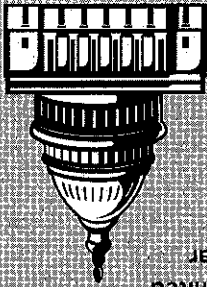


# The Bill of Rights and Civil Liberties

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## CONTEMPORARY CONNECTION



After National Security Agency analyst Edward Snowden fled the United States in 2013 and released thousands of documents, it became clear to what extent the government was using surveillance techniques. The release of these documents began a debate on whether the Constitution's Fourth Amendment's privacy protections were violated by the government, or whether national security allowed the government to conduct this program. This chapter explores the origins of the Bill of Rights, their meaning, application and interpretation of them, and how they apply to the states through what is called "selective incorporation." Significant Supreme Court decisions that have been handed down and impact the Bill of Rights are also discussed.

The Bill of Rights, adopted in 1791 by the states two years after the ratification of the Constitution, established the civil liberties for Americans. Viewing the Bill of Rights you will notice a number of "negative" statements:

- ① "Congress shall make no law . . . " abridging freedom of religion, speech, press, assembly, petition.
- "The right of people to keep and bear arms shall not be infringed."
- "No soldier shall . . . be quartered."

- “The right of the people . . . shall not be violated . . .” regarding unreasonable searches and seizures.
- “No person shall be held . . .” to be a witness against himself, in double jeopardy, or “deprived of life, liberty, or property without due process of law . . .”
- “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

These excerpts illustrate why the Bill of Rights represents a basic definition of a person’s civil liberties—those rights of the people that the government cannot take away. They are guaranteed in the Constitution, in the Bill of Rights, in other amendments passed, as well as through court interpretation. These rights are characterized as substantive, the kind of limits placed on the national government (like the First, Second, and Eighth Amendments) and procedural, outlining how the government is supposed to treat individuals (for instance the Fifth Amendment). Civil liberties differ from civil rights. Civil liberties protect individuals from abuses of the government, whereas civil rights come about as a result of the equal protection under the law. Both civil liberties and civil rights limit the power of government.

This chapter also explores the historical development of the Bill of Rights and gives you a breakdown of the nature of the Bill of Rights and how it protects individuals against the tyranny of the government, as well as highlights key Supreme Court decisions. It also explains how the Bill of Rights through these Court decisions has been extended to the states, creating a form of judicial federalism.

## INDIVIDUAL RIGHTS AND THE CONSTITUTION

It became apparent to the Founding Fathers that, without some kind of compromise regarding a statement of the people’s rights, the ratification of the Constitution would be in jeopardy. When the original proposal was made by George Mason, a Virginia delegate, to add a bill of rights to the Constitution in 1787, it was turned down by the Federalist forces controlling the convention. However, when the states began the ratification process, it became obvious that the necessary nine states needed to approve the document would not vote to ratify without an agreement to add a series of amendments that would protect people from the potential abuses by the national government. The Federalists argued initially that a bill of rights was not necessary because the states under a federal system would protect their citizens. The Anti-Federalists insisted that these rights be written and included in the proposed Constitution.

States such as Massachusetts, South Carolina, New Hampshire, Virginia, and New York agreed to support a bill of rights immediately after the Constitution was ratified. In the argument over whether or not to include a bill of rights into the original Constitution, James Madison wrote in the *Federalist No. 84*, “I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous.” On the other hand, in a *Letter from the Federal Farmer to the Republican* (an Anti-Federalist publication), it was written that “People, and very wisely too, like to be express and explicit about their essential rights, and not to be forced to claim them on the precarious and unascertained tenure of inferences and general principles. . . .” The Anti-Federalist forces prevailed, and the bill of rights was adopted in 1791.

### Selective Incorporation

The John Marshall Court of the 1800s was responsible for key decisions that clarified the nature of government. Decisions such as *Marbury v Madison* (1803), *McCulloch v Maryland* (1819), and *Gibbons v Ogden* (1824) defined the power of various components of government. And even

**Historically, the Constitution could not have been ratified without an agreement that a bill of rights would be included.**

- Can states directly support parochial schools with public funds?
- church and state?

■ To what extent does use of the word *God* in public institutions violate the separation of

many Supreme Court decisions in this area. Some of the major questions raised in this area follow:  
 between government fostering of religious practice in our society and accommodation is the basis of certain religious practices possibly including some direct forms of aid to public institutions. The line what is called governmental accommodation of religion, which is the ability of government to allow clause has been the foundation of religious liberty in this country. However, it is also balanced by Witnesses that they should not be forced to participate in religious activities in public schools, this settlement of this country by the Pilgrims who sought religious freedom to the belief by the Jehovah's a restriction on government, creating a "wall of separation" between church and state. From the the right of the citizens to practice their religions without governmental interference. It also places Called the establishment clause, this component of the First Amendment to the Constitution defines

*exercise thereof. . . ."*

*"Congress shall make no law respecting an establishment of Religion, or prohibiting the free*

## FREEDOM OF RELIGION

which significant cases contributed to the nationalization of the Bill of Rights.

As we delve into the specific nature of the Bill of Rights and civil liberties, we will also point out

of the Bill of Rights to the states, the concept of judicial federalism was defined more fully.

Earl Warren in the 1950s and 1960s. Each time the Court made a ruling that incorporated an aspect states, and the Bill of Rights. This selective incorporation reached its peak under the leadership of Court ruled that there was a direct relationship among the Fourteenth Amendment, actions by the *process clause of the 14th Amendment from impairment by the States.* For the first time, the Supreme ment by Congress—are among the fundamental personal rights and liberties protected by the due that "freedom of speech and of press—which are protected by the First Amendment from abridg-gered the public welfare. More important was the statement made by the majority that determined were in violation of a New York statute because his actions created a "bad tendency," which endan- ing the forcible overthrow of the government using violent means. The Court ruled that his actions- tion Doctrine, occurred in *Gitlow v New York* in 1925. Gitlow was convicted in New York of advocat- The first time the Supreme Court applied a state case to the Bill of Rights, known as the Incorpora- practice. Chapter 6 discusses the incorporation of civil rights into the Bill of Rights.

the Bill of Rights. Southern states passed Jim Crow laws and segregation became an acceptable the privileges and immunities of its citizens. . . ." the people received the complete protection of Fourteenth Amendment was passed in 1868 with its clear statement that "No state shall abridge zen was under the jurisdiction of the national government as well as state governments. After the Bill of Rights to the citizens of the states. It created a concept of dual citizenship, wherein a cit- states." This decision established the nature of judicial federalism regarding the extension of the must be understood as restraining the power of the general government, not as applicable to the tions on the powers of its particular government as its judgment dictated. . . the fifth amendment established a constitution for itself, and in that constitution provided such limitations and restric- him of just compensation of property under the Fifth Amendment, Marshall wrote that "Each state government, not the states. In turning down Barron's argument that the city of Baltimore had deprived In *Barron v Baltimore* (1833), the Court ruled that the Bill of Rights limited only the national gov- extend the provisions of the Bill of Rights to the states.

though the Court ruled that it had the power to declare state laws unconstitutional, it refused to

The First Amend-  
 ment's guarantee  
 of free exercise of  
 religion is balanced  
 by the separation  
 of church and  
 state.

Even after the  
 Bill of Rights was  
 extended to the  
 states as a result  
 of the passage of  
 the Fourteenth  
 Amendment,  
 citizens needed  
 protection against  
 state abuses from  
 the Supreme Court.

- Can states legislate nondenominational prayer, a moment of silence, creationism as a part of the curriculum, and equal access to its facilities to religious groups?
- Can clergy recite a blessing at graduation ceremonies?
- Are seasonal displays at public areas allowable?
- Are vouchers and public monies used for private parochial schools constitutional?

These are just a few of the many questions raised by the establishment clause. The following key Supreme Court decisions have created precedent.

### Key Court Cases

**\*Engle v Vitale (1962)**—This decision struck down a New York State nondenominational prayer that started with the words “Almighty God, we acknowledge our dependence upon thee . . .”

**Lemon v Kurtzman (1971)**—The Lemon test, which came out of this case, sets the criteria in determining whether the line of governmental interference is crossed. The three-pronged standard indicates that the purpose of the legislation must be secular, not religious, that its primary effect must neither advance nor inhibit religion, and that it must avoid an “excessive entanglement of government with religion.” Even though this case struck down a law that provided governmental aid to private schools, it has been used as a barometer to measure other legislative practices of the state.

**\*Wisconsin v Yoder (1972)**—The Supreme Court ruled that a state could not force Amish students to attend school past the 8th grade because it violated the free exercise clause.

**Lee v Weisman (1992)**—This decision directed school officials not to invite clergy to recite prayers at graduation ceremonies.

\*Required cases

### FREEDOM OF SPEECH AND THE PRESS

*“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”*

**The guarantees of freedom of speech and press are also limited by the interests and well being of the citizens.**

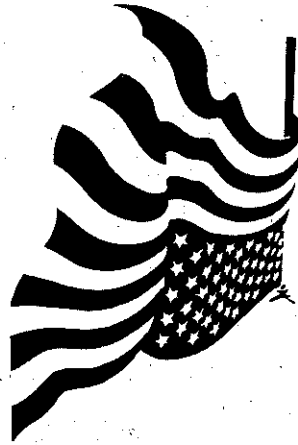
The protection of the citizens’ right of free expression versus the government’s interest of limiting speech and the press for the interests and safety of the country and its citizens is basic to the interpretation of this clause of the First Amendment. From John Peter Zenger’s concept of complete freedom of the press on the one hand to Justice Oliver Wendell Holmes’s recognition that you cannot yell “Fire” in a darkened movie theater on the other hand, the issue of how much freedom of speech and the press can be allowed has been debated.

Speech can be categorized as symbolic and expressive. It extends to public areas of commercial speech as well as private application. It raises the complex issue of what is acceptable and what is obscene. Government has the role to maintain a balance between order and the ability of its citizens to criticize policy. The issue of what constitutes “fighting words” or a “clear and present danger” goes to the heart of free speech and expression.

Press is characterized by the written word and the ability of a publication to print material without prior review or prior restraint (censorship) by a governmental body. It also raises issues regarding the rights of reporters to pursue a story and what constitutes libel.

Some of the major questions raised in this area follow.

- Can the government limit free speech and press during times of war or other national emergency?
- To what extent can organized “hate groups” such as the Ku Klux Klan and Nazis advocate their views publicly?



**THE TEXAS v JOHNSON CASE DETERMINED THAT BURNING A FLAG WAS CONSIDERED SYMBOLIC SPEECH**

**Key Court Cases**

- What kinds of actions are considered symbolic speech?
- How do you define speech and expression that is obscene?
- When do libel and slander come into play?

**\*Schenck v United States (1919)**—Justice Holmes ruled for the majority that Schenck did not have the right to print, speak, and distribute material against United States efforts in World War I because a "clear and present danger" existed.

**\*Gitlow v New York (1925)**—Applying the due process clause of the 14th Amendment to the states, the Supreme Court established that advocating the forcible overthrow of the government using violent methods created a "bad tendency" and violated the free speech provision of the 1st Amendment.

**\*Chaplinsky v New Hampshire (1942)**—In a key incorporation case, a doctrine defining what constitutes "fighting words" was established as a result of spoken words that "by their very utterance inflict injury or tend to incite an immediate breach of peace that governments may constitutionally punish." These words "have a direct tendency to cause acts of violence by the person to whom, individually, the remarks are addressed." However, the Court has also determined that the use of obscenities aimed at governmental policy or worn on clothing as a means of protest do not constitute fighting words in and of themselves.

**\*New York Times v Sullivan (1964)**—This decision created a base definition of what constitutes libel—material that is written with malice and a reckless disregard for the truth. Slander criteria are very similar, but much more difficult to prove when charges are made against public officials.

**\*Tinker v Des Moines (1969)**—This decision established that students' rights are "not shed at the schoolhouse gates" and defined the students' wearing a black armband in silent protest of the Vietnam War as "a legitimate form of symbolic speech." These rights were later restricted in the student press case *Hazelwood v Kuhlmeier* (1988) when the Court gave school administrators the right to censor a school newspaper.

**New York Times v United States (1971)**—Known as the Pentagon Papers case, the Supreme Court ruled that the government did not have the right to prevent the *New York Times* from printing information about the history of the country's involvement in the Vietnam War.

\*Required cases

**\*Buckley v Valeo (1976)**—The Court upheld federal limits on campaign contributions and ruled that **spending money** to influence elections is a form of constitutionally protected free speech.

**Texas v Johnson (1988)**—Based on the arrest of Gregory Lee Johnson for burning a flag outside the Republican National Convention in protest of the president's foreign policy, the Supreme Court ruled that this action was a form of symbolic speech protected by the First Amendment. The Supreme Court decisions in this area have tended to tread a thin line.

**\*Citizens United v Federal Election Commission (2010)**—This case overturned parts of the **McCannell v Federal Election Commission (2003)**, the court ruling that corporate funding of political advertisements that did not specifically endorse a candidate was constitutional under the First Amendment's free speech clause and could not be limited. The court upheld the parts of the 2003 *McCannell* case that required the disclosure of political advertising sponsors and it upheld the ban of direct corporate and union contributions to political candidates. In 2014, the Supreme Court struck down the total amount of money one contributor could give to all candidates, political parties, and PACs combined in federal elections. Known as *McCutcheon v FEC*, the court's ruling almost completely eliminated any soft money restrictions, other than money directly given to one candidate. Candidates could raise money from multiple sources giving individuals the right to donate millions of dollars. The significance of these cases was that in the 2010 and 2014 midterm elections and the 2012 presidential campaign independent expenditures skyrocketed.

\*Required cases

## FREEDOM OF ASSEMBLY

*"Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."*

The ability of people to assemble, associate, and petition the government freely may come into conflict with the legitimate interests of the government and individuals.

The rights of people to gather in places they want and express their point of view without government interference, the right of association, and by extension the right to present their point of view to a governmental body are the central themes in the final clause of the First Amendment. These rights must be balanced by restrictions such as the time, manner, and place of assembly. They also must be aware of the protection of the individuals at the scene of assembly. Additionally, the extent to which individuals through their association in political groups can exert pressure on the government must be taken into account.

Some of the major questions raised by the themes of this clause follow.

- What constitutes equitable time, manner, and place restrictions on groups?
- To what extent can these demonstrations take place on public and private property?
- If a group an individual plans to associate with advocates violence, can the government restrict association and the right to petition?

### Key Court Case

**DeJonge v Oregon (1937)**—In a key incorporation case, the Supreme Court ruled that the Fourteenth Amendment's due process clause applies to freedom of assembly. The Court found that DeJonge had the right to organize a Communist Party and speak at its meetings even though the party advocated "industrial or political change or revolution." However, in the 1950s with the fear of communism on the rise the Court ruled in *Dennis v United States* (1951), that Dennis, who was leader of the Communist Party, violated the Smith Act by advocating the forcible overthrow of the United States government.

\*Required case

*McDonald v Chicago (2010)*—The Court held that the right of an individual to “keep and bear arms” protected by the 2nd Amendment is incorporated by the Due Process Clause of the 14th Amendment and applies to the states. The decision cleared up the uncertainty left in the wake of *Distric of Columbia v Heller* as to the scope of gun rights in regard to the states.

*McDonald v Chicago* that the Second Amendment’s right to bear arms applies to the states. The first Supreme Court decision that ruled on the question of whether the right to bear arms constitutionally protected individuals came in 2008, when the court announced its decision in *Distric of Columbia v Heller*. This case challenged a Washington, D.C., gun control law that banned guns in the District and required any legal guns to be unloaded. In a 5–4 decision, the court ruled that the law was unconstitutional and that the Second Amendment protected an individual’s right to bear arms. How far-reaching this decision is remains a question, since the decision only applied to Washington, D.C., and federal laws. In 2010, the Supreme Court ruled in

the passage of an assault weapons ban that was part of the Crime Bill passed in 1994. would not stop criminals from obtaining weapons. They used the same rationale in arguing against perform instant checks. The National Rifle Association lobbied against its passage, insisting that it 1997 Supreme Court decision did, however, strike down the part of the law forcing local officials to waiting period before purchase. Many states had to change their laws based on this legislation. A gun in the attempted assassination of the president, it took more than ten years to obtain con- gressional approval. The law placed restrictions on handgun registration, setting up a minimum Bill in 1993. Named after President Reagan’s press secretary who was seriously injured by a hand- regulation of arms has been a state matter. This was changed as a result of the passage of the Brady situational because it did not have any link to a state militia. Because this was a federal case, the a crime to ship certain kinds of weapons across states lines unless they were registered, was con- (1939). This case determined that a section of the National Firearms Act of 1934, which made it The first Second Amendment case to be heard by the Supreme Court is *United States v Miller*

### Key Court Case

- Should registration and a waiting period be required for a person to own recreational guns?
- Should certain types of arms such as assault weapons be banned?

Although the historical intent of the Second Amendment was the right of each state to main- tain an armed militia, it has been interpreted as the right of individuals to own weapons. The National Rifle Association has become a primary interest group in supporting the gun enthusiast and hunter’s right to purchase and use arms. With the issue of crime and violence a significant concern of society, laws have been proposed restricting the availability, use, and kinds of weap- ons. This clash has resulted in a national debate over the meaning of the Second Amendment as shown in the following questions.

### RIGHT TO KEEP AND BEAR ARMS

*“The right of the people to keep and bear arms, shall not be infringed.”*

The issues revolving around freedom of assembly and petition have continued to challenge restrictions placed on groups. In 1994 an anti-abortion group, Operation Rescue, was restricted in the manner in which they could demonstrate against a clinic performing abortions. The Court said that the group had to picket within a minimum distance from the clinic. Cases such as this illus- trate how social issues such as abortion get mixed up with First Amendment issues of assembly.

The Second Amendment’s provision for the people’s right to bear arms has become a rallying call of interest groups as well as a caveat of many segments of society.

## RIGHT TO PRIVACY

*Quartering of soldiers "in time of peace" shall be illegal "without the consent of the owner."*

*"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 . . ."*

**The Third and Fourth Amendments protect individuals from arbitrary invasion of a person's house or an individual's privacy.**

The first of three amendments that deal with the due process rights of individuals, those procedural rights that protect individuals from governmental interference, are the Third and Fourth Amendments. They deal with such issues as search and seizure and the right of privacy. Included in the Bill of Rights because of abuses in this area by Great Britain when it ruled the colonies, these amendments prevent the unrestricted quartering of soldiers, blanket search warrants, and the unlimited invasion of privacy by the government.

By and large, the only time the Third Amendment has been used by the government was during the Civil War when the North quartered troops in Southern mansions. There have been no Supreme Court cases involving the Third Amendment.

The Fourth Amendment has come under the scrutiny of both the federal and state governments in determining how far they can go in obtaining evidence. The key criterion in determining the legitimacy of the search is probable cause. That becomes the first component of the due process rights of individuals, which also applies to the states as a result of a similar clause in the Fourteenth Amendment. An exception to the probable cause component is the "plain view" characteristic. It allows police to obtain evidence that is in sight of the investigators. Situations such as emergencies, investigations requiring wiretapping, and the extent a police official can search a car are also raised by the Fourth Amendment. Some of the major issues related to the Fourth Amendment follow.

- To what extent can police conduct a search without a warrant and obtain evidence found to prosecute an individual?
- What methods can law officials use to obtain evidence?
- Can the right of privacy extend to social issues such as abortion?
- Can the government use wire taps without a court order?

### Key Court Cases

***Wolf v Colorado (1938)***—In the first incorporation case that dealt with the privacy section of the Fourth Amendment, the Supreme Court held that even though the exclusion of illegally obtained evidence as stipulated by state law was not mandated by the due process section of the Fourteenth Amendment, the court did say that the Fourteenth Amendment's due process clause did apply to the states. They said the states could adopt other measures that would not fall below the minimum standards set forth in that amendment. The decision was overturned by the *Mapp v Ohio* case.

***Mapp v Ohio (1961)***—A key state incorporation case, *Mapp v Ohio* established the exclusionary rule for states. The exclusionary rule determined that police may obtain only that evidence available through a legitimate search warrant. Other evidence found at the scene of the crime is not admissible in the trial; it must be excluded. This doctrine has been modified by the plain view doctrine. Many people have been critical of the exclusionary rule, suggesting that it handcuffs the police from obtaining legitimate evidence necessary to prosecute a criminal. Since *Mapp v Ohio*, other cases have created further exceptions. In *Nix v Williams (1984)* the Court allowed "inevitable discovery" of tainted evidence, that is, evidence that would have eventually been discovered with a legal warrant. *United States v Leon (1984)* created a "good faith" doctrine, which stated that if



Before looking at key cases, you should have a clear understanding of the intent of each of these steps. Habeas corpus, a right that cannot be taken away by government, found in the body of the enact unreasonable laws.

The Fifth, Sixth, and Seventh Amendments, which establish procedural due process for the accused, have been viewed by critics as an over-protection of criminal rights and the placement of an undue burden of proof on the government.

Procedural due process can be viewed as a series of steps established by the Fifth, Sixth, and Seventh Amendments that protect the rights of the accused at every step of the investigation and limit how governmental power may be exercised. The following steps represent the manner in which the evidence is gathered (Fourth Amendment), the charges made by the police upon arrest (habeas corpus), the formal indictment and interrogation (allowance made for obtaining lawyers, witnesses), the trial (speedy and public trial, impartial jury, guaranteeing against self-incrimination, trial by jury), and the right to confront witnesses. Another kind of due process, substantive, places limits on the government as they relate to the content of legislation and the extent government can use its power to

... the right of trial by jury shall be preserved ...

Counsel for his defense.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have... process for obtaining witnesses... and to have the assistance of

No person shall be held to answer for a capital... crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offense to be twice put in jeopardy... nor shall he be compelled... to be a witness against himself, nor be deprived of life, liberty, or property without due process of law...

### RIGHT TO PROCEDURAL DUE PROCESS

Required case and upheld, in principle, *Roe v Wade*.  
Planned Parenthood v Casey (1992)—The Court upheld a Pennsylvania law requiring minors to wait 24 hours after receiving parental approval before getting an abortion as constitutional. The decision also struck down a provision mandating that women obtain "informed spousal consent" that the evidence was obtained without violating the core principles of *Mapp v Ohio*.  
United States v Leon (1984)—In this decision, the Court created a "good faith" exception to the exclusionary rule, allowing the introduction of illegally obtained evidence where police can prove that the evidence was obtained without violating the core principles of *Mapp v Ohio*.  
Roe v Wade (1972)—Using the concept of being "secure in their persons," the Supreme Court ruled that abortions are constitutionally protected. It set up a trimester system allowing unrestricted abortions in the first trimester but regulated abortions during the second trimester and allowed the states to ban abortion during the third trimester unless the mother's or baby's life was endangered. This decision has been most controversial and set the stage for a national debate. We will come back to this issue in the next chapter.  
Using the privacy provision of the Fourth Amendment, the Court stated that individuals had the right to privacy in the area of sexual relations.  
Griswold v Connecticut (1965)—The Court struck down a Connecticut law that prohibited the use of contraceptives. It arose after a doctor was arrested for distributing birth control devices.  
the police obtained essential evidence in good faith and did not violate the spirit and intent of the Fourth Amendment, that evidence would be allowed.

Constitution in Article I Section 9, has also been called a writ of liberty. It directs the police to show cause why a person may be held for a crime. It has also been used by convicted criminals as a route to appeal their conviction from the state courts to the federal courts based on procedural issues. An indictment is a formal list of charges made by a grand jury. When enough evidence is given to the grand jury, it develops a list of formal charges that is presented to the accused prior to trial. A speedy trial has been defined by law on the federal level as a trial that must take place no more than 100 days after arrest. Each state has laws addressing this issue. A public trial means that it is held in a public courthouse. Depending upon the specific issue, the extent of public viewing and media coverage can be determined by the judge. The right to a jury trial does not necessarily mean that the jurors will be identified by name. In the trial of the World Trade Center bombers, the jury was chosen in this manner. In obtaining an adequate defense, the conditions in which a defendant can obtain a lawyer based on financial considerations and the exact time a lawyer is brought in are not defined. Double jeopardy means that once a verdict is handed down, you cannot be tried twice for the same crime. That does not mean that if you are found innocent of state charges, you cannot be tried for a federal offense dealing with the same issue. That is what happened to the police involved in the beating of Rodney King.

Surveys taken have shown that much of the public is critical of the manner in which courts have interpreted these provisions. Crime and violence have become a national concern. Anti-crime legislation and Supreme Court decisions have responded to the public's concern.

Some of the questions raised by these amendments follow.

- Can due process rights be suspended during times of national emergencies?
- Is live media coverage of trials allowable?
- Does a lawyer have to be assigned to a defendant who cannot afford one?
- At what point does the accused have the right to consult a lawyer?
- To what extent do the police have to advise the accused of their rights?

### **Key Court Cases**

***Escobedo v Illinois (1964)***—Danny Escobedo requested the assistance of a lawyer after he was arrested for the murder of his brother. The police would not grant the request even though there was a lawyer at the police station. Escobedo made a number of incriminating statements without his lawyer present, which were later used against him at the trial. The Supreme Court ruled Escobedo's due process rights of self-incrimination and right to counsel were violated and he was released from prison.

***\*Gideon v Wainright (1964)***—This landmark case established that the accused has the right to an attorney even if he or she cannot afford one. Gideon, accused of a felony in Florida, requested the assistance of a lawyer. The Florida criminal justice system allowed free assistance only in cases that were punishable by death. Gideon defended himself and lost. The Supreme Court ruled that his Sixth Amendment due process rights made applicable by the Fourteenth Amendment were denied.

***Miranda v Arizona (1966)***—In probably one of the most publicized cases of its kind, Ernesto Miranda, mentally retarded, was accused and convicted of rape and kidnapping. He confessed to the crime under intense interrogation without any mention by the police of his right to obtain a lawyer or what consequences the answers to their questions would have on the outcome of the trial. The Supreme Court, in its landmark ruling, established the Miranda rights. Those rights directed the police to inform the accused upon arrest that he has a constitutional right to remain silent, that any thing said can be used in court, that he has a right to consult with a lawyer at any

\*Required case

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

### UNDEFINED RIGHTS

a criminal is convicted of three felonies. duplicated in many states. This bill mandates that life imprisonment be given for federal crimes if bill that created a "three strikes and you're out" feature passed the Congress in 1994 and has been between society's needs of protecting its citizens and the rights of the accused. A federal crime These issues have resulted in a national debate regarding the best way to create a balance rather than an illness that can be treated violated the Eighth and Fourteenth Amendments. penalties as denial of medical assistance or an interpretation that narcotics addiction is a crime other forms of treatment of criminals while they are in prison can also be cruel and unusual. Such executions and the manner in which states impose death penalties. The Court has also ruled that other criteria have been established regarding the kinds of cases that can result in the kinds of in *Furman v Georgia* (1972), regarding discretion of judges and make-up of juries. Since *Gregg v Gregg v Georgia* (1976)—The landmark case, which held that "the punishment of death does not invariably violate the Constitution." However it did affirm standards and criteria set down in *Furman v Georgia* (1972), regarding discretion of judges and make-up of juries. Since *Gregg*

### Key Court Case

- What constitutes excessive bail?
- Is the death penalty cruel and unusual punishment?

Some of the major issues posed by this amendment follow. are arguments revolving around the nature and extent of government imposed punishment. Excessive fines and cruel and unusual punishment have resulted in some of the most passion-

unduly punished prior to the trial.

As part of the procedural due process, an accused has the right to post bail, an amount of money set by the court as a guarantee that the person will return to stand trial. This amount may not be excessive and is imposed based on the nature of the crime and the history of the accused. Critics of the system raise the issue that if the accused cannot afford the bail, even if it is not excessive, then the person is

The Eighth Amendment completes the due process cycle and raises the issue of the extent a government can impose punishment on convicted criminals.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

### EIGHTH AMENDMENT

*Hamdi v Rumsfeld* (2004)—Enemy combatants held in the United States have due process rights.

public safety is threatened.

*New York v Quarles* (1984)—The Court created a "public safety" exception to the *Miranda* warn-

the rights established by these cases.

and at any time request a lawyer. Since the *Miranda* ruling, the courts have begun to limit some of accused must be asked if he understands these rights and told that he has the right to remain silent time during the process, and that a lawyer will be provided if the accused cannot afford one. The

**The Ninth and Tenth Amendments to the Constitution further define rights not listed in the Constitution to the people and states.**

Called by some the elastic clause of the Bill of Rights, the Ninth Amendment guarantees that those undefined rights not listed anywhere in the Constitution cannot be taken away. Such issues as abortion and the “right to die” have come under the umbrella of this amendment.

The Tenth Amendment, discussed in Chapter 4, extends to the states the right to create laws for the best interests of their people. It is the basis of federalism, and when this amendment comes into conflict with the other amendments of the Bill of Rights and the Fourteenth Amendment, the outcome of the dispute further defines the changing nature of federalism. The more the Supreme Court nationalized the Bill of Rights through the application of the Fourteenth Amendment, the more judicial federalism made the Bill of Rights apply directly to the states.

Some of the questions raised by these amendments follow.

- Does an individual have the right to die?
- How do the courts resolve the conflict between state and federal laws and issues raised by the Bill of Rights?

### **Key Court Cases**

**\*McCulloch v Maryland (1819)**—The Supreme Court ruled that a state did not have the right to tax a federal institution saying that “the power to tax is the power to destroy.”

**United States v Lopez (1995)**—The Supreme Court ruled that Congress misused its authority in enacting the Gun-Free School Zone Safety Act, which made the possession of a gun within 1,000 yards of a school a federal crime. The Court held that enforcement of such an act comes under the authority of the states.

**Printz, Sheriff/Coroner, Ravalli County, Montana v United States (1997)**—Challenging the provision of the Brady Law, which mandated local officials to perform background checks on people purchasing handguns, the Supreme Court ruled that that specific part of the law was unconstitutional.

The discussion involving the relationship of the Bill of Rights to the state’s right to develop its own laws and procedures goes to the heart of what the future of federalism will be. There is no doubt that the nationalization of the Bill of Rights through the incorporation of the Fourteenth Amendment has had a significant impact on state laws. From the interpretation of the First Amendment freedoms to the rights of the accused, the states increasingly have to be responsive to the principles of the Bill of Rights. However, decisions reached by the Rehnquist Court have tilted some of the power back to the states.

**Gonzales v Oregon (2006)**—The Supreme Court ruled that the federal government could not block Oregon’s Assisted Suicide Law by moving against physicians who assisted terminally ill patients by giving them medicine that would enable them to commit suicide.

**National Federation of Independent Business v Sebelius (2012)**—The Supreme Court ruled that the Affordable Care Act (also known as “Obamacare”) was constitutional. In a split decision, the court ruled that even though the Congress violated the Tenth Amendment’s interstate commerce clause by imposing a penalty on those individuals who did not pay for health insurance, Congress under its power to tax did have the authority to collect a fee if health insurance was not bought.

\*Required case