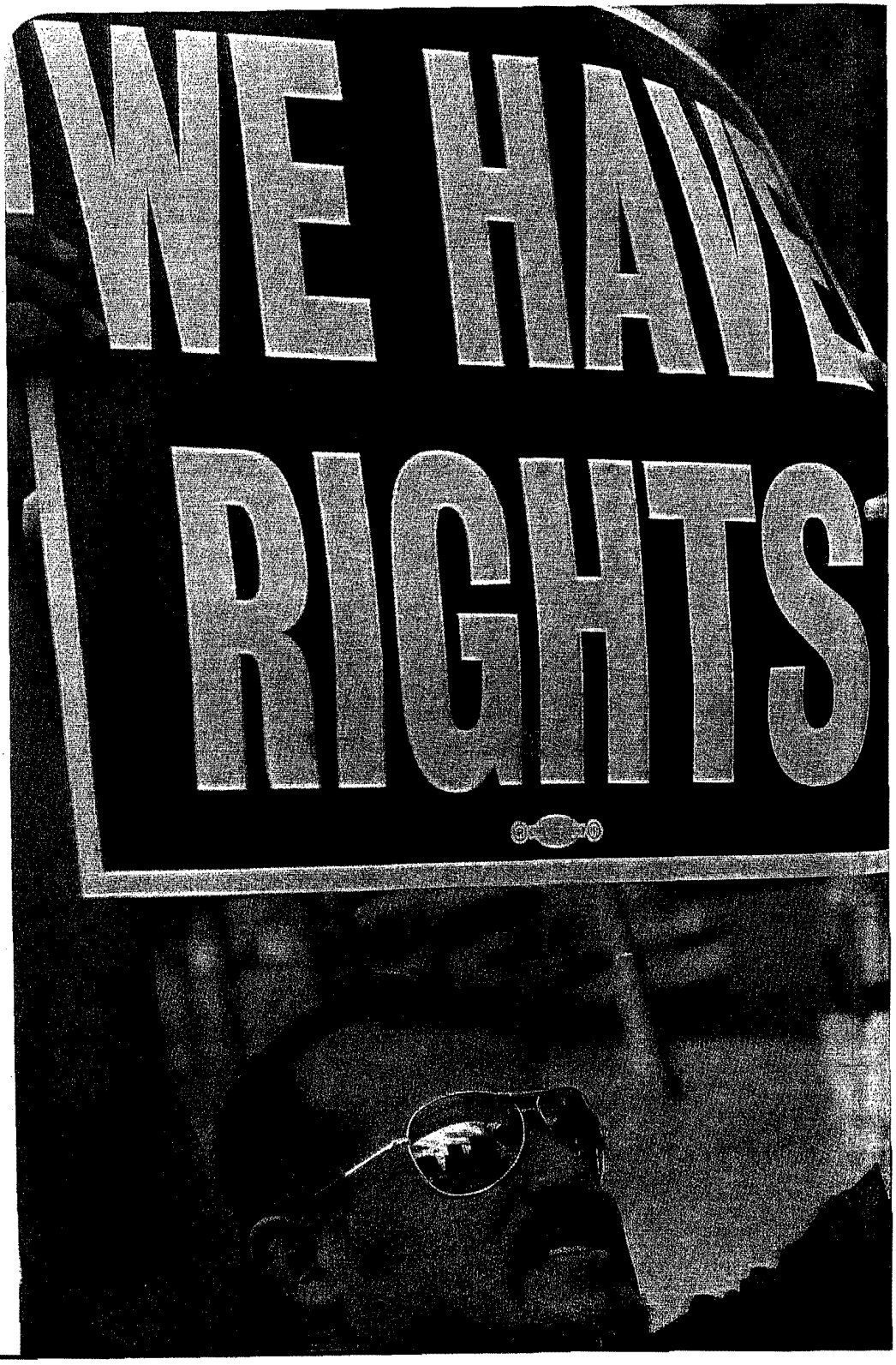
GOVT

4

Civil Liberties



LEARNING OBJECTIVES

LO1 Define the term *civil liberties,* explain how civil liberties differ from civil rights, and state the constitutional basis for our civil liberties.

LO2 List and describe the freedoms guaranteed by the First Amendment and explain how the courts have interpreted and applied these freedoms.

LO3 Discuss why Americans are increasingly concerned about privacy rights.

LO4 Summarize how the Constitution and the Bill of Rights protect the rights of accused persons.

CourseMate

AMERICA AT ODDS

Should Government Entities Enjoy Freedom of Speech?

We all know that the First Amendment to the U.S. Constitution states that Congress shall make no law "abridging the freedom of speech." Indeed, citizens of the United States may enjoy greater freedom of speech than the citizens of any other country. But what about government entities? Do they, too, enjoy freedom of speech? Can government bodies decide without constraint the messages they wish to communicate to the public?

This question becomes important when we consider whether religious displays can be allowed on government property. Until recently, the legal battles over such displays have centered on another part of the First Amendment—the establishment clause, which states: "Congress shall make no law respecting an establishment of religion." On several occasions, the United States Supreme Court has been asked to decide whether Christmas nativity scenes on public property violate the establishment clause. The Court has found that they do, unless equal space is provided for secular displays or the symbols of other religions.

Recently, the Supreme Court grappled with a case in which a small religious group, Summum, wanted to force Pleasant Grove, Utah, to accept a granite monument containing "the Seven Aphorisms of Summum" and place it in a public park. The city had earlier accepted a monument containing the Ten Commandments as one of several dozen displays in the park. Summum claimed that the city had violated the group's free speech rights by refusing to accept its donation. The Court backed the arguments of the city, however, and ruled that "the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause." Because it was the city speaking, and not the groups that donated the monuments, none of the organizations could make a free speech claim. In short, government bodies enjoy their own rights to free speech. Is this appropriate?

Obviously, the Government Has a Right to Free Speech

The free speech clause involves government regulation of private speech. It does not regulate government speech. A government entity has the right to "speak for itself" and is entitled to say what it wishes. How could any government body function if it lacked this basic freedom? If citizens had the right to insist that no official path with public funds could express a view with which that citizen disagreed, debate over issues of public concern would be severely limited. The process of government would be radically transformed. To govern, governments have to say something.

Governments own public land, including parks. Government officials have to decide what expressions of speech should be affixed permanently to public land. If the government did not have the right to decide, every single religious body and special interest group could demand that their monuments be placed on public land. Alongside the Statue of Liberty, New York might be required to erect a "statue of autocracy." In the end, governments would be forced to ban monuments or statues of any description. We cannot take away government bodies' rights to decide in such instances.

It's the Edge of the Wedge

To apply the concept of freedom of speech to governments is asking for trouble. It may be that by accepting a privately financed and donated monument, a government body has exercised a kind of government speech and has implicitly accepted the ideas represented by such monuments. Such thinking raises serious establishment clause issues. If the privately donated monuments are religious in nature, as was true in the Pleasant Grove case, the government is implicitly violating the establishment clause of the First Amendment.

We must make sure that government bodies understand that they cannot even hint at preferring one religion over another. If a government does accept one religious monument, then it had better accept a variety of others. The "government speech doctrine," newly developed by the Supreme Court, must not allow government bodies to escape the establishment clause's ban on discriminating among religious sects or groups. Several Supreme Court justices in the Pleasant Grove case argued that the Court could have ruled for the city without reference to any theory of free speech for governments. The Court's majority should have taken their advice.

WHERE DO YOU STAND?

1. How can voters hold governments accountable for their decisions about which monuments to display and which not to display?
2. Several courts have held that any opinions communicated by specialty license plates are those of the driver, not the state. Why are license plates different from monuments in parks?

EXPLORE THIS ISSUE ONLINE

- The FindLaw Web site lets you browse through recent decisions by the Supreme Court on a wide variety of topics. Civil liberties issues are grouped together with civil rights. To locate cases, use the search box at **www.findlaw.com/casecode.**
- Adam Liptak, the Supreme Court correspondent of the *New York Times*, writes a regular column called "Sidebar." To see Liptak's perceptive columns, go to **www.nytimes.com** and type "sidebar" into the search box.

CIVIL LIBERTIES
are legal and constitutional rights that protect citizens from government actions.

Introduction

The debate over government free speech discussed in the chapter-opening *America at Odds* feature is but one of many controversies concerning our civil liberties. **Civil liberties** are legal and constitutional rights that protect citizens from government actions. For example, the First Amendment to the U.S. Constitution prohibits Congress from making any law that abridges the right to free speech. The First Amendment also guarantees freedom of religion, freedom of the press, and freedom to assemble (to gather together for a common purpose, such as to protest against a government policy or action). These and other freedoms and guarantees set forth in the Constitution and the Bill of Rights are essentially *limits* on government action.

Perhaps the best way to understand what civil liberties are and why they are important to Americans is to look at what might happen if we did not have them. If you were a student in China, for example, you would have to exercise some care in what you said and did. That country prohibits a variety of kinds of speech, notably any criticism of the leading role of the Communist Party. If you criticized the government in e-mail messages to your friends or on your Web site, you could end up in court on charges that you had violated the law—and perhaps even go to prison.

civil liberties Individual rights protected by the Constitution against the powers of the government.

writ of *habeas corpus* An order that requires an official to bring a specified prisoner into court and explain to the judge why the person is being held in prison.

bill of attainder A legislative act that inflicts punishment on particular persons or groups without granting them the right to a trial.

Note that some Americans confuse *civil liberties* (discussed in this chapter) with *civil rights* (discussed in the next chapter) and use the terms interchangeably. Nonetheless, scholars make a distinction between the two. They point out that whereas civil liberties are limitations on government action, setting forth what the government *cannot do*, civil rights specify what the government *must* do—to ensure equal protection under the law for all Americans, for example.

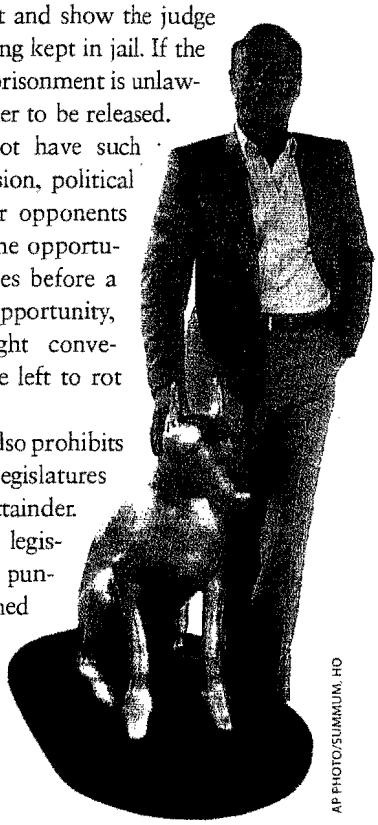
LO1 The Constitutional Basis for Our Civil Liberties

The founders believed that the constitutions of the individual states contained ample provisions to protect citizens from government actions. Therefore, the founders did not include many references to individual civil liberties in the original version of the Constitution. Many of our liberties were added by the Bill of Rights, ratified in 1791. Nonetheless, the original Constitution did include some safeguards to protect citizens against an overly powerful government.

Safeguards in the Original Constitution

Article I, Section 9, of the Constitution provides that the writ of *habeas corpus* (a Latin phrase that roughly means "produce the body") will be available to all citizens except in times of rebellion or national invasion. A **writ of *habeas corpus*** is an order requiring that an official bring a specified prisoner into court and show the judge why the prisoner is being kept in jail. If the court finds that the imprisonment is unlawful, it orders the prisoner to be released. If our country did not have such a constitutional provision, political leaders could jail their opponents without giving them the opportunity to plead their cases before a judge. Without this opportunity, many opponents might conveniently disappear or be left to rot away in prison.

The Constitution also prohibits Congress and the state legislatures from passing bills of attainder. A **bill of attainder** is a legislative act that directly punishes a specifically named



Corky Ra is the founder of the group Summum, described on the previous page.

AP PHOTO/SUMMUM, HO

individual (or a group or class of individuals) without a trial. For example, no legislature can pass a law that punishes a named Hollywood celebrity for unpatriotic statements.

Finally, the Constitution also prohibits Congress from passing *ex post facto* laws. The Latin term *ex post facto* roughly means "after the fact." An ***ex post facto* law** punishes individuals for committing an act that was legal when it was committed.

The Bill of Rights

As you read in Chapter 2, one of the contentious issues in the debate over ratification of the Constitution was the lack of protections for citizens from government actions. Although many state constitutions provided such protections, the Anti-Federalists wanted more. The promise of the addition of a bill of rights to the Constitution ensured its ratification.

The Bill of Rights was ratified by the states and became part of the Constitution on December 15, 1791. Look at the text of the Bill of Rights on page 42 in Chapter 2. As you can see, the first eight amendments grant the people specific rights and liberties. The remaining two amendments reserve certain rights and powers to the people and to the states.

Basically, in a democracy, government policy tends to reflect the view of the majority. A key function of the Bill of Rights, therefore, is to protect the rights of those in the minority against the will of the majority. When there is disagreement over how to interpret the Bill of Rights, the courts step in. The United States Supreme Court, as our nation's highest court, has the final say on how the Constitution, including the Bill of Rights, should be interpreted. The civil liberties that you will read about in this chapter have all been shaped over time by Supreme Court decisions. For example, it is the Supreme Court that determines where freedom of speech ends and the right of society to be protected from certain forms of speech begins.

Ultimately, the responsibility for protecting minority rights lies with the American people. Each generation has to learn anew how it can uphold its rights by voting, expressing opinions to elected representatives, and bringing cases to the attention of the courts when constitutional rights are threatened.

The Incorporation Issue

For many years, the courts assumed that the Bill of Rights limited only the actions of the national government, not the actions of state or local governments. In other words, if a state or local law was contrary to a basic freedom, such as the freedom of speech or the right to due process of law, the federal Bill of Rights did not come into play. The founders believed that the states, being closer to the people, would be less likely to violate their own citizens' liberties. Moreover, state constitutions, most of which contain bills of rights, protect citizens against state government actions. The United States Supreme Court upheld this view when it decided, in *Barron v. Baltimore* (1833), that the Bill of Rights did not apply to state laws.[1]

ex post facto law A criminal law that punishes individuals for committing an act that was legal when the act was committed.

due process clause The constitutional guarantee, set out in the Fifth and Fourteenth Amendments, that the government will not illegally or arbitrarily deprive a person of life, liberty, or property.

due process of law The requirement that the government use fair, reasonable, and standard procedures whenever it takes any legal action against an individual; required by the Fifth and Fourteenth Amendments.

Eventually, however, the Supreme Court began to take a different view. Because the Fourteenth Amendment played a key role in this development, we look next at the provisions of that amendment.

THE RIGHT TO DUE PROCESS In 1868, three years after the end of the Civil War, the Fourteenth Amendment was added to the Constitution. The **due process clause** of this amendment requires that state governments protect their citizens' rights. (A similar requirement, binding on the federal government, was provided by the Fifth Amendment.) The due process clause reads, in part, as follows:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

The right to **due process of law** is simply the right to be treated fairly under the legal system. That system and its officers must follow "rules of fair play" in making decisions, in determining guilt or innocence, and in punishing those who have been found guilty.

Procedural Due Process *Procedural* due process requires that any governmental decision to take life, liberty, or property be made equitably. For example, the government must use fair procedures in determining whether a person will be subjected to punishment or have some burden imposed on him or her. Fair procedure has been interpreted as requiring that the person have at least an opportunity to object to a proposed action before an impartial, neutral decision maker (which need not be a judge).

establishment clause The section of the First Amendment that prohibits Congress from passing laws "respecting an establishment of religion." Issues concerning the establishment clause often center on prayer in public schools, the teaching of fundamentalist theories of creation, and government aid to parochial schools.

free exercise clause The provision of the First Amendment stating that the government cannot pass laws "prohibiting the free exercise" of religion. Free exercise issues often concern religious practices that conflict with established laws.

Substantive Due Process

Substantive due process focuses on the content, or substance, of legislation. If a law or other governmental action limits a *fundamental right*, it will be held to violate substantive due process, unless it promotes a *compelling* or *overriding state interest*. All First Amendment rights plus the rights to interstate travel, privacy, and voting are considered fundamental. Compelling state interests could include, for example, the public's safety.

Table 4–1

Incorporating the Bill of Rights into the 14th Amendment

Year	Issue	Amendment Involved	Court Case
1925	Freedom of speech	I	*Gitlow v. New York*, 268 U.S. 652.
1931	Freedom of the press	I	*Near v. Minnesota*, 283 U.S. 697.
1932	Right to a lawyer in capital punishment cases	VI	*Powell v. Alabama*, 287 U.S. 45.
1937	Freedom of assembly and right to petition	I	*DeJonge v. Oregon*, 299 U.S. 353.
1940	Freedom of religion	I	*Cantwell v. Connecticut*, 310 U.S. 296.
1947	Separation of church and state	I	*Everson v. Board of Education*, 330 U.S. 1.
1948	Right to a public trial	VI	*In re Oliver*, 333 U.S. 257.
1949	No unreasonable searches and seizures	IV	*Wolf v. Colorado*, 338 U.S. 25.
1961	Exclusionary rule	IV	*Mapp v. Ohio*, 367 U.S. 643.
1962	No cruel and unusual punishments	VIII	*Robinson v. California*, 370 U.S. 660.
1963	Right to a lawyer in all criminal felony cases	VI	*Gideon v. Wainwright*, 372 U.S. 335.
1964	No compulsory self-incrimination	V	*Malloy v. Hogan*, 378 U.S. 1.
1965	Right to privacy	Various	*Griswold v. Connecticut*, 381 U.S. 479.
1966	Right to an impartial jury	VI	*Parker v. Gladden*, 385 U.S. 363.
1967	Right to a speedy trial	VI	*Klopfer v. North Carolina*, 386 U.S. 213.
1969	No double jeopardy	V	*Benton v. Maryland*, 395 U.S. 784.
2010	Right to bear arms	II	*McDonald v. Chicago*, 561 U.S. ___.

OTHER LIBERTIES INCORPORATED The Fourteenth Amendment also states that no state "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." For some time, the Supreme Court considered the "privileges and immunities" referred to in the amendment to be those conferred by state laws or constitutions, not the federal Bill of Rights.

Starting in 1925, however, the Supreme Court gradually began using the due process clause to say that states could not abridge a civil liberty that the national government could not abridge. In other words, the Court *incorporated* the protections guaranteed by the national Bill of Rights into the liberties protected under the Fourteenth Amendment. As you can see in Table 4–1 above, the Supreme Court was particularly active during the 1960s in broadening its interpretation of the due process clause to ensure that states and localities could not infringe on civil liberties protected by the Bill of Rights. Today, the liberties still not incorporated include the right to refuse to quarter soldiers and the right to a grand jury hearing. The right to bear arms described in the Second Amendment was incorporated only in 2010.

LO2 Protections under the First Amendment

As mentioned earlier, the First Amendment sets forth some of our most important civil liberties. Specifically, the First Amendment guarantees the freedoms of religion, speech, the press, and assembly, as well as the right to petition the government. In the pages that follow, we look closely at each of these freedoms and discuss how, over time, Supreme Court decisions have defined their meaning and determined their limits.

Freedom of Religion

The First Amendment prohibits Congress from passing laws "respecting an establishment of religion, or prohibiting the free exercise thereof." The first part of this amendment is known as the **establishment clause.** The second part is called the **free exercise clause.**

AP PHOTO/SALT LAKE TRIBUNE/AL HARTMANN

The right to bear arms is included in the Second Amendment to the U.S. Constitution. In 2008, the Supreme Court ruled for the first time that this right applies to individuals, not just state militias. In 2010, the Court ruled that state governments were also required to respect this right.

That freedom of religion was the first freedom mentioned in the Bill of Rights is not surprising. After all, many colonists came to America to escape religious persecution. Nonetheless, these same colonists showed little tolerance for religious freedom within the communities they established. For example, in 1610 the Jamestown colony enacted a law requiring attendance at religious services on Sunday "both in the morning and the afternoon." Repeat offenders were subjected to particularly harsh punishments. For those who twice violated the law, for example, the punishment was a public whipping. For third-time offenders, the punishment was death.

The Maryland Toleration Act of 1649 declared that anyone who cursed God or denied that Jesus Christ was the son of God was to be punished by death. In all, nine of the thirteen colonies had established official religions by the time of the American Revolution.

This context is helpful in understanding why, in 1802, President Thomas Jefferson, a great proponent of religious freedom and tolerance, wanted the establishment clause to be "a wall of separation between church and state." The context also helps to explain why even state leaders who supported state religions might have favored the establishment clause—to keep the national government from interfering in such state matters. After all, the First Amendment says only that *Congress* can make no law respecting an establishment of religion. It says nothing about whether the *states* could make such laws. And, as noted earlier, the protections in the Bill of Rights initially applied only to actions taken by the national government, not the state governments.

THE ESTABLISHMENT CLAUSE The establishment clause forbids the government to establish an official religion. This makes the United States different from countries that are ruled by religious governments, such as the Islamic government of Iran. It also makes us different from nations that have in the past strongly discouraged the practice of any religion at all, such as the People's Republic of China.

What does this separation of church and state mean in practice? For one thing, religion and government, though constitutionally separated in the United States, have never been enemies or strangers. The establishment clause does not prohibit government from supporting religion in *general.* It remains a part of public life.

Most government officials take an oath of office in the name of God, and our coins and paper currency carry the motto "In God We Trust." Clergy of different religions serve in each branch of the armed forces. Public meetings and even sessions of Congress open with prayers. Indeed, the establishment clause often masks the fact that Americans are, by and large, religious and would like their political leaders to be people of faith.

The "wall of separation" that Thomas Jefferson referred to, however, does exist and has been upheld by the Supreme Court on many occasions. An important ruling by the Supreme Court on the establishment clause came in 1947 in *Everson v. Board of Education.*[2] The case involved a New Jersey law that allowed the state to pay for bus transportation of students who attended parochial schools (schools run by churches or other religious groups). The Court stated as follows: "No tax in any amount, large or small, can be levied to support any religious activities or institutions."

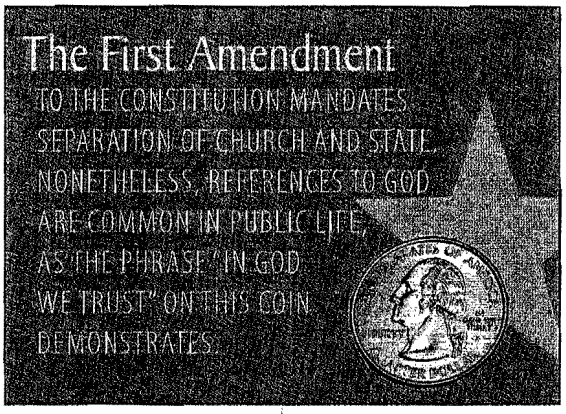
The Court upheld the New Jersey law, however, because it did not aid the church *directly* but provided for the safety and benefit of the students. The ruling both affirmed the importance of separating church and state and set the precedent that not *all* forms of state and federal aid to church-related schools are forbidden under the Constitution.

A full discussion of the various church-state issues that have arisen in American politics would fill volumes. Here we examine three of these issues: prayer in the schools, evolution versus creationism or intelligent design, and government aid to parochial schools.

Prayer in the Schools On occasion, some public schools have promoted a general sense of religion without proclaiming allegiance to any particular church or sect. Whether the states have a right to allow this was the main question presented in 1962 in *Engel v. Vitale,*[3] also known as the "Regents' Prayer case." The State Board of Regents in New York had composed a nondenominational prayer (a prayer not associated with any particular church) and urged school districts to use it in classrooms at the start of each day. The prayer read as follows:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country.

Some parents objected to the prayer, contending that it violated the establishment clause. The Supreme Court agreed and ruled that the Regents' Prayer was unconstitutional. Speaking for the majority, Justice Hugo Black wrote that the First Amendment must at least mean "that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."



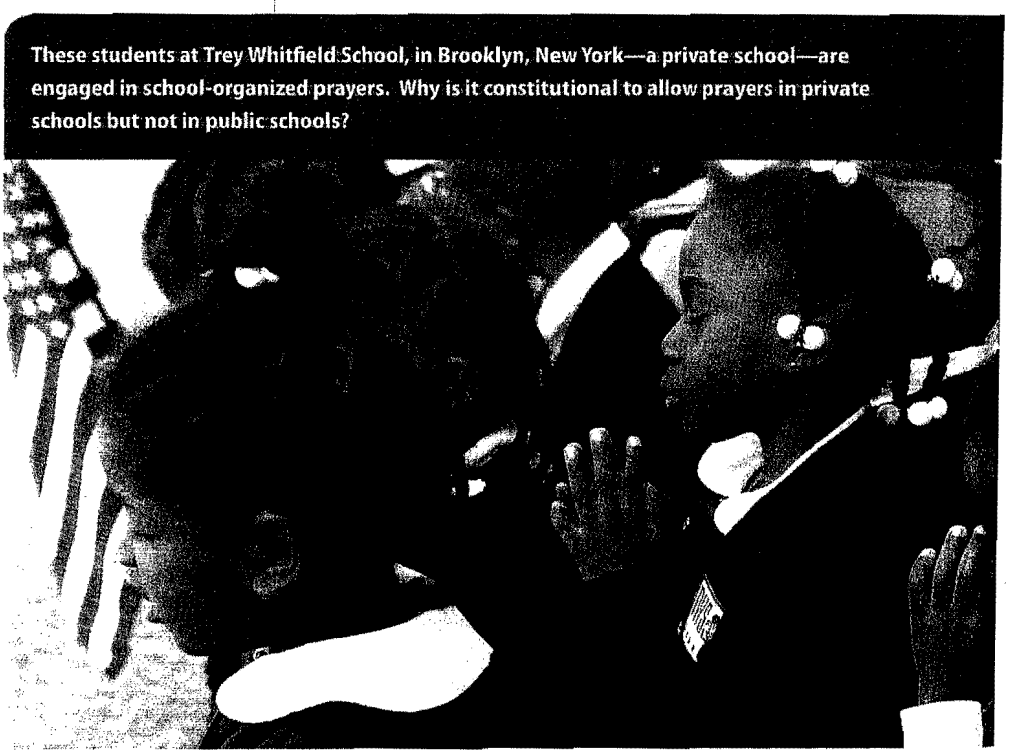
KARY NIEUWENHUIS/ISTOCKPHOTO

or proposed laws permitting (but not *requiring,* as the Kentucky law did) the display of the Ten Commandments on public property, including public schools. Supporters of such displays contend that they will help reinforce the fundamental religious values that are a part of the American heritage. Opponents claim that the displays blatantly violate the establishment clause.

Another controversial issue is whether "moments of silence" in the schools are constitutional. In 1985, the Supreme Court ruled that an Alabama law authorizing a daily one-minute period of silence for meditation and voluntary prayer was unconstitutional. Because the law specifically endorsed prayer, it appeared to support religion.[5] Since then, the lower courts have generally held that a school may require a moment of silence, but only if it serves a clearly secular purpose (such as to meditate on the day's activities).[6] Yet another issue concerns prayers said before public school sporting events, such as football games. In 2000, the Supreme Court held that student-led pregame prayer using the school's public-address system was unconstitutional.[7]

In sum, the Supreme Court has ruled that the public schools, which are agencies of government, cannot

Prayer in the Schools—The Debate Continues Since the *Engel v. Vitale* ruling, the Supreme Court has continued to shore up the wall of separation between church and state in a number of decisions. Generally, the Court has had to walk a fine line between the wishes of those who believe that religion should have a more prominent place in our public institutions and those who do not. For example, in a 1980 case, *Stone v. Graham,*[4] the Supreme Court ruled that a Kentucky law requiring that the Ten Commandments be posted in all public schools violated the establishment clause. Many groups around the country opposed this ruling. Today, a number of states have passed



These students at Trey Whitfield School, in Brooklyn, New York—a private school—are engaged in school-organized prayers. Why is it constitutional to allow prayers in private schools but not in public schools?

MARILYNN K. YEE/NEW YORK TIMES/REDUX

sponsor religious activities. It has *not*, however, held that individuals cannot pray, when and as they choose, in schools or in any other place. Nor has it held that the schools are barred from teaching *about* religion, as opposed to engaging in religious practices.

Evolution versus Creationism Certain religious groups have long opposed the teaching of evolution in the schools. These groups contend that evolutionary theory, a theory with overwhelming scientific support, directly counters their religious belief that human beings did not evolve but were created fully formed, as described in the biblical story of the creation. In fact, surveys have repeatedly shown that a majority of Americans believe that humans were directly created by God rather than having evolved from other species. The Supreme Court, however, has held that state laws forbidding the teaching of evolution in the schools are unconstitutional.

For example, in *Epperson v. Arkansas,*[8] a case decided in 1968, the Supreme Court held that an Arkansas law prohibiting the teaching of evolution violated the establishment clause because it imposed religious beliefs on students. In 1987, the Supreme Court also held unconstitutional a Louisiana law requiring that the biblical story of the creation be taught along with evolution. The Court deemed the law unconstitutional in part because it had as its primary purpose the promotion of a particular religious belief.[9]

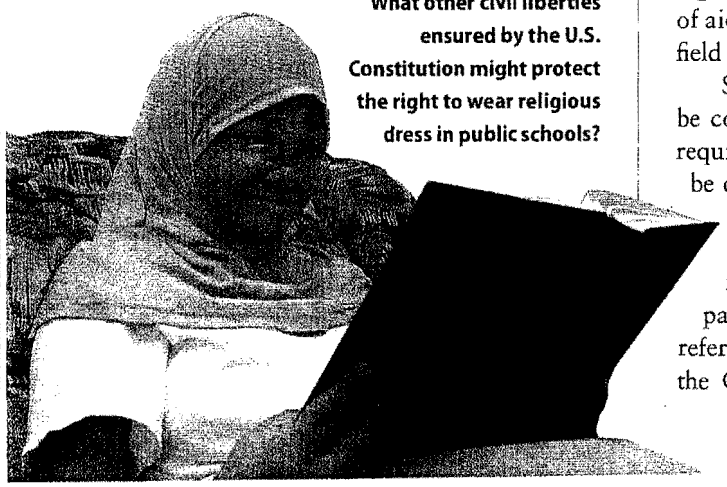
Nevertheless, some state and local groups continue their efforts against the teaching of evolution. Recently, for example, Alabama approved a disclaimer to be inserted in biology textbooks, stating that evolution is "a controversial theory some scientists present as a scientific explanation for the origin of living things." Laws and policies that discourage the teaching of evolution are also being challenged on constitutional grounds. For example, in Cobb County, Georgia, stickers were inserted into science textbooks stating that "evolution is a theory, not a fact" and that "the theory should be approached with an open mind, studied carefully, and critically considered." When Cobb County's actions were challenged in court as unconstitutional, a federal judge held that the stickers conveyed a "message of endorsement of religion," thus violating the First Amendment.

***Lemon* test** A three-part test enunciated by the Supreme Court in the 1971 case of *Lemon v. Kurtzman* to determine whether government aid to parochial schools is constitutional. To be constitutional, the aid must (1) be for a clearly secular purpose; (2) in its primary effect, neither advance nor inhibit religion; and (3) avoid an "excessive government entanglement with religion." The *Lemon* test has also been used in other types of cases involving the establishment clause.

Evolution versus Intelligent Design Some schools have adopted the concept of "intelligent design" as an alternative to the teaching of evolution. Advocates of intelligent design believe that an intelligent cause, and not an undirected process such as natural selection, lies behind the creation and development of the universe and living things. Proponents of intelligent design claim that it is a scientific theory and thus that its teaching should not violate the establishment clause in any way. Opponents of intelligent design theory claim that it is pseudoscience at best and that, in fact, the so-called theory masks its supporters' belief that God is the "intelligent cause."

Aid to Parochial Schools Americans have long been at odds over whether public tax dollars should be used to fund activities in parochial schools—private schools that have religious affiliations. Over the years, the courts have often had to decide whether specific types of aid do or do not violate the establishment clause. Aid to church-related schools in the form of transportation, equipment, or special educational services for disadvantaged students has been held permissible. Other forms of aid, such as funding teachers' salaries and paying for field trips, have been held unconstitutional.

Since 1971, the Supreme Court has held that, to be constitutional, a state's school aid must meet three requirements: (1) the purpose of the financial aid must be clearly secular (not religious), (2) its primary effect must neither advance nor inhibit religion, and (3) it must avoid an "excessive government entanglement with religion." The Court first used this three-part test in *Lemon v. Kurtzman,*[10] and hence it is often referred to as the ***Lemon* test.** In the 1971 *Lemon* case, the Court denied public aid to private and parochial



AP PHOTO/AMY DeMOSS/MUSKOGEE DAILY PHOENIX

When an Oklahoma school attempted to bar a young Muslim girl from wearing a head scarf to school, the federal government intervened. Why would the U.S. government protect the right to wear religious symbols in public schools? What other civil liberties ensured by the U.S. Constitution might protect the right to wear religious dress in public schools?

school voucher An educational certificate, provided by a government, that allows a student to use public funds to pay for a private or a public school chosen by the student or his or her parents.

schools for the salaries of teachers of secular courses and for textbooks and instructional materials in certain secular subjects. The Court held that the establishment clause is designed to prevent three main evils: "sponsorship, financial support, and active involvement of the sovereign [the government] in religious activity."

In 2000, the Supreme Court applied the *Lemon* test to a federal law that gives public school districts federal funds for special services and instructional equipment. The law requires that the funds be shared with all private schools in the district. A central issue in the case was whether using the funds to supply computers to parochial schools had a clearly secular purpose. Some groups claimed that it did not, because students in parochial schools could use the computers to access religious materials online. Others, including the Clinton administration (1993–2001), argued that giving high-tech assistance to parochial schools did have a secular purpose and was a religiously neutral policy. The Supreme Court sided with the latter argument and held that the law did not violate the establishment clause.[11]

School Voucher Programs Another contentious issue has to do with the use of **school vouchers**—educational certificates, provided by state governments, that students can use at any school, public or private. In an effort to improve their educational systems, several school districts have been experimenting with voucher systems. Four states now have limited voucher programs under which schoolchildren may attend private elementary or high schools using vouchers paid for by taxpayers' dollars.

In 2002, the United States Supreme Court ruled that a voucher program in Cleveland, Ohio, was constitutional. Under the program, the state provided up to $2,250 to low-income families, who could use the funds to send their children to either public or private schools. The Court concluded that the taxpayer-paid voucher program did not unconstitutionally entangle church and state because the funds went to parents, not to schools. The parents theoretically could use the vouchers to send their children to nonreligious private academies or charter schools, even though 95 percent used the vouchers at religious schools.[12]

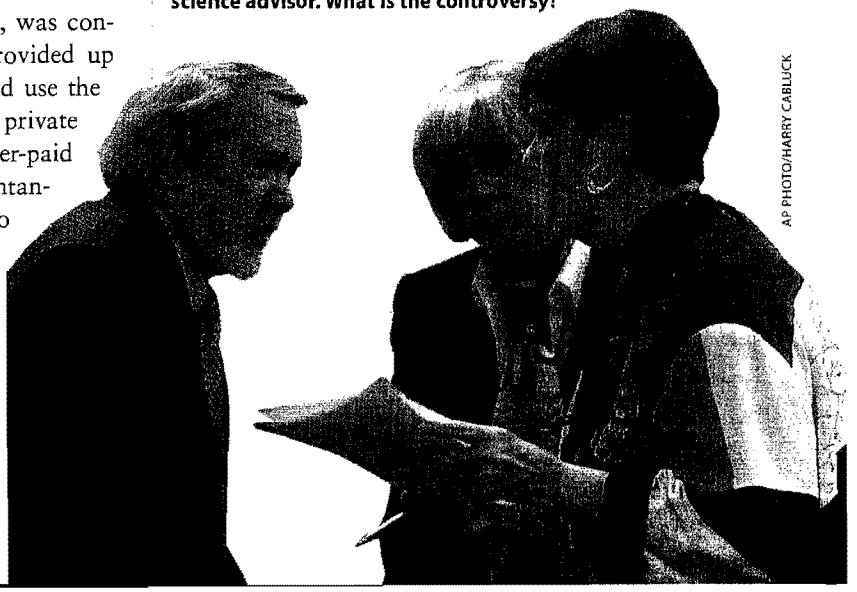
Despite the 2002 Supreme Court ruling, several constitutional questions surrounding school vouchers remain unresolved. For example, some state constitutions are more explicit than the federal Constitution in denying the use of public funds for religious education. Even after the Supreme Court ruling in the Ohio case, a Florida court ruled in 2002 that a voucher program in that state violated Florida's constitution.[13]

The public is very closely divided on this issue. About 30 percent of those responding to a public opinion poll on the subject did not have strong feelings one way or the other; those with opinions were evenly split. Support for vouchers tended to come from Catholics and white evangelicals, which is not surprising—a large number of existing private schools represent either the Catholic or evangelical faiths. Public school teacher unions oppose vouchers strongly, and they are a major constituency for the Democratic Party. With the Democrats in control of the presidency, federal support for vouchers is unlikely in the near future.

THE FREE EXERCISE CLAUSE As mentioned, the second part of the First Amendment's statement on religion consists of the free exercise clause, which forbids the passage of laws "prohibiting the free exercise of religion." This clause protects a person's right to worship or believe as he or she wishes without government interference. No law or act of government may violate this constitutional right.

Belief and Practice Are Distinct The free exercise clause does not necessarily mean that individuals can act in any way they want on the basis of their religious beliefs. There is an important distinction between belief and practice. The Supreme Court has ruled consistently

These members of the Texas State Board of Education discuss the teaching of evolution and scientific theory with the state science advisor. What is the controversy?



AP PHOTO/HARRY CABLUCK

that the right to hold any *belief* is absolute. The government has no authority to compel you to accept or reject any particular religious belief. The right to *practice* one's beliefs, however, may have some limits. As the Court itself once asked, "Suppose one believed that human sacrifice were a necessary part of religious worship?"

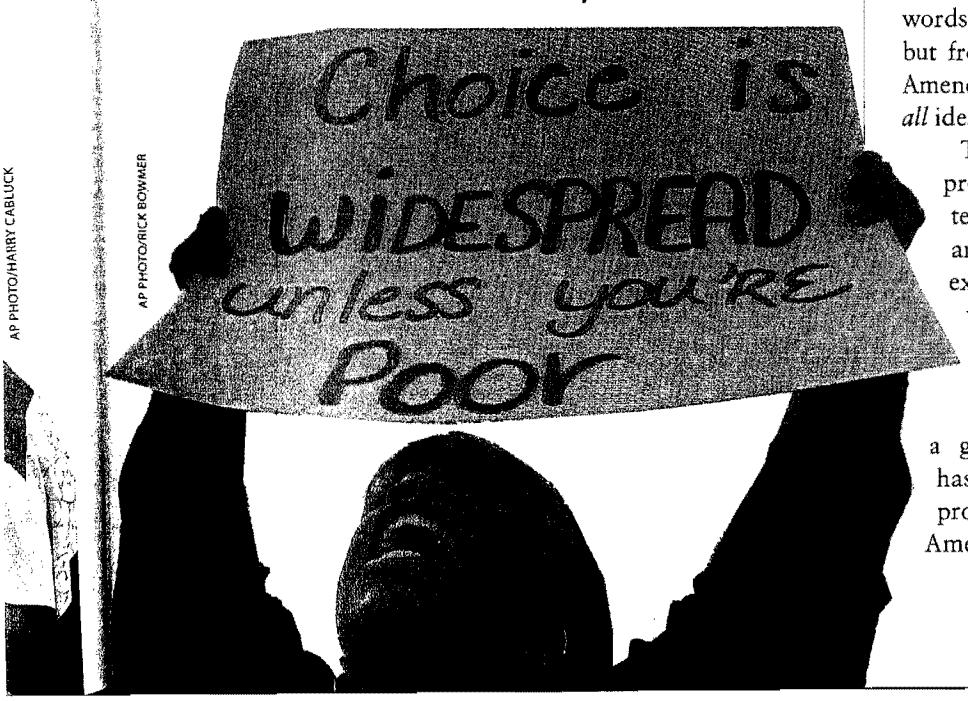
The Supreme Court first dealt with the issue of belief versus practice in 1878 in *Reynolds v. United States.*[14] Reynolds was a Mormon who had two wives. Polygamy, or the practice of having more than one spouse at a time, was encouraged by the customs and teachings of his religion. Polygamy was also prohibited by federal law. Reynolds was convicted and appealed the case, arguing that the law violated his constitutional right to freely exercise his religious beliefs. The Court did not agree. It said that to allow Reynolds to practice polygamy would make religious doctrines superior to the law.

THE FREE EXERCISE CLAUSE

protects a person's right to worship or believe as he or she wishes without government interference.

Student religious organizations at colleges and universities have been the subject of a number of civil liberties controversies over the years. One of the most recent cases focused on a free exercise topic. We discuss it in this chapter's feature *Join the Debate: Should We Let Student Religious Groups Bar Gays from Membership?* on the following page.

This proponent of a school voucher program in Cleveland, Ohio, believes that only the students of rich parents have much school choice. Her implicit argument is that school vouchers will give the same school choice to children who are poor as to those who are rich.



AP PHOTO/RICK BOWMER

AP PHOTO/HARRY CABLUCK

Religious Practices and the Workplace The free exercise of religion in the workplace was bolstered by Title VII of the Civil Rights Act of 1964, which requires employers to accommodate their employees' religious practices unless such accommodation causes an employer to suffer an "undue hardship." Thus, if an employee claims that his or her religious beliefs prevent him or her from working on a particular day of the week, such as Saturday or Sunday, the employer must attempt to accommodate the employee's needs.

Several cases have come before lower federal courts concerning employer dress codes that contradict the religious customs of employees. For example, in 1999 the Third Circuit Court of Appeals ruled in favor of two Muslim police officers in Newark, New Jersey, who claimed that they were required by their faith to wear beards and would not shave them to comply with the police department's grooming policy. A similar case was brought in 2001 by Washington, D.C., firefighters.[15] Muslims, Rastafarians, and others have refused to change the grooming habits required by their religions and have been successful in court.

Freedom of Expression

No one in this country seems to have a problem protecting the free speech of those with whom they agree. The real challenge is protecting unpopular ideas. The protection needed is, in Justice Oliver Wendell Holmes's words, "not free thought for those who agree with us but freedom for the thought that we hate." The First Amendment is designed to protect the freedom to express *all* ideas, including those that may be unpopular.

The First Amendment has been interpreted to protect more than merely spoken words. It also protects **symbolic speech**—speech involving actions and other nonverbal expressions. Some common examples include picketing in a labor dispute and wearing a black armband in protest of a government policy. Even burning the American flag as a gesture of protest has been held to be protected by the First Amendment.

symbolic speech The expression of beliefs, opinions, or ideas through forms other than speech or print; speech involving actions and other nonverbal expressions.

JOIN THE DEBATE

Should We Let Student Religious Groups Bar Gays from Membership?

Other members of campus student organizations often share common beliefs. Young Republicans do not normally seek to join the Democratic club on campus, and vice versa. You don't expect to find many members of the Association of Muslim Law Students who are not Muslims. Many colleges and universities, however, prohibit certain membership restrictions in student organizations. For example, the Student Conduct Code at Eastern Michigan University (EMU) lists the following violation: "*Discrimination by Student Organizations.* Selecting its membership upon the basis of restrictive clauses involving race, religion, color, national origin, gender, age, sexual orientation, or disability unless any given student organization's membership restriction is shown to be specifically allowed by law."

Under such rules, EMU's Democratic club could ban Republicans, because political ideology is an acceptable basis for membership. But what about a Christian group that, as a matter of belief, opposes sex outside of marriage between a man and a woman? Can such student religious groups bar gay men and lesbians from membership? If they do, can the school withdraw official recognition?

This question was at the heart of a recent case involving the University of California's Hastings College of the Law. The Christian Legal Society (CLS) at the school excludes from affiliation anyone who engages in "unrepentant homosexual conduct" or holds religious convictions different from those in the group's Statement of Faith. Hastings, however, requires that all recognized student organizations accept *any* student as a member. (At Hastings, unlike EMU, the campus Republicans could *not* formally exclude Democrats.) Hastings therefore refused to grant recognition to the CLS. The organization sued—and lost at every stage, all the way to the Supreme Court.[1]

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Government Bodies Must Oppose Discrimination

Those who support the Court's ruling believe that the ruling is as it should be. The Court's ruling did not force the CLS to accept lesbians or gay men as members. It did not ban the group, which continues to meet on campus despite its lack of official status. But why should a student pay mandatory student activity fees to fund a group that would reject her as a member? A free society must accept all minorities. Whether discrimination is based on religion, sexual orientation, or race, it should not be subsidized by state universities. Groups should be able to believe—and say—whatever they want, but discrimination is an action, not a belief.

What Happened to Freedom of Association?

Opponents of the Court's decision point out that the Bill of Rights grants us freedom of association. Freedom to associate also means freedom *not* to associate. That's why Hastings' ridiculous open membership rule is wrong. Indeed, there's some evidence that Hastings created the rule specifically to apply to the CLS. In effect, the Court's decision denies freedom of expression when that expression offends prevailing standards of political correctness. If campus organizations cannot choose their members, an African American student group will have to admit members of the Ku Klux Klan. Consider one possibility—everyone opposed to the principles of an organization could join that group, and then vote to disband. Is this freedom?

For Critical Analysis: *When is it legal for an organization to restrict who may join?*

THE RIGHT TO FREE SPEECH IS NOT ABSOLUTE

Although Americans have the right to free speech, not *all* speech is protected under the First Amendment. Our constitutional rights and liberties are not absolute. Rather, they are what the Supreme Court—the ultimate interpreter of the Constitution—says they are. Although the Court has zealously safeguarded the right to free speech, at times it has imposed limits on speech in the interests of protecting other rights of Americans. These rights include security against harm to one's person or reputation, the need for public order, and the need to preserve the government.

Generally, throughout our history, the Supreme Court has attempted to balance our rights to free speech against these other needs of society. As Justice Holmes once said, even "the most stringent protection of free

speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[17] We look next at some of the ways that the Court has limited the right to free speech.

EARLY RESTRICTIONS ON EXPRESSION At times in our nation's history, various individuals have opposed our form of government. The government, however, has drawn a fine line between legitimate criticism and the expression of ideas that may seriously harm society. Clearly, the government may pass laws against violent acts. But what about **seditious speech,** which urges resistance to lawful authority or advocates overthrowing the government?

"FREE SPEECH is the whole thing, the whole ball game. Free speech is life itself."

~ SALMAN RUSHDIE ~
INDIAN-BORN BRITISH WRITER
B. 1947

As early as 1798, Congress took steps to curb seditious speech when it passed the Alien and Sedition Acts, which made it a crime to utter "any false, scandalous, and malicious" criticism of the government. The acts were considered unconstitutional by many but were never tested in the courts. Several dozen individuals were prosecuted under the acts, and some were actually convicted. In 1801, President Thomas Jefferson pardoned those sentenced under the acts, and Congress soon repealed them.

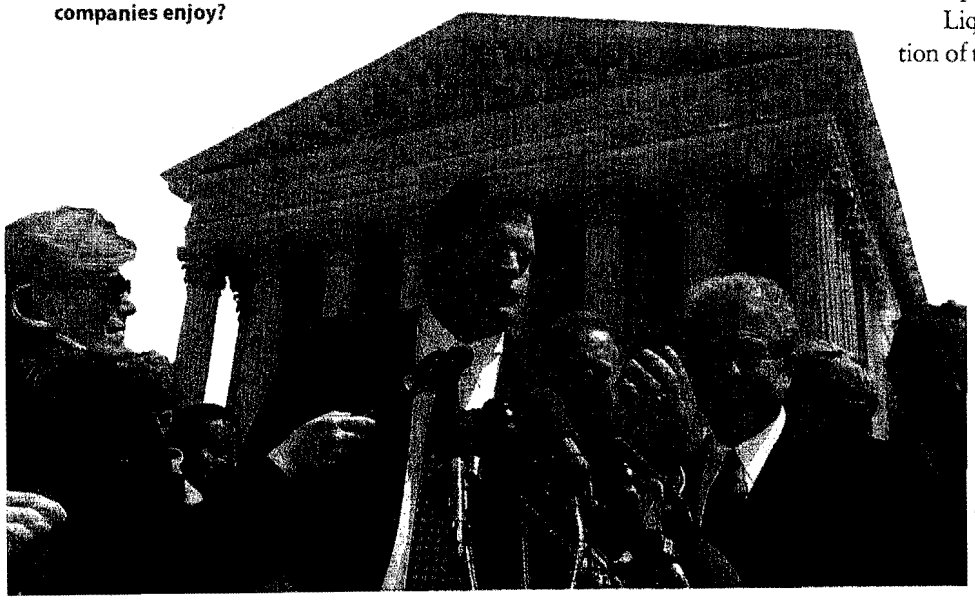
During World War I, Congress passed the Espionage Act of 1917 and the Sedition Act of 1918. The 1917 act prohibited attempts to interfere with the operation of the military forces, the war effort, or the process of recruitment. The 1918 act made it a crime to "willfully utter, print, write, or publish any disloyal, profane, scurrilous [insulting], or abusive language" about the government. More than two thousand persons were tried and convicted under this act, which was repealed at the end of World War I.

In 1940, Congress passed the Smith Act, which forbade people from advocating the violent overthrow of the U.S. government. In 1951, the Supreme Court first upheld the constitutionality of the Smith Act in *Dennis v. United States,*[18] which involved eleven top leaders of the Communist Party who had been convicted of violating the act. The Court found that their activities went beyond the permissible peaceful advocacy of change. Subsequently, however, the Court modified its position. Since the 1960s, the Court has defined seditious speech to mean only the advocacy of imminent and concrete acts of violence against the government.[19]

LIMITED PROTECTION FOR COMMERCIAL SPEECH Advertising, or **commercial speech,** is also protected by the First Amendment, but not as fully as regular speech. Generally, the Supreme Court has considered a restriction on commercial speech to be valid as long as the restriction "(1) seeks to implement a substantial government interest, (2) directly advances that interest, and (3) goes no further than necessary to accomplish its objective." Problems arise, though, when restrictions on commercial advertising achieve one substantial government interest yet are contrary to the interest in protecting free speech and the right of consumers to be informed. In such cases, the courts have to decide which interest takes priority.

Liquor advertising is a good illustration of this kind of conflict. For example,

Attorney Patrick Coughlin (center) gives a press conference in front of the Supreme Court. He represented activists who sued Nike for false advertising when it defended itself from attacks against its employment policies in Asia. How much free speech do companies enjoy?



KEVIN LAMARQUE/REUTERS/LANDOV

seditious speech Speech that urges resistance to lawful authority or that advocates the overthrowing of a government.

commercial speech Advertising statements that describe products. Commercial speech receives less protection under the First Amendment than ordinary speech.

libel A published report of a falsehood that tends to injure a person's reputation or character.

slander The public utterance (speaking) of a statement that holds a person up for contempt, ridicule, or hatred.

obscenity Indecency or offensiveness in speech, expression, behavior, or appearance. Whether specific expressions or acts constitute obscenity normally is determined by community standards.

in one case, Rhode Island argued that its law banning the advertising of liquor prices served the state's goal of discouraging liquor consumption (because the ban discouraged bargain hunting and thus kept liquor prices high). The Supreme Court, however, held that the ban was an unconstitutional restraint on commercial speech. The Court stated that the First Amendment "directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[20]

UNPROTECTED SPEECH Certain types of speech receive no protection under the First Amendment. These types of speech include defamation (libel and slander) and obscenity.

Libel and Slander No person has the right to libel or slander another. **Libel** is a published report of a falsehood that tends to injure a person's reputation or character. **Slander** is the public utterance (speaking) of a statement that holds a person up for contempt, ridicule, or hatred. To prove libel or slander, however, certain criteria must be met. The statements made must be untrue, must stem from an intent to do harm, and must result in actual harm.

The Supreme Court has ruled that public figures (public officials and others in the public limelight) cannot collect damages for remarks made against them unless they can prove the remarks were made with "reckless" disregard for accuracy. Generally, it is believed that because public figures have greater access to the media than ordinary persons do, they are in a better position to defend themselves against libelous or slanderous statements.

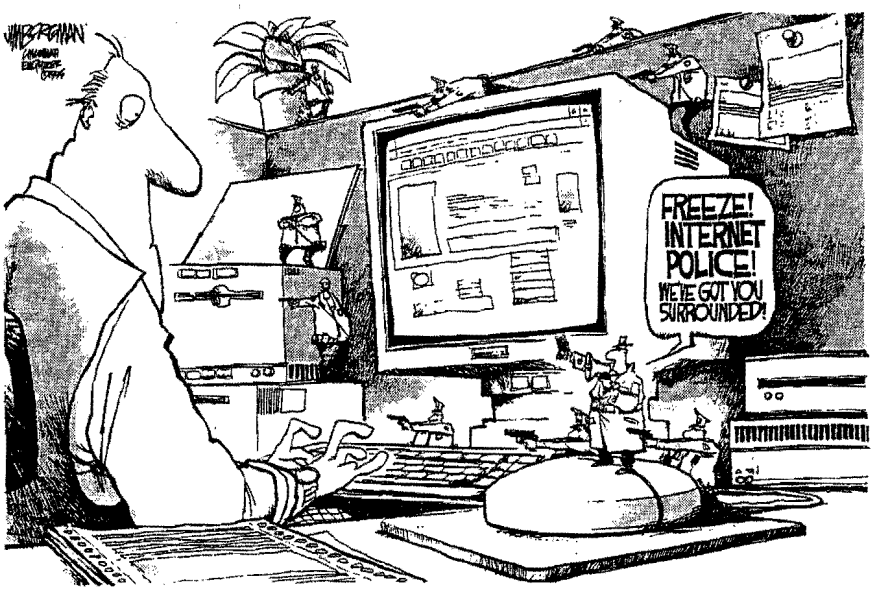
Obscenity Obscene speech is another form of speech that is not protected under the First Amendment. Although the dictionary defines **obscenity** as that which is offensive and indecent, the courts have had difficulty defining the term with any precision. Supreme Court justice Potter Stewart's famous statement, "I know it when I see it," certainly gave little guidance on the issue.

One problem in defining obscenity is that what is obscene to one person is not necessarily obscene to another. What one reader considers indecent, another reader might see as "colorful." Another problem is that society's views on obscenity change over time. Major literary works of such great writers as D. H. Lawrence (1885–1930), Mark Twain (1835–1910), and James Joyce (1882–1941), for example, were once considered obscene in most of the United States.

After many unsuccessful attempts to define obscenity, in 1973 the Supreme Court came up with a three-part test in *Miller v. California*.[21] The Court decided that a book, film, or other piece of material is legally obscene if it meets the following criteria:

1. The average person applying contemporary (present-day) standards finds that the work taken as a whole appeals to the prurient interest—that is, tends to excite unwholesome sexual desire.
2. The work depicts or describes, in a patently (obviously) offensive way, a form of sexual conduct specifically prohibited by an antiobscenity law.
3. The work taken as a whole lacks serious literary, artistic, political, or scientific value.

The very fact that the Supreme Court has had to set up such a complicated test shows how difficult defining obscenity is. The Court went on to state that, in effect, local communities should be allowed to set their own standards for what is obscene. What is obscene to many people in one area of the country might be perfectly acceptable to those in another area.



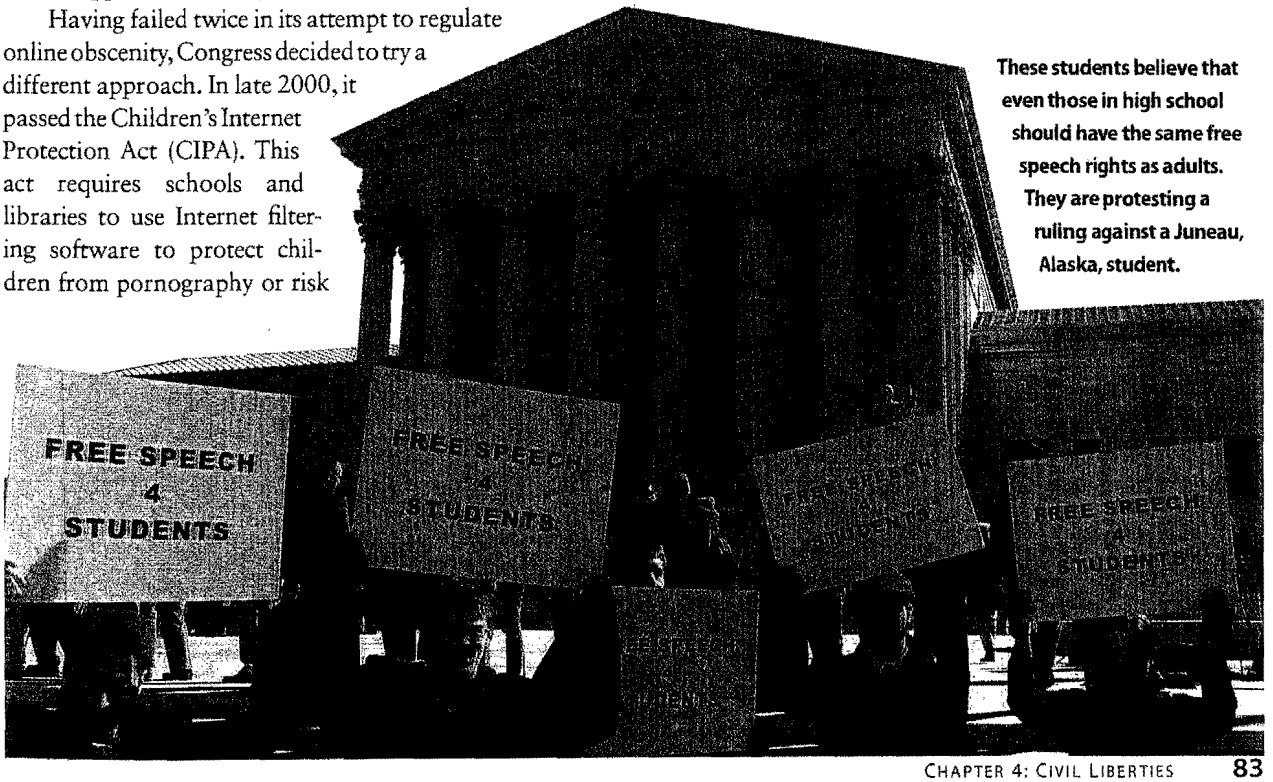
Obscenity in Cyberspace A hugely controversial issue concerning free speech is the question of obscene and pornographic materials in cyberspace. Such materials can be easily accessed by anyone of any age anywhere in the world at countless Web sites. Many people strongly believe that the government should step in to prevent obscenity on the Internet. Others believe, just as strongly, that speech on the Internet should not be regulated.

The issue came to a head in 1996, when Congress passed the Communications Decency Act (CDA). The law made it a crime to transmit "indecent" or "patently offensive" speech or images to minors (those under the age of eighteen) or to make such speech or images available online to minors. Violators of the act could be fined up to $250,000 or imprisoned for up to two years. In 1997, the Supreme Court held that the law's sections on indecent speech were unconstitutional. According to the Court, those sections of the CDA were too broad in their scope and significantly restrained the constitutionally protected free speech of adults,[22] Congress made a further attempt to regulate Internet speech in 1998 with the Child Online Protection Act. The act imposed criminal penalties on those who distribute material that is "harmful to minors" without using some kind of age-verification system to separate adult and minor Web users. In 2004, the Supreme Court barred enforcement of the act, ruling that the act likely violated constitutionally protected free speech, and sent the case back to the district court for a trial.[23] The district court found the act unconstitutional, and in 2008 a federal appellate court upheld the district court's ruling.

Having failed twice in its attempt to regulate online obscenity, Congress decided to try a different approach. In late 2000, it passed the Children's Internet Protection Act (CIPA). This act requires schools and libraries to use Internet filtering software to protect children from pornography or risk losing federal funds for technology upgrades. The CIPA was also challenged on constitutional grounds, but in 2003 the Supreme Court held that the act did not violate the First Amendment. The Court concluded that because libraries can disable the filters for any patrons who ask, the system was reasonably flexible and did not burden free speech to an unconstitutional extent.[24]

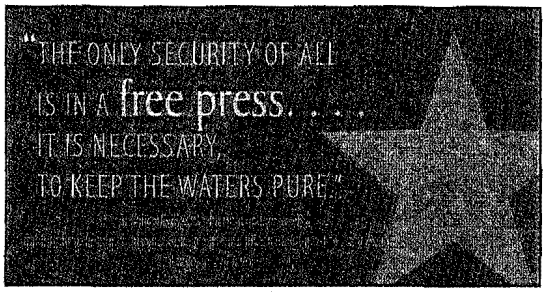
FREE SPEECH FOR STUDENTS? America's schools and college campuses experience an ongoing tension between the guarantee of free speech and the desire to restrain speech that is offensive to others. Typically, cases involving free speech in the schools raise the following question: Where should the line between unacceptable speech and merely offensive speech be drawn? Schools at all levels—elementary schools, high schools, and colleges and universities—have grappled with this issue.

Generally, the courts allow elementary schools wide latitude to define what students may and may not say to other students. At the high school level, the Supreme Court has allowed some restraints to be placed on the freedom of expression. For example, as you will read shortly in the discussion of freedom of the press, the Court does allow school officials to exercise some censorship over high school publications. And, in a controversial 2007 case, the Court upheld a school principal's decision to suspend a high school student who unfurled a banner reading "Bong Hits 4 Jesus" at an event off the school premises. The Court sided with the school officials, who maintained that the banner appeared to advocate illegal



MARK WILSON/GETTY IMAGES

These students believe that even those in high school should have the same free speech rights as adults. They are protesting a ruling against a Juneau, Alaska, student.



drug use in violation of school policy. Many legal commentators and scholars strongly criticized this decision.[25]

A difficult question that many universities face today is whether the right to free speech includes the right to make hateful remarks about others based on their race, gender, or sexual orientation. Some claim that allowing people with extremist views to voice their opinions can lead to violence. In response to this question, several universities have gone so far as to institute speech codes to minimize the disturbances that hate speech might cause. Although these speech codes have often been ruled unconstitutional on the ground that they restrict freedom of speech,[26] such codes continue to exist on many college campuses. For example, the student assembly at Wesleyan University passed a resolution in 2002 stating that the "right to speech comes with implicit responsibilities to respect community standards."[27] Campus rules governing speech and expression, however, can foster the idea that "good" speech should be protected, but "bad" speech should not. Furthermore, who should decide what is considered "hate speech"?

Freedom of the Press

The framers of the Constitution believed that the press should be free to publish a wide range of opinions and information, and generally the free speech rights just discussed also apply to the press. The courts have placed certain restrictions on the freedom of the press, however. Over the years, the Supreme Court has developed various guidelines and doctrines to use in deciding whether freedom of speech and the press can be restrained.

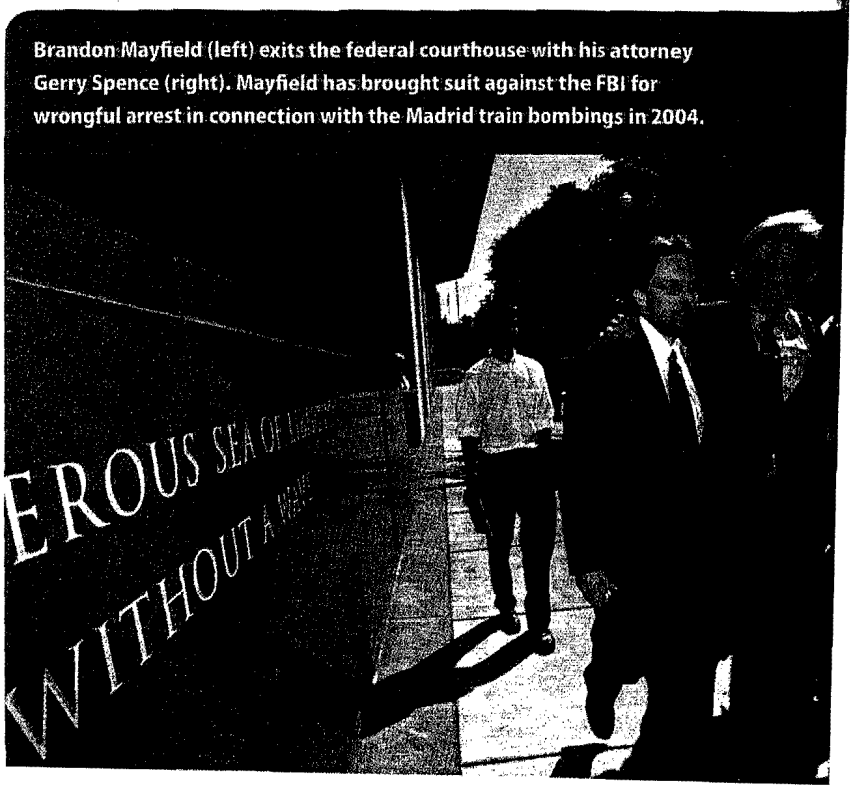
CLEAR AND PRESENT DANGER One guideline the Court has used resulted from a case in 1919, *Schenck v. United States.*[28] Charles T. Schenck was convicted of printing and distributing leaflets urging men to resist the draft during World War I. The government claimed that his actions violated the Espionage Act of 1917, which made it a crime to encourage disloyalty to the government or resistance to the draft. The Supreme Court upheld both the law and the convictions. Justice Holmes, speaking for the Court, stated as follows:

> 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. It is a question of proximity [closeness] and degree. [Emphasis added.]

Thus, according to the *clear and present danger test,* government should be allowed to restrain speech only when that speech clearly presents an immediate threat to public order. It is often hard to say when speech crosses the line between being merely controversial and being a "clear and present danger," but the principle has been used in many cases since *Schenck.*

The clear and present danger principle seemed too permissive to some Supreme Court justices. Several years after the *Schenck* ruling, in the case of *Gitlow v. New York,*[29] the Court held that speech could be curtailed even if it had only a *tendency* to lead to illegal action. Since the 1920s, however, this guideline, known as the *bad-tendency test,* generally has not been supported by the Supreme Court.

THE PREFERRED-POSITION DOCTRINE Another guideline, called the *preferred-position doctrine,* states that certain freedoms are so essential to a democracy that they hold a preferred position. According to this doctrine, any law that limits these freedoms should be presumed unconstitutional unless the government can show that the law is absolutely necessary. Thus, freedom of speech and the press should rarely, if ever, be diminished, because spoken and printed words are the prime tools of the democratic process.



Brandon Mayfield (left) exits the federal courthouse with his attorney Gerry Spence (right). Mayfield has brought suit against the FBI for wrongful arrest in connection with the Madrid train bombings in 2004.

STEPHEN VOSS/REDUX

PRIOR RESTRAINT Stopping an activity before it actually happens is known as *prior restraint.* With respect to freedom of the press, prior restraint involves *censorship,* which occurs when an official removes objectionable materials from an item before it is published or broadcast. An example of censorship and prior restraint would be a court's ruling that two paragraphs in an upcoming article in the local newspaper had to be removed before the article could be published. The Supreme Court has generally ruled against prior restraint, arguing that the government cannot curb ideas *before* they are expressed.

"THE RIGHT TO BE LET ALONE
– the most comprehensive of the rights and the right most valued by civilized men."
~ LOUIS BRANDEIS ~
ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT
1916–1939

On some occasions, however, the Court has allowed prior restraint. For example, in a 1988 case, *Hazelwood School District v. Kuhlmeier,*[30] a high school principal deleted two pages from the school newspaper just before it was printed. The pages contained stories on students' experiences with pregnancy and discussed the impact of divorce on students at the school. The Supreme Court, noting that students in school do not have exactly the same rights as adults in other settings, ruled that high school administrators *can* censor school publications. The Court said that school newspapers are part of the school curriculum, not a public forum. Therefore, administrators have the right to censor speech that promotes conduct inconsistent with the "shared values of a civilized social order."

LO3 The Right to Privacy

Supreme Court justice Louis Brandeis stated in 1928 that the right to privacy is "the most comprehensive of rights and the right most valued by civilized men."[31] The majority of the justices on the Supreme Court at that time did not agree. In 1965, however, in the landmark case of *Griswold v. Connecticut,*[32] the justices on the Supreme Court held that a right to privacy is implied by other constitutional rights guaranteed in the First, Third, Fourth, Fifth, and Ninth Amendments. For example, consider the words of the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In other words, just because the Constitution, including its amendments, does not specifically mention the right to privacy does not mean that this right is denied to the people.

Since then, the government has also passed laws ensuring the privacy rights of individuals. For example, in 1966 Congress passed the Freedom of Information Act, which, among other things, allows any person to request copies of any information about her or him contained in government files. In 1974, Congress passed the Privacy Act, which restricts government disclosure of data to third parties. In 1994, Congress passed the Driver's Privacy Protection Act, which prevents states from disclosing or selling a driver's personal information without the driver's consent.[33] In late 2000, the federal Department of Health and Human Services issued a regulation ensuring the privacy of a person's medical information. Health-care providers and insurance companies are restricted from sharing confidential information about their patients.

Although Congress and the courts have acknowledged a constitutional right to privacy, the nature and scope of this right are not always clear. For example, Americans continue to debate whether the right to privacy includes the right to have an abortion or the right of terminally ill persons to commit physician-assisted suicide. Since the terrorist attacks of September 11, 2001, another pressing privacy issue has been how to monitor potential terrorists to prevent another attack without violating the privacy rights of all Americans.

The Abortion Controversy

One of the most divisive and emotionally charged issues being debated today is whether the right to privacy means that women can choose to have abortions.

ABORTION AND PRIVACY In 1973, in the landmark case of *Roe v. Wade,*[34] the Supreme Court, using the *Griswold* case as a precedent, held that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The right is not absolute throughout pregnancy, however. The Court also said that any state could impose certain regulations to safeguard the health of the mother after the first three months of pregnancy and, in the final stages of pregnancy, could act to protect potential life.

Since the *Roe v. Wade* decision, the Supreme Court has adopted a more conservative approach and has

upheld restrictive state laws requiring counseling, waiting periods, notification of parents, and other actions prior to abortions.[35] Yet the Court has never overturned the *Roe* decision. In fact, in 1997 and again in 2000, the Supreme Court upheld laws requiring "buffer zones" around abortion clinics to protect those entering the clinics from unwanted counseling or harassment by antiabortion groups.[36] In 2000, the Supreme Court invalidated a Nebraska statute banning "partial-birth" abortions, a procedure used during the second trimester of pregnancy.[37] Undeterred by the fate of the Nebraska law, President George W. Bush signed the Partial Birth Abortion Ban Act in 2003. In a close (five-to-four) and controversial 2007 decision, the Supreme Court upheld the constitutionality of the 2003 act.[38]

MARK PETERSON/REDUX

Abortion continues to be extremely controversial in the United States. Pro-choice supporters demonstrate their desire that abortion remain legal.

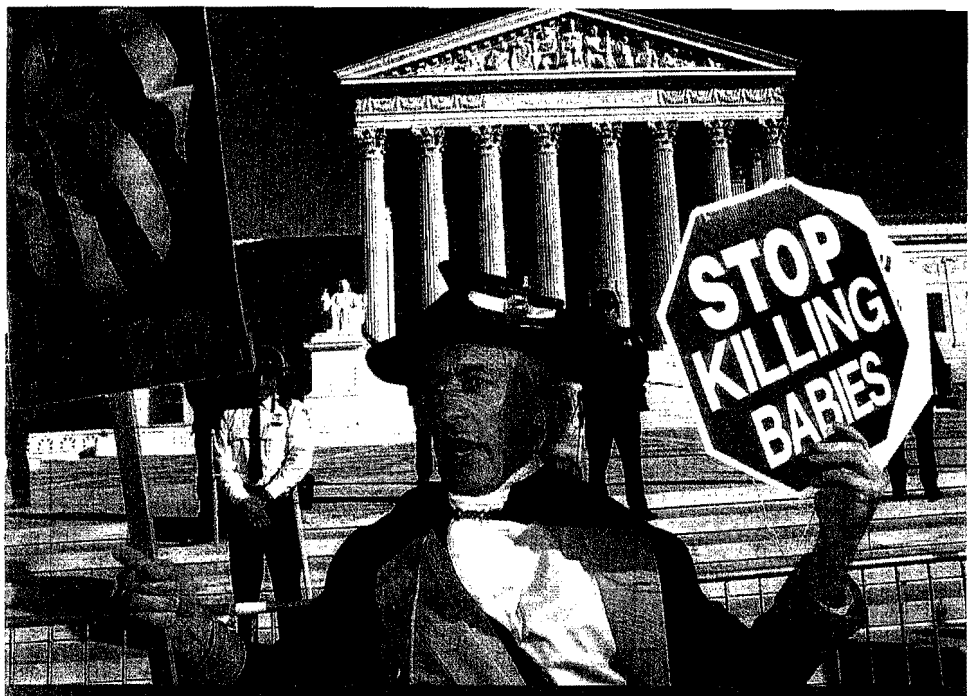
Many were surprised at the Court's decision on partial-birth abortion, given that the federal act banning this practice was quite similar to the Nebraska law that had been struck down by the Court in 2000, just seven years earlier. Since that decision was rendered, however, the Court has become more conservative with the appointment of two new justices by President George W. Bush. Dissenting from the majority opinion in the case, Justice Ruth Bader Ginsburg said that the ruling was an "alarming" departure from three decades of Supreme Court decisions on abortion.

ABORTION AND POLITICS American opinion on the abortion issue is more nuanced than the labels "pro-life" and "pro-choice" would indicate. For example, a 2010 Gallup poll found that 45 percent of the respondents considered themselves pro-choice and 47 percent called themselves pro-life. Yet when respondents were asked whether abortion should be legal or illegal, public opinion was more middle-of-the-road than the attachments to these labels would suggest. About 54 percent thought that abortion should be limited to only certain circumstances, while 19 percent believed it should be illegal in all circumstances, and 24 percent thought that it should be legal in all circumstances.

Do We Have the "Right to Die"?

Whether it is called euthanasia (mercy killing), assisted suicide, or a dignified way to leave this world, it all comes down to one basic question: Do terminally ill persons have, as part of their civil liberties, a right to die and to be assisted in the process by physicians or others? Phrased another way, are state laws banning physician-assisted suicide in such circumstances unconstitutional?

In 1997, the issue came before the Supreme Court, which characterized the question as follows: Does the liberty protected by the Constitution include a right to commit suicide, which itself includes a right to assistance in doing so? The Court's clear and categorical answer to this question was no. To hold otherwise, said the Court, would be "to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every state."[39] Although the Court upheld the states' rights to ban such a practice, the Court did not hold that state laws *permitting* assisted suicide were unconstitutional. In 1997, Oregon became the first state to implement such a law. In 2008, Washington and Montana became the second and third states, respectively, to allow the practice. Oregon's law was upheld by the Supreme Court in 2006.[40]



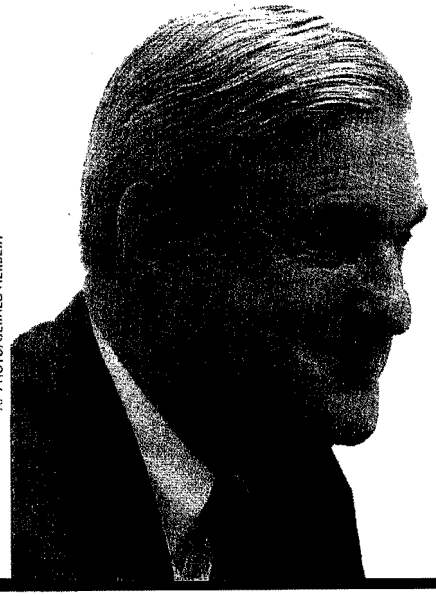
MARK PETERSON/REDUX

Anti-abortion activists often protest in front of the Supreme Court building. They have taken on the label "Pro-life." Their opponents are called "Pro-Choice." What is at issue in this debate?

The Supreme Court's enunciation of its opinion on this topic has not ended the debate, though, just as the debate over abortion did not stop after the 1973 *Roe v. Wade* decision legalizing abortion. Americans continue to be at odds over this issue.

Personal Privacy and National Security

Since the terrorist attacks of September 11, 2001, a common debate in the news media and on Capitol Hill has been how the United States can address the urgent need to strengthen national security while still protecting civil liberties, particularly the right to privacy. As you will read throughout this book, various programs have been proposed or attempted, and some have already been dismantled after public outcry. For example, the Homeland Security Act passed in late 2002 included language explicitly prohibiting a controversial program called Operation TIPS (Terrorism Information and Prevention System). Operation TIPS was proposed to create a national reporting program for "citizen volunteers" who regularly work in neighborhoods and communities, such as postal carriers and meter readers, to report suspicious activity to the government. The public backlash against the program was quick and resolute—neighbors would not spy on neighbors. Indeed, Americans are protective enough of their privacy to reject the idea of national identification cards, even though such cards are common in other countries. We say more about national ID cards in the feature *The Rest of the World: Fingerprinting 1.2 Billion Citizens of India* on the following page.



AP PHOTO/GERALD HERBERT

FBI director Robert Mueller often faces questioning in front of congressional hearings on national security. What limits his decisions?

THE USA PATRIOT ACT Other laws and programs that infringe on Americans' privacy rights were also created in the wake of 9/11 in the interests of protecting the nation's security. For example, the USA Patriot Act of 2001 gave the government broad latitude to investigate people who are only vaguely associated with terrorists. Under this law, the government can access personal information on American citizens to an extent heretofore never allowed by law. The Federal Bureau of Investigation was also authorized to use "National Security Letters" to demand personal information about individuals from private companies (such as banks and phone companies). In one of the most controversial programs, the National Security Agency (NSA) was authorized to monitor certain domestic phone calls without first obtaining a warrant. When Americans learned of the NSA's actions in 2005, the ensuing public furor

Fingerprinting 1.2 Billion Citizens of India

From time to time, persons who are concerned about our national security propose that the United States create a national identity card. That would mean that all 310 million Americans would be required to have an official federal ID card. Now imagine imposing such a requirement on a nation of more than 1.2 billion people. It sounds like quite a task, but the government of India began work on such a project in 2011.

Lots of Precedent

Quite a few countries, including Belgium, France, Germany, and Spain, already require that their residents have national identity cards. In fact, more than a hundred countries require such cards. Why not India? The big problem, of course, is that few countries have to deal with more than a billion fingerprints to create a biometric identity card for every resident.

All for the Good, According to Some

According to Nandan Nilekani, head of India's Unique Identity Authority, providing a national biometric identity card will change his country. "Every person for the first time will be able to prove who he or she is," he said in a recent interview. "If you are going to have all of this economic growth, people who are marginalized should be given a chance." He was referring to the more than 75 million homeless people who do not even have birth certificates. They cannot obtain government aid or register their children for school. They cannot even obtain phone service or open a bank account.

Are Civil Liberties an Issue?

More than one-sixth of the world's population lives in India. If every single man, woman, and child there is registered in a government database, then more than one-sixth of the world's inhabitants can be found by searching that single database. Civil libertarians argue that there will be no oversight mechanism to defend against the surveillance abuses that will be possible with such a large database. The reality, though, is that India already has a gigantic bureaucracy that oversees its citizens. In some regions, residents must have twenty different ID cards—one to vote, one to obtain food ration tickets, and many others for various purposes.

For Critical Analysis *If more than one hundred countries already require a national identity card for every resident, why doesn't the United States do the same?*

forced the Bush administration to agree to henceforth obtain warrants for such monitoring activities.

THE CIVIL LIBERTIES DEBATE Some Americans, including many civil libertarians, are so concerned about the erosion of privacy rights that they wonder why the public outcry has not been even more vehement. They point out that trading off even a few civil liberties, including our privacy rights, for national security is senseless. After all, these liberties are at the heart of what this country stands for. When we abandon any of our civil liberties, we weaken our country rather than defend it. Essentially, say some members of this group, the federal government has achieved what the terrorists were unable to accomplish—the destruction of our freedoms. Other Americans believe that we have little to worry about. Those who have nothing to hide should not be concerned about government surveillance or other privacy intrusions undertaken by the government to make our nation more secure against terrorist attacks. To what extent has the Obama administration revised the policies established under President Bush? We examine that question in this chapter's *Perception versus Reality* feature on page 90.

LO4 The Rights of the Accused

The United States has one of the highest murder rates in the industrialized world. It is therefore not surprising that many Americans have extremely strong opinions about the rights of persons accused of criminal

offenses. Indeed, some Americans complain that criminal defendants have too many rights.

Why do criminal suspects have rights? The answer is that all persons are entitled to the protections afforded by the Bill of Rights. If criminal suspects were deprived of their basic constitutional liberties, all people would suffer the consequences, because there is nothing to stop the government from accusing anyone of being a criminal. In a criminal case, a state official (such as the district attorney, or D.A.) prosecutes the defendant, and the state has immense resources that it can bring to bear against the accused person. By protecting the rights of accused persons, the Constitution helps to prevent the arbitrary use of power by the government.

The Rights of Criminal Defendants

The basic rights, or constitutional safeguards, provided for criminal defendants are set forth in the Bill of Rights. These safeguards include the following:

- The Fourth Amendment protection from unreasonable searches and seizures.
- The Fourth Amendment requirement that no warrant for a search or an arrest be issued without **probable cause**—cause for believing that there is a substantial likelihood that a person has committed or is about to commit a crime.
- The Fifth Amendment requirement that no one be deprived of "life, liberty, or property, without due process of law." As discussed earlier in this chapter, this requirement is also included in the Fourteenth Amendment, which protects persons against actions by state governments.
- The Fifth Amendment prohibition against **double jeopardy**—being tried twice for the same criminal offense.
- The Fifth Amendment provision that no person can be required to be a witness against (incriminate) himself or herself. This is often referred to as the constitutional protection against **self-incrimination.** It is the basis for a criminal suspect's "right to remain silent" in criminal proceedings.
- The Sixth Amendment guarantees of a speedy trial, a trial by jury, a public trial, and the right to confront witnesses.
- The Sixth Amendment guarantee of the right to counsel at various stages in some criminal proceedings. The right to counsel was strengthened in 1963 in *Gideon v. Wainwright.*[41] The Supreme Court held that if a person is accused of a felony and cannot afford an attorney, an attorney must be made available to the accused person at the government's expense.
- The Eighth Amendment prohibitions against excessive bail and fines and against cruel and unusual punishments.

The Exclusionary Rule

Any evidence obtained in violation of the constitutional rights spelled out in the Fourth Amendment normally is not admissible at trial. This rule, which has been applied in the federal courts since at least 1914, is known as the **exclusionary rule.** The rule was extended to state court proceedings in 1961.[42] The reasoning behind the exclusionary rule is that it forces law enforcement personnel to gather evidence properly. If they do not, they will be unable to introduce the evidence at trial to convince the jury that the defendant is guilty.

The *Miranda* Warnings

In the 1950s and 1960s, one of the questions facing the courts was not whether suspects had constitutional rights—that was not in doubt—but how and when those rights could be exercised. For example, could the right to remain silent (under the Fifth Amendment's prohibition against self-incrimination) be exercised during pretrial interrogation proceedings or only during the trial? Were confessions obtained from suspects admissible in court if the suspects had not been advised of their right to remain silent and other constitutional rights? To clarify these issues, in 1966 the Supreme Court issued a landmark decision in *Miranda v. Arizona.*[43] In that case, the Court enunciated the ***Miranda* warnings** that are now familiar to virtually all Americans:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed.

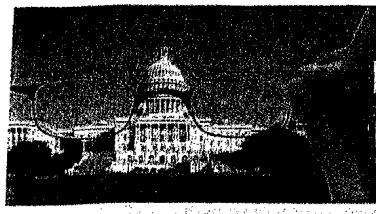
probable cause Cause for believing that there is a substantial likelihood that a person has committed or is about to commit a crime.

double jeopardy The prosecution of a person twice for the same criminal offense; prohibited by the Fifth Amendment in all but a few circumstances.

self-incrimination Providing damaging information or testimony against oneself in court.

exclusionary rule A criminal procedural rule requiring that any illegally obtained evidence not be admissible in court.

***Miranda* warnings** A series of statements informing criminal suspects, on their arrest, of their constitutional rights, such as the right to remain silent and the right to counsel; required by the Supreme Court's 1966 decision in *Miranda v. Arizona.*



PERCEPTION VERSUS REALITY

Obama's Antiterrorism Stance Compared with Bush's

During much of the administration of President George W. Bush, civil libertarians denounced the antiterrorism policies of President Bush and his vice president, Dick Cheney. Certainly, after 9/11, the administration's view of civil liberties, especially those relating to privacy, changed substantially. The USA Patriot Act, which Bush signed into law on October 26, 2001, authorized a major expansion in the "snooping" activities of the federal government. In addition, the National Security Agency (NSA) was allowed to engage in domestic wiretapping without obtaining search warrants.

The Perception

During the Bush administration, Bush and Cheney ran a counterterrorism program that violated the civil liberties of Americans, tortured enemy combatants, and committed a variety of other illegal actions. According to Cheney, these practices saved "thousands, perhaps hundreds of thousands" of lives. They were also "legal, essential, justified, successful and the right thing to do." President Barack Obama made the country "less safe," said Cheney, by eliminating them and by attempting to close the prison holding suspected terrorists at the Guantánamo Bay Naval Base.

In contrast, Obama called the Guantánamo prison a "misguided experiment" that actually increased the threats to American national security. "The problem of what to do with Guantánamo detainees was not caused by my decision to close the facility," Obama said. "The problem exists because of the decision to open Guantánamo in the first place."

The Reality

At most, the excessive antiterrorism policies of the Bush administration lasted for three years following 9/11. This nation had been blindsided—our intelligence officials knew almost nothing about the threats against us. The Bush administration frantically attempted to discover and prevent any further threats. It was in this environment that officials such as Cheney could demand—and obtain—policies that seemed to violate traditional American standards.

By 2005, however, members of the Bush administration were trying to rein in the excesses of the earlier post-9/11 period. Secretary of State Condoleezza Rice, National Security Advisor Stephen Hadley, and other officials sought to wean the administration away from the Cheney approach. In 2007, Rice refused to support an executive order reviving the "enhanced" interrogation program. Throughout Bush's second term, officials tried to close Guantánamo and pleaded with foreign governments to take some of its prisoners.

The most famous "enhanced" interrogation technique—waterboarding—was halted long before Obama came to power. Obama castigated the military-commission system used to try captured enemy combatants, but in fact he revived this system with only cosmetic changes. Harvard law professor Jack Goldsmith puts it this way: "The main difference between the Obama and Bush administrations concerns not the substance of terrorism policy, but rather its packaging." In reality, Obama's policies largely represented a continuation of the policies adopted during Bush's second term. Cheney, Bush, and Obama all had an interest in glossing over that fact.

Blog On National security blogs may outnumber the stars you can see on a cloudless night. We can mention only a few. The *National Journal* offers expert posts at **security.nationaljournal.com**. The Heritage Foundation takes a strongly conservative line at **www.heritage.org/Issues/National-Security-and-Defense**. Finally, this blog defends the rights of Guantánamo detainees: **gtmoblog.blogspot.com**.

The Erosion of *Miranda*

As part of a continuing attempt to balance the rights of accused persons against the rights of society, the Supreme Court has made a number of exceptions to the *Miranda* ruling. In 1986, for example, the Court held that a confession need not be excluded even though the police failed to inform a suspect in custody that his attorney had tried to reach him by telephone.[44] In an important 1991 decision, the Court stated that a suspect's conviction will not be automatically overturned if the suspect was coerced into making a confession. If the other evidence admitted at trial was strong enough to justify the conviction without the confession, then the fact that the confession was obtained illegally can be, in effect, ignored.[45] In yet another case, in 1994 the Supreme Court ruled that a suspect must unequivocally and assertively state his right to counsel in order to stop police questioning. Saying "Maybe I should talk to a lawyer" during an interrogation after being taken

into custody is not enough. The Court held that police officers are not required to decipher the suspect's intentions in such situations.[46]

Miranda may eventually become obsolete regardless of any decisions made in the courts. A relatively new trend in law enforcement has been for agencies to digitally record interrogations and confessions. Thomas P. Sullivan, a former U.S. attorney in Chicago, and his staff interviewed personnel in more than 230 law enforcement agencies in thirty-eight states that record interviews of suspects who are in custody. Sullivan found that nearly all police officers said the procedure saved time and money, created valuable evidence to use in court, and made it more difficult for defense attorneys to claim that their clients had been illegally coerced.[47] Some scholars have suggested that recording all custodial interrogations would satisfy the Fifth Amendment's prohibition against coercion and in the process render the *Miranda* warnings unnecessary.

ELENA ROORAID/PHOTOEDIT

This police officer is reading the accused his *Miranda* warnings. Since the 1966 *Miranda* decision, the Supreme Court has relaxed its requirements in some situations, such as when a criminal suspect who is not under arrest enters a police station voluntarily.

AMERICA AT ODDS *Civil Liberties*

Civil liberties is a contentious topic, and Americans are at odds over many of its issues. Almost all Americans claim to believe in individual rights, but how should this freedom be defined? Often, one right appears to interfere with another. Some of the resulting disputes include the following:

- Should the First Amendment's establishment clause be interpreted strictly, so that no one's rights are infringed on by government sponsorship of religion—or should it be interpreted loosely, to recognize that the United States is a very religious country?
- What kinds of religious practices should be allowed under the free exercise clause? In particular, should religious groups that limit or ban participation by gay men and lesbians receive the same government benefits as any other group—or may they be penalized for discrimination?
- Should advertising receive the same free-speech rights as any other kind of speech—or should advertisers be held accountable for making false claims?
- Has the government gone too far in restricting liberties in an attempt to combat terrorism—or are the restrictions trivial compared with the benefits?
- Consider finally the most intense controversy of all. Should women have a privacy right to terminate a pregnancy for any reason—or should abortion be a crime?

Take Action

If you are ever concerned that your civil liberties are being threatened by a government action, you can exercise one of your liberties—the right to petition the government—to object to the action. Often, those who want to take action feel that they are alone in their struggles until they begin discussing their views with others. Brenda Koehler, a writing student attending college in Kutztown, Pennsylvania, relates how one of her friends, whom we will call "Charyn," took action in response to the USA Patriot Act of 2001. Concerned about the extent to which this act infringed on Americans' civil liberties, Charyn began e-mailing her friends and others about the issue. Eventually, a petition against the enforcement of the act in her town was circulated, and the city council agreed to consider the petition. Charyn did not expect anything to come from the review and assumed that the council would dismiss the petition without even reading the three-hundred-page Patriot Act. On the day of the hearing, the council chambers were packed with town citizens who shared Charyn's and her friends' concerns. The council adjourned the meeting for a week so that it could review the act, and when it met the next week, the resolution to oppose enforcing the act was adopted. Although one person's efforts are not always so successful, there will certainly be no successes at all if no one takes action.[48]

POLITICS ON THE WEB

- Almost three dozen First Amendment groups have launched the Free Expression Network, a Web site designed to feature legislation updates, legal briefings, and news on cases of censorship in local communities. Go to **www.freeexpression.org**
- The Web site for the leading civil liberties organization, the American Civil Liberties Union (ACLU), can be found at **www.aclu.org**
- The Liberty Counsel is "a nonprofit religious civil liberties education and legal defense organization established to preserve religious freedom." Its take on civil liberties is definitely right of center. You can access this organization's home page at **www.lc.org**
- For information on the effect of new computer and communications technologies on the constitutional rights and liberties of Americans, go to the Center for Democracy and Technology at **www.cdt.org**
- For information on privacy issues relating to the Internet, go to the Electronic Privacy Information Center's Web site at **www.epic.org/privacy**
- To access United States Supreme Court decisions on civil liberties, go to the Court's official Web site at **www.supremecourt.gov**
- For many people, the YouTube Web site is a favorite destination not only for entertainment but also for information on a host of topics. URLs for locating videos on YouTube take the form of **www.youtube.com/watch?v=** immediately followed by a string of characters that identifies a particular video. Videos on civil liberties topics include **AviKQaEsaDM**, which describes the role of the Jehovah's Witnesses in winning civil liberties cases during the twentieth century. Federal policies on inspecting and seizing laptop computers and MP3 players at the border are described at **rSGDVTk6ra0**.