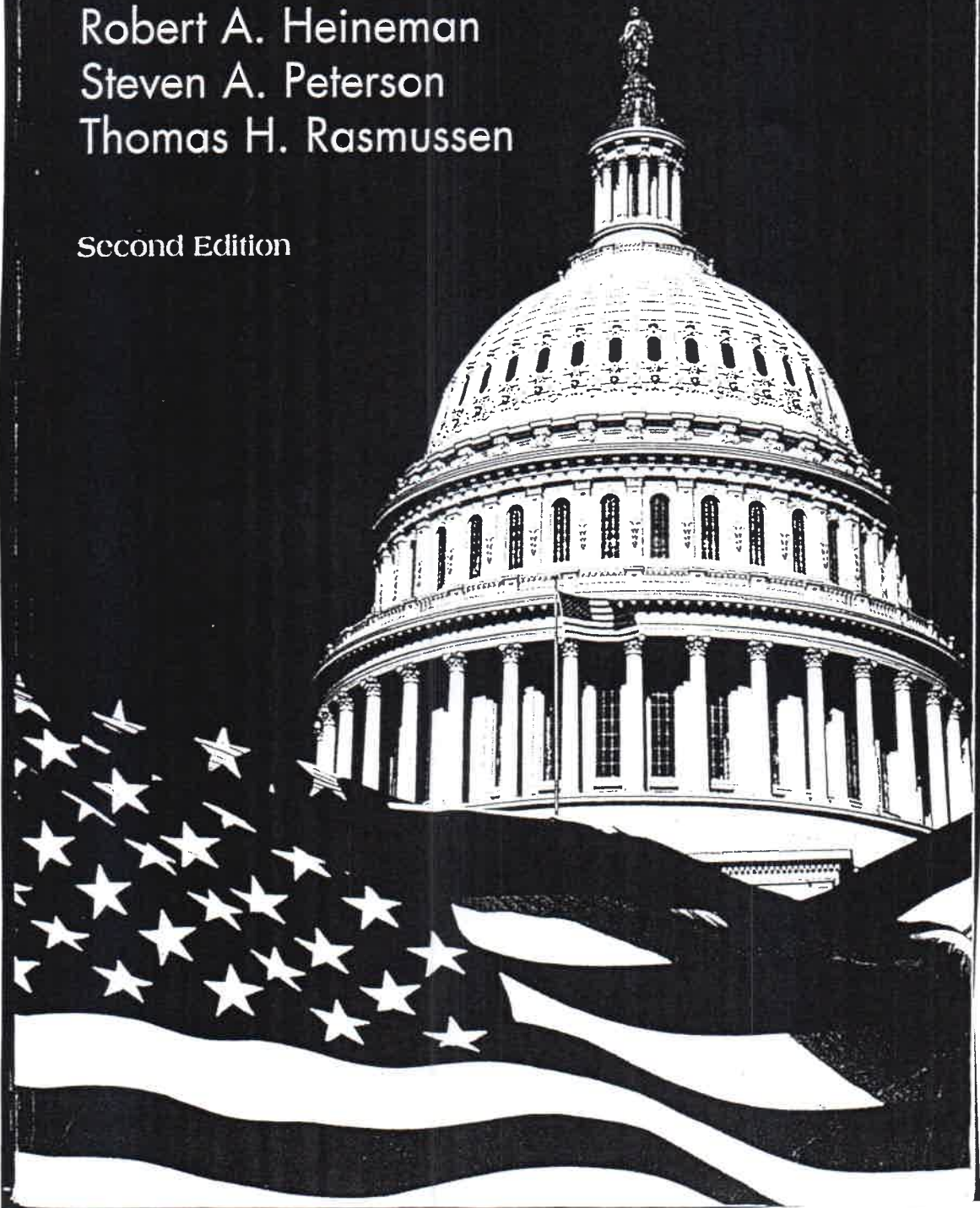


American Government

Robert A. Heineman
Steven A. Peterson
Thomas H. Rasmussen

Second Edition



CHAPTER 14

Civil Liberties and Civil Rights

Time Line

- 1868 Ratification of Fourteenth Amendment containing “due process” and “equal protection” clauses
- 1870 Ratification of Fifteenth Amendment outlawing discrimination in voting
- 1883 *Civil Rights Cases* decision establishing “state action” doctrine
- 1896 *Plessy v. Ferguson* decision establishing “separate but equal” doctrine
- 1925 First Amendment free expression protections applied against the states (*Gilow v. New York*, 268 U.S. 652)
- 1941 Fifteenth Amendment held to apply national law to primary elections
- 1949–1954 Period of concern about internal subversion, often labeled the McCarthy era after the activities of Senator Joseph McCarthy from 1950–1954
- 1954 *Brown v. Board of Education* decision overturns “separate but equal” doctrine as applied to education
- 1961–1966 Warren Court dramatically expands individual rights in the criminal process
- 1963 March on Washington by those supporting black civil rights, led by Martin Luther King, Jr.
- 1964 Passage of the Civil Rights Act utilizing the “equal protection” clause and Congress’s commerce power to attack discrimination
- 1965 Passage of the Voting Rights Act providing for effective registration of blacks in the southern states
- 1971 First application of equal protection clause to protect women from discrimination (*Reed v. Reed*, 404 U.S. 71)
- 1971 Supreme Court supports busing as means of racial integration in school districts (*Swann v. Charlotte-Mecklenberg*, 402 U.S. 1)
- 1973 Women’s right to abortion established (*Roe v. Wade*, 410 U.S. 113)
- 1978 In *Regents v. Bakke*, Supreme Court begins to consider use of quotas as means of affirmative action
- 1986 State laws prohibiting adult homosexual activity upheld (*Bowers v. Hardwick*, 478 U.S. 186)
- 1992 Supreme Court narrows “fighting words” exception to First Amendment protection (*R.A. V. v. City of St. Paul, Minnesota*, 120 L. Ed. 2d 305)
- 1992 Three former critics of *Roe v. Wade* join to form a new majority reaffirming women’s fundamental right to abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 120 L. Ed. 2d 674)
- 1993 President Clinton orders modification of the military’s policy of excluding gays and lesbians from service

The basic rights of the individual within the state are divided into civil liberties, which are individual rights to act and to be protected in the criminal process, and civil rights, which are protections against discrimination be-

cause one is a member of a particular class. There are both constitutional and statutory bases for these rights. Generally speaking, in the twentieth century the courts have played a key role in increasing the scope of civil liberties and rights. Legislatures have followed expansive judicial interpretations of constitutional rights with statutory support.

The courts have been primary actors in the development and protection of civil liberties and civil rights because of Americans' fundamental belief in the concept of the rule of law. Although there have been notable deficiencies in its application, the idea that all citizens are equal before the law has been a consistent theme of American political history and has been one of the key factors behind the expansion of individual rights. This belief elevates the status of judges, and it places limits on the powers of majorities. Americans believe that democracy is more than majority rule. For them, it also must include protections of basic liberties and rights that stand above the wills of executives or legislatures. These rights are to be found in the national and state constitutions, and the courts are their ultimate guardians.

Rights Within the Constitution

At the national level of government, all rights are derived from the Constitution. Statutes may elaborate rights in particular areas, but they must ultimately draw on rights found in the Constitution.

Although most of the protections for American citizens are found in the Bill of Rights and following amendments, several rights are contained in the main text of the Constitution itself. These are in large part reactions against excesses that occurred in England during the seventeenth century and that the Founding Fathers wanted to avoid in the new republic. During the turmoil of that century, Parliament and monarchs acted viciously in their treatment of political opponents. Four protections in the body of the Constitution—the definition of treason, the prohibition of bills of attainder and ex post facto laws, and the provision for the writ of habeas corpus—are attempts to guarantee that such acts will not recur in the United States.

Definition of Treason

The Founding Fathers were very careful in their definition of treason. The definition of treason in the Constitution (Article III, Section 3) as levying war against the United States or “adhering to their enemies, giving them aid and comfort” effectively limits treason, without constitutional amendment, to those acts. Further, the courts have limited what constitutes treason by declaring that

one must adhere to the country’s enemies *and* give them aid and comfort. However, the Founding Fathers were not satisfied with mere definition. They also specified the procedures by which a person can be convicted of treason. In the United States, a person can be convicted of treason only on his or her confession in open court or on the testimony of two witnesses to the same act. The courts, in turn, have followed the spirit of the authors of the Constitution and have interpreted its treason provisions strictly in favor of defendants.

Prohibition of Bills of Attainder and Ex Post Facto Laws

The Constitution (Article I, Section 9) prohibits both states and the national government from enacting bills of attainder and ex post facto laws, two legislative excesses that historically have often been related. Bills of attainder are essentially legislative findings of guilt. In this country, legislatures may not find an individual guilty of a crime and punish him or her. This can be done only within the judicial system. Ex post facto laws are laws that make an act a crime after it has been committed, increase the penalties for a crime after it has been committed, or make it easier to convict someone of a crime after it has been committed. Key elements of the rule of law are that the law be known and that it be impartially applied. The prohibition of bills of attainder and ex post facto laws is an important element in protecting the rule of law in this country.

Writ of Habeas Corpus

The writ of habeas corpus is another fundamental individual right protected in the Constitution (also Article I, Section 9). Application for a writ of habeas corpus from a court, in its most basic form, means that an individual who is being held prisoner is asking to either be charged with a crime or be released. Unless the writ is suspended as provided for in the Constitution in times of rebellion or invasion, a person cannot be held prisoner without the right to judicial determination of the legality of his or her imprisonment. The courts have held that only Congress has the power to suspend the writ, but Presidents Abraham Lincoln and Franklin Roosevelt, during wartime, both issued executive orders imposing military jurisdiction over areas of the nation that had the effect of suspending the writ.

The Bill of Rights

The Bill of Rights is the first ten amendments to the Constitution and contains the core of individual rights against government. Of these amendments,

really only the First, Fourth, Fifth, Sixth, and Eighth have had continuing importance.

Fourteenth Amendment Expansion—Due Process

In 1833, in a decision that technically remains good law, the Supreme Court held that the Bill of Rights applies only against the national government (*Barron v. Baltimore*, 32 U.S. 243 [1833]). The effects of that decision changed, however, with the enactment of the Fourteenth Amendment in 1868. This amendment contains a clause—the due process clause—that prohibits the states from denying any person “life, liberty, or property, without due process of law.” In the twentieth century, the Supreme Court began to incorporate rights from the Bill of Rights into the term “liberty” in the Fourteenth Amendment’s due process clause. Thus, “liberty” became an expandable term through which most of the protections in the Bill of Rights have been applied against state governments. Today, citizens are protected by the entire Bill of Rights in relation to the national government and by most of the important protections in that group of amendments from state action as well.

The Gradual Incorporation Doctrine

The doctrine by which protections in the Bill of Rights have been applied against the states has been termed the gradual, or selective, incorporation doctrine, meaning that these protections have been applied over the years, on a case-by-case basis. Some Supreme Court justices have argued that the entire Bill of Rights should be applied against the states in what is known as the total incorporation doctrine. Others have urged that the entire Bill of Rights plus other rights not listed there should be incorporated into the due process clause of the Fourteenth Amendment. Most recently, some justices have suggested that the Bill of Rights standard for incorporating rights through the Fourteenth Amendment should be abandoned and the standard instead should simply be due process. None of these latter positions have carried a Supreme Court majority, however, and the gradual incorporation approach remains the law of the land.

First Amendment Liberties

The liberties guaranteed by the First Amendment have all been applied against the states and are seen by many as the vital core of a free, democratic system. The most important of these liberties are those involving religion and free expression of ideas.

Religion

The religious protections in the First Amendment are contained in two clauses, the “establishment” clause and the “free exercise” clause. The first prohibits Congress from passing laws “respecting an establishment of religion.” The second prohibits Congress from abridging the free exercise of religion.

The “Establishment” Clause

The establishment clause has been the focus of most contemporary controversy. Clearly, it means that Congress should not provide direct aid to religion. Its application against the states, however, is less clear, since at the time it was adopted Massachusetts and Connecticut both had state-sponsored and state-supported religions. In the decision that has set the framework for modern constitutional treatment of the establishment clause, Justice Hugo Black upheld the use of state tax monies to transport students to public and parochial schools (*Everson v. Board of Education*, 330 U.S. 1 [1947]). In his opinion, Black argued that the Constitution required that a “wall of separation” should be maintained between church and state. The current standard for determining the permissible relationship between church and state is the three-prong test suggested by Chief Justice Burger in *Lemon v. Kurtzman* (403 U.S. 602 [1971]). Under this test a statute must have a secular purpose; its primary effect must neither advance nor inhibit religion; and it must not lead to “excessive government entanglement with religion.” A law that fails any one of these three tests is unconstitutional under the establishment clause.

Since the *Everson* decision, the Supreme Court has dealt extensively with the relation of religion and education. It has consistently disapproved use of public school facilities for religious exercises and prohibited prayer in these schools. It has, however, supported a “moment of silence” that has no religious content or context. The area of funding for parochial schools has been more complex. Here the Court has tended to follow the “child benefit” doctrine, holding that if the aid benefits the child and not religion, it is constitutional. Thus aid to parochial schools for secular texts and ancillary services has been upheld. The case of *Mueller v. Allen* (463 U.S. 388 [1983]) suggests that the Court is also willing to sustain programs of tuition assistance that treat secular and nonsecular, private- and public-school students equally.

The “Free Exercise” Clause

Cases involving the free exercise clause have come less frequently before the Supreme Court. In the case of *Bob Jones University v. U.S.* (461 U.S. 574

[1983]), Bob Jones University claimed that its right to free exercise of religion was abridged when the Internal Revenue Service removed its tax-exempt status, thus making contributions to it no longer tax deductible. From the government's perspective, Bob Jones's refusal to allow interracial dating constituted racial discrimination in violation of national policy. The Court held that the university's religious beliefs about racial relationships were contrary to national policy and precluded the university from continued support through beneficial tax exemption. *Wisconsin v. Yoder* (406 U.S. 205 [1972]) presented another conflict between state policy and religious belief and practice. In that instance, the Amish refused to send their children to school beyond the eighth grade despite the fact that Wisconsin law required school attendance until age 16. The Supreme Court held for the Amish, however, noting that their religious practices had been maintained for three centuries and that they were entitled to state deference.

Recently, claims of religious freedom have been made against state laws punishing the sacramental rituals of particular religions. In 1990, the Supreme Court upheld an Oregon statute that prohibited the use of the hallucinogenic drug peyote for religious purposes (*Oregon v. Smith*, 494 U.S. 872). But in 1993, the Court found a Hialeah, Florida, ordinance outlawing the sacrificial killing of animals to be an unconstitutional infringement of the ritual practices of Santeria, an Afro-Cuban religion that uses animal sacrifice as an important part of its ceremonies (*Church of the Lukumi Babalu Aye v. City of Hialeah*, 124 L. Ed. 2d 472 [1993]).

Freedom of Expression

Freedom of speech and press merge under the idea of freedom of expression. Both are vital to the free and robust exchange of opinion in a democratic system. The Supreme Court has wrestled throughout the twentieth century with the proper balance between government power and the right to free expression but has not discovered a way to draw definitive lines between the two. Free expression has extensive constitutional protection, but its limits have varied depending on the historical context.

Judicial Standards

The Court has tried to provide some predictability to its free speech position by fashioning tests by which speech could be measured. In *Schenck v. U.S.* (249 U.S. 47 [1919]), Justice Oliver Wendell Holmes offered the famous "clear and present danger" test, arguing that circumstances could be such as to render normally permissible speech a clear and present danger to national security. Thus, Holmes asserted, one may not yell "Fire" falsely in a crowded

theater. Later, in a famous footnote in the *Caroleene Products* case (*U.S. v. Caroleene Products Co.*, 304 U.S. 144 [1938]), Justice Harlan F. Stone suggested a "preferred freedoms" standard for the First Amendment. Under this test, the Court would recognize that the freedoms in the First Amendment are more important than other freedoms in the Constitution and thus hold a preferred status. Any attempt by government to infringe these freedoms would receive rigorous scrutiny by the Court.

Justice Black soon followed with his "absolute standard" for free speech. His position was that the First Amendment's prohibition against infringing speech is absolute: it says Congress shall make *no* law abridging freedom of speech or press. Black concluded that pure speech and the printed word simply cannot be punished by the state. In a democracy, the channels of communication must be kept open. The minority must always have the opportunity to try to persuade the majority.

Other tests have also been proposed. One, Justice Felix Frankfurter's "balancing test," might be seen as the diametric opposite of Black's absolute test in that it remains highly subjective. Frankfurter would balance the value of speech against the danger that it poses to society, leaving the issue of whether it is allowable to a particular court on a particular day.

In many respects, Justice Black's position appears to have merit. Simply following the words of the Constitution would seem to make dealing with expression easier and more predictable. However, shortly after ratification of the First Amendment, Congress passed the Alien and Sedition Acts, which allowed for punishment of expression, thereby indicating that some types of expression were not protected by the First Amendment.

While the issue of punishing expression after it has occurred remains subject to whichever test the Supreme Court wishes to apply, the Court has consistently found prior restraint, suppression of expression before it becomes public, to be unconstitutional. Thus, one is free to express an opinion, but the possibility of ensuing punishment remains. However, recent courts have taken a very broad view of permissible expression where political and social issues are involved. Today, the *Brandenburg* doctrine, which holds that speech is allowable unless it threatens "imminent lawless action and is likely to incite or produce such action," seems to be the prevailing position of the Court (*Brandenburg v. Ohio*, 395 U.S. 444 [1969]).

While Justice Black was very tolerant of pure expression, he drew the line at what has been termed symbolic speech, actions (sometimes called expressive conduct) that are intended to express opinions. Members of the Court have divided over how far the First Amendment protects acts that claim to be expressions of political or social ideas. The wearing of black armbands to pub-

lie school to protest the Vietnam war or the inscription “F_____ the Draft” on a jacket worn in public have been found permissible. The Court has upheld prosecution of other actions, such as burning one’s draft card, that claimed symbolic speech protection, but in doing so it has refused to define the issues as involving free speech.

Previous to 1989, the Court had also taken this route with regard to cases involving desecration of the flag. But in that year in *Texas v. Johnson* (491 U.S. 397), a case that involved a state statute, and in 1990 in *U.S. v. Eichman* (496 U.S. 310), a case that involved a national statute, the Court held that laws making it a crime to desecrate the flag abridged the First Amendment’s protection of free expression. The area of symbolic speech under the First Amendment must by its very nature remain one that will be determined on a case-by-case basis, although the justices will surely attempt to construct tests to make their decisions easier.

In 1992, in a case involving a so-called hate ordinance passed by the city of St. Paul, Minnesota, the Supreme Court in an opinion by Justice Antonin Scalia drew a careful distinction between action and words (*R.A.V. v. City of St. Paul*, 120 L. Ed. 2d 305 [1992]). At issue was the scope of the “fighting words” doctrine, under which for many years the Court had held that certain types of antagonistic speech directed personally at individuals did not have First Amendment protection from prosecution by government. In its hate bias statute, St. Paul incorporated this doctrine by making speech aimed at arousing “anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” punishable. Justice Scalia, however, saw the statute as an attempt by the city to use its authority to restrict the free flow of opinion and debate in favor of particular groups and to leave others—the disabled, gays, and lesbians, for example—subject to verbal attack. The “fighting words” doctrine may still enable prosecution of vicious personal verbal attacks, but it is clear from this case that government cannot specify which groups it wishes to protect and which it does not. The Court has held, however, that a state may increase the penalties for crimes that are motivated by racial or other kinds of hatred (*Wisconsin v. Mitchell*, 124 L. Ed. 2d 436 [1993]).

Obscenity

Obscenity has raised questions under the First Amendment, but the Supreme Court has treated them as being different from those involved in political and social debate. Maintaining his absolutist position, Justice Black contended that the First Amendment protects speech and the printed word from being judged obscene. The Supreme Court, however, has been fairly consistent in discouraging obscene expression. Only under the Warren Court and the early

Burger Court was pornographic expression given broad license. This tolerance grew out of the standards established by the Warren Court in the famous “Fanny Hill” case (*Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts*, 383 U.S. 413 [1966]), in which the Court held as part of its test for obscenity that the material must be “utterly without redeeming social value.” This made it exceptionally difficult to find any material obscene, and the cloak of First Amendment protection was thrown over a wide range of pornographic expression.

In *Miller v. California* (413 U.S. 15 [1973]), the Burger Court discarded the “utterly without redeeming social value” test and substituted more restrictive standards for obscenity. One standard uses the criterion of the average person, who, utilizing community standards, would find that the dominant theme of a work taken as a whole appeals to his or her prurient interest. Another requires statutory description in detail of the kinds of behavior that may not be depicted. Finally, the Court believes that a work should have serious social, political, scientific, or educational value for it to be acceptable. Furthermore, the Court has held that a state may prohibit the sale of material not obscene by adult standards to youths under age 16. Communities may allow the sale of pornographic materials, but if a state wishes to circumscribe such activity, it is now much easier to do so than under the previous standards of the Warren Court.

National Security Issues

A primary concern about unfettered freedom of expression and association has been the danger that it might pose to governmental stability. This fear heightened with the success of the Bolshevik Revolution in the Soviet Union and its proclaimed goal of worldwide revolution. Democratic processes in the United States have been based on the value of allowing people to associate freely and to express their opinions, but revolutionary movements pose the possibility that their adherents may use these freedoms to gain power and then suppress rights of others.

The most recent sustained concern about threats to national security from internal subversion occurred during the late 1940s and early 1950s in what has become known as the McCarthy era, after Senator Joseph McCarthy of Wisconsin. McCarthy gained notoriety launching attacks against government officials and others whom he believed to be communists or communist sympathizers. For a time, all three branches of government worked to ferret out subversives.

Congress, in 1940, passed the Smith Act, which prohibits a wide variety of activities aimed at the violent overthrow of the government. In the late 1940s this law was used to successfully prosecute leading members of the

American Communist party. In 1950, Congress added the Internal Security Act to its arsenal of antisubversion weaponry. This act allowed the president to declare a state of internal security emergency that invoked substantial limits on the rights of individuals who were suspected of being subversives. The act also provided that organizations found to be “communist-action, communist-front, or communist-infiltrated” by the attorney general had to register with that office. Registration then subjected the organization to various disabilities. In 1954, Congress in the Communist Control Act of that year outlawed the Communist party.

These efforts to legislate against subversion have been diluted over the years. The Smith Act remains on the books, but it has been limited by court interpretation. The internal security emergency portion of the Internal Security Act has been repealed, and its registration provisions have been declared unconstitutional. The Communist Control Act has never been enforced because it appears to violate the First Amendment’s protection of freedom of association.

Legislative efforts to control subversion were supplemented by an executive loyalty security program to investigate possible subversives in the national government. Loyalty oaths proliferated at the national and state levels. Negative loyalty oaths—oaths in which one swears to have never been a subversive or belonged to a subversive organization—have generally been ruled unconstitutional because they chill freedom of expression and association. Affirmative oaths—oaths in which one swears to support the government—however, carefully drawn, remain constitutional. State efforts to institute comprehensive loyalty security programs were limited by the Supreme Court’s decision that the area of subversion control was preempted by congressional action. The McCarthy era drew to a close with the Senate’s censure of Senator McCarthy in 1954.

Individual Rights in Criminal Procedure

The criminal process begins with the commission of a crime. The police then gather evidence and arrest a suspect. The suspect is arraigned before a judge and is released or held pending resolution of the case. Assuming that a plea bargain arrangement is not reached, the defendant may be indicted and then stand trial. After the trial, upon conviction, the defendant is subject to a variety of penalties.

At each point in this process, rights from the Bill of Rights apply to the individual. These rights are intended to preserve the accusatorial nature of the criminal process. In other words, a defendant does not have to participate in

his or her prosecution. The state must convict the defendant on the basis of objective evidence. This, of course, does not often occur, since plea bargains resolve most cases or defendants confess. If a defendant insists on his or her constitutional rights, the state may gather objective evidence, such as fingerprints or hair samples, but it may not force the individual to provide information of a nonphysical, or subjective nature.

Search and Seizure (Fourth Amendment)

The Fourth Amendment’s prohibition against unreasonable search and seizure protects the individual in his or her privacy. Essentially, the primary requisite of a reasonable search is a judicially issued warrant authorizing the search. On some occasions, however, police officers are justified in searching without a warrant. Upon arresting a defendant, police officers have the right to search that person simply to protect themselves. They also have the right to search the immediate vicinity for the “fruits of the crime.” Obviously, what constitutes the immediate vicinity of the arrest has been and continues to be the subject of litigation.

Another area of justified warrantless search occurs when the police officer has “reasonable cause” to believe that an individual has committed or is committing a crime. An officer may then “stop and frisk” an individual or pull over a car and search the occupants and the interior. Even without cause, police officers may conduct automobile stops at highway checkpoints as long as they have a pattern to their stops. Such stops are often used at the state level to check for drunken driving.

Courts enforce the protection against unreasonable search and seizure through the exclusionary rule. Under this approach, the courts will exclude from a trial any evidence that has been gathered in violation of the Fourth Amendment and any evidence that has been gathered because of evidence so obtained (the “fruit of the poisonous tree” doctrine). The problem with this approach is that it often allows individuals who are clearly guilty to go free because the major evidence against them has to be excluded. For this reason, former Chief Justice Warren Burger and others have suggested that constitutionally tainted evidence be allowed into trial and that the defendant be given other remedies, such as legal judgment for damages against the offending police officers. The Supreme Court appears unwilling to abandon the exclusionary rule, although the Court has given the police increased leeway where minor infractions of the Constitution have occurred.

An important part of the search and seizure area today is the use of electronic devices to record conversations. The increased sophistication of these devices makes their control almost impossible. However, the courts have

taken a strong position that the Constitution requires a warrant before evidence obtained electronically can be admissible in a trial. The primary exception to this requirement is in national security cases involving surveillance of foreign agents.

Pretrial Rights

Miranda Rights

An individual's pretrial rights commence as soon as he or she is the primary suspect in a crime. At that point and certainly upon arrest the suspect must be informed of his or her Miranda rights. These rights stem from the famous case of *Miranda v. Arizona* (384 U.S. 436 [1966]), in which the Supreme Court applied the right to counsel and protection against self-incrimination at the point at which a suspect is apprehended. These rights had been previously applied to the states at the trial stage, but the Court recognized the importance of ensuring that the defendant is protected during the sensitive period prior to trial.

The rights which must be communicated to a suspect are as follows:

1. You have a right to remain silent.
2. Anything that you say can and will be used against you in a court of law.
3. You have the right to an attorney at this point and at any point throughout these proceedings.
4. If you cannot afford an attorney, one will be provided for you.
5. You have the right to stop making statements or answering questions at any time during these proceedings.

These rights have withstood numerous challenges, and the Supreme Court has applied the exclusionary rule where they have been clearly violated. On the other hand, the Court has allowed into evidence spontaneous statements and those statements made after minor errors in the communicating of the Miranda rights.

Right Against Excessive Bail (Eighth Amendment)

Also of importance to pretrial conditions is the right against excessive bail provided in the Eighth Amendment. The purpose of bail is simply to ensure that the accused will appear before the court when ordered to do so. In cases involving drug dealers or others with considerable financial resources and great mobility, bail may be set very high. For those without funds, however, bail in any amount is beyond reach, and these people may have to remain in custody until trial, which may be a considerable period. To provide greater

fairness for the poor and working classes, many jurisdictions have developed release on recognizance programs that allow those with stable roots in the community to be released on their promise to return. These programs have worked very well, allowing defendants to maintain their jobs and family lives with minimal interruption.

The Supreme Court has ruled, however, that the Eighth Amendment does not guarantee the right to bail. In *U.S. v. Salerno* (481 U.S. 739 [1987]), the Court considered the Bail Reform Act of 1984, which allows a judge to refuse bail to a defendant if that person appears likely to commit further crimes while awaiting trial. The statute was aimed at the problem posed by defendants who have been released pending trial and continue their criminal ways during this period, which can stretch out for months or even years with a series of delays. Chief Justice Rehnquist, speaking for the Court, upheld the constitutionality of the statute.

Use of the Grand Jury (Fifth Amendment)

A final stage before trial in a criminal matter is the determination as to whether there is sufficient evidence to hold a person for trial. This decision can be made through indictment. If a person is indicted, it does not mean that he or she is guilty of the crime; it means only that the grand jury, a body of individuals, believes that there is enough evidence to justify ordering the defendant to be held for trial. Typically, at the indictment stage, the prosecutor has a great deal of influence. However, if the prosecutor's case does not satisfy a grand jury, the defendant must be freed. The Fifth Amendment requires the use of the grand jury for indictment at the federal level. This right has not been applied to the states, and they may use other, less cumbersome approaches to bring individuals to trial.

The Trial Stage

Most criminal cases never go to trial. The bulk of criminal cases (estimates are 90 to 95 percent) are resolved through negotiations between the prosecutor and the defense counsel. This process, known as plea bargaining, significantly relieves the tremendous workload on the criminal courts. Although plea bargaining has often been criticized as being too lenient toward defendants, it has the advantage for both sides of avoiding the uncertainty, time, and expense of a trial. Most of the rights pertaining to criminal trials are provided by the Sixth Amendment.

Right to Counsel (Sixth Amendment)

The American legal process is an adversary process. This means that the two sides enter into legal combat under the assumption that through this con-

test the truth will become apparent. Key to the adversary process in the criminal area is the belief that the defendant should have a fair chance against the tremendous resources that the state can bring to bear. Basic to protecting the defendant is the Sixth Amendment right to counsel. Since 1972, the Supreme Court has insisted that a defendant may not be sentenced to jail without having access to an attorney. Previous to 1963, however, defendants in noncapital cases—cases that did not involve the death penalty—at the state level had no right to have an attorney appointed if they could not afford one.

Subpoena Power and Right to Cross-Examine (Sixth Amendment)

Other protections in the Sixth Amendment relating directly to the adversary nature of the criminal trial are the right to compel witnesses to appear (subpoena power) and the right to cross-examine, or confront, unfavorable witnesses. The latter right is particularly important; it prevents the prosecution from simply introducing written statements. With but a few exceptions, the defendant has a right to question his or her accusers directly. Recognizing the overbearing resources of the state in criminal prosecutions, the Supreme Court has also insisted that the state must provide the defendant with any information that is favorable to him or her.

Rights to a Speedy Trial and to an Impartial Jury (Sixth Amendment)

Perhaps less directly related to the adversary nature of the trial, but still of great importance, are the rights to a speedy trial and to an impartial jury. Most jurisdictions now have statutory limits on how long a defendant must wait for a trial before he or she can move to have the case dismissed. Often, however, because of agreements between the prosecutor and defense attorney, these limits are exceeded without penalty to either side.

Obtaining an impartial jury continues to be a constitutional problem, and two areas—racial discrimination and opposition to capital punishment—are of particular concern. In choosing a jury, attorneys may object to potential jurors *for cause*. These objections are unlimited in number and are usually based on some conflict of interest or prejudice regarding the case. Attorneys also have a limited number of peremptory challenges, objections for which they need give no reason. The Supreme Court has held that individuals conscientiously opposed to the death penalty may be excluded for cause from juries in capital punishment cases. Within the past two decades, the Court has turned its attention to the use of peremptory challenges and has held that neither the prosecution nor the defense may use these challenges systematically to exclude blacks from a jury. In 1994 the Court extended this reasoning to disallow the use of peremptory challenges by a state to exclude jurors based on

their gender. Whether the Court will expand these decisions to include other groups in the population remains to be seen.

Protection Against Self-Incrimination (Fifth Amendment)

Also important to the trial process is the protection against self-incrimination provided in the Fifth Amendment. Not only does this protection permit a defendant to refuse to testify in a trial; it has also been taken to mean that a prosecutor cannot comment during the trial on the defendant's refusal to testify. The courts have held that an individual may invoke the self-incrimination protection whenever he or she is in danger of providing information that could be used for criminal prosecution—for example, when testifying before a congressional committee or a grand jury. In an effort to strike more effectively against organized crime figures, Congress has provided that a federal prosecutor can give a witness immunity from prosecution, thus forcing testimony under threat of a contempt of court conviction. Obviously, for organized crime figures such a grant of immunity, which they may not refuse, can create a serious dilemma. It places them in the position of having to choose between facing a jail sentence for continuing to refuse to testify or of facing their colleagues in organized crime after they have testified.

Posttrial Rights

Double Jeopardy (Fifth Amendment)

Under the Fifth Amendment's protection against double jeopardy, once an individual has been acquitted after trial, that person cannot be retried for the same crime. Again, this protection is intended to give greater balance to the adversary process. The state may not use its power to bring repeated charges against an individual for the same crime in the hope that eventually a conviction will be obtained. This means that, normally, the prosecution cannot appeal an acquittal. On the other hand, if a defendant appeals his or her conviction, that person waives the right not to be retried. In other words, if an appeals court overturns the original conviction, the state may then again enter charges and prosecute for the same crime. Also, it is possible that an act may be a crime in both federal and state jurisdictions. Thus an individual may be acquitted at the state level and then be prosecuted by federal authorities, or vice versa.

Capital Punishment

In terms of punishment after conviction of a crime, the most controversial area is capital punishment. Although some have contended that the death sen-

tence per se constitutes cruel and unusual punishment and as such is prohibited by the Eighth Amendment, the Supreme Court has continued to uphold its constitutionality. The Court has, however, been concerned that it be applied in only the most serious crimes and that it be applied as fairly as possible.

Opponents of the death penalty won a temporary victory in the case of *Furman v. Georgia* (408 U.S. 238 [1972]). In that case, a badly divided Court held unconstitutional most of the death penalty statutes then in existence. The decision itself was in the form of a brief per curiam opinion. The accompanying dissents and concurrences indicated, however, that three of the five justices in the majority believed that juries had been granted too much discretion in applying the death penalty and that this discretion had led to discrimination against minorities.

State legislatures responded to the *Furman* decision by revising their death penalty procedures, and four years later in the case of *Gregg v. Georgia* (428 U.S. 153 [1976]), the Court upheld the two-stage approach that Georgia took toward applying the death penalty. Under this approach, the jury first decides the question of guilt or innocence. If the defendant is found guilty, then separate argument is held on the issue of the appropriate penalty. If the defendant is sentenced to death, the jury must specify in writing which of the aggravating circumstances detailed in the law as justifying the death sentence were met in the particular case. The jury also must consider mitigating circumstances provided by Georgia law. The Supreme Court believed that these procedures, which have been copied by other states, limit the discretion of the jury and help to ensure fair application of the death penalty.

Since the *Gregg* decision, the Court has defined more precisely which crimes may justify the death sentence. In *Coker v. Georgia* (433 U.S. 584 [1977]), the Court's holding that the death sentence for rape of an adult woman was disproportionate to the crime seemed to suggest that only murder could justify the death sentence. Furthermore, subsequent Court decisions have indicated that only murders of a certain type are punishable by death. The Court has been unwilling to permit the death sentence for crimes of passion, for example, marital disputes that result in murder. Murders that are premeditated or committed in the process of other crimes, however, still clearly fall within the ambit of the death penalty.

Racial Discrimination

Attempts to eliminate racial discrimination have been an important part of the advance of civil rights in the twentieth century. Despite their passage shortly after the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amend-

ments provided little protection for blacks during the nineteenth century. In this century, the Thirteenth Amendment has not been heavily used, but the other two amendments have been exceedingly important in protecting against racial discrimination.

Prior to the twentieth century, however, these amendments were ineffective protections against racial discrimination owing primarily to the unwillingness of the Supreme Court to impose national power on the states. The "equal protection" clause of the Fourteenth Amendment, which was clearly designed to protect blacks against state discrimination, was gutted by two early Court decisions. In the *Civil Rights Cases* (109 U.S. 3 [1883]) the Court held that the federal government could not prohibit discrimination by private individuals or businesses because the equal protection clause referred only to state denial of equal protection of the laws. This became known as the "state action" doctrine. In *Plessy v. Ferguson* (163 U.S. 537 [1896]), the Court in turn allowed state discrimination by declaring that state laws could segregate, or separate, the white and black races as long as the facilities were separate but equal. Thus was born the "separate but equal" doctrine. Between these two Court doctrines, blacks had almost no protection from racial discrimination under the equal protection clause by the turn of the century.

Voting Rights

Prior to the 1940s, the Supreme Court was also unsympathetic to effective application of the Fifteenth Amendment's prohibition of racial discrimination in voting. Numerous legal "tests" and standards devised by the southern states barred most blacks from voting. An exception to the Supreme Court's support for these ploys occurred in 1911, when the Supreme Court invalidated laws with "grandfather clauses" that exempted those whose ancestors could vote before 1865 from having to pass a literacy test before being able to vote. Nonetheless, literacy tests themselves were upheld by the Court and remained an effective means of preventing blacks from voting.

During most of the first half of the twentieth century, the southern states also used the "white primary" as a means of disenfranchising blacks. The white primary was successful because the Democratic party was the only effective party in the South during this time. The Democratic primary decided who was to hold office because whoever won that election would face only token opposition in the general election. Claiming that the primary was a private party function immune from the sanctions of the Fifteenth Amendment, southern Democrats limited primary elections to whites only. Finally, in a pair of cases in the 1940s, the Supreme Court declared that primary elections were

subject to the Fifteenth Amendment and proceeded to outlaw the white primary (*U.S. v. Classic*, 313 U.S. 299 [1941]; *Smith v. Allwright*, 321 U.S. 649 [1944]).

The 1960s saw the next significant attack on racial discrimination in voting. The Twenty-fourth Amendment, ratified in 1964, outlawed the poll tax, which was seen by many as discriminating against both poor blacks and whites in the South. The 1964 Civil Rights Act also contained provisions aimed at limiting the discriminatory use of literacy tests, but it was the 1965 Voting Rights Act that provided the first really effective voting rights for blacks.

The 1965 Voting Rights Act used a voter registration formula to attack discrimination. It declared any test or requirement prerequisite to voting automatically discriminatory and void in any county where 1964 registration fell below 50 percent of eligible voters. Furthermore, the attorney general was authorized to send federal agents to those counties that failed to meet the 50 percent standard and to ensure that everyone could register and could vote. Because the Democratic party had dominated the South for so long, voting turnout had become very low in that area, and entire states fell under the attorney general's power to send federal voting registrars into the counties. The result was a dramatic increase in the number of black voters and the election of black officials at the local, state, and national levels. The Voting Rights Act continues in effect, and some states remain subject to Justice Department review of any changes made in their election laws or voting districts.

Equal Education

One of the most serious sources of racial discrimination in America was in public education, where the "separate but equal" doctrine of *Plessy v. Ferguson* had been applied to establish separate schools for whites and blacks. In the famous 1954 case of *Brown v. Board of Education of Topeka* (347 U.S. 483 [1954]), the Supreme Court overturned the separate but equal doctrine as applied to public education, declaring that separate educational facilities based on race were inherently unequal. The implementation of this decision was slow and arduous because resistance in the South was bitter and sustained. Governors in Alabama, Mississippi, and Arkansas made political careers for themselves by opposing attempts to integrate schools in their states. In the climate of opposition created by such political leaders, locally elected school boards, for reasons of both personal conviction and political expedience, refused to act to implement the *Brown* decision.

The burden of taking the initiative for racial integration thus fell squarely on the shoulders of the federal district court judges, who, of course, were them-

selves white southerners. Nonetheless, the Supreme Court continued to rely on these courts to enforce the supreme law of the land, and here and there, courageous southern judges emboldened by firm higher court support began to make some headway. They also were assisted in this respect by attorney generals under the Johnson and Nixon administrations, who vigorously pursued integration cases in the courts.

In the process of giving the U.S. district courts the authority to enforce racial integration, the Supreme Court increased their influence greatly. In the 1970s these courts were given the power to require busing of students in order to achieve greater racial integration. In some cities, federal district court judges actually took over the schools and acted in place of school boards and administrators. Today the problem is not *de jure* segregation (segregation by law) but *de facto* segregation (segregation due to other causes). For example, housing patterns may have developed in such a way as to concentrate the races in particular areas. Thus schools in these areas would tend to be heavily of one race.

Private Discrimination

For years the primary tool for combating racism in American society was the equal protection clause of the Fourteenth Amendment. Beginning with the *Brown* decision, legally sanctioned racial segregation throughout society was invalidated. The more difficult issue was to be private discrimination, which in 1883 had been upheld by the Supreme Court under the state action doctrine (see p. 303). The approach taken by the Court was to attack the problem of private discrimination by expanding the scope of what constituted state action. Thus in 1964 the Court held that a private amusement park could not have blacks who had entered the premises arrested for trespass because the arrest invoked state action in the aid of racial discrimination. Justice Black's dissent in this case indicated, however, that the definition of what constituted state action could not be expanded much further.

At this point, Congress, through the 1964 Civil Rights Act, intervened to strengthen efforts to limit private discrimination. The Civil Rights Act was based not only on the equal protection clause but also on the interstate commerce clause. The latter clause gave Congress extensive power over commercial activity, and Congress invoked this power to prohibit racial discrimination in public accommodations in interstate commerce and in employment. Under this act, the courts have interpreted Congress's power very broadly, and few business establishments are beyond its scope. Thus, expanding the state action doctrine has become less important as a means for attacking racial discrimination.

Affirmative Action and Equal Employment

Interpretation of the Civil Rights Act soon became involved in the question of how far agencies and employers could go in applying affirmative action efforts to remedy past discrimination. Some general principles have emerged from the numerous cases in this area. The basic principle that the Supreme Court appears to follow is that an affirmative action plan should not punish individuals who have not participated in discrimination.

Thus the racially defined quotas set for admission to the medical school of the University of California at Davis were ruled unconstitutional because they prevented Alan Bakke, who was better qualified than many of those admitted under a quota, from being admitted (*Regents of the University of California v. Bakke*, 438 U.S. 265 [1978]). The *Bakke* case was decided by the swing vote of Justice Powell, who wrote the opinion of the Court. Powell voted with four of the justices to declare quotas based on race unconstitutional, but he also voted with the other four justices to suggest that schools could take race, socioeconomic background, and other factors into consideration when they made admissions decisions.

In subsequent decisions involving employment, the Court has examined the use of quotas in more detail. It has ruled that whites with more seniority than minorities just hired may not be laid off before those minorities simply to maintain a proper racial balance in the work force. On the other hand, quotas used on a temporary basis to ensure the hiring of more minorities or to facilitate their advancement in the workplace have been upheld. These have been seen as necessary measures to overcome the effects of past discrimination in a particular area. Permanent quotas based on race, however, would probably not pass constitutional muster.

Also important in the area of equality of opportunity has been the Equal Employment Opportunity Commission (EEOC) established under the 1964 Civil Rights Act. This body has the authority to investigate claims of discrimination based on gender, age, and race and to sue in the federal courts for redress if a settlement cannot be negotiated by other means. Of less importance, the Civil Rights Commission, which was established in 1957 civil rights legislation, has been the source of much controversy because of the ideological divisions among its members. Its functions are limited to making studies and recommendations.

Housing Discrimination

In 1968, Congress also passed an open housing act, which prohibited discrimination in the rental and sale of most housing. In 1974, this was extended

to include gender discrimination. Enforcement of this act has been hampered by limited funding.

Gender Discrimination

Like the struggle against racial discrimination, the effort to eliminate discrimination based on gender has made extensive use of the equal protection clause and the 1964 Civil Rights Act. The Supreme Court has not been willing to apply the equal protection clause as rigorously to gender distinctions as it has to racial distinctions. Racial distinctions automatically fall into what the Court has described as a "suspect classification," meaning that any such distinction is really almost impossible to justify under the equal protection clause. The Court has, however, never placed gender distinctions in the same category. It has held that such distinctions may be permissible if they bear a rational relationship to a legitimate state goal. Thus Congress may exempt women from the military draft system. States may exclude women as guards in maximum security male prisons, and they may make age distinctions based on gender for the crime of statutory rape.

Employment

The Supreme Court began to apply the equal protection clause to gender discrimination in 1971, and since then, a large number of decisions have helped to define women's rights. Congress has aided these developments with supporting legislation. One of the most active areas for legal action has been employment. Much of this activity has been under Title VII of the 1964 Civil Rights Act, but other Congressional statutes also protect women's rights in the workplace. The EEOC has been particularly active in prosecuting gender discrimination and has obtained substantial monetary awards from major industries. The Supreme Court has also approved the promotion of women over marginally more qualified men into jobs where there has clearly been a history of gender discrimination.

An issue of particular controversy has been that of *comparable worth* in the treatment of jobs. Americans generally agree that individuals, regardless of gender, should be paid equally for doing the same jobs. The advocates of comparable worth, however, carry this position further, arguing that some jobs held largely by women, such as nursing, should be paid at the same level as men are paid in comparable jobs. This is obviously a complex issue, and the Supreme Court has not dealt with it directly, although there are lower court decisions supporting the concept.

Abortion

Another highly controversial issue related to the subject of women's rights is that of abortion. The Supreme Court entered this thorny thicket in 1973 in the case of *Roe v. Wade* (410 U.S. 113 [1973]), in which it held that a woman had a constitutional right to an abortion through the second trimester of pregnancy. During the third trimester the state could intervene and prohibit abortion. The justices based this decision on the right of privacy that they discerned in the due process clause of the Fourteenth Amendment.

Despite repeated attempts to have the *Roe* decision overturned, the Court steadfastly continued to affirm it. A majority of the justices have held, however, that neither the national government nor the states are required to provide funding for abortions for those who cannot afford the medical expenses. Also, as Justice Sandra Day O'Connor pointed out in her dissent in *Akron v. Akron Center for Reproductive Health, Inc.* (462 U.S. 416 [1983]), medical technology began to undermine the trimester approach used in the *Roe* decision. That decision assumed that viability of the fetus outside the womb before the end of the second trimester of pregnancy was unlikely. Today, however, such viability is possible earlier, thus making abortion before the end of the second trimester of the *Roe* standard more questionable on both legal and ethical grounds.

Finally, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (120 L. Ed. 2d 674 [1992]), the Supreme Court seems to have brought much of the abortion debate in the national courts to at least a temporary halt. What was especially striking about the *Casey* decision was that three justices—Sandra Day O'Connor, David Souter, and Anthony Kennedy—who had been critical of much of *Roe v. Wade* joined with two other justices to create a new majority supporting that earlier decision's declaration of a woman's right to an abortion. Despite her personal reservations about the wisdom of the *Roe* decision, Justice O'Connor declared that "liberty finds no refuge in a jurisprudence of doubt" and concluded that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." The fact that the membership of the Court had changed substantially since the *Roe* decision was not a sufficient reason for overturning that precedent. In Justice O'Connor's view, to act on that basis would undermine respect for the rule of law and the Court itself.

At the same time that it affirmed the basic principle of the *Roe* decision, the Court modified it substantially in *Casey*. Justice O'Connor took

this opportunity to discard the trimester system and to hold that the state may prohibit abortions after the point of viability but not before that point. Waiting periods before the performance of the abortion were also approved, as was the provision of certain forms of counseling to the woman. The state could also require that unmarried minors have parental consent for an abortion.

At this point certain fairly clear minimum standards for abortion have emerged from the Court's decisions. First, the state may not prohibit abortion before the point of viability. Second, the state may not prohibit abortion at all in cases of incest or rape, or where the health of the mother is threatened. Third, the state may not require the father's notification or consent for an abortion. There will continue to be cases challenging state and national efforts to regulate abortion, but it is unlikely that the Court will in the foreseeable future uphold any state regulations that do not incorporate these basic principles.

Recent Issues in Civil Rights and Liberties

Continual technological change and activity by organized interests have combined to raise difficult civil liberties questions under a constitution whose authors could not possibly have foreseen the issues involved.

Privacy

The question of the extent to which a right to privacy is provided in the Constitution remains exceptionally difficult for the Supreme Court. The Fourth Amendment's protection against unreasonable search and seizure provides some privacy protection in the criminal process. But the courts have moved toward providing substantive privacy protections as well. The problems in doing this were illustrated in the *Griswold v. Connecticut* (381 U.S. 479 [1965]) decision, in which the Supreme Court invalidated a Connecticut statute that prohibited the sale and use of contraceptives. The Court was both-ered by the enforcement of the prohibition against the use of contraceptives, arguing that the marital relationship was entitled to privacy protection. Nonetheless, the Court could not find a specific protection of this sort in the Constitution and relied on a "penumbra" around the Bill of Rights. Later, this right to privacy was also important in the abortion decisions. Its future, however, may be in some doubt, as the Court's willingness to find rights not specifically provided in the Constitution has led to charges of judicial legislating and caused considerable criticism of the Court.

Sexual Orientation

Tied fairly closely to the privacy question have been the efforts of gay and lesbian rights groups to gain constitutional protections for homosexuals and homosexual activity. The Supreme Court has not been sympathetic to these endeavors. It has consistently upheld the power of prison authorities to punish such behavior, and in *Bowers v. Hardwick* (478 U.S. 186 [1986]) it specifically rejected the claim that the Constitution provided a fundamental right for consenting adults to engage in private homosexual activity. States, of course, remain free to legislate on behalf of homosexuals, and some state legislatures, executives, and courts have been supportive of gay and lesbian rights. The outbreak of acquired immune deficiency syndrome (AIDS) has focused increased attention on homosexual behavior, or alternative lifestyles, primarily in the area of male homosexuality. The national government has provided funds for combating the disease. Moreover, the Supreme Court's application of Section 504 of the Rehabilitation Act of 1973 to contagious diseases has opened the possibility that this legislation also protects AIDS victims from employment discrimination by institutions covered by it.

Gay and lesbian groups contributed heavily to President Clinton's campaign and found sympathy for their claims within his administration. This support was demonstrated by President Clinton's effort to remove the ban on homosexuals in the military. After considerable opposition from the military and Congress to complete removal of the ban, in the summer of 1993 a compromise was reached under which inductees into the military were no longer asked about their sexual orientation and aggressive investigations into the sexual life-styles of military personnel were discouraged. However, open advocacy of homosexuality or engaging in homosexual activity while a member of the military remained grounds for discharge from service. While the military and most members of Congress appeared satisfied with the compromise, President Clinton himself thought that it did not go far enough toward integrating gays and lesbians into the military, and court challenges to the policy from gays and lesbians seemed probable.

The Mentally Impaired

The rights of the mentally incapacitated also have received Supreme Court attention. The Court has held that if an individual is no danger to society and can function outside a mental institution, that person cannot be institutionalized against his or her will. On the other hand, the Court has found no constitutional right to extensive treatment for the institutionalized mentally

retarded, holding that such individuals are entitled only to that training that will contribute to their safety and freedom from undue restraint. In this area the Court has clearly deferred to the judgment of professionals in the mental health field.

Prisoners

The federal courts also have found themselves dealing with an increasing number of claims from prisoners. The Supreme Court has granted these individuals the rudimentary due process rights to be informed of charges against them and to have an opportunity to answer the charges before they are punished. Additionally, access to legal resources is a basic right of all prisoners.

Life Extension Issues

An area into which the Supreme Court has not yet ventured in any definitive way, although the lower federal courts and state courts have begun to act, is the legal definition of what constitutes life within the protections of the Constitution. Two aspects of this issue that pose exceedingly difficult questions are those revolving around the extension, and definition, of life both at birth and in old age. Modern technology has reached the point where it is now possible to keep human beings alive indefinitely even though they are incapable of a volitional functional existence. In most respects decisions in these areas are probably best dealt with outside the judicial arena, but if the American political tradition is any indication, the courts will inevitably be drawn into deciding fundamental ethical and cultural questions stemming from these controversies.

The Elderly

With the enactment of the Age Discrimination in Employment Act of 1967, Congress indicated its intention to protect workers and job applicants who are over 40 from discrimination solely because of their age. In 1986 the act was amended to prevent employers, with some exceptions, from mandating that their employees must retire at a specified age.

The Disabled

In 1990 Congress passed the Americans with Disabilities Act, which encompassed a wide range of disabilities. This act prohibited employment discrimination against the disabled and required access to facilities for them. Judicial suits requiring the interpretation of this and previous statutes dealing

with the disabled will undoubtedly increase, and these can be expected to produce a substantial body of case law defining the rights of the disabled.

This chapter began with examination of individual rights protected by the Constitution. These include rights in the body of the document and those in the Bill of Rights and Thirteenth, Fourteenth, and Fifteenth amendments. Protections in the Bill of Rights have been applied to the states through the due process clause of the Fourteenth Amendment. Freedom of expression is given wide latitude today by the courts. The key concepts behind criminal protections have been the adversary process and the need to preserve an accusatorial criminal system.

Attempts to eliminate racial discrimination have given primary impetus to the expansion of protection of civil rights. In this area the equal protection clause has been the most important constitutional basis for action. Since the 1960s, Congress has enacted legislation to give further protection against discrimination. Both constitutional and legislative protections have been expanded to include gender discrimination. Today, major issues remain as to which groups are entitled to similar protections and to what extent governments and private organizations may take affirmative action to compensate for past discrimination.

The courts have been the major force in protecting and advancing civil liberties and civil rights in America. In this effort they have often had to stand as barriers to policies supported by the majority. Their position has been that democracy requires the maintenance of fundamental rights free from majority interference. Minority interests must be allowed the opportunity to exercise free belief and to change the opinions of the majority. Similarly, the minority interests encouraged by pluralism have increasingly turned to the courts for protection. The result has been that the judiciary, one of the most elitist institutions in American government, has been vital in protecting both basic democratic rights and the forces of pluralism.

Recommended Reading

Henry J. Abraham: *Freedom and the Court*. 5th ed., Oxford University Press, New York, 1988.

Peter Irons: *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court*, Penguin Books, New York, 1990.

Yale Kamisar, Wayne R. LaFare, and Jerold H. Israel: *Criminal Procedure*, 7th ed., West, St. Paul, Minn., 1989.

Richard Kluger: *Simple Justice*, Knopf, New York, 1976.

Anthony Lewis: *Gideon's Trumpet*, Vintage Books, New York, 1966.

Susan Gluck Mezey: *In Pursuit of Equality: Women, Public Policy and the Federal Courts*, St. Martin's, New York, 1992.

Nancy McGlen and Karen O'Connor: *Women's Rights*, Praeger, New York, 1983.

Chapter 13

1. Mancur Olson, *The Rise and Decline of Nations*, Yale University Press, New Haven, 1982; Alan Schick, "The Distributive Congress," in Alan Schick, ed., *The Distributive Congress*, American Enterprise Institute, Washington, D.C., 1983.
2. Lance T. Leloup, *Budgetary Politics*, King's Court Communications, Brunswick, Ohio, 1986.
3. Richard Hula, ed., *Market-based Public Policy*, Macmillan, New York, 1987; E. S. Savas, *Privatization: The Key to Better Government*, Chatham House, Chatham, N.J., 1987.
4. James A. Buchanan and Richard E. Wagner, *Democracy in Deficit: The Legacy of Lord Keynes*, Academic Press, New York, 1977.
5. Milton Friedman and Walter Heller, *Monetary vs. Fiscal Policy*, Norton, New York, 1969.
6. Douglas A. Hibbs, *The Political Economy of Industrial Democracies*, Harvard University Press, Cambridge, Mass., 1987, chap. 4.
7. Stephen Marris, *Deficits and Dollars: The World Economy at Risk*, Institute for International Economics, Washington, D.C., 1985.
8. Council of Economic Advisers, *Economic Report of the President: 1994*, Government Printing Office, Washington, D.C., 1994, pp. 240–243.
9. Frank Levy and Richard C. Michel, *The Economic Future of American Families: Income and Wealth Trends*, Urban Institute Press, Washington, D.C., 1991, chap. 7.
10. Paul Craig Roberts, *The Supply Side Revolution*, Harvard University Press, Cambridge, Mass., 1984.
11. David Stockman, *The Triumph of Politics: How the Reagan Revolution Failed*, Harper & Row, New York, 1986.
12. Bob Woodward, "Bickering While Rome Burns," *Washington Post*, October 19, 1992, p. 8.
13. John T. Wooley, *Monetary Politics: The Federal Reserve Board and the Politics of Monetary Policy*, Cambridge University Press, New York, 1984.
14. Greg B. Markus, "The Impact of Personal and National Economic Conditions on Presidential Voting, 1956–1988," *American Journal of Political Science*, 36(3):829–834, August 1992.
15. Council of Economic Advisers, *Economic Report to the President January 1993*, Government Printing Office, Washington, D.C., 1993, p. 115.
16. *Ibid.*
17. Lester C. Thurow, *Head to Head: The Coming Economic Battle Among Japan, Europe and America*, Morrow, New York, 1992.

18. Edward Tufte, *Political Control of the Economy*, Princeton University Press, Princeton, N.J., 1978; James E. Alt and Alec Crystal, *Political Economics*, University of California Press, Berkeley, 1983.
19. Joseph A. Pechman, *Who Paid the Taxes, 1966–1985?*, Brookings Institution, Washington, D.C., 1985; Bureau of the Census, "Measuring the Effect of Benefits and Taxes on Income and Poverty: 1989," *Current Population Reports*, Series P-60, No. 169-RD, September 1990.
20. Richard C. Michel, "Economic Growth and Income Equality Since the 1982 Recession," *Journal of Policy Analysis and Management*, 10:2, Spring 1991.
21. Howard E. Schuman, *Politics and the Budget: The Struggle Between the President and the Congress*, Prentice-Hall, Englewood Cliffs, N.J., 1988.
22. Peter G. Peterson and Neil Howe, *On Borrowed Time: How the Growth in Entitlement Spending Threatens America's Future*, Institute for Contemporary Studies, San Francisco, 1988.
23. Joseph White and Aaron Wildavsky, *The Deficit and the Public Interest*, University of California Press, Berkeley, 1989.
24. Donald F. Kettl, *Deficit Politics*, Macmillan, New York, 1992, chap. 1.
25. *Ibid.*

Chapter 15

1. Thomas A. Bailey, *A Diplomatic History of the American People*, Prentice-Hall, Englewood Cliffs, N.J., 1980; Walter LaFeber, *The American Age: U.S. Foreign Policy at Home and Abroad Since 1750*, Norton, New York, 1989.
2. Alexander L. George and Richard Smoke, *Deterrence in American Foreign Policy: Theory and Practice*, Columbia University Press, New York, 1974.
3. See Graham T. Allison, "Conceptual Models and the Cuban Missile Crisis," *American Political Science Review*, 64: 689–718, 1969.
4. George and Smoke, *op. cit.*
5. Ole R. Holsti and James N. Rosenau, "The Structure of Foreign Policy Attitudes Among American Leaders," *Journal of Politics*, 52:1, February 1990.
6. John Lewis Gaddis, *The United States and the Origin of the Cold War, 1941–1947*, Columbia University Press, New York, 1972.
7. Neil Sheehan, *A Bright Shining Lie: John Paul Vann and America in Vietnam*, Vintage Books, New York, 1988; David Halberstam, *The Best and the Brightest*, Random House, New York, 1969.
8. Seymour Hersh, *The Price of Power: Kissinger in the Nixon White House*, Summit Books, New York, 1983; Stanley Hoffman, *Primacy or World Order: American Foreign Policy Since the Cold War*, McGraw-Hill, New York, 1978.

9. Joan E. Spero, *The Politics of International Economic Relations*, St. Martin's, New York, 1981.
10. Seyom Brown, "U.S. Policy Toward the Post-Soviet States," in Robert J. Art and Seyom Brown, *U.S. Foreign Policy: The Search for a New Role*, Macmillan, New York, 1993.
11. William W. Kaufman, *Glasnost, Perestroika, and U.S. Defense Spending*, Brookings Institution, Washington, D.C., 1990; Sam Nunn, *Nunn: 1990: A New Military Strategy*, Center for Strategic and International Studies, Washington, D.C., 1990.
12. Bruce Stokes, "Export or Die," *National Journal*, January 2, 1993.
13. Saadet Deger and Ron Smith, "Military Expansion and Growth in Less Developed Countries," *Journal of Conflict Resolution*, 27, June 1983.
14. Mitchell Reiss, *Without the Bomb: The Politics of Nuclear Nonproliferation*, Columbia University Press, New York, 1988.
15. Richard Rosecrance, *The Rise of the Trading State: Commerce and Conquest in the Modern World*, Basic Books, New York, 1986.
16. Joseph M. Grieco, *Cooperation Among Nations: Europe, America and Non-Tariff Barriers To Trade*, Cornell University Press, Ithaca, N.Y., 1990.
17. Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, Knopf, New York, 1973, p. 4; A. F. K. Organski, *World Politics*, Knopf, New York, 1958.
18. Adam Przeworski, *Democracy and the Market*, Cambridge University Press, New York, 1991; Georg Sorenson, *Democracy and Democratization*, Westview, Boulder, Colo., 1993.
19. James Schlesinger, "Quest for a Post Cold War Foreign Policy," *Foreign Affairs*, 72:1, 1993.
20. Jessica Tuchman Mathews, "Environmental Policy," in Robert J. Art and Seyom Brown, *op. cit.*
21. Alexander L. George, *Presidential Decisionmaking: The Effective Use of Information and Advice*, Westview, Boulder, Colo., 1980; I. M. Destler, Leslie H. Gelb, and Anthony Lake, *Our Own Worst Enemy: The Unmaking of American Foreign Policy*, Simon and Schuster, New York, 1984.
22. Graham Allison, *Essence of Decision*, Little, Brown, Boston, 1971.
23. Henry Kissinger, "Domestic Structure and Foreign Policy," in James N. Rosenau, ed., *International Politics and Foreign Policy*, Free Press, New York, 1969, p. 268.
24. Nathan Miller, *Spying for America: The Hidden History of U.S. Intelligence*, Paragon House, New York, 1989.
25. Arthur M. Schlesinger, Jr., *The Imperial Presidency*, Houghton Mifflin, Boston, 1989.

26. Thomas E. Mann, ed., "Making Foreign Policy: President and Congress," *A Question of Balance: The President, the Congress and Foreign Policy*, Brookings Institution, Washington, D.C., 1990.
27. Duane M. Oldfield and Aaron Wildavsky, "Reconsidering the Two Presidencies," *Society*, 26:5, July/August 1989.
28. Roger Hilsman, *The Politics of Policy Making in Defense and Foreign Affairs: Conceptual Models and Bureaucratic Politics*, Prentice-Hall, Englewood Cliffs, N.J., 1987.