CHAPTER 5

Civil Liberties

OBJECTIVES

This chapter examines the ways in which the courts have interpreted the Bill of Rights. It focuses on the First Amendment and on criminal due process concerns. After reading and reviewing the material in this chapter, the student should be able to do each of the following:

1. Discuss the relationship of the Bill of Rights to the concept of majority rule, and give examples of tension between majority rule and minority rights.
2. Explain how the civil liberties may at times be a matter of majoritarian politics and offer several examples.
3. Explain how the structure of the federal system affects the application of the Bill of Rights.
4. Describe how the Supreme Court has used the Fourteenth Amendment to expand coverage in the federal system. Discuss changing conceptions of the due process clause of the Fourteenth Amendment.
5. List the categories under which the Supreme Court may classify "speech." Explain the distinction between "protected" and "unprotected" speech and name the various forms of expression that are not protected under the First Amendment. Describe the test used by the Court to decide the circumstances under which freedom of expression may be qualified.
6. State what the Supreme Court decided in *Miranda* v. *Arizona,* and explain why that case illustrates how the Court operates in most such due process cases.

OVERVIEW

Like most issues, civil liberties problems often involve competing interests—in this case, conflicting rights or conflicting rights and duties—and groups may mobilize to argue for their interests. Like some other issues, civil liberties concerns can also arise from the successful appeals of a policy entrepreneur. These appeals have sometimes reduced liberty, as when popular fears are aroused during or just after a war or attack.

Civil liberties are foundational to political beliefs and political culture in the United States. Among the most important protections are those in the First Amendment: What is "speech"? How much of it should be free? How far can the state go in aiding religion? How do we strike a balance between national security and personal expression? The zigzag course followed by the courts in judging these matters has, on balance, tended to enlarge freedom of expression.

Also important has been the struggle to strike a balance between the right of society to protect itself from criminals and the right of all people to be free from unreasonable searches and coerced confessions. As with free speech cases, the courts have generally broadened the rights, this time at some expense to the police. In more recent years, though, the Supreme Court has qualified some of its exclusionary rule protections.

The resolution of these issues by the courts is political in the sense that there are competing opinions about what is right or desirable. In this competition of ideas and values, federal judges, though not elected, are often sensitive to strong currents of popular opinion. When no strong national mood is discernible, the opinions of elites influence judicial thinking.

At the same time, courts resolve political conflicts in a manner that differs in three important respects from the resolution of conflicts by legislators and executives. *First,* the relative ease with which one can enter a court facilitates challenges to accepted standards. An unpopular political or religious group may have little or no access to a legislature, but it will have substantial access to the courts. *Second,* judges often settle controversies about rights not simply by deciding the case at hand but by formulating a general rule to cover similar cases elsewhere. This means that the law tends to become more consistent and better known, but the rules may also be inappropriately applied. A definition of "obscenity" or "fighting words" may suit one situation, but be inadequate in another. *Third,* judges interpret the Constitution, whereas legislatures often consult popular preferences or personal convictions. Still, though their own beliefs influence how judges read the Constitution, its language constrains almost all of their decisions.

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

CHAPTER OUTLINE WITH KEYED-IN RESOURCES

I. The politics of civil liberties
   A. The Framers believed that the Constitution limited government—what wasn't specifically allowed was obviously *not* allowed
   B. States ratifying constitutions demanded the addition of the Bill of Rights
      1. Bill of Rights seen as specific restrictions on federal government actions
      2. Bill of Rights not originally understood as applying to state government actions
   C. Civil liberties: protections the Constitution provides against the abuse of government power
   D. Civil rights: protecting certain groups against discrimination
   E. In practice, no clear line between civil liberties and civil rights

II. Culture and civil liberties
   A. Rights in conflict
      1. Constitution and Bill of Rights contain a list of *competing* rights and duties
         a) *Sheppard* case (free press versus fair trial)
         b) *New York Times* and the Pentagon Papers (common defense versus free press)
         c) Kunz anti-Jewish speeches (free speech versus public order)
      2. Struggles over rights follow a pattern similar to interest-group politics in economic issues.
   B. War has been the crisis that has most often restricted the liberty of some minority
      1. Sedition Act of 1798, following the French Revolution
      2. Espionage and Sedition Acts, directed against German-Americans in World War I
      3. Smith Act (1940): made it illegal to advocate the overthrow of the U.S. government
      4. Internal Security Act of 1950: required members of the Communist Party to register with the government
      5. Communist Control Act of 1954: declared the Communist Party to be part of a conspiracy to overthrow the government
      6. Supreme Court usually upheld this legislation, though their importance abated as war or crisis passed
      7. Some use is still made of the Sedition Act, although the Supreme Court has increasingly protected political speech.
   C. Cultural conflicts
      1. Original settlement by white European Protestants meant that "Americanism" was equated with their values
      2. Conflicts about the meaning of some constitutionally protected freedoms surround the immigration of "new" ethnic, cultural, and/or religious groups

a) Jews offended by crèches at Christmas
b) English-speakers often prefer monolingual schools.
c) Is prohibiting gay men from serving as Boy Scout troop leaders discriminatory?

3. Differences even within a single cultural tradition (example: pornography)

D. Applying the Bill of Rights to the states
1. Before Civil War, Constitution and Bill of Rights were only understood to apply to federal government—not to state governments
2. Change began after Civil War with the 14th Amendment (1868)
a) Due process clause: "*no state* shall deprive any person of life, liberty or property without due process of law"
b) Equal protection clause: "*no state* shall deny to any person within its jurisdiction the equal protection of the laws"
3. Supreme Court used these two clauses to apply certain rights to state governments
a) 1897: said no state could take private property without just compensation
b) 1925 (*Gitlow)*: declared federal guarantees of free speech and free press also applied to states
c) 1937 (*Palko* v. *Connecticut*): certain rights must apply to the states because they are essential to "ordered liberty" and they are "principles of justice"
4. Decisions began the process of *incorporation*: applying some (but not all) federal rights to the states
5. Bill of Rights is now generally applied to the states *except for*:
a) 2nd Amendment: right to bear arms
b) 3rd Amendment: quartering troops
c) 5th Amendment: right to be indicted by grand jury
d) 7th Amendment: right to jury trial in civil cases
e) 8th Amendment: ban on excessive bail and fines
6. "New rights" (e.g., right to privacy) are applied to both state and national governments

III. Interpreting and applying the First Amendment (THEME A: FIRST AMENDMENT RIGHTS)
A. Speech and national security
1. Blackstone: press should be free of prior restraint, but then must accept the consequences if a publication is improper or illegal
2. Sedition Act of 1798 followed Blackstone's view, with improvements
a) Jury trial, not a judge's decision
b) Defendant would be acquitted if it could be proved that the publication was accurate
3. Congress defines limits of expression: 1917–1918
a) Treason, insurrection, forcible resistance to federal laws, encouraging disloyalty in the armed services not protected by the First Amendment
b) Upheld in *Schenck* (1919) via "clear and present danger" test (authored by Justice Oliver Wendell Holmes)
c) Holmes dissented in cases that subsequently applied this test, believing that its conditions had not been met
4. Change in national-state relationship: *Gitlow* (1925)
a) Supreme Court initially denied that due process clause made the Bill of Rights applicable to the states.
b) Change occurred in *Gitlow* (1925), when due process clause was applied to protect "fundamental personal rights" from infringement by the states
5. Supreme Court moved toward more free expression after WWI but with some deference to Congress during times of crisis
a) Supreme Court upheld the convictions of Communists under the Smith Act
b) By 1957, to be punished, the speaker must use words "calculated to incite" the overthrow of the government
c) By 1969 (*Brandenburg*), speech calling for illegal acts is protected, if the acts are not "imminent"

d) In 1977, American Nazi march in Skokie, Illinois, is held to be lawful
e) In 1992, Minnesota law that made it a crime to display hate symbols or objects overturned
f) Hate speech is permissible, but hate crimes that result in direct physical harm may be punished more harshly

B. What is speech? Some kinds of speech are not fully protected.
1. Libel: written statement defaming another by false statement
a) Defamatory oral statement: slander
b) Variable jury awards
c) Public figures must also show the words were written with "actual malice"—with reckless disregard for the truth or with knowledge that the words were false
2. Obscenity
a) No enduring and comprehensive definition
b) 1973 definition: judged by "the average person, applying contemporary community standards" to appeal to the "prurient interest" or to depict "in a patently offensive way, sexual conduct specifically defined by applicable state law" and lacking "serious literary, artistic, political, or scientific value"
c) Balancing competing claims remains a problem: freedom vs. decency
d) Localities decide whether to tolerate pornography but must comply with strict constitutional tests if they decide to regulate it
e) Protection is extended to almost all forms of communication; e.g., nude dancing is somewhat protected
f) Indianapolis statute, Court ruled the legislature cannot show preference for one form of expression over another (women in positions of equality vs. women in positions of subordination)
g) Zoning ordinances for adult theaters and bookstores have been upheld: regulates use of property rather than expression
h) Internet regulation ruled unconstitutional by the Supreme Court.
3. Symbolic speech
a) Cannot claim protection for an otherwise illegal act on the grounds that it conveys a political message (example: burning a draft card)
b) However, statutes cannot make certain types of symbolic speech illegal: e.g., flag burning is protected speech

IV. Who is a person?
A. Corporations and organizations usually have same rights as individuals.
1. Corporations and interest groups have First Amendment rights
2. Businesses that cater to "vice" also have First Amendment rights
B. Restrictions can be placed on commercial speech (advertising); however, the regulation must be narrowly tailored and serve the public interest
C. McCain-Feingold campaign finance reform changed the parameters of acceptable political speech for corporations and other organizations
1. Organizations could not pay for "electioneering communications" that "refer" to a specific candidate on radio or television 60 days before an election
2. Supreme Court upheld this law, saying ads that only mentioned, but did not "expressly advocate" a candidate were ways of influencing the election
D. Young people (minors) may have less freedom of expression than adults
1. *Hazelwood* (1988) allowed that a school newspaper can be restricted
2. School-sponsored activities can be controlled if controls are related to pedagogical concerns

V. Church and state
A. The free exercise clause
1. Relatively clear meaning: no state interference, similar to speech
a) Ensures that no law may impose particular burdens on religious institutions

b) Example: Hialeah, FL, cannot ban animal sacrifices by Santerians because killing animals is not generally illegal
2. But there are no religious exemptions from laws binding all other citizens, even if that law oppresses your religious beliefs
3. Some conflicts between religious freedom and public policy continue to be difficult to settle
a) Conscientious objection to war, military service
b) Refusal to work Saturdays (Seventh-Day Adventists)
c) Refusal to send children to public school beyond eighth grade (Amish)

B. The establishment clause
1. Jefferson's view: there is a "wall of separation" between church and state
2. Ambiguous phrasing of First Amendment requires Court interpretation
3. Supreme Court interpretation: no governmental involvement, even if the involvement would be nonpreferential
a) 1947 New Jersey case allowed Catholic schools parents to be reimbursed for the cost of busing their children to schools because business is a religiously-neutral activity
b) The Court has since struck down: school prayer, "creationism," in-school release time for religious instruction
c) Court has allowed certain kinds of aid to parochial schools and denominational colleges
d) Court has also allowed voucher money to go to parochial schools, on the grounds that the aid is going not to a specific school but rather to the families, who were then free to choose a school
e) Government involvement in religious activities is constitutional if it meets the following tests:
(1) Secular purpose
(2) Primary effect neither advances nor inhibits religion
(3) No excessive government entanglement with religion
f) Supreme Court rulings, however, remain complex and shifting in regard to the establishment clause

VI. Crime and due process
A. The exclusionary rule
1. The challenge of evidence in the courtroom
a) Most nations let all evidence into trial, later punishing any police misconduct
b) United States excludes improperly obtained evidence from trial
2. Exclusionary rule: evidence gathered in violation of the Constitution cannot be used in a trial
a) Implements the Fourth Amendment (freedom from unreasonable searches and seizures) and the Fifth Amendment (protection against self incrimination)
b) *Mapp* v. *Ohio* (1961): Supreme Court began to use the exclusionary rule to enforce a variety of constitutional guarantees

B. Search and seizure
1. When can reasonable searches of individuals be made?
a) With a properly obtained search warrant: an order from a judge authorizing the search of a place and describing what is to be searched and seized; judge can issue only if there is probable cause
b) Incident to an arrest
2. What can the police search, incident to a lawful arrest?
a) The individual being arrested
b) Things in plain view
c) Things or places under the immediate control of the individual
3. What about an arrest of someone in a car?
a) Answer changes almost yearly

b) Recent cases have allowed the police to do more searching
4. Court attempts to protect a "reasonable expectation of privacy"

C. Confessions and self-incrimination
1. Constitutional ban originally was intended to prevent torture or coercion
2. Extended to people who are unaware of their rights, particularly their right to remain silent in both the courtroom and the police station
a) *Miranda* case: confession presumed to be involuntary unless suspect fully informed of their rights
b) Protection does not apply if, while in jail, you confess a crime to another inmate who turns out to be an undercover officer

D. Relaxing the exclusionary rule
1. Positions taken on the rule:
a) Any evidence should be admissible
b) Exclusionary rule has become too technical to effectively deter police misconduct
c) Rule is a vital safeguard for liberties
2. Courts began to adopt the second position, allowing some exceptions to the rule.
a) Limited coverage (e.g., police with greater freedom to question juveniles)
b) Incorporation of the "good-faith exception"
c) "Overriding considerations of public safety" may justify questioning a person without first reading them their rights
d) Evidence that would "inevitably" have been found is admissible

E. Terrorism and Civil Liberties
1. U.S. Patriot Act meant to increase federal government's powers to combat terrorism
a) Government may tap any telephone used by a suspect, rather than obtaining a separate order for each phone
b) Government may tap, with a court order, internet communications
c) Government may seize, with a court order, voicemail
d) Investigators can share information learned in grand jury proceedings
e) Any non-citizen may be held as a security risk for seven days, longer if certified to be a security risk
f) Federal government can track money across U.S. borders and among banks
g) Statute of limitations on terrorist crimes eliminated; penalties increased
2. Executive order then proclaimed a national emergency; noncitizens believed to be a terrorist, or to have harbored a terrorist, will be tried by a military court.
a) Tried before a commission of military officers
b) Two-thirds vote of the commission to find the accused guilty
c) Appeal to the secretary of defense or the president, only
3. Can the people the U.S. captures be held without giving them access to the courts?
a) Traditional answer from WWII era: spies sent to this country were "unlawful combatants"
b) American citizens detained while working with the enemy (i.e., the Taliban) were entitled to hearing before neutral decisionmaker to challenge the basis for their detention
4. Many controversial provisions of the Patriot Act automatically expire in 2005

WEB RESOURCES

American Civil Liberties Union (ACLU): http://www.aclu.org/

Civil Rights—Civil Liberties Law Review, Harvard Law School: http://www.law.harvard.edu/Studorgs/crcl_lawreview

Human Rights Watch, Women's Rights: http://www.hrw.org/women/index.php

National Lesbian and Gay Task Force: http://www.nlgtf.org/

U.N. High Commission Human Rights, Women's Rights: http://www.unhchr.ch/women

U.S. Department of Justice: http://www.usdoj.gov/

RESEARCH AND DISCUSSION TOPICS

How would you decide? Review cases pending before the Supreme Court and select one for a moot court exercise in your classroom. Record the students' statements. Then, review the oral argument conducted before the Court, comparing students' insights with those of the attorneys and Supreme Court justices. What are the strengths and weaknesses of each set of oral arguments? What are the implications for the Court's rulings? For transcripts of oral arguments in the U.S. Supreme Court, see: http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html

A nation of immigrants, under law. . . Figure 5.1 sets out the patterns of immigration to the United States from 1840 to 1996, identifying the major events that influenced these outcomes. Ask students to research this topic further, using the *Statistical Abstract of the United States* to further analyze where immigrants came from, when, and why. Also, be clear about the effects of United States immigration law, in accepting or in refusing to allow certain peoples to immigrate. What does it mean to say that the United States is a "nation of immigrants"? What role has United States law played in determining just which immigrants can join this nation?

Should the exclusionary rule be absolute? In recent years, the Supreme Court has allowed a number of exceptions to the exclusionary rule, which are discussed in the text. Do students agree with these exceptions? Why or why not? At what point does the need to prosecute wrongdoers begin to erode the privacy of innocent citizens?

IMPORTANT TERMS

***clear and present danger test**	Law should not punish speech unless there was a clear and present danger of producing harmful actions.
***due process of law**	Denies the government the right, without due process, to deprive people of life, liberty, and property.

***equal protection of the law**	A standard of equal treatment that must be observed by the government.
***establishment clause**	First Amendment ban on laws "respecting an establishment of religion."
***exclusionary rule**	Improperly gathered evidence may not be introduced in a criminal trial.
***freedom of expression**	Right of people to speak, publish, and assemble.
***freedom of religion**	People shall be free to exercise their religion and government may not establish a religion.
***free exercise clause**	First Amendment requirement that law cannot prevent free exercise of religion.
***good-faith exception**	An error in gathering evidence sufficiently minor that the evidence may be used in a trial.
***incorporation**	Court cases that apply the Bill of Rights to the States.
***libel**	Writing that falsely injures another person.
***probable cause**	Reasonable cause for issuing a search warrant or making an arrest; more than mere suspicion.
***search warrant**	A judge's order authorizing a search.
***symbolic speech**	An act that conveys a political message.
***wall of separation**	Court ruling that government cannot be involved with religion.

THEME A: FIRST AMENDMENT RIGHTS

Instructor Resources

Azizah Y. Al-Hibri and Jean Bethke Elshtain, *Religion in American Public Life: Living with Our Deepest Differences*. New York: W.W. Norton and Company, 2001.

Robert S. Alley, ed., *The Constitution and Religion: Leading Supreme Court Cases on Church and State.* Prometheus Books, 1999.

Janine Bell, *Policing Hatred: Law Enforcement, Civil Rights, and Hate Crime*. Albany: State University of New York Press, 2002.

Paul S. Boyer, *Purity in Print: Book Censorship in America from the Guilded Age to the Computer Age*, 2nd ed. Madison: University of Wisconsin Press, 2002.

David Cole and James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*. New York: W.W. Norton, 2002.

Catharine Cookson, *Regulating Religion: The Courts and the Free Exercise Clause*. New York: Oxford University Press, 2001.

E.J. Dionne and John J. DiIulio, *What's God Got to Do with the American Experiment?* Washington, D.C.: The Brookings Institution, 2000.

Terry Eastland, ed., *Freedom of Expression in the Supreme Court*. Lanham, MD: Rowman & Littlefield, 2002.

Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage*. New York: Oxford University Press, 2002.

Robert Justin Goldstein, *Flag Burning and Free Speech: The Case of Texas v. Johnson.* Lawrence: University Press of Kansas, 2000.

James B. Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics.* New York: Oxford University Press, 2000.

Ted G. Jelen, *To Serve God and Mammon: Church-State Relations in American Politics.* Boulder, CO: Westview Press, 2000.

Carolyn N. Long, *Religious Freedom and Indian Rights: The Case of Oregon v. Smith.* Lawrence: University Press of Kansas, 2000.

Catharine MacKinnon, *Only Words.* Cambridge, MA: Harvard University Press, 2000.

David M. O'Brien, *Constitutional Law and Politics, Volume 2: Civil Rights and Civil Liberties,* 5th ed. New York: W.W. Norton, 2001.

William Rehnquist, *All the Laws But One: Civil Liberties in Wartime*. New York: Vintage Books, 2000.

Paul Weithman, *Religion and the Obligations of Citizenship*. New York: Cambridge University Press, 2002.

Welsh S. White, *Miranda's Waning Protections: Police Interrogation Practices After Dickerson.* Ann Arbor: University of Michigan Press, 2001.

Summary

In the 1960s, the Supreme Court began broadening the way in which constitutional rights are interpreted. In the area of free expression, the First Amendment now guarantees virtually any form of communication, although several exceptions exist. First, *libel*—false statements that harm a person's reputation—remains unprotected, but it has been made more difficult to prove in certain situations. Public figures must prove actual malice, an extremely high burden in which a defamed person must establish that a statement was uttered either in the knowledge that it was false or with reckless disregard for its accuracy. In 1991, the Court went so far as to exclude fabricated quotations from the definition of libel so long as the misquote did not "materially change" the meaning of what was actually said.

Obscenity is the second form of speech not protected under the First Amendment. The problem is that it is not entirely clear what constitutes obscenity for constitutional purposes. The absence of a precise definition has led to anomalies, such as the rap group 2-Live Crew being acquitted of obscenity in Broward County, Florida, despite the conviction of a record store owner for selling albums in the same county that contained the same songs. The Court's current *Miller* test of obscenity hardly articulates a satisfactory standard for banning a particular kind of speech.

The third variety of speech rendered at least partially unprotected under the First Amendment is called *symbolic speech.* Expression of this kind typically involves some type of illegal behavior designed to communicate an idea. Speech expressed through conduct is frequently referred to as "speech plus," the plus being the conduct. Activities considered symbolic speech include demonstrating and marching, pouring blood on army recruiting records, and wearing a black armband as a protest. Such speech is not wholly without constitutional safeguard, but it is entitled to a lesser degree of protection. In the words of Justice Goldberg, "We emphatically reject the notion…that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct…as these amendments afford to those who communicate ideas by pure speech" (*Cox* v. *Louisiana (I),* 1965). Thomas Tedford summarizes the Supreme Court's position in determining whether behavior is considered "symbolic speech" in the following way: (a) the speaker must have an intent to convey a message; (b) the audience must be likely to understand the message; and (c) the speech must make a contribution to the body of knowledge. The Court has allowed the government more latitude in regulating the conduct associated with symbolic speech than the expressive component itself. Thus the government can punish the burning of a draft card as a form of protest, since its goal in making the regulation is not to suppress the idea being communicated but to defend the nation's security. On the other hand, the government cannot forbid the burning of the American flag as a form of protest since the behavior does not threaten a breach of peace, making the suppression of an idea the only purpose behind the law.

The fourth type of expression lacking complete constitutional protection is commercial speech. At first, the Supreme Court placed commercial speech entirely outside the First Amendment (*Valentine* v. *Chrestensen,* 1942) but eventually it was provided limited coverage: Advertising, according to Justice Harry Blackmun in *Bigelow* v. *Virginia* (1975), is "not stripped of all First Amendment protection" so long as it is truthful and of value to the public. It is only when advertising is either deceptive or involves an illegal or harmful product that commercial speech is subject to suppression or regulation.

The religion clauses of the First Amendment are caught in a similar web of confusion. The free exercise clause was initially treated, in the words of Leo Pfeffer, as a "stepchild" of the free speech clause. Until the 1960s, cases raising free exercise claims were typically decided on the basis of principles of free speech. In *Sherbert* v. *Verner* (1963), the Court gave the free exercise clause an independent identity and required the government to provide a "compelling interest" to justify any burden on the practice of religion. The confusion enters through the manner in which this tough standard was implemented, with the Court almost always deciding against the free exercise claim.

In 1988, a fatal blow to *Sherbert* was rendered in *Employment Division* v. *Smith,* in which the compelling interest test was held inappropriate to criminal conduct. People can no longer rely on the free exercise clause to exempt their behavior from a law of "general applicability" that is not designed as an attack on a particular religion. In response to *Smith,* the Congress passed the Religious Freedom Restoration Act (RFRA, 1993), which was explicitly intended to displace *Smith* and reinstate *Sherbert*'s compelling interest test. In *City of Boerne* v. *Flores, Archbishop of San Antonio* (1997), however, the Court ruled that the RFRA exceeded Congress's authority. The opinion, delivered by Justice Kennedy, noted that Congress could properly "enforce" the constitutional right to free exercise of religion, but that such enforcement could only be "preventive or remedial." The RFRA, however, involved the Congress in defining the right. As such, it contradicted the separation of powers. Second, the RFRA was described as wildly "out of proportion to a supposed remedial or preventive object": "All told, RFRA is a considerable congressional intrusion in the states' traditional prerogatives and general authority to regulate for the health and welfare of their citizens and is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion." Thus the RFRA also contravened federalism. The *Smith* standard has therefore been reinstated, though legal scholars speculate about what additional actions might be taken by Congress.

Many of the same problems haunt the establishment clause, which, Thomas Jefferson argued, is intended to erect a "wall of separation" between church and state. It is generally agreed that the clause forbids the creation of an official religion and restricts the government from becoming involved in church matters, even on a nonpreferential basis. Beyond that, the meaning of the establishment clause remains elusive. The Court in *Lemon* v. *Kurtzman* (1971) articulated a three-part test to determine violations of the establishment clause: (1) the statute must have a legislative purpose that is secular; (2) a government policy must have a "primary effect" that neither advances nor inhibits religion; and (3) a government policy must not result in an excessive entanglement between church and state. These tests have produced a great deal of uncertainty, to the point where some courts have openly refused to abide by the *Lemon* standards, while others have distorted their meaning to reach a desired conclusion. Thus the ambiguity of both religion clauses awaits further judicial clarification.

Many controversial civil liberties cases occur in the area of criminal procedure. The exclusionary rule states that illegally obtained evidence or confessions cannot be used against a defendant. Search warrants are normally required and must describe what is to be searched and seized. They can be issued only upon probably cause or reasonable grounds due to presumed illegal activity. However, if the individual is arrested, the police can search her or him, things in plain view, and things and places that the individual has under her or his immediate control. During the 1980s, the original ruling in *Mapp* v. *Ohio* was relaxed somewhat by the Supreme Court, which limited the exclusionary rule's coverage and incorporated a "good faith" exception.

A logical corollary of the exclusionary rule is the Miranda rule, which arose from the Court decision that a confession could not be admitted into evidence unless a defendant was informed of her or his

rights under the Fifth Amendment. These rights included the right to remain silent, to have an attorney present during interrogation, and to have an attorney provided if the accused can not afford one.

Discussion Questions

1. Another area of speech not given automatic constitutional protection is "fighting words": words that would provoke a reasonable person to fight. Should fighting words be protected as a form of speech? What if the words are true? Should the First Amendment permit the punishment of truth?
2. What is the Supreme Court's current definition of obscenity? Is this definition clear? Could it guide a publisher who wished to publish a certain book but who wondered whether it was obscene?
3. Should the definition of obscenity be broadened? Several studies have found that those who commit sexual violence are likely to be consumers of pornography and this has caused a number of lawyers to argue that the protection of pornography is a violation of women's civil rights. What is your thinking on the connections between obscenity, pornography, and sexual violence? Is this issue properly understood as a matter of the viewer's civil liberties or the victim's civil rights? What is the reasoning that supports your conclusion?
4. What regulations should be imposed on the Internet? In *Reno* v. *American Civil Liberties Union* (117 S.Ct. 2329 [1997]), the Supreme Court ruled that the Communications Decency Act of 1996 (CDA) was insufficiently precise in its restrictions. The CDA had prohibited the "knowing transmission of obscene or indecent messages to any recipient under 18 years of age" and the "knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age." The Court ruled that the CDA thereby "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." In reaching this conclusion, the Court commented on the technological resources available to regulate Internet communications and the extent of the Internet audience. For example, the Court noted, a chat room might have hundreds of individuals who were participants of which two were minors, with the result that all communications would be subject to the CDA prohibitions. As another example, the Court observed that parents transmitting birth control information by e-mail to their own child could violate someone's standard of decency, even though their family and community would consider the communication entirely appropriate. Given these considerations of audience and technology, is any regulation of Internet communication constitutional?
5. The free exercise clause protects religious behavior. But what is a valid religion? How can courts distinguish fraudulent religious claims from legitimate ones?

Supplementary Material for Theme A

Pornography, Rape, and the First Amendment

Pornography remains one of the most controversial forms of speech. The Supreme Court has explicitly ruled that obscene matter is not protected by the First Amendment. This ruling, however, opens the question of what constitutes "obscene matter." Some argue that what is to be prohibited must be defined as narrowly as possible. To do otherwise is to facilitate the government's intrusion into the individual's thoughts and creative imagination. Others argue that the definition should be carefully broadened. Such an approach will allow society to protect its quality of life and the safety of its citizens. There are no simple liberal/conservative divisions on this issue. Feminists, among others, are deeply divided over the extent to which pornography should be regulated.

Among the most outspoken critics of pornography are Catharine A. MacKinnon and Andrea Dworkin. The starting point for their analysis is that pornography is not a First Amendment right (which MacKinnon describes as a "substance-based argument") but is instead a violation of women's civil

rights (a "harm-based" argument). Pornography, maintains MacKinnon, serves as an instructional manual for relations between the sexes.

> [P]ornography makes inequality into sex, which makes it enjoyable, and into gender, which makes it seem natural. By packaging the resulting product as pictures and as words, pornography turns gendered and sexualized inequality into "speech," which has made it a right. Thus does pornography, cloaked as the essence of nature and the index of freedom, turn the inequality between women and men into those twin icons of male supremacy, sex and speech, and a practice of sex discrimination into a legal entitlement. (*Feminism Unmodified, Discourses on Life and Law,* Cambridge, MA: Harvard University Press, 1987. Page 3.)

> In pornography, there it is, in one place, all of the abuses that women had to struggle so long even to begin to articulate, all the unspeakable abuse: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children. Only in pornography it is called something else: sex, sex, sex, sex, and sex, respectively. Pornography sexualizes rape, battery, sexual harassment, prostitution, and child sexual abuse; it thereby celebrates, promotes, authorizes, and legitimizes them. (Page 171.)

In support of her argument, MacKinnon provides statistics pointing to the widespread practice of sexual violence by men against women.

- 44% of women will be raped during their lifetime.
- 85% of women experience sexual harassment in the workplace, often in physical forms.
- 25 to 33% of women are battered in their homes.
- 38% of girls are sexually molested inside or outside the family. (Page 169.)

Dworkin also cited these figures, adding case studies and personal experiences that challenge society to protect women's civil rights—including their First Amendment rights.

> You become unable to use language because it stops meaning anything. If you use regular words and say you have been hurt and by whom and you point to visible injuries and you are treated as if you made it up or as if it doesn't matter or as if it is your fault or as if you are stupid and worthless, you become afraid to try to say anything. You cannot talk to anyone because they will not help you and if you talk to them, the man who is battering you will hurt you more. Once you lose language, your isolation is absolute. (*Letters from a War Zone, 1976–1989,* New York: E. P. Dutton, 1989. Page 332.)

Dworkin, like MacKinnon, insists that society's power structures be critically reviewed, because those power structures are tortuously unequal.

Still, there is a sizable body of research that concludes that the causal connection between pornography and sexual violence—rape, in particular—is uncertain, even tenuous. With testimony and evidence so limited, these researchers conclude that First Amendment rights to the production and consumption of pornography must be protected.

Discussion Questions

1. Why is there such conflicting evidence on the relationship between pornography and sexual violence? (Most of this is survey research; be sure to apply your learning about public opinion polls.)
2. Should pornography be protected by the First Amendment? How do you respond to the MacKinnon-Dworkin argument that it is more properly understood as a violation of women's civil rights? What is the reasoning that supports your interpretation?
3. In *Paris Adult Theatre I* v. *Slaton* (1973), the Court ruled the following: "Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature

of Georgia could quite reasonably determine that such a connection does or might exist." The Court then proceeded to list other such instances when legislatures had acted "on various unprovable assumptions," listing a number that related to economic regulations. Should the Georgia state legislature seek to prevent possible harm from pornography? Why or why not? What proof do you require to endorse the regulation of pornography?

4. The Court has distinguished between the purely private possession of pornography (*Stanley* v. *Georgia* [1969]) and the commercial display of pornography (*Paris Adult Theatre I* v. *Slaton* [1973]). In the first case, it ruled that the state could not take action; in the second, it ruled that the state could regulate. Should such a distinction be drawn? MacKinnon and Dworkin would argue strongly against doing so. (In *Stanley,* the Court maintained that there was a need to guard against government intrusion into individual privacy and warned of the potential for thought control. The possibility of antisocial behavior was not deemed sufficient grounds for regulation. In *Paris,* the Court noted that the effects of public presentation could spread to the surrounding community; these could not be controlled by limiting audiences to consenting adults. "There is a proper State concern with safeguarding against crime and other arguably ill effects of obscenity by prohibiting the public or commercial exhibition of obscene material.")