Civil Liberties and Civil Rights (Unit 3)

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BIG IDEAS

- → LIBERTY AND ORDER
- → CONSTITUTIONALISM
- → COMPETING POLICY-MAKING INTERESTS
- → CIVIC PARTICIPATION IN A REPRESENTATIVE DEMOCRACY

The Bill of Rights, adopted in 1791 by the states two years after the ratification of the Constitution, established civil liberties for Americans. Viewing the Bill of Rights, you will notice a number of "negative" statements:

- "Congress shall make no law" abridging freedom of religion, speech, press, assembly, petition.
- "The right of people to keep and bear arms shall not be infringed."
- "No soldier shall . . . be quartered."
- "The right of the people . . . shall not be violated" regarding unreasonable searches and seizures.
- "No person shall be held" to be a witness against himself, in double jeopardy, or "deprived of life, liberty, or property without due process of law."
- "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

These excerpts illustrate why the Bill of Rights represents a basic definition of a person's civil liberties—those rights of the people that the government cannot take away. They are guaranteed in the Constitution, in the Bill of Rights, in other amendments passed, as well as through court interpretation. These rights are characterized as substantive, the kind of limits placed on the national government (like the First, Second, and Eighth Amendments), and as procedural, outlining how the government is supposed to treat individuals (for instance the Fifth Amendment). Civil liberties differ from civil rights. Civil liberties protect individuals from abuses of the government, whereas civil rights come about as a result of the equal protection under the law. Both civil liberties and civil rights limit the power of government.

The history of the civil rights movement parallels the nationalization of the Fourteenth Amendment of the Constitution. Even though the Civil War solved the problem of slavery and established the legitimacy and dominance of the federal government, the fact remained that many states still passed Jim Crow laws—legislation that legalized segregation even after the adoption of the Fourteenth Amendment. Segregation existed in America, and the Supreme Court in the *Plessy* decision stated "separate but equal" was an acceptable standard. Some inroads were made as civil rights activists pressured the national government to address the issue of racial discrimination. But it took the landmark *Brown v Board of Education* decision for the movement to see results.

Other minority groups such as women, immigrant groups, Native Americans, homosexuals, senior citizens, and the young have faced discrimination. Congressional legislation and Supreme Court decisions have used affirmative action programs as a means of providing equality under the law.

THE NATURE OF THE BILL OF RIGHTS

The rights of Americans are clearly outlined in the Bill of Rights as is the ability of the people to exercise the right to vote. Limits are placed on both the federal government and the state governments.

It became apparent to the founding fathers that, without some kind of compromise regarding a statement of the people's rights, the ratification of the Constitution would be in jeopardy. When in 1787 Virginia delegate George Mason made the original proposal to add a bill of rights to the Constitution, it was turned down by the Federalists controlling the Constitutional Convention. However, when the ratification process began it became obvious that the necessary nine states needed to approve the document would not vote to ratify without an agreement to add a series of amendments that would protect people from potential abuses by the national government. The Federalists argued initially that a bill of rights was not necessary because the states under a federal system would protect their citizens. The Anti-Federalists insisted that these rights be written down and included in the proposed Constitution.

States such as Massachusetts, South Carolina, New Hampshire, Virginia, and New York agreed to support a bill of rights immediately after the Constitution was ratified. In the argument over whether or not to include a bill of rights into the original Constitution, James Madison wrote in the Federalist No. 84, "I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous." On the other hand, in a *Letter from the Federal Farmer to the Republican* (an Anti-Federalist publication), it was written that "People, and very wisely too, like to be express and explicit about their essential rights, and not to be forced to claim them on the precarious and unascertained tenure of inferences and general principles." The Anti-Federalist forces prevailed, and the Bill of Rights was adopted in 1791.

Selective Incorporation Came About Because of the Court's Power of Judicial Review

The John Marshall court of 1801–1835 was responsible for key decisions that clarified the nature of government. Decisions such as *Marbury v Madison* (1803), *McCulloch v Maryland* (1819), and *Gibbons v Ogden* (1824) defined the power of various components of government. And even though the Court ruled that it had the power to declare state laws unconstitutional, it refused to extend the provisions of the Bill of Rights to the states.

In *Barron v Baltimore* (1833), the Court ruled that the Bill of Rights limited only the national government, not the states. In turning down Barron's argument that the city of Baltimore had deprived him of just compensation of property under the Fifth Amendment, Marshall wrote that "Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated . . . the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states." This decision established the nature of judicial federalism regarding the extension of the Bill of Rights to the citizens of the states. It created a concept of dual citizenship, wherein a citizen was under the jurisdiction of the national government as well as state governments. After the Fourteenth Amendment was passed in 1868 with its clear statement that "No state shall abridge the privileges and immunities of its citizens," the people received the complete protection of the Bill of Rights. Southern states passed Jim Crow laws, and segregation became an acceptable practice.

FREEDOM OF RELIGION

"Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof."

Called the establishment clause, this component of the First Amendment to the Constitution defines the right of the citizens to practice their religions without governmental interference. It also places a restriction on government, creating a "wall of separation" between church and state. From the settlement of this country by the Pilgrims, who sought religious freedom, to the belief by the Jehovah's Witnesses that they should not be forced to participate in religious activities in public schools, this clause has been the foundation of religious liberty in this country. However, it is also balanced by what is called governmental accommodation of religion, which is the ability of government to allow certain religious practices, possibly including some direct forms of aid to religious institutions. The line between government's fostering of religious practice in our society and accommodation is the basis of many Supreme Court decisions in this area. Some of the major questions raised in this area follow:

- To what extent does use of the term *God* in public institutions violate the separation of church and state?
- Can states directly support parochial schools with public funds?
- Can states legislate nondenominational prayer, a moment of silence, creationism as a part of the curriculum, and equal access to its facilities to religious groups?
- Can clergy recite a blessing at graduation ceremonies?
- Are religious displays in public areas allowable?
- Is it constitutional to use vouchers and public monies for private parochial schools?

These are just a few of the many questions raised by the establishment clause. The following key Supreme Court decisions have created precedent.

Key Court Cases

Required Court Case

***Engel v Vitale* (1962)**

Essential fact: Students in a public high school refused to recite a nondenominational (not connected to any religion) prayer that started with the words "Almighty God, we acknowledge our dependence upon thee."

Constitutional Issue: Whether the establishment clause of the First Amendment was violated by New York State because it made the recitation of this prayer mandatory.

Majority Decision: "We think that, by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity."

Concurring Decision: "The point for decision is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state levels is presently honeycombed with such financing. Nevertheless, I think it is an unconstitutional undertaking whatever form it takes."

Dissenting Opinion: "With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation."

Lemon v Kurtzman (1971)

The Lemon test, which came out of this case, sets the criteria in determining whether the line of governmental interference is crossed. The three-pronged standard indicates that the purpose of the legislation must be secular, not religious, that its primary effect must neither advance nor inhibit religion, and that it must avoid an "excessive entanglement of government with religion." Even though this case struck down a law that provided governmental aid to private schools, it has been used as a barometer to measure other legislative practices of the state.

Required Court Case

Wisconsin v Yoder (1972)

Essential Fact: The State of Wisconsin had a law that mandated school attendance for everybody past the eighth grade. Amish students refused to attend high school after finishing the eighth grade.

Constitutional Issue: Did the state law violate the free exercise clause of the First Amendment?

Unanimous Decision: "The Court found that the values and programs of secondary school were 'in sharp conflict with the fundamental mode of life mandated by the Amish religion.'"

The Supreme Court ruled that a state could not force Amish students to attend school past the eighth grade because it violated the free exercise clause.

Lee v Weisman (1992)

This decision directed school officials not to invite clergy to recite prayers at graduation ceremonies.

Zelman v Simmons-Harris (2002)

School voucher programs that allow parents to send their children to a private school is not in violation of the Establishment Clause, where the vast majority of participating private schools are affiliated with religious groups.

FREEDOM OF SPEECH AND THE PRESS

"Congress shall make no law . . . abridging the freedom of speech, or of the press."

The protection of citizens' right of free expression versus the government's interest in limiting speech and the press in the interest of the safety of the country and its citizens is basic to the interpretation of this clause of the First Amendment. From John Peter Zenger's concept of complete freedom of the press on the one hand to Justice Oliver Wendell Holmes's recognition that you cannot yell "Fire!" in a darkened movie theater on the other hand, the issue of how much freedom of speech and the press can be allowed has been debated.

Speech can be categorized as symbolic and expressive. It extends to public areas of commercial speech as well as to private application. It raises the complex issue of what is acceptable and what is obscene. Government has the role to maintain a balance between order and the ability of its citizens to criticize policy. The issue of what constitutes "fighting words" or a "clear and present danger" goes to the heart of free speech and expression.

Press is characterized by the written word and the ability of a publication to print material without prior review or prior restraint (censorship) by a governmental body. It also raises issues regarding the rights of reporters to pursue a story and what constitutes libel.

Some of the major questions raised in this area are as follows:

- Can the government limit free speech and press during times of war or other national emergency?
- To what extent can organized "hate groups" such as the Ku Klux Klan and Nazis advocate their views publicly?
- What kinds of actions are considered symbolic speech?
- How do you define speech and expression that is obscene?
- When do libel and slander come into play?

Key Supreme Court Cases

Required Court Case

***Schenck v United States* (1919)**

Essential Fact: Schenck continued to print, distribute material, and speak against United States efforts in World War I. He was tried and convicted for violating the Espionage Act.

Constitutional issue: Did the government have the right to censor material in a time of national emergency?

Unanimous Decision: Justice Holmes ruled for the majority that Schenck did not have the right to print, speak, and distribute material against United States efforts in World War I because a "clear and present danger" existed.

Gitlow v New York (1925)

Applying the due process clause of the Fourteenth Amendment to the states, the Supreme Court established that advocating the forcible overthrow of the government using violent methods created a "bad tendency" and violated the free speech provision of the First Amendment.

Chaplinsky v New Hampshire (1942)

In a key incorporation case, a doctrine defining what constitutes "fighting words" was established as a result of spoken words that "by their very utterance inflict injury or tend to incite an immediate breach of peace that governments may constitutionally punish." These words "have a direct tendency to cause acts of violence by the person to whom, individually, the remarks are addressed." However, the court has also determined that the use of obscenities aimed at governmental policy or worn on clothing as a means of protest do not constitute fighting words in and of themselves.

West Virginia Board of Education v Barnette (1943)

The Free Speech clause of the First Amendment to the U.S. Constitution protected students from being forced to salute the American flag and say the Pledge of Allegiance in public schools.

Required Court Cases

Tinker v Des Moines (1969)

Essential Fact: Students were suspended after being warned not to wear black armbands as a symbol of protest against the Vietnam War.

Constitutional Issue: Were the students' First Amendment free-speech rights violated by the school district for protesting while using symbolic speech?

Majority Decision: "In wearing armbands, the petitioners were quiet and passive. They were not disruptive and did not impinge upon the rights of others. In these circumstances, their conduct was within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment."

This decision established that students' rights are "not shed at the schoolhouse gates" and defined the students' wearing a black armband in silent protest of the Vietnam War as "a legitimate form of symbolic speech." These rights were later restricted in the student press case *Hazelwood v Kuhlmeier* (1988) when the court gave school administrators the right to censor a school newspaper.

Dissenting Opinion: "I deny, therefore, that it has been the 'unmistakable holding of this Court for almost 50 years' that 'students' and 'teachers' take with them into the 'schoolhouse gate' constitutional rights to 'freedom of speech or expression.' "

New York Times v United States (1971)

Key Fact: The *New York Times* printed the Pentagon Papers, a secret study of the Vietnam War, and the United States government attempted to halt the publication, claiming that it would injure the national security of the United States.

Constitutional Issue: Was the *New York Times* protected by the First Amendment's free-press clause even in a case where the government declares the material to be essential to national security?

In this litigation, known as the Pentagon Papers case, the Supreme Court ruled the government did not have the right to prevent the *New York Times* from printing information about the history of the country's involvement in the Vietnam War, stating, "In seeking injunctions against these newspapers, and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment."

Buckley v Valeo (1976)

The court upheld federal limits on campaign contributions and ruled that **spending money** to influence elections is a form of constitutionally protected free speech.

Texas v Johnson (1988)

Based on the arrest of Gregory Lee Johnson for burning a flag outside the Republican National Convention in protest of the president's foreign policy, the Supreme Court ruled that this action was a form of symbolic speech protected by the First Amendment. The Supreme Court decisions in this area have tended to tread a thin line.

Morse v Fredrick (2007)

The First Amendment does not prevent educators from suppressing, from a school-supervised event that took place off school property, student speech that is reasonably viewed as promoting illegal drug use.

FREEDOM OF ASSEMBLY

"Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The rights of people to gather in places they want and express their point of view without government interference, the right of association, and by extension the right to present their point of view to a governmental body—these are the central themes in the final clause of the First Amendment. These rights must be balanced by restrictions such as the time, manner, and place of assembly. The Government also must be aware of the protection of the individuals at the scene of assembly. Additionally, the extent to which individuals, through their association in political groups, can exert pressure on the government must be taken into account.

Some of the major questions raised by the themes of this clause are as follows:

- What constitutes equitable time, manner, and place restrictions on groups?
- To what extent can these demonstrations take place on public and private property?
- If a group or an individual plans to associate with advocates of violence, can the government restrict association and the right to petition?

Key Court Case

***DeJonge v Oregon* (1937)**

In a key incorporation case, the Supreme Court ruled that the Fourteenth Amendment's due process clause applies to freedom of assembly. The court found that DeJonge had the right to organize a communist party and speak at its meetings even though the party advocated "industrial or political change or revolution." However, in the 1950s, with the fear of communism on the rise, the Court ruled in *Dennis v United States* (1951), that Dennis, who was leader of the Communist Party USA, violated the Smith Act by advocating the forcible overthrow of the United States government.

The issues revolving around freedom of assembly and petition have continued to challenge restrictions placed on groups. In 1994 an anti-abortion group, Operation Rescue, was restricted in how it could demonstrate against a clinic performing abortions. The court said the group had to picket beyond a minimum distance from the clinic. Cases such as this illustrate how social issues such as abortion become mixed up with First Amendment issues of assembly.

RIGHT TO KEEP AND BEAR ARMS

"The right of the people to keep and bear arms, shall not be infringed."

Although the historical intent of the Second Amendment was the right of each state to maintain an armed militia, it has been interpreted as the right of individuals to own firearms. The National Rifle Association has become a primary interest group in supporting the gun enthusiast and the hunter's right to purchase and use arms. With the issue of crime and violence a significant concern of society, laws have been proposed restricting the availability, use, and kinds of firearms. This clash has resulted in a national debate over the meaning of the Second Amendment as shown in the following questions.

- Should registration and a waiting period be required for a person to own recreational firearms?
- Should certain types of firearms such as assault rifles be banned?

Key Court Case

The first Second Amendment case to be heard by the Supreme Court is *United States v Miller* (1939). This case determined that a section of the National Firearms Act of 1934, which made it a crime to ship certain kinds of weapons across state lines unless they were registered, was constitutional because it did not have any link to a state militia. Because this was a federal case, the regulation of arms has been a state matter. This was changed as a result of the passage of the Brady Bill in 1993. Named after President Reagan's press secretary, who was seriously injured by a handgun in the attempted assassination of the president, this bill took more than ten years to obtain Congress's approval. The law placed requirements on handgun registration, setting up a minimum waiting period before purchase. Many states had to change their laws based on this legislation. A 1997 Supreme Court decision did, however, strike down the part of the law forcing local officials to perform instant checks. The National Rifle Association lobbied against its passage, insisting that it would not stop criminals from obtaining weapons. They used the same rationale in arguing against the passage of an assault weapons ban that was part of the Crime Bill passed in 1994.

The first Supreme Court decision to rule on the question of whether the right to bear arms constitutionally protected individuals and not only militias came in 2008, when the court announced its decision in *District of Columbia v Heller*. This case challenged a Washington, D.C., gun-control law that banned handguns in the District and required any legal firearms such as hunting rifles to be kept unloaded. In a 5–4 decision, the court ruled that the law was unconstitutional and that the Second Amendment protected an individual's right to bear arms. How far-reaching this decision is remains a question, since the decision only applied to Washington, D.C., and federal laws. In 2010, the Supreme Court ruled in *McDonald v Chicago* that the Second Amendment's right to bear arms applies to the states.

Required Court Case

***McDonald v Chicago* (2010)**

Essential Fact: Chicago maintained its gun-control laws after the Supreme Court ruled in *Heller* that the Second Amendment gave an individual the right to bear arms.

Constitutional Issue: Did Chicago violate the Fourteenth Amendment's due process clause?

Majority Decision: "The Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States." The court held that the right of an individual to "keep and bear arms" protected by the Second Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment and applies to the states. This decision cleared up the uncertainty left in the wake of *District of Columbia v Heller* as to the scope of gun rights in regard to the states.

Dissenting Opinion: "I write separately only to respond to some aspects of Justice Stevens' dissent. Not that aspect which disagrees with the majority's application of our precedents to this case, which is fully covered by the Court's opinion. But much of what Justice Stevens writes is a broad condemnation of the theory of interpretation which underlies the Court's opinion, a theory that makes the traditions of our people paramount."—Antonin Scalia.

Dissenting Opinion: "I have yet to see a persuasive argument that the Framers of the Fourteenth Amendment thought otherwise. To the contrary, the historical evidence suggests that, at least by the time of the Civil War if not much earlier, the phrase 'due process of law' had acquired substantive content as a term of art within the legal community."—John Paul Stevens