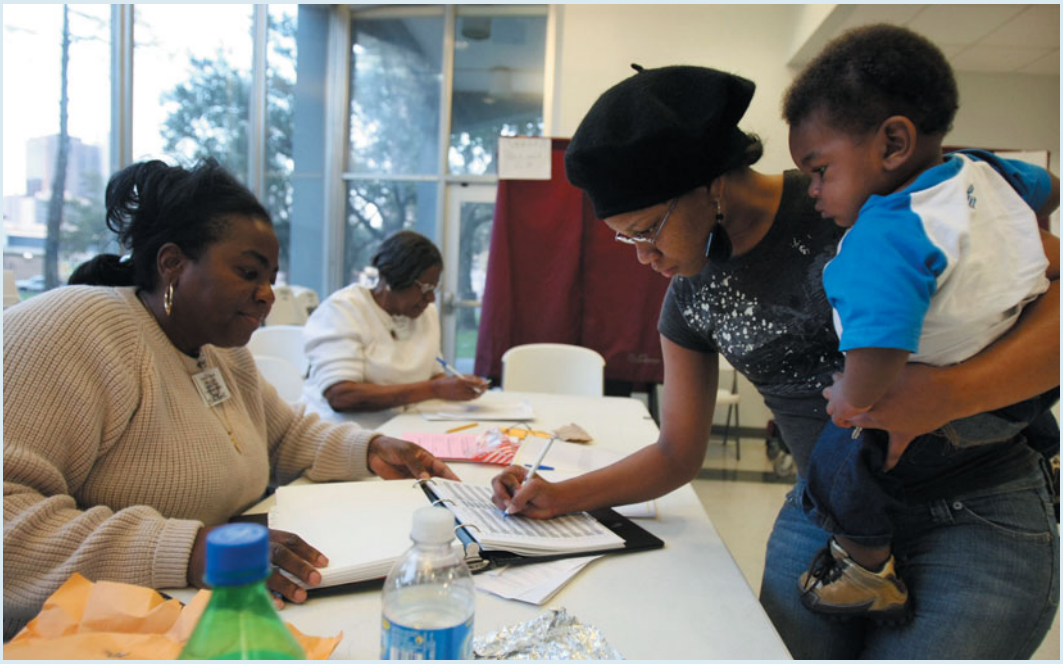
CHAPTER 5

Rights



Voters sign to cast primary ballots in New Orleans in 2008. (Mario Tama/Getty)

The nation has suffered a terrible wound, and its enemies aim to do worse. Citizens demand both security and revenge. Can basic constitutional rights and guarantees be curbed in what many people believe is an emergency? Must the nation stand defenseless against terrorists who use our very freedoms against us? These were the questions the United States faced after 9/11 and the speedy—some say hasty—passage of the Patriot Act, which increased government surveillance of anyone deemed suspicious. The Constitution, as many have noted, "is not a suicide pact." Especially troubling were the "enhanced interrogation techniques" authorized by the Bush administration, which included "waterboarding," simulated drowning used by the Spanish Inquisition. Can rights be abrogated for national security?

Questions to Consider

1. What are constitutions and constitutionalism?
2. What makes something a "right"?
3. Should constitutions specify social and economic rights?
4. How can the very short U.S. Constitution still work in the modern age?
5. Do most constitutions have "checks and balances"?
6. How has the U.S. Constitution changed over time?
7. Should outlawing hate speech trump free speech?
8. Should terrorist suspects have any rights?
9. How did 9/11 alter the U.S. climate for rights? Has this happened before?

This was not a new problem in U.S. history, which has seen similar restrictions on freedoms in other tense situations. Every political system has a problem establishing and limiting power, especially in times of stress. A fair balance between government powers and civil liberties and between the wishes of the majority and the rights of the **minority** are not easy choices. For example, may states ban same-sex marriages, or does that deny homosexuals equal rights? And if one state allows such marriages, must other states recognize them as legal? May federal agencies survey telephone calls, e-mails, and the transfer of funds—without warrants—to try to detect terrorists?

These questions raise the issues of rights and political power. Most Americans would agree that a Supreme Court decision is law even if Congress dislikes it. We will probably disagree, though, over whether Muslims praying at the airport should be kicked off their flight on the suspicion that they might blow up the plane. Should special attention be paid to Middle Eastern–looking men who might, just might, be terrorists? And if they are not terrorists, do they have the right to sue their accusers? How do we determine the limits of political power and balance the needs

of the majority with the rights of individuals and minorities? Some guidelines are provided by traditions, by **statutes**, and above all by national constitutions, which lay down the basic rules for governing.

CONSTITUTIONS IN THE MODERN WORLD

In common usage, a **constitution** is a written document outlining the structure of a political system. Political scientists define "constitution" as the rules and customs, either written or unwritten, legally established or extralegal, by which a government conducts its affairs. Almost all nations have constitutions because they operate according to some set of rules. In chaotic, corrupt, or dictatorial systems, constitutions may not count for much. Afghanistan, divided by armed tribes and warlords, has not been able to implement its new constitution. In Congo (formerly Zaire), Mobutu allowed nothing to limit his stealing of the country's wealth. And Stalin in 1936—precisely when he began his bloody purges—set up a Soviet constitution that looked fine on paper but was a trick to fool the gullible. A few countries like Britain and Israel have no single written document but still have constitutions. British customs, statues, precedents, and traditions are so strong that the British government considers itself bound by practices developed over the centuries. Thus, Britain has a constitution.

minority Subgroup distinct by background, viewpoint, or practice within the larger society.

statute An ordinary law passed by a legislature, not part of the constitution.

constitution Basic rules that structure a government, usually written.

Most constitutions now also specify individual rights and freedoms. Except for the U.S. Constitution, this has been a more recent thing. Canada got its Charter of Rights and Freedoms only in 1982. Britain got the equivalent only in 2000, when it adopted the European Convention on Human Rights. Before that, British rights and freedoms were not so clear.

Constitutions are supposed to establish the forms, institutions, and limits of government and balance minority and majority interests. Not all function that way. Political scientists study not only what is written but what is actually practiced. The Constitution of the United States, for example, is very short and leaves much unsaid. Its seven articles mostly define the powers of each branch of government; the subsequent 27 amendments broadly define civil rights but leave much open for interpretation.

In contrast, most constitutions written since World War II have remarkable detail. The postwar Japanese constitution, which was drafted by the U.S. military government in five days in 1946, contains 40 articles on the rights and duties of the people alone, among them the right to productive employment, a decent standard of living, and social welfare benefits—a sharp contrast to the general values of "justice . . . domestic tranquility . . . common defense . . . general welfare . . . liberty" outlined in the American Preamble. Article I of the postwar German constitution (the Basic Law) also has a long list of rights, including not only fundamental legal and political freedoms but also social and economic safeguards, including state supervision of the educational system and public control of the economy.

The 1988 Brazilian constitution enumerates many rights—40-hour workweek, medical and retirement plans, minimum wages, maximum interest rates, environmental protection, you name it—that Brazil's economy cannot afford. These rights can block needed economic reforms. Many now believe that detailed social and economic rights should never have been put into the constitution; they should have been passed as statutes or left to the workings of the market. Rights that cannot be fulfilled are common in newer constitutions, whose drafters thought they could fix social and economic problems.

Britain may be able to get by with no written constitution, although the British government is thinking about drafting one. The United States manages to function with a very general constitution. In both Britain and the United States, the details are filled in by usage over time. But most recently established nations commit themselves to long written constitutions that try to spell out everything in detail.

The Highest Law of the Land

Nations adopt constitutions for the same reason that the ancient Mesopotamian lawgiver Hammurabi codified the laws of Babylon: to establish a supreme law of the land. Constitutions state the fundamental laws of society and are not meant to be easily revised. They are yardsticks by which activities of the government or the people are measured. A legislature can pass a law one year and repeal it the next, but amending the constitution is made deliberately much harder. In Sweden, constitutional amendments must be passed by two successive legislatures with a general election in between. Amending the U.S. Constitution is even more difficult. The most common procedure requires the approval of two-thirds of both the Senate and the House of Representatives, then ratification by three-fourths of the state legislatures. The fact that our Constitution has been amended only 17 times since the adoption of the Bill of Rights in 1791 illustrates how difficult the amendment procedure is. (The last, the Twenty-Seventh Amendment of 1992, specified no congressional pay raises without an election in between.) The Equal Rights Amendment failed to pass in 1983 because fewer than three-fourths of the state legislatures voted to ratify it.

COMPARING ■ THE DANGERS OF CHANGING CONSTITUTIONS

Beware the country that keeps changing its constitution; it is a sign of instability and indicates that no constitution has rooted itself into the hearts and minds of the people. France since the Revolution has had 15 constitutions, not all of them put into practice. Brazil has had seven since independence in 1822. Yugoslavia under Tito came out with a new constitution every decade, each more dubious than the one before. The 1963 Yugoslav constitution provided for a legislature of *five* chambers. Such constant experimentation with the highest law of the land meant that no constitution was established and legitimate, one reason Yugoslavia fell apart in bloodshed in 1991. Constitutions are too important to experiment with.

judicial review Ability of courts to decide if laws are constitutional; not present in all countries.

judicial activism Willingness of some judges to override legislatures by declaring certain statutes unconstitutional.

judicial restraint Unwillingness of some judges to overturn statutes passed by legislatures.

Basic Law German *Grundgesetz*. Germany's constitution since 1949.

The General Nature of Constitutional Law Because constitutions, no matter how detailed, cannot cover every problem that may arise, many provide for a constitutional court to interpret the highest law in specific cases. This concept of judicial interpretation of a constitution is a fairly new thing worldwide; it was pioneered by the United States and has spread only in recent decades. Accordingly, many of our examples are American.

The U.S. Constitution says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" in Amendment I of the Bill of Rights. This is a very general statement, and how it is interpreted in a specific case (such as the question of prayer in school or a satanic cult that believes in animal sacrifice or illegal drugs) depends on those in power at the time. Does it mean that prayer in public schools breaches the separation of church and state? Or that prayer in schools is part of the free exercise of religion? Or that prayer in schools is permissible if that is what most people in a given school district want?

Constitutional law must be interpreted for specific incidents. Who has the authority to decide what the general wording of a constitution means? Starting with the United States, now more than 30 nations give the power of **judicial review** to the highest national court. Such courts rule on the constitutionality of government acts and declare null and void acts it considers unconstitutional. This power is controversial. Many critics have accused the Supreme Court (most notably when Earl Warren was chief justice from 1953 to 1969) of imposing personal philosophies as the laws of the land. To a large extent, a constitution is indeed what its interpreters say it is, but the possibility of too-subjective an interpretation is a necessary risk with judicial review.

The courts do not always interpret the constitution in a consistent fashion. The Warren Court exemplified **judicial activism**, which does not necessarily mean "liberal." It refers to a judge's willingness to strike down certain laws and practices. The opposite philosophy is **judicial restraint**, when a Supreme Court sees its job not as legislating but as following the lead of Congress. Justices Oliver Wendell Holmes and Felix Frankfurter, who counseled the Court on judicial restraint, are regarded as great liberals. The Roberts Court, on the other hand, struck down several laws but was considered conservative.

Likewise, Germany's Federal Constitutional Court is no stranger to controversy. Modeled after the U.S. Supreme Court—except that it has 16 justices—the German court is mandated to make sure all laws conform to the **Basic Law**. In 1975, the German court found that a law permitting abortions conflicted with the strong right-to-life provisions of the Basic Law—enacted to repudiate the horrors of the Nazi era—and declared abortion unconstitutional. After German unification in 1990, the court allowed some abortions in East Germany because it had been the established law and usage there. In 1979, the German court found there was

nothing unconstitutional about "worker codetermination"—that is, employees having nearly the same rights as owners and managers in determining the long-term future of their corporations. Not all nations give their highest court the power of judicial review; some reserve that power for the legislature. The British Parliament alone determines what is constitutional.

political culture The psychology of the nation in regard to politics.

constitutionalism Degree to which government limits its powers.

Constitutions and Constitutional Government A constitution depends largely on the way it is interpreted. Two separate nations could adopt very similar constitutions but have them work quite differently. Sweden and Italy have similar structures, but their **political cultures** (see Chapter 7) are quite different, so their written rules function differently. A constitution can be a fiction. The Soviet constitution set a government framework—a federal system with a bicameral legislature, with executive and administrative powers given to the cabinetlike Council of Ministers—and accorded to its citizens a long list of democratic rights. In actuality, the top command of the Communist Party controlled nearly everything, including individual rights.

Constitutionalism means that the power of government is limited. We see its beginnings in the Magna Carta, which England's nobles forced King John to sign in 1215. The Great Charter does not mention democracy; it merely limits the king's power and safeguards the nobles' rights. Over the centuries, however, it was used to promote democracy and individual freedom in modern Britain, the United States, and Canada. In a constitutionally governed nation, laws and institutions limit government to make sure that the fundamental rights of citizens are not violated. In contrast, a totalitarian or authoritarian government (see Chapter 6) is not limited by its constitution; individuals and minority groups have little protection against arbitrary acts of government, in spite of what the constitution may say. In the 1970s, the military regimes of Argentina and Chile "disappeared" (meaning tortured and killed) thousands of suspected leftists even though their written constitutions promised human rights.

The United States is no stranger to violations of minority rights. Perhaps the biggest was the 1942 internment of some 120,000 Japanese Americans on the West Coast under infamous Executive Order 9066, in the mistaken belief

COMPARING ■ CANADA'S NEW CONSTITUTION

Canada was in a curious situation. The British North America Act of 1867, passed by the British Parliament, gave Canada its independence, but as the British Dominion of Canada, it could amend its constitution only by approval of the House of Commons in London. Increasingly, this rankled Canadians, who demanded "patriation" of their constitution, that is, bringing it back to Canada. They got this only in 1982 along with something they had never had before: a Charter of Rights and Freedoms similar to the U.S. Bill of Rights.

that they were enemy aliens (most were born in the United States). Robbed of their homes, businesses, and liberty without due process of law, they were sent to ramshackle, dusty camps surrounded by barbed wire and guard towers—in some ways, similar to Nazi concentration camps. Not one case of disloyalty was ever demonstrated against a Japanese American; they were victims of racism and wartime hysteria.

Even Secretary of War Henry L. Stimson, who signed the order, feared it "would make a tremendous hole in our Constitution." It did, but not until 1983 did a federal court overturn the legality of internment. The incident shows that even a well-established democracy can throw out its civil liberties in a moment of exaggerated and groundless panic. (A similar reaction flared after 9/11, aimed at Muslims.) The 442nd Regimental Combat Team, recruited from Japanese Americans, was the most decorated U.S. unit of World War II.

The Purpose of a Constitution

If some nations pay little heed to what is written in their constitutions, why do they bother to write a constitution at all? Constitutions do several things: They put in writing national ideals, formalize the structure of government, and attempt to justify the government's right to govern.

A Statement of National Ideals The Preamble of the U.S. Constitution proclaims its dedication to six goals: to form a more perfect union, to establish justice, to ensure domestic tranquility, to provide for the common defense, to promote the general welfare, and to secure the blessings of liberty. The 1977 Soviet constitution proclaimed the Soviet Union to be a "developed socialist society" dedicated to building a classless utopia. The constitution of the Federal Republic of Germany, seeking to repudiate the Nazis, states its determination to "serve the peace of the world" and expressly proclaims that no group of people can be stripped of their German citizenship—a reaction to Hitler's Nuremburg Laws, which made hundreds of thousands of Germans noncitizens.

Preambles and lists of rights are symbolic statements: They indicate the values, ideals, and goals of those who draft the documents. Preambles are by nature very general and have dubious legal force. How are they interpreted? What does the U.S. Constitution mean by a "more perfect union," "establish justice," or "promote the general welfare"? Constitutions state national ideals, but the interpretation of these goals and values requires some decisions.

Formalizes the Structure of Government A constitution is also a blueprint, a written description of who does what in government, defining the authority and limiting the powers of each branch and providing for regularized channels through which conflict may be resolved. Articles I through III of the U.S. Constitution outline the duties of Congress, the president, and the judiciary. Congress may collect taxes and customs duties but is prohibited from taxing exports. The president is named commander in chief of the armed forces but must have the "advice and consent" of the Senate to conclude treaties. In a system in which

there is **separation of powers**, the constitution divides authority and responsibilities among the various branches of government; it also limits the power of each branch.

separation of powers U.S. doctrine that branches of government should be distinct and should check and balance each other, found in few other governments.

State Duma Russia's national legislature.

constituent assembly Legislature convened to draft new constitution.

No other constitution uses "checks and balances" like the American one; most, in fact, specify the unification of power, a point we will study in Chapter 13. Few other countries abhor the concentration of power the way the U.S. Founding Fathers did. Many observers think the 1993 Russian constitution gives the executive far too much power and the parliament, the **State Duma**, too little, an imbalance that bothers few Russians, most of whom prefer a strong hand at the top to prevent anarchy and stabilize the economy. Again, political culture counts for a lot in how a constitution actually works.

As we considered in the previous chapter, constitutions also outline the division of power between central and regional or local governments. In a federal system, powers and responsibilities are divided between one national government and several provincial or state governments. In the U.S. Constitution, this division is a general one; any powers not accorded to the central government are reserved for the states or the people. This division of power has become less clear-cut, especially in recent years, as the federal government has taken on a greater share of financing the operations of education, health, welfare, housing, and much else.

Most nations are unitary systems; that is, they do not divide power territorially but concentrate it in the nation's capital. Unitary systems do not seek to "balance" powers between central and provincial, but they may give a little autonomy to counties (Sweden and Ireland) or prefectures (Japan). They may also remake and even erase existing states and localities; this is not true with federal systems, which cannot easily erase or alter their component states, each of which has a legal existence

Establishes the Legitimacy of Government A constitution may also give a government the stamp of legitimacy, something both symbolic and practical. Many nations will not recognize a new state until it has established a written constitution, which is a sign of permanence and responsibility. The U.S. Articles of Confederation and, subsequently, the U.S. Constitution symbolized American independence.

Most constitutions were written shortly after major changes of regime and try to establish the new regime's right to rule. A **constituent assembly** is a legislature meeting for the first time after the overthrow of one regime to write a new constitution. The Spanish parliament elected in 1977 turned itself into a constituent assembly to repudiate the Franco system with the new 1978 constitution. That job done, it turned itself back into the Cortes, the regular parliament. In 1990, Bulgaria elected a 400-member Grand National Assembly to write a new, post-Communist constitution. That done, in 1991 Bulgaria elected a regular parliament, the 240-member National Assembly. After ousting the Taliban regime, Afghan

factions met in a *loya jirga*, a traditional constituent assembly, to produce a new constitution in 2004. The warlords and Taliban who run much of Afghanistan, however, ignore it.

Can Constitutions Ensure Rights?

Civil Liberties and Civil Rights During World War II, Nazi concentration camps exterminated millions, and the Japanese army raped and pillaged China. In reaction, the world took steps to prevent such horrors. In 1948, the UN General Assembly adopted the Universal Declaration on Human Rights, a symbolic statement (with no real power of sanction) that establishes fundamental precepts and norms that most nations are reluctant to violate openly. Countries that do—Mao had tens of millions of Chinese killed; Saddam Hussein used poison gas against fellow Iraqis; Laurent Kabila condoned and covered up tribal massacres in the Congo—risk being isolated from world aid and trade. Charges of human rights violations try to persuade Sudan to cease killing in its Darfur region. Although not directly enforceable, the setting of norms for human rights made us more likely to seek them.

The Universal Declaration, patterned on the French Declaration of the Rights of Man and Citizen and on the American Declaration of Independence and the Bill of Rights, affirms the basic civil and human rights that government may not arbitrarily take away. These include the rights to life and freedom of assembly, expression, movement, religion, and political participation. The Universal Declaration also provides for many economic and cultural needs: the rights to work, to an education, to marry, to raise a family, and to provide for that family and the right to live according to one's culture. These rights are almost impossible to enforce, and few have tried. The fact is that rights and liberties are difficult to define, and all nations restrict civil liberties in some way. The problem of minority groups is worldwide. Europe's most serious civil rights problem is with Gypsies, who are despised nearly everywhere.

Minority Groups and Civil Liberties Few nations are homogeneous; most have citizens from several racial, ethnic, religious, cultural, or linguistic backgrounds, and their civil or cultural liberties are often compromised. Haitians living in Florida or Mexicans in California are at a disadvantage unless they speak English. Indians and Pakistanis in Great Britain, Algerians in France, and Turks in Germany are under pressure to conform to the dominant culture. But the Universal Declaration states that minorities have the right to preserve their cultural uniqueness. Can it—or should it—be enforced in these situations? The U.S. debate over "multiculturalism" hinges on this question. Should the United States abandon *e pluribus unum* in favor of preserving ethnic groups? Do the children of minority groups have the right to be schooled in their parents' language? In 1998, California voters—including a majority of Latinos—approved Proposition 227, ending bilingual education and making English the only and standard language of instruction. Were rights violated? Or were they improved? Most Spanish speakers want their children to master English *para ganar más dinero.*

THE ADAPTABILITY OF THE U.S. CONSTITUTION

Constitutions are modified by traditions, new usages, and laws. The U.S. Constitution does not mention political parties, yet our party system has become an established part of the American political process. Judicial precedents and government traditions, too, make up the fundamental laws of a society. Constitutions need some flexibility to adapt over time. The right to bear arms and freedom of expression illustrate the changing nature of the U.S. Constitution.

human rights Freedom from government mistreatment such as arrest, torture, jail, and death without due process.

civil rights Ability to participate in politics and society, such as voting and free speech; sometimes confused with but at a higher level than human rights.

economic rights Guarantees of adequate material standards of living; the newest and most controversial rights.

constructed Something widely believed as old and hallowed but actually recent and artificial.

The Right to Bear Arms

In 2008, the Supreme Court ruled for the first time that the Second Amendment's "right to bear arms" is an *individual* right. The point has been and continues to be controversial. In 1939, the Court ruled in *United States v. Miller* against transporting sawed-off shotguns, and

KEY CONCEPTS ■ WHAT IS A RIGHT?

Where do "rights" come from? Are they natural or artificial? Thinkers of a classic bent—including the U.S. Founding Fathers—took "natural rights" as a basis for **human rights**. Nature expresses God's intentions, which are not hard to discern. You know instantly and instinctively that it is wrong to crash a jetliner into a building. Life and liberty are natural; therefore, government may deprive people of these basic rights only for good cause. Human rights can generally be formulated in the negative as "freedom from," namely, from various forms of tyranny, the great concern of Thomas Jefferson.

Civil rights are newer and at a higher level; they grew up with modern democracy, in which citizens need the freedom to speak and vote. They are not as self-evident as human rights. Press freedom is probably a civil rather than a human right, although the two overlap. Those deprived of civil rights—such as the right to organize an opposition party—may soon also find themselves locked up by the dictatorial regime. In the United States, equal opportunity became a major civil rights issue.

Economic rights are the newest—appearing in the nineteenth century with the early socialists (see Chapter 3) and shifting rights into the material realm. Advanced by people like Franklin D. Roosevelt, they are usually formulated in the positive as "freedom to," namely, to live adequately, have a job, and get an education and health care. Many of them cost lots of taxpayer money in government programs. Conservatives say these are not rights at all, merely desirable things demanded by various groups, such as oldsters demanding prescription drugs as a "right." Some fear a "rights industry" creating dubious rights without limit.

"Right" said English philosopher Jeremy Bentham, "is the child of law." Something becomes a right only when it is put into a constitution or statutes. Before the Medicare law, senior citizens had no right to federally funded health insurance. Now it is a right. All rights are more or less artificial or "socially **constructed**." Is something good and desirable automatically a right? Is everything an interest group demands really its right? Beware of overusing the term "rights."

judges nationwide used Miller as the *precedent* (see page 278) to allow restrictions on gun ownership. But with *District of Columbia v. Heller* in 2008, the Court ruled that the District's strict gun law violated the Second Amendment. (Titles of U.S. court decisions are the italicized names of plaintiffs and defendants.)

The Founding Fathers wanted to prevent any concentration of power that might flow from a standing national army. The Constitution's "militia clauses" envisioned defense as largely in the hands of state "militias," which would disperse power among the states and citizen militia members. To bolster this, Amendment II of the Bill of Rights (adopted in 1791) says, "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 militia concept of citizen-based defense never came to much (the states did not want to spend the money), so Washington turned the militias into the National Guard.

But is there also an *individual* right, apart from belonging to a militia, to have guns? Liberals and gun-control advocates claimed there is not, that the right pertains only to militias. Accordingly, states and municipalities can restrict gun ownership. Washington, DC, for example, in 1976 outlawed private handguns, something that conservatives charged was unconstitutional. The Supreme Court in *Heller* decided 5–4 that handguns in the home for defense were legal. That instantly became the law of the land, and the National Rifle Association immediately brought suits to strike down similar laws nationwide.

Heller opened the door to numerous Second Amendment questions that will drag on for years. Does it mean Americans can own any gun without restriction? Outside of the home? Concealed? Machine guns? Sawed-off shotguns? Cop-killer ammunition? How about suspected terrorists or deranged youths? Or do states and municipalities still have the power to impose reasonable restrictions? Both *Miller* and *Heller* illustrate that a two-century-old constitution will be reinterpreted in response to new conditions and specific cases.

Freedom of Expression in the United States

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." So says Amendment I of the U.S. Bill of Rights. We regard freedom of expression as a hallmark of any democratic nation. Citizens who think the government is bad or wrong may say so publicly. An antigovernment or anti-religion artwork should draw no interference or investigation from a government agency.

This is a peculiarly American problem, as most countries outlaw "hate speech" in the interests of domestic calm. In most of Europe, it is illegal to deny that the Holocaust happened. A 2008 British Columbia case accused Canada's leading news magazine of hate speech for an article warning that Muslims will take over the world. In the United States, this case would have been thrown out immediately. Shouted one Canadian spectator: "It's hate speech!" Shouted another: "It's free speech!" In 2010, the Supreme Court took up the case of a fringe pastor who called U.S. combat deaths divine punishment for a country

that tolerates homosexuality. The Court considered the pain this inflicted on the family of the deceased and seemed ready to set a limit on hateful speech.

red scare Exaggerated fear of Communist subversion, as in World War I and McCarthy periods.

Free speech is not easy. Does it give a campus bigot the right to incite hatred of African American students? Does a newspaper have a right to publish information that might damage national security? Can a publicly funded museum reject artworks that offend some religious sensibilities? Americans believe in the right of free expression, but most agree that there are limits. As Justice Oliver Wendell Holmes argued, one cannot yell "Fire!" in a crowded theater unless there really is a fire. Does free speech include the right to spread dangerous or malicious falsehoods, for example, urging that political figures who support healthcare reform be "eliminated"? Suppose some fanatic acts on that suggestion.

According to Justice Holmes, freedom of expression must also be restricted in cases in which statements or publications present a "clear and present danger" of bringing about "substantive evils," which Congress has a right to prevent. The Supreme Court in its 1925 *Gitlow v. New York* decision upheld the conviction of a radical who called for the violent overthrow of the government on the grounds that his words had represented a "bad tendency," which could "corrupt morals, incite crime, and disturb the public peace." That decision, during a "**red scare**," would likely have come out differently in tranquil times.

First Amendment controversies are never-ending. In 1971 a multivolume, secret Defense Department study of the decisions that led to the Vietnam War was leaked to the *New York Times* and *Washington Post*, both of which started publishing a series of sensational articles based on them. The Nixon administration immediately got a court order blocking further publication on national-security grounds. In what became known as the Pentagon Papers case, the Supreme Court quickly and unanimously rejected the government's claim that official secrets had been compromised. By that time, most Americans were fed up with the war. The reasoning of Justice Hugo Black:

> *Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the Government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.... [T]he newspapers nobly did precisely that which the founders hoped and trusted they would do.*

Recently, some have argued that free speech has gone too far, especially if it deals in racism and pornography or if it throttles others' speech in the name of "political correctness." In 2010, the Supreme Court overturned portions of a campaign-reform law designed to curb the influence of big money, partly because campaign contributions are seen by many as a form of free speech. Dollars, they argued, are like words; both should flow without restriction to support candidates and causes. Now corporations can give freely and directly to political campaigns. Some critics fear rich corporations will simply buy elections. The Internet has opened vast new areas in this debate, as the Internet lends itself

Peace protesters tell the White House what they think of the Iraq and Afghanistan wars. (Kevin Lamarque/Corbis)

sedition Incitement to public disorder or to overthrow the state.

to all manner of hate-filled, extremist causes. Should WikiLeaks be stopped from putting classified cables on the Internet for all to read?

Free Speech and Sedition

Sedition is criticism of the government or officials aimed at producing discontent or rebellion. The U.S. government has used sedition laws to suppress radical expression several times since the adoption of the Bill of Rights. Congress passed the first Sedition Act in 1798, after the XYZ affair. It was aimed at the "Jacobins," as American defenders of the French Revolution were called, at a time when the United States was in an undeclared naval war with France. The Sedition Act was supposed to expire the day that President John Adams left office (which indicates that its true purpose may have been to influence the election). The act was controversial, but it lapsed without any test of constitutionality in the Supreme Court. The next Sedition Act came during the Civil War, when President Lincoln used his war powers to suppress Northern opponents of the war. The matter came before the Supreme Court, which declined to judge the legality

of his actions, so they went untested. After the Civil War, all "political prisoners" were pardoned.

Twentieth-Century Sedition Acts As the United States entered World War I, many socialists and pacifists spoke against it, urging Americans to refuse military service and to disrupt the war effort. The 1917 Espionage Act aimed to silence the radicals, and several hundred, including Socialist Party leader Eugene Debs, were jailed under it. The Supreme Court upheld the law on the grounds that free speech could be restricted if it created, in Justice Holmes's words, a "clear and present danger" to national security. Most of those jailed were later released, and the 1917 act was little used thereafter because it was hard to prove that speech was dangerous. Recently, some wanted to silence and prosecute WikiLeaks under the Espionage Act.

In the 1940s and 1950s, sedition acts were directed against Communists. The 1940 Smith Act, the most comprehensive sedition act ever passed, made it a crime to advocate the violent overthrow of the government, to distribute literature urging such, or to knowingly join any organization or group that advocated such actions. The Smith Act aroused much controversy but was not put to a constitutional test

HOW TO . . . ■ LIST REFERENCES

Whoever reads your paper should be able to look up your sources to make sure they are valid and in context. References are now usually put at the end of a paper. Shown here is the standard urged by the American Political Science Association, but this is not sacred. It is derived from the American Psychological Association ("psych style") and a variation of the *Chicago Manual of Style.* Your instructor may prefer the similar style of the Modern Language Association, and some may prefer the old-fashioned footnote style, which at least was consistent across disciplines. There is some variation in what is considered standard, especially with Web sites. In general, references give the reader a road map to your sources.

At the end of your paper, under the subhead "References" or "Works Cited," with hanging indents and in alphabetical order, give the author (last name first), the year, the article in quotation marks, the journal or book title italicized, and, if a book, the city and publishing house. If a journal, give the month and day at the end. Separate these elements with periods. If there is no listed author, use the article's title or, especially with Web sites, the sponsoring agency's name. Referring to the "How To… Use Sources" box on page 75, here is what they look like:

Works Cited

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habeas corpus Detainee may protest innocence before judge.

until 1951, when the Supreme Court upheld the convictions of the leaders of the American Communist Party even though they had not been charged with any overt acts of force against the government. "It is the existence of the conspiracy which constitutes the danger," ruled Chief Justice Vinson, "not the presence or absence of overt action." Since then, there have been other court rulings on the constitutionality of the Smith Act, and they have fluctuated. In *Yates v. the United States* in 1957, the Warren Court reversed the conviction of the Communist leaders on the grounds that there was no overt action, only abstract advocacy of rebellion. Four years later, in *Scales v. the United States*, the Court upheld the section of the Smith Act that makes membership in the Communist Party illegal—but this ruling also specified that it is active membership, involving the direct intent to bring about the violent overthrow of the government, that is criminal. The Court was careful to point out that membership per se was not made illegal by the Smith Act.

The most stringent legislation against Communist subversion was passed during the McCarthy era after World War II, another red scare. The McCarran Act of 1950 (the Internal Security Act) barred Communists from working for the federal government or in defense-related industries, established a Subversive Activities Control Board (SACB) to enforce the act, and required SACB-designated organizations to register with the attorney general. Critics of the McCarran Act charged that the law not only encroached on the rights of free speech and free assembly but also violated the self-incrimination clause of the Fifth Amendment. Although the Internal Security Act in its entirety has never been declared unconstitutional, every action by the SACB demanding specific organizational or individual registration with the attorney general's office has been declared unconstitutional. Finally, with the realization on all sides that the SACB accomplished nothing, it was abolished in 1973. Interestingly, the U.S. government did essentially nothing to stop criticism of the Vietnam War; opposition was too widespread, and there was no declaration of war.

Rights for Terrorists?

After 9/11 the Bush administration invented a new category for terrorist suspects who had been arrested: "unlawful enemy combatants." Evidence against them was often vague. They were in a limbo between criminal suspects and prisoners of war and lacked the rights of either. They were harshly interrogated by means such as "waterboarding," simulated drowning. No one knows if valid information was obtained. Some were held in Guantánamo—because it was not on U.S. soil—without charge, trial, lawyers, or time limit. Unquestionably many of them—but which?—were dangerous terrorists, but evidence against them was kept secret. In effect, they got life sentences without a trial.

After the 9/11 panic subsided, many wondered if this was constitutional. In 2004, the Supreme Court ruled that Guantánamo is effectively under U.S. laws. In 2006 and 2008, it ruled that suspected terrorists had **habeas corpus** rights.

The court did not free any detainees or order any trials, but it did push the administration to decide whether they were criminal suspects or war prisoners. If the former, they get a trial; if the latter, they get treated under the Geneva Conventions. The law did not sit easily with the new category of "unlawful enemy combatant."

The history of government actions to curb speech or arrest suspicious persons in the United States indicates that the guarantees of the Bill of Rights have been interpreted to mean different things over time. When Congress, the president, and the courts perceive danger and threat, they tend to be more restrictive; in other times, they are more permissive. Rights are highly context-dependent. After the 9/11 terrorist attacks of 2001, few Americans worried about detaining hundreds of suspicious people without due process. A few years later, with examples of panicked overreaction in mind, some worried that the Patriot Act, passed in haste, should be modified to make sure it does not infringe on the Constitution. Warrantless wiretaps of that period were ruled unconstitutional.

We should remember this context-dependency when we see legal restrictions on human and civil rights in other lands. Some regimes really are under siege; opponents want to overthrow them (often with good reason). And because elections are routinely rigged, the only way to overthrow such regimes is by extralegal means, which may include violence. In such situations, free speech may lead quickly to violent overthrow, which may be richly deserved. Governments of whatever stripe clamp down when they are scared, and they are scared because they know they may be overthrown. Myanmar (formerly Burma), South Korea, Indonesia, Egypt, Iran, South Africa, Argentina, and many other lands have imprisoned political opponents for speaking out. "Free speech" is not just a nice thing; it can be dynamite. Freedom of expression thrives best under long-established, legitimate governments in tranquil times. It is, in short, political.

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KEY TERMS

Basic Law (p. 82)
civil rights (p. 87)
constituent assembly (p. 85)
constitution (p. 80)
constitutionalism (p. 83)
constructed (p. 87)
economic rights (p. 87)
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red scare (p. 89)
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separation of powers (p. 85)
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