

CH. 15-16 - CIVIL LIBERTIES

A respect for civil liberties and civil rights is one of the most fundamental principles of the American political culture. The founders were very concerned with defining and protecting liberties and rights, and their efforts are reflected in the Declaration of Independence, the Constitution, and the Bill of Rights. Civil liberties and rights have continued to evolve through the years by means of additional amendments (particularly the Fourteenth), court decisions, and legislative actions.

THE DECLARATION OF INDEPENDENCE

"We hold these truths to be self-evident; that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

Thomas Jefferson, 1776

The Declaration clearly reflects the founders' belief that governments are responsible for protecting the "unalienable rights" of "life, liberty, and the pursuit of happiness." Since people are clearly capable of abusing the "natural rights" of others, the government must protect the rights of its citizens.

THE ORIGINAL CONSTITUTION

Most of the framers believed that the basic "natural rights" were guaranteed by the original Constitution before the Bill of Rights was added. Rights specifically mentioned in the body of the Constitution are:

- *writ of habeas corpus*
- no bills of attainder
- no *ex post facto* laws
- trial by jury in federal courts in criminal cases
- protection as citizens move from one state to another
- no titles of nobility
- limits on punishment for and use of the crime of treason
- no religious oaths for holding federal office
- guarantee of republican government for all states

THE WRIT OF *HABEAS CORPUS*

"The privilege of the *Writ of Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Article One, Section Nine - The Constitution of the United States

Habeas Corpus literally means "produce the body." The writ is a court order requiring government officials to present a prisoner in court and to explain to the judge why the person is being held. Suspension of *habeas corpus* is a right of Congress, since the passage above appears in Article One, which defines the powers of Congress.

Originally, the writ was only a court inquiry regarding the jurisdiction of the court that ordered the individual's confinement, but today it has developed into a remedy that a prisoner can formally request. A federal judge may order the jailer to show cause why the person is being held, and the judge may order the prisoner's immediate release.

The Supreme Court under Chief Justice Rehnquist has severely limited the use of *habeas corpus* partly because prisoners on death row have used it to delay their executions, sometimes for years. Supporters of *habeas corpus* believe that judges should be allowed to use their own judgment in issuing the writs because they are protecting constitutional rights.

EX POST FACTO LAWS AND BILLS OF ATTAINDER

The Constitution forbids both national and state governments from passing **ex post facto laws**. An ex post facto law is a retroactive criminal law that affects the accused individual negatively. Such laws may make an action a crime that was not a crime when committed, or they may increase punishment for a crime after it was committed. On the other hand, the restriction does not apply to penal laws that work in favor of the accused.

A bill of attainder is a legislative act that punishes an individual or group without judicial trial. The Constitution forbids them because the founders believed that it is the job of the Courts, not Congress, to decide that a person is guilty of a crime and then impose punishment

THE BILL OF RIGHTS

The overwhelming majority of court decisions that define American civil liberties are based on the Bill of Rights, the first ten amendments added to the Constitution in 1791.

Even though most of the state constitutions in 1787 included separate bills of rights for their citizens, the original Constitution mentioned only the rights listed above. These rights were scattered throughout the articles, with most of the attention focused on defining the powers of the branches of government, not on preserving individual rights. Many people were widely suspicious of these omissions, and in order to gain ratification, the founders agreed to add ten amendments in 1791, the **Bill of Rights**.

- The **First Amendment** guarantees freedom of speech, press, assembly and petition. In addition, it prohibits Congress from establishing a national religion.
- The **Second Amendment** allows the right to bear arms.
- The **Third Amendment** prohibits the quartering of soldiers in any house.
- The **Fourth Amendment** restricts searches and seizures ("the right of the people to be secure in their persons, houses, papers, and effects").
- The **Fifth Amendment** provides for grand juries, restricts eminent domain (the right of the government to take private property for public use), and prohibits forced self-incrimination and double jeopardy (being tried twice for the same crime).
- **Amendment Six** outlines criminal court procedures.
- **Amendment Seven** guarantees trial of jury in civil cases that involve values as low as twenty dollars.
- **Amendment Eight** prevent excessive bail and unusual punishment
- The **Ninth Amendment** allows that Amendments 1-8 do not necessarily include all possible rights of the people.
- The **Tenth Amendment** reserves for the states any powers not delegated to the national government specifically in the Constitution.

OTHER SOURCES OF CIVIL LIBERTIES AND CIVIL RIGHTS

The Constitution and the Bill of Rights form the basis of Americans values concerning civil liberties and civil rights, but they have been supplemented through the years by other amendments, court decisions, and legislative action.

THE FOURTEENTH AMENDMENT

Civil rights are also protected by the **Fourteenth Amendment**, which protects violation of rights and liberties by the state governments.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment Fourteen, Section One

Although the Fourteenth Amendment was originally passed in the post-Civil War era specifically to protect the rights of ex-slaves, the famous Section One protects many citizens' rights from abuse by state governments

Whereas the Bill of Rights literally applies only to the national government, the Fourteenth Amendment is intended to limit the actions of state governments as well. Section One includes:

- a citizenship clause that protects "**privileges and immunities**"
- a **due process clause** that prohibits abuse of "life, liberty, or property"
- an **equal protection clause** that has been an important basis of the modern civil rights movement

One important consequence of the Fourteenth Amendment is the **incorporation** of the Bill of Rights to apply to the states. The Bill of Rights originally only limited the powers of the federal government. For example, in 1833 in *Barron v. Baltimore* the U.S. Supreme Court ruled that the Bill of Rights did not apply to state laws.

It was assumed that the states' bills of rights would protect individuals from abuse by state laws. However, the 14th Amendment nationalized the nature of civil rights with this statement:

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

Incorporation happened gradually over time through individual court decisions that required states to protect most of the same liberties and rights that the Bill of Rights protects from federal abuse. These changes are reflected in numerous court decisions made between 1925 and 1969. Two examples of cases that reflect incorporation are:

- *Gitlow v. New York* (1925) - Benjamin Gitlow was arrested and found guilty of breaking a New York state sedition act when he passed out pamphlets that supported socialism and overthrow of the government. Gitlow believed that his freedom of speech was violated, and the case was appealed to the Supreme Court. Even though the Court did not declare the New York law unconstitutional, the majority opinion stated that "fundamental personal rights" were protected from infringement by states by the Due Process Clause of the Fourteenth Amendment.
- *Gideon v. Wainwright* (1963) - Clarence Gideon appealed the decision of a Florida court to send him to prison for breaking and entering a pool hall. He based his appeal on the right to counsel (guaranteed in the Sixth Amendment) because in the original trial he could not afford to hire a lawyer and was not provided one by the state court. The Supreme Court ruled in his favor, again applying the Due Process Clause of the Fourteenth Amendment to require states to provide counsel to anyone charged with a felony who was too poor to afford a lawyer.

COURT DECISIONS

The Supreme Court continues to shape the definition and application of civil rights and civil liberties. Although the court has always played an important role in the protection of civil rights and civil liberties, it has been particularly active in the modern era since about 1937. The Supreme Court sets precedents that influence legislation and subsequent court decisions. The Court's influence is based largely on **judicial review**, the power to judge the constitutionality of a law or government regulation.

LEGISLATIVE ACTION

The Constitution, the Bill of Rights, and the Fourteenth Amendment protect individuals from actions of government, but court decisions and legislation protect individuals from discriminatory actions by private citizens and organizations. Legislative action is an essential component of the modern civil rights era, although the courts took the earliest initiatives.

The activist court of the 1960s set precedents that broadly construe the commerce clause, which gives Congress the power to regulate interstate and foreign commerce. As a result, through laws like the Civil Rights Act of 1964, the legislature has played a major role in combating discrimination.

The Constitution, the Bill of Rights, the Fourteenth Amendment, Supreme Court decisions, and legislative actions all define the nature of civil rights and civil liberties in American society, but issues arise which constantly cause reinterpretations of the sources. Conflicts arise largely because issues often involve one citizen's or group's rights versus another's.

FIRST AMENDMENT LIBERTIES

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The First Amendment - The Constitution of the United States

The **First Amendment** protects several basic liberties: freedom of religion, speech, press, petition, and assembly. Interpretation of the amendment is far from easy, as court case after court case has tried to define the limits of these freedoms. The definitions have evolved throughout American history, and the process continues today.

FREEDOM OF RELIGION

The 1st Amendment protects freedom of religion in two separate clauses: the **establishment clause**, which prohibits the government from establishing an official church, and the **free exercise clause** that allows people to worship as they please. Surprisingly, the First Amendment does not refer specifically to the "separation of church and state" or a "**wall of separation.**" Those phrases evolved later, probably from letters written by Thomas Jefferson, but the First Amendment does prohibit the establishment of a government sponsored religion, such as the Anglican Church in England.

The Establishment Clause

The ***Everson v. Board of Education*** case in 1947 challenged a New Jersey town for reimbursing parents for the cost of transporting students to school, including local parochial schools. The plaintiffs claimed that since the parochial schools were religious, publicly financed transportation costs could not be provided for parochial students. The challenge was based on the establishment clause. The court in this case ruled against the plaintiffs, claiming that busing is a "religiously neutral" activity, and that the reimbursements were appropriate. However, the majority opinion declared that states cannot support one religion above another.

Aid to church-related schools has been a topic at issue with the establishment clause. In 1971 in ***Lemon v. Kurtzman***, the Supreme Court ruled that direct state aid could not be used to subsidize religious instruction. The Court's opinion stated that government aid to religious schools had to be secular in aim, and that "an excessive government entanglement with religion" should be avoided. However, in recent years the Court has relaxed restrictions on government aid to religious schools. For example, in 1997 the Supreme Court overturned ***Aquilar v. Felton***, a 1985 decision that ruled unconstitutional state aid for disadvantaged students who attend religious schools.

A current establishment clause issue is that of **school vouchers** that allow individuals to "purchase" education at any school, public or private. School districts in several states, including Florida, Ohio, and Wisconsin, have experimented with voucher programs. In 2002 the Supreme Court held that the Cleveland voucher system was constitutional, although almost all the students used the vouchers to attend religious schools.

The most controversial issue of the separation of church and state has been school prayer. The first major case was ***Engle v. Vitale*** (1962). In this case, the Court banned the use of a prayer written by the New York State Board of Regents. It read, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country." Later decisions overturned laws requiring the saying of the Lord's Prayer and the posting of the Ten Commandments in classrooms. In 1985, ***Wallace v. Jaffree*** banned Alabama's **moment of silence** law that provided for a one-minute period of silence for meditation or voluntary prayer.

In recent years prayer outside the classroom has become an issue, with student initiated prayer at graduation ceremonies and sports events at its focus. In 2000 the Supreme Court affirmed a lower court ruling that school prayer at graduation did not violate the establishment clause, but that prayer over loud speakers at sports events did.

The Free Exercise Clause

The free exercise clause does not allow any laws prohibiting the free exercise of religion. The courts have interpreted the 14th Amendment to extend the freedom to protection from state governments as well. Religions sometimes require actions that violate the rights of others or forbid actions that society thinks are necessary. The Supreme Court has never allowed religious freedom to be an excuse for any type of behavior. It has consistently ruled that people have the absolute right to believe what they want, but not necessarily the right to religious practices that may harm society.

Some outlawed practices have been polygamy, the use of poisonous snakes in religious rites, and prohibiting medical treatment to children based on religious beliefs. On the other hand, Courts have disallowed some government restrictions of religious exercise, such as forcing flag salutes and requiring Amish parents to send their children to school after eighth grade.

FREEDOM OF SPEECH

Citizens of modern America almost take for granted the responsibility of the government to guarantee freedom of speech. In reality, the definition of freedom of speech has changed dramatically over the years, with an ever-increasing emphasis on protection of free speech, often at the expense of other liberties and rights. Until recently, especially during times of war and crisis when national security is at stake, the government has passed laws that control free speech.

Free Speech vs. National Security

Early in United States history the government almost certainly did not put high priority on the government's responsibility to protect freedom of speech. John Adams, when faced with an international crisis that threatened war with France, saw that Congress passed the **Sedition Act of 1798**, making it a crime to write, utter, or publish anti-government statements with the "intent to defame." The Federalists, who favored strong government authority and emphasized order at the expense of liberty, believed that the First Amendment did not forbid punishing newspapers for libel. The Anti-Federalists did NOT argue that the press should be free of government controls; they protested the act on the grounds that state, not federal government should have control. Thomas Jefferson, a prominent Anti-Federalist, allowed the twenty-year limitation of the Act to run out during his presidency, and the Act died during peace time with little protest.

Presidents, such as Abraham Lincoln during the Civil War, continued to support the government's right to restrict freedom of speech during national security crises through the 19th century and into the 20th. During World War I, the U.S. Congress passed two controversial laws that restricted freedom of speech: **The Espionage Act of 1917** and the **Sedition Act of 1918**.

The Espionage Act of 1917 forbid false statements that intended to interfere with the U.S. military forces or materials to be mailed if they violated the law or advocated resistance to government. The Sedition Act of 1918 forbid individuals to utter, print, write or publish language intended to incite resistance to the U.S. government. Under the mandate of the Sedition Act, thousands were arrested and convicted, and some were deported from the country.

The most famous Supreme Court case that resulted from the World War I restrictions was ***Schenck v. U.S.*** Charles Schenck, a socialist who mailed circulars to young men urging them to resist the military draft, was convicted of violating the Espionage Act. The Supreme Court upheld his conviction, with Oliver Wendell Holmes writing the precedent-setting opinion that any language that directly caused an illegal act was not protected by the First Amendment. Holmes distinguished between language that was merely critical of the government and that which was directly a "clear and present danger" to national security. **The "clear and present danger"** test became a standard by which to balance national security and freedom of speech.

Even before the U.S. entered World War II, Congress passed the **Smith Act**, intending to protect the country from the influence of Nazism and Communism. The Act contained two clauses:

- punishment for willfully advocating the overthrow of the government
- punishment for membership in a group that advocated the overthrow of government (the membership clause)

A few cases were tried for wartime behavior, but the real impact of the Smith Act came after World War II was over with the fear of Communist espionage in the Red Scare, or McCarthyism. The U.S. experienced a dramatic reaction to the Cold War, fueled by the fear that communists were infiltrating the U.S. government and passed security secrets to the Russians. The Internal Security Act of 1950 required Communist organizations to register and to publish membership lists. Many were questioned by Congressional Committees and many were arrested.

By the late 1950s, with McCarthyism subsided and a new Supreme Court under the direction of Earl Warren, the Court leaned more and more toward freedom of speech. No laws were passed restricting speech during the Vietnam War, and the ***Brandenburg v. Ohio*** case established that speech would have to be judged as inciting "imminent" unlawful action in order to be restricted. The case involved a Ku Klux Klan leader convicted of attempting to incite mob action when he said "We'll take the (expletive deleted) street later." The conviction was overturned by the Supreme Court because Brandenburg did not call for an **"imminent" action**.

Restrictions on Free Speech

Today, the following forms of speaking and writing are not granted full constitutional protection

- 1) **Libel**, a written statement that attacks another person's character, is not automatically protected, although it is very hard to sue for libel. Public figures must prove that a statement is not only false but that it intended "actual malice," a condition that is very hard to define.
- 2) **Obscenity** is not protected, but the Court has always had a difficult time defining obscenity. The current Court leaves local governments to decide restrictions for hard-core pornography, but if they choose to restrict it, they must meet some strict constitutional tests. One common reaction has been for a local government to establish areas where pornography can and can't be sold. A new issue concerns pornography on the internet. In 1997 the Supreme Court ruled the Communications Decency Act unconstitutional because it infringed too much on free speech.
- 3) **Symbolic speech**, an action meant to convey a political message, is not protected because to protect it would be to allow many illegal actions, such as murder or rape, if an individual meant to send a message through the action. The Court made an exception to the action of flag-burning in ***Texas v. Johnson*** (1989), when it declared that the Texas law prohibiting flag desecration was unconstitutional. Since flag-burning has no other intent than to convey a message, the Court has ruled that it does not incite illegal actions. Symbolic speech includes advocacy of illegal actions, as well as "fighting words," or inciting others to commit illegal actions. However, in 2003 the Supreme Court ruled that a Virginia law that prohibited the burning of a cross with an intent to intimidate did not violate the First Amendment. The Court reasoned that a burning cross is an instrument of racial terror so threatening that it overshadows free speech concerns.

LIBERTIES BASED ON OTHER AMENDMENTS

PRIVACY RIGHTS

The phrase **"right to privacy"** does not appear anywhere in the Constitution or the Bill of Rights. The idea was first expressed in the 1965 ***Griswold v. Connecticut*** case in which a doctor and family-planning specialist were arrested for disseminating birth control devices under a little-used Connecticut law that forbid the use of contraceptives. The Supreme Court ruled against the state, with the majority opinion identifying "penumbras" - unstated liberties implied by the stated rights - that protected a right to privacy, including a right to family planning.

The most important application of privacy rights came in the area of abortion as first ruled by the Court in ***Roe v. Wade*** in 1973. Jane Roe (whose real name was Norma McCorvey) challenged the Texas law allowing abortion only to save the life of a mother. Texas argued that a state has the power to regulate abortions, but the state overruled, forbidding any state control of abortions during the first three months of a pregnancy and limiting state control during the fourth through sixth months. The justices cited the right to privacy as the liberty to choose to have an abortion before the baby was viable. The ***Roe v. Wade*** decision sparked the controversy that surrounds abortion today.

Since the late 1980s the Supreme Court has tended to rule more conservatively on abortion rights. For example, in ***Webster v. Reproductive Health Services*** (1989) the Court upheld a Missouri statute that banned the use taxpayer-supported facilities for performing abortions. In 1992, the Court upheld a Pennsylvania law that

required pre-abortion counseling, a waiting period of twenty-four hours, and for girls under eighteen, parental or judicial permission. In 2000 the court reviewed a Nebraska act that banned partial birth abortion, a procedure that could only take place during the second trimester of a pregnancy. The Court declared the act unconstitutional because it could be used to ban other abortion procedures. The majority opinion also noted that the law did not include protection of the health of the pregnant women. In 2003, the U.S. congress passed a national law similar to the Nebraska act, and it was immediately challenged in court.

RIGHTS OF DUE PROCESS

The **due process** clauses in the Fifth and Fourteenth Amendment forbid the national and state governments to "deny any person life, liberty, or property without due process of law." Although the Supreme Court has refused to define precisely what is meant by due process, it generally requires a procedure that gives an individual a fair hearing or formal trial. Although due process is most often associated with the rights of those accused of crimes, it is required for protecting property rights as well.

PROPERTY RIGHTS

The founders saw the government as not only the protector of property but also the potential abuser of property rights.

The Fifth Amendment allows the government the right to **eminent domain** (the power to claim private property for public use), but the owner must be fairly compensated. The Court has interpreted this clause to be a direct taking of property, not just a government action that may result in a property losing value, such as a rezoning regulation. Also, the government and the property owner sometimes interpret "just compensation" differently. In such a case, the courts are the final arbitrators.

THE FOURTH AMENDMENT AND SEARCH AND SEIZURE

Freedom from **unreasonable search and seizure** is guaranteed by the Fourth Amendment. To prevent abuse by police, the Constitution requires that searches of private property are permissible only if probable cause exists that indicates that a crime may have taken place.

An important limitation was set on police searches by ***Mapp v. Ohio***, a 1961 case in which the police broke into the home of Dollree Mapp, a woman under suspicion for illegal gambling activities. Instead, they found obscene materials and arrested Mapp for possessing them. She appealed her case, claiming that the Fourth Amendment should be applied to state and local governments, and that the evidence had been seized illegally. The police, she claimed, had no probable cause for suspecting her for the crime she was arrested for. The court ruled in her favor, thus redefining the rights of the accused.

FIFTH AMENDMENT RIGHTS

The Fifth Amendment forbids self-incrimination, stating that no one "shall be compelled to be a witness against himself." The rights for protection against self-incrimination originated from a famous 1966 Court decision ***Miranda v. Arizona***. Ernesto Miranda was arrested as a prime suspect in the rape and kidnapping of an eighteen year old girl. During a two hour questioning by the police, he was not advised of his constitutional right against self-incrimination nor his right to counsel. His responses led to his conviction, but the Supreme Court reversed it, and set the modern **Miranda Rights**: to remain silent, to be warned that responses may be used in a court of law, and to have a lawyer present during questioning.

A very important principle related to both the 4th and 5th Amendments is the **exclusionary rule**, which upholds the principle that evidence gathered illegally cannot be used in a trial. Critics of the exclusionary rule, including Chief Justice William Rehnquist, express doubts that criminals should go free just because of mistakes on the part of the police. However, the Courts continue to apply the exclusionary rule.

THE EIGHTH AMENDMENT AND CRUEL AND UNUSUAL PUNISHMENT

The 8th amendment prohibits **cruel and unusual punishments**, a concept rooted in English law. By far, the most controversial issue that centers on the 8th Amendment is capital punishment, or the practice of issuing death sentences to those convicted of major crimes.

In general, states are allowed to pursue their own policies regarding capital punishment. The Supreme Court did not challenge the death penalty until 1972 in ***Furman v. Georgia***.

Even then, it did not judge capital punishment to be cruel and unusual punishment. It simply warned the states that the death penalty was to be carried out in a fair and consistent way.

RIGHT VS. RIGHT

Most of us think of civil rights and liberties as principles that protect freedoms for all of us all the time. However, the truth is that rights listed in the Constitution and the Bill of Rights are usually *competing* rights. Most civil liberties and rights court cases involve the plaintiff's right vs. another right that the defendant claims has been violated. For example, in 1971, the *New York Times* published the "Pentagon Papers" that revealed some negative actions of the government during the Vietnam War. The government sued the newspaper, claiming that the reports endangered national security. *The New York Times* countered with the argument that the public had the right to know and that its freedom of the press should be upheld. So, the situation was national security vs. freedom of the press. A tough call, but the Court chose to uphold the rights of *The Times*.