The Encyclopedia of
Civil Liberties in America

THE ENCYCLOPEDIA OF
CIVIL LIBERTIES IN AMERICA

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This book contains essays on terms, historical documents and events, constitutional provisions, individuals and associations that have been important in the struggle for civil liberties, legal terms and procedures,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 preventing 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 plaintiffs 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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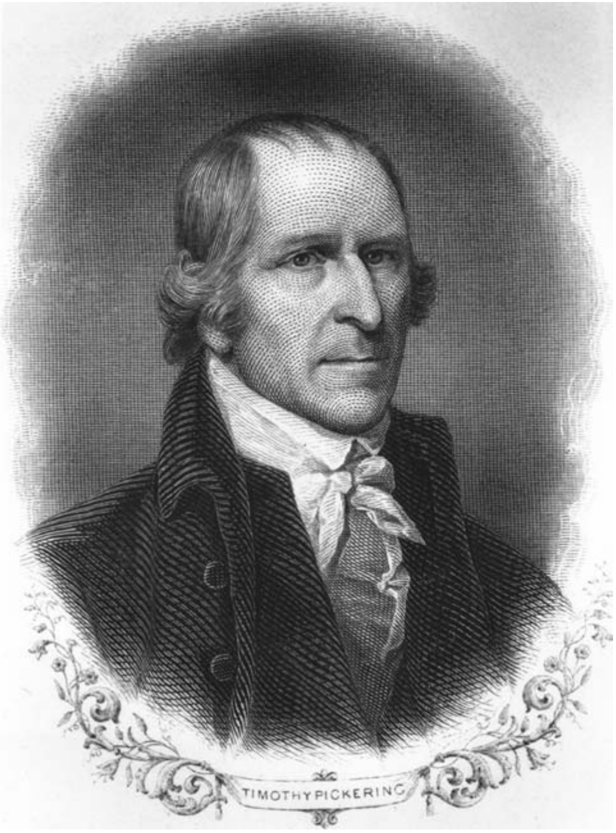
Alien and Sedition Acts (1798)

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.

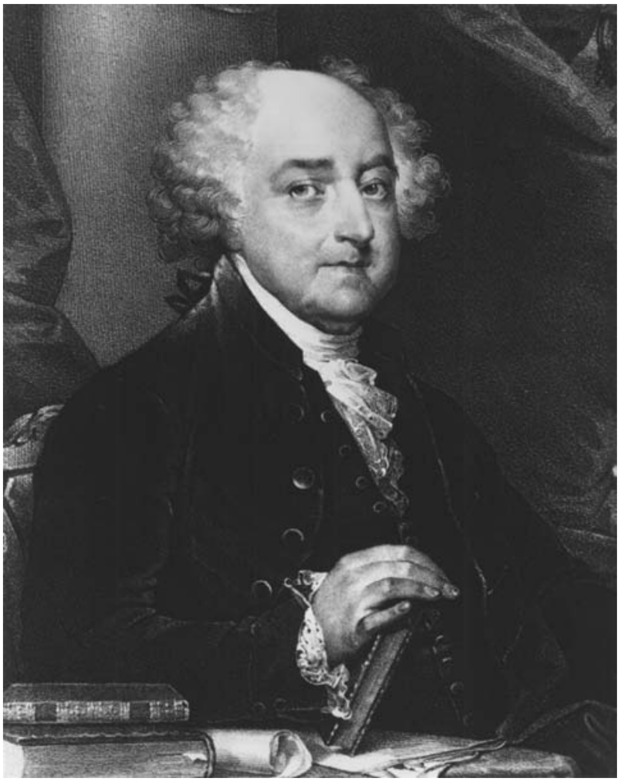
Secretary of State Timothy Pickering and President John Adams were among the leading champions of the proposed legislation, although Adams never advocated the use of the laws for partisan purposes. The Federalists did not distinguish between liberal democrats and subversive radicals; some Federalists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

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.

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 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 doctrine—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.

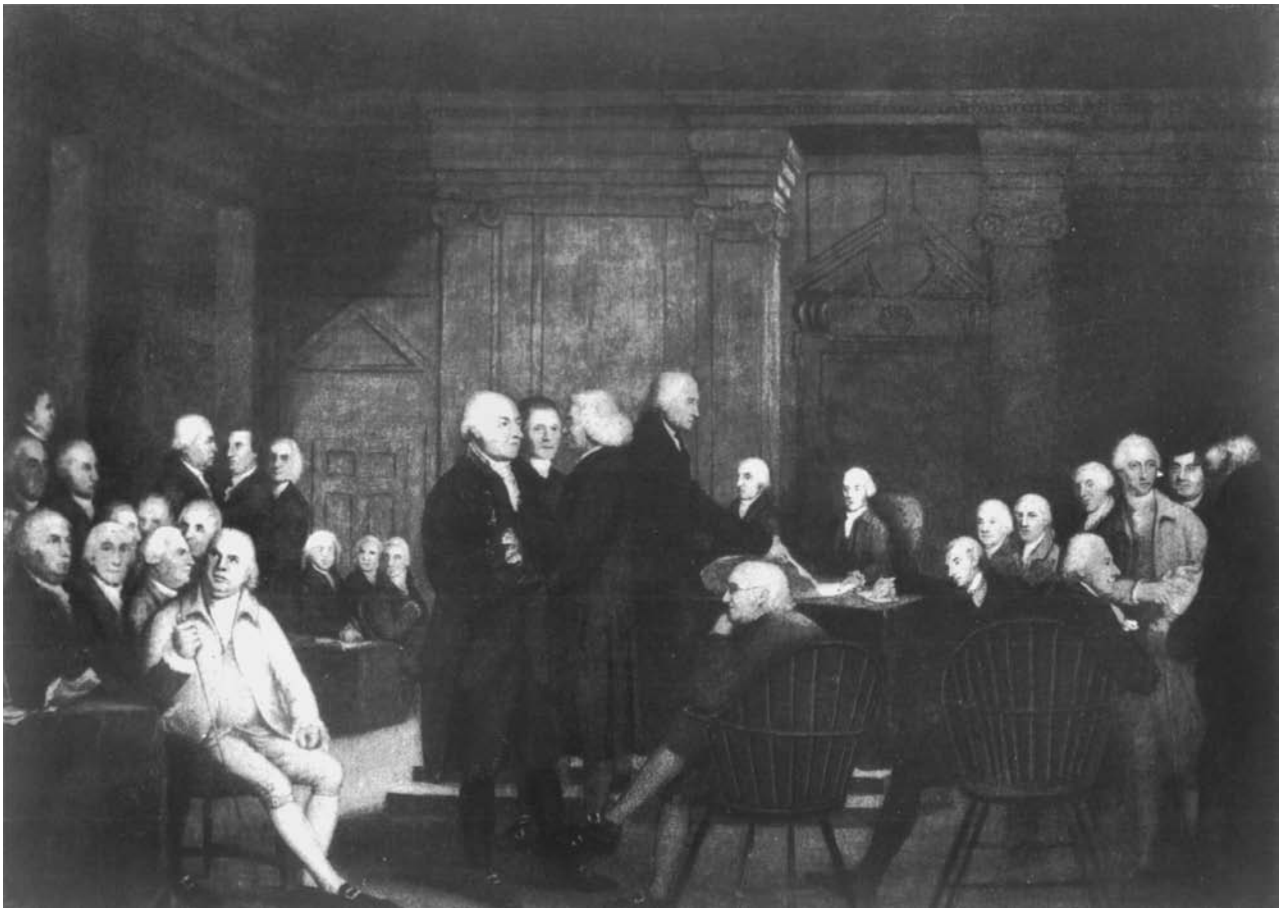
Through the articles, the duties of the revolutionary Continental Congress were transferred to the new and permanent Congress. The new Congress also assumed the form of the Continental Congress. Each state had one vote on any matter before the Congress. To be enacted, any major legislation needed nine 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

SEEKING
Atty General:
RACISTS
NEED NOT APP
AMERICANS DIED FOR CIVIL RIGHTS
NO ASHCROFT
STOP ASHCROFT NOW!
Prune Bush ...
Dump

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 "material 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

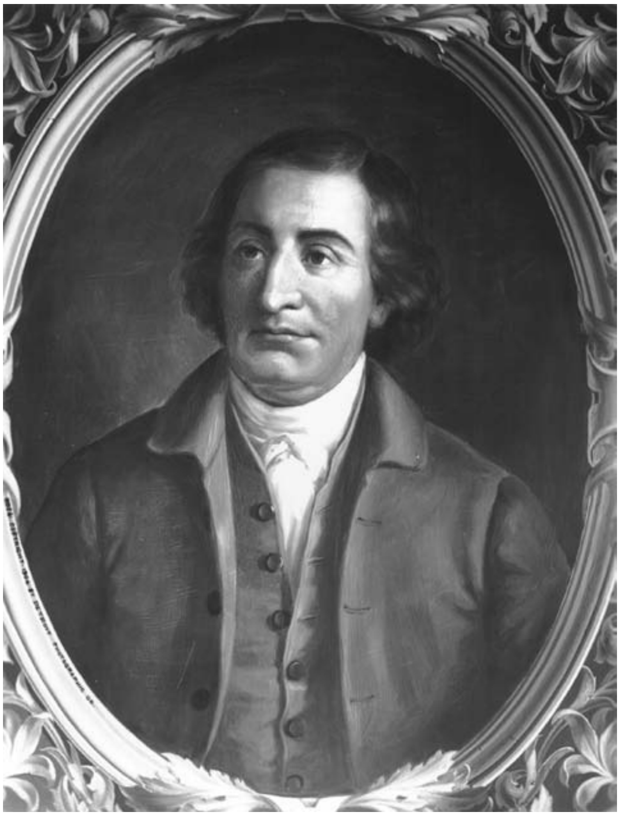
See Bill of Attainder

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.
(© Monika Graff/The Image Works)

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-

"Images Removed Due to Copyright Issues"

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 purportedly 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-

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-enhancement 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 separate 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 considerations 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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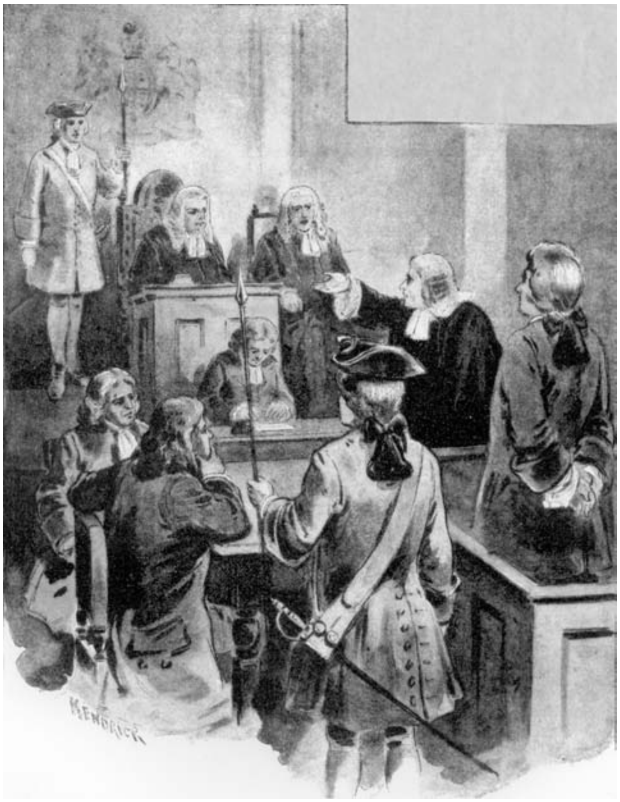
Zenger, John Peter (1697–1746)

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

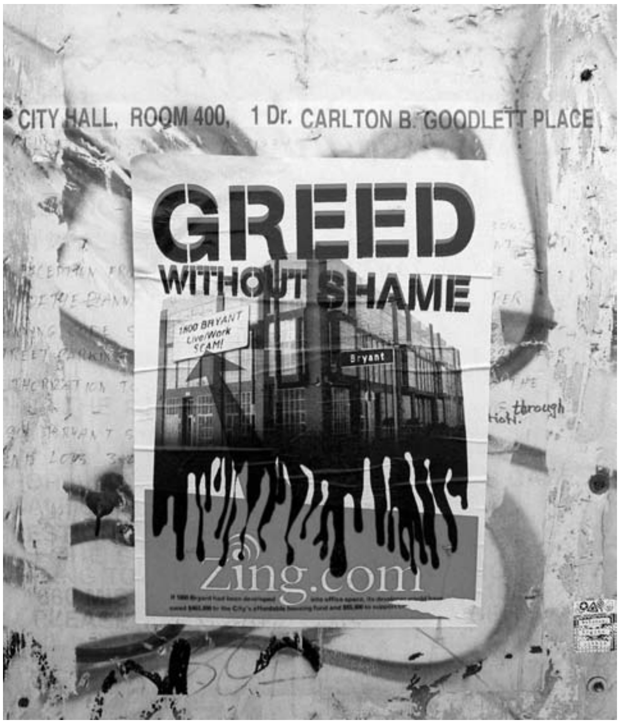
Zoning can be described as the legislative attempt to provide for orderly urban growth and to prevent incompatible land uses. It seeks to accomplish this by the designation of zoning categories. Each category includes a description of the types of land use permissible within that category. Zoning may 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. Because 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.


CITY HALL, ROOM 400, 1 Dr. CARLTON B. GOODLETT PLACE
GREED
WITHOUT SHAME
1800 BRYANT Live/Work SCAM!
Bryant
Zing.com
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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)*

Zoning became a more complex process over time. 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 categories, 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.

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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 assailants. 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.

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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 baroncy of an earl by L100; the heir or heirs of a baron, L100 for a whole baroncy; 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, moreover, 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 preside: 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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