meet, and school officials could determine the best use of academic resources.

In a concurring opinion, Justice John Paul Stevens agreed that the university's fear of violating the Establishment Clause was groundless. Still, he was unwilling to apply the public-forum standard because he feared it could impinge on a university's leeway in allocating limited resources. As an example, he suggested that if one group wanted to view cartoons and another wanted to rehearse *Hamlet,* the university should be able to make a content-based choice as to which group was more relevant to the university's mission.

The lone dissenter, Justice Byron R. White, distinguished between what he thought the state *may* do and what it *must* do under the Establishment Clause, and he saw this as a case of *may.* He further rejected the majority's idea that religious speech was just another category of speech competing in a public forum. He observed that in cases involving school prayer and posting of the Ten Commandments, religious speech was clearly placed in a distinct category. Finally, he maintained that the most satisfactory approach to resolving this issue was to ask to what extent the university's policy placed a serious burden on Cornerstone members' free exercise of religion, and he concluded that having to walk a little farther to meet because of the university policy was an incidental and therefore allowable inconvenience.

In a footnote to the majority opinion, Justice Powell described college students as "young adults" and "less impressionable than younger students." The implication, consistent with other Court rulings, was that the Court might strike down a policy similar to Missouri's if it were in a secondary school setting. Nonetheless, the *Widmar* decision encouraged Congress in 1984 to pass the Equal Access Act (*U.S. Code,* Vol. 20, secs. 4071–4074) prohibiting high schools from barring student religious groups from meeting on their campuses. The Court, in turn, upheld that law in *Westside Community Schools v. Mergens,* 496 U.S. 226 (1990).

Jane G. Rainey

See also: Establishment Clause; Free Exercise Clause.

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Wiggins v. Smith (2003)

Although courts are generally reluctant to find that a defendant has had ineffective assistance of counsel, the Supreme Court did so in *Wiggins v. Smith,* 539 U.S. 510 (2003), which involved the penalty phase of a capital crime. The issue before the Court was whether attorneys for the defendant conducted an adequate presentation at the sentencing hearing and thus satisfied the Sixth Amendment provision guaranteeing an accused the right to "have the assistance of counsel." A recurring factor in such cases involves whether counsel provided "effective" assistance, because the Sixth Amendment is silent about the type of assistance to be provided.

Kevin Wiggins had been convicted for drowning an elderly woman in her bathtub and robbing and ransacking her apartment. After a Maryland judge found Wiggins guilty of first-degree murder, his two public defenders attempted to bifurcate (split in two) a hearing before a jury to establish that Wiggins was not the principal offender, and, only if they lost on this point, to focus on mitigating circumstances. After the court rejected the bifurcated approach, one of his attorneys said in her opening statement that the defense planned to introduce mitigating circumstances. Although they established that Wiggins had no prior convictions, Wiggins's attorneys introduced no evidence of his life history, which included neglect, abuse, and sexual molestation. The jury sentenced Wiggins to death, and the Maryland Court of Appeals affirmed.

Wiggins subsequently sought postconviction relief in a Baltimore County Circuit Court, arguing that he had received ineffective assistance of counsel. This court and a state appellate court rejected Wiggins's plea, and he subsequently filed for a writ of habeas corpus in a U.S. district court. This court granted relief but was overturned by the U.S. Fourth Circuit Court of Appeals. The case then reached the U.S. Supreme Court.

In assessing Wiggins's Sixth Amendment claim of ineffective assistance of counsel, the majority justices cited *Strickland v. Washington,* 466 U.S. 668 (1984). Under a test established by this precedent, a defendant must establish that the performance of counsel "fell below an objective standard of reasonableness" and thereby prejudiced his defense. Although his attorneys had hired a psychologist, they relied only on cursory reports of Wiggins's background and failed to order preparation of a social history report, despite the availability of state funds for such a purpose. Without knowledge of the facts of Wiggins's childhood, his attorneys were not in a reasonable position to make the strategic choices to focus on his degree of participation in the crime for which he had been convicted, rather than on mitigating factors related to the abuse he had suffered. The majority further found it likely that the jury's decision might well have been different had its members had access to such information.

In dissent, Justice Antonin Scalia, joined by Justice Clarence Thomas, pointed to evidence from the lower courts' records showing that Wiggins's attorneys were aware of his background. Scalia denied that they were under an obligation to hire a social worker to compile a social history report and noted that much of the "evidence" the majority cited about Wiggins's childhood abuse consisted of unsubstantiated assertions by the defendant that would have been excluded from the sentencing hearing.

John R. Vile

See also: Ineffective Assistance of Counsel; *Strickland v. Washington.*

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Williams, Edward Bennett (1920–1988)

Edward Bennett Williams (1920–1988) was one of the best-known criminal defense attorneys during the second half of the twentieth century. He was the lawyer the rich and famous, especially those in Washington D.C., called when they were in trouble. Interestingly, he was one of the top names on President Richard Nixon's enemies list, but he was also the person Nixon wished could have represented him during the Watergate scandal (the bungled 1972 burglary of Democratic National Committee headquarters in the Watergate apartment complex by individuals connected with Nixon's reelection campaign and the subsequent cover-up efforts by the White House). Williams, however, was more than the nation's leading criminal defense attorney; he was also an author and teacher who stressed the importance of protecting the civil rights and civil liberties of every citizen.

Edward Bennett Williams was born in Hartford, Connecticut, May 31, 1920. He grew up in a very devout Catholic household that stressed the importance of education. In fact, he would be greatly influenced by the teachings of the Jesuits both during his undergraduate studies at the College of the Holy Cross and later while in law school at Georgetown College in Washington, D.C. As a lawyer, he would represent both of these Jesuit institutions pro bono ("for the good," or without charge) on many occasions. After law school, Williams worked at a large Washington law firm, but he found the practice there to be dull. He was more interested in the high-paced world of criminal law, so he decided to establish his own practice.

Williams made a reputation for himself as a well-respected litigator, and his list of clients steadily grew. One of his guiding principles as a criminal defense attorney was that everybody needed a competent legal defense, and it was not his role to condone or absolve his clients of their misfeasance. Williams was fond of saying, "I defend my clients against legal guilt. Moral judgments I leave to the majestic vengeance of God." This attitude served him well when he defended his first well-known client, Senator Joseph McCarthy of Wisconsin. McCarthy was in the process of being censured by the Senate for his conduct during his anti-Communist hearings, and the Republican senator desperately needed legal help.

Up to that time, individuals appearing in front of a congressional committee did not always have legal representation. Williams changed that. He became the veritable counselor at the witness table during congressional investigations, and he went a long way toward curbing the abuses that tyrannical and publicity-seeking committee chairs such as McCarthy had inflicted on witnesses. Williams did this by demanding that his clients give him total control of their case. He felt that by having complete control, he could make the strongest argument in his client's best interest. During his defense of McCarthy, in fact, the former dictatorial committee chair was very meek. Although Williams did not save McCarthy from being censured, he was able to lessen what could have been an extremely acrimonious hearing.

Williams's actions did not go unnoticed. A few years later when leaders of the Mafia were hailed in front of a congressional committee, the chief don and model for the top boss in *The Godfather,* Frank Costello, hired Williams to be the man sitting next to him at the witness table. Again, Williams was able to defuse the highly contentious atmosphere of the hearings by his mere presence; significantly, he also kept Costello from being deported. His greatest success, however, came in his defense of Jimmy Hoffa in front of a congressional committee that charged him with bribery. Williams tangled daily with the committee's legal counsel, a young Robert Kennedy. In fact, Kennedy boasted that if Jimmy Hoffa got off on the bribery charges, he would jump off the Capitol. Williams gained an acquittal for Hoffa and sent a parachute to Kennedy.

Though having an attorney sit next to a witness at a congressional committee may not seem like an advance in civil liberties, it was more important than would be expected. Especially during the 1940s and 1950s, individuals were subjected to great abuses of their rights in front of congressional committees, and the actions of lawyers like Williams served to advance the right to counsel in that most important venue. Also at that time, Williams was making significant

contributions to civil rights and civil liberties through his scholarship and his teaching at Georgetown Law School.

In the early 1960s, the United States was undergoing a major transition in civil rights and civil liberties brought on by the U.S. Supreme Court under Chief Justice Earl Warren. Williams was at the forefront of this change. His book, *One Man's Freedom,* was fifth on the best-sellers list. It touted the importance of having young committed lawyers who were concerned about gaining justice for their clients no matter what the public at large felt. Reviewers described Williams as the next Clarence Darrow, and many individuals looked to him for inspiration. Even Raymond Burr, television's *Perry Mason,* sought an audience with him. But his book had an even greater influence by showing how a commitment to civil rights and civil liberties was critical to the proper functioning of the legal system.

Williams did not cease his dedication to civil rights and civil liberties after his book was published but rather took an active role in a number of noteworthy cases. In 1963 he was the lead counsel for a hospital that challenged the right of a Jehovah's Witness to withhold life-saving medical treatment from his wife. Judge Skelly Wright overrode the husband's choice to withhold treatment and had the hospital save the woman's life. The full appellate court later reversed the judgment of Judge Wright; however, Williams believed that advocating to save the life of the woman was essential, even though it impinged on the husband's religious liberties.

Another noteworthy case came through Williams's representation of the *Washington Post.* In the late 1960s and early 1970s, there was much contention over the war in Vietnam, and the *Washington Post* and the *New York Times* came into possession of what later became known as the Pentagon Papers, which exposed in great detail the U.S. government's dealings in Vietnam. The federal government did not want the documents released, but Williams advised *Washington Post* editors that they had every right to publish the information under the freedom of press rights protected by the First Amendment of the Constitution. Williams was correct in his assessment, as the U.S. Supreme Court later ruled.

By the mid-1970s, Williams had become an elder statesman of the legal community. Many of his protégés were employing what they had learned from Williams to guarantee the rights of their clients. But Williams still was a much sought-after defense attorney. During this period, he successfully defended former Texas governor and U.S. treasury secretary John Connally on charges of bribery. His cross-examination of the lead prosecution witness in that case is still used as an example of how to cross-examine a witness effectively. When Williams died August 13, 1988, the nation remembered not only his reputation as a stellar trial advocate but also his commitment to ensuring the civil rights and civil liberties of all Americans.

David T. Harold

See also: McCarthy, Joseph; McCarthyism.

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Wilson, Woodrow (1856–1924)

Woodrow Wilson served as the twenty-eighth president of the United States. Elected in 1912, he left office after two terms and died in 1924. Wilson became president after an extraordinarily successful career as a college professor, president of Princeton University, and governor of New Jersey. He was among the most intellectually prepared persons ever to be president. His *Constitutional Government* is considered a classic that showed his theoretical understanding of government. Wilson prided himself on being a man of high moral standards who acted on principle.

Raised as a Southern Democrat, Wilson was elected president largely because Republicans split their votes with conservatives supporting William Howard Taft and progressives supporting Theodore Roosevelt. Elected with only 44 percent of the vote, Wilson was a strong, progressive president who fought vigorously and won against long-entrenched business interests.

He pushed to lower tariffs that protected manufacturers but forced consumers to pay higher prices, reformed antitrust laws, created the Interstate Commerce Commission, and revamped the banking system, including creating the Federal Reserve System.

For all his successes, President Wilson gained a reputation for indifference to civil liberties. During the campaign of 1912, Wilson had actively courted African American voters, but events during his first term reflected the attitude of most southern whites toward racial matters. The House of Representatives passed a law making interracial marriages in the District of Columbia a felony. The Post Office, Treasury Department, Bureau of the Census, Bureau of Printing and Engraving, and the Department of the Navy began to segregate their bureaucracies. A new requirement that all applicants for federal jobs submit photographs resulted in the systematic exclusion of African Americans from federal jobs. When confronted, Wilson replied that "the purpose of these measures was to reduce friction. . . . It is as far as possible from being a movement against the Negroes. I sincerely believe it to be in their interest." Many historians consider Wilson's position on race to have been one of the greatest defects in his moral vision for the nation.

Like other presidents, Wilson never completely controlled his agenda. In economic issues he was focused, disciplined, and passionate. This was not the case with prohibition, a great social issue of the day. Although he was a Presbyterian teetotaler, he thought prohibition was a bad idea because it was divisive and unenforceable. Still, he acquiesced in legislation banning the sale of alcohol and allowing the Eighteenth Amendment to be ratified. His reluctance earned him the disdain of the prohibitionists; his acquiescence, the anger of the "wets." His attitude toward child labor laws was also equivocal. Progressives had worked for years to pass a federal law prohibiting child labor. Although Wilson expressed sympathy, he thought the Constitution left this issue in state hands and refused to provide leadership or moral support to suppress child labor.

President Wilson fared little better on the issue of women's suffrage. His campaign in the northern states led people to believe he supported women's right to vote. Once in the White House, he initially refused to provide leadership, arguing again that this was a state matter and that the Democratic Party's platform did not contain a suffrage plank. Faced with persistent demonstrations outside the White House, he eventually supported the Nineteenth Amendment.

No issue so undermined Wilson's progressive reputation as his willingness to sacrifice freedom of speech and the press once World War I began. Reelected in 1916 on the motto "He kept us out of war," Wilson soon realized neutrality was no longer possible. Congress declared war on April 6, 1917. Wilson viewed the war as a crusade to "make the world safe for democracy." Within a week he created the Committee on Public Information (CPI) and appointed journalist George Creel as chairman. Creel quickly arranged a "voluntary" self-censorship of the American press, lest it provide classified information or give opponents of the war sympathetic coverage. A CPI publicity campaign constantly reiterated that Americans fought only for freedom and democracy, and that Germans were barbarian "Huns." The CPI questioned the loyalty of German Americans and sought to undermine socialist and even prounion attitudes.

A second wartime initiative, the loosely worded Espionage Act of 1917, authorized the Post Office and Justice Department to punish "obstructionism," permitting prosecution of people who expressed antiwar sentiments or criticized such institutions as the Red Cross, the YMCA, or Wall Street. Not satisfied, the president pushed through the Sedition Act of 1918 to punish expressions of opinion that were "disloyal, profane, scurrilous or abusive" of American government, the flag, or the armed forces. As a result of the hysteria that CPI engendered, more than 1,500 people were arrested. Of these, only ten were for actual efforts to sabotage the war effort; 450 of the others were arrested for being conscientious objectors. To be sure, there were violent antiwar protesters, but they were few in number and concentrated in a few major cities. During the years that are now called the "red scare," 1919–1920, Attorney General A. Mitchell Palmer used the Espionage and Sedition Acts to conduct raids and launch attacks against socialists and other left-wing groups that expressed opposition to U.S. involvement in the war. Socialist presidential candidate Eugene Debs and several others were sentenced to twenty years in prison for daring to speak out against the war effort.

Wilson so focused on winning the war that he was willing to sacrifice First Amendment freedoms during hostilities. In the latter years of his presidency, Wilson became obsessed with gaining congressional approval for the ill-fated League of Nations. He refused any compromise with his opponents, campaigned across the country to win popular support, and ended up with a stroke. By this time he had alienated so many potential supporters that his efforts failed. He left the presidency a broken man.

Paul J. Weber

See also: Debs, Eugene Victor; Espionage Act of 1917; Palmer Raids; Red Scare; Sedition Act of 1918; World War I.

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Wiretapping

A wiretap is an electronic recording device used to gather information as it passes through a communications circuit. In most cases, wiretaps have been used to record telephone conversations in secret. More recently, wiretaps have been used to gather information sent by fax machines, e-mail, and cellular phones. Law enforcement officials use the information gathered through a wiretap for criminal prosecutions and for gathering foreign intelligence.

States and the federal government have passed laws directed at regulating the use of wiretaps by the government and by private citizens. As a matter of constitutional principles, the federal law lays down the minimum requirements, but most states have enacted laws granting further protection for their citizens. State law cannot grant protection for its citizens where protection does not exist under federal law. If a state law and federal law conflict, federal law will decide the legality of the wiretap.

FEDERAL LAW

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 regulates the use of wiretaps to intercept oral or wire conversations. Originally, this law was passed to help federal officials fight organized crime. Today, wiretaps are used for various reasons by federal and state authorities as well as private citizens.

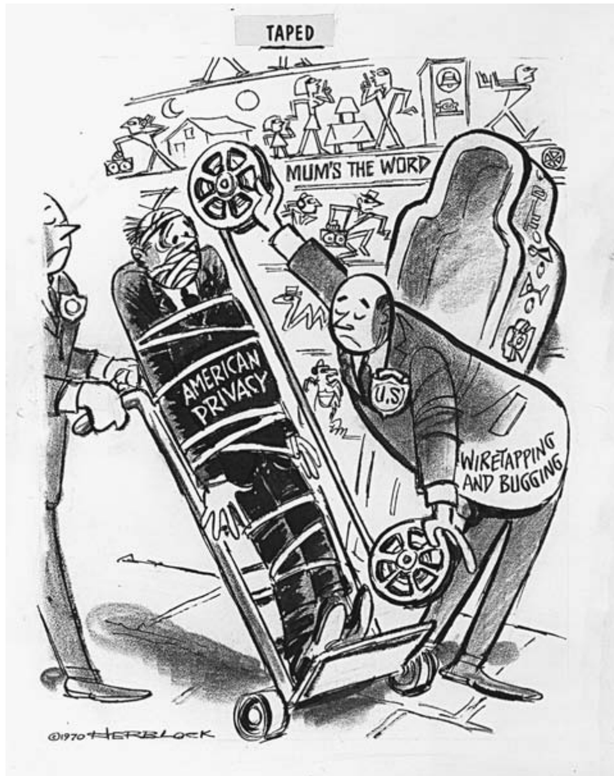
The Fourth Amendment to the U.S. Constitution protects individuals from unlawful searches and seizures. Neither police nor private citizens may conduct searches of a person's home or property without permission or probable cause. Wiretapping is one type of search that implicates a citizen's Fourth Amendment rights.

In general, no person may intentionally intercept any wire, oral, or electronic communication. Any person who unlawfully intercepts another's oral, wire, or electronic communication can face criminal and civil charges. A criminal offense may result in a fine and up to five years' imprisonment. Additionally, a court may grant monetary and injunctive relief to a victim of unlawful wiretapping.

Nevertheless, not every person whose phone lines have been tapped is entitled to money, nor is every person who reads another individual's e-mail subject to imprisonment. The statute lists several instances in which a person's communication may be lawfully intercepted. These exceptions protect private citizens as well as government employees who may need to listen in on conversations as part of their everyday job.

A judge, upon request, can authorize the use of a wiretap. A wiretap is allowed if the information gathered may provide evidence of a crime, such as sabotage of nuclear facilities, espionage, trade secrets, or piracy. Additionally, a judge can allow a wiretap if the information gathered may offer evidence of a murder, kidnapping, robbery, or extortion, among many other felonies.

For instance, *United States v. Jackson,* 345 F.3d 638 (8th Cir. 2003), involved the use of a wiretap on a suspected cocaine trafficker's cellular phone. In part



Editorial cartoon showing U.S. government official, "Wiretapping and Bugging," binding a man, "American Privacy," with reel-to-reel tape, preparing him for a sarcophagus; on the wall in the background, hieroglyphics suggest that "mum's the word." *(Library of Congress)*

because of the evidence gained through the wiretap, the defendant was given concurrent life sentences for his role in the drug ring. In another case, Federal Bureau of Investigation (FBI) agents tapped into the defendant's phone and fax lines to gather information about bank fraud. In *United States v. McGuire,* 307 F.3d 1192 (9th Cir. 2003), the defendant was sentenced to 180 months with help from the evidence gained by the FBI's wiretap search.

If an officer does not have permission of a judge, no part of the information gained can be used in any trial. Additionally, evidence that arises from information learned during a wiretap is known as "fruit of the poisonous tree." Fruit of the poisonous tree may not be used in a trial either.

Further, unlawful wiretapping can lead to legal remedies for the person whose phone line was tapped. For example, David Taketa, a Drug Enforcement Administration agent, and Thomas O'Brien, an officer for the Nevada Bureau of Investigations, faced criminal charges because they conducted wiretaps without a judge's order. In *United States v. Taketa,* 923 F.2d 665 (9th Cir. 1991), the defendants' convictions were overturned because the trial court admitted a warrantless videotape of Taketa and O'Brien committing the illegal wiretaps.

The federal wiretapping statute exempts certain classes of individuals under its authority from civil or criminal liability. For instance, switchboard operators and employees of the Federal Communications Commission are exempt from prosecution while operating in their respective positions.

Other exceptions also fall under the type of communication being intercepted. For example, one exception is referred to as the "extension phone exception." This exception protects people who may hear conversations through a work telephone. In some cases, this exception has been broadened to include a wiretap that one spouse conducts on another. Additionally, few courts will find a violation of law when a parent listens in or even records a child's telephone conversation.

STATE STATUTORY AUTHORITY

States can regulate wiretaps only to the extent that the federal government gives them discretion. Of those states that have enacted legislation regarding wiretaps, few vary from the federal guidelines in any substantial way. In general, because state statutes are modeled after the federal laws, most states are uniform in the application of laws to wiretapping.

PATRIOT ACT

The Patriot Act, enacted by Congress after the September 11, 2001, terrorist attacks upon the World Trade Center in New York City and the Pentagon in Washington, D.C., increased the authority granted to law enforcement officials to conduct wiretaps. Traditionally, officers gathering information regarding foreign intelligence faced much lower standards than those required for a domestic wiretap. The Patriot Act now expands the authority of officers to conduct wiretaps that are not as directly involved with gathering

foreign intelligence. Specifically, the law allows officials to monitor the Internet and to conduct "roving" wiretaps. As long as foreign intelligence is a significant purpose, federal agents face many fewer restrictions when they conduct a wiretap search.

Zachary Crain

See also: Electronic Eavesdropping; Exclusionary Rule; Fruits of the Poisonous Tree; *Katz v. United States;* Patriot Act.

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Wisconsin v. Mitchell (1993)

In *Wisconsin v. Mitchell,* 508 U.S. 476 (1993), the U.S. Supreme Court held that a penalty-enhancement law that doubled the standard punishment for individuals who committed crimes based on their abstract beliefs was consistent with the free speech rights protected under the First Amendment to the U.S. Constitution. In this application, a belief biased against white people because of injustices done to blacks, when that belief was the motive for criminal behavior, was not entitled to First Amendment protection.

On October 7, 1989, Todd Mitchell and his friends, all African Americans, were gathered at an apartment complex in Kenosha, Wisconsin, discussing a scene from the movie *Mississippi Burning,* in which a Caucasian beat a young African American boy who was praying. As perceived retaliation for the beating in the motion picture, Mitchell and his friends ran toward a Caucasian boy, beat him ruthlessly, and stole his tennis shoes. The boy was left unconscious and remained in a coma for four days.

The maximum penalty for aggravated battery in Wisconsin was two years. Because Mitchell intentionally selected his victim based on race, however, his sentence was increased to four years, according to the state's penalty-enhancement statute. The Wisconsin Court of Appeals upheld the decision. Relying on *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992), a U.S. Supreme Court precedent, the Wisconsin Supreme Court reversed, reasoning that Mitchell's free speech rights included offensive thoughts and the state could not increase punishment of an individual based on his beliefs. On appeal to the U.S. Supreme Court, Wisconsin contended that it was punishing only conduct, not speech, and to consider the motives behind a crime was appropriate when determining the severity of the sentence.

Writing for a unanimous Court, Chief Justice William H. Rehnquist held that the penalty-enhancement statute did not violate the First Amendment free speech right. In discerning what sentence to impose, the Court asserted that a judge traditionally would consider a variety of factors in addition to the evidence of guilt. The Court recognized that although a judge could not consider a defendant's abstract beliefs, the penalty-enhancement law targeted not speech but conduct, which was unprotected by the First Amendment. In *Mitchell,* the physical assault was not entitled to constitutional protection.

The Court, moreover, rejected Mitchell's claim that the Wisconsin law had a "chilling effect" on free speech, which would prevent Mitchell's free and unobstructed flow of ideas. The Court mused that the notion that his ideas would be used as evidence against Mitchell if he were to commit a serious offense was too speculative to confirm. The most essential factor for the Court was that Wisconsin used the penalty-enhancement law to prevent greater individual and societal harm. The Court noted that hate crimes were more likely to induce retaliatory measures by offended actors, which the state had a right to control under its police powers.

The *Mitchell* decision endorsed penalty-enhance-

ment laws and paved the way for other states to codify similar laws to punish individuals more severely when they committed hate crimes. *Mitchell* was another indication by the Rehnquist Court that protecting the safety of society may outweigh any potential competing civil liberties claims.

John R. Hermann

See also: Hate Crimes; Hate Speech; *R.A.V. v. City of St. Paul.*

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Wisconsin v. Yoder (1972)

In *Wisconsin v. Yoder,* 406 U.S. 205 (1972), the U.S. Supreme Court addressed whether application of Wisconsin's compulsory school-attendance law to members of the Amish religion violated their right to free exercise of religion as guaranteed by the First Amendment to the Constitution and applied to the states by the Fourteenth Amendment. The Wisconsin statute required all children to attend school until age sixteen, but certain members of the Amish religion refused to send their children to any school (public or private) after the eighth grade. The Amish parents were therefore tried for violating the law.

The parents contended that attendance at high school was contrary to the Amish religion and way of life. Noting that a hallmark of the Amish faith was life in a community separated from the modern world, the parents presented uncontroverted testimony that the values taught in high school conflicted with Amish values, especially by exposing Amish children to competitiveness, materialism, and worldliness. Because their objection to formal schooling was intertwined so closely with their religious beliefs, the parents challenged the Wisconsin law based on the Free Exercise Clause of the First Amendment, which through the doctrine of incorporation has been applied to the states via the Due Process Clause of the Fourteenth Amendment. The trial court found that although the compulsory-attendance law did interfere with the parents' religious freedom, the law was a reasonable exercise of governmental power, and the parents were subsequently convicted for violating the state law. On appeal, the Wisconsin Supreme Court reversed the convictions, finding that the law violated the First Amendment. The state appealed to the U.S. Supreme Court.

In its six–one decision (Justices Lewis F. Powell Jr. and William H. Rehnquist did not participate), written by Chief Justice Warren E. Burger, the Court initially noted that there is "[n]o doubt as to the power of a state, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." Relying primarily on *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), the Court also noted that this power of the state must be balanced against, and at times yield to, parental rights.

Next, the Court examined whether the compulsory-attendance law infringed on the free exercise of religious belief. In reviewing the record, the Court found that it "abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." Additionally, the Court found in the record support for the conclusion that the values taught in modern secondary school contradicted those espoused by the Amish faith and constituted a grave threat to the child's religious development. Therefore, the Court concluded that the compulsory-attendance law, with the threat of criminal sanction, would "endanger if not destroy" the free exercise of religion.

Finding that the law infringed the free exercise of religious belief, the Court next asked whether the state's interest in compelling education was sufficient to override the First Amendment. The state argued that compulsory education prepared citizens to participate in the democratic process and to be self-sufficient members of society. Accepting these

propositions, the Court found that requiring Amish children to attend two years of high school would do little to serve those interests, noting that the Amish community was a successful one, with highly productive and law-abiding members who rejected public welfare. Given this success, and noting that compulsory education beyond the eighth grade was a recent historical development, the Court concluded that it would require a more "particularized showing from the state on this point to justify the severe interference with religious freedom such additional compulsory attendance would entail." Finding that the state had not met its burden, the Court held that the parents' rights to free exercise of religion under the First and Fourteenth Amendment had been violated.

In dissent, Justice William O. Douglas focused on what he thought was the Court's inadequate provision for allowing the students involved to state their desires in the matter. He also expressed concern that the Court was giving greater deference to members of organized religion than to individuals who were motivated by more individualistic beliefs. By contrast, Justice Potter Stewart in concurrence believed the record established that the children held the same views as their parents.

Elizabeth M. Rhea

See also: Free Exercise Clause; *Pierce v. Society of Sisters.*

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Wolf v. Colorado (1949)

Wolf v. Colorado, 338 U.S. 25 (1949), is often cited as the case in which the U.S. Supreme Court made the Fourth Amendment's prohibition of unreasonable searches and seizures applicable to the states, though refusing to require state courts to follow the federal rule that evidence obtained illegally may not be introduced against an accused at trial (the exclusionary rule). The majority opinion by Justice Felix Frankfurter provided support for this interpretation by proclaiming that "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society" and thus "enforceable against the states" under the Due Process Clause of the Fourteenth Amendment. Thus, it was plausible for the authors of the concurring and dissenting opinions in *Wolf*—all four of whom were on record in support of the position that all provisions of the Bill of Rights (the first ten amendments to the Constitution) should be applied to the states—to argue that the Court had "incorporated" the Fourth Amendment into the "liberty" protected against state deprivation without due process of law by the Fourteenth Amendment. This broad reading was probably not what Frankfurter intended, however.

Of even greater significance was the majority's view in *Mapp v. Ohio,* 367 U.S. 643 (1961), that the Court had already made the Fourth Amendment applicable to the states in *Wolf.* On this understanding, Justice Tom C. Clark was able to assert that the Court in *Mapp* needed only to overturn the inexplicable refusal of the *Wolf* Court to apply the exclusionary rule—the only meaningful sanction for violations of the Fourth Amendment—in state as well as federal courts.

When *Wolf* is read in light of contemporary debates about incorporation of the Bill of Rights into the Fourteenth Amendment, however, it is clear that Frankfurter did not understand *Wolf* as making the Fourth Amendment applicable to the states. Indeed, Frankfurter was careful to specify that federal law enforcement activities were governed by the Fourth Amendment itself, whereas the constitutionality of state action that invaded privacy was to be determined solely by reference to the more open-ended language of due process. In Frankfurter's view, the Fourteenth Amendment prohibited arbitrary invasion of a home (or doctor's office) by state or local law enforcement officers, but did not mandate exclusion in state court of evidence so obtained. In short, Frankfurter's opinion in *Wolf* was fully consistent with the "fundamental fairness" approach to due process that he consistently offered as an alternative to the incorporation doctrine endorsed by his more liberal colleagues. Because Frankfurter's opinion in *Wolf* did not embrace the

proposition that the Fourth Amendment was incorporated into the Fourteenth, it was logical that the majority justices in *Mapp* were willing to make the constitutional protection against unreasonable searches or seizures fully applicable to the states.

Edward V. Heck

See also: Exclusionary Rule; *Mapp v. Ohio; Weeks v. United States.*

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World War I

When the United States entered World War I in 1917, the administration of President Woodrow Wilson adopted a comprehensive policy to limit dissent. The U.S. entry into the war was described as a noble endeavor aimed at making the world safe for democracy. Individuals who challenged the idea of U.S. involvement in the war soon found that their ability to express ideas was limited by the actions of federal, state, and local officials. The government's rush to quell dissent raised difficult issues involving freedom of speech and press as protected under the First Amendment to the U.S. Constitution.

When Wilson asked Congress during 1917 and 1918 to grant him powers to regulate speech, Congress responded by passing two measures, the Espionage Act of 1917 and the Sedition Act of 1918. These legislative measures gave broad powers to the federal government to regulate speech. The Espionage Act provided for fines and jail sentences for those found to be in violation of its provisions. Among its stipulations was a clause making it illegal to interfere with the recruitment of soldiers. The Sedition Act was more intrusive on civil liberties than the Espionage Act. Under its provisions, it was illegal to criticize the president, the Constitution, the government, or members of the military. By issuing an executive order, the president also identified the use of the postal system for antiwar activities to be a violation of the Espionage Act. Wilson used these measures to the fullest extent. Indeed, his wartime presidency has been compared with Abraham Lincoln's Civil War presidency, during which civil liberties also were restricted. Still, Wilson never sought to suspend the writ of habeas corpus (petition for release from unlawful confinement) as Lincoln did; Wilson claimed that such action would have violated the Constitution.

Wilson also requested authority to regulate economic matters, and Congress responded with the Lever Food and Fuel Control Act of August 10, 1917. This measure authorized the president to regulate the national economy for the wartime effort. Businesses would henceforth be required to follow presidential directives. Given this measure's extensive sweep, many members of Congress were reluctant to give such power to the president. Therefore, an amendment was added that set up a congressional committee to supervise the executive branch's use of the powers granted to it by the Lever Act. On this matter, however, Wilson was particularly upset. He charged that the amendment would weaken the ability of his administration to wage war. In fact, he said that Lincoln had faced a similar committee during the Civil War, the Committee on the Conduct of the War. According to him, the committee that oversaw Lincoln's management of the war had made his job untenable. After resisting the amendment, Wilson secured a victory. Congress deleted the amendment, thus giving President Wilson the extraordinary powers he had sought.

Many Americans, both well known and less well known, were imprisoned for their political speech during this period. Over two thousand citizens were charged with violation of the antispeech laws, with half being found guilty of the charges. One prominent American, Eugene V. Debs, leader of the Socialist Party, presidential candidate, and activist, was sent to prison for two years and eight months for a speech delivered in June 1918 attacking President Wilson's leadership of the nation. Debs's Socialist Party was also the target of the Wilson administration's attack on civil liberties. By 1919 party membership had declined from 109,000 to 36,000, and it never recovered from the attacks it suffered during the war years. Pres-

President Woodrow Wilson. When the United States entered World War I, the Wilson administration adopted a comprehensive policy to limit dissent. Congress responded by passing two measures, the Espionage Act of 1917 and the Sedition Act of 1918. *(National Archives)*

ident Warren G. Harding commuted Debs's sentence in December 1921.

Another noteworthy case from the World War I period involved Charles Schenck, who sent draft resistance letters through the mail system. Charged with violating the Espionage Act, Schenck was convicted, and his case was never overturned. Despite this, the matter did reach the Supreme Court, which not only upheld the conviction by a unanimous vote but also developed the noteworthy "clear and present danger" test for application to matters involving freedom of speech under the First Amendment.

By the end of the war, several states had sedition laws restricting free speech. During the interwar period, the Supreme Court reviewed the sedition act of New York, which closely resembled Wilson's requested Sedition Act of 1918. In *Gitlow v. New York,* 268 U.S. 652 (1925), although the Supreme Court upheld Benjamin Gitlow's conviction for engaging in expression prohibited by the New York law, the Court nevertheless ruled that the First Amendment was applicable to the states as being "incorporated" through the Due Process Clause of the Fourteenth Amendment. In other words, states as well as the federal government were bound to honor the fundamental freedoms protected by the First Amendment. *Gitlow* was the first among numerous cases through which the Court applied against the states most of the fundamental liberties protected by the Bill of Rights, in a process known as "selective incorporation." In this manner, the Supreme Court made it possible for the Bill of Rights eventually to influence state laws.

Government actions during World War I are illustrative of the nation's tendency to infringe on civil liberties during times of national crisis. Although the executive branch initiates the actions hostile to civil liberties, the legislative and judicial branches are reluctant to challenge executive actions. Once the crisis is over, the executive branch becomes more circumspect about its actions, and the courts become less willing to permit infringement of civil liberties. Measures taken during World War I are by no means unique. World War II, the Korean War, the Cold War, Afghanistan, Iran, Iraq, not to mention the September 11, 2001, terrorist attacks in New York City and Washington, D.C., and the failed attempt in Pennsylvania—all these and other crises have led to renewed efforts to restrict fundamental liberties. In the latest round of restrictions is the Patriot Act of 2001, which civil liberties advocates seek to challenge for several constitutional infractions.

Michael E. Meagher

See also: Debs, Eugene Victor; Espionage Act of 1917; Incorporation Doctrine; Palmer Raids; Red Scare; Sedition Act of 1918; Wilson, Woodrow.

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World War II

World War I is known both for the adoption of the Espionage Act of 1917 and the Sedition Act of 1918 as well as for a number of U.S. Supreme Court decisions upholding convictions under these and similar laws passed during patriotic fear and fervor but subsequently found to infringe on constitutional liberties. Supreme Court decisions during World War II generally did less damage to First Amendment freedom of expression, but a number of decisions established the dangerous precedent, since largely repudiated, of upholding the use of racial classifications to restrict civil liberties.

In *Hartzel v. United States,* 322 U.S. 680 (1944), the Court, in a five–four opinion authored by Justice Frank Murphy, overturned a conviction based on the Espionage Act of 1917 of a fascist who had mailed literature critical of the United States to Selective Service (draft) registrants. The majority narrowly interpreted the law's provision that individuals must seek "willfully" to cause insubordination or to obstruct the draft. Similarly, in another five–four decision authored by Justice Owen J. Roberts, the Court in *Keegan v. United States,* 325 U.S. 478 (1945), set aside convictions of members of the German American Bund (previously designated Friends of the New Germany) for conspiring to counsel against the draft on the basis that the government had failed to establish specific intent. In *Baumgartner v. United States,* 322 U.S. 665 (1944), the Court further overturned the attempted denaturalization of an alleged Nazi sympathizer under the Nationality Act of 1940, again deciding that the government's evidence had been insufficient.

One of the most notable opinions from World War II was the Court's decision in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), reversing an earlier decision in *Minersville School District v. Gobitis,* 310 U.S. 586 (1940), and invalidating compulsory flag salutes in public schools, which Jehovah's Witnesses had opposed as being idolatrous. In an opinion appropriately issued on Flag Day (June 14), five of the eight other justices agreed with Justice Robert H. Jackson's opinion that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Just as World War I had witnessed the adoption of laws expressing animus against Germans and the teaching of the German language, so, too, the toughest issues the nation faced during World War II involved the treatment of Japanese Americans. Shortly after the Japanese attack on Pearl Harbor on December 7, 1941, President Franklin D. Roosevelt issued Executive Order No. 9066 giving military commanders on the West Coast power to take measures against the potential for a Japanese threat. Fearful of a possible Japanese invasion and arguably influenced by strands of racism, these commanders first issued a curfew for the region's 112,000 individuals of Japanese ancestry, most of them U.S. citizens; excluded the Japanese from these military zones (thus displacing them from their homes); and then ordered that the Japanese be incarcerated in detention camps.

These policies were based on the fear that Japanese Americans, some of whom were considered to be dual U.S. and Japanese citizens, would constitute a type of "fifth column," consisting of individuals who would be sympathetic to Japanese invaders. Unfortunately, the military applied similar policies to both Issei, who retained their Japanese citizenship, and to Nisei, who were U.S.-born. In *Hirabayashi v. United States,* 320 U.S. 81 (1943), the Supreme Court unanimously upheld a curfew on Japanese Americans but was careful to limit its decision to this action. In *Korematsu v. United States,* 323 U.S. 214 (1944), the Court further approved the order excluding Japanese from the designated military zones but attempted somewhat unpersuasively to sidestep the issue of whether the detention camps were legal. In language that has since been put to more liberal uses as the backbone of the Court's "strict-scrutiny" standard of review, Justice Hugo L. Black said that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." Nevertheless, Justice Black said

the Court had to defer to the military judgment that exclusion based on race in this instance was needed. Recognizing that such exclusion presented hardships, Black argued that "hardships are part of war, and war is an aggregation of hardships." By contrast, Justice Murphy argued that the exclusion of Japanese Americans "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." Similarly, Justice Jackson feared that the judicial authorization of such exclusion would serve, like a loaded gun, as a possible precedent for further erosion of rights. Finally in *Ex parte Endo,* 323 U.S. 283 (1944), the Court offered a small victory to Japanese Americans by releasing from detention a Japanese American woman who had filed a writ of habeas corpus and for whom the government could establish no individualized suspicion of disloyalty.

In a case on a related issue, the Court decided in *Duncan v. Kahanamoku,* 327 U.S. 304 (1946), that the trial and sentencing by military courts of two civilians in Hawaii, under a declaration of martial law by the territory's governor later supported by a presidential order, had been unconstitutional. One civilian was a shipfitter who was tried and convicted for assaulting two military personnel; the other was a stockbroker accused of embezzling. In both cases, the Court could find no reason that the regular civilian courts, under which the full panoply of rights would have been upheld, could not try such individuals.

In *Ex parte Quirin,* 317 U.S. 1 (1942), the Court upheld the trial and conviction of German saboteurs (one of whom claimed to be a U.S. citizen) who had landed by submarine in the United States and hidden their uniforms with the apparent intention to spy and destroy. In contrast to the Civil War context that the Court had reviewed in *Ex parte Milligan,* 71 U.S. 2 (1866), the Court decided that the Germans were prisoners of war and thus legitimately subject to military trial and punishment. Similarly, in the case of *In re Yamashita,* 327 U.S. 1 (1946), the Court unanimously upheld the conviction by military court of a Japanese general who, it was alleged, had not properly restrained his troops from committing atrocities against civilians in the Philippines.

World War II highlighted the evils of racism. African Americans who had served as soldiers (like Japanese Americans who had likewise distinguished themselves in battle) returned home with the knowledge that they had played an important role in America's victory and with the belief that they should be entitled to equal treatment. Not long after the war, President Harry S Truman ended segregation in the U.S. military by executive order, and the Court's decision on school desegregation, *Brown v. Board of Education,* 347 U.S. 483 (1954), followed within a decade and was in turn succeeded by an invigorated civil rights movement.

The end of World War II was followed relatively quickly by the Cold War between the United States and the Soviet Union, then the world's two major superpowers. During this time the Alien Registration (Smith) Act of 1940, adopted just before U.S. entry into World War II, and the Subversive Activities Control Act of 1950 were frequently directed at domestic dissent, especially by Communists or their sympathizers. A number of the issues raised during World War II have been relevant to post–September 11, 2001, decisions involving individuals captured in the war on terrorism in the aftermath of the attacks on the World Trade Center in New York City and on the Pentagon in Washington, D.C.

John R. Vile

See also: Espionage Act of 1917; First Amendment; Flag Salute; *Korematsu v. United States;* Martial Law; *Milligan, Ex parte;* President and Civil Liberties; Sedition Act of 1918; Smith Act Cases; Strict Scrutiny; Suspect Classifications; *West Virginia Board of Education v. Barnette;* World War I.

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Write-in Votes

Voters sometimes wish to cast a vote for a candidate not listed on the ballot. Forty-five states and the District of Columbia permit write-in votes; voters may write the name of their preferred candidate on the ballot in a special location. When election officials later count the ballots, they count the number of votes cast for each candidate, including the write-ins. In many states the write-ins are not individually reported unless it appears that the total number of write-in votes exceeds the number of votes cast for any ballot-listed candidate.

In five states (Hawaii, Nevada, South Dakota, Oklahoma, and Louisiana), the election code does not permit write-in votes. In other states, write-ins are used in only some elections, for instance, only in general elections.

Alan Burdick, a voter in Hawaii (a non-write-in state), brought suit to compel the state to allow him to cast a write-in vote and to compel the state to count such votes and publish the results. Burdick claimed that he wished to vote for a person who had not filed nomination papers to run for a seat in the state House of Representatives (only one candidate had filed the papers). Burdick argued that the inability to cast a write-in vote violated his First Amendment rights to expression (his dissent against the number of candidates) and association (with his preferred candidate).

In *Burdick v. Takushi,* 504 U.S. 428 (1992), the U.S. Supreme Court held that a state's burden to justify its election laws varied with the burden imposed on individual voters. In the case of write-in votes, the Court held, there was little burden on voters because of Hawaii's relatively easy process for a candidate or a new political party to qualify for the ballot. For instance, a candidate could appear on a nonpartisan primary ballot by filing nominating papers with fifteen to twenty-five signatures and then advance to the general election by receiving only 10 percent of the primary vote.

Write-in votes can be important in an election system, but they are probably not constitutionally required when a state provides fairly easy access to the ballot. The fundamental liberty of voting in elections is not compromised in this situation.

Edward Still

See also: Right to Vote.

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Writs of Certiorari

In order to hear cases involving civil liberties (or any other subject), the U.S. Supreme Court must first accept them. It does so through reviewing written petitions known as writs. There are three primary types of writs—writs of appeal, similar to the old writs of error, which the Court must hear as a matter of right; writs of certification, in which courts are asked to answer a question of law in which a lower court seeks instructions; and writs of certiorari. Writs of appeal have been seriously curtailed since a 1988 law that largely limited them to cases in which three-judge district courts have issued or denied injunctions, and writs of certification are rarer still. Thus, most cases (90 percent or more) that get to the Supreme Court get there through writs of certiorari.

"Certiorari" is a Latin term meaning "made more certain." Lawyers who file writs of certiorari are asking the Court to reconsider the rulings in their cases. Most writs are appealed from decisions by U.S. Circuit Courts of Appeal, but in cases involving "federal issues" (cases arising under the Constitution or federal statutes), such writs may also be filed from state supreme courts. Writs typically explain how the Supreme Court has jurisdiction, state the issues presented and the facts relevant to these issues, and explain why a party thinks the Court should accept review. The Court decides which cases to review on a purely discretionary basis, although it typically looks for issues on which lower courts have split, for matters involving interpretation of the U.S. Constitution or

U.S. laws or treaties, or for cases where decisions seem to conflict with those the Supreme Court has itself issued.

Eight of nine justices (all but Justice John Paul Stevens) currently participate in a "cert pool" under which their clerks, usually recent law school graduates, collectively review petitions and recommend to the justices whether they should be reviewed on their merits. Any justice may place a case on the "discuss list" of those deemed worthy of consideration, but the large majority are consigned to the "dead list" that do not receive further review. The Court operates according to the "rule of four" by which it will not accept a case unless four of the nine justices think it is worthy of a hearing (some justices will occasionally file a "join-3" vote, indicating they will accept cert if three others agree to do so). Justices do not give written reasons for denials of cert, although justices will occasionally file dissents from such denials. Of the thousands of writs that the Court reviews each year, it currently accepts only about seventy-five for oral argument; the percentage of cases that actually receive full review is thus quite small.

Justices themselves dispute the meaning of a denial of certiorari. Such a denial leaves lower-court decisions in place, but it does not necessarily mean that the Supreme Court would have ruled the same way. The Court simply might think that an issue is not important enough, that the case is not yet "ripe" for review, or that a particular case has other infirmities that do not make it a particularly good vehicle for decision-making.

The right of appeal is a basic civil liberty designed to serve as a guard against mistakes or injustices in lower courts and as a means of providing for general uniformity in a federal system. However, without the ability to turn down appeals it considers frivolous or otherwise lacking in merit that writs of certiorari provide, the Supreme Court would be overwhelmed.

John R. Vile

See also: Right to Appeal; United States Supreme Court.

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Y

Yates v. United States (1957)

In 1940 the U.S. Congress passed the Smith Act making it illegal for anyone in the United States to advocate or teach the forcible overthrow of the government. After World War II, the Smith Act was used during the Cold War era to prosecute leaders of the Communist Party in the United States. The first such case to reach the Supreme Court was *Dennis v. United States,* 341 U.S. 494 (1951), in which the U.S. Supreme Court upheld the convictions of eleven Communist Party members for organizing a party designed to overthrow the U.S. government. Applying a modified clear-and-present-danger test—a test the Court had first developed in *Schenck v. United States,* 249 U.S. 47 (1919), to analyze the extent of free speech rights protected by the First Amendment to the U.S. Constitution—the Court found that even though the possibility of overthrow was remote, significant harm would result from any attempt. When the government was aware of a group advocating and teaching the necessity of overthrow, the government was required to act.

In *Yates v. United States,* 354 U.S. 298 (1957), the Court modified its ruling in *Dennis* to increase First Amendment protections for political speech. Six years had passed since *Dennis,* during which time the political climate had changed. Senator Joseph McCarthy (R-WI) had died, and anti-Communist sentiment had somewhat abated.

Yates involved the 1951 convictions of fourteen "second string" members of the Communist Party in California. The Court's decision was based on interpreting the Smith Act instead of addressing First Amendment issues. In the opinion for the Court majority, Justice John M. Harlan found that the trial judge's instructions to the jury did not adequately distinguish between advocacy and teaching of abstract doctrine and advocacy of unlawful action either now or at some point in the future. The Smith Act prohibited advocacy of action and not advocacy of ideas. Advocacy and teaching addressed at taking action, whether or not incitement, was punishable. Advocacy addressed at merely believing in something was not punishable. In *Dennis,* the Court was concerned with the presence of advocacy aimed at taking forcible action in the future and not with a conspiracy to engage in seditious advocacy at some point in the future.

Although Justice Harlan stated that *Yates* was a clarification of *Dennis,* many scholars believed that *Yates* was an evolution in the Supreme Court's First Amendment jurisprudence. The Court began to incorporate elements of District Court Judge Learned Hand's incitement approach. Hand's analysis in *Masses Publishing Co. v. Patten,* 244 F. 535 (S.D.N.Y. 1917), was to focus on the speaker's words. If the language used incited those who heard it to action, the speech was not protected under the First Amendment.

Carrie A. Schneider

See also: Clear and Present Danger; Communists; *Dennis v. United States;* Hand, Learned; *Schenck v. United States;* Smith Act Cases.

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Young v. American Mini Theatres, Inc. (1976)

In *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976), the U.S. Supreme Court, in a plurality opinion by Justice John Paul Stevens and with a sep-

arate opinion by Justice Lewis F. Powell Jr., narrowly upheld (by a five–four vote) the constitutionality of a Detroit, Michigan, ordinance passed under the city's zoning power to isolate the location of "adult" theaters and bookstores. The ordinance required that adult theaters and bookstores be located at least 1,000 feet from regulated businesses, including bars, hotels, and cabarets, and 500 feet from residential areas. The ordinance defined adult theaters as those exhibiting motion pictures that featured specific sexual activities (aroused human genitals, masturbation, sexual intercourse, sodomy, and erotic touching of genitalia, buttocks, and breasts) or specific anatomical areas (uncovered genitalia and female breasts and covered but discernible genitals in a "turgid" state). At issue was whether the zoning ordinance infringed the right to free expression provided by the First Amendment to the U.S. Constitution.

Justice Stevens held that the ordinance was a constitutional regulation of expressive material that had lesser value than the political speech protected by the First Amendment. As with incitement, fighting words, and defamation—which also were not entitled to First Amendment protection—he judged the ordinance did not violate the government's "primary obligation of neutrality in its regulation of protected communication." Also, the ordinance did not demand the total suppression of the sexual material. Instead, Detroit had required only the reasonable separation of adult businesses from other enterprises and residences to "preserve the quality of urban life."

Powell concluded the ordinance was constitutional because it was not a limitation on the content of expression and because it did not restrict "in any significant way" the opportunity to view movies at a theater. In addition, the ordinance was a reasonable government regulation of the place and manner of expression, according to Justice Powell's application of the four-part balancing test announced in *United States v. O'Brien,* 391 U.S. 367 (1968).

The four dissenting justices, in an opinion by Justice Potter Stewart, asserted that the ordinance was an unconstitutional regulation of content. They argued that it was neither a valid regulation of expression of lesser value than other speech nor a valid regulation of the time, place, or manner of expressive activities.

Subsequent decisions refined the meaning of *Young.* In *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986), the Court revisited the zoning of adult businesses. Using the balancing approach of Justice Powell in *Young,* Justice William H. Rehnquist upheld a zoning ordinance concentrating the location of adult theaters because their "secondary effects" (drugs, prostitution, traffic, and the like) were harmful to the surrounding community. Also, in *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425 (2002), Justice Sandra Day O'Connor in the plurality opinion allowed the use of any "reasonably relevant" evidence to show the harmfulness of adult businesses' direct or secondary effects on urban life. Justice Anthony M. Kennedy, the fifth vote in support of the Los Angeles ordinance, required "substantial" rather than "reasonably relevant" evidence of harm to the community.

Richard Brisbin

See also: City of Los Angeles v. Alameda Books, Inc.; City of Renton v. Playtime Theatres, Inc.; Obscenity; Zoning.

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Z

Zablocki v. Redhail (1978)

The U.S. Supreme Court has recognized the right to marry as a fundamental—albeit unenumerated—constitutional right under both the "fundamental rights" prong of equal protection and the substantive Due Process Clause of the Fourteenth Amendment to the Constitution. Thus, it is a basic civil liberty that is entitled to the strongest degree of constitutional protection.

In *Loving v. Virginia,* 388 U.S. 1 (1967), the Court applied strict scrutiny to a Virginia statute that prohibited interracial marriage, reasoning that marriage was a basic civil right fundamental to human existence and survival. Nevertheless, the Court in *Loving* implied that infringements on marital relationships would be upheld if drawn narrowly to achieve a compelling government interest. Later, in *Califano v. Jobst,* 434 U.S. 47 (1977), the Court upheld the validity of a Social Security regulation that cut off benefits to a disabled dependent child of a covered wage earner upon the disabled person's marriage, unless the marital partner was independently entitled to such benefits. Despite upholding the regulation, the Court reaffirmed the notion that any obstacle directly and substantially interfering with the right to marry would trigger heightened scrutiny.

The Court considered one such obstacle a year later in *Zablocki v. Redhail,* 434 U.S. 374 (1978). An indigent plaintiff, a father, challenged a Wisconsin law requiring that a parent under court order to support a minor child who was not in his custody must demonstrate (1) that all court-ordered child support had been paid, and (2) that the child was not currently benefiting and was not likely to benefit from welfare, in order for the parent to be permitted to marry. The father failed to meet the requirement pertaining to child support and therefore was prohibited from getting married. Consequently, he attacked the statute on both equal protection and substantive due process grounds.

The Supreme Court invalidated the Wisconsin law, grounding its holding in the Equal Protection Clause, which mandates strict judicial scrutiny of any statute impinging on a fundamental right. Although Wisconsin's interests were legitimate and substantial, the state's method of furthering those interests unnecessarily interfered with a fundamental right. According to the Court, in order to ensure compliance with child support requirements, the state could have devisedless drastic compliance methods. The Court also determined that the means used were grossly underinclusive. In other words, many other financial commitments—apart from marriage—were not similarly barred. In short, the provision at issue tended to discourage marriage by placing a direct legal obstacle in the path of any parent desiring to marry and therefore was a significant interference with the marriage right.

In *Zablocki,* the Court reiterated the notion that the right to marry was "fundamental," and substantial interference with that right could not be sustained merely because the state could cite a "rational" justification. This case reinforced the distinction between regulations that grant or deny public benefits based on marital status (*Jobst)* and ones that determine who may lawfully marry (*Zablocki).* Regulations judged to fall into the latter category probably will be subject to strict scrutiny and deemed invalid under *Zablocki.*

Zablocki can be criticized because of the Court's failure to consider the broader social and economic concerns that affect families and children. For example, in the years after *Zablocki,* there was a substantial increase in the number of female-headed households with children. The means of fulfilling the Wisconsin legislature's objectives that were implemented in this case ensured that parents fulfilled their financial responsibility to noncustodial children before being allowed to marry and have more. Notably, since *Zablocki,* there has been a significant decline in the standard of living of divorced women with children

compared with how their former husbands fared; overall, the husbands' financial positions after divorce markedly improved.

Gia Elise Barboza

See also: Loving v. Virginia; Marriage, Right to; Parental Rights.

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Zadvydas v. Davis (2001)

In *Zadvydas v. Davis,* 533 U.S. 678 (2001), the U.S. Supreme Court ruled that resident aliens held by the government beyond the ninety-day removal period were entitled to a habeas corpus hearing (hearing held on a petition for release from unlawful confinement) if they were detained more than six months beyond expiration of this time period. The case was significant because it limited the power of the Immigration and Naturalization Service (INS) to indefinitely detain aliens awaiting deportation.

Aliens are individuals who are not citizens but nonetheless reside in the United States. In some cases, these individuals have entered the country illegally, or they have been convicted of a crime or otherwise have failed to comply with the conditions that allow them to remain in the United States. In such circumstances, these individuals may be deported if a final order has been issued. If that occurs, federal law states that the INS may hold in custody for up to ninety days (called the removal period) the person subject to deportation. During this time the INS prepares the alien for removal while, for example, it seeks to determine to what country to send that person.

In some situations, the ninety-day period expires before the individual is ready to be deported. In these situations, federal law allows the U.S. attorney general to detain the person beyond the removal period if officials believe the person is a risk to the community, a security threat, or in danger of flight if released. This post-removal-period detention has no time limit, which implies that the INS may hold an alien indefinitely. This indefinite holding of an alien by the INS was the subject of the dispute in *Zadvydas v. Davis.*

Kestutis Zadvydas was a resident alien who was born in Germany of Lithuanian parents and immigrated to the United States with his parents when he was eight years old. Zadvydas had a long criminal record that included burglaries and drug convictions, and in 1974 after a conviction for the possession and sale of cocaine, he was taken into custody by the INS and ordered deported. However, Germany refused to accept Zadvydas that year, the Dominican Republic refused in 1996, and in 1998 Lithuania also rejected him.

Beginning in 1995, Zadvydas filed habeas corpus petitions in court seeking release from detention by the INS. His claim was that he was being illegally detained beyond the ninety-day removal period. In 1997 a federal district court granted his habeas petition and ordered him released, but the Fifth Circuit Court of Appeals reversed, indicating that his detention was not unconstitutional because his deportation was impossible and because the government was making good faith efforts to remove him from the United States. The U.S. Supreme Court accepted the case for review and reversed the Fifth Circuit opinion.

Writing for the Court, Justice Stephen G. Breyer first noted that habeas corpus in federal court was available to review post-removal-period detentions. He then addressed the main issue of whether the government could detain someone for an indefinite period of time beyond the ninety-day removal period. The INS argued that the statute permitted this, but the Court stated that indefinite detention raised serious constitutional questions, especially when deportation hearings were supposed to be civil and nonpunitive.

Moreover, Justice Breyer questioned whether Congress had intended to allow this indefinite detention, noting that Congress had changed the law to limit the removal period to ninety days and this fact suggested an intent to limit how long the government could detain someone. He also rejected government arguments that detention of aliens was inherently an issue for the executive department in its security consider-

ations and that the president and attorney general should be given significant leeway in making these types of decisions. Overall, the majority concluded some reasonable limit was necessary on how long a person could be held, which the Court decided was six months beyond the expiration of the ninety-day removal period. At that point the detainee could petition for release, and the burden then would be on the government to show why continued detention was required.

Zadvydas v. Davis was considered an important victory for the rights of aliens. The case was decided in June 2001, but it took on even more importance after the terrorist attacks on the United States later that year on September 11. As the United States was cracking down on individuals suspected of being terrorists, the decision placed limits upon the government's ability to detain them indefinitely simply because they were aliens.

David Schultz

See also: Due Process of Law; Immigration Law.

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Zelman v. Simmons-Harris (2002)

In *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), the U.S. Supreme Court was asked to review an Ohio school "voucher" program that provided state funds to Cleveland parents for tuition payments at religious schools. Building on earlier decisions in *Mitchell v. Helms,* 530 U.S. 793 (2000), and *Rosenberger v. University of Virginia,* 515 U.S. 819 (1995), the Court continued to lower the wall between church and state erected in *Everson v. Board of Education,* 330 U.S. 1 (1947), and rejected the claim that the Ohio program, which transferred millions of tax dollars to religious (and primarily Catholic) schools, violated the Establishment Clause of the First Amendment to the U.S. Constitution. Under that clause, government is prohibited from engaging in activity that would constitute "establishment of religion."

In response to a perceived failure by the Cleveland public school system to educate Ohio's citizens adequately, the state legislature enacted in 1995 the Pilot Project Scholarship Program. The new policy provided parents with two options for supplementing a free public education. For children remaining in public schools, financial assistance for private tutoring was provided to parents. Parents could also choose to remove their children to a private school, for which the state would provide tuition assistance. Among those parents choosing tuition assistance, more than 96 percent enrolled their children in private religious schools. This tuition assistance portion of the program came under review in *Zelman.*

The Court's increasing leniency in certain Establishment Clause cases was emphasized in Justice David H. Souter's dissent. Souter identified four waves to the Court's Establishment Clause jurisprudence. In 1947 *Everson* established a "no-aid" principle that lasted until 1968, when the Court began to distinguish between the secular and religious activities of religious institutions. In 1983 the Court liberalized its standard to allow aid, provided that it did not create a substantial benefit for the religious institution, was offered on a neutral basis, and was directed to the institution by the free choice of individuals. Justice Souter identified the *Zelman* decision with a fourth reworking of Establishment Clause requirements, a reworking that ignored the substantiality of the aid directed to the religious institution.

Justice Souter also challenged the Ohio program on the grounds that the aid was not offered on a neutral basis (most of the private schools benefiting from the program were Catholic), and that parents were coerced into sending aid to religious schools (the difference between tuition and tutorial assistance was so great as to force the hands of parents in the direction of religious education).

The *Zelman* majority rejected Souter's charge of judicial creativity. Justice Sandra Day O'Connor argued in her concurrence that a fair reading of precedent revealed a Court consistently willing to condone neutral and noncoerced state aid to religious institutions. Chief Justice William H. Rehnquist, mean-

while, challenged Souter's contention that the aid program was impermissibly generous or even coercive.

Regardless of Justice Souter's charge, *Zelman* represents the reasoning in a line of cases in which the Rehnquist Court has responded with less hostility to the public funding of religious institutions than was the norm on the Court under Chief Justices Earl Warren and Warren E. Burger.

Brendan Dunn

See also: Establishment Clause; *Everson v. Board of Education; Rosenberger v. University of Virginia.*

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Zenger, John Peter (1697–1746)

John Peter Zenger was an impoverished immigrant who became a printer, a pawn, a patriot, and eventually a symbol for the importance of a free and independent press. He was born in the Rhine region of Germany in 1697, and at age thirteen he emigrated with his family to America. Unfortunately, his father did not survive the two-month voyage, and his mother was left to raise him and his siblings. Soon after his arrival, Zenger was indentured as an apprentice for eight years to New York's only printer, William Bradford. At the end of his apprenticeship, Zenger traveled the colonies looking for printing work. He met and married Mary White and settled in Chestertown, Maryland. He returned to New York shortly thereafter, however, in part due to the death of his wife. Upon his return, he married Anna Catherina Maulin with whom he eventually had five children.

In 1625, Zenger's previous master, William Bradford, began publishing Manhattan's first newspaper, the *New York Gazette.* Bradford also held all of the colonial government's printing contracts, and because his livelihood was dependent on these contracts, the *Gazette* became the quasi-official publication of the governor's office. For a brief period, Zenger partnered with Bradford, but he soon struck out on his own. At first, his printing business was slow, consisting mostly of religious texts, but that would rapidly change with the arrival of a new colonial governor, William Cosby, in 1731.

Cosby was an arrogant governor and a lightning rod for controversy. In one of his first official actions, he demanded that local councilman Rip Van Dam turn over half of the salary Van Dam had earned while serving as acting governor of New York during the year between Cosby's appointment and his arrival in the colony. Van Dam agreed, but only if Cosby also split the salary he had earned during that same time period. Cosby refused and ordered that the Supreme Court of New York sit as a court of equity and decide the dispute. Lewis Morris, who was chief justice at the time, despised this improper use of the court as an attempt to avoid the colony's established jury system. Unfortunately, his was the lone voice of dissent, and in April 1733, the court ruled in favor of Cosby. Morris, however, was not without recourse. He hired Zenger to print his stinging dissent from the decision as a pamphlet that was distributed throughout New York. Cosby immediately removed him from office and replaced him with loyalist James De Lancey.

In response, Rip Van Dam, Lewis Morris, and local attorney James Alexander organized what came to be known as the Popular Party or Morrisites. They approached Zenger to publish a newspaper sympathetic to their party platform. Thus on November 5, 1733, the Morrisites unleashed the nation's first independent weekly newspaper, the *New York Weekly Journal.* The paper, which was advertised to contain "the freshest advises, foreign and domestic," was an instant success and, due to its political slant, stood in stark contrast to Bradford's *Gazette.* Its pages were filled with articles, written anonymously by Morris and Alexander, that attacked Cosby as an idiot, a Nero, a rogue, and a lawbreaker, "tyrannically flouting the laws of England and New York." The paper focused on stories of Morris's political success while simultaneously ac-

Andrew Hamilton's defense of John Peter Zenger, which established freedom of the press in the American colonies, 1734–35. *(© North Wind Picture Archives)*

cusing Cosby of "incompetence, influence peddling, corruption, collusion with the French, election fraud, and tyranny."

In response, Cosby ordered the colonial grand jury to issue indictments against Zenger for seditious libel, but the jury twice refused. When the Morrisites won numerous seats in the September 1734 city elections, Cosby could take no more. He ordered his attorney general to file a complaint before the New York Supreme Court, and the justices issued a bench warrant for the arrest of John Peter Zenger for seditious libel. On November 17, 1734, the sheriff arrested Zenger and took him to New York's old city jail. Subsequently, Francis Harison, who was the governor's unofficial censor and an editor of the rival *Gazette,* went to Zenger's shop, confiscated all copies of the *Weekly Journal,* and burned them on the steps of city hall.

Chief Justice De Lancey set bail for Zenger at £400, an incredibly high amount for that time. Zenger's supporters were all rich men and could have raised the bail easily, but Zenger was worth more to their cause as a symbol of the governor's tyranny, so he was left in jail. During his eight-month incarceration, the *Weekly Journal* was published each week by his wife, Anna Catherina, who received her instructions "through the Hole of the Door of the Prison." Zenger was finally brought to trial in April 1735. However, his first set of attorneys, which included James Alexander, were disbarred for having the audacity to attack the validity of the judge that Cosby had handpicked to hear the case, the infamous Justice De Lancey. Zenger's cause was not lost, though, because the famous advocate Andrew Hamilton, also noted architect of Independence Hall, agreed to plead his case before the judge and jury.

Pursuant to colonial law, seditious libel was the publication of statements intended to arouse the people against the government by either bringing it into contempt or exciting dissatisfaction. Zenger was clearly guilty of this offense, and truth was not recognized as a defense to the charge. Hamilton surprised the prosecution, however, by freely admitting that Zenger had indeed published the articles. Hamilton instead argued that the law ought not to be interpreted to prohibit "the just complaints of a number of men who suffer under a bad administration." Hamilton also argued that it was within a jury's inherent power to judge the law as well as the facts and that the jury should refuse to convict Zenger if the law was unjust. (This tactic is known modernly as "jury nullification.") In his stirring and eloquent closing statement, Hamilton urged the jury to consider Zenger's case as one of utmost importance:

> The question before the Court and you gentlemen of the jury, is not of small nor private concern, it is not the cause of the poor printer, nor of New York alone, which you are now trying. No! It may in its consequence affect every freeman that lives under a British government on the mainland of America. It is the best cause. It is the cause of liberty; and I make no doubt but your upright conduct this day will not only entitle you to the love and esteem of your fellow citizens, but every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempt of tyranny; and by an impartial and un-

> corrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbors, that to which nature and the laws of our country have given us a right—the liberty both of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth.

After Hamilton's closing statement, De Lancey basically instructed the jury members that they must convict Zenger. Their role, he told them, was merely to determine whether the statements had been published and, if so, whether they referred to the persons or institutions described in the charges. For the purposes of their deliberations, he said, the truth of the statements was irrelevant and immaterial. In his own account of the trial, which was published in the *Weekly Journal,* Zenger described what followed: "The Jury returned in about Ten Minutes, and found me Not Guilty; upon which there were immediately three Hurra's of many Hundreds of People in the presence of the Court." Years later the great-grandson of Lewis Morris, Gouverneur Morris, one of the principal drafters of the Constitution, would describe the Zenger case as "the germ of American freedom, the morning star of that liberty which subsequently revolutionized America."

As a reward for his services, Zenger was made the public printer for New York and New Jersey in 1738 when the Morrisites gained control of the colonial government. However, the life of a responsible corporate printer was not for him. He was soon dismissed from both positions because of his poor English and ignorance of local idioms. Zenger died virtually penniless in 1746. His wife managed the *Weekly Journal* until December 1748, when it was taken over by John Zenger, a son of his first marriage, who continued it until 1751.

The Zenger verdict did not immediately establish that truth was a defense to libel in the American common law; it took almost a century for that maxim to be officially codified as the law of the new land. However, Zenger's acquittal stands as an example of the independence of the American spirit and the importance of a free press. Although the *Weekly Journal* itself did not survive, freedom of the press remains one of the nation's most cherished freedoms because the ability to criticize those who govern serves to preserve all liberties. As Justice Hugo L. Black stated in the *Pentagon Papers* case, *New York Times Co. v. United States,* 403 U.S. 713 (1971), "The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government."

Andrew Braniff

See also: Libel; *New York Times Co. v. United States;* Seditious Libel.

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Zobrest v. Catalina Foothills School District (1993)

The Establishment Clause of the First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion." In many of the U.S. Supreme Court's cases, such as *Zobrest v. Catalina Foothills School District,* 509 U.S. 1 (1993), the justices have struggled with the application of this amendment in the context of governmental aid to religious or sectarian schools. The most difficult cases involve government aid provided in indirect fashion rather than through overt, direct funding to religious schools. *Zobrest* involved indirect assistance.

James Zobrest, who was deaf from birth, was a student in Tucson, Arizona. He attended a school for the deaf from first grade through fifth grade and then attended public school through the eighth grade. Once he reached high school, his parents enrolled him in a Catholic high school for religious reasons. At that time, his parents requested his public school district

to provide a sign-language interpreter to accompany Zobrest to his classes at the Catholic high school.

When the school district refused, Zobrest and his parents brought a lawsuit in federal court against the school district based on the Individuals with Disabilities Education Act of 1990 (IDEA). The IDEA statute was intended to assist states and localities in the education of handicapped children. The federal district court denied Zobrest's request, concluding that providing him an interpreter would violate the Establishment Clause of the First Amendment. On appeal, the Ninth Circuit affirmed, also concluding that providing an interpreter to accompany Zobrest to a private religious school would unconstitutionally advance religion.

The U.S. Supreme Court reversed and held that the Establishment Clause did not bar the school district from providing an interpreter to Zobrest. In its five–four decision written by Chief Justice William H. Rehnquist, the Court reasoned that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge." Otherwise, the Court pointed out, churches and religious schools could not receive the protection of police and fire departments. Additionally, the Court reasoned that a broadly available statutory scheme that incidentally benefited religious schools "as a result of numerous private choices of individual parents" was different from a law that directly provided aid to the schools.

Applying those principles to the facts of this case, the Court concluded that the benefits provided under IDEA were generally available to any handicapped child, regardless of the school the child attended. The Court noted that the choice of school was dependent on the parents' choice and that the statute provided no financial incentive for a parent to choose a religious school. Thus, any benefit Zobrest's Catholic high school might receive under IDEA was not an impermissible advancement of religion.

The school district argued that the provision of an interpreter was similar to the provision of educational services on school premises, a form of aid struck down by the Court in prior cases. The Court responded that the provision of an interpreter to Zobrest was not direct aid to the Catholic high school. Additionally, the Court reiterated that "any attenuated financial benefit that parochial schools do ultimately receive from the IDEA is attributable to the private choices of individual parents." Because "handicapped children, not sectarian schools, are the primary beneficiaries of the IDEA," the Court concluded that the provision of an interpreter to Zobrest to facilitate his education did not violate the Establishment Clause. Later case law regarding governmental aid to religious schools expanded on *Zobrest*'s premise—that the principles of neutrality and private choice would ensure that any incidental benefit to religion was not attributable to the national government.

Elizabeth M. Rhea

See also: Establishment Clause; *Everson v. Board of Education; Locke v. Davey.*

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Zoning

Zoning can be described as the legislative attempt to provide for orderly urban growth and to prevent incompatible land uses. It seeks to accomplish this by the designation of zoning categories. Each category includes a description of the types of land use permissible within that category. Zoning may or may not be accompanied by the creation of an overall plan for the development of the city or other geographic entity (county, region, and so on).

In the United States some of the earliest attempts to regulate land use were pioneered by New York City, which developed the first zoning ordinance in 1916. The ordinance was simple. It established height and setback controls on buildings and separated incompatible uses to halt the encroachment of industry into Manhattan's office and department-store districts. Be-

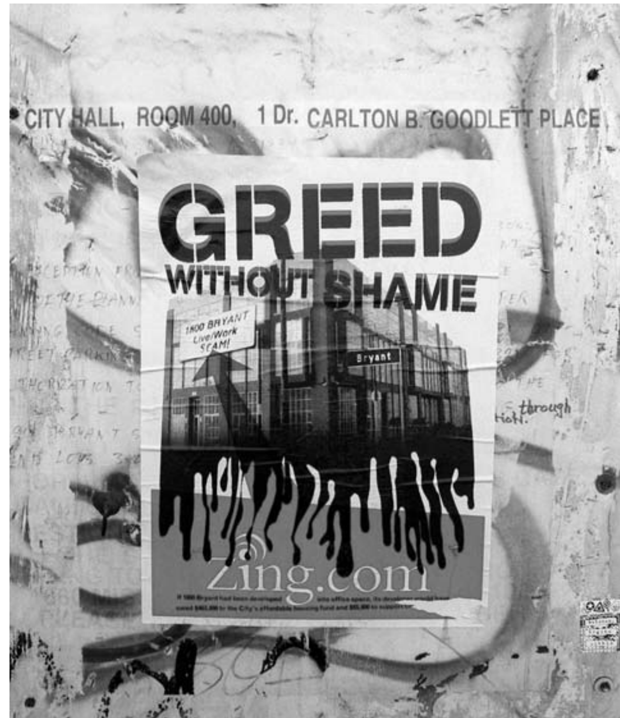
cause of the growth of skyscrapers and complaints from city residents that these blocked the sunlight, the ordinance specified buildings should be shaped so as to taper toward their top, like a multitiered cake.

Zoning quickly became popular as cities struggled with uncontrolled urban expansion and development. They sought to protect residential areas from obnoxious and noisy uses. In the process, the values of urban land were affected, some adversely and some positively. Land zoned for industrial and commercial purposes often became more valuable. Landowners sought to obtain zoning classifications that would enhance the value of their land. This principle, which came to be know as the "highest and best use," meant only the most economically valuable use of the land from the perspective of the owner.

During the 1920s, the U.S. Department of Commerce proposed what was to become the Standard Zoning Enabling Act (SZA). All state zoning legislation is based on this act, and although state enabling acts in some instances have substantially modified the SZA, the similar basic framework has led to remarkably consistent court decisions on zoning nationwide.

Zoning began to arouse hostility from landowners whose land was zoned in a category that lessened its value. Some of them challenged the zoning ordinances. In the landmark case *Euclid v. Ambler Realty Co.,* 272 U.S. 375 (1926), the small village of Euclid, on the fringes of Cleveland, Ohio, enacted a zoning ordinance designed to protect Euclid from being overrun by the expansion of Cleveland. Ambler Realty, which owned property it wanted to sell for industrial use, challenged the Euclid ordinance. Ambler claimed the ordinance was unconstitutional on its face and that it constituted a "taking" under the Fifth and Fourteenth Amendments to the Constitution, under which government cannot take property for public use without compensating the property owner. The U.S. Supreme Court ultimately upheld the validity of Euclid's zoning ordinance as a permissible exercise of the police power to provide for the health, safety, and welfare of the community. After *Euclid,* it became extremely difficult to invalidate a zoning-change denial or other change, unless it could be shown the change was arbitrary and capricious or was inconsistent with the city's zoning map and/or comprehensive plan.

Zoning became a more complex process over time.



One of several posters hung in San Francisco's Mission District about a controversial use of "live/work" lofts for commercial space, mostly for Internet businesses. Activists placing the posters claim the businesses are bypassing the city's zoning laws and not paying their fair share of taxes as a result. *(© Thor Swift/The Image Works)*

Original zoning ordinances employed what was known as "cumulative zoning." If there was a zoning category, Ind-1 (Industrial-1), which included heavy industry, any lesser use, such as commercial or even residential, could be placed in an area zoned Ind-1. In contrast, in land zoned R-1 (single-family residential), industrial and commercial uses were prohibited, as were multifamily uses. Cumulative zoning failed to solve many problems, because it often resulted in incompatible uses, such as housing developments located alongside noisy, polluting industrial activities. Thus, noncumulative zoning categories were substituted in modern zoning ordinances. Ind-4, for example, could be used only for heavy industry.

As new urban developments became larger and more complex, cities began to experiment with various new zoning categories, such as "planned urban development" (PUD). Rather than zoning or rezoning individual parcels of land, cities would zone large tracts, which might contain several different zoning catego-

ries, such as single-family, multifamily, light office, and commercial retail. A category known as a "floating zone" was even invented, which did not exist in fact but which could be allocated to a tract of land in order to meet certain developmental needs of a developer or the city.

Another Supreme Court decision, *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922), laid the groundwork for a new line of attack on zoning. Although not a zoning case itself, *Pennsylvania Coal* established the principle that when regulation (of land use) goes too far, it can be challenged under the Fifth and Fourteenth Amendments as a regulatory taking. The Court did not provide more specific guidelines as to how far was too far, and this ambiguity provided the basis for extensive litigation in the ensuing years.

In recent years there have been concerted attacks on zoning, at both the federal and state levels, based on the concept of a taking. Bills were introduced in both the U.S. Congress and in numerous state legislatures to provide for automatic compensation by municipalities to landowners when a zoning change had the effect of reducing the value of a landowner's property by some arbitrary percentage, usually around 25 percent. These efforts nationwide were spearheaded by real estate agencies, developers, and timber and mining interests and often went beyond an attack on zoning to include any government regulation having the effect of reducing the value of property interests. A few states and a number of municipalities enacted such laws, among them Oregon and Washington. Washington's law was subsequently repealed.

Zoning also has been criticized for being used to prevent socially undesirable results. This is termed "exclusionary zoning" and usually involves the exclusion of some unwanted group of persons, for example, lower-income or mentally challenged groups. This can be accomplished by large-lot restrictions, up to as much as four acres, and by specific zoning categories that result in exclusion. Courts have been divided on the constitutional validity of these ordinances.

Finally, the concept of zoning itself has been questioned by urban planners in recent years. The so-called New Urbanism movement seeks to replace zoning with the creation of compact, walkable, mixed-use cities, similar to neighborhoods at the turn of the nineteenth century. As of 2003, more than 500 New Urbanism projects were planned or under construction in the United States, half of them in historic urban centers.

James V. Cornehls

See also: Land Use; Property Rights; Takings Clause.

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Zorach v. Clauson (1952)

In *Zorach v. Clauson,* 343 U.S. 306 (1952), the U.S. Supreme Court ruled that students at public schools could be excused from school one hour per week for the purpose of attending religious observance and education off school premises. The Court held that granting students release time from school for religious exercise did not violate the Establishment Clause of the First Amendment to the U.S. Constitution, as applied to the states through the Due Process Clause of the Fourteenth Amendment. Under that religion clause, government is prohibited from engaging in activity that would constitute "establishment of religion." The issue in *Zorach* was whether the state was advancing religion by permitting students to leave school premises to attend such sessions.

Unlike *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203 (1948), which involved unconstitutional use of the public school classroom for religious instruction, *Zorach* dealt with New York City's policy of granting release time during the school day for students who had parental permission to attend religious instruction or devotional exercises

elsewhere; nonattending students remained at school. One important question before the Court was whether school officials used coercion to get students to attend these religious programs and thus violated the Establishment Clause by making the state an agent of one or another religious entity.

The Court wondered whether its previous First Amendment rulings that required "complete and unequivocal separation of church and state" were meant to address every instance in which state action possibly might benefit religion in general. The Court found that an absolute separation of the governmental and religious spheres, without exception, evinced an alienating, "hostile, suspicious, and even unfriendly" stance toward religion. This was not in keeping with the nation's historical wellsprings, as given in perhaps the most famous passage from *Zorach:* "We are a religious people whose institutions presuppose a Supreme Being." Justice William O. Douglas, writing for the Court, stated that merely to adjust classroom schedules so as to encourage religious instruction, or to cooperate with religious authorities, "follows the best of our traditions." To do otherwise would be to "show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." The Court construed a thoroughgoing lack of cooperation toward religion as hostility and as favoring nonbelievers.

The three dissenting justices (Hugo L. Black, Felix Frankfurter, and Robert H. Jackson) were not persuaded that moving the religious instruction off school premises crucially distinguished *Zorach* from *McCollum,* or that the issue of coercion was adequately understood by the majority. For the dissent, the program not only relied on the state's power to secure school attendance—which a denominational organization perhaps could not do, or not do with confidence—but also denigrated classroom time for those who remained in school. Those who left school were granted release time only on the condition that they attend religious instruction, but Justice Jackson expressed concern for students who remained in class: "[S]chooling is suspended during the 'released time' so the nonreligious attendants will not forge ahead of the churchgoing group. But it serves as a temporary jail for a pupil who will not go to Church."

In addition, the dissenting justices thought it presumptuous to believe that were it not for state cooperation, the intrinsic attractiveness of religion could not by itself draw adherents. For Justice Black, the Establishment Clause turned on whether the state had "entered this forbidden field" of entanglement of church and state at all, the slightest entry being "not separation but combination of Church and State."

Gordon A. Babst

See also: Establishment Clause; Release-Time Program; Separation of Church and State.

FURTHER READING

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Zurcher v. Stanford Daily News (1978)

In *Zurcher v. Stanford Daily News,* 436 U.S. 547 (1978), the U.S. Supreme Court examined whether the government violated the Constitution when it executed a search warrant issued against a newspaper office that was not a criminal suspect. The Court analyzed important issues pertaining to search and seizure, as governed by the Fourth Amendment to the U.S. Constitution, and to freedom of the press, as guaranteed by the First Amendment; these provisions also have been applied to state governments through the Due Process Clause of the Fourteenth Amendment. The case arose during the period of protest demonstrations against the Vietnam War, as waves of antiwar activity swept across the country.

On April 9, 1971, demonstrators seized the administrative offices at Stanford University Hospital in Stanford, California, and barricaded the doors. When the police forced their way inside, rioters attacked them with clubs and sticks, injuring nine officers. The student newspaper, *The Stanford Daily,* ran a special issue devoted to the incident that indicated one of the paper's journalists may have photographed the assail-

ants. The Santa Clara County District Attorney's Office secured a search warrant, and four police officers searched the newspaper office for film of the assailants, but they found nothing relevant.

The Stanford Daily filed a civil suit in federal district court alleging that the search violated their First, Fourth, and Fourteenth Amendment rights. The court ruled in favor of the newspaper, holding that the Fourth Amendment prohibited issuing a warrant to search one not suspected of crime except upon a showing that a subpoena would be ineffective. The court also held that the First Amendment prohibited the search of newspaper offices unless the government showed that important evidence would otherwise be destroyed or removed and that a restraining order to prevent destruction or removal of evidence would be futile. The Ninth Circuit Court of Appeals affirmed the ruling, and the Supreme Court agreed to review the case.

A divided Supreme Court (five–three, with Justice William J. Brennan Jr. not participating) ruled in favor of the government and reversed the lower-court decision, holding that warrants could be issued to search any property when police had probable cause to believe that evidence related to a crime would be found. In the majority opinion, Justice Byron R. White stated that the government's interest was in enforcing the criminal law, regardless of whether the subject of a search was a criminal suspect or not, and that the framers of the Constitution did not forbid issuing warrants to search the press. He argued that using a subpoena to get evidence could cause delay and result in the disappearance of evidence, since parties would have the opportunity to contest the issuance of subpoenas. Further, because search warrants were more difficult to obtain than subpoenas and subpoenas were not reviewed by judges or magistrates, Justice White argued, subpoenas would not protect the interests of third-party nonsuspects.

Justice Potter Stewart, joined by Justice Thurgood Marshall, dissented from the majority opinion, arguing that it was self-evident that police searches of newspaper offices unconstitutionally burdened freedom of the press. A search, he argued, involved a physical disruption of the operation of the newspaper, but even more serious was the possible disclosure of information from or identity of confidential sources. It was necessary, Justice Stewart urged, to protect these sources to enable the press to fulfill its constitutional function of informing the public.

Justice John Paul Stevens also wrote a dissenting opinion. He argued that countless law-abiding citizens might have materials in their possession relevant to an ongoing criminal investigation, and the consequences of exposing all these people to unannounced police searches would be extremely serious. The dramatic character of a sudden police search, Stevens wrote, could cause an unjustified injury to the reputation of the person searched.

The significance of *Stanford Daily* was the Court's holding that search warrants could be issued legally against nonsuspects who might have some evidence related to a crime. Furthermore, and particularly alarming to First Amendment advocates, the Court held that the press was subject to these searches to the same degree as were private individuals. This ruling, made by the relatively conservative members of the Court under the leadership of Chief Justice Warren E. Burger, however, was circumvented by the Democratic-controlled Congress through its enactment of the Privacy Protection Act of 1980. This law prohibited unannounced searches of media newsrooms by law enforcement officials except in limited circumstances.

Keith Rollin Eakins

See also: Branzburg v. Hayes; First Amendment; Search Warrants.

FURTHER READING

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Magna Carta (1215)

PREAMBLE:

John, by the grace of God, king of England, lord of Ireland, duke of Normandy and Aquitaine, and count of Anjou, to the archbishop, bishops, abbots, earls, barons, justiciaries, foresters, sheriffs, stewards, servants, and to all his bailiffs and liege subjects, greetings. Know that, having regard to God and for the salvation of our soul, and those of all our ancestors and heirs, and unto the honor of God and the advancement of his holy Church and for the rectifying of our realm, we have granted as underwritten by advice of our venerable fathers, Stephen, archbishop of Canterbury, primate of all England and cardinal of the holy Roman Church, Henry, archbishop of Dublin, William of London, Peter of Winchester, Jocelyn of Bath and Glastonbury, Hugh of Lincoln, Walter of Worcester, William of Coventry, Benedict of Rochester, bishops; of Master Pandulf, subdeacon and member of the household of our lord the Pope, of brother Aymeric (master of the Knights of the Temple in England), and of the illustrious men William Marshal, earl of Pembroke, William, earl of Salisbury, William, earl of Warenne, William, earl of Arundel, Alan of Galloway (constable of Scotland), Waren Fitz Gerold, Peter Fitz Herbert, Hubert De Burgh (seneschal of Poitou), Hugh de Neville, Matthew Fitz Herbert, Thomas Basset, Alan Basset, Philip d'Aubigny, Robert of Roppesley, John Marshal, John Fitz Hugh, and others, our liegemen.

1. In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate; and we will that it be thus observed; which is apparent from this that the freedom of elections, which is reckoned most important and very essential to the English Church, we, of our pure and unconstrained will, did grant, and did by our charter confirm and did obtain the ratification of the same from our lord, Pope Innocent III, before the quarrel arose between us and our barons: and this we will observe, and our will is that it be observed in good faith by our heirs forever. We have also granted to all freemen of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever.

2. If any of our earls or barons, or others holding of us in chief by military service shall have died, and at the time of his death his heir shall be full of age and owe "relief," he shall have his inheritance by the old relief, to wit, the heir or heirs of an earl, for the whole barony of an earl by L100; the heir or heirs of a baron, L100 for a whole barony; the heir or heirs of a knight, 100s, at most, and whoever owes less let him give less, according to the ancient custom of fees.

3. If, however, the heir of any one of the aforesaid has been under age and in wardship, let him have his inheritance without relief and without fine when he comes of age.

4. The guardian of the land of an heir who is thus under age, shall take from the land of the heir nothing but reasonable produce, reasonable customs, and reasonable services, and that without destruction or waste of men or goods; and if we have committed the wardship of the lands of any such minor to the sheriff, or to any other who is responsible to us for its issues, and he has made destruction or waster of what he holds in wardship, we will take of him amends, and the land shall be committed to two lawful and discreet men of that fee, who shall be responsible for the issues to us or to him to whom we shall assign them; and if we have given or sold the wardship of any such land to anyone and he has therein made destruction or waste, he shall lose that wardship, and it shall be transferred to two lawful and discreet men of that fief, who shall be responsible to us in like manner as aforesaid.

5. The guardian, moreover, so long as he has the wardship of the land, shall keep up the houses, parks, fishponds, stanks, mills, and other things pertaining to the land, out of the issues of the same land; and he shall restore to the heir, when he has come to full age, all his land, stocked with ploughs and wainage, according as the season of husbandry shall require, and the issues of the land can reasonable bear.

6. Heirs shall be married without disparagement, yet so that before the marriage takes place the nearest in blood to that heir shall have notice.

7. A widow, after the death of her husband, shall forthwith and without difficulty have her marriage portion and inheritance; nor shall she give anything for her dower, or for her marriage portion, or for the inheritance which her husband and she held on the day of the death of that husband; and she may remain in the house of her husband for forty days after his death, within which time her dower shall be assigned to her.

8. No widow shall be compelled to marry, so long as she prefers to live without a husband; provided always that she gives security not to marry without our consent, if she holds of us, or without the consent of the lord of whom she holds, if she holds of another.

9. Neither we nor our bailiffs will seize any land or rent for any debt, as long as the chattels of the debtor are sufficient to repay the debt; nor shall the sureties of the debtor be distrained so long as the principal debtor is able to satisfy the debt; and if the principal debtor shall fail to pay the debt, having nothing wherewith to pay it, then the sureties shall answer for the debt; and let them have the lands and rents of the debtor, if they desire them, until they are indemnified for the debt which they have paid for him, unless the principal debtor can show proof that he is discharged thereof as against the said sureties.

10. If one who has borrowed from the Jews any sum, great or small, die before that loan be repaid, the debt shall not bear interest while the heir is under age, of whomsoever he may hold; and if the debt fall into our hands, we will not take anything except the principal sum contained in the bond.

11. And if anyone die indebted to the Jews, his wife shall have her dower and pay nothing of that debt; and if any children of the deceased are left under age, necessaries shall be provided for them in keeping with the holding of the deceased; and out of the residue the debt shall be paid, reserving, however, service due to feudal lords; in like manner let it be done touching debts due to others than Jews.

12. No scutage not aid shall be imposed on our kingdom, unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be levied more than a reasonable aid. In like manner it shall be done concerning aids from the city of London.

13. And the city of London shall have all its ancient liberties and free customs, as well by land as by water; furthermore, we decree and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs.

14. And for obtaining the common counsel of the kingdom anent the assessing of an aid (except in the three cases aforesaid) or of a scutage, we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons, severally by our letters; and we will moveover cause to be summoned generally, through our sheriffs and bailiffs, and others who hold of us in chief, for a fixed date, namely, after the expiry of at least forty days, and at a fixed place; and in all letters of such summons we will specify the reason of the summons. And when the summons has thus been made, the business shall proceed on the day appointed, according to the counsel of such as are present, although not all who were summoned have come.

15. We will not for the future grant to anyone license to take an aid from his own free tenants, except to ransom his person, to make his eldest son a knight, and once to marry his eldest daughter; and on each of these occasions there shall be levied only a reasonable aid.

16. No one shall be distrained for performance of greater service for a knight's fee, or for any other free tenement, than is due therefrom.

17. Common pleas shall not follow our court, but shall be held in some fixed place.

18. Inquests of novel disseisin, of mort d'ancestor, and of darrein presentment shall not be held elsewhere than in their own county courts, and that in manner following; We, or, if we should be out of the realm, our chief justiciar, will send two justiciaries through every county four times a year, who shall alone with four knights of the county chosen by the county, hold the said assizes in the county court, on the day and in the place of meeting of that court.

19. And if any of the said assizes cannot be taken on the day of the county court, let there remain of the knights and freeholders, who were present at the county court on that day, as many as may be required for the efficient making of judgments, according as the business be more or less.

20. A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his "contentment"; and a merchant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "wainage" if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighborhood.

21. Earls and barons shall not be amerced except through their peers, and only in accordance with the degree of the offense.

22. A clerk shall not be amerced in respect of his lay holding except after the manner of the others aforesaid; further, he shall not be amerced in accordance with the extent of his ecclesiastical benefice.

23. No village or individual shall be compelled to make bridges at river banks, except those who from of old were legally bound to do so.

24. No sheriff, constable, coroners, or others of our bailiffs, shall hold pleas of our Crown.

25. All counties, hundred, wapentakes, and trithings (except our demesne manors) shall remain at the old rents, and without any additional payment.

26. If anyone holding of us a lay fief shall die, and our sheriff or bailiff shall exhibit our letters patent of summons for a debt which the deceased owed us, it shall be lawful for our sheriff or bailiff to attach and enroll the chattels of the deceased, found upon the lay fief, to the value of that debt, at the sight of law worthy men, provided always that nothing whatever be thence removed until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfill the will of the deceased; and if there be nothing due from him to us, all the chattels shall go to the deceased, saving to his wife and children their reasonable shares.

27. If any freeman shall die intestate, his chattels shall be distributed by the hands of his nearest kinsfolk and friends, under supervision of the Church, saving to every one the debts which the deceased owed to him.

28. No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.

29. No constable shall compel any knight to give money in lieu of castle-guard, when he is willing to perform it in his own person, or (if he himself cannot do it from any reasonable cause) then by another responsible man. Further, if we have led or sent him upon military service, he shall be relieved from guard in proportion to the time during which he has been on service because of us.

30. No sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.

31. Neither we nor our bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood.

32. We will not retain beyond one year and one day, the lands [of] those who have been convicted of felony, and the lands shall thereafter be handed over to the lords of the fiefs.

33. All kydells for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the seashore.

34. The writ which is called praecipe shall not for the future be issued to anyone, regarding any tenement whereby a freeman may lose his court.

35. Let there be one measure of wine throughout our whole realm; and one measure of ale; and one measure of corn, to wit, "the London quarter"; and one width of cloth (whether dyed, or russet, or "halberget"), to wit, two ells within the selvedges; of weights also let it be as of measures.

36. Nothing in future shall be given or taken for a writ of inquisition of life or limbs, but freely it shall be granted, and never denied.

37. If anyone holds of us by fee-farm, either by socage or by burage, or of any other land by knight's service, we will not (by reason of that fee-farm, socage, or burage), have the wardship of the heir, or of such land of his as if of the fief of that other; nor shall we have wardship of that fee-farm, socage, or burgage, unless such fee-farm owes knight's service. We will not by reason of any small serjeancy which anyone may hold of us by the service of rendering to us knives, arrows, or the like, have wardship of his heir or of the land which he holds of another lord by knight's service.

38. No bailiff for the future shall, upon his own unsupported complaint, put anyone to his "law," without credible witnesses brought for this purpose.

39. No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

40. To no one will we sell, to no one will we refuse or delay, right or justice.

41. All merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us. And if such are found in our land at the beginning of the war, they shall be detained, without injury to their bodies or goods, until information be received by us, or by our chief justiciar, how the merchants of our land found in the land at war with us are treated; and if our men are safe there, the others shall be safe in our land.

42. It shall be lawful in future for anyone (excepting always those imprisoned or outlawed in accordance with the law of the kingdom, and natives of any country at war with us, and merchants, who shall be treated as if above provided) to leave our kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy-reserving always the allegiance due to us.

43. If anyone holding of some escheat (such as the honor of Wallingford, Nottingham, Boulogne, Lancaster, or of other escheats which are in our hands and are baronies) shall die, his heir shall give no other relief, and perform no other service to us than he would have done to the baron if that barony had been in the baron's hand; and we shall hold it in the same manner in which the baron held it.

44. Men who dwell without the forest need not henceforth come before our justiciaries of the forest upon a general summons, unless they are in plea, or sureties of one or more, who are attached for the forest.

45. We will appoint as justices, constables, sheriffs, or bailiffs only such as know the law of the realm and mean to observe it well.

46. All barons who have founded abbeys, concerning which they hold charters from the kings of England, or of which they have long continued possession, shall have the wardship of them, when vacant, as they ought to have.

47. All forests that have been made such in our time shall forthwith be disafforested; and a similar course shall be followed with regard to river banks that have been placed "in defense" by us in our time.

48. All evil customs connected with forests and warrens, foresters and warreners, sheriffs and their officers, river banks and their wardens, shall immediately be inquired into in each county by twelve sworn knights of the same county chosen by the honest men of the same county, and shall, within forty days of the said inquest, be utterly abolished, so as never to be restored, provided always that we previously have intimation thereof, or our justiciar, if we should not be in England.

49. We will immediately restore all hostages and charters delivered to us by Englishmen, as sureties of the peace of faithful service.

50. We will entirely remove from their bailiwicks, the relations of Gerard of Athee (so that in future they shall have no bailiwick in England); namely, Engelard

of Cigogne, Peter, Guy, and Andrew of Chanceaux, Guy of Cigogne, Geoffrey of Martigny with his brothers, Philip Mark with his brothers and his nephew Geoffrey, and the whole brood of the same.

51. As soon as peace is restored, we will banish from the kingdom all foreign born knights, crossbowmen, serjeants, and mercenary soldiers who have come with horses and arms to the kingdom's hurt.

52. If anyone has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore them to him; and if a dispute arise over this, then let it be decided by the five and twenty barons of whom mention is made below in the clause for securing the peace. Moreover, for all those possessions, from which anyone has, without the lawful judgment of his peers, been disseised or removed, by our father, King Henry, or by our brother, King Richard, and which we retain in our hand (or which as possessed by others, to whom we are bound to warrant them), we shall have respite until the usual term of crusaders, excepting those things about which a plea has been raised, or an inquest made by our order, before our taking of the cross; but as soon as we return from the expedition, we will immediately grant full justice therein.

53. We shall have, moreover, the same respite and in the same manner in rendering justice concerning the disafforestation or retention of those forests which Henry our father and Richard our brother afforested, and concerning the wardship of lands which are of the fief of another (namely, such wardships as we have hitherto had by reason of a fief which anyone held of us by knight's service), and concerning abbeys founded on other fiefs than our own, in which the lord of the fee claims to have right; and when we have returned, or if we desist from our expedition, we will immediately grant full justice to all who complain of such things.

54. No one shall be arrested or imprisoned upon the appeal of a woman, for the death of any other than her husband.

55. All fines made with us unjustly and against the law of the land, and all amercements, imposed unjustly and against the law of the land, shall be entirely remitted, or else it shall be done concerning them according to the decision of the five and twenty barons whom mention is made below in the clause for securing the peace, or according to the judgment of the majority of the same, along with the aforesaid Stephen, archbishop of Canterbury, if he can be present, and such others as he may wish to bring with him for this purpose, and if he cannot be present the business shall nevertheless proceed without him, provided always that if any one or more of the aforesaid five and twenty barons are in a similar suit, they shall be removed as far as concerns this particular judgment, others being substituted in their places after having been selected by the rest of the same five and twenty for this purpose only, and after having been sworn.

56. If we have disseised or removed Welshmen from lands or liberties, or other things, without the legal judgment of their peers in England or in Wales, they shall be immediately restored to them; and if a dispute arise over this, then let it be decided in the marches by the judgment of their peers; for the tenements in England according to the law of England, for tenements in Wales according to the law of Wales, and for tenements in the marches according to the law of the marches. Welshmen shall do the same to us and ours.

57. Further, for all those possessions from which any Welshman has, without the lawful judgment of his peers, been disseised or removed by King Henry our father, or King Richard our brother, and which we retain in our hand (or which are possessed by others, and which we ought to warrant), we will have respite until the usual term of crusaders; excepting those things about which a plea has been raised or an inquest made by our order before we took the cross; but as soon as we return (or if perchance we desist from our expedition), we will immediately grant full justice in accordance with the laws of the Welsh and in relation to the foresaid regions.

58. We will immediately give up the son of Llywelyn and all the hostages of Wales, and the charters delivered to us as security for the peace.

59. We will do towards Alexander, king of Scots, concerning the return of his sisters and his hostages, and concerning his franchises, and his right, in the same manner as we shall do towards our other barons of

England, unless it ought to be otherwise according to the charters which we hold from William his father, formerly king of Scots; and this shall be according to the judgment of his peers in our court.

60. Moreover, all these aforesaid customs and liberties, the observances of which we have granted in our kingdom as far as pertains to us towards our men, shall be observed by all of our kingdom, as well clergy as laymen, as far as pertains to them towards their men.

61. Since, moveover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance forever, we give and grant to them the underwritten security, namely, that the barons choose five and twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter, so that if we, or our justiciar, or our bailiffs or any one of our officers, shall in anything be at fault towards anyone, or shall have broken any one of the articles of this peace or of this security, and the offense be notified to four barons of the foresaid five and twenty, the said four barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, petition to have that transgression redressed without delay. And if we shall not have corrected the transgression (or, in the event of our being out of the realm, if our justiciar shall not have corrected it) within forty days, reckoning from the time it has been intimated to us (or to our justiciar, if we should be out of the realm), the four barons aforesaid shall refer that matter to the rest of the five and twenty barons, and those five and twenty barons shall, together with the community of the whole realm, distrain and distress us in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations towards us. And let whoever in the country desires it, swear to obey the orders of the said five and twenty barons for the execution of all the aforesaid matters, and along with them, to molest us to the utmost of his power; and we publicly and freely grant leave to everyone who wishes to swear, and we shall never forbid anyone to swear. All those, moveover, in the land who of themselves and of their own accord are unwilling to swear to the twenty five to help them in constraining and molesting us, we shall by our command compel the same to swear to the effect foresaid. And if any one of the five and twenty barons shall have died or departed from the land, or be incapacitated in any other manner which would prevent the foresaid provisions being carried out, those of the said twenty five barons who are left shall choose another in his place according to their own judgment, and he shall be sworn in the same way as the others. Further, in all matters, the execution of which is entrusted, to these twenty five barons, if perchance these twenty five are present and disagree about anything, or if some of them, after being summoned, are unwilling or unable to be present, that which the majority of those present ordain or command shall be held as fixed and established, exactly as if the whole twenty five had concurred in this; and the said twenty five shall swear that they will faithfully observe all that is aforesaid, and cause it to be observed with all their might. And we shall procure nothing from anyone, directly or indirectly, whereby any part of these concessions and liberties might be revoked or diminished; and if any such thing has been procured, let it be void and null, and we shall never use it personally or by another.

62. And all the will, hatreds, and bitterness that have arisen between us and our men, clergy and lay, from the date of the quarrel, we have completely remitted and pardoned to everyone. Moreover, all trespasses occasioned by the said quarrel, from Easter in the sixteenth year of our reign till the restoration of peace, we have fully remitted to all, both clergy and laymen, and completely forgiven, as far as pertains to us. And on this head, we have caused to be made for them letters testimonial patent of the lord Stephen, archbishop of Canterbury, of the lord Henry, archbishop of Dublin, of the bishops aforesaid, and of Master Pandulf as touching this security and the concessions aforesaid.

63. Wherefore we will and firmly order that the English Church be free, and that the men in our kingdom have and hold all the aforesaid liberties, rights, and concessions, well and peaceably, freely and quietly, fully and wholly, for themselves and their heirs, of us and our heirs, in all respects and in all places forever, as is aforesaid. An oath, moreover, has been taken, as well on our part as on the part of the barons, that all these conditions aforesaid shall be kept in good faith and without evil intent. Given under our hand—the above named and many others being witnesses—in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of our reign.

The Virginia Declaration of Rights (1776)

VIRGINIA CONVENTION OF DELEGATES

Adopted unanimously June 12, 1776

I
That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

II
That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

III
That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

IV
That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge be hereditary.

V
That the legislative and executive powers of the state should be separate and distinct from the judicative; and, that the members of the two first may be restrained from oppression by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

VI
That elections of members to serve as representatives of the people in assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

VII
That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people is injurious to their rights and ought not to be exercised.

VIII
That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgement of his peers.

IX
That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

X
That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.

XI

That in controversies respecting property and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.

XII

That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.

XIII

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power.

XIV

That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

XV

That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.

XVI

That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

The Declaration of Independence (1776)

ACTION OF SECOND CONTINENTAL CONGRESS, JULY 4, 1776

The unanimous Declaration of the thirteen United States of America

WHEN in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.

WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes; and accordingly all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed. But when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security. Such has been the patient Sufferance of these Colonies; and such is now the Necessity which constrains them to alter their former Systems of Government. The History of the present King of Great Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid World.

HE has refused his Assent to Laws, the most wholesome and necessary for the public Good.

HE has forbidden his Governors to pass Laws of immediate and pressing Importance, unless suspended in their Operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

HE has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyrants only.

HE has called together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records, for the sole Purpose of fatiguing them into Compliance with his Measures.

HE has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People.

HE has refused for a long Time, after such Dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of the Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the Dangers of Invasion from without, and the Convulsions within.

HE has endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands.

HE has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

HE has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.

HE has erected a Multitude of new Offices, and sent hither Swarms of Officers to harrass our People, and eat out their Substance.

HE has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures.

HE has affected to render the Military independent of and superior to the Civil Power.

HE has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation:

FOR quartering large Bodies of Armed Troops among us:

FOR protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

FOR cutting off our Trade with all Parts of the World:

FOR imposing Taxes on us without our Consent:

FOR depriving us, in many Cases, of the Benefits of Trial by Jury:

FOR transporting us beyond Seas to be tried for pretended Offences:

FOR abolishing the free System of English Laws in a neighbouring Province, establishing therein an arbitrary Government, and enlarging its Boundaries, so as to render it at once an Example and fit Instrument for introducing the same absolute Rules into these Colonies:

FOR taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

FOR suspending our own Legislatures, and declaring themselves invested with Power to legislate for us in all Cases whatsoever.

HE has abdicated Government here, by declaring us out of his Protection and waging War against us.

HE has plundered our Seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our People.

HE is, at this Time, transporting large Armies of foreign Mercenaries to compleat the Works of Death, Desolation, and Tyranny, already begun with circumstances of Cruelty and Perfidy, scarcely paralleled in the most barbarous Ages, and totally unworthy the Head of a civilized Nation.

HE has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the Executioners of their Friends and Brethren, or to fall themselves by their Hands.

HE has excited domestic Insurrections amongst us, and has endeavoured to bring on the Inhabitants of our Frontiers, the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes and Conditions.

IN every stage of these Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury. A Prince, whose Character is thus marked by every act which may define a Tyrant, is unfit to be the Ruler of a free People.

NOR have we been wanting in Attentions to our British Brethren. We have warned them from Time to Time of Attempts by their Legislature to extend an unwarrantable Jurisdiction over us. We have reminded them of the Circumstances of our Emigration and Settlement here. We have appealed to their native Justice and Magnanimity, and we have conjured them by the Ties of our common Kindred to disavow these Usurpations, which, would inevitably interrupt our Connections and Correspondence. They too have been deaf to the Voice of Justice and of Consanguinity. We must, therefore, acquiesce in the Necessity, which denounces our Separation, and hold them, as we hold the rest of Mankind, Enemies in War, in Peace, Friends.

WE, therefore, the Representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS, Assembled, appealing to the Supreme Judge of the World for the Rectitude of our Intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly Publish and Declare, That these United Colonies are, and of Right ought to be,

FREE AND INDEPENDENT STATES; that they are absolved from all Allegiance to the British Crown, and that all political Connection between them and the State of Great-Britain, is and ought to be totally dissolved; and that as FREE AND INDEPENDENT STATES, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which INDEPENDENT STATES may of right do. And for the support of this Declaration, with a firm Reliance on the Protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

John Hancock.

Georgia: *Button Gwinnett, Lyman Hall, Geo. Walton.*

North Carolina: *Wm. Hooper, Joseph Hewes, John Penn.*

South Carolina: *Edward Rutledge, Thos. Heyward, Jr., Thomas Lynch, Jr., Arthur Middleton.*

Maryland: *Samuel Chase, Wm. Paca, Thos. Stone, Charles Carroll, of Carrollton.*

Virginia: *George Wythe, Richard Henry Lee, Thos. Jefferson, Benja. Harrison, Thos. Nelson, Jr., Francis Lightfoot Lee, Carter Braxton.*

Pennsylvania: *Robt. Morris, Benjamin Rush, Benja. Franklin, John Morton, Geo. Clymer, Jas. Smith, Geo. Taylor, James Wilson, Geo. Ross.*

Delaware: *Caesar Rodney, Geo. Read.*

New York: *Wm. Floyd, Phil. Livingston, Frank Lewis, Lewis Morris.*

New Jersey: *Richd. Stockton, Jno. Witherspoon, Fras. Hopkinson, John Hart, Abra. Clark.*

New Hampshire: *Josiah Bartlett, Wm. Whipple, Matthew Thornton.*

Massachusetts Bay: *Saml. Adams, John Adams, Robt. Treat Paine, Elbridge Gerry.*

Rhode Island: C. *Step. Hopkins, William Ellery.*

Connecticut: *Roger Sherman, Saml. Huntington, Wm. Williams, Oliver Wolcott.*

IN CONGRESS, JANUARY 18, 1777.

Articles of Confederation and Perpetual Union (1781)

TO ALL WHOM THESE PRESENTS SHALL COME, we the undersigned Delegates of the States affixed to our Names send greeting. Articles of Confederation and perpetual Union between the states of New Hampshire, Massachusetts-bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

Article I

The Stile of this Confederacy shall be "The United States of America."

Article II

Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

Article III

The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

Article IV

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

Article V

For the most convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislatures of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No State shall be represented in Congress by less than two, nor more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress, and the members of Congress shall be protected in their persons from arrests or imprisonments, during the time of their going to and from, and attendence on Congress, except for treason, felony, or breach of the peace.

Article VI

No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or

State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind whatever from any King, Prince or foreign State; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any King, Prince or State, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessel of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only, as in the judgement of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the Kingdom or State and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

Article VII

When land forces are raised by any State for the common defense, all officers of or under the rank of colonel, shall be appointed by the legislature of each State respectively, by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

Article VIII

All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.

Article IX

The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the

service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies commited on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgement and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgement, which shall in like manner be final and decisive, the judgement or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgement, shall take an oath to be administered by one of the judges of the supreme or superior court of the State, where the cause shall be tried, 'well and truly to hear and determine the matter in question, according to the best of his judgement, without favor, affection or hope of reward': provided also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States—fixing the standards of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing or regulating post offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated 'A Committee of the States,' and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their members to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half-year to the respective States an account of the sums of money so borrowed or emitted—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a solid-like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled. But if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of each State, unless the legislature of such State shall judge that such extra number cannot be safely spread out in the same, in which case they shall raise, officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque or reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of the majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgement require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several States.

Article X

The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of the nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled be requisite.

Article XI

Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

Article XII

All bills of credit emitted, monies borrowed, and debts contracted by, or under the authority of Congress,

before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

Article XIII

Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

And Whereas it hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union. Know Ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained: And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said Confederation are submitted to them. And that the Articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

In Witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the Year of our Lord One Thousand Seven Hundred and Seventy-Eight, and in the Third Year of the independence of America.

The Constitution of the United States (1788)

WE THE PEOPLE OF THE UNITED STATES, in order to form a more perfect union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall pre-

side: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member. Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time: and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Section Law. Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being

disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

- To borrow Money on the credit of the United States;
- To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
- To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
- To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
- To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
- To establish Post Offices and post Roads;
- To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
- To constitute Tribunals inferior to the supreme Court;
- To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;
- To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
- To provide and maintain a Navy;
- To make Rules for the Government and Regulation of the land and naval Forces;
- To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
- To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
- To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And
- To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from,

one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States. No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

- to all Cases affecting Ambassadors, other public Ministers and Consuls;
- to all Cases of admiralty and maritime Jurisdiction;
- to Controversies to which the United States shall be a Party;
- to Controversies between two or more States;
- between a State and Citizens of another State;
- between Citizens of different States;

- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first

Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names,

George Washington—President and deputy from Virginia
New Hampshire: *John Langdon, Nicholas Gilman*
Massachusetts: *Nathaniel Gorham, Rufus King*
Connecticut: *William Samuel Johnson, Roger Sherman*
New York: *Alexander Hamilton*
New Jersey: *William Livingston, David Brearly, William Paterson, Jonathan Dayton*
Pennsylvania: *Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas FitzSimons, Jared Ingersoll, James Wilson, Gouverneur Morris*
Delaware: *George Read, Gunning Bedford, Jr., John Dickinson, Richard Bassett, Jacob Broom*
Maryland: *James McHenry, Daniel of Saint Thomas Jenifer, Daniel Carroll*
Virginia: *John Blair, James Madison, Jr.*
North Carolina: *William Blount, Richard Dobbs Spaight, Hugh Williamson*
South Carolina: *John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler*
Georgia: *William Few, Abraham Baldwin*

The Bill of Rights (1789)

Amendment I

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

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

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

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

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

Amendment IX

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

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Chronology

1215 King John I of England signs the Magna Carta at Runnymeade, England; the document was the basis for subsequent claims for many civil liberties.

1607 English settlers found Jamestown, Virginia.

1619 First meeting of the Virginia House of Burgesses.

Africans arrive in Virginia as indentured servants.

1620 Settlers in modern-day Massachusetts sign the Mayflower Compact.

1628 English Parliament drafts Petition of Right.

1641 Massachusetts adopts the Massachusetts Body of Liberties.

1644 John Milton publishes his *Areopagitica* in defense of freedom of the press.

1647 Putney debates in England raise serious questions about the nature of liberty.

1679 English Parliament adopts Habeas Corpus Act.

1681 King Charles II grants a charter to William Penn for a colony in North America.

Penn's colony in Pennsylvania would become a haven for Quakers fleeing religious persecution.

1688 "Glorious Revolution" in England replaces James II with King William of Orange and Queen Mary.

1689 English Parliament establishes a Bill of Rights.

1692 Salem witch trials.

1735 Trial of John Peter Zenger results in an acquittal on charges of seditious libel.

1761 James Otis argues for colonial rights in the Writs of Assistance Case. His opposition to general warrants prepared the way for the limits on search warrants later established by the Fourth Amendment.

1763 End of the French and Indian War marks the end of Britain's policy of "salutary neglect" in the colonies and the beginning of assertions of parliamentary power that result in the Revolutionary War.

1770 John Adams defends British soldiers in the Boston Massacre trials.

1775 Fighting between the colonists and the English breaks out at Lexington and Concord, Massachusetts.

1776 George Mason authors the Virginia Declaration of Rights.

Thomas Jefferson writes, and the Second Continental Congress revises and adopts, the Declaration of Independence.

1777 Continental Congress proposes the Articles of Confederation.

1780 Massachusetts adopts a state constitution that will influence the later writing of the U.S. Constitution.

1781 The last state ratifies the Articles of Confederation.

1783 Treaty of Paris is signed recognizing peace between the United States and Great Britain.

George Washington refuses to support troops who want to march on the national capital to demand back pay, thus helping to reinforce the idea of military subordination to civilian authorities.

1785 James Madison authors "Memorial and Remonstrance Against Religious Assessments."

1786 Virginia adopts Bill for Establishing Religious Freedom.

1787 U.S. Constitutional Convention meets in Philadelphia.

Articles of Confederation adopts the Northwest Ordinance.

1788 Requisite number of states ratify the U.S. Constitution.

1789 George Washington is inaugurated as the first president of the United States.

1789 Judiciary Act establishes the U.S. Supreme Court and permits appeals to reach the Court both from lower federal courts and from state supreme courts.

Office of Attorney General created by act of Congress.

Led by James Madison, the First Continental Congress proposes twelve amendments, ten of which would become the Bill of Rights.

Alexander Hamilton's proposal for the establishment of a national bank leads to divisions between Federalists and Democratic-Republicans (precursors to today's Democrats).

1791 Bill of Rights is ratified by the requisite number of states.

1798 Congress adopts the repressive Alien and Sedition Acts.

Virginia and Kentucky respond with resolutions questioning congressional authority.

Supreme Court decides in *Calder v. Bull* that the ex post facto provision in the Constitution applies only to retroactive criminal laws.

1801 Thomas Jefferson wins the presidential election, resulting in a transfer of power from the Federalist Party to the Democratic-Republicans.

John Marshall becomes chief justice of the United States.

1803 Chief Justice John Marshall asserts the principle of judicial review, by which federal courts can invalidate national legislation, in *Marbury v. Madison.*

1810 In *Fletcher v. Peck,* the Supreme Court declares it has the power to review the constitutionality of state laws.

1819 In *McCulloch v. Maryland,* the Supreme Court upholds the constitutionality of the Bank of the United States and indicates that Congress has expansive power under the Necessary and Proper Clause of the Constitution.

Supreme Court rules in *Trustees of Dartmouth College v. Woodward* that a colonial charter is a contract protected against infringement under the U.S. Constitution.

1820 Missouri Compromise admits Maine as a free state and Missouri as a slave state and attempts to divide Louisiana Purchase lands into free and slave territories.

1824 In *Gibbons v. Ogden,* the Supreme Court recognizes broad congressional powers to regulate interstate commerce.

1826 Both Thomas Jefferson and John Adams die on July 4.

1828 Andrew Jackson is elected president.

1831 In *Cherokee Nation v. Georgia,* the Supreme Court issues the first of several decisions regarding the status of Native Americans in the United States.

1833 Chief Justice John Marshall decides in *Barron v. City of Baltimore* that the Bill of Rights limits only the national government.

1836 Roger B. Taney succeeds John Marshall as chief justice of the United States.

1836 James Madison, the last surviving delegate to the Constitutional Convention of 1787, dies.

1837 Supreme Court loosens its reading of the Contracts Clause in *Charles River Bridge v. Warren Bridge.*

1848 Seneca Falls (New York) Convention meets to discuss the rights of women.

1849 Henry David Thoreau writes his essay "Civil Disobedience."

1854 Republican Party is founded in Ripon, Wisconsin, opposing the expansion of slavery.

1857 Chief Justice Roger B. Taney declares in *Scott v. Sandford* (*Dred Scott* decision) that blacks are not and cannot be citizens of the United States.

1860 Abraham Lincoln is elected president, the first Republican to hold the office.

1861–1865 Nation is torn by the Civil War after Southern states secede and Abraham Lincoln attempts to preserve the Union.

1863 Lincoln issues the Emancipation Proclamation freeing all slaves behind enemy lines.

1865 States ratify the Thirteenth Amendment outlawing involuntary servitude except as a punishment for crimes.

1866 Supreme Court invalidates the military trial of a civilian in Indiana in *Ex parte Milligan.*

1868 States ratify the Fourteenth Amendment defining citizenship and guaranteeing the rights of all citizens.

1870 States ratify the Fifteenth Amendment, which, on paper, prohibits discrimination in voting on the basis of race.

Department of Justice is created.

1873 In the *Slaughterhouse Cases,* the Supreme Court gives a narrow reading to the Privileges or Immunities Clause of the Fourteenth Amendment.

1875 Supreme Court rules in *Minor v. Happersett* that states may deny women the right to vote.

1877 Federal troops withdraw from the South, ending the period of congressional Reconstruction.

1878 American Bar Association is founded.

1883 In the *Civil Rights Cases,* the Supreme Court decides that the Fourteenth Amendment outlaws only discriminatory state (as opposed to private) action.

1886 On May 3 police shoot and kill striking workers of the McCormick Reaper Works outside Haymarket Square in Chicago, Illinois. The Haymarket Affair becomes the basis of what eventually would be a May 1 (May Day) celebration of workers' rights.

1895 Supreme Court upholds the use of injunctions to halt labor strikes in *In re Debs.*

Supreme Court narrows the application of the Sherman Antitrust Act and the power of Congress to regulate commerce in *United States v. E. C. Knight Co.*

1896 Supreme Court approves a policy of "separate but equal" for treatment of the races in *Plessy v. Ferguson.*

1897 In *Chicago, Burlington, and Quincy Railroad Co. v. Chicago,* the Supreme Court applies the Just Compensation Clause of the Fifth Amendment to the states, thus beginning the process of "incorporation" by which most other provisions in the Bill of Rights are also later applied.

In *Allgeyer v. Louisiana,* the Supreme Court strikes down a state law regulating a private contract.

1905 In *Lochner v. New York,* the Supreme Court invalidates a law designed to limit the hours of New York bakers.

1908 In *Muller v. Oregon,* the Supreme Court upholds laws limiting working hours for women; Louis D. Brandeis introduces the famous "Brandeis brief" in the case.

1910 Congress adopts the Mann Act penalizing the transportation of women across state lines for immoral purposes.

1914 In *Weeks v. United States,* the Supreme Court applies the exclusionary rule to the federal government.

1917 Bolshevik Revolution brings communism to Russia.

Congress adopts the Espionage Act of 1917.

1918 Congress adopts the Sedition Act of 1918.

In *Hammer v. Dagenhart,* the Supreme Court strikes down child labor laws as an unconstitutional regulation of commerce.

1919 Justice Oliver Wendell Holmes Jr. articulates the clear-and-present-danger test for First Amendment issues in *Schenck v. United States.*

In *Abrams v. United States,* the Supreme Court upholds the convictions of Russian immigrants who circulated antiwar documents.

1919 A fear of communism, known as the "red scare," sweeps the United States, and U.S. Attorney General Mitchell Palmer leads raids on suspected radicals and Communists.

Nation enacts Eighteenth Amendment providing for national prohibition of alcohol.

1920 States ratify the Nineteenth Amendment forbidding discrimination against women who want to vote.

American Civil Liberties Union is founded.

1921 William Howard Taft becomes chief justice of the United States, the only former president to fill such a role.

1923 In *Meyer v. Nebraska,* the Supreme Court strikes down a Nebraska law prohibiting the teaching of modern foreign languages.

1925 The Supreme Court in *Carroll v. United States* establishes the basis for warrantless searches of automobiles.

The trial of teacher John Scopes deals with a Tennessee state law prohibiting the teaching of evolution.

In *Gitlow v. United States,* the Supreme Court renews the process by which provisions of the Bill of Rights (in this case freedom of speech within the First Amendment) are applied to the states, but upholds the conviction of suspected radicals for distributing pamphlets believed to have a "bad tendency."

In *Pierce v. Society of Sisters,* the Supreme Court recognizes the right of parents to educate their children in parochial schools.

1927 Supreme Court permits the involuntary sterilization of an "imbecile" in *Buck v. Bell.*

1928 In *Olmstead v. United States,* the Supreme Court refuses to invalidate wiretapping.

1929 Stock market crash initiates the Great Depression.

1930 Charles Evans Hughes becomes chief justice of the United States.

1931 In *Near v. Minnesota,* the Supreme Court emphasizes the strong presumption under the First Amendment against "prior restraint" of publication.

1932 Franklin D. Roosevelt is elected to his first term as president and begins his New Deal programs, significantly expanding the federal government's role in the economy.

Supreme Court decides in *Powell v. Alabama* (one of the "Scottsboro boys" cases) that states must provide counsel for defendants in capital cases.

1933 Twenty-first Amendment repeals national prohibition of alcohol.

1934 Supreme Court upholds the Minnesota Mortgage Moratorium Law in *Home Building and Loan Association v. Blaisdell.*

1935–1936 Supreme Court strikes down a number of important pieces of New Deal legislation.

1937 President Franklin D. Roosevelt's proposal for a "Court-packing plan" probably helps bring about the Court's acceptance of most New Deal legislation dealing with economic matters (a move called the "switch in time that saved nine").

Justice Benjamin N. Cardozo articulates the principle of "selective incorporation" in *Palko v. Connecticut.*

1938 Harlan Fiske Stone authors his historic footnote four in *United States v. Carolene Products Co.,* articulating two standards of judicial review depending on the constitutional issue under consideration.

Congress creates the House Committee on Un-American Activities (HUAC).

1939 Hatch Act limits campaign activities of governmental workers.

1940 In *Minersville School District v. Gobitis,* the Supreme Court upholds a compulsory flag-salute law.

1941 Harlan Fiske Stone becomes chief justice of the United States.

Japanese attack on Pearl Harbor, Hawaii, leads to U.S. entry into World War II.

1942 Supreme Court decides in *Betts v. Brady* not to require state appointment of counsel in nonfelony cases, a decision later reversed in *Gideon v. Wainwright* (1963).

Supreme Court declares in *Skinner v. Oklahoma* that individuals have a fundamental right to procreate.

1943 In *West Virginia Board of Education v. Barnette,* the Supreme Court outlaws compulsory flag salutes.

1944 In *Korematsu v. United States,* the Supreme Court refuses to invalidate the exclusion of Japanese Americans from designated military zones in the West.

1945 U.S. use of atomic weapons against the Japanese brings an end to World War II.

1946 Frederick Moore Vinson becomes chief justice of the United States.

In *Colegrove v. Green,* the Supreme Court says it will not hear reapportionment cases.

1947 In *Everson v. Board of Education,* the Supreme Court announces that the First Amendment intended to create a "wall of separation" between church and state.

Americans for Democratic Action is founded.

Central Intelligence Agency is created.

1949 In *Wolf v. Colorado,* the Supreme Court applies the Fourth Amendment but not the exclusionary rule to the states.

Federal Communications Commission formulates the fairness doctrine.

1950 Congress adopts the Internal Security (McCarran) Act.

1951 In *Dennis v. United States,* the Supreme Court upholds the conviction of leading members of the U.S. Communist Party under provisions of the Smith Act.

Senator Joseph McCarthy (R-WI) gives a February speech declaring that the State Department is infiltrated with at least fifty-seven card-carrying members of the Communist Party. This speech begins three years of oratory and hearings that McCarthy and his assistant Roy Cohn use to investigate alleged Communist infiltration in the United States.

1952 In *Youngstown Sheet and Tube Co. v. Sawyer,* the Supreme Court declares that President Harry Truman's seizure of the steel mills during the Korean War was unconstitutional.

1953 Earl Warren becomes chief justice of the United States.

Julius and Ethel Rosenberg are executed for passing U.S. atomic secrets to the Soviet Union.

1954 Supreme Court issues its historic decision in *Brown v. Board of Education* overturning *Plessy v. Ferguson* (which upheld the separate-but-equal concept) and calling for an end to racial segregation in public schools.

Senate censures Senator Joseph McCarthy of Wisconsin for abuses in connection with his investigations of communism.

In *Berman v. Parker,* the Supreme Court upholds the broad authority of governments to take private property for a variety of public uses, including urban renewal.

1955 Dr. Martin Luther King Jr. launches boycott of Montgomery, Alabama, buses after Rosa Parks engages in an act of civil disobedience by refusing to give up her bus seat to a white person.

Congress adopts the Communist Control Act.

1957 In *Watkins v. United States,* the Supreme Court decides that questions asked by congressional committees must be pertinent to the subject of the investigation.

1958 In *Trop v. Dulles,* Supreme Court invalidates removal of citizenship from a native-born American as "cruel and unusual punishment."

In *Cooper v. Aaron,* the Supreme Court reaffirms its power of judicial review and commands the Little Rock, Arkansas, school board to continue with racial desegregation.

1961 In *Mapp v. Ohio,* the Supreme Court extends the exclusionary rule to the states.

1962 In *Engel v. Vitale,* the Supreme Court invalidates the reciting of public prayers in public schools.

In *Baker v. Carr,* the Supreme Court accepts the justiciability (appropriateness for Court consideration) of cases dealing with state legislative apportionment, which the Court previously had treated as a "political question."

1963 In *Abington School District v. Schempp,* the Supreme Court widens the prohibition in *Engel v. Vitale* to include the Lord's Prayer and Bible reading.

In *Gideon v. Wainwright,* the Supreme Court extends the right to appointed counsel to apply in felony cases.

Dr. Martin Luther King Jr. delivers his famous "I Have a Dream" speech during the historic "March on Washington" in the nation's capital.

1964 Congress adopts the Civil Rights Act.

In *New York Times Co. v. Sullivan,* the Supreme Court establishes a high standard of proof for public figures to meet in pursuing libel cases against the media.

Supreme Court in *Reynolds v. Sims* mandates that both houses of state legislatures follow the principle of "one person, one vote."

1965 Supreme Court invalidates a Connecticut birth control law in *Griswold v. Connecticut* on the basis of a right to privacy that it locates within the "penumbras" of various provisions of the Bill of Rights and the Fourteenth Amendment.

Congress adopts the Voting Rights Act.

1966 Supreme Court announces the *Miranda* rules governing conduct when individuals are arrested and interrogated by police.

1967 Supreme Court decides in *Katz v. United States* that governmental agents need a warrant before they can place a wiretap.

Thurgood Marshall, former U.S. solicitor general, becomes the first African American to serve on the Supreme Court.

In *Loving v. Virginia,* the Supreme Court strikes down a Virginia miscegenation law.

1968 In *Terry v. Ohio,* the Supreme Court permits warrantless stop-and-frisk searches.

Supreme Court in *Duncan v. Louisiana* applies the right to a jury trial to the states.

1969 In *Tinker v. Des Moines Independent School District*, the Supreme Court recognizes that school students have a right to symbolic speech.

Warren E. Burger is named chief justice of the United States.

In *Brandenburg v. Ohio,* the Supreme Court decides that speech can be prosecuted only if it is likely to lead to "imminent, lawless action."

1971 Supreme Court articulates the three-part *Lemon* test whereby it analyzes laws for violations of the Establishment Clause (prohibiting establishment of religion) of the First Amendment.

Supreme Court lifts a lower-court injunction and permits publication of the *Pentagon Papers*.

Twenty-sixth Amendment extends voting rights to individuals ages eighteen to twenty-one.

On May 4, four students protesting the U.S. invasion of Cambodia are shot and killed by National Guardsmen at Kent State University in Ohio. More than 700 campuses around the country close to protest the killings.

1972 In *Furman v. Georgia,* the Supreme Court invalidates the death penalty as then administered.

Supreme Court expands the right to counsel in *Argersinger v. Hamlin.*

1973 Supreme Court establishes the *Miller* test (applying community standards) to judge obscenity.

1973 In *Roe v. Wade,* the Supreme Court recognizes a woman's right to secure an abortion during the first two trimesters of pregnancy.

In *Frontiero v. Richardson,* the Supreme Court indicates it is giving increased scrutiny to classifications involving gender.

Supreme Court in *San Antonio Independent School District v. Rodriguez* declares that education is not a fundamental constitutional right and that Texas does not have to equalize school funding.

1974 President Richard M. Nixon resigns from office in disgrace as a result of the Watergate break-in and its subsequent cover-up.

1976 Nation celebrates the bicentennial of the Declaration of Independence.

Supreme Court permits reinstitution of the death penalty in *Gregg v. Georgia* provided the trial is bifurcated and the jury considers aggravating and mitigating circumstances.

In *Buckley v. Valeo,* the Supreme Court upholds most provisions of the Federal Election Campaign Act related to contributions (except for those that candidates make to themselves) but strikes down some spending limits.

1980 Ronald Reagan is elected president of the United States.

Supreme Court in *Stone v. Graham* strikes down a Kentucky statute requiring the posting of the Ten Commandments in public school classrooms.

1981 Sandra Day O'Connor becomes the first woman to serve on the Supreme Court.

1984 Supreme Court in *Lynch v. Donnelly* upholds city display of nativity scene as part of a larger Christmas display that includes secular symbols.

1986 Supreme Court refuses to overturn state laws banning sodomy in *Bowers v. Hardwick.*

Justice William H. Rehnquist, first named to the Supreme Court in 1972, is elevated to the position of chief justice.

Supreme Court decides in *Meritor Savings Bank v. Vinson* that sexual harassment violates the Civil Rights Act of 1964.

1987 Nation celebrates the bicentennial of the U.S. Constitution.

1989 In *Texas v. Johnson,* the Supreme Court overturns a conviction for burning an American flag as a violation of freedom of speech.

1990 Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith* rules that states need not have a compelling state interest to justify a criminal law that falls unequally on religious groups.

In *Cruzan v. Director, Missouri Department of Health,* the Supreme Court rules that individuals have a right to die and withhold medical treatment, but it permits Missouri to continue life support over parental objections in the absence of "clear and convincing evidence" that the patient would have wanted treatment stopped.

1991 United States engages in its first war with Iraq, a response to the Iraqi invasion of neighboring Kuwait.

Supreme Court permits use of victim-impact statements in *Payne v. Tennessee.*

1992 In *Lee v. Weisman,* the Supreme Court extends the ban on public prayer to public school graduation exercises.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* the Supreme Court upholds the "central holding" of *Roe v. Wade* permitting abortion.

Supreme Court strikes down a cross-burning law as a violation of the First Amendment in *R.A.V. v. City of St. Paul.*

1995 Supreme Court rules in *Rosenberger v. University of Virginia* that a denial of student activity funds to a religious group violates freedom of speech.

1996 In *Romer v. Evans,* the Supreme Court invalidates an amendment to the Colorado state constitution prohibiting legislation on behalf of gays.

1997 In *City of Boerne v. Flores,* the Supreme Court strikes down the Religious Freedom Restoration Act of 1993.

Supreme Court in *Washington v. Glucksberg* upholds Washington state's ban on physician-assisted suicide.

1999 Congress adopts Foreign Narcotics Kingpin Designation Act.

2000 George W. Bush is declared president after the Supreme Court decision in *Bush v. Gore* halts vote recount in Florida.

In *Santa Fe Independent School District v. Doe,* the Supreme Court invalidates student-led prayers at football games.

2001 Attacks on the World Trade Center in New York City and the Pentagon in Washington, D.C., and the failed attempt in Pennsylvania, raise increased fears of foreign terrorists.

Congress adopts USA Patriot Act to fight terrorism.

2002 Supreme Court invalidates imposition of the death penalty for individuals who are retarded in *Atkins v. Virginia.*

In *Board of Education v. Earls,* the Supreme Court affirms the right of public schools to conduct drug testing of students participating in extracurricular activities.

2003 Supreme Court overturns a Texas sodomy statute in *Lawrence v. Texas,* thus negating its earlier decision in *Bowers v. Hardwick* (1986).

In *Virginia v. Black,* the Supreme Court upholds a law banning cross-burning for the purpose of intimidating others.

Supreme Court in *McConnell v. Federal Communications Commission* upholds the "soft money" ban in the Bipartisan Campaign Finance Reform Act of 2002.

In *Connecticut Department of Public Safety v. Doe,* the Supreme Court upholds Connecticut's "Megan's law" requiring that individuals convicted of sexual offenses register with the Department of Public Safety.

Supreme Court in *Ewing v. California* upholds California's three-strikes-and-you're-out law.

United States deposes Saddam Hussein from power in Iraq.

2004 Supreme Court rules in *Elk Grove Unified School District v. Newdow* that father seeking to strike the words "under God" from flag salute in public schools does not have proper standing to bring his case.

After two decisions by its highest court, Massachusetts becomes the first state to allow gay marriages, which leads to nationwide discussion of the contentious subject.

In *Hamdi v. Rumsfeld,* Supreme Court rules that a U.S. citizen captured in Afghanistan and being held in a military brig could file a habeas corpus appeal.

Supreme Court in *Rasul v. Bush* upholds the right of federal courts to hear habeas corpus appeals by foreign nationals being held at Guantánamo Bay, Cuba.

George W. Bush elected to a second term.

Chief Justice William Rehnquist treated for thyroid cancer, fueling speculation about his position and other possible Supreme Court appointments.

Attorney General John Ashcroft resigns.

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