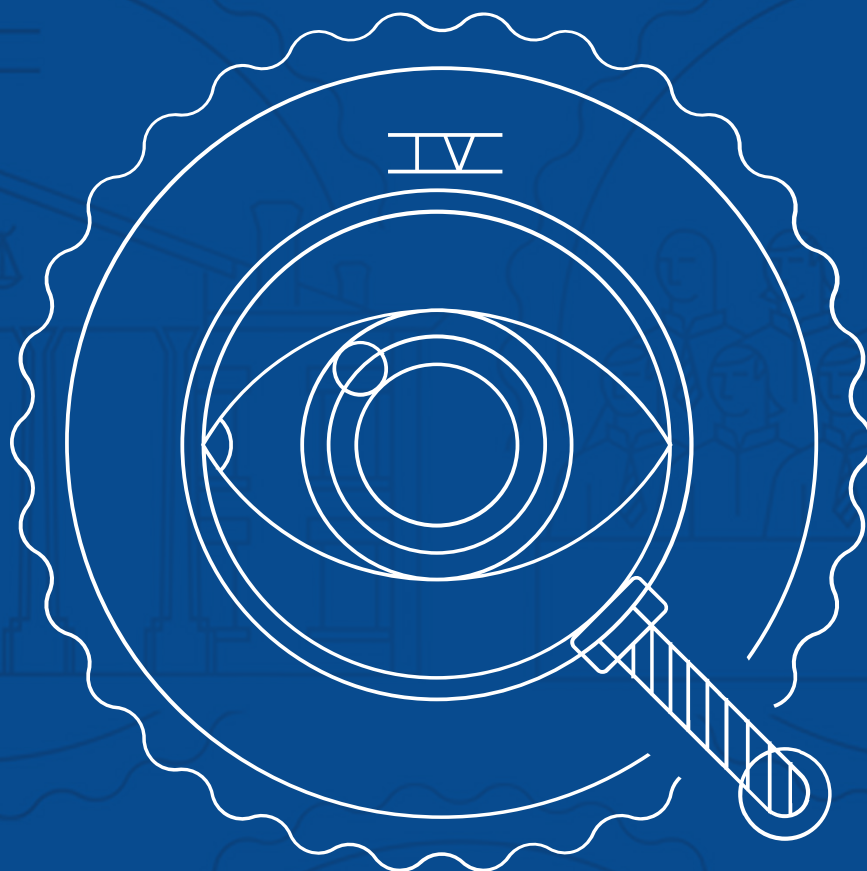


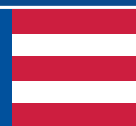


INTERACTIVE *Constitution*



4TH AMENDMENT: SEARCH AND SEIZURE HIGH SCHOOL LEVEL LESSON PLAN

NATIONAL CONSTITUTION CENTER



Independence Mall • 525 Arch Street • Philadelphia, PA 19106

NATIONAL CONSTITUTION CENTER

LESSON PLAN

Grade Levels: 12th

Number of class periods: 1 (approximately 45-minutes)

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ABOUT THIS LESSON

This lesson introduces students to different viewpoints and debates surrounding the 4th Amendment by using the National Constitution Center's *Interactive Constitution*. Students will build understanding of the resources and methods used by justices on the Supreme Court and Constitutional scholars when analyzing and forming opinions about articles, sections, and clauses of the Constitution. Using graphic organizers, students will identify key points from the essays of constitutional scholars Barry Friedman and Orin Kerr. Students will be able to trace the historic development of the 4th Amendment with help from the Common Interpretation and matters of debate essays, and use evidence from the readings to explore modern interpretation of the 4th Amendment.

For students studying the Constitution and the Bill of Rights, this lesson helps clarify the role of the Supreme Court and constitutional scholars in interpreting and applying the Constitution today.



COMMON CORE STANDARDS**KEY IDEAS AND DETAILS****CCSS.ELA-Literacy.RH.11-12.1**

Cite specific textual evidence to support analysis of primary and secondary sources, connecting insights gained from specific details to an understanding of the text as a whole.

CCSS.ELA-Literacy.RH.11-12.2

Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.

CCSS.ELA-Literacy.RH.11-12.6

Evaluate authors' differing points of view on the same historical event or issue by assessing the authors' claims, reasoning, and evidence.

ESSENTIAL QUESTIONS:

- ★ What are the tools and resources used by the Supreme Court and experts who study the Constitution?
- ★ How are parts of the Constitution understood at different points of history?
- ★ How do the Supreme Court and experts who study the Constitution understand and apply the 4th Amendment?

MATERIALS:

- ★ Excerpts from Barry Friedman's and Orin Kerr's "Matters of Debate" essays from the *Interactive Constitution* (attached)
Full essays available here:
["What the Fourth Amendment Fundamentally Requires"](#) (Friedman)
["The Future of the Fourth Amendment"](#) (Kerr)
- ★ Sticky notes
- ★ 4th Amendment graphic organizer (attached)
- ★ Key points from the Common Interpretation (attached)
- ★ Excerpt of the Common Interpretation (attached)

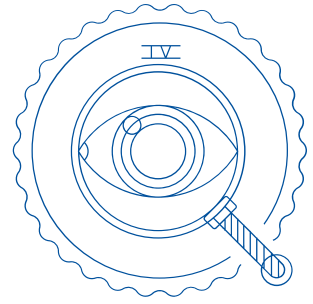
OBJECTIVES:

- ★ Trace the development of understanding and application of the 4th Amendment throughout history.
- ★ Analyze the methods and tools used by scholars to interpret the Constitution.
- ★ Assess the strength of an argument based on the evidence.



PROCEDURE:**1. THINK AND WRITE: Preview / Hook Activity / Do Now (2-3 minutes):**

As the students walk into the class, they will see the symbol for the 4th Amendment from the *Interactive Constitution*. Have the students describe the details of the symbol and identify what they think they will discuss during the lesson.



2. INTRO: Use the student observations about the symbol to start a broader discussion about the 4th Amendment, what the students will be doing, and why they are going to be doing it. Use the following questions to guide the discussion.

- ★ Where are specific rights of American citizens protected? (Students will say the Constitution or Bill of Rights)
- ★ Who interprets, or answers legal questions about, the Constitution? (The students might say the government, the President, but they will likely say the Supreme Court.)
- ★ How might the justices on the Supreme Court form their opinions? (Students might say personal experience, history, etc. The Justices actually form their opinions based on the work of constitutional experts. They also form ideas working with their clerks, staff who help look at history and modern debates.)
- ★ Where do clerks get their information? (They get their information from constitutional scholars, too.)
- ★ “So, today, we will investigate opinions from top constitutional scholars—just like clerks and Justices at the Supreme Court to better understand debates about the 4th Amendment.”

This may be a good point to emphasize that Supreme Court Justices use more than their personal opinions and beliefs to interpret the Constitution when making rulings. The students will not use their personal political opinions during this lesson, either. They will look at the arguments put forth by the constitutional scholars and decide who makes the better argument.

3. SHORT LECTURE (5-10 minutes): Common Interpretation: The Common Interpretation essay on the 4th Amendment was written by Barry Friedman (Jacob D. Fuchsberg Professor of Law, New York University School of Law) and Orin Kerr (Fred C. Stevenson Research Professor of Law, George Washington University Law School)—leading conservative and liberal scholars on the 4th Amendment. It includes information and interpretations on which the two scholars **agree**. It provides a foundation of *common* ground before students consider opposing viewpoints about how we might interpret the Amendment in the future.

Break students into groups of 3 or 4. Each group will read the excerpt of the Common Interpretation or they can use the Interactive Constitution App or website to read through it. The groups should spend about 5 to 10 minutes tracing the historical development and application of the 4th Amendment. After the groups are done reading, the teacher should

lead a quick review of the Common Interpretation and its key points to insure that all of the groups have a similar understanding of the Common Interpretation.

Key Points from the Common Interpretation:

- ★ The 4th Amendment limits the power of police to seize and search people, property, and homes.
- ★ Modern debates: Police and intelligence agencies engage in controversial activities. Examples: the federal government has conducted bulk collection of phone and Internet data as part of War on Terror. Police using “stop and frisk.” Police-citizen encounters where police a civilian is shot. Concern about aerial surveillance (drones).
- ★ Founding Era: There was no organized police force. Great Britain allowed searches for goods on which taxes had not been paid. John Adams called this legal battle the “spark” that led to the American Revolution. The idea that a person’s home is their castle, and should not invaded by government.
- ★ Today: 4th Amendment limits government when it detains or searches a person or property. Search or seizure should be cleared by a judge, and the government must show “probable cause.” There are some exceptions, the police can search cars without warrants, can detain people on the street, and can search or seize in an emergency.
- ★ Questions today: What is a “search” (Flying drones over backyards. Internet records.)? Is search acceptable when government has no suspicion that a person has done something wrong (Think of airport security)?

4. **GROUP ACTIVITY (12-14 minutes):** Each group will read the excerpts from the “Matters of Debate” essays by Barry Friedman and Orin Kerr. In these essays the same scholars who wrote the Common Interpretation write individual essays about how they believe the Amendment should be interpreted moving forward.

As the students are reading, they should identify the thesis or “main point” of each scholar by highlighting, circling, or underlining the thesis of each essay and filling in each side of the graphic organizer. This will help the students focus on the argument the scholar is trying to make. After finding the thesis for each scholar, students should write at least one question they have for the scholars.

- ★ “If the scholars were in the room with us, today, what is something you would want to ask them about their opinion? What would need to have clarified to understand their argument?”
- ★ While students complete these the teacher should post the names “Barry Friedman” and “Orin Kerr” on opposite sides of the classroom.
- ★ Teacher will circulate through the room to support students, as needed, with isolating the thesis, understanding new vocabulary, etc.



Once they identify the theses and develop questions, each group should, then, write each thesis and two of their questions on separate sticky notes (four, total, for each group). Students should place their sticky notes—with the theses and questions—on the wall under the corresponding scholars' names.

- ★ Having the students use sticky notes to report their findings and question at the front of the room allows the teacher to quickly assess the answers from all the groups at once rather than going around the room group by group. The anonymity also removes the pressure of students being “put on the spot” when reporting out the theses or asking their questions.

- 5. SHARE (6-8 minutes):** Once every group has posted their theses and questions, use their findings and questions to facilitate discussion about Friedman’s essay and Kerr’s essay. This can help as a quick assessment to make sure each group knows what each scholar is trying to say. The teacher will be able to clarify any questions the students may have and highlight the key arguments of each scholar.

Teacher will remind the students, as needed, that they are analyzing the scholars’ constitutional arguments—not having a political debate.

NOTE: The teacher will answer the “Questions for Friedman” and “Questions for Kerr” based on the scholars’ essay. So she/he will need to be familiar with the full text of those essays before using this lesson.

- ★ **Full essays available here:**
[“What the Fourth Amendment Fundamentally Requires”](#) (Friedman)
[“The Future of the Fourth Amendment”](#) (Kerr)

- 6. LINE-UP (6-8 minutes):** After the students have gathered information from the common interpretation and the essays, ask the students to use the understandings they developed from the readings and discussion (not their political opinions) to stand on the side of room near the name of the scholar they think does **a better job of providing an understanding of how the Amendment should be applied**. Explain to the students that they can stand somewhere in the middle if they do not fully agree with one side or the other, if they have more questions, or if they need more information. Once the students have picked a place to stand, lead a discussion asking some students why they stood where they did reminding the student that they should relate their answer back to the history, common interpretation, and scholar essays. (It is important to remind students throughout that they are considering the arguments are presented in the lecture, essay excerpts, and whole class discussion—they are NOT debating political/personal opinions.)

- ★ Ask a student standing near Friedman to explain why they think Friedman offers the stronger argument.



- ★ Ask a student standing near Kerr to explain why they think Kerr offers the stronger argument.
 - ★ Ask a student in the middle why they are standing in the middle.
 - ★ Ask a student standing near Friedman to explain why they think someone else might think Kerr offers the stronger argument (get the students to consider the other side of the argument)
 - ★ Ask a student standing near Kerr to explain why they think someone else might think Friedman offers the stronger argument.
- 7. REFLECTION/EXIT SLIP (2 minutes):** Students will then go back to their seats and write a brief reflection on how their understandings of the scholars' viewpoint affected their understanding of the amendment. This, along with the work from the rest of the activity, will be on their 4th Amendment graphic organizer and can be collected to assess class participation and learning outcomes.



NAME:

4TH AMENDMENT

Notes on the “Common Interpretation”. What are the things on which the scholars agree?

BARRY FRIEDMAN:

ORIN KERR:

QUESTION FOR FRIEDMAN:

QUESTION FOR KERR:

How do you understand current debates about this Amendment based on the “Common Interpretation” and what Friedman and Kerr say? (Why did you stand where you did when everyone lined up and why did you not stand somewhere else?)



TEACHER KEY

4TH AMENDMENT

Notes on the “Common Interpretation”. What are the things on which the scholars agree?

- ★ The 4th Amendment limits the power of police to seize and search people, property, and homes.
- ★ Modern debates: Police and intelligence agencies engage in controversial activities. Examples: the federal government has conducted bulk collection of phone and Internet data as part of War on Terror. Police using “stop and frisk.” Police-citizen encounters where police a civilian is shot. Concern about aerial surveillance (drones).
- ★ Founding Era: There was no organized police force. Great Britain allowed searches for goods on which taxes had not been paid. John Adams called this legal battle the “spark” that led to the American Revolution. The idea that a person’s home is their castle, and should not be invaded by government.
- ★ Today: 4th Amendment limits government when it detains or searches a person or property. Search or seizure should be cleared by a judge, and the government must show “probable cause.” There are some exceptions, the police can search cars without warrants, can detain people on the street, and can search or seize in an emergency.
- ★ Questions today: What is a “search” (Flying drones over backyards. Internet records.)? Is search acceptable when government has no suspicion that a person has done something wrong (Think of airport security)?

BARRY FRIEDMAN:

What the Fourth Amendment protects is the right of the people to be secure. The Fourth Amendment is the means of keeping the government out of our lives and our property unless it has good justification.

ORIN KERR:

The goal for interpreting the Fourth Amendment should be to strike that same balance in the online setting. Just like in the physical world, the police should be able to collect some evidence without restriction to ensure that they can investigate crimes.

QUESTION FOR FRIEDMAN:

QUESTION FOR KERR:

How do you understand current debates about this Amendment based on the “Common Interpretation” and what Friedman and Kerr say? (Why did you stand where you did when everyone lined up and why did you not stand somewhere else?)



FOURTH AMENDMENT, FROM THE *INTERACTIVE CONSTITUTION*

SEARCH AND SEIZURE

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

JOINT STATEMENT: BARRY FREIDMAN AND PROFESSOR ORIN KERR

Imagine you're driving a car, and a police officer spots you and pulls you over for speeding. He orders you out of the car. Maybe he wants to place you under arrest. Or maybe he wants to search your car for evidence of a crime. Can the officer do that?

The Fourth Amendment is the part of the Constitution that gives the answer. According to the Fourth Amendment, the people have a right "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." This right limits the power of the police to seize and search people, their property, and their homes.

The Fourth Amendment has been debated frequently during the last several years, as police and intelligence agencies in the United States have engaged in a number of controversial activities. The federal government has conducted bulk collection of Americans' telephone and Internet connections as part of the War on Terror. Many municipal police forces have engaged in aggressive use of "stop and frisk." There have been a number of highly-publicized police-citizen encounters in which the police ended up shooting a civilian. There is also concern about the use of aerial surveillance, whether by piloted aircraft or drones.

The application of the Fourth Amendment to all these activities would have surprised those who drafted it, and not only because they could not imagine the modern technologies like the Internet and drones. They also were not familiar with organized police forces like we have today. Policing in the eighteenth and early nineteenth centuries was a responsibility of the citizenry, which participated in "night watches." Other than that, there was only a loose collection of sheriffs and constables, who lacked the tools to maintain order as the police do today.

The primary concerns of the generation that ratified the Fourth Amendment were "general warrants" and "writs of assistance." Famous incidents on both sides of the Atlantic gave rise to placing the Fourth Amendment in the Constitution. In Britain, the Crown employed "general warrants" to go after political enemies, leading to the famous decisions in *Wilkes v. Wood* (1763) and *Entick v. Carrington* (1765). General warrants allowed the Crown's messengers to search without any cause to believe someone had committed an offense. In those cases the judges decided that such warrants violated English common law. In the colonies the Crown used the writs of assistance—like general warrants, but often unbounded by time restraints—to search for goods on which taxes had not been



paid. James Otis challenged the writs in a Boston court; though he lost, some such as John Adams attribute this legal battle as the spark that led to the Revolution. Both controversies led to the famous notion that a person's home is their castle, not easily invaded by the government.

Today the Fourth Amendment is understood as placing restraints on the government any time it detains (seizes) or searches a person or property. The Fourth Amendment also provides that “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.” The idea is that to avoid the evils of general warrants, each search or seizure should be cleared in advance by a judge, and that to get a warrant the government must show “probable cause”—a certain level of suspicion of criminal activity—to justify the search or seizure.

To the extent that a warrant is required in theory before police can search, there are so many exceptions that in practice warrants rarely are obtained. Police can search automobiles without warrants, they can detain people on the street without them, and they can always search or seize in an emergency without going to a judge.

The way that the Fourth Amendment most commonly is put into practice is in criminal proceedings. The Supreme Court decided in the mid-twentieth century that if the police seize evidence as part of an illegal search, the evidence cannot be admitted into court. This is called the “exclusionary rule.” It is controversial because in most cases evidence is being tossed out even though it shows the person is guilty and, as a result of the police conduct, they might avoid conviction. “The criminal is to go free because the constable has blundered,” declared Benjamin Cardozo (a famous judge and ultimately Supreme Court justice.) But, responded another Supreme Court justice, Louis Brandeis, “If the government becomes the lawbreaker, it breeds contempt for the law.”

One of the difficult questions today is what constitutes a “search?” If the police standing in Times Square in New York watched a person planting a bomb in plain daylight, we would not think they needed a warrant or any cause. But what about installing Closed Circuit TV cameras on poles, or flying drones over backyards, or gathering evidence that you have given to a third party such as an Internet provider or a banker?

Another hard question is when a search is acceptable when the government has no suspicion that a person has done something wrong. Lest the answer seem to be “never,” think of airport security. Surely it is okay for the government to screen people getting on airplanes, yet the idea is as much to deter people from bringing weapons as it is to catch them—there is no “cause,” probable or otherwise, to think anyone has done anything wrong. This is the same sort of issue with bulk data collection, and possibly with gathering biometric information.

What should be clear by now is that advancing technology and the many threats that face society add up to a brew in which the Fourth Amendment will continue to play a central role.



FOURTH AMENDMENT BASICS (BARRY FRIEDMAN), FROM THE *INTERACTIVE CONSTITUTION*

In the Supreme Court’s decisions interpreting the Fourth Amendment, there are a lot of cross-cutting arguments. For example, sometimes the Justices say that there is a strong preference for government agents to obtain warrants, and that searches without warrants are presumptively invalid. At other times they say warrants are unnecessary, and the only requirement is that searches be “reasonable.” At times the Justices say probable cause is required to support a search; at others they say probable cause is not an “irreducible minimum.”

This is your Fourth Amendment. It describes “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.” It is important for each American to focus on some basics and decide—separate and apart from what the Justices say—what this vital amendment means.

People say that the Fourth Amendment protects privacy, but that trivializes it. In this world you give up a lot of privacy, whether you wish to or not. Internet cookies, or data stored in web browsers, are just one example. But the Internet companies are not going to come take you away. The government might. What the Fourth Amendment protects is the right of the people to be secure. The Fourth Amendment is the means of keeping the government out of our lives and our property unless it has good justification.

In evaluating how the Fourth Amendment should be interpreted, it is essential to bear in mind the vast changes in policing since the time it was ratified. Whereas policing once was reactive, tasked with identifying and catching criminals, today it has become proactive and is based in deterrence. Before, policing was mostly based on “suspicion,” it was aimed at people for whom there was cause to believe they had violated or were about to violate the law. Today, policing is aimed at all of us—from red light cameras to bulk data collection by intelligence agencies to airport security.

There are some basic principles that should govern searches and seizures.

First, no member of the Executive branch should be permitted to intervene in our lives without the say-so of at least one other branch. This is fundamental, and all the more important when that Executive actor engages in surveillance of the citizenry and can use force and coercion against them.

Second, a central purpose of the Fourth Amendment is preventing arbitrary or unjustified intrusions into the lives and property of citizens.

In light of these basic principles, certain interpretations of the Fourth Amendment follow:

No search or seizure is “reasonable” if it is not based on either legislative authorization or pursuant to rules that have some form of democratic say in their making. The police can write rules—all other agencies of executive government do—but absent a critical need for secrecy those rules should be public and responsive to public wishes.



Second, warrants are to be preferred. Policing agencies are mission-oriented. We want them to be—they have a vital role protecting public safety. But because they are mission-oriented, warrants should be obtained in advance of searching whenever possible so that a neutral judge can assess the need to intrude on people’s lives.

Third, we should distinguish between searches aimed at suspects and those aimed at society in general. When there is a particular suspect, the protections of a warrant and probable cause apply. But those protections make no sense when we are all the target of policing. In the latter instance the most important protection is that policing not discriminate among us. For example, at airport security all must be screened the same unless and until there is suspicion—“cause”— to single someone out.

Finally, often today’s policing singles out a particular group. Examples include profiling (based on race, religion, or something else) or subjecting only workers in some agencies to drug tests. When policing is group-based, the proper clause of the Constitution to govern is the Equal Protection Clause. When discriminatory searching or seizing occurs, the government should have to prove two things: that the group it is selecting for unfavorable treatment truly is more likely to contain people worthy of the government’s attention, and that the incidence of problematic behavior is sufficiently great in that group to justify burdening everyone. Otherwise, the government should go back to either searching individuals based on suspicion, or search us all.



FOURTH AMENDMENT (ORIN KERR), FROM THE *INTERACTIVE CONSTITUTION*

The biggest challenge ahead for the Fourth Amendment is how it should apply to computers and the Internet. The Fourth Amendment was written over two hundred years ago. But today's crimes often involve computers and the Internet, requiring the police to collect digital evidence and analyze it to solve crimes.

The major question is, how much power should the police have to collect this data? What is an unreasonable search and seizure on the Internet?

Consider the example of a Facebook account. If you log in to Facebook, your use of the account sends a tremendous amount of information to Facebook. Facebook keeps records of everything. What you post, what messages you send, what pictures you "like," even what pages you view. Facebook gets it all, and it keeps records of everything you do.

Now imagine that the police come to Facebook and want records of a particular user. The police think the suspect used Facebook to commit the crime or shared evidence of the crime using the site. Maybe the suspect was cyberstalking and harassing a victim on Facebook. Or maybe the suspect is a drug dealer who was exchanging messages with another drug dealer planning a future crime. Or perhaps the suspect committed a burglary, and he posted pictures of the burglary for all of his Facebook friends to see.

Here's the hard question: What limits does the Fourth Amendment impose on the government getting access to the account records? For example, is it a Fourth Amendment "search" or "seizure" for the government to get what a person posted on his Facebook wall for all of his friends to see? Is it a search or seizure to get the messages that the suspect sent? How about records of what page the suspect viewed? And if it is a search or seizure, how much can the government seize with a warrant? Can the government get access to all of the account records? Only some of the account records?

The courts have only begun to answer these questions, and it will be up to future courts to figure out what the Fourth Amendment requires. As more people spend much of their lives online, the stakes of answering these questions correctly becomes higher and higher.

In my view, courts should try to answer these questions by translating the traditional protections of the Fourth Amendment from the physical world to the networked world. In the physical world, the Fourth Amendment strikes a balance. The government is free to do many things without constitutional oversight. The police can watch people in the public street or watch a suspect in a public place. They can follow a car as it drives down the street. On the other hand, the police need cause to stop people, and they need a warrant to enter private places like private homes. The goal for interpreting the Fourth Amendment should be to strike that same balance in the online setting. Just like in the physical world, the police should be able to collect some evidence without restriction to ensure that they can investigate crimes. And just like in the physical world, there should be limits on what the government can do to ensure that the police do not infringe upon important civil liberties.



A second important area is the future of the exclusionary rule, the rule that evidence unconstitutionally obtained cannot be used in court. The history of the exclusionary rule is a history of change. In the 1960s and 1970s, the Supreme Court dramatically expanded the exclusionary rule. Since the 1980s, however, the Supreme Court has cut back on when the exclusionary rule applies.

The major disagreement is over whether and how the exclusionary rule should apply when the police violate the Fourth Amendment, but do so in “good faith,” such as when the law is unclear or the violation is only technical. In the last decade, a majority of the Justices have expanded the “good faith exception” to the exclusionary rule. A central question is whether the good faith exception will continue to expand, and if so, how far.