

**AP<sup>®</sup>**  
**EDITION**

# AMERICAN DEMOCRACY NOW

6th Edition

Brigid Harrison

Jean Harris

Michelle Deardorff



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**EDITION**

# AMERICAN DEMOCRACY NOW

6th Edition

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## AMERICAN DEMOCRACY NOW: SIXTH EDITION

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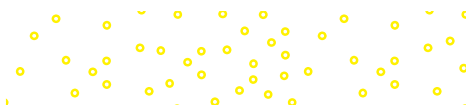
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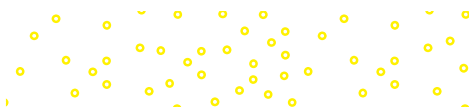
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# Designed for AP Success

The 6th Edition of *American Democracy Now* has been thoroughly updated to fully align with the Advanced Placement® U.S. Government and Politics Curriculum Framework. The program engages students with current and compelling content and increases their sense of political efficacy by exciting them about the political conversations of the day. Integrated critical thinking activities help students to connect the past and present of politics with the future, and ask: What's next for their democracy? Students learn how the fundamental principles of American democracy inform their understanding of the politics and policies of today so that they can think about, and participate in creating, the policies they would like to see take shape tomorrow.

At the heart of the *American Democracy Now* is a rich set of pedagogical tools that develop the enduring understandings, align with the learning objectives, and offer comprehensive coverage of the essential knowledge statements required to meet the rigors of the coursework and prepare students for success on the Exam. The instructional design is visually appealing, relevant and written in an accessible voice to ensure all students, at all levels, are well supported as they garner a solid understanding of the key elements, institutions, and dynamics of government.

## AP Features

- Chapter openers spotlight AP Enduring Understandings and focus the learning ahead.
- Required Supreme Court cases are highlighted and supported with annotations and activities for in-depth analysis and understanding.

The graphic displays a sample of the AP Introduction chapter. A blue header reads "AP Introduction". Below it, text discusses civil liberties. A callout box on the left, titled "AP KEY DOCUMENTS", highlights the case *McDonald v. Chicago* (1962) and notes that the Court incorporated the Second Amendment to the states. A callout box on the right, titled "AP Enduring Understandings", lists LOR-2 and LOR-3. A caption at the bottom right states "Chapter-level focus on core AP content".

**AP Introduction**

A strong belief in civil liberties is deeply embedded in our understanding of what it means to be an American. Civil liberties protect people from government intrusion and allow them to follow their own belief systems. Civil liberties also empower people to speak out against the government, as long as they do not harm others.

Since the nation's founding, political discourse among the people has often centered on the ideals of liberty and freedom. The colonists took up arms against Britain because the king and Parliament refused to recognize their rights as English citizens: freedom of speech and assembly and the right to protection from unrestrained governmental power, especially in the investigation and prosecution of crimes. Withdrawing their consent to be governed by the king, they sought to establish a government that would protect their rights.

**AP KEY DOCUMENTS**

■ *McDonald v. Chicago* (1962)

In *McDonald v. Chicago* the Court incorporated the Second Amendment to the states.

**AP Enduring Understandings**

**LOR-2:** Provisions of the U.S. Constitution's Bill of Rights are continually being interpreted to balance the power of government and the civil liberties of individuals

**LOR-3:** Protections of the Bill of Rights have been selectively incorporated by way of the Fourteenth Amendment's due process clause to prevent state infringement of basic liberties.

Chapter-level focus on core AP content

Highlight on AP required  
Supreme Court cases

# Designed for AP Success, continued

- *Then, Now, Next* provides ample practice in applying political concepts and processes to past, present, and future scenarios and to develop arguments in support of a position.
- *Thinking Critically* feature asks students to thoughtfully evaluate sources in the context of concept application, argumentation, and source analysis.
- Integrated data analysis activities help students consume political data in a meaningful way.
- A variety graph, charts, illustrations, photos, political cartoons, text-based documents and commentary provide additional source analysis activities.
- The end-of-chapter AP Key Terms and Documents offer students the opportunity to review and check their understanding before moving onto the chapter AP test practice.
- AP Test Practice in the AP multiple choice format
- Powerful, personalized digital resources with the *AP Advantage*

## AP Key Terms and Documents

Use the terms below with a ■ to focus your study of AP U.S. Government and Politics key concepts and terms in this chapter.

bad tendency test 127	■ free exercise clause 136	obscenity 131
■ civil liberties 119	■ <i>Gideon v. Wainwright</i> (1963) 144	■ prior restraint 133
■ clear and present danger test 127	■ <i>habeas corpus</i> 127	right to privacy 138
clear and probable danger test 128	imminent lawless action test (incitement test) 129	■ <i>Roe v. Wade</i> (1973) 139
commercial speech 131	<i>Lemon</i> test 135	■ <i>Schenck v. U.S.</i> (1919) 127
■ criminal due process rights 141	■ libel 131	■ selective incorporation 123
double jeopardy 144	marketplace of ideas 126	■ slander 131
■ due process 120	■ <i>McDonald v. Chicago</i> (2010) 124	■ symbolic speech 129
■ <i>Engel v. Vitale</i> (1962) 136	■ Miranda rights 144	time, place, and manner restrictions 132
■ establishment clause 134	■ <i>New York Times Company v. U.S.</i> (1971) 133	■ <i>Tinker v. Des Moines</i> (1969) 130
■ exclusionary rule 142		total incorporation
fighting words 132		

AP key terms and documents are revisited at the end of each chapter for review and reinforcement

AP Test Practice at the end of each chapter are designed to give students additional practice answering AP-style multiple-choice and free response questions. Special focus is given to the required Supreme Court cases and the required Foundational Documents.

## AP Test Practice

### Multiple Choice Questions

Choose the best answer to each question.

1. Which of the following supports James Madison's theory in Federalist No. 10 that factions ensure representation of competing interests?  
(A) Factionalism  
(B) Pluralism  
(C) Elitism  
(D) Hyperpluralism
2. Which of the following best describes the concept of elite theory?  
(A) A multiplicity of interests will naturally balance each other out  
(B) Far too many interest groups are at play and create a system of hyperpluralism  
(C) Members of Congress act on their own with little regard for constituent opinion  
(D) The poor form coalitions that overwhelm the interests of other Americans

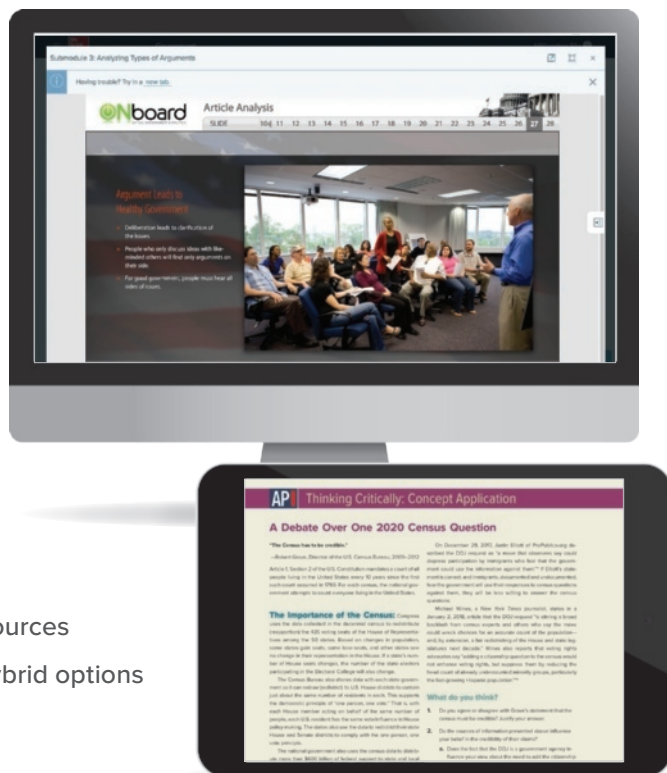
# The Pathway to Success for Today's AP<sup>®</sup> Students

**AP advantage** helps students navigate the rigors of Advanced Placement<sup>®</sup> coursework with accessible, engaging, and fully aligned resources designed specifically for today's learners.

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## 1 ONboard

### AP Course Prep

- Self-paced, diagnostic, interactive AP course prep
- Builds prerequisite skills and knowledge
- Great for first weeks of school assignments

## 2 APcore

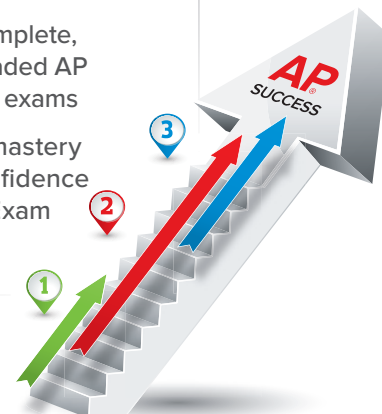
### AP Course Resources

- Robust online teaching and learning platform that extends class instruction
- Interactive, engaging pedagogy tied to the text
- Powerful reporting tools and customizable content

## 3 SCOREboard

### AP Test Prep

- Personalized, adaptive AP content review
- Four complete, auto-graded AP practice exams
- Builds mastery and confidence for AP Exam success



# Personalized, Adaptive, and Dynamic Digital Resources

***American Democracy Now*** is enriched with multimedia content including Concept Clips, interactive data activities, and key Foundational Document and Supreme Court Case activities that deepen the teaching and learning experience both inside and outside of the classroom.

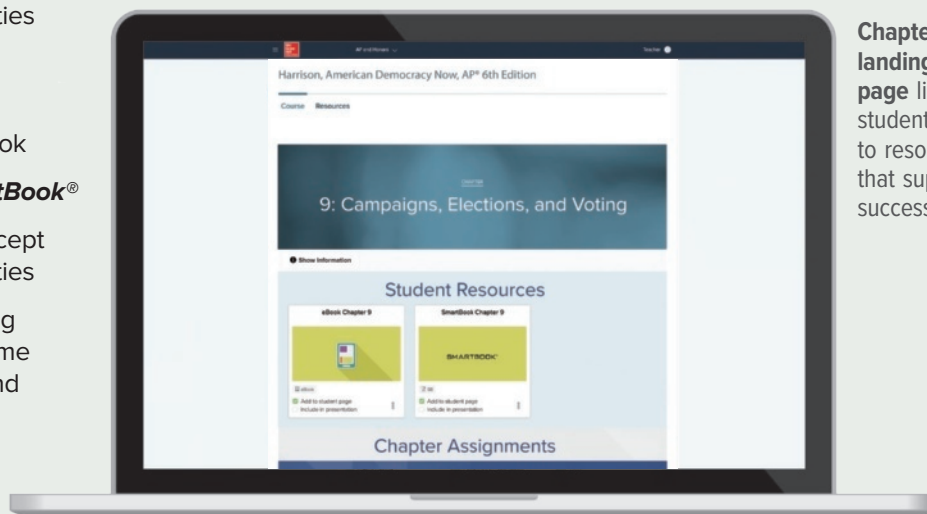
Authored by the world's leading subject matter experts and organized at the chapter level, the resources provide students with multiple opportunities to think critically and contextualize, and apply their understanding. Teachers can save time, customize lessons, monitor student progress, and make data-driven decisions in the classroom with the flexible, easy-to-navigate instructional tools.

## Intuitive Design

Resources are organized at the chapter level. To enhance the core content, teachers can add assignments, activities, and instructional aides to any lesson.

The chapter landing page gives students access to:

- assigned activities
- resources and assessments
- interactive eBook
- adaptive **SmartBook®**
- interactive concept and data activities
- activities delving into key Supreme Court Cases and Foundational Documents



**Chapter landing page** links students to resources that support success.

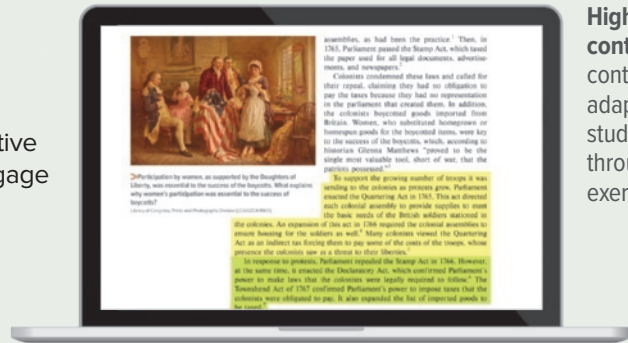


**Mobile Ready** Access to course content on-the-go is easier and more effective than ever before with the ReadAnywhere mobile app.

## Adaptive Study Tools

**SMARTBOOK®** is the online adaptive study tool. The interactive features engage students and personalize the learning experience with self-guided tools that:

- assess a student's proficiency and knowledge,
- track which topics have been mastered,
- identify areas that need more study,
- improve reading comprehension by highlighting key content that needs additional study,
- present focused content specific to the student's individual needs.



**Highlighted content** continuously adapts as students work through exercises.



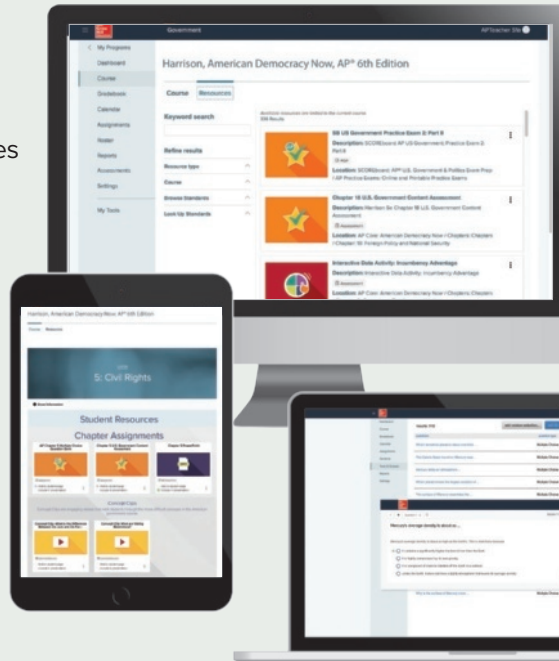
**Practice sets** measure depth of understanding and present a personalized learning path based on student responses.

## Teacher Resources

Teachers have access to the interactive eBook, adaptive *SmartBook®*, plus a wealth of customizable chapter resources and powerful gradebook tools.

Resources include:

- Online Teacher Manual with chapter outlines, teaching suggestions, reading strategies, and pacing guides
- Student performance reports to help teachers identify gaps, make data-driven decisions, and adjust instruction
- Customizable PowerPoint presentations
- Labeled visual aids and additional ideas for lecture enrichment



**Searchable library** makes it easy to find and assign resources.

**Customizable assignments** and quiz banks are automatically graded and populate easy-to-read reports.



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## Concept and Skills-based Digital Support

**Concept Clips** help students break down key concepts in American Government. Using easy-to-understand audio narration, visual cues, and colorful animations, Concept Clips provide a step-by-step presentation that aid in student retention. New Concept Clips for this edition include the following:

- Types of Government
- Federalists vs. Anti-Federalists
- Due Process Clause
- Explaining Levels of Scrutiny
- Public Opinion and Government Policy
- Regulation of the Media
- Who Participates?
- Interest Group Strategies or Collective Action/ Organization
- How Is Congress Organized?
- Going Public
- What Is Devolution?
- Instruments of Foreign Policy

In addition to the concept-based clips, this new edition also offers several skills-based clips that equip students for work within and outside the classroom. These **skills-based clips** include the following:

- How to Read a Historic Document
- Primary vs. Secondary Sources
- How to Read a Court Case
- Interpreting Political Cartoons
- Interpret Data/Graph/Chart
- How to Analyze a Map
- Reading for Comprehension
- Thinking Critically
- Evaluating Sources
- Making an Argument for a Position



Also at the *remember* and *understand* levels of Bloom's, **Newsflash** exercises tie current news stories to key American government concepts and learning objectives. After interacting with a contemporary news story, students are assessed on their ability to make the connections between real-life events and course content. Examples include the 2018 midterm election results, 2017 tax reform legislation, and trade tariffs.

At the *apply*, *analyze*, and *evaluate* levels of Bloom's taxonomy, **critical thinking activities** allow students to engage with the political process and learn by doing.

Examples are:

- Quiz: What Is Your Political Ideology?
- Poll: Americans' Confidence in the Police
- Research: Find Your Senator
- Infographic: Compare the Courts

## THEN NOW NEXT

### How Group Participation Has Changed in the United States

Then (1960s)	Now
Individuals joined bowling leagues, civic associations, and community service organizations.	People join virtual communities and use social networking sites to keep in touch with others who share their personal and public interests.
Many people entertained and socialized a great deal at home.	People are more likely to visit with friends and relatives in restaurants, cafés, and other public settings, as well as online through “virtual visits,” like Facetiming and Snapchatting.
Groups used traditional activities to communicate their interests to policy-makers, including letter writing and lobbying.	Groups rely on traditional activities but also increasingly use social media, including Twitter, to communicate with members, to fund-raise, and to lobby policymakers.

**AP WHAT'S NEXT?**

- > Representative democracies can take several forms. Develop an argument that explains which of the two models of representative democracy—participatory or pluralist—best achieves the founders’ intent for American democracy in terms of ensuring a stable government run by the people.
- > Articulate a defensible claim or thesis that responds to the prompt and establishes a line of reasoning. Support your claim with at least TWO pieces of accurate and relevant information, use reasoning to explain why your evidence supports your claim/thesis, and respond to an opposing or alternative perspective using refutation, concession, or rebuttal.

“Then, Now, Next” encourages students to weigh historical contexts and precedents against current political events and actions, formulate a judgment, and consider how the past and present might shape the future. This feature allows students to apply the key Disciplinary Practices of contextualizing political concepts and processes within real-world scenarios and to develop arguments in an essay format.

“Analyzing the Sources” guides students through AP Source Analysis as they practice and apply interpreting data, images, maps, and primary sources and respond to prompts that promote analytical thinking.

For example, in Chapter 11, students evaluate the effectiveness of ads generated by Russian operatives through the lens of politics and technology.

## AP Analyzing the Sources

### TROLLING FOR VOTES

In the 18 months leading up to the 2016 presidential election, about 126 million Americans saw Facebook content that included ads and posts generated by Russian operatives. Using bots, the Russians sought to influence the outcome of the election and foment divisions and dissent among the American people. Using Facebook’s advertiser tools, the Russians targeted Americans based on their self-professed “likes”—algorithms that indicate users’ political preferences—and demographic characteristics including age, sex, and geography.




Source: BM (Facebook event)

Source: Being Patriotic (Facebook event)

### Practice Analytical Thinking

1. Why would Russian operatives seek to create divisions within the American electorate?
2. What are the obstacles to preventing such covert disinformation attacks?
3. How can social media users protect themselves from being the target of disinformation campaigns?

## Should College Campuses Be Allowed to Limit Speech?

**The Issue:** The faculty and administrators of public universities are struggling with the meaning of the First Amendment's free speech protections on college campuses. As student bodies become more diverse, students expect to have their identities and beliefs treated with respect, and current student bodies often do not want to hear perspectives that are directly different from their own. Speech in the United States has become more polarized and extreme, and speakers who gain fame from social media often are not temperate or reasoned in their analysis, but focus on being provocative.

**All Speech Should Be Allowed:** Without exposure to sometimes offensive and difficult views, future Americans will not be capable of engaging in a public debate that forces one to confront contrary perspectives. In light of our great polarization as a nation, the onus is on universities to educate our students to be capable citizens in our democracy. And at the heart of our democracy is the First Amendment, with its guarantee that all citizens can participate in the debates that will direct our governance.

Free speech has historically been essential to advancing equal rights and political equality. Students do not know the history of free speech or the ways in which contrary views have been shut down and dissenters persecuted by the government. The First Amendment and the value of academic freedom are clear. The Supreme Court clearly states that public institutions cannot punish speech or exclude speakers based on the content of their speech. Campuses can regulate where and when the speech occurs to prevent the disruption of learning, and counter-demonstrations are also protected. And just because speakers can express hateful speech, campuses do not have to agree with ideas reflected in the speech and can always denounce the hate behind it.

**Some Speech Should Not Be Allowed:** Many students want campuses to stop offensive speech and believe that campus officials have the power to do so. Pew Research Institute

found in a 2015 survey that 40 percent of college students believe that the government should prevent people from making statements offensive to minority groups. They want to make campuses inclusive for all, and they know that hate speech is harmful, especially to those who have been traditionally excluded from higher education. The university is a special place. It exists to educate and create knowledge, both of which require the evaluation of the quality of ideas. We teach students to do this and grade them on the merit of their own arguments and understandings. Faculty teach content discrimination, and their ideas are evaluated based on their judgments regarding content. A classroom and the university are not an open forum. They promote freedom of ideas, but this does not mean that all ideas have equal value; universities must teach students the skill of facing and evaluating threatening and dangerous ideas. This does not mean that students should be exposed to abuse and threatening language. For a university to do its job, it must encourage and tolerate offensive ideas while rejecting and refusing personal incivility.

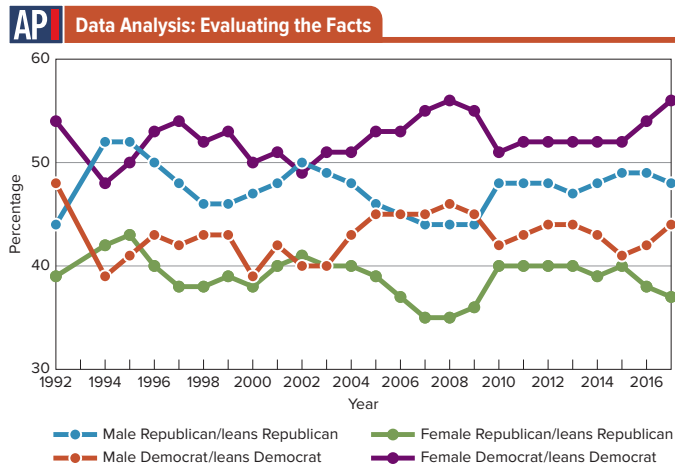
### What Do You Think?

1. Is there a difference between speakers sponsored by professors and departments versus those sponsored by student organizations? Explain your answer.
2. What role should a university play in distinguishing between the quality of ideas and the manner in which they are delivered?
3. Does the First Amendment mean something different at a university than it does in a city park?
4. How should universities prepare students to confront ideas they see as "threatening and dangerous"?

**SOURCES:** Robert C. Post, "There Is No 1st Amendment Right to Speak on a College Campus," *Vox*, December 31, 2017, and Erwin Chemerinsky, "Hate Speech Is Protected Free Speech, Even on College Campuses," *Vox*, December 26, 2017.

"Thinking Critically" is a debate feature focusing on a specific AP Disciplinary Practice that gives students an appreciation of multiple sides of a political issue and an opportunity to evaluate a variety of sources and formulate their own positions. For example, in Chapter 4, students explore civil liberties and the current debate regarding whether college campuses should be allowed to limit speech.

"Data Analysis: Evaluating the Facts" increases student knowledge of the Data Analysis Disciplinary Practice by developing critical thinking skills that will assist them in evaluating information they encounter daily and determining both the legitimacy of the source and the motivation or agenda of the source. For example, in Chapter 6, students explore political socialization as they analyze the gender gap in party identification and consider reasons for these trends over time.



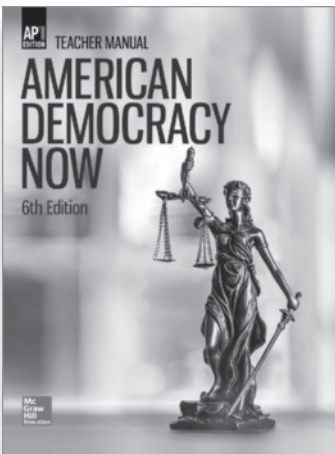
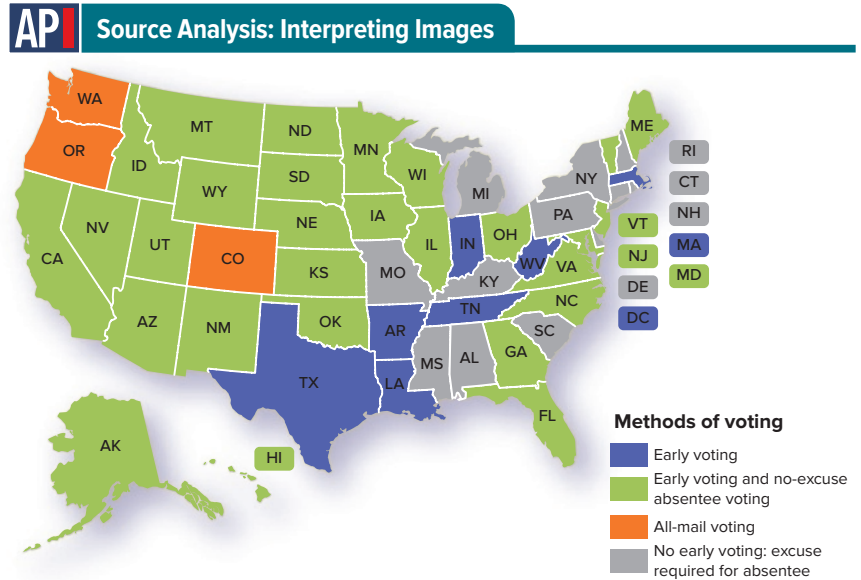
**FIGURE 6.3** Party Identification Among Men and Women

1. In general, what has been the trend regarding men's party identification?
2. When has the gender gap been the largest? Why do you think there were such differences between men's and women's party identification then?
3. When has the gender gap been the smallest? In those times, which party attracted the greater proportion of supporters?

**SOURCE:** Pew Research Center.

## “Source Analysis: Interpreting Images”

encourages the development of the AP Disciplinary Practice of Source Analysis as students interpret original-source visual elements, including photographs, documents, maps, tables, and graphs. For example, in Chapter 14, students explore bureaucracy as they analyze data on the trends in federal expenditures and uncover possible explanations for those trends.



## Teacher Support

An **AP Teacher Manual** gives teachers the tools to help students navigate the AP American Government and Politics course and succeed on the AP Exam. The content supports and deepens understanding of the content covered in the Student Edition ensuring it will both engage and broaden the perspectives of students. The Teacher Manual, available in print and digital format, provides:

- Pacing guides
- Key AP terms and definitions
- Activities focused on key AP figures and tables throughout the Student Edition
- AP Topics activities
- Video discussion questions
- Answers and rubrics for the new end-of-chapter AP Test Practice questions in the Student Edition
- Additional practice questions designed to prepare students for the AP exam

# Staying Current

This edition reflects the November 2018 election results. Also, as mentioned, the authors revised in response to student Heat Map data that pinpointed the topics and concepts with which students struggled the most. This Heat Map-directed revision is reflected primarily in Chapters 1, 2, 6, 8, 9, 11, 12, 13, and 18. Other content changes include the following:

## CHAPTER 1 PEOPLE, POLITICS, AND PARTICIPATION

- Added new discussion on the importance of tolerant, civic discourse in our nation.
- Updated discussion of the current political context, including Russian intervention in the 2016 election and U.S. engagement with North Korea.
- Updated voter turnout data.
- Added new discussion of the politics of Generation Z.
- Added new Analyzing the Sources that frames the issues of increased ideological polarization in the United States by generation.
- Updated data about the U.S. population.

## CHAPTER 2 THE CONSTITUTION

- Revised section “British Policies Incite Revolution in Colonies.”
- Revised Then, Now, Next feature.
- Added new Thinking Critical feature on Census 2020.
- Revised Analyzing the Sources feature on Convening a Constitutional Convention.
- Revised the section on “The Constitution as a Living, Evolving Document.”
- Updated inquiry questions in the Annotated Constitution.

## CHAPTER 3 FEDERALISM

- Reorganized chapter sections to foster understanding of foundational structures and concepts of our federal system.
- Added new section on “Partisan Federalism.”
- Revised Thinking Critically feature, “Can State Governments Nullify National Marijuana Law?”
- Revised section on “Tools of Intergovernmental Relations,” including a new section on “Nullification” and “Intergovernmental Tensions.”
- Revised Then, Now, Next feature, “Americans’ Trust in Their Governments.”

## CHAPTER 4 CIVIL LIBERTIES

- Updated statistics, data, and Supreme Court rulings from the previous edition.
- Provided a greater emphasis on selective incorporation and its significance.
- Introduced decisions and policies of the Trump administration, as opposed to prior focus on the Obama administration.
- Updated campus policies on concealed weapons.
- Moved focus from Millennials to Generation Z.
- Introduced a new section on free speech on campus.

## CHAPTER 5 CIVIL RIGHTS

- Updated statistics, data, and Supreme Court rulings from the previous edition.
- Included coverage of current issues, such as the #MeToo movement and diversity within the Asian American community.
- Added new Thinking Critically on the impact of illegal immigration.
- Updated all references and citations.

## CHAPTER 6 POLITICAL SOCIALIZATION AND PUBLIC OPINION

- Added new Thinking Critically feature that asks whether the United States should have stricter gun safety laws.
- Explored new data concerning the gender gap in political party identification between men and women.
- Evaluated new data about the policy priorities of men and women in the 2016 presidential election.
- Evaluated the gender gap in presidential vote choice in 2016.
- Updated information about the opinions of Millennials.
- Added new information on the politics of Generation Z.
- Included new discussion of the new “most important problem.”
- Included new data concerning trust in government.

## CHAPTER 7 INTEREST GROUPS

- Included a new discussion of the Women’s March protests.
- Included additional explanation of the role of group competition in determining interest group success.
- Included a discussion of the effect of *Janus v. United States* on interest groups.
- Updated information on the top lobbying interests in the United States.



# CHAPTER-BY-CHAPTER CHANGES

- Included more detailed discussion of *Citizens United v. Federal Election Commission*.
- Added a new Analyzing the Sources feature demonstrating the importance of considering interest groups' perspective when evaluating interest group ratings.

## CHAPTER 8 POLITICAL PARTIES

- Included a new discussion titled "A Democratic Party Struggling to Define Itself."
- Included a new discussion titled "The Republican Party in the Era of President Trump."
- Updated data concerning Americans' opinions of the two political parties.
- Added new information about the role of the parties in the 2018 mid-term congressional elections.
- Updated the discussion of the responsible party model.
- Provided new data concerning post-2018 election party control of state legislatures.
- Added a new Analyzing the Sources feature that asks students to evaluate the characteristics of voters who have switched political party preference since 2011.
- Updated data on Americans' support for a third party.

## CHAPTER 9 CAMPAIGNS, ELECTIONS, AND VOTING

- Explained the U.S. Intelligence Community's conclusions about Russian interference in the 2016 election.
- Enhanced the discussion of the importance of fair, independent elections.
- Explained why election meddling matters.
- Highlighted the idea of political participation as an expression of the will of the people.
- Discussed 2018 ballot initiatives in the states.
- Explained campaign finance regulations for the 2018 elections.
- Updated data concerning age and presidential election turnout.
- Revised an Analyzing the Sources feature examining race and presidential elections.
- Included new research concerning reasons for low voter turnout.

## CHAPTER 10 THE MEDIA

- Contextualized the current debate about media accuracy.
- Revised the Analyzing the Sources feature examining new data on confidence in the media.

- Added new data on the increasing diversity in newsrooms.
- Included new research on the demographics of increasing online news consumption.
- Reexamined the question of media bias.

## CHAPTER 11 POLITICS AND TECHNOLOGY

- Discussed social media hacking and data breaches.
- Updated data on Internet usage.
- Updated research on the use of technology in the 2018 elections.
- Added information on the use of social media as a tool of macro-protests, including facilitating the #MeToo movement.
- Added a new Analyzing the Sources feature that asks students to evaluate whether Facebook ads generated by Russian operatives were effective.
- Added new information and research on election infiltration.
- Described the effects of FCC Chairman Ajit Pai's rollback of the net neutrality order.

## CHAPTER 12 CONGRESS

- Added a new Thinking Critically feature that asks whether congressional elections are "rigged" through gerrymandering.
- Described new trends regarding the use of congressional earmarks.
- Added a new discussion of the filibuster.
- Updated the congressional leadership section.
- Discussed the role of Congress in supporting special counsel Robert Mueller.
- Added updates on the 2018 election and the party composition of Congress.
- Described congressional action on President Trump's policy agenda, including the overhaul of the federal tax plan.
- Included new discussion on the diversity in Congress after the 2018 elections.

## CHAPTER 13 THE PRESIDENCY

- Examined the revolutionizing effect on the presidency of President Trump's use of social media.
- Added new discussion of the Electoral College.
- Examined President Trump's role in managing the economy, looking at the issue of tariffs and the overhaul of the federal tax structure.

- Updated information on Trump administration officials, including the cabinet.
- Included new comparative data on women and minorities appointed to presidential cabinets.
- Updated discussion of the use of executive privilege.
- Included new comparative data on presidential public approval.
- Examined the geographical variation of President Trump's popularity.
- Added information on First Lady Melania Trump's priorities for her role.

## CHAPTER 14 THE BUREAUCRACY

- Added new Then, Now, Next feature, "Federal Civil Service Hiring Process."
- Added new discussion of President Trump's budget proposals and their potential impact on federal civil service hiring.
- Updated data on pay scale for white-collar (GS) federal civil servants.
- Revised section on "State, Local and Shadow Bureaucrats."
- Revised (to make more clear and concise) sections on bureaucratic accountability.
- Updated data and analysis in section "Can Bureaucratic Performance Be Improved?"
- Added new Analyzing the Sources feature, "Is it Government Performance or Partisanship?"
- Updated discussion and analysis in section "Can Contracting Out Improve Performance?"

## CHAPTER 15 THE JUDICIARY

- Reorganized sections to foster understanding of foundational structures and concepts of the federal judiciary.
- Added new Analyzing the Sources features on judicial independence.
- Revised Then, Now, Next feature, "Supreme Court Diversity."
- Updated data on demographics of federal judges to include those confirmed during first year of the Trump administration.
- Revised discussion on judicial policy making, including comparisons of judicial activism, judicial restraint, and originalism and the Constitution as a living document
- Added discussion of Supreme Court activity and decisions since the death of Associate Justice Scalia.

## CHAPTER 16 ECONOMIC POLICY

- Integrated discussion of the Trump administration's economic policy initiatives supporting supply-side economics, including the Tax Cuts & Jobs Act (2017) and deregulation.
- Updated survey data on Americans' views about the American dream.
- Reorganized sections to foster understanding of foundational concepts and theories.
- Added new Then, Now, Next feature on tax law.

- Updated data on the health of the U.S. economy.
- Updated federal budget data.
- Reviewed the use of continuing resolutions in the FY 2018 budget process.
- Revised (and streamlined) discussion of trade policy.
- Revised section on "The American Dream in Today's Economy," which integrates Trump administration policies and Americans' policy preferences.

## CHAPTER 17 DOMESTIC POLICY

- Added new Analyzing the Sources feature, "Partisan Differences on Top Priorities for President Trump and Congress."
- Added new Critical Thinking feature, "Should the National Government Mandate Flood Insurance?"
- Added new Then, Now, Next feature, "Federal Websites and Climate Change."
- Integrated the Trump administration's environmental, energy, health care, and immigration policy initiatives.
- Updated data on safety net programs (income security, housing security, health insurance programs).
- Updated data on immigrants.
- Eliminated section on Homeland Security policy.

## CHAPTER 18 FOREIGN POLICY AND NATIONAL SECURITY

- Described the context for current foreign policy.
- Updated the "The Military Option" section to include U.S. air strikes in Syria.
- Updated coverage of the use of new technologies in foreign policy.
- Added new Analyzing the Sources feature that asks students to evaluate recent U.S. troop deployment.
- Examined President Trump's America First foreign policy in the context of Huntington's Clash of Civilizations thesis.
- Described future challenges in foreign policy, including trade policy, the renewed threat of terrorism, and Russian expansion and efforts to increase influence.

# Acknowledgments

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## American Government Symposia

Since 2006, McGraw-Hill has conducted several symposia in American Government for instructors from across the country. These events offered a forum for instructors to exchange ideas and experiences with colleagues they might not have met otherwise. They also provided an opportunity for editors from McGraw-Hill to gather information about what instructors of American Government need and the challenges they face. The feedback we have received has been invaluable and has

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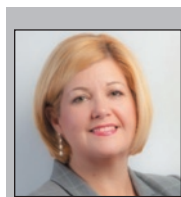
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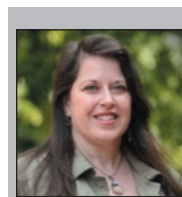
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Welcome to the sixth edition of *American Democracy Now!* In this program, we share our passion for politics while providing students with the foundation they need to become informed citizens in a rapidly changing democracy.

In creating the first edition of *American Democracy Now*, we merged our years of experience as classroom instructors and our desire to captivate students with the compelling story of their democracy into a student-centered program. We refined those goals with an integrated learning program for American government to maximize student performance in the second edition. The third edition revolutionized how we think about American democracy by incorporating for the first time a chapter on Politics and Technology, demonstrating the extent to which technology has become integral to how citizens participate in their democracy and how governments serve their citizenry. The fifth edition continued this tradition, tackling new ways in which technology is changing how politics happens—both for the good and the bad. The goals of the sixth edition stem from the necessities of our times: We seek to help students navigate the vast array of information that technology provides by strengthening their ability to evaluate information for accuracy. We also hope to encourage civil discourse by providing students with critical thinking skills that will enable them to develop an empathy and understanding of the positions held by those whose views differ from their own.

More than any previous edition, the sixth edition of *American Democracy Now* relies on technological advances to improve how we deliver information to students in a way that they can best understand, enjoy, and share our passion for political life. Informed by data garnered from thousands of students who have used our digital platforms, we have revised our program to ensure greater clarity in areas that have proven complex for past student readers. We have continued to integrate an examination of the increasing role technology is playing in politics. And we have continued our quest to create a student-centered program that increases students' sense of political efficacy by exciting them about the political conversations of the day and by integrating a critical thinking framework that not only explains the past and present of politics, but also asks them to think critically about the future: What's next for their democracy? In *American Democracy Now*, sixth edition, students learn how the fundamental principles of American democracy inform their understanding of the politics and policies of today so that they can think about the policies they would like to see take shape tomorrow. In short, they learn to inquire: How does *then* and *now* shape what's going to happen *next*? This "Then, Now, Next" approach to critical thinking serves as the basis for student participation.

*American Democracy Now*, sixth edition, takes a broader, more contemporary view of participation than other programs. To us, participation encompasses a variety of activities from the modest, creative, local, or even personal actions students can take to the larger career choices they can make. And choosing how to participate makes American government matter.

Today's hyper-partisan politics and ever-changing technology provide challenges for those seeking to ensure that the rights guaranteed by the Constitution are protected, and they present opportunities for those striving to fulfill the

responsibilities that come with living in a constitutional democracy. *American Democracy Now*, sixth edition, enables students to garner a solid understanding of the essential elements, institutions, and dynamics of national government and politics, while fostering critical thinking skills that are essential to meeting these novel challenges and realizing these new opportunities.

Facilitating success—as students, but also as citizens and participants—means honing their critical thinking skills, harnessing their energy, and creating tools that foster success in the American government course and in our polity. We know we have succeeded when students apply their knowledge and sharpened skills to consider the outcomes they—as students, citizens, and participants—would like to see.

Creating this success means joining increasingly diverse students where they are so they can see the relevance of politics in their everyday lives. Instagram, YouTube, Snapchat, and Twitter are not only powerful social networking tools, but also powerful political and educational tools. New technologies help politicians to communicate with citizens, citizens to communicate with each other, and you to communicate with your students. The sixth edition of *American Democracy Now* further integrates technology into our students' study of politics so that their engagement with content is seamless.

We are excited to present you with the sixth edition of *American Democracy Now*, and we wish you and your students success.

**BRIGID CALLAHAN HARRISON**  
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**EDITION**

# AMERICAN DEMOCRACY NOW

6th Edition



## CHAPTER 4

# Civil Liberties



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### THEN

The Bill of Rights was designed to protect citizens' rights to speak and act without undue monitoring by or interference from the national government; however, Congress soon legislated exceptions to those protections.

### NOW

Ideas about liberty in the context of such areas as religion and privacy often conflict with one another, resulting in tensions that legislatures and courts must resolve.

### NEXT

Will the nation find ways to balance the Second Amendment's guarantee of a protected individual right to bear arms with concerns about security and the increased visibility of mass shootings?

How do we protect free speech on public campuses while recognizing a more diverse community?



# AP Introduction

A strong belief in civil liberties is deeply embedded in our understanding of what it means to be an American. Civil liberties protect people from government intrusion and allow them to follow their own belief systems. Civil liberties also empower people to speak out against the government, as long as they do not harm others.

Since the nation's founding, political discourse among the people has often focused on the ideals of liberty and freedom. The colonists took up arms against Britain because the king and Parliament refused to recognize their liberties as English citizens: freedom of speech and assembly and the right to be free from unrestrained governmental power, especially in the investigation and prosecution of crimes. Withdrawing their consent to be governed by the king, they created a new government that would tolerate political discourse and disagreement and that could not legally disregard the collective or individual will of citizens.

Ideologies of liberty and freedom inspired the War for Independence and the founding of the new nation.<sup>1</sup> Those rights, though guaranteed, were never absolute. In fact, one of the earliest acts passed by Congress after the Bill of Rights was the Alien and Sedition Acts (1798), which not only limited immigration but also prohibited certain criticisms of the government. From its origins, the Constitution guaranteed basic liberties, but those protections were tempered by other goals and values, perhaps most importantly by the goal of order and the need to protect people and their property. Following the terrorist attacks of September 11, 2001, the national government enacted laws aimed at protecting American citizens and property from further attacks, such as the Parkland shootings in 2018. But those laws, in some cases, overturned decades of legal precedents that protected civil liberties. As technology evolves, the government's ability to engage in surveillance activities that escape public awareness increases, as does the capacity of private individuals and anonymous groups to expose these activities. Is such public exposure a way of holding the government accountable or an act of treason?

## Civil Liberties in the American Legal System

Civil liberties are individual liberties established in the Constitution and safeguarded by state and federal courts. We also refer to civil liberties as *personal freedoms* and often use the concepts of “liberty” and “freedom” interchangeably.

Civil liberties differ from civil rights. **Civil liberties** are constitutionally established guarantees that protect citizens, opinions, and property *against* arbitrary

### AP Enduring Understandings

**LOR-2:** Provisions of the U.S. Constitution's Bill of Rights are continually being interpreted to balance the power of government and the civil liberties of individuals

**LOR-3:** Protections of the Bill of Rights have been selectively incorporated by way of the Fourteenth Amendment's due process clause to prevent state infringement of basic liberties.

#### ■ civil liberties

Constitutionally established guarantees that protect citizens, opinions, and property against arbitrary government interference.

government interference. In contrast, civil rights (the focus of Chapter 5) reflect positive acts of government (in the form of constitutional provisions or statutes) *for* the purpose of protecting individuals against arbitrary or discriminatory actions. For example, the freedom of speech, a liberty established in the First Amendment to the U.S. Constitution, protects citizens against the government's censorship of their words, in particular when those words are politically charged. In contrast, the constitutionally protected right to vote requires the government to step in to ensure that all citizens be allowed to vote, without restriction by individuals, groups, or government officials.

## The Freedoms Protected in the American System

The U.S. Constitution, through the Bill of Rights, and state constitutions explicitly recognize and protect civil liberties. As demonstrated in the Constitution in Chapter 2, the first 10 amendments to the Constitution explicitly limited the power of the legislative, executive, and judicial branches of the national government.

The Bill of Rights established freedoms essential to individuals' and groups' free and effective participation in the larger community. Without these protections, citizens could not freely express their opinions through rallies, speeches, protests, letters, pamphlets, tweets, blogs, e-mail, and other forms of civic engagement. The Constitution's framers, who had been denied these liberties under British rule, saw them as indispensable to forming a new democratic republic.

The meanings of these precious freedoms have shifted over the course of U.S. history, as presidents, legislators, judges, and ordinary citizens have changed their minds about how much freedom the people should have. When Americans have not perceived themselves as being under some external threat, they generally have adopted an expansive interpretation of civil liberties. At those times, citizens tend to believe that the government should interfere as little as necessary in individuals' lives, strongly supporting people's right to gather with others and to speak their minds. When the nation has been under some perceived threat, citizens have often allowed the government to limit protected freedoms.<sup>2</sup> (See "Analyzing the Sources.") Limits have also extended to many **due process** protections—legal safeguards that prevent the government from arbitrarily depriving people of life, liberty, or property without adhering to strict legal procedures. In this chapter, we consider not only the historical context of our civil liberties but also recent changes in how Congress, the president, and the courts interpret these liberties.

### **I** due process

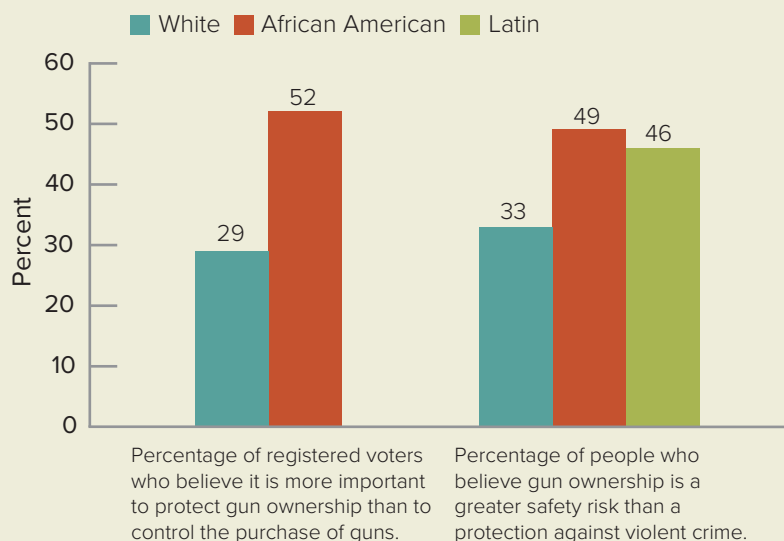
The legal safeguards that prevent the government from arbitrarily depriving citizens of life, liberty, or property; guaranteed by the Fifth and Fourteenth Amendments.

## The Historical Basis for American Civil Liberties: The Bill of Rights

The framers vividly remembered the censorship and suppression of speech that they had suffered under British rule. Colonists had been harshly punished, often by imprisonment and confiscation of their property and even death, if they criticized the British government, through both speech and the publication of pamphlets. The framers understandably viewed liberty as a central principle guiding the creation of a new democratic republic. Federalists such as Alexander Hamilton

# AP Analyzing the Sources

## BALANCING THE TENSION BETWEEN LIBERTY AND SECURITY



SOURCE: Pew Research Center, "Opinions on Gun Policy and the 2016 Campaign," August 26, 2016.

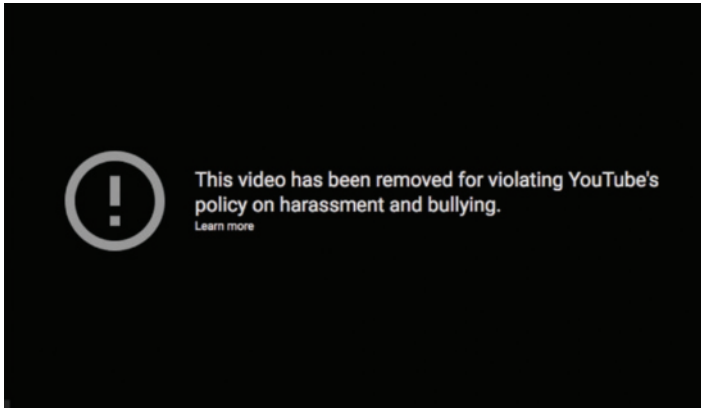
## Practice Analytical Thinking

1. In recent years, we have seen an increase in mass shootings in the United States with larger numbers of victims. How might these shootings on U.S. soil affect public opinion on the issue of liberty versus security?
2. What does this public opinion data tell us about perceptions of how tensions between liberty and security can be resolved?

saw the Constitution itself as a bill of rights because it delegated specific powers to the national government and contained specific provisions designed to protect citizens against an abusive government.

Some constitutional protections were designed to protect people from being punished, imprisoned, or executed for expressing political beliefs or opposition. These are noted on the annotated Constitution in Chapter 2. However, the Anti-Federalists still stressed the need for a written bill of rights. As we saw in Chapter 2, the ratification of the Constitution stalled because citizens feared that the government might use its expanded powers to limit individual freedoms, particularly those associated with political speech and engagement. The First Amendment, which ensures freedom of religion, the press, assembly, and speech, was essential to political speech and to discourse in the larger society.

The freedoms embodied in the Bill of Rights are broad principles rather than specific prohibitions against governmental action. From the nation's beginnings, the vagueness of the Bill of Rights led to serious disagreement about how to interpret its amendments. For example, the First Amendment's establishment clause states simply that "Congress shall make no law respecting an establishment of religion." Some commentators, most notably Thomas Jefferson, argued that the clause mandated a "wall of separation between church and state" and barred any



>When YouTube began removing posted videos that violated their harassment and bullying policy, some individuals claimed the privately owned company was engaged in viewpoint discrimination and a violation of free speech. While the company is not a government entity limited by the First Amendment, challengers claim that in the twenty-first century, companies like YouTube, Google, and Facebook are the equivalent of the public square. Do you think private companies in cyberspace should give users of these large social media conglomerates the same free speech rights as the government must provide in physical public space?

Source: YouTube

federal support of religion. Others interpreted the clause more narrowly as barring only the establishment of a national religion or the requirement that all public officials swear an oath to some particular religion.

Other freedoms, too, have been subject to differing interpretations, including the First Amendment guarantees of freedom of speech, assembly, and the press. These conflicting interpretations often arise in response to public crises or security concerns. Security concerns also affect the protections offered to those accused of threatening the safety of the nation. Civil liberties advocates worry that fear is causing Americans to give up their most precious freedoms.

## Incorporation of the Bill of Rights to Apply to the States

The framers intended the Bill of Rights to restrict the powers of only the *national government*. They did not see the Bill of Rights as

applicable to the state governments. In general, there was little public worry that the states would curtail civil liberties, because most state constitutions included a bill of rights that protected the individual against abuses of state power. Further, it was generally believed that because the state governments were geographically closer to the people than the national government, they would be less likely to encroach upon individual rights and liberties.

Through most of early U.S. history, the Bill of Rights applied to the national government, but not to the states. That assumption is illustrated by the case of *Barron v. Baltimore* (1833), in which a wharf owner named Barron sued the city of Baltimore. Barron claimed that the city had violated the “takings clause” of the Fifth Amendment, which bars the taking of private property for public use without just compensation. *Barron* argued that by paving its streets, the city of Baltimore had changed the natural course of certain streams; the resulting buildup of silt and gravel in the harbor made his wharf unusable. In *Barron*, the Supreme Court determined that the Fifth Amendment applies only to actions taken by the federal government and not to state actions.<sup>3</sup>

In 1868, three years after the Civil War ended, the Fourteenth Amendment was added to the U.S. Constitution. The Fourteenth Amendment reads as if it were meant to extend the protections of the Bill of Rights to citizens’ interactions with *state governments*:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Although this language sounds like an effort to protect citizens’ rights and liberties from arbitrary interference by state governments, the Supreme Court rejected the doctrine of **total incorporation**: that is, the application of *all* the protections contained in the Bill of Rights to the states. Instead, beginning with

### total incorporation

The theory that the Fourteenth Amendment’s due process clause requires the states to uphold *all* freedoms in the Bill of Rights; rejected by the Supreme Court in favor of selective incorporation.

a series of cases decided by the Court in the 1880s, the justices formulated a narrower approach, known as **selective incorporation**.<sup>4</sup> This approach considered each protection individually, one case at a time, for possible incorporation into the Fourteenth Amendment and application to the states. The Court determined that due process mandates the incorporation of those rights that serve the fundamental principles of liberty and justice, those that were at the core of the “very idea of free government” and that were unalienable rights of citizenship.

As Table 4.1 shows, it was not until 1925 that the Court gradually began the process of incorporation, starting with the First Amendment protections most central to democratic government and civic engagement. That year, in the case of *Gitlow v. New York*, the Court held that freedom of speech is “among the fundamental personal rights and ‘liberties’ protected by the due process clause of the

### ■ selective incorporation

The process by which, over time, the Supreme Court applied those freedoms that served *some* fundamental principle of liberty or justice to the states, thus rejecting total incorporation.

## AP Data Analysis: Evaluating the Facts

**TABLE 4.1** Selective Incorporation of the Bill of Rights

The process of selective incorporation has been very slow; while a Supreme Court decision in 1897 was later understood to incorporate a right to the state, the Supreme Court did not deliberately begin the process until 1925, and it continues until today. What trends do you see in the incorporation of the Bill of Rights to the states? What categories of rights were more quickly applied to the states under the Fourteenth Amendment and which ones took longer? Do you think those amendments that have not been currently incorporated might be in the future? Why or why not?

DATE	LIBERTY	AMENDMENT	KEY CASE
1897	Right to just compensation (for property taken by government)	V	<i>Chicago, B&amp;Q RR Co. v. Chicago</i>
1925	Freedom of speech	I	<i>Gitlow v. New York</i>
1931	Freedom of the press	I	<i>Near v. Minnesota</i>
1937	Freedom of assembly and petition	I	<i>DeJonge v. Oregon</i>
1940	Freedom to practice religion	I	<i>Cantwell v. Connecticut</i>
1947	Freedom from government-established religion	I	<i>Everson v. Board of Education</i>
1948	Right to a public trial	VI	<i>In re Oliver</i>
1949	No unreasonable searches and seizures	IV	<i>Wolf v. Colorado</i>
1961	Exclusionary rule	IV	<i>Mapp v. Ohio</i>
1962	No cruel and unusual punishments	VIII	<i>Robinson v. California</i>
1963	Right to counsel in criminal cases	VI	<i>Gideon v. Wainwright</i>
1964	No compulsory self-incrimination	V	<i>Malloy v. Hogan</i>
1965	Right to confront witnesses	VI	<i>Pointer v. Texas</i>
1966	Right to an impartial jury	VI	<i>Parker v. Gladden</i>
1967	Right to a speedy trial	VI	<i>Klopfer v. North Carolina</i>
1968	Right to a jury in criminal trials	VI	<i>Duncan v. Louisiana</i>
1969	No double jeopardy	VII	<i>Benton v. Maryland</i>
2010	Right to bear arms	II	<i>McDonald v. City of Chicago</i>
	No quartering of soldiers	III	Not incorporated
	Right to grand jury indictment	V	Not incorporated
	Right to a jury in civil trials	VII	Not incorporated
	No excessive fines or bail	VIII	Not incorporated

Fourteenth Amendment from impairment by the states.”<sup>5</sup> In 1931, in its decision in *Near v. Minnesota*, the Court added freedom of the press, and in 1937 it added freedom of assembly to the list of incorporated protections.<sup>6</sup>

Incorporation progressed further with the landmark case of *Palko v. Connecticut* (1937), in which the Court laid out a formula for defining fundamental rights that later courts have used time and time again in incorporation cases, as well as in due process cases more generally. The justices found that fundamental rights were rooted in the traditions and conscience of the American people. Moreover, if those rights were eliminated, the justices argued, neither liberty nor justice could exist.<sup>7</sup> In case after case, the justices have considered whether such a right is fundamental—that is, rooted in the American tradition and conscience and essential for liberty and justice—and they have been guided by the principle that citizen participation in government and society is necessary for democracy in gauging the importance of each constitutionally protected right.

## Freedoms in Practice: Controversy over the Second Amendment and the Right to Bear Arms

The fierce debate today over gun control illustrates much about the conflicts surrounding the civil liberties protected in the United States. Americans disagree about how to interpret the Second Amendment of the Constitution, but they do agree to have their disputes settled through laws and court rulings rather than armed conflict. Private citizens and political interest groups use their First Amendment freedoms of speech and assembly to voice their opinions about the place of guns in society. They also work behind the scenes to influence elected officials through campaign contributions and lobbying (see Chapter 7). At the heart of this debate is the question of the role of guns in creating a safe and free society and negotiating the tension between personal liberty and community security.

### Changing Interpretations of the Second Amendment

Over the last decade, the Supreme Court has changed its interpretation of the Second Amendment, which reads

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Second Amendment was initially interpreted by the Supreme Court as ensuring that state militias could support the government in maintaining public order; under this interpretation the right to bear arms is a group right subject to regulation by Congress and the states.<sup>8</sup>

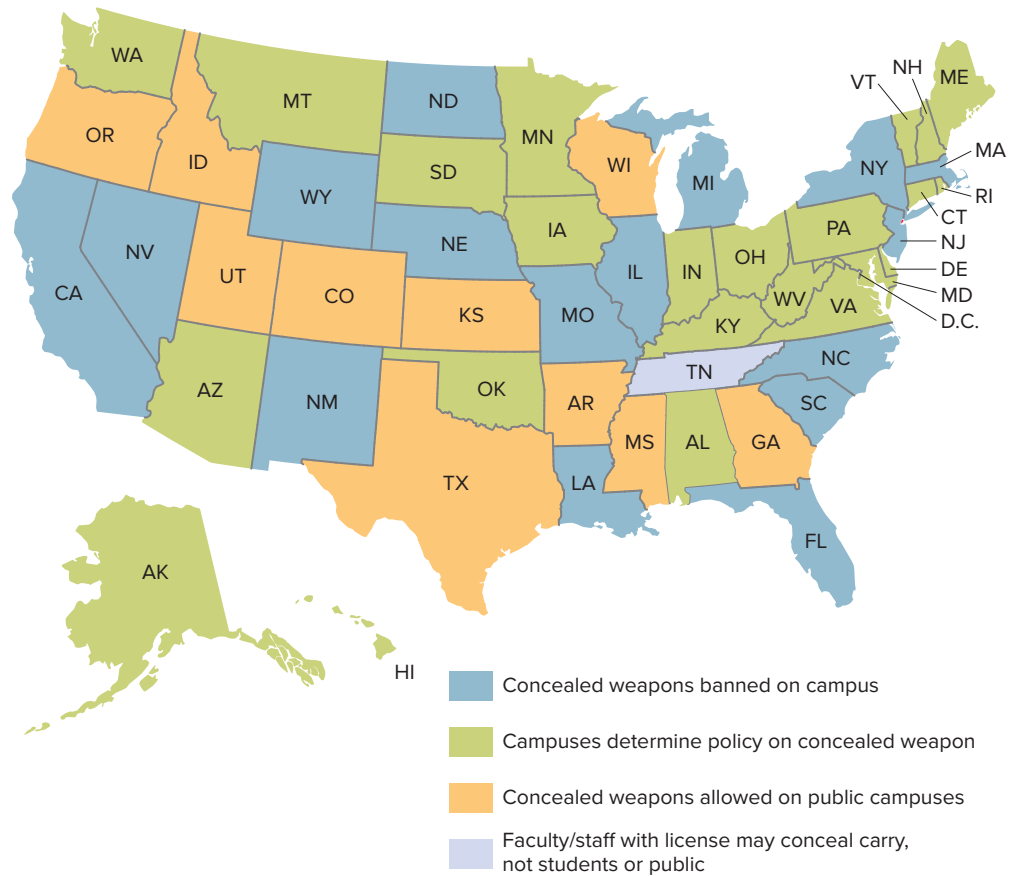
In 2008, the Supreme Court ruled in the *District of Columbia v. Heller* that the Second Amendment confers an individual right to possess a firearm for lawful purposes, such as self-defense.<sup>9</sup> In the 2010 case of *McDonald v. Chicago*, the Court incorporated the Second Amendment to the states, requiring states to respect this new individual constitutional right when they regulated citizen access to guns.<sup>10</sup> This forced many states to change their laws to allow individuals to carry concealed weapons, though there remains a great deal of variation in how these laws are implemented (see Figure 4.1).

#### AP KEY DOCUMENTS

##### I *McDonald v. Chicago* (1962)

In *McDonald v. Chicago* the Court incorporated the Second Amendment to the states.





**FIGURE 4.1 ■ Concealed Carry Laws and College Campuses** All 50 states allow individuals the right to carry a concealed weapon. Only the District of Columbia prohibits it. After a number of campus shootings, some state legislatures have made provisions to allow the carrying of concealed weapons on college campuses. Currently, 23 states allow campuses to make this determination for themselves, and 16 states ban carrying concealed weapons on campuses. What regional variations do you see regarding these laws? How could you use this data to determine whether increased access to weapons on campus could (1) decrease violence on campuses or (2) heighten the potential for additional shootings? What else do you need to know?

SOURCE: National Conference of State Legislatures, "Guns on Campus Overview," May 5, 2017.

## Citizens Engaged: Fighting for a Safer Nation

The U.S. gun death rate (homicides and suicides) increased in 2016 and 2017 after 15 years of stability.<sup>11</sup> The increased visibility of mass shootings—such as those in Virginia Tech; Sandy Hook Elementary School; the Aurora movie theater; the church in Charleston; the Orlando Nightclub; Las Vegas; and Parkland—has kept the question of domestic security visible. Some activists, like the interest group The Coalition to Stop Gun Violence, argue that stricter weapons laws are necessary for a safe society.

Other groups, like the National Rifle Association, believe that if more law-abiding citizens can carry weapons, fewer violent crimes will be committed. Both groups have joined vocally in the public debate, exercising their freedom of speech and assembly to influence opinions about guns in the United States and by working to influence policy.

By 2014, every state allowed for some form of concealed-carry protection, permitting citizens to have weapons on them or in close proximity. In addition, the nation has been debating the wisdom of “Stand Your Ground” laws, allowing individuals who feel threatened to fire their weapons in self-defense. The shooting death of Trayvon Martin, a 17-year-old African American high school student, in February 2012 in Sanford, Florida, galvanized many critics of Stand Your Ground laws. George Zimmerman, a 28-year-old neighborhood watch coordinator, claimed that he felt threatened by the unarmed Martin. Later that year, the shooting of Jordan Davis, another unarmed 17-year-old high school student at a Florida convenience store, by Michael David Dunn, sparked protests against liberal gun laws. Dunn objected to the volume of the music playing in the car in which Davis was riding. Unlike Zimmerman, Dunn was convicted of murder and sentenced to life in prison and another 90 years for three counts of attempted murder. Critics argued that the mere perception of a threat does not constitute one, while many civil rights groups contend that Stand Your Ground laws ultimately result in the deaths of innocent, young African American men, like Martin and Davis, who are more likely to be unfairly stereotyped as a threat.

By 2017, numerous states had passed campus carry laws allowing weapons (with an appropriate permit) on public campuses (see Figure 4.1) and others sought to arm trained teachers and security personnel in public schools. Federal legislation allowing soldiers to remain armed on bases has been introduced to Congress, despite dissent from the Pentagon. Advocates of these policies believe that the introduction of personal firearms into these previously gun-free spaces will serve as a deterrent to additional mass shootings. Opponents think it will only increase the likelihood of additional casualties due to the lax regulations of who may legally carry a firearm.

## Freedoms of Speech, Assembly, and the Press: Supporting Civic Discourse

Civic discourse and free participation in the political process have certain requirements. As we consider in this section, an individual must be able to express his or her political views through speech, assembly, and petition. Freedom of speech, assembly, petition, and the press is essential to an open society and to democratic rule. These freedoms ensure that individuals can discuss the important issues facing the nation and try to agree about how to address these matters without government censorship. Scholars have referred to this sharing of contrasting opinions as the **marketplace of ideas**. It is through the competition of ideas—some of them radical, some even loathsome—that solutions emerge. Freedom of the press allows for the dissemination and discussion of these varying ideas and encourages consensus building.

The marketplace of ideas enables people to voice their concerns and views freely and allows individuals to reconsider their ideas on important national and local issues. The centrality of the freedom of political expression to the First Amendment reflects the founders’ belief that democracy would flourish only through robust discussion and candid debate.

### The First Amendment and Political Instability

Over time, the Supreme Court has distinguished between political expression that the First Amendment protects and expression that the government may limit or

#### marketplace of ideas

A concept at the core of the freedoms of expression and press, based on the belief that true and free political discourse depends on a free and unrestrained discussion of ideas.

even prohibit. The government has tried to limit speech, assembly, and the press during times of national emergency, when it has viewed that expression as more threatening than it would be in normal times.

**THE TENSION BETWEEN FREEDOM AND ORDER** A fundamental tension exists between the Bill of Rights, with its goal of protecting individual freedoms, and the government's central goal of ensuring order. Not even a decade had gone by after the Constitution's ratification when Congress passed the Alien and Sedition Acts (1798). These laws placed the competing goals of freedom and order directly in conflict. The Sedition Act criminalized all speech and writings judged to be critical of the government, Congress, or the president. This was just the first of many times in U.S. history that lawmakers sacrificed free speech and freedom of the press in an effort to ensure national security and order. For example, President Abraham Lincoln (1861–1865) attempted to silence political dissidents during the Civil War by mandating that they be tried in military courts, without the due process protections afforded in a civilian court. Lincoln also suspended the writ of *habeas corpus* (Latin, meaning “you have the body”), an ancient right and constitutional guarantee that protects an individual in custody from being held without the right to be heard in a court of law.<sup>12</sup> Again, political dissidents were targeted for indefinite detention without trial. Whenever the nation has perceived itself under attack or threat, pressure has been placed on the government by some citizens to limit individual freedom to ensure societal order, and other citizens have pressured the government to maintain freedom while securing order.

The struggle for a balance between freedom and order continues today as the United States fights a global war on terrorism. Part of the 1798 Alien and Sedition Acts, known as the Alien Enemies Act, empowered the president to deport aliens suspected of threatening the nation's security or to imprison them indefinitely.<sup>13</sup> Soon after assuming office in January 2017, President Donald J. Trump signed an executive order that identified countries from which the United States would not accept immigrants or visitors and expanded the basis on which immigrants could be deported.<sup>14</sup> A federal district judge determined the order to be biased against Muslims and a constitutional violation of the First Amendment; a revised executive order has been litigated in the federal courts.<sup>15</sup>

**THE HISTORICAL CONTEXT FOR FREE SPEECH LAWS** The Supreme Court's willingness to suppress or punish political speech has changed over time in response to perceived internal and external threats to the nation. During World War I, the Court upheld the conviction of socialist and war protester Charles Schenck for distributing a pamphlet to recently drafted men urging them to resist the draft.<sup>16</sup> For the first time, the Court created through its ruling a test to evaluate such government actions, called the **clear and present danger test**. Under this standard, the government may silence speech or expression only when there is an evident and immediate danger that such speech will bring about some harm that the government has the power to prevent. In the *Schenck* case, the Court noted that the circumstances of war permit greater restrictions on the freedom of speech than would be allowable during peacetime. The justices ruled that Schenck's actions could endanger the nation's ability to carry out the draft and prosecute the war.

Soon after the *Schenck* case, a majority of the justices adopted a far more restrictive test that made it easier to punish citizens for the content of their speech. This test, known as the **bad tendency test**, was extended in the case of Benjamin

### **■ *habeas corpus***

An ancient right that protects an individual in custody from being held without the right to be heard in a court of law.

### **■ **clear and present danger test****

A standard established in the 1919 Supreme Court case *Schenck v. U.S.* whereby the government may silence speech or expression when there is a clear and present danger that this speech will bring about some harm that the government has the power to prevent.

### **AP KEY DOCUMENTS**

#### **■ *Schenck v. U.S.* (1919)**

In *Schenck* the Court ruled that wartime circumstances permitted greater restriction on free speech rights.

#### **bad tendency test**

A standard extended in the 1925 case *Gitlow v. New York* whereby any speech that has the likelihood of inciting crime or disturbing the public peace can be silenced.



> In August 2017, white supremacists and armed militia gathered in Charlottesville, Virginia, under the cry of “Unite the Right.” After Virginia and a torch-lit march the first night, counter-demonstrators gathered to challenge the messages of “Blood and Soil” (a Nazi phrase) and “White Lives Matter” as well as the confederate flags and Nazi symbols. In the violent aftermath one protester was killed and two police officers died. What kind of free speech protections should we provide unpopular views that challenge the political rights of others?

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Gitlow, who was convicted of violating a New York State criminal anarchy law by publishing pamphlets calling for a revolutionary mass action to create a socialist government.<sup>17</sup> The political context of Gitlow’s conviction is revealing: A so-called red scare—fears that the socialist revolution in the Soviet Union would spread to other nations with large populations of workers—was sweeping the nation. Gitlow’s lawyer contended that there was no proof that Gitlow’s pamphlet created a clear and present danger of a violent uprising. The Court disagreed, however, ruling that any speech that had a likelihood of inciting crime or disturbing the public peace could be silenced.

This highly restrictive test required only that the government demonstrate that some speech may at some time help to bring about harm. The threat did not need to be immediate or even direct. The test sacrificed the freedoms of speech and the press to concerns about public safety and protection of the existing order. The bad tendency test lasted only a short while; by the late 1930s, the Court had reverted to the clear and present danger test, which the justices interpreted more broadly to protect

speech and participation. The relative peace and stability of the period between the two world wars is apparent in the Court’s handling of speech and press cases, as the justices required government officials to demonstrate that the speech obviously posed a danger to public safety.

Even after the Court returned to the clear and present danger test, however, it still allowed concerns about national security to control its handling of First Amendment cases. In the wake of World War II, a war of conflicting ideologies emerged between the United States and the Soviet Union. Termed the *Cold War* because it did not culminate in a direct military confrontation between the countries, this development nevertheless created a climate of fear and insecurity in both nations. Concerns about the spread of communism in the United States led to prosecutions of individuals deemed to be sympathetic to communism and socialism under the Smith Act of 1940. This federal law barred individuals from advocating or teaching about “the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence.”

In the most important case of this period, the Supreme Court upheld the conviction of several individuals who were using the writings of German philosophers Karl Marx and Friedrich Engels, along with those of Soviet leaders Vladimir Lenin and Josef Stalin, to teach about socialism and communism.<sup>18</sup> In upholding the convictions, the justices found that although the use of these writings did not pose a risk of imminent danger to the government, it created the *probability* that such harm would result. The seriousness of the evil was key to the test that came out of this ruling, known as the **clear and probable danger test**. Because the government was suppressing speech to avoid the gravest danger, an armed takeover of the United States, the Supreme Court majority ruled that it was justified in its actions—even if the risk or probability of this result was relatively remote.

### clear and probable danger test

A standard established in the 1951 case *Dennis v. U.S.* whereby the government could suppress speech to avoid grave danger, even if the probability of the dangerous result was relatively remote; replaced by the imminent lawless action (incitement) test in 1969.

As the Cold War subsided and concerns diminished about a potential communist takeover of the United States, the Court shifted to a broader interpretation of the First Amendment speech and press protections. Beginning with *Brandenburg v. Ohio* (1969), the Court signaled that it would give more weight to First Amendment claims and less to government concerns about security and order. In this case, the Court considered the convictions of the leaders of an Ohio Ku Klux Klan group who were arrested after they made a speech at a televised rally, during which they uttered racist and anti-Semitic comments and showed guns and rifles. Local officials charged them with violating a state law that banned speech that disturbed the public peace and threatened armed overthrow. In overturning the convictions, the Court reverted to a strict reading of the clear and present danger test. The justices held that government officials had to demonstrate that the speech they sought to silence went beyond mere advocacy, or words, and that it created the risk of immediate disorder or lawlessness.<sup>19</sup>

**THE STANDARD TODAY: THE IMMINENT LAWLESS ACTION TEST** The *Brandenburg* test, known as both the **imminent lawless action test** and the **incitement test**, altered the clear and present danger test by making it even more stringent. Specifically, after the *Brandenburg* decision, any government in the United States—national, state, or local—trying to silence speech would need to show that the risk of harm from the speech was highly likely and that the harm was imminent or immediate. The imminent lawless action test is the standard the courts use today to determine whether speech is protected from government interference.

Even though the *Brandenburg* test is well established, the issue of whether speech is protected continues to be debated. For example, public attention has increasingly focused on websites operated by terrorists and terrorist sympathizers, especially members of militant Islamic groups and those of the alt right. Do First Amendment guarantees protect sites on which posters threaten those who disagree with them and equip their followers for violence? What about websites threatening violence against white supremacists or those who are accused of committing sexual assault? Courts examining these questions must determine not only whether the speech intends to bring about a bad result—most would agree that intent exists—but also whether the speech incites lawless action that is imminent.

#### **imminent lawless action test (incitement test)**

A standard established in the 1969 *Brandenburg v. Ohio* case, whereby speech is restricted only if it goes beyond mere advocacy, or words, to create a high likelihood of immediate disorder or lawlessness.

## **Freedom of Speech**

The freedom to speak publicly, even critically, about government and politics is central to the democratic process. Citizens cannot participate fully in a political system if they are unable to share information, opinions, advice, and calls to action. Citizens cannot hold government accountable if they cannot criticize government actions or demand change.

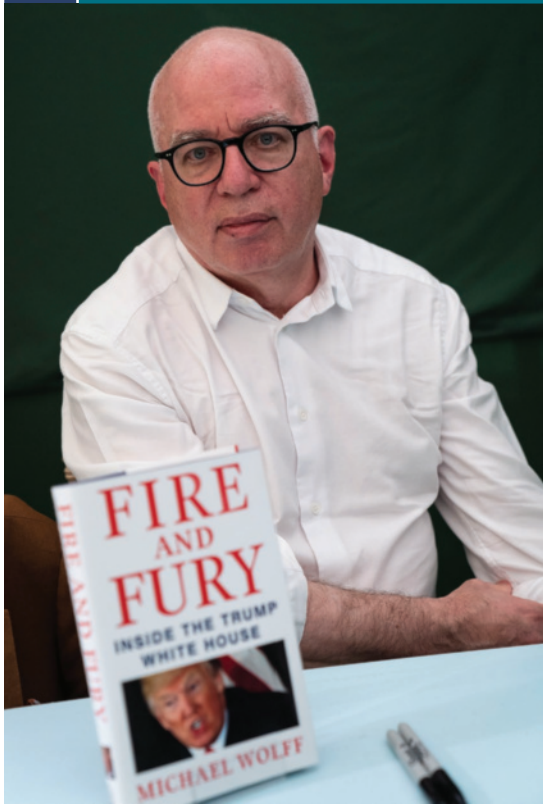
**PURE SPEECH VERSUS SYMBOLIC SPEECH** The Supreme Court has made a distinction between pure speech that is “just words” and advocacy that couples words with actions. With respect to civic discourse, both are important. When speech moves beyond words into the realm of action, it is considered to be **symbolic speech**, nonverbal “speech” in the form of an action such as picketing or wearing an armband to signify a protest.

Unless words threaten imminent lawless action, the First Amendment will likely protect the speaker. But in civic discourse, words are often combined with action. For example, in the 1960s, antiwar protesters were arrested for burning their draft

#### **symbolic speech**

Nonverbal “speech” in the form of an action such as picketing, flag burning, or wearing an armband to signify a protest.





> Michael Wolff is a journalist who wrote an insider tell-all book, based on anonymous sources, that is very critical of the Trump White House. Why does the Constitution guarantee that the government cannot prevent such negative portrayals from being published?

©David Levenson/Getty Images

### AP Key Documents

#### I *Tinker v. Des Moines* (1969)

In *Tinker v. Des Moines* the Court ruled that students have the right to political expression that does not disrupt normal school activities.

cards to demonstrate their refusal to serve in Vietnam, and public high school students were suspended from school for wearing black armbands to protest the war. When the two groups brought their cases to the Supreme Court, the justices had to determine whether their conduct rose to the level of political expression and merited First Amendment protection. Together, these cases help to define the parameters for symbolic speech.

In the first of these cases, *U.S. v. O'Brien*, the justices considered whether the government could punish several Vietnam War protesters for burning their draft cards in violation of the Selective Service Act, which made it a crime to “destroy or mutilate” those cards. The Court balanced the free expression guarantee against the government’s need to prevent the destruction of the cards. Because the cards were critical to the nation’s ability to raise an army, the Court ruled that the government had a compelling interest in preventing their destruction. Moreover, because the government had passed the Selective Service Act to facilitate the draft and not to suppress speech, the impact of the law on speech was incidental. When the justices balanced the government’s interest in making it easy to raise an army against the incidental impact that this law had on speech, they found that the government’s interest overrode that of the political protesters.<sup>20</sup>

In contrast, when the Court considered the other symbolic speech case of this era, *Tinker v. Des Moines*, they found that the First Amendment did protect the speech in question. In this case, the justices ruled that the political expression in the form of the students’ wearing black armbands to school to protest the Vietnam War was protected.<sup>21</sup> On what basis did the justices distinguish the armbands in the *Tinker* case from the draft cards in the *O'Brien* case? They cited legitimate reasons for the government to ban the burning of draft cards

in a time of war; but there were no comparable reasons to ban the wearing of armbands, apart from the school district’s desire to curb or suppress political expression on school grounds. School officials could not show that the armbands had disrupted normal school activities.<sup>22</sup> For that reason, the Court argued, the symbolic speech in *Tinker* warranted more protection than that in *O'Brien*.

The highly controversial case of *Texas v. Johnson* (1989) tested the Court’s commitment to protecting symbolic speech of a highly unpopular nature. At issue was a man’s conviction under state law for burning the American flag during the Republican National Convention in 1984 to emphasize his disagreement with the policies of the administration of President Ronald Reagan (1981–1989). The Supreme Court overturned the man’s conviction, finding that the flag burning was political speech worthy of protection under the First Amendment.<sup>23</sup> After the *Johnson* decision, Congress quickly passed the Flag Protection Act in an attempt to reverse the Court’s ruling. Subsequently, however, in the case of *U.S. v. Eichman* (1990), the Court struck down the new law by the same 5–4 majority as in the *Johnson* ruling.<sup>24</sup>

The decisions in these flag-burning cases were very controversial and prompted Congress to pursue the only remaining legal avenue to enact flag protection statutes—a constitutional amendment. Every other year from 1995 to 2006, the proposed amendment has received the two-thirds majority necessary for approval in the U.S.



House of Representatives, but failed to achieve the same constitutionally required supermajority vote in the U.S. Senate. This issue has apparently been resolved in favor of liberty.

**NOT ALL SPEECH IS CREATED EQUAL: UNPROTECTED SPEECH** The Supreme Court long ago rejected the extreme view that all speech should be free in the United States. Whereas *political speech* tends to be protected against government suppression, other forms of speech can be limited or prohibited.

The courts afford **commercial speech**, that is, advertising statements, limited protection under the First Amendment. According to the Supreme Court, commercial speech may be restricted as long as the restriction “seeks to implement a substantial government interest, directly advances that interest, and goes no further than necessary to accomplish its objective.” Restrictions on tobacco advertising, for example, limit free speech in the interest of protecting the health of society. In 2010, the Supreme Court, in the controversial *Citizens United v. Federal Elections Commission* decision, revised its previous rulings and determined that the First Amendment also protected corporate spending during elections as a form of free speech. Legislation that limits such spending was an unconstitutional banning of political speech.<sup>25</sup>

Other forms of speech, including libel and slander, receive no protection under the First Amendment. **Libel** (written statements) and **slander** (verbal statements) are false statements that harm the reputation of another person. To qualify as libel or slander, the defamatory statement must be made publicly and with fault, meaning that reporters, for example, must undertake reasonable efforts to verify allegations. The statement must extend beyond mere name-calling or insults that cannot be proven true or false. Those who take a legal action on the grounds that they are victims of libel or slander, such as government officials, celebrities, and people involved with specific public controversies, are required to prove that the defendant acted with malice—with knowledge that the statement was false or that they recklessly disregarded the accuracy of the statement.

**Obscenity**, indecent or offensive speech or expression, is another form of speech that is not protected under the First Amendment. After many unsuccessful attempts to define obscenity, in 1973 the Supreme Court developed a three-part test in *Miller v. California*.<sup>26</sup> The Court ruled that a book, a film, or another form of expression is legally obscene if

- the average person applying contemporary standards finds that the work taken as a whole appeals to the prurient interest—that is, tends to excite unwholesome sexual desire;
- the work depicts or describes, in an obviously offensive way, a form of sexual conduct specifically prohibited by an anti-obscenity law;
- the work taken as a whole lacks serious literary, artistic, political, or scientific value.

API

## Source Analysis: Interpreting Images



> The Slants is an Asian-American band that could not register their name because of a federal law prohibiting disparaging terms from being granted a trademark. In a 2017 decision, the Supreme Court found that law to be a violation of free speech. The Slants said they wanted to reclaim a term that had been used as a racial slur. How might this decision impact other uses of disparaging terms? Should the government forbid groups from naming themselves “Abort the Republicans” or “Democrats Shouldn’t Breed” (real groups denied names under this law)?

©Keeton Gale/Shutterstock

### commercial speech

Advertising statements that describe products.

### libel

False written statements about others that harm their reputation.

### slander

False verbal statements about others that harm their reputation.

### obscenity

Indecent or offensive speech or expression.

### fighting words

Speech that is likely to bring about public disorder or chaos; the Supreme Court has held that this speech may be banned in public places to ensure the preservation of public order.

Of course, these standards do not guarantee that people will agree on what materials are obscene. What is obscene to some may be acceptable to others. For that reason, the Court has been reluctant to limit free speech, even in the most controversial cases.

The Court may also ban speech known as **fighting words**—speech that inflicts injury or results in public disorder. The Court first articulated the fighting-words doctrine in *Chaplinsky v. New Hampshire* (1942). Walter Chaplinsky was convicted of violating a New Hampshire statute that prohibited the use of offensive, insulting language toward persons in public places after he made several inflammatory comments to a city official. The Court, in upholding the statute as constitutional, explained the limits of free speech: “These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>27</sup> Thus the Court ruled that, like slander, libel, and obscenity, “fighting words” do not advance the democratic goals of free speech. Cross burning, for example, has been a form of symbolic speech that in the United States has come to represent racial violence and intimidation against African Americans and other vulnerable groups. In 2005, the Supreme Court in *Virginia v. Black* found that a state could ban cross burning when it was used to threaten or attempt to silence other individuals, but that the state law could not assume all cross burnings attempt to communicate that message.<sup>28</sup>

Even the types of “unprotected speech” we have considered enjoy broad protection under the law. Although cigarette ads are banned from television, many products are sold through every media outlet imaginable. Though a tabloid such as the *National Inquirer* sometimes faces lawsuits for the false stories it prints, most celebrities do not pursue legal action because of the high burden of proving that the paper knew the story was false, intended to damage the subject’s reputation, and in fact caused real harm. Even though network television is censored for broadcasting objectionable material, the Supreme Court has ruled that the government cannot ban (adult) pornography on the Internet or on paid cable television channels.<sup>29</sup> And despite continued reaffirmation of the fighting-words doctrine, the Supreme Court has declined to uphold any convictions for fighting words since *Chaplinsky*. In short, the Court is reluctant to do anything that might limit the content of adults’ free speech and expression, even when that speech is unpopular or offensive.

## Freedom of Assembly and Redress of Grievances

The First Amendment says that people have the freedom to assemble peaceably and to seek redress of (compensation for) grievances against the government; yet, there are limits placed on assembly. As the Supreme Court has considered free assembly cases, it has been most concerned about ensuring that individuals and groups can gather to discuss their concerns and that they can take action in the public arena that advances their political goals.

The Court is keenly aware of the need for order in public forums and will clamp down on speech that is intended and likely to incite public unrest and anger. That is one reason the Court has reaffirmed the fighting-words doctrine. Although officials cannot censor speech before it occurs, they can take action to limit speech once it becomes apparent that public disorder is going to erupt. In its rulings, the Court has also allowed content-neutral **time, place, and manner restrictions**—regulations regarding when, where, or how expression may occur. Such restrictions do not target speech based on content, and to stand up in court, they must be

### time, place, and manner restrictions

Regulations regarding when, where, or how expression may occur; must be content neutral.

applied in a content-neutral manner. For example, people have the right to march in protest, but not while chanting into bullhorns at four o'clock in the morning in a residential neighborhood.

The Court's rulings in these various cases illustrate how the government is balancing the freedom of public assembly against other concerns, notably public safety and the right of an individual to be left alone. The Court is carefully weighing the freedoms of one group of individuals against another and attempting to ensure the protection of free public expression.

## Freedom of the Press

Throughout American history, the press has played a crucial role in the larger debate about political expression. Before the War for Independence, when the British monarchy sought to clamp down on political dissent in the colonies, the king and Parliament quickly recognized the urgency of silencing the press. A free press is essential to democratic ideals, and democracy cannot survive when a government controls the press. The First Amendment's guarantees of a free press ensure not only that American government remains accountable to its constituents but also that the people hear competing ideas about how to deal with matters of public concern. Increasingly, ordinary citizens share their views on important political issues on social media.

Ensuring a free press can complicate the work of government. As we have been reminded by the Trump administration, the White House cannot control its press coverage. While this has been a source of frustration of most presidents, President Trump has responded with public expressions of anger and irritation. For instance, in the summer of 2017, President Trump tweeted a video of himself at a wrestling match, throwing a man with the CNN logo over his head to the floor. The president's use of Twitter has been justified by the administration as a way of communicating directly to the public and avoiding a media he perceives to be biased against him. The Committee to Protect Journalists noted its concern that such White House rhetoric "undermines the media in the U.S. and emboldens autocratic leaders around the world."<sup>30</sup>

Certain well-established principles govern freedom of the press in the United States. First and foremost, the courts almost never allow the government to engage in prior restraint. **Prior restraint** means censorship—the attempt to block the publication of material that is considered to be harmful. The Supreme Court established this rule against censorship in 1931 in the landmark case of *Near v. Minnesota*. After editor Jay Near wrote a story in the *Saturday Press* alleging that Jews were responsible for corruption, bribery, and prostitution in Minneapolis, a state judge barred all future sales of the newspaper. The Court overturned the state judge's ruling, finding that the sole purpose of the order was to suppress speech. Because freedom of the press has strong historical foundations, the Court concluded, censorship is clearly prohibited.

In the *Near* ruling, the Court recognized, however, that there might be times when government officials could limit the publication of certain stories. Specifically, such censorship might be justified under extraordinary circumstances related to ensuring public safety or national security or in cases involving obscenity. In reality, though, the Court has disallowed prior restraint in the vast majority of cases. For example, in the most important case examining the national security exception, *New York Times v. U.S. (1971)*, the Court rejected the government's attempt to prevent publication of documents that detailed the history of the United States' involvement in Vietnam. In this case, also known as the *Pentagon Papers*

### ■ prior restraint

A form of censorship by the government whereby it blocks the publication of news stories viewed as libelous or harmful.

### AP KEY DOCUMENTS

#### ■ *New York Times v. U.S. (1962)*

In *New York Times v. U.S.* the Court ruled that national security could not prevent the publication of documents clearly in the public interest.

case, the government argued that censorship was necessary to prevent “irreparable injury” to national security. But the Court dismissed that argument, asserting that full disclosure was in the interest of all Americans and that publication of the documents could contribute to the ongoing debate about the U.S. role in the Vietnam War.<sup>31</sup> In their ruling, the justices recognized that some materials are clearly necessary for full and fair discussion of issues facing the nation, whereas others are far less important to political discourse.

## Freedoms of Religion, Privacy, and Criminal Due Process: Encouraging Civic Engagement

The Constitution’s framers understood that the government they were creating could use its powers to single out certain groups for either favorable or unfavorable treatment. They realized, too, that unequal treatment of that kind could interfere with the creation of community—and with citizens’ engagement within that community. The founders’ commitment to community building and citizens’ engagement lies at the heart of several constitutional amendments in the Bill of Rights. Specifically these are the amendments establishing the freedom of religion, the right to privacy, and the right to due process for individuals in the criminal justice system.

### The First Amendment and the Freedom of Religion

The religion clauses of the First Amendment—the establishment clause and the free exercise clause—essentially do two things. First, they bar the government from establishing or supporting any one religious sect over another, and second, they ensure that individuals are not hindered in the exercise of their religion. Whereas the establishment clause requires that the government be neutral toward religious institutions, favoring neither one specific religion over others nor all religious groups over nonreligious groups, the free exercise clause prohibits the government from taking action that is hostile toward individuals’ practice of their religion. As we now consider, there is tension between these two clauses.

#### ■ establishment clause

The First Amendment clause that bars the government from passing any law “respecting an establishment of religion”; often interpreted as a separation of church and state, but this is increasingly challenged.

**THE ESTABLISHMENT CLAUSE** Stating only that “Congress shall make no law respecting an establishment of religion,” the **establishment clause** does little to clarify what the relationship between church and state should be. The Constitution’s authors wanted to ensure that Congress could not create a national religion, as a number of European powers (notably France and Spain) had done; the framers sought to avoid that level of government entanglement in religious matters. Further, many colonists had emigrated to America to escape religious persecution in Europe, and although many were deeply religious, uncertainty prevailed about the role that government should play in the practice of religion. That uncertainty, too, is reflected in the brevity of the establishment clause. The question arises, does the clause prohibit the government from simply preferring one sect over another, or is it broader, preventing any kind of government support of religion?

This is a crucial question because religious institutions have always been important forums for community building and engagement in the United States. Americans continue to be a very religious people. In 2016, over 75 percent of Americans surveyed said religion was fairly or very important in their lives.<sup>32</sup> But even given

their strong religious affiliations, most Americans believe in some degree of separation between religious organizations and the government. The actual debate has been about how much separation the establishment clause requires.

Over time, scholars and lawyers have considered three possible interpretations of the establishment clause. One interpretation, called separationism, is that the establishment clause requires a *strict separation of church and state* and bars most or all government support for religious sects. Supporters of the strict separationist view invoke the writings of Thomas Jefferson, James Madison, and others that call for a “wall of separation” between church and state.<sup>33</sup> They also point to societies outside the United States in which religious leaders dictate how citizens may dress, act, and pray as examples of what can happen without strict separation.

A second, and more flexible, interpretation allows the government to offer support to religious sects as long as that support is neutral and not biased toward one sect. This interpretation, known as *neutrality* or the *preferential treatment standard*, would permit government support provided that this support extended to all religious groups. The third interpretation is the most flexible and reads the establishment clause as barring only establishment of a state religion. This interpretation, known as *accommodationism*, allows the government to offer support to any or all religious groups provided that this support does not rise to the level of recognizing an official religion.<sup>34</sup>

Which of these three vastly different interpretations of the establishment clause is correct? Over time, the Supreme Court has shifted back and forth in its opinions, usually depending on the kind of government support in question. Overall, the courts have rejected the strictest interpretation of the establishment clause, which would ban virtually any form of aid to religion. Instead, they have allowed government support for religious schools, programs, and institutions if the support advances a secular (nonreligious) goal (such as teaching mathematics) and does not specifically endorse a particular religious belief.

For example, in 1974, the Court upheld a New Jersey program that provided funds to the parents of parochial school students to pay for bus transportation to and from school.<sup>35</sup> The Court reasoned that the program was necessary to help students to get to school safely and concluded that if the state withdrew funding for any of these programs for parochial school students, it would be impossible to operate these schools. The impact would be the hindrance of the free exercise of religion for students and their parents.

In another landmark case, *Lemon v. Kurtzman* (1971), however, the Court struck down a state program that used cigarette taxes to reimburse parochial schools for the costs of teachers’ salaries and textbooks. The Court found that subsidizing parochial schools furthered a process of religious teaching and that the “continuing state surveillance” that would be necessary to enforce the specific provisions of the laws would inevitably entangle the state in religious affairs.<sup>36</sup>

In the *Lemon* case ruling, the Court refined the establishment clause standard to include three considerations.

- Does the state program have a secular, as opposed to a religious, purpose?
- Does it have as its principal effect the advancement of religion?
- Does the program create an excessive entanglement between church and state?

This three-part test is known as the ***Lemon test***. The programs most likely to withstand scrutiny under the establishment clause are those that have a secular purpose, have only an incidental effect on the advancement of religion, and do not excessively entangle church and state.

#### ***Lemon test***

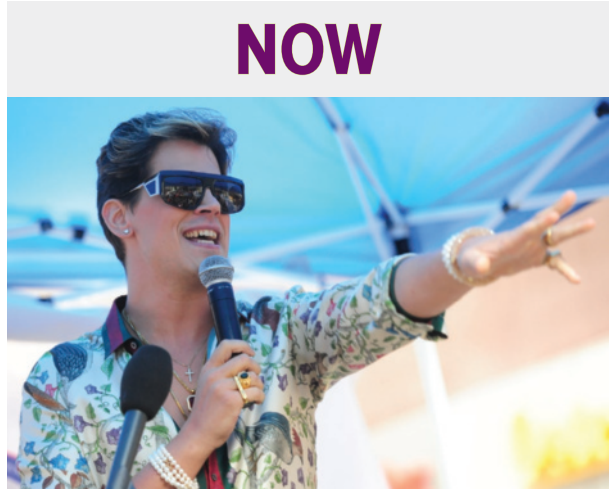
A three-part test established by the Supreme Court in the 1971 case *Lemon v. Kurtzman* to determine whether government aid to parochial schools is constitutional; the test is also applied to other cases involving the establishment clause.



# THEN



# NOW



**AP Source Analysis** Throughout the first decades of the 21st century, the Supreme Court wrestled with protecting student-initiated prayer and study, as demonstrated by this picture of a “Rally Round the Flagpole” prayer. Now the public is wrestling with new issues; in the picture on the right, Milos Yiannopoulos is at an alt-right rally protesting the City University of New York’s selection of Muslim-American activist Linda Sarsour as their commencement speaker. Court challenges to the “rally around the flag” practice at public schools and the court case *Engel v. Vitale* both deal with what 1st amendment clause? If members of Congress disagreed with the ruling by the Supreme Court, what action could they take?

Group prayer: ©Valerie Berta/Journal-Courier/The Image Works; Individual: ©Susan Watts/NY Daily News via Getty Images

More recently, the Court upheld an Ohio program that gave vouchers to parents to offset the cost of parochial schooling.<sup>37</sup> The justices ruled that the purpose of the program was secular, not religious, because it was intended to provide parents with an alternative to the Cleveland public schools. Any aid to religious institutions—in this case, mostly Catholic schools—was indirect, because the primary beneficiaries were the students themselves. Finally, there was little entanglement between the church and state, because the parents received the vouchers based on financial need and then were free to use these vouchers as they pleased. There was no direct relationship between the religious schools and the state.

If a government program offers financial support, the Court has tended to evaluate the program by using either the preferential treatment standard or the accommodationist standard. If a program or policy involves prayer in the schools or issues related to the curriculum, however, the Court has adopted a standard that looks more like strict separatism.

A series of cases beginning with *Engel v. Vitale* (1962) has barred formalized prayer in the schools, finding that such prayer has a purely religious purpose and that prayer is intended to advance religious, as opposed to secular, ideals.<sup>38</sup> For that reason, the Court has barred school-organized prayer in public elementary and secondary schools on the grounds that it constitutes a state endorsement of religion. Student-organized prayer is constitutional because the state is not engaging in any coercion by mandating or encouraging student participation.

## AP KEY DOCUMENTS

### Engel v. Vitale (1962)

In *Engel v. Vitale* the Court ruled that formal prayers in school violate the establishment clause.

### free exercise clause

The First Amendment clause prohibiting the government from enacting laws prohibiting an individual’s practice of his or her religion; often in contention with the establishment clause.

**THE FREE EXERCISE CLAUSE** The tension between the establishment and free exercise clauses arises because the establishment clause bars the state from helping religious institutions, whereas the **free exercise clause** makes it illegal for the government to enact laws prohibiting the free practice of religion by individuals. Establishment clause cases often raise free exercise claims, and so courts must frequently consider whether, by banning state aid, they are interfering with the free exercise of religion.



Although free exercise and establishment cases raise many of the same concerns, they are different kinds of cases, whose resolution depends on distinct legal tests. Because establishment clause cases often center on state aid to religious schools, many involve the Roman Catholic Church, which administers the largest number of private elementary and secondary schools in the country. In contrast, free exercise clause cases tend to involve less-mainstream religious groups, among them Mormons, Jehovah's Witnesses, Christian Scientists, and Amish. These groups' practices tend to be less well known—or more controversial. For example, free exercise clause cases have involved the right to practice polygamy, use hallucinogens, refuse conventional medical care for a child, sacrifice animals, and refuse to salute the flag.

The Supreme Court has refused to accept that the government is barred from *ever* interfering with religious exercise. Free exercise claims are difficult to settle because they require that courts balance the individual's right to free practice of religion against the government's need to adopt some policy or program. First and foremost, the Court has always distinguished between religious beliefs, which government may not interfere with, and religious actions, which government is permitted to regulate. For example, although adults may refuse lifesaving medical care on the basis of their own religious beliefs, they may not refuse medical procedures required to save the lives of their children.<sup>39</sup> More recently, debates over mandatory vaccination laws for students enrolling in public schools have been challenged as a violation of the free exercise of religion protected in the First Amendment. Lower federal courts have found these regulations to be a lawful exercise of the police power;<sup>40</sup> unless there is conflict among the lower courts over this issue, the Supreme Court most likely will not hear this controversy.

In assessing those laws that interfere with religiously motivated action, the Court has distinguished between laws that are neutral and generally applicable to all religious sects and laws that single out one sect for unfavorable treatment. In *Employment Division, Department of Human Resources v. Smith* (1990), the Court allowed the state of Oregon to deny unemployment benefits to two substance-abuse counselors who were fired from their jobs after using peyote as part of their religious practice. Oregon refused to provide benefits because the two men had

# THEN NOW NEXT

## How Does the Changing Religious Affiliation of Americans Affect the First Amendment?

	Then (2000)	Now
Protestant	54%	46.6%
Catholic	24	20.8
Jewish	2	1.9
Islam/Muslim	N/A	.9
Other faith	5	3.5
None	14	22.8

**SOURCE:** All data derived from the General Social Survey: The Association of Religion Data Archive, Pew Research Center, "Religious Landscape Study."

### AP WHAT'S NEXT?

- > What are two clauses from the first amendment dealing with the freedom of religion?
- > How has increasing religious diversity lead to Supreme Court cases like *Wisconsin v. Yoder*?
- > Can you identify another Supreme Court dealing with religious freedom?

been fired for engaging in an illegal activity. The Court concluded that there was no free exercise challenge, because Oregon had good reason for denying benefits to lawbreakers who had been fired from their jobs. The justices concluded that the state was simply applying a neutral and generally applicable law to the men as opposed to singling them out for bad treatment.<sup>41</sup> One consequence of this case was that several states, including Oregon, passed laws excluding members of the Native American Church, who smoke peyote as part of traditional religious rites, from being covered by their controlled-substance laws.

One major change in the free exercise clause has been the extension of the First Amendment constitutional rights to corporations. The 2014 case of *Burwell v. Hobby Lobby* was an appeal of the Affordable Care Act's (Obamacare) requirement that family-owned corporations pay for insurance coverage of birth control for its employees.<sup>42</sup> The two companies, Hobby Lobby and Conestoga Wood Specialties, were owned by families who claimed that they try to run their businesses on Christian principles and that providing contraception coverage burdened their religious liberty. The Court agreed with the companies, but noted the decision applied only to "closely held" for-profit companies run on religious principles. The dissenting justices noted this was the first time the constitutional protection of religious freedom was extended to the commercial world, and more litigation will follow.

In summary, people are free to hold and profess their own beliefs, to build and actively participate in religious communities, and to allow their religious beliefs to inform their participation in politics and civil society. However, individual *actions* based on religious beliefs may be limited if those actions conflict with existing laws that are neutrally applied in a nondiscriminatory fashion. The extension of these rights to some corporations means that our understanding of religious liberty will continue to evolve.

## The Right to Privacy

So far in this section, we have explored the relationship between civil liberties and some key themes of this book: civic participation, inclusiveness, community building, and community engagement. We now shift our focus somewhat to consider the **right to privacy**, the right of an individual to be left alone and to make decisions freely, without the interference of others. Privacy is a core principle for most Americans, and the right to make decisions, especially about intimate or personal matters, is at the heart of this right. Yet the right to privacy is also necessary for genuine inclusiveness and community engagement, because it ensures that each individual is able to act autonomously and to make decisions about how he or she will interact with others.

The right to privacy is highly controversial and the subject of much public debate. In large part, the reason is that this right is tied to some of the most divisive issues of our day, including abortion, aid in dying, and sexual orientation. The right to privacy is also controversial because, unlike the freedoms of speech, the press, assembly, and religion, it is not mentioned explicitly anywhere in the Constitution. A further reason for the debate surrounding the right to privacy is that the Supreme Court has only recently recognized it.

**THE EMERGENT RIGHT TO PRIVACY** For more than 100 years, Supreme Court justices and lower-court judges have concluded that the right to privacy is implied in all the other liberties spelled out in the Bill of Rights. Not until the landmark

### right to privacy

The right of an individual to be left alone and to make decisions freely, without the interference of others.

Supreme Court case *Griswold v. Connecticut* (1965) did the courts firmly establish the right to privacy. The issue in this case may seem strange to us today: whether the state of Connecticut had the power to prohibit married couples from using birth control. In their decision, the justices concluded that the state law violated the privacy right of married couples by preventing them from seeking access to birth control, and the Court struck down the Connecticut prohibition. The Court argued that the right to privacy was inherent within many of the constitutional guarantees, most importantly in the First Amendment freedom of association, the Third Amendment right to be free from the quartering of soldiers, the Fourth Amendment right to be free from unreasonable searches and seizures, the Fifth Amendment protection against self-incrimination, and the Ninth Amendment assurance of rights not explicitly listed in the Bill of Rights. Justice William O. Douglas and his colleagues effectively argued that a zone of privacy surrounded every person in the United States and that government could not pass laws that encroached upon this zone.<sup>43</sup>

In its ruling, the Court asserted that the right to privacy existed quite apart from the law. It was implicit in the Bill of Rights and fundamental to the American system of law and justice. The right to privacy hinged in large part on the right of individuals to associate with one another, and specifically the right of marital partners to engage in intimate association.

In a 1984 case, the Supreme Court ruled that the Constitution protects two kinds of freedom of association: (1) intimate associations and (2) expressive associations.<sup>44</sup> The protection of intimate associations allows Americans to maintain private human relationships as part of their personal liberty. The protection of expressive associations allows people to form associations with others and to practice their First Amendment freedoms of speech, assembly, petition, and religion.

**THE RIGHT TO PRIVACY APPLIED TO OTHER ACTIVITIES** The challenge for the Court since *Griswold* has been to determine which activities fall within the scope of the privacy right, and that question has placed the justices at the center of some of the most controversial issues of the day. For example, the first attempt to extend the privacy right, which raised the question of whether the right protected abortion, remains at least as controversial today as it was in 1973 when the Court decided the first abortion rights case, *Roe v. Wade*.<sup>45</sup> In *Roe* and the many abortion cases the Court has heard since, the justices have tried to establish whether a woman's right to abortion takes precedence over any interests the state may have in either the woman's health or the fetus's life. Over time, the Court has adopted a compromise position by rejecting the view that the right to abortion is absolute and by attempting to determine when states can regulate, or even prohibit, access to abortion. In 1992, the Court established the "undue burden" test, which asks whether a state abortion law places a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."<sup>46</sup> The Court, in 2016, found that state requirements such as requiring doctors to have admitting rights at local hospitals or that abortions could occur only at surgical centers imposed such an undue burden without significantly protecting women's health.<sup>47</sup> Although the Court used this standard to strike down spousal notification requirements, it has upheld other requirements imposed by some states, including waiting periods, mandatory counseling, and parental consent.

The Court has also stepped gingerly around other privacy rights, such as the right to choose one's sexual partners and the right to terminate medical treatment or engage in physician-assisted suicide. Both of these rights have been presented to the Court as hinging on the much broader right to privacy. With respect to the

**AP KEY DOCUMENTS**  
**I *Roe v. Wade* (1973)**

In *Roe v. Wade* the Court ruled that the right to privacy protected abortion.



>Public debate over abortion was not settled by the Supreme Court's 1973 decision in *Roe v. Wade*. In these photos taken more than four decades later, pro-life and pro-choice activists hold signs supporting their differing viewpoints. Abortion rights advocates frame the issue in terms of a woman's right to privacy and to control her own body without interference from the government. Abortion rights opponents view abortion as murder and frame the issue in terms of the rights of an unborn child. Where do you believe the privacy line should be drawn in the question of abortion?

Pro-life: ©Olivier Douliery/Getty Images; Pro-choice: ©B Christopher/Alamy Stock Photo

right to terminate medical treatment, the Court has been fairly clear. Various Court decisions have confirmed that as long as an individual is competent to terminate treatment, the state may not stop him or her from taking this action, even if stopping treatment will lead to the person's death.<sup>48</sup>

The Court has been less clear in its rulings when an incompetent person's right is advanced by another individual, such as a spouse, a parent, or a child. In these circumstances, the Court has accepted the state's argument that before treatment may be terminated, the state may require that the person seeking to end life show that his or her loved one would have wanted that course of action.<sup>49</sup> When a person's wishes are not clear, loved ones may wage legal battles over whether to discontinue life support.

In cases involving the right to engage in consensual sexual activities with a partner of one's choosing, the Supreme Court has also employed a less than absolute approach. For many years, the Court allowed states to criminalize homosexual activity, finding that the right to engage in consensual sexual activity did not extend to same-sex partners.<sup>50</sup> In a 2003 case, *Lawrence v. Texas*, the Court changed course by ruling that the right to engage in intimate sexual activity was protected as a liberty right, especially when the activity occurred inside one's home, and that states could not criminalize this activity.<sup>51</sup> Since that decision, rights activists have worked through the courts and state and federal legislatures to secure for same-sex partners the same rights that heterosexual couples enjoy, including benefits provided by group health insurance and marriage. In the 2015 decision of *Obergefell v. Hodges*, the Supreme Court found that same-sex couples possessed the fundamental right to marry under the Fourteenth Amendment.<sup>52</sup> (See Chapter 5 for further discussion of the ruling.) Despite these rulings, states are still free to prohibit a range of sexual activities, including prostitution, child sexual abuse, and sex in public places.<sup>53</sup> In the Court's view, these activities can be prohibited primarily because they are not consensual or do not take place in the home, a place that accords special protection by the privacy right.

The right to privacy remains very controversial. Cases brought under the right to privacy tend to link this right with some other civil liberty, such as the protection against unreasonable search and seizure, the right to free speech, or the

protection against self-incrimination. In other words, the privacy right, which the justices themselves created, seems to need buttressing by other rights that the Bill of Rights *explicitly* establishes. The explanation for this development may be the contentiousness of Americans' civic discourse about abortion, aid in dying, and other privacy issues. In short, continuing civic disagreement may have forced the Court to fall back on rights that are well established and more widely accepted.

**GOVERNMENT USE OF SOCIAL MEDIA IN INVESTIGATIONS** Public discourse about privacy is constantly evolving as people voluntarily share more and more information about themselves through online networking sites such as Facebook, Pinterest, Twitter, LinkedIn, and Instagram. Users of such sites and bloggers share stories, photos, and videos of themselves—as well as of others, who may be unaware that they are the subject of a posting, a blog, or a video. Civil libertarians worry about the misuse and theft of personal information in a high-tech society where people's financial, employment, consumer, legal, and personal histories are so easily accessible.

In 2013, global media organizations disclosed evidence that the National Security Agency had tracked and reviewed international and domestic phone calls, text messages, and e-mails of an unknown number of Americans without first obtaining a warrant.<sup>54</sup> Social media platforms operated by such entities as Facebook, Apple, Microsoft, LinkedIn, Twitter, and Google are seeking to provide greater transparency as to their cooperation with governmental requests for user information.<sup>55</sup> However, in 2017 Google reported an unprecedented number of governmental requests for personal data from the United States and other nations.<sup>56</sup> Without legislation to determine when and if social media organizations may deny warrantless requests and without legislation that mandates public disclosure of the scope of inquiries, no clear limits exist on the government.

## The Fourth, Fifth, Sixth, and Eighth Amendments: Ensuring Criminal Due Process

The last category of civil liberties that bear directly on civic engagement consists of the criminal due process protections established in the Fourth, Fifth, Sixth, and Eighth Amendments. Does it surprise you that so many of the Bill of Rights amendments focus on the rights of individuals accused of crimes? The context for this emphasis is the founders' concern with how the British monarchy had abused its power and used criminal law to impose its will on the American colonists. The British government had used repeated trials, charges of treason, and imprisonment without bail to stifle political dissent. The founders therefore wanted to ensure that there were effective checks on the power of the federal government, especially in the creation and enforcement of criminal law. As we have seen, the Bill of Rights amendments were incorporated to apply to the states and to their criminal codes through the process of selective incorporation. Thus, criminal due process protections are the constitutional limits imposed on law enforcement personnel.

These four amendments together are known as the **criminal due process rights** because they establish the guidelines that the government must follow in investigating, bringing to trial, and punishing individuals who violate criminal law. Each amendment guides the government in administering some facet of law enforcement, and all are intended to ensure justice and fairness in the administration of the law. Criminal due process is essential to guarantee that individuals can participate in the larger society and that no one person is singled out for better or worse treatment under the law. Like the First Amendment, due process protects

### **criminal due process rights**

Safeguards for those accused of crime; these rights constrain government conduct in investigating crimes, trying cases, and punishing offenders.



political speech and freedom. Without these liberties, government officials could selectively target those who disagree with the laws and policies they advocate.

Moreover, without these rights, there would be little to stop the government from using criminal law to punish those who want to take action that is protected by the other amendments we have examined in this chapter. For example, what good would it do to talk about the freedom of speech if the government could isolate or punish someone who spoke out critically against it without having to prove in a public venue that the speech threatened public safety or national security? The criminal due process protections are essential to ensuring meaningful participation and engagement in the larger community and to safeguarding justice and fairness.

#### THE FOURTH AMENDMENT AND THE PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES

The Fourth Amendment requires police to get a warrant before engaging in a search and guides law enforcement personnel in conducting criminal investigations and in searching an individual's body or property. It has its roots in colonial history—specifically, in the British government's abuse of its law enforcement powers to prosecute and punish American colonists suspected of being disloyal to England.

The Fourth Amendment imposes significant limits on law enforcement. In barring police from conducting any unreasonable searches and seizures, it requires that they show probable cause that a crime has been committed before they can obtain a search warrant. The warrant ensures that police officers can gather evidence only when they have probable cause. Further, a judicially created ruling known as the **exclusionary rule** compels law enforcers to carry out searches properly. Established for federal prosecutions in 1914, the exclusionary rule forbids the courts to admit illegally seized evidence during trial.<sup>57</sup> In the Supreme Court decision of *Mapp v. Ohio* (1961), the exclusionary rule was extended to state court proceedings.<sup>58</sup> Here, the Court overturned an Ohio court's conviction of Dollree Mapp for the possession of obscene materials. Police had found pornographic books in Mapp's apartment after searching it without a search warrant and despite the defendant's refusal to let them in. Critics of the exclusionary rule note that securing a warrant is not always necessary or feasible and that guilty people sometimes go free because of procedural technicalities. They argue that reasonable searches should not be defined solely by the presence of a court-ordered search warrant.<sup>59</sup>

What are "reasonable" and "unreasonable" searches under the Fourth Amendment? Over time, the U.S. Supreme Court has established criteria to guide both police officers and judges hearing cases. In the strictest definition of reasonableness, a warrant is always required: where there is no warrant, the search is considered to be unreasonable. However, the Supreme Court has ruled that even without a warrant, some searches would still be reasonable. In 1984, for example, the Court held that illegally obtained evidence could be admitted at trial if law enforcers could prove that they would have obtained the evidence legally anyway.<sup>60</sup> In another case the same year, the Court created a "good faith" exception to the exclusionary rule by upholding the use of evidence obtained with a technically incorrect warrant, because the police officer had acted in good faith.<sup>61</sup>

More broadly, a warrantless search is valid if the person subjected to it has no reasonable expectation of privacy in the place or thing being searched. From colonial times to the present, the assumption has been that individuals have a reasonable expectation of privacy in their homes. Where there is no reasonable expectation of privacy, however, there can be no unreasonable search, and so the police are not required to get a warrant before conducting the search or surveillance. Since the 1990s, the Court has expanded the situations in which there is

#### ■ exclusionary rule

The criminal procedural rule stating that evidence obtained illegally cannot be used in a trial.



> Jonathan Fleming, who had already served 24 years in prison for a crime he didn't commit, embraces his mother. Disregarding the constitutional rights of the accused can lead to wrongful convictions, like the 50 cases currently under review by the Brooklyn district attorney. Is ensuring that innocent people are not wrongfully convicted worth the societal cost of allowing some guilty people to go free?

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no reasonable expectation of privacy and hence no need for a warrant. For example, there is no reasonable expectation of privacy in one's car, at least in those areas that are in plain view, such as the front and back seats. There is also no expectation of privacy in public places such as parks and stores, because it is reasonable to assume that a person knowingly exposes his or her activities to public view in those places. The same is true of one's trash: because there is no reasonable expectation of privacy in the things that one discards, police may search this material without a warrant.<sup>62</sup>

In instances when there is a reasonable expectation of privacy, individuals or their property may be searched if law enforcement personnel acquire a warrant from a judge. To obtain a warrant, the police must provide the judge with evidence that establishes probable cause that a crime has been committed. Also, the warrant must be specific about the place to be searched and the materials that the agents are seeking. These requirements limit the ability of police simply to go on a "fishing expedition" to find some bit of incriminating evidence.

As society changes, expectations of privacy change as well. For example, technological innovation has given us new technology, such as e-mail and the Internet, and Fourth Amendment law has had to adapt to these inventions. As an example, in 2015, the Supreme Court ruled in *Torrey Dale Grady v. North Carolina* that the placement of a GPS tracking device on a convicted felon in order to monitor his movements is an unlawful search and violation of the Fourth Amendment.<sup>63</sup> Is there a reasonable expectation of privacy in our movements in public spaces? This is an important question, especially in light of citizens' heightened concerns about terrorism and security.

**THE FIFTH AND SIXTH AMENDMENTS: THE RIGHT TO A FAIR TRIAL AND THE RIGHT TO COUNSEL** The Fifth and Sixth Amendments establish the rules for conducting a trial. These two amendments ensure that criminal defendants are protected at the formal stages of legal proceedings. Although less than 10 percent of all charges result in trials, these protections have significant symbolic and

**double jeopardy**

The trying of a person again for the same crime that he or she has been cleared of in court; barred by the Fifth Amendment.

**■ Miranda rights**

A criminal procedural rule, established in the 1966 case *Miranda v. Arizona*, requiring police to inform criminal suspects, on their arrest, of their legal rights, such as the right to remain silent and the right to counsel; these warnings must be read to suspects before interrogation.

**AP KEY DOCUMENTS**

**■ *Gideon v. Wainwright* (1963)**

In *Gideon v. Wainwright* the Court ruled that the right to counsel meant that a lawyer must be provided to those who cannot afford one.

practical importance, because they hold the state to a high standard whenever it attempts to use its significant power to prosecute a case against an individual.

The Fifth Amendment bars **double jeopardy** and compelled self-incrimination. These safeguards mean, respectively, that a person may not be tried twice for the same crime or forced to testify against himself or herself when accused of a crime. These safeguards are meant to protect people from persecution, harassment, and forced confessions. A single criminal action, however, can lead to multiple trials if each trial is based on a separate offense.

The Sixth Amendment establishes the rights to a speedy and public trial, to a trial by a jury of one’s peers, to information about the charges against oneself, to the confrontation of witnesses testifying against oneself, and to legal counsel. The protection of these Fifth and Sixth Amendment liberties is promoted by the **Miranda rights**, based on the Supreme Court decision in *Miranda v. Arizona* (1966).<sup>64</sup> In the *Miranda* case, the Court outlined the requirement that “prior to questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed.” Later cases have created some exceptions to *Miranda* (see Table 4.2).

Together, the Fourth, Fifth, and Sixth Amendments ensure the protection of individuals against abuses of power by the state, and in so doing they promote a view of justice that the community widely embraces. Because these rights extend to individuals charged with violating the community’s standards of right and wrong, they promote a broad sense of inclusiveness—a respect even for persons who allegedly have committed serious offenses, and a desire to ensure that the justice system treats all people fairly.

The Court has considered the community’s views in reaching its decisions in cases brought before it. For example, through a series of Supreme Court cases culminating with ***Gideon v. Wainwright* (1963)**, the justices interpreted the right to counsel to mean that the government must provide lawyers to individuals who are too poor to hire their own.<sup>65</sup> The justices adopted this standard because they came to believe that the community’s views of fundamental fairness dictated this result. Before this decision, states had to provide attorneys only in cases that could result in capital punishment.

**TABLE 4.2** Cases Weakening Protection Against Self-Incrimination

YEAR	CASE	RULING
1986	<i>Moran v. Burbine</i>	Confession is not inadmissible because police failed to inform suspect of attorney’s attempted contacts.
1991	<i>Arizona v. Fulminante</i>	Conviction is not automatically overturned in cases of coerced confession if other evidence is strong enough to justify conviction.
1994	<i>Davis v. U.S.</i>	Suspect must unequivocally and assertively state his right to counsel to stop police questioning.
2013	<i>Salina v. Texas</i>	Accused must explicitly invoke the Fifth Amendment for it to apply.

## THE EIGHTH AMENDMENT: PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT

The meaning of *cruel* and *unusual* has changed radically since the Eighth Amendment was ratified, especially with regard to the imposition of capital punishment—the death penalty. Moreover, Americans have always disagreed among themselves about the death penalty itself. Throughout the country’s history, citizens and lawmakers have debated the morality of capital punishment as well as the circumstances under which the death penalty should be used. Central to the public debate have been the questions of which crimes should be punished by death and how capital punishment should be carried out.

Generally, the Court has supported the constitutionality of the death penalty. An exception was the landmark case *Furman v. Georgia* (1972), in which, in a 5–4 decision, the Court suspended the use of the death penalty.<sup>66</sup> Justices Brennan and Marshall believed the death penalty to be “incompatible with evolving standards of decency in contemporary society.” The dissenting justices argued in turn that capital punishment had always been regarded as appropriate under the Anglo-American legal tradition for serious crimes and that the Constitution implicitly authorized death penalty laws because of the Fourteenth Amendment’s reference to the taking of “life.” The decision came about as a result of concurring opinions by Justices Stewart, White, and Douglas, who focused on the arbitrary nature with which death sentences had been imposed. The Court’s decision forced the states and the national legislature to rethink their statutes for capital offenses to ensure that the death penalty would not be administered in a capricious or discriminatory manner. After states changed their laws regarding the death penalty in order to address legal processes that were unfair or arbitrary, the Court allowed the death penalty to be reinstated in the states (*Gregg v. Georgia*, 1976).<sup>67</sup>

Over time, the courts have also interpreted the Eighth Amendment as requiring that executions be carried out in the most humane and least painful manner. Public discourse and debate have strongly influenced thinking about which methods of execution are appropriate.

Recent studies, however, suggest that states’ administration of the sedative sodium pentothal has left individuals conscious and in agony but paralyzed and thus unable to cry out while they are dying. But in 2008, the Supreme Court ruled in a 7–2 decision that lethal injection does not constitute cruel and unusual punishment,<sup>68</sup> paving the way for 10 states, which had halted lethal injections pending the case’s outcome, to resume executions. The 2008 decision of *Baze v. Rees* marked the first time the Supreme Court reviewed the constitutionality of a method of execution since 1878, when the Court upheld Utah’s use of a firing squad.<sup>69</sup>

After the execution of Clayton Lockett using a three-drug lethal injection resulted in a 40-minute conscious death, Oklahoma created a new death protocol. One remaining option was a drug used in the Lockett execution—midazolam. Twenty-one inmates on death row argued that the use of midazolam violated the Eighth Amendment. The Court found that the Eighth Amendment did not guarantee a pain-free execution and that medical evidence did not demonstrate that midazolam created a risk of severe pain in light of Oklahoma’s new safeguards.<sup>70</sup>

## Civil Liberties Now

Public discussion about the proper balance of individual freedom with public action extends from First Amendment freedoms to gun laws to the rights of the accused. Debate has intensified as the nation struggles with the threat of terrorism

and a growing protest culture at home. Citizens and government leaders are rethinking their beliefs about the proper scope of governmental power.

Over the course of U.S. history, liberty and security have coexisted in a state of tension. This tension has become more acute as the federal, state, and local governments have taken certain actions that directly intrude on individual freedoms. New technologies have increased the government's capacity to invade citizens' privacy, and a heightened fear of internal and external threats has been used to justify such invasions. The government and many citizens argue that these actions are necessary to protect life and property. But civil libertarians shudder at what they see as unprecedented violations of individual freedoms and rights.

## Perceived Intrusions on Free Speech and Assembly

Although the tension between liberty and order has been clear since the origins of our republic, this conflict has become more intense in recent years. For instance, the Foreign Intelligence Surveillance Act (FISA) of 1978, which empowers the government to conduct secret searches where necessary to protect national security, significantly broadened the powers of law enforcement agencies to engage in investigation. Agencies must go before a designated court, the Foreign Intelligence Surveillance Act Court, to justify a secret search. Civil libertarians are concerned about the FISA court's concealed location and sealed records, as well as its judicial proceedings, in which the suspect is never told about the investigation and probable cause is not required to approve surveillance or searches of any person suspected of having some link to terrorism.

Following September 11, 2001, a number of government agencies engaged in the surveillance of political groups in the United States. In late 2005, the media exposed a program by the Bush administration and the National Security Agency (NSA) to target U.S. civilians for electronic surveillance without judicial oversight. Members of the Bush administration claimed that they had monitored only communications where one party was suspected of links to terrorism and was currently overseas. Beginning in 2005, however, the American Civil Liberties Union (ACLU) issued a series of reports demonstrating that the Federal Bureau of Investigation (FBI) spied not only on people suspected of taking part in terrorist plots but also on individuals involved in peaceful political activities.<sup>71</sup> The ACLU has released similar reports describing the Pentagon's database of peaceful war protesters.<sup>72</sup>

The ACLU and other critics of the domestic surveillance program have argued that the federal government is targeting political protest, not domestic terrorism plots. Opponents of the policy warn that the FBI and other agencies are infringing upon free speech, assembly, and expression. But employees of the NSA and the Department of Justice have defended the government's expanded investigation and enforcement activities, claiming that the threats to national security are grave and that the government must be given the power it needs to protect against these dangers.<sup>73</sup>

## Perceived Intrusions on Criminal Due Process

Attacks in Europe and across the globe, isolated attacks in the U.S. from people claiming sympathies with terrorist organizations and numerous mass shootings, have meant many Americans are willing to accept some infringement on their freedoms if it makes them safer. These citizens assume that criminal activity may be afoot and that the surveillance is not being used to target groups that are politically unpopular or critical of the administration. Much of the debate about the



surveillance activities of the FBI and other groups centers on the distinction between criminally active groups and politically unpopular groups. How do we know which groups the federal government is using its powers to investigate?

To what extent must administration officials provide evidence of criminal intent before placing a suspect under surveillance? Since September 11, 2001, the laws that govern domestic spying have been modified in such a way that the government has much more leeway in conducting searches and investigations, even where there is no proof of criminal activity.

One example is the USA PATRIOT Act, which allowed the FBI and other intelligence agencies to access personal information and records without getting permission from, or even informing, targeted individuals.<sup>74</sup> Much of the data come from private sources, which are often ordered to hand over their records.

On July 28, 2007, President George W. Bush (2001–2009) called on Congress to pass legislation to reform the FISA in order to ease restrictions on the surveillance of terrorist suspects in cases where one party or both parties to the communication are located overseas. The Protect America Act of 2007 essentially legalized ongoing NSA practices.<sup>75</sup> Under the act, the U.S. government may wiretap without FISA court supervision any communications that begin or end in a foreign country. The act removes from the definition of “electronic surveillance” in FISA any surveillance directed at a person reasonably believed to be located outside the United States. This means that the government may listen to conversations without a court order as long as the U.S. attorney general approves the surveillance. Supporters stress that flexibility is needed to monitor the communications of suspected terrorists and their networks. Critics, however, worry that the law is too vague and provides the government with the ability to monitor any group or individual it opposes, regardless of whether it has links to terrorism.

In 2009, the Inspectors General of the Department of Defense, the Department of Justice, the CIA, the NSA, and the Office of the Director of National Intelligence revealed that the surveillance program had a much larger scope than previously believed.<sup>76</sup> Edward Snowden, an IT contractor with the NSA, downloaded approximately 200,000 classified documents revealing the NSA’s large-scale surveillance of both American citizens and residents of other countries. These meta-data collections included most phone calls made in the U.S., e-mail, Facebook, text messages, raw Internet traffic, and an unknown number of phone conversations. In 2013, Snowden fled the U.S. and began slowly sharing this information with *The Guardian* and *The Washington Post*.

The USA Freedom Act was signed into law in 2015, renewing a number of expired elements of the PATRIOT Act until 2019. These controversial aspects included roving wiretaps, the capacity to search business records, and the surveillance of so-called lone wolves, persons who while suspected of terrorist actions do not appear to be formally related to organized terrorist groups. The new law also amended a part of the USA PATRIOT Act to prevent the NSA from collecting telephone data from the masses and then storing the data perpetually. Under the USA Freedom Act, phone companies store the data and the federal government can access data of specified individuals by obtaining a warrant.

Although many Americans are concerned about domestic surveillance, especially in situations where it targets political speech and expression, these laws remain on the books, and this surveillance likely will continue. For the time being, the line between suspected criminal activity and purely political expression remains blurred. Civic discourse about how to balance liberty and national security continues to evolve as Americans consider how much freedom they should sacrifice to protect public safety.

Another place the nation has observed intrusions on criminal due process has been in the response of police forces to public outcry against perceived unjustified killings of civilians. In part because of the visibility of the Black Lives Matter movement (see Chapter 5 for a more detailed discussion) and cell phone videos made public over social media, the public has called for greater police accountability in their use of deadly force. After the police shooting in Ferguson, Missouri, of Michael Brown in 2014, the accompanying protests, additional high-profile shootings, and a Department of Justice investigation of local police practices, the arguments for police accountability have expanded beyond the Black and Latino communities where they originated and become part of a national discussion. As activists recorded similar fatalities from across the country, a disproportionate pattern of officers killing persons of color was evident.

In response to such events, the use of body cameras for police officers has become policy in many communities. The federal government has provided \$41 million to fund cameras, and cities are seeking to similarly equip their officers; body cameras are the nation's primary response to claims of systemic racism and police abuse.<sup>77</sup> While these new policies had the stated intention of protecting vulnerable populations, there are no national uniform guidelines of how this equipment can be used. Organizations including the Leadership Conference on Civil and Human Rights are concerned that this taping of civilians (but not of police actions) could simply become a means of government surveillance, absent careful regulations.<sup>78</sup> As this technology becomes integrated into local law enforcement communities, this question becomes increasingly significant: How can we ensure that it improves the quality of policing and relationships with citizens without enabling police to profile and track people of color?

## Free Speech on Campus

After a very contentious and polarizing 2016 presidential election season, some of the nation's elite public universities struggled with the meaning and requirements of free speech on campus. Student bodies are more ethnically, racially, and socioeconomically diverse than in previous generations, and these student groups seek to have a voice on campus. Universities are pressured to intellectually welcome traditionally marginalized student voices and value their perspectives on campus, a place from which they had historically been excluded. At the same time, a newly empowered conservative movement, particularly those on the alt-right who are galvanized by white supremacy and threatened by a more diverse and multicultural society, are calling for greater visibility on college campuses. Using the First Amendment to protect their speech, they have challenged public universities to allow their voices to be heard. Students of color and their allies feel they can't be silent because the alt-right is an "existential threat" seeking to destroy their very existence.<sup>79</sup>

For instance, at California State University at Fullerton, Milo Yiannopoulos—an openly gay, former editor at the conservative media outlet Breitbart—who is known for his misogynistic, racist, and homophobic speeches and posts, spoke to an audience of 800 in October 2017. Sponsored by College Republicans, his presence led to fights between protesters and attendees, resulting in seven arrests despite the university's claim that dozens of police officers patrolled the event. The enhanced police presence was considered essential because prior events with polarizing speakers at campuses across the country had resulted in violent responses from protesters, including fires and window smashing. Universities canceled his events, and Yiannopoulos has withdrawn.<sup>80</sup>

## Should College Campuses Be Allowed to Limit Speech?

**The Issue:** The faculty and administrators of public universities are struggling with the meaning of the First Amendment's free speech protections on college campuses. As student bodies become more diverse, students expect to have their identities and beliefs treated with respect, and current student bodies often do not want to hear perspectives that are directly different from their own. Speech in the United States has become more polarized and extreme, and speakers who gain fame from social media often are not temperate or reasoned in their analysis, but focus on being provocative.

**All Speech Should Be Allowed:** Without exposure to sometimes offensive and difficult views, future Americans will not be capable of engaging in a public debate that forces one to confront contrary perspectives. In light of our great polarization as a nation, the onus is on universities to educate our students to be capable citizens in our democracy. And at the heart of our democracy is the First Amendment, with its guarantee that all citizens can participate in the debates that will direct our governance.

Free speech has historically been essential to advancing equal rights and political equality. Students do not know the history of free speech or the ways in which contrary views have been shut down and dissenters persecuted by the government. The First Amendment and the value of academic freedom are clear. The Supreme Court clearly states that public institutions cannot punish speech or exclude speakers based on the content of their speech. Campuses can regulate where and when the speech occurs to prevent the disruption of learning, and counter-demonstrations are also protected. And just because speakers can express hateful speech, campuses do not have to agree with ideas reflected in the speech and can always denounce the hate behind it.

**Some Speech Should Not Be Allowed:** Many students want campuses to stop offensive speech and believe that campus officials have the power to do so. Pew Research Institute

found in a 2015 survey that 40 percent of college students believe that the government should prevent people from making statements offensive to minority groups. They want to make campuses inclusive for all, and they know that hate speech is harmful, especially to those who have been traditionally excluded from higher education. The university is a special place. It exists to educate and create knowledge, both of which require the evaluation of the quality of ideas. We teach students to do this and grade them on the merit of their own arguments and understandings. Faculty teach content discrimination, and their ideas are evaluated based on their judgments regarding content. A classroom and the university are not an open forum. They promote freedom of ideas, but this does not mean that all ideas have equal value; universities must teach students the skill of facing and evaluating threatening and dangerous ideas. This does not mean that students should be exposed to abuse and threatening language. For a university to do its job, it must encourage and tolerate offensive ideas while rejecting and refusing personal incivility.

### What Do You Think?

1. Is there a difference between speakers sponsored by professors and departments versus those sponsored by student organizations? Explain your answer.
2. What role should a university play in distinguishing between the quality of ideas and the manner in which they are delivered?
3. Does the First Amendment mean something different at a university than it does in a city park?
4. How should universities prepare students to confront ideas they see as "threatening and dangerous"?

**SOURCES:** Robert C. Post, "There Is No 1st Amendment Right to Speak on a College Campus," *Vox*, December 31, 2017, and Erwin Chemerinsky, "Hate Speech Is Protected Free Speech, Even on College Campuses," *Vox*, December 26, 2017.

These circumstances have raised new questions around the First Amendment and free speech. When speakers—whether liberal or conservative—use abusive and threatening language toward specific groups, does the First Amendment protect them from the government (or state universities) exercising content discrimination? If such controversial speakers as Yiannopoulos and white supremacist Richard Spencer attract counterprotests requiring states to spend much additional

money for security, is this considered a legitimate state regulation of the time, place, and manner of speech? When a university allows speakers to appear who offend or threaten students' identities, is it an endorsement of that speech?

## Conclusion

# Thinking Critically About What's Next for Civil Liberties

At the core of the U.S. political and legal system lies a strong belief in individual liberties and rights. This belief is reflected in the Bill of Rights, the first 10 amendments to the Constitution. The freedoms therein are at the heart of civic engagement and ensure that individuals can freely participate in the political and social life of their communities. But these freedoms are also malleable, and at times the government has starkly limited them, as when officials perceive a threat to national security.

The inevitable tension between freedom and order is heightened as Americans and their government struggle to protect essential liberties while guarding the nation against future terrorist attacks and internal violence. Debates over enhanced Second Amendment rights in a culture of increasing mass shootings remain unresolved and continue to mobilize groups to protest and campaign. Privacy continues to be a concern of citizens as Internet providers create new services that consumers both demand and desire. Tension between national security and personal freedom is reflected in contemporary debates over free speech and hate speech.

Meanwhile, governmental mining of private information through warrantless surveillance of social media sites, as well as the increased reliance on police body cameras, raises new questions regarding the limits of liberty. The issues we confront will continue to evolve as we struggle to maintain the commitment to liberty that defines our nation while preserving the country itself.

## AP Key Terms and Documents

Use the terms below with a **I** to focus your study of AP U.S. Government and Politics key concepts and terms in this chapter.

bad tendency test 127	<b>I</b> free exercise clause 136	obscenity 131
<b>I</b> civil liberties 119	<b>I</b> <i>Gideon v. Wainwright</i> (1963) 144	<b>I</b> prior restraint 133
<b>I</b> clear and present danger test 127	<b>I</b> <i>habeas corpus</i> 127	right to privacy 138
clear and probable danger test 128	imminent lawless action test (incitement test) 129	<b>I</b> <i>Roe v. Wade</i> (1973) 139
commercial speech 131	<i>Lemon</i> test 135	<b>I</b> <i>Schenck v. U.S.</i> (1919) 127
<b>I</b> criminal due process rights 141	<b>I</b> libel 131	<b>I</b> selective incorporation 123
double jeopardy 144	marketplace of ideas 126	<b>I</b> slander 131
<b>I</b> due process 120	<b>I</b> <i>McDonald v. Chicago</i> (2010) 124	<b>I</b> symbolic speech 129
<b>I</b> <i>Engel v. Vitale</i> (1962) 136	<b>I</b> Miranda rights 144	time, place, and manner restrictions 132
<b>I</b> establishment clause 134	<b>I</b> <i>New York Times Company v. U.S.</i> (1971) 133	<b>I</b> <i>Tinker v. Des Moines</i> (1969) 130
<b>I</b> exclusionary rule 142		total incorporation 122
fighting words 132		

## AP Test Practice

### Multiple Choice Questions

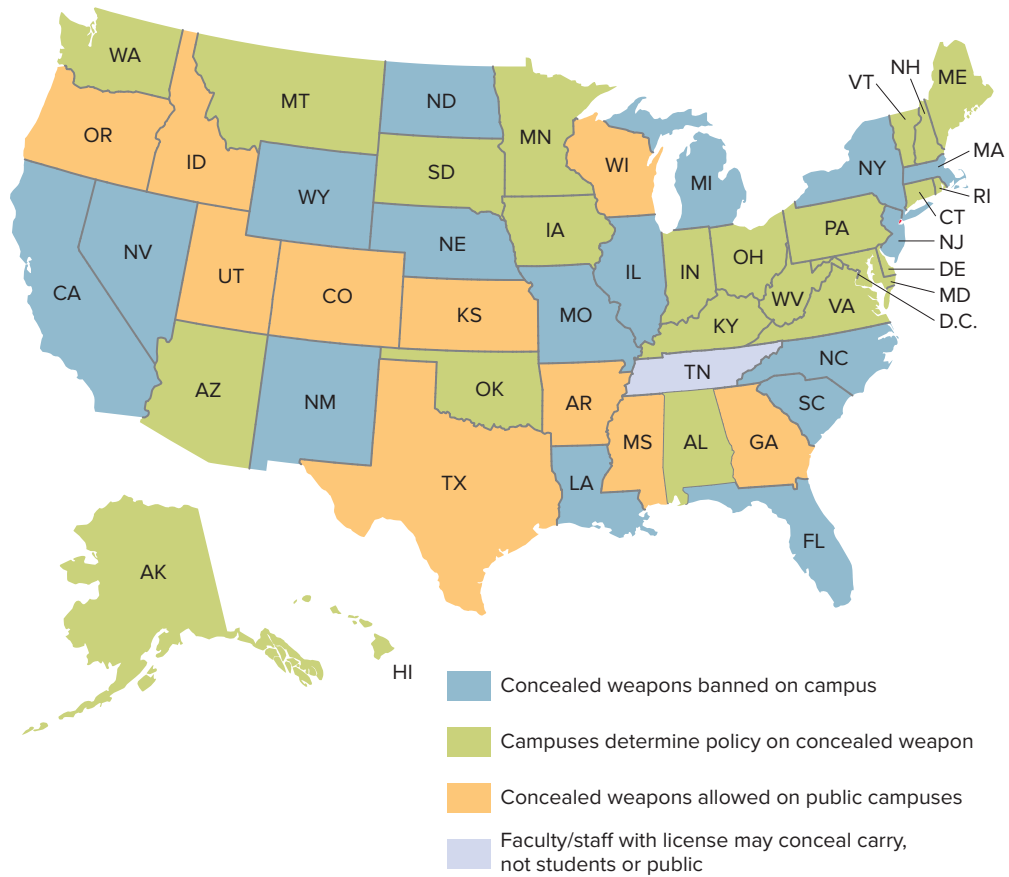
1. The free exercise clause of the first amendment to the Constitution can be limited when actions  
(A) Conflict with longstanding traditions and laws  
(B) Advance the religion of one over another  
(C) Create heightened scrutiny  
(D) Prohibit a religious group from forming
2. Which of the following is true about selective incorporation?  
(A) It has been a key enumerated component of the Constitution  
(B) It incorporates state constitutions to the national government  
(C) It requires that the Bill of Rights be applied to the states on a case by case basis  
(D) It requires that all aspects of the Bill of Rights be applied to the states
3. Held that reciting the Lord's Prayer or mandatory reading from the Bible in public school violates the First Amendment and the Establishment Clause  
(A) *Lemon v. Kurtzman* (1967)  
(B) *School District of Abington v. Schempp* (1963)  
(C) *Gitlow v. New York* (1925)  
(D) *Engel v. Vitale* (1962)



4. Which of the following is an accurate comparison of civil rights and civil liberties?

Civil Rights	Civil Liberties
(A) Actions the government takes to protect individuals from discrimination	Protect citizens from government interferences
(B) Established by the Bill of Rights	Established through law
(C) Personal freedoms	Government restrictions
(D) The right to free speech and assembly	Voting Rights Act of 1965

Questions 5 and 6 refer to the map below.



**Concealed Carry Laws and College Campuses**

5. Which of the following best describes the information on the map?
- (A) The majority of states ban weapons on campus.
  - (B) The majority of states allow weapons on campus.
  - (C) There is a mix of laws on weapons on campus and no version dominates.
  - (D) Trained faculty are allowed to carry on most campuses.
6. Which of the following Supreme Court cases is most relevant to the topic of the map?
- (A) *Burwell v. Hobby Lobby*
  - (B) *Engel v. Vitale*
  - (C) *New York Times v. Sullivan*
  - (D) *McDonald v. Chicago*
7. *Lemon v. Kurtzman* and *Wisconsin v. Yoder* are both examples of an individual's right to
- (A) Symbolic speech
  - (B) Practice their religious beliefs
  - (C) Slander
  - (D) Political speech

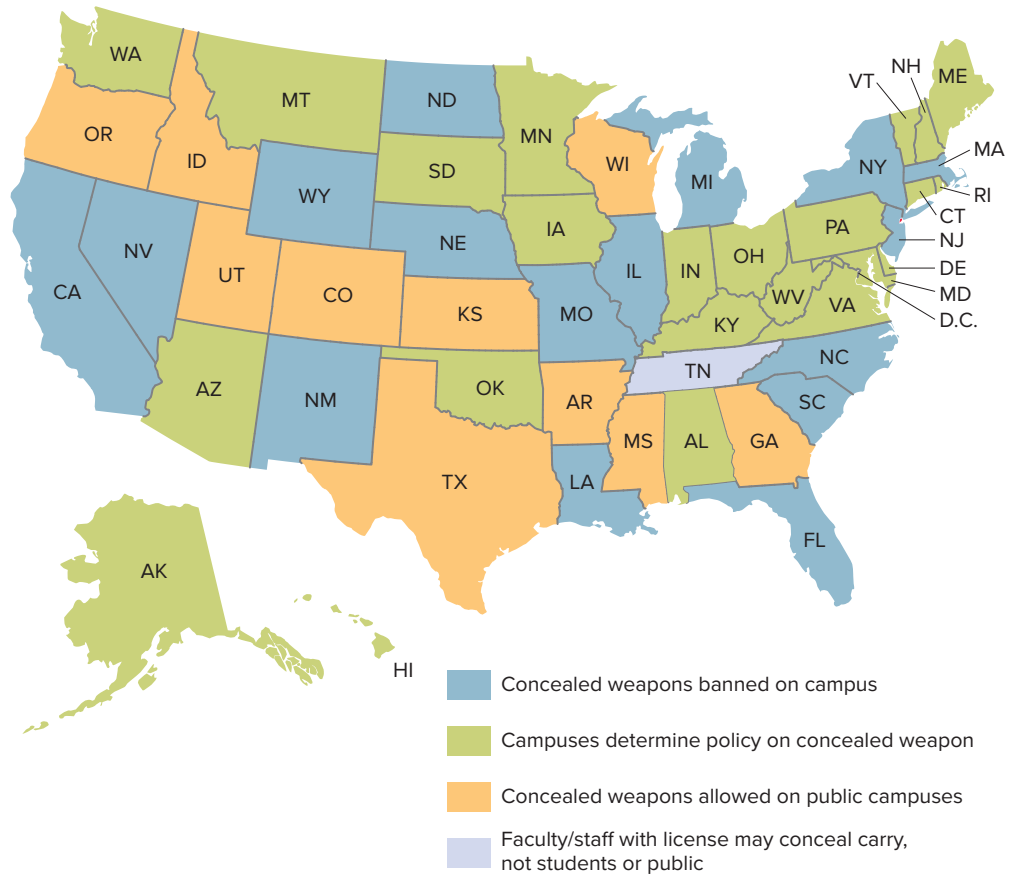
### Free Response Questions: SCOTUS Comparison

In *The Church of Lukumi Babalu Aye v. City of Hialeah* (1993), congregants of The Church of Lukumi Babalu Aye practiced Santeria, which uses animal sacrifice as a form of worship. The City of Hialeah passed a city ordinance prohibiting possession of animals for sacrifice or slaughter, with specific exemptions for state-licensed activities.

In their ruling, the Supreme Court stated that the city ordinance singled out the activities of the Santeria faith and were neither neutral nor generally applicable. In passing the ordinance, the city of Hialeah targeted religious behavior.

- (A) Identify the constitutional clause that is common to both *The Church of Lukumi Babalu Aye v. City of Hialeah* (1993) and *Wisconsin v. Yoder* (1972).
- (B) Based on the constitutional clause identified in part A, explain why the facts of *The Church of Lukumi Babalu Aye v. City of Hialeah* led to the same holding as in *Wisconsin v. Yoder*.
- (C) Current U.S. law bans bigamy and polygamy despite the fact that it is practiced by some religious groups. Using the ruling from the cases above, explain why these laws have been upheld by the Supreme Court.

## Free Response Questions: Quantitative



### Concealed Carry Laws and College Campuses

- Identify the most common type of concealed carry laws on college campuses in the United States
- Describe a similarity or difference in concealed carry laws by state or region, as illustrated in the information graphic, and draw a conclusion about that similarity or difference.
- Explain how concealed carry laws on college campuses as shown in the information graphic demonstrates the principle of federalism.

### Free Response Questions: Argument

Develop an argument in which you decide whether the government is justified in taking actions limiting the freedom of citizens to ensure order.

In your essay, you must:

- Articulate a defensible claim or thesis that responds to the prompt and establishes a line of reasoning.
- Support your claim with at least TWO pieces of accurate and relevant information:
  - At least ONE piece of evidence must be from one of the following foundational documents:
    - The Constitution of the United States (including the Bill of Rights and subsequent Amendments)
    - Brutus 1
    - Federalist No. 51
- Use a second piece of evidence from another foundational document from the list or from your study of the electoral process
- Use reasoning to explain why your evidence supports your claim/thesis
- Respond to an opposing or alternative perspective using refutation, concession, or rebuttal