Name\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Analyzing Current Events related to the Bill of Rights**

1. Summarize the article in one paragraph.
2. What amendment is discussed in the article?
3. What are the perspectives (opinions) regarding the amendment?
4. What is the author’s opinion on the issue?
5. What is your opinion on the issue?

July 24, 2012

**A Way Out of the Gun Stalemate**

**By** [**CRAIG R. WHITNEY**](http://topics.nytimes.com/top/reference/timestopics/people/w/craig_r_whitney/index.html)

THE national conversation about guns, since James E. Holmes shot 12 people to death and wounded 58 others at a movie theater in Aurora, Colo., has been a dialogue of the deaf. Unless gun-control advocates and gun-rights supporters stop screaming at each other and look for common ground on how to deal with gun violence, the next massacre is only a matter of time.

Liberals have to deprive the National Rifle Association of its core argument, that the real aim of all gun control measures is to strip Americans of their right to have and use firearms. Gun-control supporters must make clear that they accept that Americans have had this individual, common-law right since Jamestown and the Plymouth Colony; that this right was recognized in the Second Amendment to the Constitution in 1791; and that the Supreme Court affirmed its constitutionality in 2008. Liberals should accept that the only realistic way to control gun violence is not by keeping guns out of the hands of as many Americans as possible, but by keeping guns out of the hands of people we all agree should not have them.

Gun owners and their advocates must, in turn, stop insisting that gun ownership is an absolute right. The Second Amendment is not a law unto itself. Before and after 1791, the right to keep and bear arms has been inseparable from civic responsibility: originally, the duty to answer a call to carry arms in defense of community or country, as part of militia service. Today — with 30,000 firearms deaths a year (half of them suicides) — the civic duty is to find ways for gun ownership and public safety to better coexist. Yet the N.R.A. continues to act as if gun owners have no responsibility to anyone but themselves and their families.

So far, liberals and centrists have done more to adopt a reasonable position. The president of the Brady Campaign to Prevent Gun Violence has lately begun to emphasize that it accepts the Supreme Court’s ruling on the Second Amendment (which also [upheld “longstanding prohibitions”](http://www.nytimes.com/2008/06/27/washington/27scotuscnd.html) on gun ownership by felons and the mentally ill, and gun bans in schools and government buildings).

New York City’s mayor, Michael R. Bloomberg, co-chairman of [Mayors Against Illegal Guns](http://www.mayorsagainstillegalguns.org/), has put forward a raft of proposals to tighten background checks, better regulate gun shows, trace and share information about guns used in crimes, and crack down on the importation of machine guns, military-style rifles and other especially dangerous weapons. But the mayor has no credibility with the N.R.A. and its supporters.

The N.R.A. has frightened lawmakers into giving it credibility it does not deserve. Even after President Obama tried to start a dialogue on gun violence last year, stating, “I believe that the Second Amendment guarantees an individual right to bear arms,” the N.R.A. flatly rebuked his overture and urged its members to vote against Mr. Obama so that he couldn’t try to deprive them of gun rights through Supreme Court appointments in a second term.

What kinds of measures might have helped prevent the Aurora massacre? Some have no connection with gun control: mental health outreach and screening might have detected that a doctoral student in neuroscience was headed into a dark corner of the mind. That might have resulted in his failing the background checks he passed when he bought his guns.

Another possibility: restrictions on the purchase of large volumes of ammunition. Who, besides a soldier in battle or a policeman in a siege, needs 6,300 rounds, or a 100-round “drum” magazine like the one in Mr. Holmes’s AR-15 — a modified semiautomatic version of the military full-automatic M-16 — that allowed it to fire as fast as his finger could squeeze the trigger?

(The online ads for drum magazines make one’s skin crawl. On a site called Woot! a 100-round magazine was advertised for $99.95: “Just the ticket, should things really heat up and the lead needs to fly. Of course, this means less time spent reloading, and more time for shooting as fast as you can pull the trigger.”)

Shooting sports are important recreation for many Americans. So an outright ban on bulk ammunition purchases, or on “assault” weapons like the AR-15, would be a nonstarter. That was the constitutional flaw the Supreme Court found in 2008, when it overturned the District of Columbia’s ban on handguns for self-defense at home. The 1994 ban on purchases of new assault rifles and extended magazines, which was allowed to lapse in 2004, was similarly overbroad.

New York City, where I live, has some of the nation’s toughest gun laws. I probably couldn’t get a permit to carry a handgun on the street here even if I thought I had a clear justification for one; only 37,000 New Yorkers have them. But keeping me and as many other law-abiding citizens as possible from having guns does little to prevent criminals or misguided youths from illegally buying them elsewhere, or having confederates buy or steal them.

Gun-control supporters need higher-precision instruments than the federal assault weapons ban in their arsenal if they want legislators to discuss and debate their proposals instead of dismissing them. A law requiring membership in a shooting range or a gun club for bulk purchases of ammunition or extended magazines would be a reasonable start. Vigorous enforcement of existing federal laws that criminalize buying guns, under a false pretext, for somebody else who can’t pass the federal background check — a favorite ruse of criminals — would be a good next step. (Here we should take the N.R.A. at its word; it keeps saying laws on the books should be enforced.)

Maybe someday we could even require people who buy guns from private owners, online or at gun shows to pass that same federal background check. But we’ll never know until we begin seriously talking to each other about our gun violence problem.

[Craig R. Whitney](http://topics.nytimes.com/topics/reference/timestopics/people/w/craig_r_whitney/index.html), a former reporter, foreign correspondent and editor at The New York Times, is the [author](http://craigrwhitney.com/) of the forthcoming [book](http://www.publicaffairsbooks.com/publicaffairsbooks-cgi-bin/display?book=9781610391696) “Living With Guns: A Liberal’s Case for the Second Amendment.”

July 20, 2012

**The Shootings in Colorado**

The most appropriate response now to [the shootings early Friday in Aurora, Colo.](http://www.nytimes.com/2012/07/21/us/colorado-mall-shooting.html?hp), is also the simplest: sympathy for the victims, for the injured and for their families.

President Obama [asked a crowd](http://www.whitehouse.gov/the-press-office/2012/07/20/remarks-president-shootings-aurora-colorado) in Fort Myers, Fla., “to pause in a moment of silence for the victims of this terrible tragedy, for the people who knew them and loved them, for those who are still struggling to recover, and for all the victims of less publicized acts of violence that plague our communities every single day.”

He returned to the White House and, like Mitt Romney, [pulled his political ads off the air in Colorado](http://thecaucus.blogs.nytimes.com/2012/07/20/after-killings-at-theater-campaigns-suspend-their-ads-in-colorado/).

[Mr. Romney addressed the senseless violence](http://thecaucus.blogs.nytimes.com/2012/07/20/romney-reacts-to-colorado-shooting) at a previously scheduled campaign stop in New Hampshire.

“I stand before you today not as a man running for office but as a father and grandfather, a husband, an American,” he said. “This is a time for each of us to look into our hearts and remember how much we love one another and how much we love and how much we care for our great country.”

Both men struck absolutely the right note. The country needs a pause for reflection, to wait for more information and to take a break from this ugly political campaign. But as Mayor Michael Bloomberg of New York, a leader in the search for sensible answers about guns, said, we will need to do more than reflect.

“Maybe,” [the mayor said](http://www.youtube.com/watch?v=R_Zhvk6A3kE), “it’s time that the two people who want to be president of the United States stand up and tell us what they’re going to do about it.”

Sadly, however, it seems unlikely that they will tell us what they are going to do about it, or that there will be a national dialogue about it, just as there was no national dialogue after Columbine or after Virginia Tech or after Jared Lee Loughner tried to assassinate then-Representative Gabrielle Giffords.

Politicians are far too fearful of the gun lobby to address gun violence, and, as a society, we keep getting stuck on a theoretical debate about the Second Amendment, which keeps us from taking practical measures that just might help avoid the all-too-frequent tragedies like the one in Aurora.

Whether you believe, as many perfectly reasonable people do, that the amendment gives each individual the right to bear arms, or whether you believe, as this editorial page has often argued, that it is society’s right to raise a militia, there is no excuse to ignore the out-of-control gun market.

The country needs laws that allow gun ownership, but laws that also control their sale and use in careful ways. Instead, we have been seeing a rash of “stand your ground” self-defense laws, other laws that recklessly encourage the carrying of concealed weapons and efforts to force every state to knuckle under to those laws. Assault rifles like one used by the killer in Colorado are too readily available, as are high-capacity ammunition clips.

What we do not need is more heedless rhetoric like we heard on Friday from Representative Louie Gohmert, the Texas Republican who drew a bizarre connection during a radio interview between the horror in Colorado and “ongoing attacks on Judeo-Christian beliefs.”

[Mr. Gohmert added](http://gohmert.house.gov/news/documentsingle.aspx?DocumentID=303954): “It does make me wonder, you know, with all those people in the theater, was there nobody that was carrying? That could have stopped this guy more quickly?”

That sort of call to vigilante justice is sadly too familiar, and it may be the single most dangerous idea in the debate over gun ownership.

# Free Speech for Computers?

###### By TIM WU

DO machines speak? If so, do they have a constitutional right to free speech?

This may sound like a fanciful question, a matter of philosophy or science fiction. But it’s become a real issue with important consequences.

In today’s world, we have delegated many of our daily decisions to computers. On the drive to work, a GPS device suggests the best route; at your desk, Microsoft Word guesses at your misspellings, and Facebook recommends new friends. In the past few years, the suggestion has been made that when computers make such choices they are “speaking,” and enjoy the protections of the First Amendment.

This is a bad idea that threatens the government’s ability to oversee companies and protect consumers.

The argument that machines speak was first made in the context of Internet search. In 2003, in a civil suit brought by a firm dissatisfied with the ranking of [Google](http://topics.nytimes.com/top/news/business/companies/google_inc/index.html?inline=nyt-org)’s search results, Google asserted that its search results were constitutionally protected speech. (In an unpublished opinion, the court ruled in Google’s favor.) And this year, facing increasing federal scrutiny, Google commissioned Eugene Volokh, a law professor at the University of California, Los Angeles, to draft a much broader and more elaborate version of the same argument. As Professor Volokh declares in his paper: “Google, Microsoft’s Bing, Yahoo! Search, and other search engines are speakers.”

To a non-lawyer the position may sound bizarre, but here is the logic. Take a newspaper advice columnist like Ann Landers: surely her answers to readers’ questions were a form of speech. Likewise, when you turn to Google with a question, the search engine must decide, at that moment, what “answers” to give, and in what order to put those answers. If such answers are speech, then any government efforts to regulate Google, like any efforts to bowdlerize Ann Landers, must be examined as censorship.

And that’s where theory hits reality. Consider that Google has attracted attention from both antitrust and consumer protection officials after accusations that it has used its dominance in search to hinder competitors and in some instances has not made clear the line between advertisement and results. Consider that the “decisions” made by Facebook’s computers may involve widely sharing your private information; or that the recommendations made by online markets like Amazon could one day serve as a means for disadvantaging competing publishers. Ordinarily, such practices could violate laws meant to protect consumers. But if we call computerized decisions “speech,” the judiciary must consider these laws as potential censorship, making the First Amendment, for these companies, a formidable anti-regulatory tool.

Is there a compelling argument that computerized decisions should be considered speech? As a matter of legal logic, there is some similarity among Google, Ann Landers, Socrates and other providers of answers. But if you look more closely, the comparison falters. Socrates was a man who died for his views; computer programs are utilitarian instruments meant to serve us. Protecting a computer’s “speech” is only indirectly related to the purposes of the First Amendment, which is intended to protect actual humans against the evil of state censorship. The First Amendment has wandered far from its purposes when it is recruited to protect commercial automatons from regulatory scrutiny.

It is true that the First Amendment has been stretched to protect commercial speech (like advertisements) as well as, more controversially, political expenditures made by corporations. But commercial speech has always been granted limited protection. And while the issue of corporate speech is debatable, campaign expenditures are at least a part of the political system, the core concern of the First Amendment.

The line can be easily drawn: as a general rule, nonhuman or automated choices should not be granted the full protection of the First Amendment, and often should not be considered “speech” at all. (Where a human does make a specific choice about specific content, the question is different.)

Defenders of Google’s position have argued that since humans programmed the computers that are “speaking,” the computers have speech rights as if by digital inheritance. But the fact that a programmer has the First Amendment right to program pretty much anything he likes doesn’t mean his creation is thereby endowed with his constitutional rights. Doctor Frankenstein’s monster could walk and talk, but that didn’t qualify him to vote in the doctor’s place.

Computers make trillions of invisible decisions each day; the possibility that each decision could be protected speech should give us pause. To Google’s credit, while it has claimed First Amendment rights for its search results, it has never formally asserted that it has the constitutional right to ignore privacy or antitrust laws. As a nation we must hesitate before allowing the higher principles of the Bill of Rights to become little more than lowly tools of commercial advantage. To give computers the rights intended for humans is to elevate our machines above ourselves.

[Tim Wu](http://timwu.org/about.html), a law professor at Columbia, is the author of “The Master Switch: The Rise and Fall of Information Empires.”

June 21, 2012

**Supreme Court Rejects F.C.C. Fines for Indecency**

**By** [**ADAM LIPTAK**](http://topics.nytimes.com/top/reference/timestopics/people/l/adam_liptak/index.html)

WASHINGTON —   The [Supreme Court](http://topics.nytimes.com/top/reference/timestopics/organizations/s/supreme_court/index.html?inline=nyt-org) on Thursday declined to address whether the government still has the authority to regulate indecency on broadcast television, but it ruled in favor of two broadcasters who had faced potential fines for programs featuring cursing and nudity on narrow grounds.

The court ruled that the broadcasters had not been given fair notice of a new [Federal Communications Commission](http://topics.nytimes.com/top/reference/timestopics/organizations/f/federal_communications_commission/index.html?inline=nyt-org) policy. It left open the question of whether changes in the media landscape have undermined the rationales for limiting their free-speech rights in ways the First Amendment would not tolerate in other settings. Cable television and the Internet are not subject to government regulation of ostensibly indecent material.

The case, [Federal Communications Commission v. Fox Television Stations](http://www.supremecourt.gov/opinions/11pdf/10-1293f3e5.pdf), No. 10-1293, was making a return appearance at the court. In 2009, the justices also passed up an opportunity to examine the First Amendment issues raised by the case. The case arose from the broadcast of fleeting expletives by celebrities on awards shows on Fox and partial nudity on the police drama “NYPD Blue” on ABC.  Justice Anthony M. Kennedy, writing for seven justices, said the broadcasters must win, but only because the commission had changed the rules in the middle of the game.

“The commission failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent,” Justice Kennedy wrote. Two of the challenged broadcasts involved cursing on the Billboard Music Awards. The first involved Cher, who reflected on her career in accepting an award in 2002. “I’ve also had critics for the last 40 years saying I was on my way out every year,” she said.

Then she, in the words of Justice Antonin Scalia in the earlier decision in the case, “metaphorically suggested a sexual act as a means of expressing hostility to her critics.” Justice Kennedy transcribed the crucial word as the letter F followed by three asterisks.

The second bout of celebrity cursing came in an exchange between Paris Hilton and Nicole Richie in 2003 in which Ms. Richie discussed in vulgar terms the difficulties in cleaning cow manure off a Prada purse.

The commission also took issue with a 2003 episode of “NYPD Blue” that included images of, in Justice Kennedy’s words, “the nude buttocks of an adult female character for approximately seven seconds and for a moment the side of her breast.”

In 2004, after the three broadcasts and in connection with cursing by the singer Bono at the Golden Globe Awards, the commission announced that broadcasts of even fleeting indecency were subject to punishment.

It did not matter, the commission said, that some of the offensive words did not refer directly to sexual or excretory functions. Nor did it matter that the cursing was isolated and apparently impromptu. The commission imposed no punishment on Fox, but it fined ABC and its affiliates $1.24 million.

In the Fox case, the United States Court of Appeals for the Second Circuit, in New York, ruled that the commission was not entitled to change its policies “without providing a reasoned explanation justifying the about-face.” The Supreme Court reversed that ruling in 2009 on administrative-law grounds, returning it to the Second Circuit for consideration of the First Amendment issues.

The appeals court then ruled that the commission’s policies were unconstitutionally vague. It later applied that reasoning to the ABC case. When the two cases made their way to the Supreme Court recently, one of them for a return trip, First Amendment advocates hoped for a square ruling from the justices on the constitutional issues. They were disappointed.

“This opinion leaves the commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements,” Justice Kennedy wrote. “And it leaves the courts free to review the current policy or any modified policy in light of its content and application.”

Justice Sonia Sotomayor, who was a judge on the Second Circuit before being appointed to the Supreme Court, recused herself from consideration of the F.C.C. case. Only Justice Ruth Bader Ginsburg, who voted with the majority but did not join its reasoning, was prepared to address the First Amendment issues raised by changes in the world of broadcasting and related media since 1978, when the Supreme Court decided the leading case in this area,   [Federal Communications Commission v. Pacifica](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=438&invol=726).

That decision said the government could restrict George Carlin’s famous “seven dirty words” monologue, which had been broadcast on the radio in the afternoon. The court relied on what it called the uniquely pervasive nature of broadcast media and its unique accessibility to children.

[Both points are open to question](http://www.nytimes.com/2012/01/11/business/media/supreme-court-weighs-relevance-of-decades-old-broadcast-decency-rules.html?pagewanted=all) given the rise of cable television and the Internet. “In my view,” Justice Ginsburg wrote, the Pacifica decision “was wrong when it issued. Time, technological advances, and the commission’s untenable rulings in the cases now before the court show why Pacifica bears reconsideration.”

In recent remarks before the American Constitution Society last week, [Justice Ginsburg discussed the case,](http://www.acslaw.org/news/video/us-supreme-court-justice-ruth-bader-ginsburg-at-the-acs-2012-national-convention) and she suggested wryly that there were gaps in the justices’ knowledge of popular culture. “The Paris Hiltons of this world, my law clerks told me, eagerly await this decision,” she said of the case decided Thursday.  “It is beyond my comprehension, I told my clerks, how the F.C.C. can claim jurisdiction to ban words spoken in a hotel on French soil.”

April 2, 2012

**Supreme Court Ruling Allows Strip Searches for Any Arrest**

**By** [**ADAM LIPTAK**](http://topics.nytimes.com/top/reference/timestopics/people/l/adam_liptak/index.html?inline=nyt-per)

WASHINGTON — The [Supreme Court](http://topics.nytimes.com/top/reference/timestopics/organizations/s/supreme_court/index.html?inline=nyt-org) on Monday [ruled by a 5-to-4 vote](http://www.supremecourt.gov/opinions/11pdf/10-945.pdf) that officials may strip-search people arrested for any offense, however minor, before admitting them to jails even if the officials have no reason to suspect the presence of contraband.

Justice Anthony M. Kennedy, joined by the court’s conservative wing, wrote that courts are in no position to second-guess the judgments of correctional officials who must consider not only the possibility of smuggled weapons and drugs, but also public health and information about gang affiliations.

“Every detainee who will be admitted to the general population may be required to undergo a close visual inspection while undressed,” Justice Kennedy wrote, adding that about 13 million people are admitted each year to the nation’s jails.

The procedures endorsed by the majority are forbidden by statute in at least 10 states and are at odds with the policies of federal authorities. According to a [supporting brief](http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-945_petitioner_amcu_aba.authcheckdam.pdf) filed by the American Bar Association, international human rights treaties also ban the procedures.

The federal appeals courts had been split on the question, though most of them prohibited strip searches unless they were based on a reasonable suspicion that contraband was present. The Supreme Court did not say that strip searches of every new arrestee were required; it ruled, rather, that the Fourth Amendment’s prohibition of unreasonable searches did not forbid them.

Daron Hall, the president of the American Correctional Association and sheriff of Davidson County, Tenn., said the association welcomed the flexibility offered by the decision. The association’s current standards discourage blanket strip search policies.

Monday’s sharply divided decision came from a court whose ideological differences are under intense scrutiny after last week’s arguments on President Obama’s [health care law](http://topics.nytimes.com/top/news/health/diseasesconditionsandhealthtopics/health_insurance_and_managed_care/health_care_reform/index.html?inline=nyt-classifier). The ruling came less than two weeks after a pair of major 5-to-4 decisions on the right to counsel in plea negotiations, though there Justice Kennedy had joined the court’s liberal wing. The majority and dissenting opinions on Monday agreed that the search procedures the decision allowed — close visual inspection by a guard while naked — were more intrusive than being observed while showering, but did not involve bodily contact.

Justice Stephen G. Breyer, writing for the four dissenters, said the strip searches the majority allowed were “a serious affront to human dignity and to individual privacy” and should be used only when there was good reason to do so.

Justice Breyer said that the Fourth Amendment should be understood to bar strip searches of people arrested for minor offenses not involving drugs or violence, unless officials had a reasonable suspicion that they were carrying contraband.

Monday’s decision endorsed a recent trend, from appeals courts in [Atlanta](http://www.ca11.uscourts.gov/opinions/ops/200516734ENB.pdf), [San Francisco](http://www.ca9.uscourts.gov/datastore/opinions/2010/02/08/05-17080.pdf) and [Philadelphia](http://www.ca3.uscourts.gov/opinarch/093603p.pdf), allowing strip searches of everyone admitted to a jail’s general population. At least seven other appeals courts, on the other hand, had ruled that such searches were proper only if there was a reasonable suspicion that the arrested person had contraband.

According to opinions in the lower courts, people may be strip-searched after arrests for violating a leash law, driving without a license and failing to pay child support. Citing examples from briefs submitted to the Supreme Court, Justice Breyer wrote that people have been subjected to “the humiliation of a visual strip search” after being arrested for driving with a noisy muffler, failing to use a turn signal and riding a bicycle without an audible bell.

A nun was strip-searched, he wrote, after an arrest for trespassing during an antiwar demonstration.

Justice Kennedy responded that “people detained for minor offenses can turn out to be the most devious and dangerous criminals.” He noted that Timothy McVeigh, later put to death for his role in the 1995 Oklahoma City bombing, was first arrested for driving without a license plate. “One of the terrorists involved in the Sept. 11 attacks was stopped and ticketed for speeding just two days before hijacking Flight 93,” Justice Kennedy added.

The case decided Monday, Florence v. County of Burlington, No. 10-945, arose from the arrest of [Albert W. Florence](http://www.nytimes.com/2011/03/08/us/08bar.html) in New Jersey in 2005. Mr. Florence was in the passenger seat of his BMW when a state trooper pulled his wife, April, over for speeding. A records search revealed an outstanding warrant for Mr. Florence’s arrest based on an unpaid fine. (The information was wrong; the fine had been paid.)

Mr. Florence was held for a week in jails in Burlington and Essex Counties, and he was strip-searched in each. There is some dispute about the details, but general agreement that he was made to stand naked in front of a guard who required him to move intimate parts of his body. The guards did not touch him.

“Turn around,” Mr. Florence, [in an interview last year](http://www.nytimes.com/2011/03/08/us/08bar.html), recalled being told by jail officials. “Squat and cough. Spread your cheeks.”

“I consider myself a man’s man,” said Mr. Florence, a finance executive for a car dealership. “Six-three. Big guy. It was humiliating. It made me feel less than a man.”

Justice Kennedy said the most relevant precedent was [Bell v. Wolfish](http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=441&invol=520), which was decided by a 5-to-4 vote in 1979. It allowed strip-searches of people held at the Metropolitan Correctional Center in New York after “contact visits” with outsiders.

As in the Bell case, Justice Kennedy wrote, the “undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt from the more invasive search procedures at issue absent reasonable suspicion of a concealed weapon or other contraband.”

The majority and dissenting opinions drew differing conclusions from the available information about the amount of contraband introduced into jails and how much strip searches add to pat-downs and metal detectors.

Justice Kennedy said one person arrested for disorderly conduct in Washington State “managed to hide a lighter, tobacco, tattoo needles and other prohibited items in his rectal cavity.” Officials in San Francisco, he added, “have discovered contraband hidden in body cavities of people arrested for trespassing, public nuisance and shoplifting.”

Justice Breyer wrote that there was very little empirical support for the idea that strip searches detect contraband that would not have been found had jail officials used less intrusive means, particularly if strip searches were allowed when officials had a reasonable suspicion that they would find something.

For instance, in a study of 23,000 people admitted to a correctional facility in Orange County, N.Y., using that standard, there was at most one instance of contraband detected that would not otherwise have been found, Judge Breyer wrote.

Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan joined Justice Breyer’s dissent.

Justice Kennedy said that strict policies deter people entering jails from even trying to smuggle contraband.

Chief Justice John G. Roberts Jr. and Justices Antonin Scalia and Samuel A. Alito Jr. joined all of Justice Kennedy’s majority opinion, and Justice Clarence Thomas joined most of it.

In a concurrence, Chief Justice Roberts, quoting from [an earlier decision](http://supreme.justia.com/cases/federal/us/322/292/case.html), said that exceptions to Monday’s ruling were still possible “to ensure that we ‘not embarrass the future.’ ”

Justice Alito wrote that different rules might apply for people arrested but not held with the general population or whose detentions had “not been reviewed by a judicial officer.”

# [Lance Armstrong Federal Complaint Dismissed](http://www.burntorangereport.com/diary/12645/lance-armstrong-federal-complaint-dismissed)

## by: [Edward Garris](http://www.burntorangereport.com/user/Edward%20Garris)

### *Mon Aug 20, 2012 at 03:30 PM CDT*

Lance Armstrong suffered a serious setback in federal court in Austin today.

As we [reported back in July](http://www.burntorangereport.com/showDiary.do?diaryId=12474) , Armstrong filed a lawsuit in federal court here complaining of the United States Anti-Doping Agency (USADA), citing them for violations of his Fifth Amendment Due Process rights, common law due process, and tortuous interference with contract.  More importantly, however, Armstrong requested an injunction from the court, barring USADA from compelling him to submit to arbitration concerning doping allegations and from stripping him of any medals or other awards for cycling - specifically, his record-breaking and setting Tour de France wins.

USADA and its head, Travis Tygart, moved to dismiss Armstrong's complaint and request for an injunction against them.  Today, Judge Sam Sparks granted that motion to dismiss.

In his [thirty-page order](http://www.scribd.com/doc/103360421/Memorandum-Opinion), Judge Sparks recounted that the heart of Armstrong's complaint and request for relief from USADA was that the agency did not have the authority or jurisdiction to force him to fight their charges of doping against him or to strip him of his medals from cycling.

Sparks wrote that the Court found that Armstrong's due  process claims lacked merit, and that this Court itself, in fact, lacked jurisdiction over Armstrong's remaining claims, or in the alternative, declined to grant equitable relief on those claims.  Interestingly, the dismissal order was without prejudice. Generally, that leaves the door open for a complaining party to refile a complaint if they can introduce something new.

In [today's comprehensive dismissal order](http://www.scribd.com/doc/103360421/Memorandum-Opinion), Judge Sparks rooted his finding of USADA jurisdiction over Armstrong by tracing the hierarchy of rules and governing bodies of international sport, from the International Olympic Committee (IOC) all the way down to the USADA, treating them as one integrated unit with power stemming from cross-border treaty, acts of Congress, and internal rules.

Sparks then recounted two USADA letters sent to Armstrong in June of this year.  Those letters accused Armstrong of a doping conspiracy from 1999 through 2005, involving EPO, blood transfusions, testosterone and cortisone, and alleged previous use starting not later than 1996.  After the first letter went out in June, Armstrong was banned from any further by the World Triathlon Corporation.

Armstrong had argued that USADA's jurisdiction was barred by time and by contract, and that the proper authority to bring charges was not USADA, but rather, the Union Cycliste Internationale (UCI).

He had also argued that his due process would be violated in any arbitration proceeding by USADA as he would not have a right to cross-examine or confront witnesses against him, he would have no right to an impartial arbitration panel, he would have no right to disclosure of exculpatory evidence, and he would have no right to disclosure of statements, agreements, or laboratory analyses, as well as no right to judicial review.

USADA had countered that [the Ted Stevens Olympic and Amateur Sports Act](http://en.wikipedia.org/wiki/Ted_Stevens_Olympic_and_Amateur_Sports_Act), 36 U.S.C. §§220501, *et seq*., a legacy of the late Alaska Republican Senator Ted Stevens, preempted Armstrong's claims and that Armstrong had failed to exhaust his administrative remedies.

The court ruled that Armstrong's due process claims had no merit, agreed that the Sports Act did preempt Armstrong's claims, and then added that even if they did have jurisdiction over Armstrong's remaining claims, they would rather defer to the international arbitration system, respecting their expertise and, seemingly, precedent in the field.

Other federal courts have rejected challenges to arbitration panels and processes similar to Armstrong's and Judge Sparks opted to do the same.  Further, the court stated that it should not interfere with an amateur sports organization's disciplinary procedures as a general matter, and in this case where no extraordinary circumstances necessary to justify federal court intervention were presented.   Armstrong had agreed by contract to accept the benefits of this regulatory sports hierarchy - to race competitively - and must now accept the detriments - their private arbitration regime.

Notably, however, Judge Sparks stated this in his conclusion:

"[T]here are troubling aspects of this case, not least of which is USADA's apparent single-minded determination to force Armstrong to arbitrate the charges against him, in direct conflict with UCI's equally evident desire not to proceed against him...The issue is further complicated by USA Cycling's late-breaking show of support for UCI, and apparent opposition to USADA's proceedings - a wrinkle which...only confirms that these matters should be resolved internally, by the parties most affected, rather than by edict of this Court."

"As mystifying as USADA's election to proceed at this date and in this manner may be, it is equally perplexing that these three national and international bodies are apparently unable to work together to accomplish their shared goal - the regulation and promotion of cycling.  However, if these bodies wish to damage the image of their sport through bitter infighting, they will have to do so without the involvement of the United States courts."

# Sixth Circuit: No Expectation of Privacy in Cell Phone GPS Data

### By Joe Palazzolo



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Drug dealers, beware. Your pay-as-you-go phones probably have GPS. And, according to a federal appeals court in Cincinnati, police can track the signal they emit without a warrant.

The U.S. Court of Appeals for the Sixth Circuit [ruled that](http://www.ca6.uscourts.gov/opinions.pdf/12a0262p-06.pdf) the Drug Enforcement Administration committed no Fourth Amendment violation in using a drug runner’s cellphone data to track his whereabouts. The DEA obtained a court order to track Melvin Skinner’s phone, after finding his number in the course of an investigation of a large-scale drug trafficking operation.

The DEA didn’t know much about Mr. Skinner or what he looked like. They knew him as Big Foot, the drug mule, and they suspected he was communicating with the leader of the trafficking operation via a secret phone that had been registered under a false name. Agents used the GPS data from his throw-away phone to track him, and he was arrested in 2006 at a rest stop near Abilene, Texas, with a motorhome filled with more than 1,100 pounds of marijuana.

Mr. Skinner was convicted of drug trafficking and conspiracy to commit money laundering. On appeal, he argued that the data emitted from his cell phone couldn’t be used because the DEA failed to obtain a warrant for it, in violation of the Fourth Amendment.

The question in the case was whether Mr. Skinner had a reasonable expectation of privacy in the data his phone emitted. It’s a question that several courts are wrestling with. Federal law enforcement authorities, as in this case, say that investigators don’t need search warrants to gather such information.

Justice Department lawyers argued in a court brief that “a suspect’s presence in a publicly observable place is not information subject to Fourth Amendment protection.”

Judge John M. Rogers, writing for the majority, agreed:

There is no Fourth Amendment violation because Skinner did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone. If a tool used to transport contraband gives off a signal that can be tracked for location, certainly the police can track the signal. The law cannot be that a criminal is entitled to rely on the expected untrackability of his tools. Otherwise, dogs could not be used to track a fugitive if the fugitive did not know that the dog hounds had his scent. A getaway car could not be identified and followed based on the license plate number if the driver reasonably thought he had gotten away unseen. The recent nature of cell phone location technology does not change this.  If it did, then technology would help criminals but not the police.

He was joined by Judge Eric L. Clay. Judge Bernice B. Donald, who concurred but disagreed with the majority’s Fourth Amendment reasoning, said the DEA couldn’t have figured out the identity of Mr. Skinner, the make and model of his vehicle or the route he would be driving without the GPS data from his phone.

“It is not accurate…to say that police in this case acquired only information that they could have otherwise seen with the naked eye,” she wrote. “While it is true that visual observation of Skinner was possible by any member of the public, the public would first have to know that it was Skinner they ought to observe.”

A lawyer for Mr. Skinner didn’t immediately respond to a request for comment.

**The Trial of Zacarias Moussaoui**

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Since the Sept. 11 attacks, the Bush administration has repeatedly tried to dodge the Constitution while prosecuting the war on terror. In the trial of Zacarias Moussaoui, the so-called 20th hijacker, the Justice Department is once again attempting to trample the Bill of Rights -- in this case, by denying Mr. Moussaoui the right to see evidence critical to his defense. The judge should not allow the government to have its way.

The dispute now raging in the Moussaoui case is over whether the defendant will be permitted to question Ramzi bin al-Shibh, a captured member of Al Qaeda who played a key role in the Sept. 11 conspiracy. Mr. bin al-Shibh is mentioned prominently in Mr. Moussaoui's indictment, and it is possible he could provide evidence that could assist Mr. Moussaoui in his defense.

The Sixth Amendment guarantees a criminal defendant the right ''to have compulsory process for obtaining witnesses in his favor,'' and Judge Leonie Brinkema has properly ordered the government to make Mr. bin al-Shibh available. But prosecutors have refused, arguing that allowing Mr. Moussaoui to question Mr. bin al-Shibh would pose a threat to national security. Faced with the government's defiance, Judge Brinkema can strike counts from the indictment that involve Mr. bin al-Shibh, or dismiss the entire case.

http://nytimes.perfectmarket.com/pm/images/pixel.gif

Allowing the government to deny access to Mr. bin al-Shibh with impunity would set the dangerous precedent that important constitutional rights can be taken away in terrorism cases. It is not at all clear that allowing Mr. Moussaoui to question Mr. bin al-Shibh in carefully monitored circumstances would threaten national security. If the Justice Department is convinced it would, it can adjust the charges against Mr. Moussaoui so Mr. bin al-Shibh's testimony is no longer necessary.

The government has put Judge Brinkema in a bind by suggesting that if it does not like her rulings it will simply transfer Mr. Moussaoui's case to a military tribunal. Tribunals must not become an end run around two centuries of constitutional law. And in any case, it is far from certain that the Supreme Court would allow tribunals to convict people without according them the rights guaranteed by the Sixth Amendment. The war on terrorism has not repealed the Constitution, and Judge Brinkema must ensure that it applies fully in Mr. Moussaoui's case.

[Metropolitan News-Enterprise](http://www.metnews.com/)

 Friday, August 17, 2012

**Supreme Court Cites Eighth Amendment, Says Sentence of 110 Years to Life for Juvenile Is Unconstitutional**

A prison sentence of 110 years to life for a defendant who was a juvenile at the time of the crime violated the Eighth Amendment prohibition against cruel and unusual punishment, the California Supreme Court ruled yesterday.

The justices threw out the sentence imposed on Rodrigo Caballero by Los Angeles Superior Court Judge Hayden Zacky and sent the case back to the Court of Appeal, which had upheld the sentence.

Caballero, 16 at the time of the crime, was convicted of three counts of attempted murder in connection with a 2007 incident in which he fired at three teenagers who belonged to a rival gang. According to testimony, the three members of the Val Verde Park Gang were rounding a street corner on foot when Caballero jumped out of a car, identified his own gang by yelling either “Vario Lancas” or “Lancas,” and began shooting when one of the three yelled “Val Verde” in response.

One of the three was hit in the back, the others were not struck.

Zacky sentenced Caballero to consecutive terms of 15 years to life for each of the attempted murders, plus firearms enhancements of 25 years to life with regard to the defendant who was hit and 20 years each as to the two who weren’t, for an aggregate of 110 years to life.

The Court of Appeal affirmed, but Justice Ming Chin, writing for the high court yesterday, said the sentence violated *Graham v. Florida* (2010) 130 S.Ct. 2011.

*Graham* struck down, on Eighth Amendment grounds, a life sentence without possibility for a parole for a juvenile convicted of burglary and attempted armed robbery. The justices ruled that while such a sentence would pass constitutional muster in a homicide case, there was no legitimate basis for it when the crime did not involve loss of life.

Chin rejected prosecution arguments that *Graham* should not be applied to a crime involving intent to kill, and that the court should look at the individual sentences, each of which carried the possibility of parole, rather than the aggregate.

The justice cited the recent case of *Miller v. Alabama* (2012) 132 S.Ct. 2455, which extended *Graham*’s reasoning to hold that a law mandating life without parole sentences for juveniles in homicide cases violates the Eighth Amendment.

Chin explained:

“*Graham*’s analysis does not focus on the precise sentence meted out.  Instead, as noted above, it holds that a state must provide a juvenile offender ‘with some realistic opportunity to obtain release’ from prison during his or her expected lifetime.”

The court’s ruling requires that sentencing courts set “meaningful” minimum terms for juveniles convicted of non-homicide offenses for which the maximum term is life, who would then be eligible for parole, and invites previously sentenced juveniles to seek habeas corpus relief.

In setting the minimum terms, Chin said, the court must consider “all mitigating circumstances,” including the offender’s age, whether the offender was a direct perpetrator or an aider and abettor, and the minor’s physical and mental development.

The opinion was joined by Chief Justice Tani Cantil-Sakauye and Justices Joyce L. Kennard, Marvin Baxter, and Carol Corrigan.

Justice Kathryn M. Werdegar, joined by Justice Goodwin Liu, concurred separately, arguing that the majority opinion gives too little guidance to the trial court.

“*Graham* does not require defendant be given a parole hearing *sometime* in the future; it prohibits a court from sentencing him to such a term lacking that possibility *at the outset*,” Werdegar wrote. “Therefore, I would remand the case to the trial court with directions to resentence defendant to a term that does not violate his constitutional rights, that is, a sentence that, although undoubtedly lengthy, provides him with a ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.’”

The case was argued in the Supreme Court by David E. Durchfort of the West Los Angeles firm of Kosnett & Durchfort for the defendant, Marsha Levick of the Philadelphia-based Juvenile Law Center as amicus for the defendant, and Deputy Attorney General Lawrence M. Daniels for the state.

The case is *People v. Caballero,* 12 S.O.S. 4146.

**Tenth Amendment Movement Aims to Give Power Back to the States**

By [James Osborne](http://www.foxnews.com/archive/author/James-Osborne/index.html)

Published May 26, 2009

*The powers not delegated to the* [*United States*](http://www.foxnews.com/topics/u.s.htm#r_src=ramp) *by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people*.  
-- U.S. Constitution, Tenth Amendment

Fed up with Washington's involvement in everything from land use to [gun control](http://www.foxnews.com/topics/politics/gun-control.htm#r_src=ramp) to education spending, states across the country are fighting back against what they say is the federal government's growing intrusion on their rights. At least 35 states have introduced legislation this year asserting their power under the Tenth Amendment to regulate all matters not specifically delegated to the federal government by the Constitution.

"This has been boiling for years, and it's finally come to a head," said Utah State Rep. Carl Wimmer. "With TARP and [No Child Left Behind](http://www.foxnews.com/topics/politics/no-child-left-behind.htm#r_src=ramp), these things that continue to give the federal government more authority, our rights as states and individuals are being turned on their head."The power struggle between the states and Washington has cropped up periodically ever since the country was founded. But now some states are sending a simple, forceful message:

The government has gone too far. Enough is enough. Montana Gov. [Brian Schweitzer](http://www.foxnews.com/topics/politics/brian-schweitzer.htm#r_src=ramp) recently signed into law a bill authorizing the state's gun manufacturers to produce "Made in Montana" firearms, without seeking licensing from the federal [Bureau of Alcohol, Tobacco, Firearms and Explosives](http://www.foxnews.com/topics/politics/bureau-of-alcohol-tobacco-firearms-and-explosives.htm#r_src=ramp). Similar laws are being considered in Utah, Alaska, Texas and Tennessee. The Montana law is expected to end up in the courts, where states' rights activists hope judges will uphold their constitutional right to regulate firearms.

That would reverse a longstanding trend, said Martin Flaherty, a professor of constitutional law at Fordham Law School. "From 1937 to 1995 there is not one instance of the [Supreme Court](http://www.foxnews.com/topics/politics/supreme-court.htm#r_src=ramp) knocking back Congress," he said. "In the Constitution the interstate commerce clause gives Congress the right to regulate commerce between the states. That gives them a lot of power. There were questions of how far they can reach, but then comes the New Deal, and Roosevelt gets all these picks on the [Supreme] Court, and they come upon a theory whereupon congressional power is almost infinite."

That 1930s understanding of the Constitution is now the norm, with advocates for the federal government arguing that issues of a certain size and scope can be addressed only by an institution with the resources of the federal government. As an example, federal authority is necessary in the economic crisis, said U.S. Rep. Dan Boren, whose home state of Oklahoma recently passed a sovereignty resolution.

"The economic situation in our nation over the past year has not been contained in any one community or state. The industries and institutions affected by the recent economic crisis touch multiple layers of our economy and are not confined to any one state or region," he said in a statement. "I feel there was Constitutional justification for Congress's recent efforts to stabilize our economy." But for many state leaders, the degree to which Congress regulates issues within their boundaries, using the interstate commerce clause to regulate just about everything and anything, has become untenable.

Texas Gov. [Rick Perry](http://www.foxnews.com/topics/politics/rick-perry.htm#r_src=ramp) made headlines recently when he made a passing reference to the possibility of the Lone Star State seceding from the U.S., saying, "if Washington continues to thumb their nose at the American people, you know, who knows what might come out of that?"

States rights advocates offer countless examples of what they believe is Washington's overreach. In Utah, 67 percent of the state's land is controlled by the federal government through wilderness preserves, limiting state leaders in their bid to fill government coffers through oil and natural gas drilling after Interior Secretary [Ken Salazar](http://www.foxnews.com/topics/politics/obama-administration/ken-salazar.htm#r_src=ramp) cancelled 103,000 acres of leases this year.

In Idaho, ranchers are furious that federal [endangered species](http://www.foxnews.com/topics/science/endangered-species-act.htm#r_src=ramp) law prevents them from shooting the wolves that prey on their cattle. "The balance of power between the states and the federal government is way out of whack," said [Georgia](http://www.foxnews.com/topics/georgia.htm#r_src=ramp) state Senator Chip Pearson." The effect here is incalculable. Everything you do from the moment you wake up until you get to bed, there is some federal law or restriction."

Up until recently, the state sovereignty movement has remained almost entirely Republican, drawing supporters from the ranks that voted against [President Obama](http://www.foxnews.com/topics/politics/obama-administration/barack-obama.htm#r_src=ramp) and attended tea parties last month to protest federal tax hikes. But the movement's rank and file are just as likely now to criticize Obama's predecessor, [George W. Bush](http://www.foxnews.com/topics/politics/george-bush.htm#r_src=ramp), as they are the new president, pointing to what they believe were Bush's overreaching policies on education and [homeland security](http://www.foxnews.com/topics/politics/national-security.htm#r_src=ramp).

Many are becoming frequent visitors to a Web site, TenthAmendmentCenter.com, which was founded in early 2007 and has become a community bulletin board for states rights activists and politicians. Up to 20,000 viewers log on to the site every day.

The site's founder, Michael Boldin, a 36-year-old Web marketer in Los Angeles who says he has no political affiliation, says he decided to launch the site after watching the Maine State Legislature fight the Department of Homeland Security on the Real ID act, a controversial Bush-era law that will require states to issue federally regulated identification cards, complete with biometric data and stringent address checks.

"Maine resisted, and the government backed off, and soon all these other states were doing the same thing," Boldin said. "The bottom line is, if there's widespread support, people can resist the federal government at the state level."

The deadline for states to comply with Real ID has now been pushed back until 2011.

The Tenth Amendment movement is not without controversy. In Georgia, a columnist for The Atlanta Journal Constitution called a sovereignty resolution in the state Senate a threat "to secede from and even disband the United States."

The resolution, which was passed as part of a group of bills that were banded together, affirmed the state's powers under the Tenth Amendment, taking its inspiration and language from Thomas Jefferson's 1798 resolution opposing the Alien and Sedition Acts -- laws enacted by the federal government during wartime to quiet protest against the government.

The resolution asserts that any instance of the federal government taking action beyond its enumerated powers "shall constitute a nullification of the Constitution for the United States of America by the government of the United States of America."

"It's been taken out of context by some editors," said Pearson, who sponsored the bill. "It certainly never meant secession. The intent was to communicate that the actions of the federal government are an infringement on states' rights."

Robert Natelson, a law professor at the University of Montana who was involved in drawing up that state's sovereignty resolution over a decade ago, argues that states up until now have been unwilling to take action of any real consequence in checking federal power.

"Back then they passed the resolution, but they didn't turn down any federal dollars," he said.

"If the states are serious about returning the federal government to its historical origins, they're going to have to do more than pass resolutions. They're going to have to turn down money and litigate."