CHAPTER

5

Civil Liberties

WHO GOVERNS?

1. **Why do the courts play so large a role in deciding what our civil liberties should be?**

TO WHAT ENDS?

1. **Why not display religious symbols on government property?**
2. **If a person confesses to committing a crime, why is that confession sometimes not used in court?**
3. **Does the Patriot Act reduce our liberties?**

Dogs trained to sniff out drugs go down your high school corridors and detect marijuana in some lockers. The school authorities open and search your locker without permission or a court order. You are expelled from school without any hearing. Have your liberties been violated?

Angry at what you consider unfair treatment, you decide to wear a cloth American flag sewn to the seat of your pants, and your fellow students decide to wear black armbands to class to protest how you were treated. The police arrest you for wearing a flag on your seat, and the school punishes your classmates for wearing armbands contrary to school regulations. Have your liberties, or theirs, been violated?

You go into federal court to find out. We cannot be certain how the court would decide the issues in this particular case, but in similar cases in the past the courts have held that school authorities can use dogs to detect drugs in schools and that these officials can conduct a "reasonable" search of you and your effects if they have a "reasonable suspicion" that you are violating a school rule. But they cannot punish your classmates for wearing black armbands, they cannot expel you without a hearing, and the state cannot make it illegal to treat the flag "contemptuously" (by sewing it to the seat of your pants, for example). In 2007, however, the Court allowed a school principal to punish a student for displaying a flag saying "Bong Hits 4 Jesus" that the official felt endorsed drug use during a school-supervised event. So a student's free speech rights (and a school's authority to enforce discipline) now lie somewhere between disgracing a flag (OK) and encouraging drug use (not OK).[1]

Your claim that these actions violated your constitutional rights would have astonished the Framers of the Constitution. They thought that they had written a document that stated what the federal government *could* do, not one that specified what state governments (such as school systems) *could not* do. And they thought that they had created a national government of such limited powers that it was not even necessary to add a list—a bill of rights—stating what that government was forbidden from doing. It would be enough, for example, that the Constitution did not authorize the federal government to censor newspapers; an amendment prohibiting censorship would be superfluous.

The people who gathered in the state ratifying conventions weren't so optimistic. They suspected—rightly, as it turned out—that the federal government might well try to do things that it was not authorized to do, and so they insisted that the Bill of Rights be added to the Constitution. But even they never imagined that the Bill of Rights would affect what *state* governments could do. Each state would decide that for itself, in its own constitution. And if by chance the Bill of Rights did apply to the states, surely its guarantees of free speech and freedom from unreasonable searches and seizures would apply to

big issues—the freedom to attack the government in a newspaper editorial, for example, or to keep the police from breaking down the door of your home without a warrant. The courts would not be deciding who could wear what kinds of armbands or under what circumstances a school could expel a student.

Civil liberties are the protections the Constitution provides against the abuse of government power by, for example, censoring your speech. Civil rights, to be discussed in the next chapter, usually refers to protecting certain groups, such as women, gays, and African Americans, against discrimination. In practice, however, there is no clear line between civil liberties and civil rights. For example, is the right to an abortion a civil liberty or a civil right? In this chapter, we take a look at free speech, free press, religious freedom, and the rights of the accused. In the next one we look at discrimination and abortion.

★ Culture and Civil Liberties

Rights in Conflict

We often think of "civil liberties" as a set of principles that protect the freedoms of all of us all of the time. That is true—up to a point. But in fact the Constitution and the Bill of Rights contain a list of *competing* rights and duties. That competition becomes obvious when one person asserts one constitutional right or duty and another person asserts a different one. For example:

- Dr. Samuel H. Sheppard of Cleveland, Ohio, asserted his right to have a fair trial on the charge of having murdered his wife. Bob Considine and Walter Winchell, two radio commentators, as well as other reporters, asserted their right to broadcast whatever facts and rumors they heard about Dr. Sheppard and his love life. Two rights in conflict.
- The U.S. government has an obligation to "provide for the common defense" and, in pursuit of that duty, has claimed the right to keep secret certain military and diplomatic information. The *New York Times* claimed the right to publish such secrets as the "Pentagon Papers" without censorship, citing the Constitution's guarantee of freedom of the press. A duty and a right in conflict.
- Carl Jacob Kunz delivered inflammatory anti-Jewish speeches on the street corners of a Jewish neighborhood in New York City, suggesting, among other things, that Jews be "burnt in incinerators." The Jewish people living in that area were outraged. The New York police commissioner revoked Kunz's license to hold public meetings on the streets. When he continued to air his views on the public streets, Kunz was arrested for speaking without a permit. Freedom of speech versus the preservation of public order.

Even a disruptive high school student's right not to be a victim of arbitrary or unjustifiable expulsion is in partial conflict with the school's obligation to maintain an orderly environment in which learning can take place.

Political struggles over civil liberties follow much the same pattern as interest group politics involving economic issues, even though the claims in question are made by individuals. Indeed, there are formal, organized interest groups concerned with civil liberties. The Fraternal Order of the Police complains about restrictions on police powers, whereas the American Civil Liberties Union defends and seeks to enlarge those restrictions. Catholics have pressed for public support of parochial schools; Protestants and Jews have argued against it. Sometimes the opposed groups are entirely private; sometimes one or both are government agencies. Often their clashes end up in the courts. (When the Supreme Court decided the cases given earlier, Sheppard, the *New York Times,* and Kunz all won.[2])

War has usually been the crisis that has restricted the liberty of some minority. For example:

- The Sedition Act was passed in 1798, making it a crime to write, utter, or publish "any false, scandalous, and malicious writing" with the intention of defaming the president, Congress, or the government or of exciting against the government "the hatred of the people." The occasion was a kind of half-war between the United States and France, stimulated by fear in this country of the violence following the French Revolution of 1789. The policy entrepreneurs were Federalist politicians who believed that Thomas Jefferson and his followers were supporters of the French Revolution and would, if they came to power, encourage here the kind of anarchy that seemed to be occurring in France.

Students at a high school talk to a military recruiter.

- The Espionage and Sedition Acts were passed in 1917–1918, making it a crime to utter false statements that would interfere with the American military, to send through the mails material "advocating or urging treason, insurrection, or forcible resistance to any law of the United States," or to utter or write any disloyal, profane, scurrilous, or abusive language intended to incite resistance to the United States or to curtail war production. The occasion was World War I; the impetus was the fear that Germans in this country were spies and that radicals were seeking to overthrow the government. Under these laws more than two thousand persons were prosecuted (about half were convicted), and thousands of aliens were rounded up and deported. The policy entrepreneur leading this massive crackdown (the so-called Red Scare) was Attorney General A. Mitchell Palmer.
- The Smith Act was passed in 1940, the Internal Security Act in 1950, and the Communist Control Act in 1954. These laws made it illegal to advocate the overthrow of the U.S. government by force or violence (Smith Act), required members of the Communist Party to register with the government (Internal Security Act), and declared the Communist Party to be part of a conspiracy to overthrow the government (Communist Control Act). The occasion was World War II and the Korean War, which, like earlier wars, inspired fears that foreign agents (Nazi and Soviet) were trying to subvert the government. For the latter two laws the policy entrepreneur was Senator Joseph McCarthy, who attracted a great deal of attention with his repeated (and sometimes inaccurate) claims that Soviet agents were working inside the U.S. government.

These laws had in common an effort to protect the nation from threats, real and imagined, posed by people who claimed to be exercising their freedom to speak, publish, organize, and assemble. In each case a real threat (a war) led the government to narrow the limits of permissible speech and activity. Almost every time such restrictions were imposed, the Supreme Court was called upon to decide whether Congress (or sometimes state legislatures) had drawn those limits properly. In most instances the Court tended to uphold the legislatures. But as time passed and the war or crisis ended, popular passions abated and many of the laws proved to be unimportant.

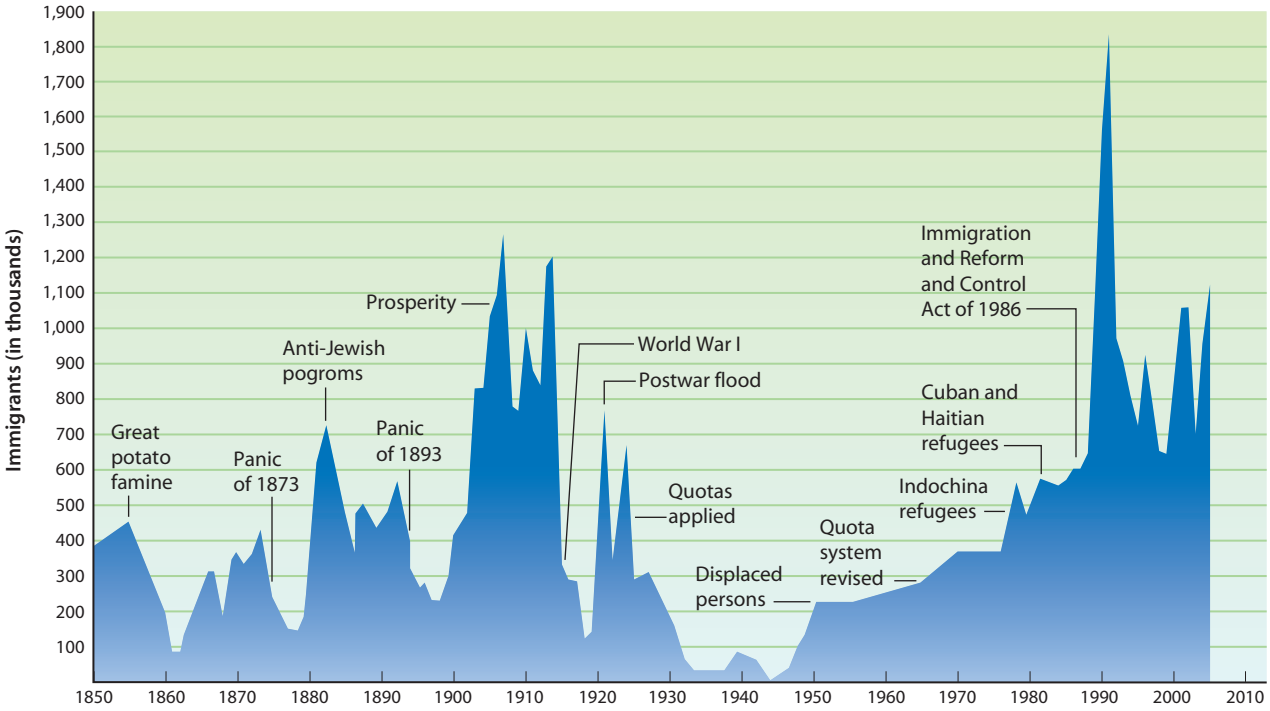
Though it is uncommon, some use is still made of the sedition laws. In the 1980s various white supremacists and Puerto Rican nationalists were charged with sedition. In each case the government alleged that the accused had not only spoken in favor of overthrowing the government but had actually engaged in violent actions such as bombings. Later in this chapter we shall see how the Court has increasingly restricted the power of Congress and state legislatures to outlaw political speech; to be found guilty of sedition now it is usually necessary to do something more serious than just talk about it.

Cultural Conflicts

In the main the United States was originally the creation of white European Protestants. Blacks were, in most cases, slaves, and American Indians were not citizens. Catholics and Jews in the colonies composed a small minority, and often a persecuted one. The early schools tended to be religious—that is, Protestant—ones, many of them receiving state aid. It is not surprising that under these circumstances a view of America arose that equated "Americanism" with the values and habits of white Anglo-Saxon Protestants.

But immigration to this country brought a flood of new settlers, many of them coming from very different backgrounds (see Figure 5.1). In the mid-

Figure 5.1 Annual Legal Immigration, 1850–2005



Note: Figures for 1989 and 1990 include persons who were granted permanent residence under the legalization program of the Immigration and Reform and Control Act of 1986.

Source: Office of Immigration Statistics, *2005 Yearbook of Immigration Statistics.* (Washington, D.C.: Department of Homeland Security, 2006), p. 5.

nineteenth century the potato famine led millions of Irish Catholics to migrate here. At the turn of the century religious persecution and economic disadvantage brought more millions of people, many Catholic or Jewish, from southern and eastern Europe.

In recent decades political conflict and economic want have led Hispanics (mostly from Mexico but increasingly from all parts of Latin America), Caribbeans, Africans, Middle Easterners, Southeast Asians, and Asians to cross our borders—some legally, some illegally. Among them have been Buddhists, Catholics, Muslims, and members of many other religious and cultural groups.

Ethnic, religious, and cultural differences have given rise to different views as to the meaning and scope of certain constitutionally protected freedoms. For example:

- Many Jewish groups find it offensive for a crèche (that is, a scene depicting the birth of Christ in a manger) to be displayed in front of a government building such as city hall at Christmastime, while many Catholics and Protestants regard such displays as an important part of our cultural heritage. Does a religious display on public property violate the First Amendment requirement that the government pass no law "respecting an establishment of religion"?
- Many English-speaking people believe that the public schools ought to teach all students to speak and write English, because the language is part of our nation's cultural heritage. Some Hispanic groups argue that the schools should teach pupils in both English and Spanish, since Spanish is part of the Hispanic cultural heritage. Is bilingual education constitutionally required?
- The Boy Scouts of America refuses to allow homosexual men to become scout leaders even though federal law says that homosexuals may not be the victims of discrimination. Many civil libertarians and homosexuals challenged this policy because it

discriminated against gays, while the Boy Scouts defended it because their organization was a private association free to make its own rules. (The Supreme Court in 2000 upheld the Boy Scouts on the grounds of their right to associate freely.)

Even within a given cultural tradition there are important differences of opinion as to the balance between community sensitivities and personal self-expression. To some people the sight of a store carrying pornographic books or a theater showing a pornographic movie is deeply offensive; to others pornography is offensive but such establishments ought to be tolerated to ensure that laws restricting them do not also restrict politically or artistically important forms of speech; to still others pornography itself is not especially offensive. What forms of expression are entitled to constitutional protection?

Applying the Bill of Rights to the States

For many years after the Constitution was signed and the Bill of Rights was added to it as amendments, the liberties these documents stated applied only to the federal government. The Supreme Court made this clear in a case decided in 1833.[3] Except for Article I which, among other things, banned ex post facto laws and guaranteed the right of habeas corpus, the Constitution was silent on what the states could not do to their residents.

due process of law *Denies the government the right, without due process, to deprive people of life, liberty, and property.*

equal protection of the law *A standard of equal treatment that must be observed by the government.*

selective incorporation *Court cases that apply Bill of Rights to states.*

freedom of expression *Right of people to speak, publish, and assemble.*

This began to change after the Civil War when new amendments were ratified in order to ban slavery and protect newly freed slaves. The Fourteenth Amendment, ratified in 1868, was the most important addition. It said that no state shall "deprive any person of life, liberty, or property without **due process of law**" (a phrase now known as the "due process clause") and that no state shall "deny to any person within its jurisdiction the **equal protection of the laws**" (a phrase now known as the "equal protection clause").

Beginning in 1897, the Supreme Court started to use these two phrases as a way of applying certain rights to state governments. It first said that no state could take private property without paying just compensation, and then in 1925 held, in the *Gitlow* case, that the federal guarantees of free speech and free press also applied to the states.[4] In 1937 it went much further and said in *Palko v. Connecticut* that certain rights should be applied to the states because, in the Court's words, they "represented the very essence of a scheme of ordered liberty" and were "principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."[5]

In these cases, the Supreme Court began the process of **selective incorporation** by which some, but not all, federal rights also applied to the states. But which rights are so "fundamental" that they ought to govern the states? There is no entirely clear answer to this question, but in general the entire Bill of Rights is now applied to the states except for the following:

- The right to bear arms (Second Amendment)
- The right not to have soldiers forcibly quartered in private homes (Third Amendment)
- The right to be indicted by a grand jury before being tried for a serious crime (Fifth Amendment)
- The right to a jury trial in civil cases (Seventh Amendment)
- The ban on excessive bail and fines (Eighth Amendment)

And as we shall see, when the Court creates a new right, such as the right to "privacy," the justices have applied it to both state and national governments.

★ Interpreting and Applying the First Amendment

The First Amendment contains the language that has been at issue in most of the cases to which we have thus far referred. It has roughly two parts: one protecting **freedom of expression** ("Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the government for a redress of grievances") and the other protecting **freedom of religion** ("Congress shall make no law respecting an establishment of religion; or abridging the free exercise thereof").

Speech and National Security

The traditional view of free speech and a free press was expressed by William Blackstone, the great English jurist, in his *Commentaries,* published in 1765. A free press is essential to a free state, he wrote, but the freedom that the press should enjoy is the freedom from **prior restraint**—that is, freedom from censorship, or rules telling a newspaper in advance what it can publish. Once a newspaper has published an article or a person has delivered a speech, that paper or speaker has to take the consequences if what was written or said proves to be "improper, mischievous, or illegal."[6]

The U.S. Sedition Act of 1798 was in keeping with traditional English law. Like it, the act imposed no prior restraint on publishers; it did, however, make them liable to punishment after the fact. The act was an improvement over the English law, however, because unlike the British model, it entrusted the decision to a jury, not a judge, and allowed the defendant to be acquitted if he or she could prove the truth of what had been published. Although several newspaper publishers were convicted under the act, none of these cases reached the Supreme Court. When Jefferson became president in 1801, he pardoned the remaining people who had been convicted under the Sedition Act. Though Jeffersonians objected vehemently to the law, their principal objection was not to the idea of holding newspapers accountable for what they published but to letting the *federal* government do this. Jefferson was perfectly prepared to have the *states* punish what he called the "overwhelming torrent of slander" by means of "a few prosecutions of the most prominent offenders."[7]

It would be another century before the federal government would attempt to define the limits of free speech and writing. Perhaps recalling the widespread opposition to the sweep of the 1798 act, Congress in 1917–1918 placed restrictions not on publications that were critical of the government but only on those that advocated "treason, insurrection, or forcible resistance" to federal laws or attempted to foment disloyalty or mutiny in the armed services.

In 1919 this new law was examined by the Supreme Court when it heard the case of Charles T. Schenck, who had been convicted of violating the Espionage Act because he had mailed circulars to men eligible for the draft, urging them to resist. At issue was the constitutionality of the Espionage Act and, more broadly, the scope of Congress's power to control speech. One view held that the First Amendment prevented Congress from passing *any* law restricting speech; the other held that Congress could punish dangerous speech. For a unanimous Supreme Court, Justice Oliver Wendell Holmes announced a rule by which to settle the matter. It soon became known as the **clear-and-present-danger test:**

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[8]

The Court held that Schenck's leaflets did create such a danger, and so his conviction was upheld. In explaining why, Holmes said that not even the Constitution protects a person who has been "falsely shouting fire in a theatre and causing a panic." In this case things that might safely be said in peacetime may be punished in wartime.

The clear-and-present-danger test may have clarified the law, but it kept no one out of jail. Schenck went, and so did the defendants in five other cases in the period 1919–1927, even though during this time Holmes, the author of the test, shifted his position and began writing dissenting opinions in which he urged that the test had not been met and so the defendant should go free.

Landmark Cases

Incorporation

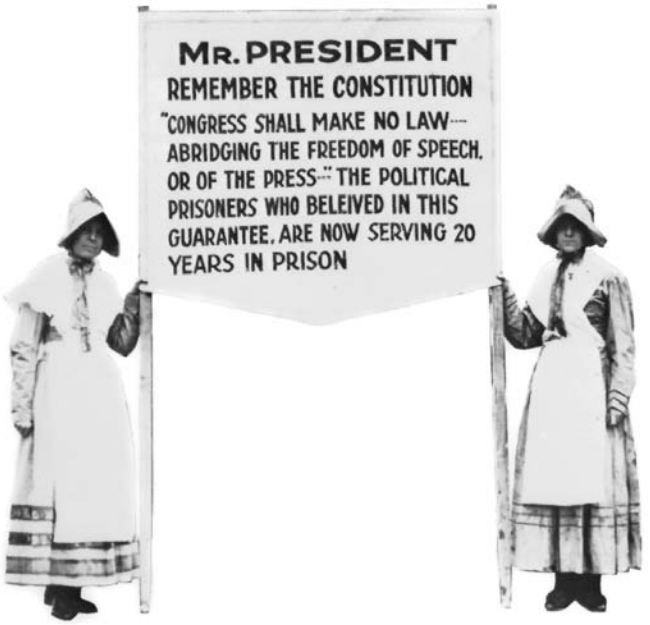
- ***Gitlow v. New York* (1925):** Supreme Court says the First Amendment applies to states.
- ***Palko v. Connecticut* (1937):** Supreme Court says that states must observe all "fundamental" liberties.

To explore these landmark cases further, visit the *American Government* web site at college.hmco.com/pic/wilsonAGlle.

freedom of religion *People shall be free to exercise their religion, and government may not establish a religion.*

prior restraint *censorship of a publication.*

clear-and-present-danger test *Law should not punish speech unless there was a clear and present danger of producing harmful actions.*



Women picketed in front of the White House, urging President Warren Harding to release political radicals arrested during his administration.

In 1925 Benjamin Gitlow was convicted of violating New York's sedition law—a law similar to the federal Sedition Act of 1918—by passing out some leaflets. The Supreme Court upheld his conviction but added, as we have seen, a statement that changed constitutional history: freedom of speech and of the press were now among the "fundamental personal rights" protected by the due-process clause of the Fourteenth Amendment from infringements by *state* action.[9] Thereafter state laws involving speech, the press, and peaceful assembly were struck down by the Supreme Court for being in violation of the freedom-of-expression guarantees of the First Amendment, made applicable to the states by the Fourteenth Amendment.[10]

The clear-and-present-danger test was a way of balancing the competing demands of free expression and national security. As the memory of World War I and the ensuing Red Scare evaporated, the Court began to develop other tests, ones that shifted the balance more toward free expression. Some of these tests are listed in the box on page 103.

But when a crisis reappears, as it did in World War II and the Korean conflict, the Court has tended to defer, up to a point, to legislative judgments about the need to protect national security. For example, it upheld the conviction of eleven leaders of the Communist Party for having advocated the violent overthrow of the U.S. government, a violation of the Smith Act of 1940.

This conviction once again raised the hard question of the circumstances under which words can be punished. Hardly anybody would deny that actually *trying* to overthrow the government is a crime; the question is whether *advocating* its overthrow is a crime. In the case of the eleven communist leaders, the Court said that the government did not have to wait to protect itself until "the *putsch* [rebellion] is about to be executed, the plans have been laid and the signal is awaited." Even if the communists were not likely to be successful in their effort, the Court held that specifically advocating violent overthrow could be punished. "In each case," the opinion read, the courts "must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[11]

But as the popular worries about communists began to subside and the membership of the Supreme Court changed, the Court began to tip the balance even farther toward free expression. By 1957 the Court made it clear that for advocacy to be punished, the government would have to show not just that a person believed in the overthrow of the government but also that he or she was using words "calculated to incite" that overthrow.[12]

By 1969 the pendulum had swung to the point where the speech would have to be judged likely to incite "imminent" unlawful action. In this case Clarence Brandenburg, a leader of the Ku Klux Klan in Ohio, staged a cross-burning rally during which he reviled blacks and Jews. The police told him to clear the street; as he left, he said, "We'll take the [expletive] street later." He was convicted of attempting to incite lawless mob action. The Supreme Court overturned the conviction, holding that any speech that does not call for illegal action is protected, and even speech that *does* call for illegal action is protected if the action is not "imminent" or there is reason to believe that the listeners will not take action.[13]

This means that no matter how offensive or provocative some forms of expression may be, this expression has powerful constitutional protections. In 1977 a group of American Nazis wanted to parade through the streets of Skokie, Illinois, a community with a large Jewish population. The residents, outraged, sought to ban the march. Many feared violence if it occurred. But the lower courts, under prodding

from the Supreme Court, held that, noxious and provocative as the anti-Semitic slogans of the Nazis may be, the Nazi party had a constitutional right to speak and parade peacefully.[14]

Similar reasoning led the Supreme Court in 1992 to overturn a Minnesota statute that made it a crime to display symbols or objects, such as a Nazi swastika or a burning cross, that are likely to cause alarm or resentment among an ethnic or racial group, such as Jews or African Americans.[15] On the other hand, if you are convicted of actually hurting someone, you may be given a tougher sentence if it can be shown that you were motivated to assault them by racial or ethnic hatred.[16] To be punished for such a hate crime, your bigotry must result in some direct and physical harm and not just the display of an odious symbol.

A Ku Klux Klan member uses his constitutional right to free speech to utter "white power" chants in Skokie, Illinois.

★ What Is Speech?

If most political speaking or writing is permissible, save that which actually incites someone to take illegal actions, what *kinds* of speaking and writing qualify for this broad protection? Though the Constitution says that the legislature may make "no law" abridging freedom of speech or the press, and although some justices have argued that this means literally *no* law, the Court has held that there are at least four forms of speaking and writing that are not automatically granted full constitutional protection: libel, obscenity, symbolic speech, and false advertising.

Libel

A **libel** is a written statement that defames the character of another person. (If the statement is oral, it is called a slander.) In some countries, such as England, it is easy to sue another person for libel and to collect. In this country it is much harder. For one thing, you must show that the libelous statement was false. If it was true, you cannot collect no matter how badly it harmed you.

A beauty contest winner was awarded $14 million (later reduced on appeal) when she proved that *Penthouse* magazine had libeled her. The actress Carol Burnett collected a large sum from a libel suit brought against a gossip newspaper. But when Theodore Roosevelt sued a newspaper for falsely claiming that he was a drunk, the jury awarded him damages of only six cents.[17]

If you are a public figure, it is much harder to win a libel suit. A public figure such as an elected official, an army general, or a well-known celebrity must prove not only that the publication was false and damaging but also that the words were published with "actual malice"—that is, with reckless disregard for their truth or falsity or with knowledge that they were false.[18] Israeli General Ariel Sharon was able to prove that the statements made about him by *Time* magazine were false and damaging but not that they were the result of "actual malice."

libel *Writing that falsely injures another person.*

Obscenity

Obscenity is not protected by the First Amendment. The Court has always held that obscene materials, because they have no redeeming social value and are calculated chiefly to appeal to one's sexual rather than political or literary interests, can be regulated by the state. The problem, of course, arises with the meaning of *obscene*. In the eleven-year period from 1957 to 1968 the Court decided thirteen major cases involving the definition of obscenity, which resulted in fifty-five separate opinions.[19] Some justices, such as Hugo Black, believed that the First Amendment protected all publications, even wholly obscene ones. Others believed that obscenity deserved no protection and strug-

gled heroically to define the term. Still others shared the view of former Justice Potter Stewart, who objected to "hard-core pornography" but admitted that the best definition he could offer was "I know it when I see it."[20]

It is unnecessary to review in detail the many attempts by the Court at defining obscenity. The justices have made it clear that nudity and sex are not, by definition, obscene and that they will provide First Amendment protection to anything that has political, literary, or artistic merit, allowing the government to punish only the distribution of "hard-core pornography." Their most recent definition of this is as follows: to be obscene, the work, taken as a whole, must be judged by "the average person applying contemporary community standards" to appeal to the "prurient interest" or to depict "in a patently offensive way, sexual conduct specifically defined by applicable state law" and to lack "serious literary, artistic, political, or scientific value."[21]

After Albany, Georgia, decided that the movie *Carnal Knowledge* was obscene by contemporary local standards, the Supreme Court overturned the distributor's conviction on the grounds that the authorities in Albany failed to show that the film depicted "patently offensive hard-core sexual conduct."[22]

It is easy to make sport of the problems the Court has faced in trying to decide obscenity cases (one conjures up images of black-robed justices leafing through the pages of *Hustler* magazine, taking notes), but these problems reveal, as do other civil liberties cases, the continuing problem of balancing competing claims. One part of the community wants to read or see whatever it wishes; another part wants to protect private acts from public degradation. The first part cherishes liberty above all; the second values decency above liberty. The former fears that *any* restriction on literature will lead to *pervasive* restrictions; the latter believes that reasonable people can distinguish (or reasonable laws can require them to distinguish) between patently offensive and artistically serious work.

Anyone strolling today through an "adult" bookstore must suppose that no restrictions at all exist on the distribution of pornographic works. This condition does not arise simply from the doctrines of the Court. Other factors operate as well, including the priorities of local law enforcement officials, the political climate of the community, the procedures that must be followed to bring a viable court case, the clarity and workability of state and local laws on the subject, and the difficulty of changing the behavior of many people by prosecuting one person. The current view of the Court is that localities can decide for themselves whether to tolerate hard-core pornography; but if they choose not to, they must meet some fairly strict constitutional tests.

The protections given by the Court to expressions of sexual or erotic interest have not been limited to books, magazines, or films. Almost any form of visual or auditory communication can be considered "speech" and thus protected by the First Amendment. In one case even nude dancing was given protection as a form of "speech,"[23] although in 1991 the Court held that nude dancing was only "marginally" within the purview of First Amendment protections, and so it upheld an Indiana statute that banned *totally* nude dancing.[24]

Of late some feminist organizations have attacked pornography on the grounds that it exploits and degrades women. They persuaded Indianapolis to pass an ordinance that defined pornography as portrayals of the "graphic, sexually explicit subordination of women" and allowed people to sue the producers of such material. Sexually explicit portrayals of women in positions of equality were not defined as pornography. The Court disagreed. In 1986 it affirmed a lower-court ruling that such an ordinance was a violation of the First Amendment because it represented a legislative preference for one form of expression (women in positions of equality) over another (women in positions of subordination).[25]

One constitutionally permissible way to limit the spread of pornographic materials has been to establish rules governing where in a city they can be sold. When one city adopted a zoning ordinance prohibiting an "adult" movie theater from locating within one thousand feet of any church, school, park, or residential area, the Court upheld the ordinance, noting that the purpose of the law was not to regulate speech but to regulate the use of land. And in any case the adult theaters still had much of the city's land area in which to find a location.[26]

With the advent of the Internet it has become more difficult for the government to regulate obscenity. The Internet spans the globe. It offers an amazing variety of materials—some educational, some entertaining, some sexually explicit. But it is difficult to apply the Supreme Court's standard for judging whether

How Things Work

Testing Restrictions on Expression

The Supreme Court has employed various standards and tests to decide whether a restriction on freedom of expression is constitutionally permissible.

1. **Preferred position** The right of free expression, though not absolute, occupies a higher, or more preferred, position than many other constitutional rights, such as property rights. This is still a controversial rule; nonetheless, the Court always approaches a restriction on expression skeptically.
2. **Prior restraint** With scarcely any exceptions, the Court will not tolerate a prior restraint on expression, such as censorship, even when it will allow subsequent punishment of improper expressions (such as libel).
3. **Imminent danger** Punishment for uttering inflammatory sentiments will be allowed only if there is an imminent danger that the utterances will incite an unlawful act.
4. **Neutrality** Any restriction on speech, such as a requirement that parades or demonstrations not disrupt other people in the exercise of their rights, must be neutral—that is, it must not favor one group more than another.
5. **Clarity** If you must obtain a permit to hold a parade, the law must set forth clear (as well as neutral) standards to guide administrators in issuing that permit. Similarly, a law punishing obscenity must contain a clear definition of obscenity.
6. **Least-restrictive means** If it is necessary to restrict the exercise of one right to protect the exercise of another, the restriction should employ the least-restrictive means to achieve its end. For example, if press coverage threatens a person's right to a fair trial, the judge may only do what is minimally necessary to that end, such as transferring the case to another town rather than issuing a "gag order."

Cases cited, by item: (1) *United States v. Carolene Products,* 304 U.S. 144 (1938). (2) *Near v. Minnesota,* 283 U.S. 697 (1931). (3) *Brandenburg v. Ohio,* 395 U.S. 444 (1969). (4) *Kunz v. New York,* 340 U.S. 290 (1951). (5) *Hynes v. Mayor and Council of Oradell,* 425 U.S. 610 (1976). (6) *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976).

sexual material is obscene—the "average person" applying "contemporary community standards"—to the Internet, because there is no easy way to tell what "the community" is. Is it the place where the recipient lives or the place where the material originates? And since no one is in charge of the Internet, who can be held responsible for controlling offensive material? Since anybody can send anything to anybody else without knowing the age or location of the recipient, how can the Internet protect children? When Congress tried to ban obscene, indecent, or "patently offensive" materials from the Internet, the Supreme Court struck down the law as unconstitutional. The Court went even further with child pornography. Though it has long held that child pornography is illegal even if it is not obscene because of the government's interest in protecting children, it would not let Congress ban pornography involving computer-designed children. Under the 1996 law, it would be illegal to display computer simulations of children engaged in sex even if no real children were involved. The Court said "no." It held that Congress could not ban "virtual" child pornography without violating the First Amendment because, in its view, the law might bar even harmless depictions of children and sex (for example, in a book on child psychology).[27]

Symbolic Speech

You cannot ordinarily claim that an illegal act should be protected because that action is meant to convey a political message. For example, if you burn your draft card in protest against the foreign policy of the United States, you can be punished for the illegal act

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"Symbolic speech": when young men burned their draft cards during the 1960s to protest the Vietnam War, the Supreme Court ruled that it was an illegal act for which they could be punished.

(burning the card), even if your intent was to communicate your beliefs. The Court reasoned that giving such **symbolic speech** the same protection as real speech would open the door to permitting all manner of illegal actions—murder, arson, rape—if the perpetrator meant thereby to send a message.[28]

On the other hand, a statute that makes it illegal to burn the American flag is an unconstitutional infringement of free speech.[29] Why is there a difference between a draft card and the flag? The Court argues that the government has a right to run a military draft and so can protect draft cards, even if this incidentally restricts speech. But the only motive that the government has in banning flag-burning is to restrict this form of speech, and that would make such a restriction improper.

The American people were outraged by the flag-burning decision, and in response the House and Senate passed by huge majorities (380 to 38 and 91 to 9) a law making it a federal crime to burn the flag. But the Court struck this law down as unconstitutional.[30] Now that it was clear that only a constitutional amendment could make flag-burning illegal, Congress was asked to propose one. But it would not. Earlier members of the House and Senate had supported a law banning flag-burning with over 90 percent of their votes, but when asked to make that law a constitutional amendment they could not muster the necessary two-thirds majorities. The reason is that Congress is much more reluctant to amend the Constitution than to pass new laws. Several members decided that flag-burning was wrong, but not so wrong or so common as to justify an amendment.

symbolic speech
An act that conveys a political message.

★ Who Is a Person?

If people have a right to speak and publish, do corporations, interest groups, and children have the same right? By and large the answer is yes, though there are some exceptions.

When the attorney general of Massachusetts tried to prevent the First National Bank of Boston from spending money to influence votes in a local election, the Court stepped in and blocked him. The Court held that a corporation, like a person, has certain First Amendment rights. Similarly, when the federal government tried to limit the spending of a group called Massachusetts Citizens for Life (an antiabortion organization), the Court held that such organizations have First Amendment rights.[31] The Court has also told states that they cannot forbid liquor stores to advertise their prices and informed federal authorities that they cannot prohibit casinos from plugging gambling.[32]

When the California Public Utility Commission tried to compel one of the utilities that it regulates, the Pacific Gas and Electric Company, to enclose in its monthly bills to customers statements written by groups attacking the utility, the Supreme Court blocked the agency, saying that forcing it to disseminate political statements violated the firm's free speech rights. "The identity of the speaker is not decisive in determining whether speech is protected," the Court said. "Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." In this case the right to speak includes the choice of what *not* to say.[33]

Even though corporations have some First Amendment rights, the government can place more limits on commercial than on noncommercial speech. The legislature can place restrictions on advertisements for cigarettes, liquor, and gambling; it can even regulate advertising for some less harmful products provided that the regulations are narrowly tailored and serve a substantial public interest.[34] If the regulations are too broad or do not serve a clear

interest, then ads are entitled to some constitutional protection. For example, the states cannot bar lawyers from advertising or accountants from personally soliciting clients.[35]

A big exception to the free-speech rights of corporations and labor unions groups was imposed by the McCain-Feingold campaign finance reform law passed in 2002. Many groups, ranging from the American Civil Liberties Union and the AFL-CIO to the National Rifle Association and the Chamber of Commerce, felt that the law banned legitimate speech. Under its terms, organizations could not pay for "electioneering communications" on radio or television that "refer" to candidate for federal office within sixty days before the election. But the Supreme Court struck down these arguments, upholding the law in *McConnell v. Federal Election Commission*. The Court said that ads that only mentioned but did not "expressly advocate" a candidate were ways of influencing the election. Some dissenting opinion complained that a Court that had once given free speech protection to nude dancing ought to give it to political speech.[36] In 2007, the Court held that the McCain-Feingold law could not be used to prevent an organization from running an ad urging people to write to Senator Feingold, right before a primary election in which he was a candidate, urging him to vote for certain judicial nominees. Since it said nothing about supporting or opposing him, this ad was "issue advocacy" and was protected by the First Amendment.

Under certain circumstances, young people may have less freedom of expression than adults. In 1988 the Supreme Court held that the principal of Hazelwood High School could censor articles appearing in the student-edited newspaper. The newspaper was published using school funds and was part of a journalism class. The principal ordered the deletion of stories dealing with student pregnancies and the impact of parental divorce on students. The student editors sued, claiming their First Amendment rights had been violated. The Court agreed that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" and that they cannot be punished for expressing on campus their personal views. But students do not have exactly the same rights as adults if the exercise of those rights impedes the educational mission of the school. Students may lawfully say things on campus, as individuals, that they cannot say if they are part of school-sponsored activities, such as plays or school-run newspapers, that are part of the curriculum. School-sponsored activities can be controlled so long as the controls are "reasonably related to legitimate pedagogical concerns."[37]

Landmark Cases

Free Speech and Free Press

- ***Schenck v. United States* (1919):** Speech may be punished if it creates a clear-and-present-danger test of illegal acts.
- ***Chaplinksy v. New Hampshire* (1942):** "Fighting words" are not protected by the First Amendment.
- ***New York Times v. Sullivan* (1964):** To libel a public figure, there must be "actual malice."
- ***Tinker v. Des Moines* (1969):** Public school students may wear armbands to class protesting against America's war in Vietnam when such display does not disrupt classes.
- ***Miller v. California* (1973):** Obscenity defined as appealing to prurient interests of an average person with materials that lack literary, artistic, political, or scientific value.
- ***Texas v. Johnson* (1989):** There may not be a law to ban flag-burning.
- ***Reno v. ACLU* (1997):** A law that bans sending "indecent" material to minors over the Internet is unconstitutional because "indecent" is too vague and broad a term.
- ***McConnell v. Federal Election Commission* (2003):** Upholds 2002 campaign finance reform law.
- ***FEC v. Wisconsin Right to Life*** (2007): Prohibits campaign finance reform law from banning political advocacy.

To explore these landmark cases further, visit the *American Government* web site at college.hmco.com/pic/wilsonAGIle.

★ Church and State

Everybody knows, correctly, the language of the First Amendment that protects freedom of speech and the press, though most people are not aware of how complex the legal interpretations of these provisions have become. But many people also believe, wrongly, that the language of the First Amendment clearly requires the "separation of church and state." It does not.

What that amendment actually says is quite different and maddeningly unclear. It has two parts. The first, often referred to as the **free-exercise clause,** states that Congress shall make no law prohibiting the "free exercise" of religion. The second, which is called the **establishment clause,** states that Congress shall make no law "respecting an establishment of religion."

The Free-Exercise Clause

The free-exercise clause is the clearer of the two, though by no means is it lacking in ambiguity. It obviously means that Congress cannot pass a law prohibiting Catholics from celebrating Mass, requiring Baptists to become Episcopalians, or preventing Jews from holding a bar mitzvah. Since the First Amendment has been applied to the states via the due-process clause of the Fourteenth Amendment, it means that state governments cannot pass such laws either. In general the courts have treated religion like speech: you can pretty much do or say what you want so long as it does not cause some serious harm to others.

free-exercise clause *First Amendment requirement that law cannot prevent free exercise of religion.*

establishment clause *First Amendment ban on laws "respecting an establishment of religion."*

Even some laws that do not appear on their face to apply to churches may be unconstitutional if their enforcement imposes particular burdens on churches or greater burdens on some churches than others. For example, a state cannot apply a license fee on door-to-door solicitors when the solicitor is a Jehovah's Witness selling religious tracts.[38] By the same token, the courts ruled that the city of Hialeah, Florida, cannot ban animal sacrifices by members of an Afro-Caribbean religion called Santeria. Since killing animals is generally not illegal (if it were, there could be no hamburgers or chicken sandwiches served in Hialeah's restaurants, and rat traps would be unlawful), the ban in this case was clearly directed against a specific religion and hence was unconstitutional.[39]

Having the right to exercise your religion freely does not mean, however, that you are exempt from laws binding other citizens, even when the law goes against your religious beliefs. A man cannot have more than one wife, even if (as once was the case with Mormons) polygamy is thought desirable on religious grounds.[40] For religious reasons you may oppose being vaccinated or having blood transfusions, but if the state passes a compulsory vaccination law or orders that a blood transfusion be given to a sick child, the courts will not block them on grounds of religious liberty.[41] Similarly, if you belong to an Indian tribe that uses a drug, peyote, in religious ceremonies, you cannot claim that your freedom was abridged if the state decides to ban the use of peyote, provided the law applies equally to all.[42] Since airports have a legitimate need for tight security measures, begging can be outlawed in them even if some of the people doing the begging are part of a religious group (in this case, the Hare Krishnas).[43]

Unfortunately some conflicts between religious belief and public policy are even more difficult to settle. What if you believe on religious grounds that war is immoral? The draft laws have always exempted a conscientious objector from military duty, and the Court has upheld such exemptions. But the Court has gone further: it has said that people cannot be drafted even if they do not believe in a Supreme Being or belong to any religious tradition, so long as their "consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become part of an instrument of war."[44] Do exemptions on such grounds create an opportunity for some people to evade the

Two opposing high school basketball teams pray together after a game.

draft because of their political preferences? In trying to answer such questions, the courts often have had to try to define a religion—no easy task.

And even when there is no question about your membership in a bona fide religion, the circumstances under which you may claim exemption from laws that apply to everybody else are not really clear. What if you, a member of the Seventh-Day Adventists, are fired by your employer for refusing on religious grounds to work on Saturday, and then it turns out that you cannot collect unemployment insurance because you refuse to take an available job—one that also requires you to work on Saturday? Or what if you are a member of the Amish sect, which refuses, contrary to state law, to send its children to public schools past the eighth grade? The Court has ruled that the state must pay you unemployment compensation and cannot require you to send your children to public schools beyond the eighth grade.[45]

These last two decisions, and others like them, show that even the "simple" principle of freedom of religion gets complicated in practice and can lead to the courts' giving, in effect, preference to members of one church over members of another.

The Establishment Clause

What in the world did the members of the First Congress mean when they wrote into the First Amendment language prohibiting Congress from making a law "respecting" an "establishment" of religion? The Supreme Court has more or less consistently interpreted this vague phrase to mean that the Constitution erects a "wall of separation" between church and state.

That phrase, so often quoted, is not in the Bill of Rights nor in the debates in the First Congress that drafted the Bill of Rights; it comes from the pen of Thomas Jefferson, who was opposed to having the Church of England as the established church of his native Virginia. (At the time of the Revolutionary War there were established churches—that is, official, state-supported churches—in at least eight of the thirteen former colonies.) But it is not clear that Jefferson's view was the majority view.

During much of the debate in Congress the wording of this part of the First Amendment was quite different and much plainer than what finally emerged. Up to the last minute the clause was intended to read "no religion shall be established by law" or "no national religion shall be established." The meaning of those words seems quite clear: whatever the states may do, the federal government cannot create an official, national religion or give support to one religion in preference to another.[46]

But Congress instead adopted an ambiguous phrase, and so the Supreme Court had to decide what it meant. It has declared that these words do not simply mean "no national religion" but mean as well no government involvement with religion at all, even on a nonpreferential basis. They mean, in short, erecting a "wall of separation" between church and state.[47] Though the interpretation of the establishment clause remains a topic of great controversy among judges and scholars, the Supreme Court has more or less consistently adopted this **wall-of-separation** principle.

Its first statement of this interpretation was in 1947. The case involved a New Jersey town that reimbursed parents for the costs of transporting their children to school, including parochial (in this case Catholic) schools. The Court decided that this reimbursement was constitutional, but it made it clear that the establishment clause of the First Amendment applied (via the Fourteenth Amendment) to the states and that it meant, among other things, that the government cannot require a person to profess a belief or disbelief in any religion; it cannot aid one religion, some religions, or all religions; and it cannot spend any tax money, however small the amount might be, in support of any religious activities or institutions.[48] The reader may wonder, in view of the Court's reasoning, why it allowed the town to pay for busing children to Catholic schools. The answer that it gave is that busing is a religiously neutral activity, akin to providing fire and police protection to Catholic schools. Busing, available to public- and private-school children alike, does not breach the wall of separation.

Since 1947 the Court has applied the wall-of-separation theory to strike down as unconstitutional every effort to have any form of prayer in public schools, even if it is nonsectarian,[49] voluntary,[50] or limited to reading a passage of the Bible.[51] Since 1992 it has even been unconstitutional for a public school to ask a rabbi or minister to offer a prayer—an invocation or a benediction—at the school's graduation ceremony, and since 2001 it has been unconstitutional for a student, elected by other students, to lead a voluntary prayer at the beginning of a high school football game.[52] Moreover, the Court has held that laws prohibiting teaching the theory of evolution or requiring giving equal time to "creationism"

wall of separation
Court ruling that government cannot be involved with religion.

(the biblical doctrine that God created mankind) are religiously inspired and thus unconstitutional.[53] A public school may not allow its pupils to take time out from their regular classes for religious instruction if this occurs within the schools, though "released-time" instruction is all right if it is done outside the public school building.[54] The school prayer decisions in particular have provoked a storm of controversy, but efforts to get Congress to propose to the states a constitutional amendment authorizing such prayers have failed.

Almost as controversial have been Court-imposed restrictions on public aid to parochial schools, though here the wall-of-separation principle has not been used to forbid any and all forms of aid. For example, it is permissible for the federal government to provide aid for constructing buildings on denominational (as well as nondenominational) college campuses[55] and for state governments to loan free textbooks to parochial-school pupils,[56] grant tax-exempt status to parochial schools,[57] allow parents of parochial-school children to deduct their tuition payments on a state's income tax returns,[58] and pay for computers and a deaf child's sign language interpreter at private and religious schools.[59] But the government cannot pay a salary supplement to teachers who teach secular subjects in parochial schools,[60] reimburse parents for the cost of parochial-school tuition,[61] supply parochial schools with services such as counseling,[62] give money with which to purchase instructional materials, require that "creationism" be taught in public schools, or create a special school district for Hasidic Jews.[63]

The Court sometimes changes its mind on these matters. In 1985 it said that the states could not send teachers into parochial schools to teach remedial courses for needy children, but twelve years later it decided that they could. "We no longer presume," the Court wrote, "that public employees will inculcate religion simply because they happen to be in a sectarian environment."[64]

Perhaps the most important establishment-clause decision in recent times was the Court ruling that vouchers can be used to pay for children being educated at religious and other private schools. The case began in Cleveland, Ohio, where the state offered money to any family (especially poor ones) whose children attended a school that had done so badly that it was under a federal court order requiring it to be managed directly by the state superintendent of schools. The money, a voucher, could be used to send a child to any other public or private school, including one run by a religious group. The Court held that this plan did not violate the establishment clause because the aid went, not to the school, but to the families who were to choose a school.[65]

If you find it confusing to follow the twists and turns of Court policy in this area, you are not alone. The wall-of-separation principle has not been easy to apply, and the Court has begun to alter its position on church-state matters. The Court has tried to sort out the confusion by developing a three-part test to decide under what circumstances government involvement in religious activities is improper.[66] That involvement is constitutional if it meets these tests:

1. It has a secular purpose.
2. Its primary effect neither advances nor inhibits religion.
3. It does not foster an excessive government entanglement with religion.

No sooner had the test been developed than the Court decided that it was all right for the government of Pawtucket, Rhode Island, to erect a Nativity scene as part of a Christmas display in a local park. But five years later it said that Pittsburgh could not put a Nativity scene in front of the courthouse but could display a menorah (a Jewish symbol of Chanukah) next to a Christmas tree and a sign extolling liberty. The Court claimed that the crèche had to go (because, being too close to the courthouse, a government endorsement was implied) but the menorah could stay (because, being next to a Christmas tree, it would not lead people to think that Pittsburgh was endorsing Judaism).

When the Ten Commandments are displayed in or near a public building, a deeply divided Court has made some complicated distinctions. It held that it was unconstitutional for two Kentucky counties to put up the Ten Commandments in their courthouses because, the Court decided, the purpose was religious. It did no good for one Kentucky courthouse to surround the Ten Commandments with displays of the Declaration of Independence and the Star Spangled Banner so as to make the Commandments part of America's political heritage. The Court said it was still a religious effort, even though it noted that there was a frieze containing Moses in the Supreme Court's own building. (This, the opinion held, was not religious.) But when the Ten Commandments was put up outside the Texas state capitol, this was upheld.

How Would You Decide?

Suppose that you are on the Supreme Court. In each of the actual cases summarized below, you are asked to decide whether the First Amendment to the Constitution permits or prohibits a particular action. What would be your decision? (How the Supreme Court actually decided is given on page 113.)

Case 1: Jacksonville, Florida, passed a city ordinance prohibiting drive-in movies from showing films containing nudity if the screen was visible to passersby on the street. A movie theater manager protested, claiming that he had a First Amendment right to show such films, even if they could be seen from the street. Who is correct?

Case 2: Dr. Benjamin Spock wanted to enter Fort Dix Military Reservation in New Jersey to pass out campaign literature and discuss issues with service personnel. The military denied him access on grounds that regulations prohibit partisan campaigning on military bases. Who is correct?

Case 3: A town passed an ordinance forbidding the placing of "For Sale" or "Sold" signs in front of homes in racially changing neighborhoods. The purpose was to reduce "white flight" and panic selling. A realty firm protested, claiming that its freedom of speech was being abridged. Who is correct?

Case 4: A girl in Georgia was raped and died. A local television station broadcast the name of the girl, having obtained it from court records. Her father sued, claiming that his family's right to privacy had been violated, and pointed to a Georgia law that made it a crime to broadcast the name of a rape victim. The television station claimed that it had a right under the First Amendment to broadcast the name. Who is correct?

Case 5: Florida passed a law giving a political candidate the right to equal space in a newspaper that had published attacks on him. A newspaper claimed that this violated the freedom of the press to publish what it wants. Who is correct?

Case 6: Zacchini is a "human cannonball" whose entire fifteen-second act was filmed and broadcast by an Ohio television station. Zacchini sued the station, claiming that his earning power had been reduced by the film because the station showed for free what he charges people to see at county fairs. The station replied that it had a First Amendment right to broadcast such events. Who is correct?

The justice, Stephen Breyer, who changed from opposing the Kentucky display to favoring the Texas one, said that in Texas the Commandments now revealed a secular message and, besides, nobody had sued to end this display for forty years after the Commandments were erected.[67]

Confused? It gets worse. Though the Court has struck down prayer in public schools, it has upheld prayer in Congress (since 1789, the House and Senate open each session with a prayer).[68] A public school cannot have a chaplain, but the armed services can. The Court has said that the government cannot "advance" religion, but it has not objected to the printing of the phrase "In God We Trust" on the back of every dollar bill.

It is obvious that despite its efforts to set forth clear rules governing church-state relations, the Court's actual decisions are hard to summarize. It is deeply divided—some would say deeply confused—on these matters, and so the efforts to define the "wall of separation" will continue to prove to be as difficult as the Court's earlier efforts to decide what is interstate and what is local commerce (see Chapter 3).

★ Crime and Due Process

Whereas the central problem in interpreting the religion clauses of the First Amendment has been to decide what they mean, the central problems in interpreting those parts of the Bill of Rights that affect people accused of a crime have been to decide not only what they mean but also how to put them into effect. It is not obvious what constitutes an "unreasonable search," but even if we settle that question, we still must decide how best to protect people against

Landmark Cases

Religious Freedom

- ***Pierce v. Society of Sisters* (1925):** Though states may require public education, they may not require that students attend only public schools.
- ***Everson v. Board of Education* (1947):** The wall-of-separation principle is announced.
- ***Zorauch v. Clauson* (1952):** States may allow students to be released from public schools to attend religious instruction.
- ***Engel v. Vitale* (1962):** There may not be a prayer, even a nondenominational one, in public schools.
- ***Lemon v. Kurtzman* (1971):** Three tests are described for deciding whether the government is improperly involved with religion.
- ***Lee v. Weisman* (1992):** Public schools may not have clergy lead prayers at graduation ceremonies.
- ***Santa Fe Independent School District v. Doe* (2000):** Students may not lead prayers before the start of a football game at a public school.
- ***Zelman v. Simmons-Harris,* (2000):** Voucher plan to pay school bills is upheld.

To explore these landmark cases further, visit the *American Government* web site at college.hmco.com/pic/wilsonAGlle.

such searches in ways that do not unduly hinder criminal investigations.

There are at least two ways to provide that protection. One is to let the police introduce in court evidence relevant to the guilt or innocence of a person, no matter how it was obtained and then, after the case is settled, punish the police officer (or his or her superiors) if the evidence was gathered improperly (for example, by an unreasonable search). The other way is to exclude improperly gathered evidence from the trial in the first place, even if it is relevant to determining the guilt or innocence of the accused.

exclusionary rule *Improperly gathered evidence may not be introduced in a criminal trial.*

Most democratic nations, including England, use the first method; the United States uses the second. Because of this, many of the landmark cases decided by the Supreme Court have been bitterly controversial. Opponents of these decisions have argued that a guilty person should not go free just because the police officer blundered, especially if the mistake was minor. Supporters rejoin that there is no way to punish errant police officers effectively other than by excluding tainted evidence; moreover, nobody should be convicted of a crime except by evidence that is above reproach.[69]

The Exclusionary Rule

The American method relies on what is called the **exclusionary rule.** That rule holds that evidence gathered in violation of the Constitution cannot be used in a trial. The rule has been used to implement two provisions of the Bill of Rights—the right to be free from unreasonable searches and seizures (Fourth Amendment) and the right not to be compelled to give evidence against oneself (Fifth Amendment).*

Not until 1949 did the Supreme Court consider whether to apply the exclusionary rule to the states. In a case decided that year the Court made it clear that the Fourth Amendment prohibited the police from carrying out unreasonable searches and obtaining improper confessions but held that it was not necessary to use the exclusionary rule to enforce those prohibitions. It noted that other nations did not require that evidence improperly gathered had to be excluded from a criminal trial. The Court said that the local police should not improperly gather and use evidence, but if they did, the remedy was to sue the police department or punish the officer.[70]

But in 1961 the Supreme Court changed its mind about the use of the exclusionary rule. It all began

*We shall consider here only two constitutional limits—those bearing on searches and confessions. Thus we will omit many other important constitutional provisions affecting criminal cases, such as rules governing wiretapping, prisoner rights, the right to bail and to a jury trial, the bar on ex post facto laws, the right to be represented by a lawyer in court, the ban on "cruel and unusual" punishment, and the rule against double jeopardy.

WHAT WOULD YOU DO?

MEMORANDUM

To: *Rebecca Saikia, Supreme Court justice*
From: *David Wilson, law clerk*
Subject: *Patriot Act and libraries*

The Patriot Act allows the FBI to seek the records of possible terrorists from banks, businesses, and libraries. Many libraries claim that this will harm the constitutional rights of Americans. You support these rights, but are also aware of the need to protect national security.

High Court Hears From Libraries About War on Terror

April 22 WASHINGTON, D.C.
Two public libraries have asked the Supreme court to strike down provisions of the Patriot Act that allow the Federal Beueau of Investigation to see the borrowing records of persons who are under investigation. . . .

Arguments supporting the Patriot Act:

1. The Patriot Act does not target individuals who have not violated a criminal law and who do not threaten human life.
2. For the FBI to collect information about borrowers, it must first obtain permission from a federal judge.
3. Terrorists may use libraries to study and plan activities that threaten national security.

Arguments against the Patriot Act:

1. Freedom of speech and expression are fundamental constitutional guarantees that should not be infringed.
2. The law might harm groups engaged in peaceful protests.
3. The law allows the government to delay notifying people that their borrowing habits are being investigated.

Your decision:

Uphold this provision _____ Overturn this provision _____

The Threat Operations Center at the National Security Agency in Fort Meade, Virginia.

when the Cleveland police broke into the home of Dollree Mapp in search of illegal drugs, and not finding them, arrested her for possessing some obscene pictures that they found there. The Court held that this was an unreasonable search and seizure because the police had not obtained a search warrant, though they had had ample time to do so. Furthermore, such illegally gathered evidence could not be used in the trial of Mapp.[71] Beginning with this case—*Mapp v. Ohio*—the Supreme Court required the use of the exclusionary rule as a way of enforcing a variety of constitutional guarantees.

Search and Seizure

After the Court decided to exclude improperly gathered evidence, the next problem was to decide what evidence was improper. What happened to Dollree Mapp was an easy case: hardly anybody argued that it was reasonable for the police to break into someone's home without a warrant, ransack their belongings, and take whatever they could find that might be incriminating. But that left a lot of hard choices still to be made.

search warrant *A judge's order authorizing a search.*

probable cause *Reasonable cause for issuing a search warrant or making an arrest; more than mere suspicion.*

When can the police search you without its being unreasonable? Under two circumstances—when they have a search warrant and when they have lawfully arrested you. A **search warrant** is an order from a judge authorizing the search of a place; the order must describe what is to be searched and seized, and the judge can issue it only if he or she is persuaded by the police that good reason (**probable cause**) exists to believe that a crime has been committed and that the evidence bearing on that crime will be found at a certain location. (The police can also search a building if the occupant gives them permission.)

In addition, you can be searched if the search occurs when you are being lawfully arrested. When can you be arrested? You can be arrested if a judge has issued an arrest warrant for you, if you commit a crime in the presence of a police officer, or if the officer has probable cause to believe that you have committed a serious crime (usually a felony). If you are arrested and no search warrant has been issued, the police, and not a judge, decide what they can search. What rules should they follow?

In trying to answer that question, the courts have elaborated a set of rules that are complex, subject to frequent change, and quite controversial. In general the police, after arresting you, can search:

- You
- Things in plain view
- Things or places under your immediate control

As a practical matter, things "in plain view" or "under your immediate control" mean the room in which you are arrested but not other rooms of the house.[72] If the police want to search the rest of your house or a car parked in your driveway, they will first have to go to a judge to obtain a search warrant. But if the police arrest a college student on campus for drinking under age and then accompany that student back to his or her dormitory room so that the student can get proof that he or she was old enough to drink, the police can seize drugs that are in plain view in that room.[73] And if marijuana is growing in plain view in an open field, the police can enter and search that field even though it is fenced off with a locked gate and a "No Trespassing" sign.[74]

But what if you are arrested while driving your car—how much of it can the police search? The answer to that question has changed almost yearly. In 1979 the Court ruled that the police could not search a suitcase taken from a car of an arrested person, and in 1981 it extended this protection to any "closed, opaque container" found in the car.[75] But the following year the Court decided that all parts of a car, closed or open, could be searched if the officers had probable cause to believe that they contained contraband

How the Court Decided

The United States Supreme Court answered the questions on page 109 in the following ways:

Case 1: The drive-in movie won. The Supreme Court, 6–3, decided that the First Amendment protects the right to show nudity; it is up to the unwilling viewer on the public streets to avert his or her eyes.

Erznoznik v. Jacksonville,
422 U.S. 205 (1975)

Case 2: The military won. The Supreme Court, 6–2, decided that military reservations are not like public streets or parks, and thus civilians can be excluded from them, especially if such exclusion prevents the military from appearing to be the handmaiden of various political causes.

Greer v. Spock,
424 U.S. 828 (1976)

Case 3: The realty firm won. The Supreme Court, 8–0, decided that the First Amendment prohibits the banning of signs, even of a commercial nature, without a strong, legitimate state interest. Banning the signs would not obviously reduce "white flight," and the government has no right to withhold information from citizens for fear that they will act unwisely.

Linmark Associates, Inc. v. Willingboro,
431 U.S. 85 (1977)

Case 4: The television station won. The Court, 8–1, decided that the First Amendment protects the right to broadcast the names of rape victims obtained from public (that is, court) records.

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975)

Case 5: The newspaper won. The Supreme Court decided unanimously that the First Amendment prohibits the state from intruding into the function of editors.

Miami Herald Publishing Co. v. Tornillo,
418 U.S. 241 (1974)

Case 6: Zacchini, the human cannonball, won. The Supreme Court, 5–4, decided that broadcasting the entire act without the performer's consent jeopardized his means of livelihood, even though the First Amendment would guarantee the right of the station to broadcast newsworthy facts about the act.

Zacchini v. Scripps-Howard Broadcasting Co.,
433 U.S. 562 (1977)

(that is, goods illegally possessed). And recently the rules governing car searches have been relaxed even further. Officers who have probable cause to search a car can also search the things passengers are carrying in the car. And if the car is stopped to give the driver a traffic ticket, the car can be searched if the officer develops a "reasonable, articulable suspicion" that the car is involved in other illegal activity.[76]

In this confusing area of the law the Court is attempting to protect those places in which a person has a "reasonable expectation of privacy." Your body is one such place, and so the Court has held that the police cannot compel you to undergo surgery to remove a bullet that might be evidence of your guilt or innocence in a crime.[77] But the police can require you to take a Breathalyzer test to see whether you have been drinking while driving.[78] Your home is another place where you have an expectation of privacy, but a barn next to your home is not, nor is your backyard viewed from an airplane, nor is your home if it is a motor home that can be driven away, and so the police need not have a warrant to look into these places.[79]

If you work for the government, you have an expectation that your desk and files will be private; nonetheless, your supervisor may search the desk and files without a warrant, provided that he or she is looking for something related to your work.[80] But bear in mind that the Constitution protects you only against *the government;* a private employer has a great deal of freedom to search your desk and files.

Confessions and Self-Incrimination

The constitutional ban on being forced to give evidence against oneself was originally intended to prevent the use of torture or "third-degree" police tactics to extract confessions. But it has since been extended to cover many kinds of statements uttered not out of fear of torture but from lack of awareness of one's rights, especially the right to remain silent, whether in the courtroom or in the police station.

For many decades the Supreme Court had held that involuntary confessions could not be used in federal criminal trials but had not ruled that they were barred from state trials. But in the early 1960s it changed its mind in two landmark cases—*Escobedo* and *Miranda*.[81] The story of the latter and of the controversy that it provoked is worth telling.

Ernesto A. Miranda was convicted in Arizona of the rape and kidnapping of a young woman. The conviction was based on a written confession that Miranda signed after two hours of police questioning. (The victim also identified him.) Two years earlier the Court had decided that the rule against self-incrimination applied to state courts.[82] Now the question arose of what constitutes an "involuntary" confession. The Court decided that a confession should be presumed involuntary unless the person in custody had been fully and clearly informed of his or her right to be silent, to have an attorney present during any questioning, and to have an attorney provided free of charge if he or she could not afford one. The accused may waive these rights and offer to talk, but the waiver must be truly voluntary. Since Miranda did not have a lawyer present when he was questioned and had not knowingly waived his right to a lawyer, the confession was excluded from evidence in the trial and his conviction was overturned.[83]

Miranda was tried and convicted again, this time on the basis of evidence supplied by his girlfriend, who testified that he had admitted to her that he was guilty. Nine years later he was released from prison; four years after that he was killed in a barroom fight. When the Phoenix police arrested the prime suspect in Ernesto Miranda's murder, they read him his rights from a "Miranda card."

good-faith exception *An error in gathering evidence sufficiently minor that it may be used in a trial.*

Everyone who watches cops-and-robbers shows on television probably knows the "Miranda warning" by heart (see the box on page 115). The police now read it routinely to people whom they arrest. It is not clear whether it has much impact on who does or does not confess or what effect, if any, it may have on the crime rate.

In time the Miranda rule was extended to mean that you have a right to a lawyer when you appear in a police lineup[84] and when you are questioned by a psychiatrist to determine whether you are competent to stand trial.[85] The Court threw out the conviction of a man who had killed a child, because the accused, without being given the right to have a lawyer present, had led the police to the victim's body.[86] You do not have a right to a Miranda warning, however, if while in jail you confess a crime to another inmate who turns out to be an undercover police officer.[87]

Some police departments have tried to get around the need for a Miranda warning by training their officers to question suspects before giving them a Miranda warning and then, if the suspect confessed, giving the warning and asking the same questions over again. But the Supreme Court would not allow this and struck the practice down.[88]

Relaxing the Exclusionary Rule

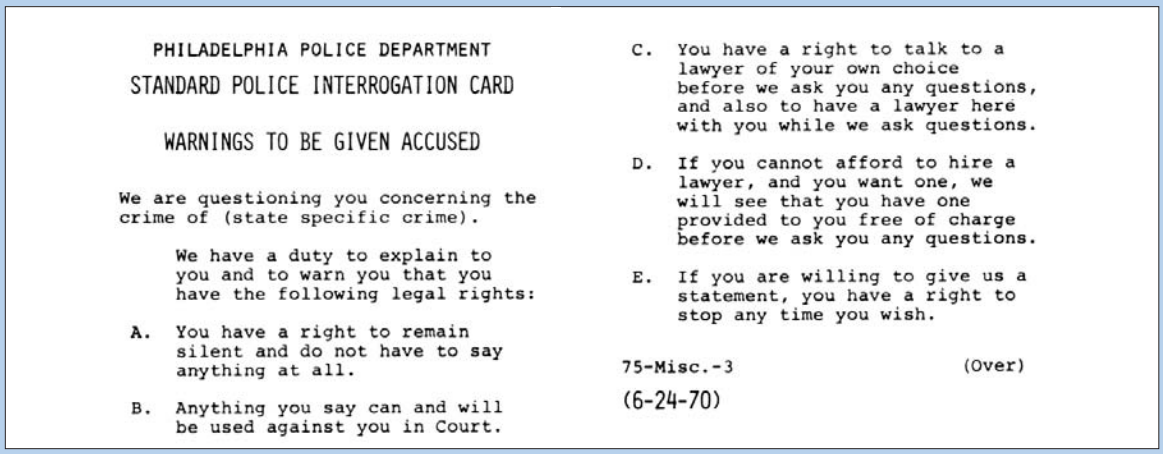
Cases such as *Miranda* were highly controversial and led to efforts in Congress to modify or overrule the decisions by statute—without much coming of the attempts. But as the rules governing police conduct became increasingly more complex, pressure mounted to find an alternative. Some thought that any evidence should be admissible, with the question of police conduct left to lawsuits or other ways of punishing official misbehavior. Others felt that the exclusionary rule served a useful purpose but had simply become too technical to be an effective deterrent to police misconduct (the police cannot obey rules that they cannot understand). And still others felt that the exclusionary rule was a vital safeguard to essential liberties and should be kept intact. The Court has refused to let Congress abolish Miranda because it is a constitutional rule.[89]

The courts themselves began to adopt the second position, deciding a number of cases in ways that retained the exclusionary rule but modified it by limiting its coverage (police were given greater freedom to question juveniles)[90] and by incorporating what was called a **good-faith exception.** For example, if the police obtain a search warrant that they believe is valid, the evidence that they gather will not be ex-

How Things Work

The Miranda Rule

The Supreme Court has interpreted the due-process clause to require that local police departments issue warnings of the sort shown below to people whom they are arresting.



PHILADELPHIA POLICE DEPARTMENT

STANDARD POLICE INTERROGATION CARD

WARNINGS TO BE GIVEN ACCUSED

We are questioning you concerning the crime of (state specific crime).

We have a duty to explain to you and to warn you that you have the following legal rights:

A. You have a right to remain silent and do not have to say anything at all.

B. Anything you say can and will be used against you in Court.

C. You have a right to talk to a lawyer of your own choice before we ask you any questions, and also to have a lawyer here with you while we ask questions.

D. If you cannot afford to hire a lawyer, and you want one, we will see that you have one provided to you free of charge before we ask you any questions.

E. If you are willing to give us a statement, you have a right to stop any time you wish.

75-Misc.-3 (Over)

(6-24-70)

Ernesto A. Miranda was convicted in Arizona of rape and kidnapping. When the Supreme Court overturned the conviction, it issued a set of rules—the "Miranda rules"—governing how police must conduct an arrest and interrogation.

cluded if it later turns out that the warrant was defective for some reason (such as the judge's having used the wrong form).[91] And the Court decided that "overriding considerations of public safety" may justify questioning a person without first reading the person his or her rights.[92] Moreover, the Court changed its mind about the killer who led the police to the place where he had disposed of his victim's body. After the man was convicted a second time and again appealed, the Court in 1984 held that the body would have been discovered anyway; thus evidence will not be excluded if it can be shown that it would "inevitably" have been found.[93]

Terrorism and Civil Liberties

The attacks of September 11, 2001, raised important questions about how far the government can go in investigating and prosecuting individuals.

A little over one month after the attacks, Congress passed a new law, the USA Patriot Act, designed to increase federal powers to investigate terrorists.*

*The name of the law is an acronym derived from the official title of the bill, drawn from the first letters of the following capitalized words: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot).

Its main provisions are these:

- Telephone taps. The government may tap, if it has a court order, any telephone a suspect uses instead of having to get a separate order for each telephone.
- Internet taps. The government may tap, if it has a court order, Internet communications.
- Voice mail. The government, with a court order, may seize voice mail.
- Grand jury information. Investigators can now share with other government officials things learned in secret grand jury hearings.
- Immigration. The attorney general may hold any noncitizen who is thought to be a national security risk for up to seven days. If the alien cannot be charged with a crime or deported within that time, he or she may still be detained if he or she is certified to be a security risk.
- Money laundering. The government gets new powers to track the movement of money across U.S. borders and among banks.
- Crime. This provision eliminates the statute of limitation on terrorist crimes and increases the penalties.

About a month later, President Bush, by executive order, proclaimed a national emergency under which any noncitizen who is believed to be a terrorist or has harbored a terrorist will be tried by a military, rather than a civilian, court.

A military trial is carried on before a commission of military officers and not a civilian jury. The tribunal can operate in secret if classified information is used in evidence. Two-thirds of the commission must agree before the suspect can be convicted and sentenced. If convicted, the suspect can appeal to the secretary of defense and the president, but not to a civilian court.

These commissions may eventually be used to try some of the men captured by the U.S. military during its campaign in Afghanistan against the Taliban regime and the al Queda terrorist network that was created by Osama bin Laden. These detainees were held in a prison at our Guantanamo naval base in Cuba and are not regarded by the Defense Department as ordinary prisoners of war.

The biggest legal issue created by this country's war on terrorism is whether the people we capture can be held by our government without giving them access to the courts. The traditional view, first announced during World War II, was that spies sent to this country by the Nazis could be tried by a military tribunal instead of by a civilian court. They were neither citizens nor soldiers, but "unlawful combatants."[94] The Bush administration relied on this view when it detained in our military base in Guantanamo Bay, Cuba, men seized by American forces in Afghanistan. These men were mostly members of the al Queda terrorist movement or of the Taliban movement that governed Afghanistan before American armed forces, together with Afghan rebels, defeated them. These men, none of them American citizens, argued that they were neither terrorists nor combatants. They demanded access to American courts. By a vote of six to three, the Supreme Court held that American courts can consider challenges to the legality of the detention of these men. The Court's opinion did not spell out what the courts should do when it hears these petitions.[95]

Inside a cell at the terrorist prison in Guantanamo, where Muslim inmates receive a copy of the Koran, a chess set, and an arrow pointing toward Mecca.

In another decision given the same day, the Supreme Court ruled on the case of an American citizen who apparently was working with the Taliban regime but was captured by our forces and was imprisoned in South Carolina. The Court said that American citizens were entitled to a hearing before a neutral decision maker in order to challenge the basis for detention.[96]

That "neutral decision maker" was created in 2006 by a law authorizing military commissions to try alien enemy combatants. These are foreign fighters not in uniform, such as members of al Queda, who are captured by American forces. Each commission will be composed of at least five military officers and

will allow the defendant certain fundamental rights (such as to see evidence and testify). Appeals from its decisions can be taken to the Court of Military Review, whose members are selected by the secretary of defense. The federal appeals court for the District of Columbia and, if it wishes, the Supreme Court may hear appeals from the Court of Military Review.[97]

When it was first passed in 2001, the Patriot Act made certain provisions temporary, perhaps to allay the fears of civil libertarians. When the act was renewed in March 2006, only a few changes were made and almost all of its provisions were made permanent.

In addition to the Patriot Act, Congress passed and the president signed in 2005 a law that requires all states by 2008 to comply with federal standards when they issue driver licenses. States, not Washington, pass out these licenses, but by mid-2008 the Real ID Act says that no federal agency, including those that manage security at airports, may accept a license or state identification card that does not have the person's photograph, address, signature, and full legal name based on documents that prove he or she is legally in this country. Some people think this amounts to a required national ID card.[98]

Searches Without Warrants

For many decades, presidents of both parties authorized telephone taps without warrants when they believed the person being tapped was a foreign spy. Some did this to capture information about their political enemies. In 1978 Congress decided to bring this practice under legislative control. It passed the Foreign Intelligence Surveillance Act (FISA) that required the president to go before a special court, composed of seven judges selected by the Chief Justice, that would approve electronic eavesdropping on persons who were thought to be foreign spies. The FISA court would impose a standard lower than that which governs the issuance of warrants against criminals. For criminals, a warrant must be based on showing that there is "probable cause" to believe the person is engaged in a crime; for FISA warrants, the government need only show that the person is likely to be working for a foreign government.

In late 2005 the *New York Times* and some other newspapers revealed that the National Security Agency (NSA), this country's code-breaking and electronic surveillance organization, had a secret program to intercept telephone calls and e-mail messages between certain people abroad and Americans. The Bush administration defended the program, arguing that the intercepts were designed, not to identify criminals or foreign spies, but to alert the country to potential terrorist threats. It could not rely on FISA because its procedures took too long and its standards of proof were too high. Critics of the program said that it imperiled the civil liberties of Americans.

The Supreme Court has never spoken on this matter, but every lower federal court, including the court that hears appeals from the FISA court, has agreed that the president, as commander in chief, has the "inherent authority" to conduct warrantless searches to obtain foreign intelligence information.[99] The ad-

Landmark Cases

Criminal Charges

- ***Mapp v. Ohio* (1961):** Evidence illegally gathered by the police may not be used in a criminal trial.
- ***Gideon v. Wainwright* (1964):** Persons charged with a crime have a right to an attorney even if they cannot afford one.
- ***Miranda v. Arizona* (1966):** Court describes ruling that police must give to arrested persons.
- ***United States v. Leon* (1984):** Illegally obtained evidence may be used in a trial if it was gathered in good faith without violating the principles of the *Mapp* decision.
- ***Dickerson v. United States* (2000):** The *Mapp* decision is based on the Constitution and it cannot be altered by Congress passing a law.
- ***Rasul v. Bush* and *Hamdi v. Rumsfeld* (2004):** Terrorist detainees must have access to a neutral court to decide if they are legally held.

To explore these landmark cases further, visit the *American Government* web site at college.hmco.com/pic/wilsonAGlle.

ministration also argued that after 9/11, when Congress passed a law authorizing the president to exercise "all necessary and appropriate" uses of military force, it included warrantless intercepts of terrorist communications. But in early 2007, the White House changed its mind and said that it had worked out an arrangement with the FISA court to speedily act on requests for warrants. Henceforth, this court will supervise NSA surveillance.

★ SUMMARY ★

Civil liberties questions are in some ways like and in some ways unlike ordinary policy debates. Like most issues, civil liberties problems often involve competing interests—in this case conflicting rights or conflicting rights and duties—and so we have groups mobilized on both sides of issues involving free speech and crime control. Like some other issues, civil liberties problems can also arise from the successful appeals of a policy entrepreneur, and so we have periodic reductions in liberty resulting from popular fears, usually aroused during or just after a war.

But civil liberties are unlike many other issues in at least one regard: more than struggles over welfare spending or defense or economic policy, debates about civil liberties reach down into our fundamental political beliefs and political culture, challenging us to define what we mean by religion, Americanism, and decency.

The most important of these challenges focuses on the meaning of the First Amendment: What is "speech"? How much of it should be free? How far can the state go in aiding religion? How do we strike a balance between national security and personal expression? The zigzag course followed by the courts in judging these matters has, on balance, tended to enlarge freedom of expression.

Almost as important has been the struggle to strike a balance between the right of society to protect itself from criminals and the right of people (including criminals) to be free from unreasonable searches and coerced confessions. As with free speech cases, the courts have generally broadened the rights at some expense to the power of the police. But in recent years the Supreme Court has pulled back from some of its more sweeping applications of the exclusionary rule.

The resolution of these issues by the courts is political in the sense that differing opinions about what is right or desirable compete, with one side or another prevailing (often by a small majority). In this competition of ideas federal judges, though not elected, are often sensitive to strong currents of popular opinion. When entrepreneurial politics has produced new action against apparently threatening minorities, judges are inclined, at least for a while, to give serious consideration to popular fears and legislative majorities. And when no strong national mood is discernible, the opinions of elites influence judicial thinking (as described in Chapter 16).

At the same time, courts resolve political conflicts in a manner that differs in important respects from the resolution of conflicts by legislatures or executives. First, the very existence of the courts, and the relative ease with which one may enter them to advance a claim, facilitates challenges to accepted values. An unpopular political or religious group may have little or no access to a legislature, but it will have substantial access to the courts. Second, judges often settle controversies about rights not simply by deciding the case at hand but by formulating a general rule to cover like cases elsewhere. This has an advantage (the law tends to become more consistent and better known) but a disadvantage as well: a rule suitable for one case may be unworkable in another. Judges reason by analogy and sometimes assume that two cases are similar when in fact there are important differences. A definition of "obscenity" or of "fighting words" may suit one situation but be inadequate in another. Third, judges interpret the Constitution, whereas legislatures often consult popular preferences or personal convictions. However much their own beliefs influence what judges read into the Constitution, almost all of them are constrained by its language.

Taken together, the desire to find and announce rules, the language of the Constitution, and the personal beliefs of judges have led to a general expansion of civil liberties. As a result, even allowing for temporary reversals and frequent redefinitions, any value that is thought to hinder freedom of expression and the rights of the accused has generally lost ground to the claims of the First, Fourth, Fifth, and Sixth Amendments.

RECONSIDERING WHO GOVERNS?

1. ***Why do the courts play so large a role in deciding what our civil liberties should be?***

   The courts are independent of the executive and legislative branches, both of which will respond to public pressures. In wartime or in other crisis periods, people want "something done." The president and members of Congress know this. The courts are usually a brake on their demands. But of course the courts can make mistakes or get things confused, as many people believe they have with the establishment clause and the rights of criminal defendants.

RECONSIDERING TO WHAT ENDS?

1. ***Why not display religious symbols on government property?***

   The courts believe that putting on government property a single religious symbol, such as a Nativity scene, will make Americans believe that the government endorses that religion. But if symbols from several different religions are displayed, no one thinks the government has endorsed any one of them. Of course, putting "In God We Trust" on a government dollar bill is all right. Do not look for consistency here.

2. ***If a person confesses to committing a crime, why is that confession sometimes not used in court?***

   Because the confession was improperly gathered by the police. Suspects may not be tortured, and they must be given the Miranda warning. There are other ways of protecting the right of people to be free of improper police procedures, such as admitting the confession in court and then punishing the officers who gathered it improperly. The American courts do not think that system would work in this country.

3. ***Does the Patriot Act reduce our liberties?***

   There have not yet been any court tests of the law. Passed after 9/11, it improves the ability of the police to obtain search warrants and eliminates the old tension between intelligence and law enforcement.

WORLD WIDE WEB RESOURCES

Court cases: **www.law.cornell.edu**
Civil Rights Division of the Department of Justice: **www.usdoj.gov**
American Civil Liberties Union: **www.aclu.org**

SUGGESTED READINGS

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