

CIVIL LIBERTIES AND CIVIL RIGHTS

Civil Liberties

- ◆ Constitution - The original Constitution mentions specific rights considered to be fundamental freedoms by the Founding Fathers:
 - **writ of habeas corpus** - You must be brought before the court and informed of charges against you.
 - no **bills of attainder** - You cannot be punished without a trial.
 - no **ex post facto laws** - Laws applied to acts committed before the laws' passage are unconstitutional.
 - trial by jury.
- ◆ Bill of Rights - added in 1791 to the original Constitution to provide specific guarantees by the national government:
 - freedom of religion, speech, press, petition and assembly.
 - no unreasonable searches and seizure.
 - protections against self-incrimination and double jeopardy.
 - protections in criminal procedures.
- ◆ The Fourteenth Amendment provided for the expansion of individual rights. The Supreme Court in *Gitlow v. New York* (1925) and subsequent cases has interpreted the due process clause of the Fourteenth Amendment to apply the guarantees of the Bill of Rights to state and local governments (incorporation). Today, most guarantees of the Bill of Rights have been incorporated to apply to the state and local governments.
- ◆ Legislative actions are laws that set limits or boundaries on one person's rights over another's or bring balance between the rights of individuals and the interests of society. For example, false advertising is not protected under the First Amendment guarantee of freedom of speech.
- ◆ Court decisions protect rights through the use of judicial review. Flag burning (*Texas v. Johnson*, 1989) is protected, but burning a draft card (*United States v. O'Brien*, 1968) is not protected symbolic speech.

Freedom of Religion

Two protections for freedom of religion exist: the establishment clause and the free exercise clause.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof - Amendment 1

The Establishment Clause

According to Thomas Jefferson, the Constitution creates a "wall of separation between Church and State." Because the church and government are separate in the United States, Congress cannot establish any religion as the national religion, nor favor one religion over another, nor tax American citizens to support anyone religion. Controversy concerning the exact meaning and extent of the establishment clause has led to actions by the Supreme Court in defining the parameters of the clause, including:

- ◆ ***Everson v. Board of Education*** (1947) - The Court upheld a New Jersey policy of reimbursing parents of Catholic school students for the costs of busing their children to school.
- ◆ ***Engel v. Vitale*** (1962) - The Court ruled school-sanctioned prayer in public schools is unconstitutional.
- ◆ ***Lemon v. Kurtzman*** (1971) - The Court struck down a Pennsylvania law reimbursing parochial schools for textbooks and teacher salaries and established the Lemon Test. To pass the test a law must 1) have a primarily secular purpose; 2) its principal effect neither aid nor inhibit religion; and 3) it must not create excessive entanglement between government and religion.
- ◆ ***Wallace v. Jaffree*** (1985) - The Court overturned a state law setting aside time for "voluntary prayer" in public schools.
- ◆ ***Edwards v. Aguillard*** (1987) - The Court ruled that Louisiana could not force public schools that taught evolution to also teach creationism.

The Free Exercise Clause

The free exercise clause guarantees the right to practice any religion or no religion at all. In its interpretations of the free exercise clause, the Supreme Court has made distinctions between belief and practice. The Court has ruled that, while religious belief is absolute, the practice of those beliefs may be restricted, especially if those practices conflict with criminal laws. For example,

- ◆ ***Reynolds v. United States*** (1879) - The Court upheld the federal law that prohibited polygamy even though Reynolds, a Mormon from Utah, claimed that the law limited his religious freedom
- ◆ ***Employment Division of Oregon v. Smith*** (1990) - The Court ruled that Oregon could deny unemployment benefits to workers fired for using drugs (peyote) as part of a religious ceremony.

In 1993 Congress passed the Religious Freedom Restoration Act, giving people the right to practice religious activities unless prohibited by laws that are narrowly tailored and the government can show a "compelling interest." In 1997 the Supreme Court ruled this law unconstitutional in *City of Boerne, Texas v. Flores*.

Freedom of Speech

Types of Speech

There are several different classifications of speech:

- ◆ pure speech - the most common form of speech, verbal speech; given the most protection by the courts
- ◆ speech plus - verbal and symbolic speech used together, such as a rally and then picketing; may also be limited
- ◆ symbolic speech - using actions and symbols to convey an idea rather than words (burning a draft card or flag, wearing an armband in protest); may be subject to government restrictions if it endangers public safety

Regulating Speech

Limitations on free speech have generally existed in the area of providing for national security. In 1798 Congress passed the Alien and Sedition Acts, making it illegal to say anything "false, scandalous and malicious against the government or its officials." Although these acts were aimed at the opponents of President John Adams and his Federalist supporters, others were convicted under these laws. The Alien and Sedition Acts were never challenged in court, and they expired in 1801.

After the assassination of President McKinley by an anarchist in 1901 and the entrance of the United States into WWI, Congress again passed sedition laws forbidding verbal attacks on the government, and the states began following suit. These and subsequent laws were challenged in the courts.

- ◆ **Schenck v. United States** (1919) - Schenck mailed fliers to draftees during World War I urging them to protest the draft peacefully; he was convicted of violating a federal law against encouraging the disobedience of military orders. Oliver Wendell Holmes wrote in the opinion that such speech was not protected during wartime because it would create a clear and present danger, establishing a standard for measuring what would and would not be protected speech.
- ◆ **Gitlow v. New York** (1925) - The Court applied the protections of free speech to the states under the due process clause of the Fourteenth Amendment.
- ◆ **Chaplinsky v. New Hampshire** (1942) - The Court ruled that the first amendment did not protect "fighting words."
- ◆ **Tinker v. Des Moines** (1969) - The Court ruled that wearing black armbands in protest of the Vietnam War was symbolic speech, protected by the First Amendment.
- ◆ **Brandenburg v. Ohio** (1969) - The Court made the "clear and present" danger test less restrictive by ruling that using inflammatory speech would be punished only if there was imminent danger that this speech would incite an illegal act.
- ◆ **Miller v. California** (1973) - The Court established the Miller test, which sets standards for measuring obscenity: 1) major theme appeals to indecent sexual desires applying contemporary community standards; 2) shows in clearly offensive way sexual behavior outlawed by state law; and 3) "lacks serious literary, artistic, political, or scientific value."
- ◆ **Texas v. Johnson** (1989) - The Court ruled that flag burning is a protected form of symbolic speech.
- ◆ **Reno v. ACLU** (1997) - The Court ruled the Communications Decency Act unconstitutional because it was "overly broad and vague" in regulating Internet speech.

Since the 1940s the Court has supported the preferred position doctrine: First Amendment freedoms are more fundamental than other freedoms because they provide a basis for other liberties; therefore, they hold a preferred position and laws regulating these freedoms must be shown to be absolutely necessary to be declared constitutional.

Freedom of the Press

Freedom of the press is often protected because it is closely related to freedom of speech; the press is used as a form of expression. Today the press includes newspapers, magazines, radio, television, and the Internet.

- ◆ **Near v. Minnesota** (1931) - The Court applied the protections of free press to the states under the due process clause of the Fourteenth Amendment and prohibited prior restraint.
- ◆ **New York Times v. Sullivan** (1964) - The Court protected statements about public officials.
- ◆ **New York Times v. United States** (1971) - The Court reaffirmed its position of prior restraint, refusing to stop the publication of the Pentagon Papers.
- ◆ **Hazelwood School District v. Kuhlmeier** (1988) - The Court ruled in favor of school district censorship of student newspapers as long as censorship is related to legitimate concerns.

Freedom of Assembly and Petition

The First Amendment guarantees the "right of the people peacefully to assemble, and to petition the Government for a redress of grievances." Freedom of assembly and petition applies to both private and public places, allowing citizens to make their views known to government officials through petitions, letters, picketing, demonstrations, parades, and marches. The courts have protected these rights while allowing the government to set limits to protect the rights and safety of others.

- ◆ **DeJonge v. Oregon** (1937) - The Court established that the right of association (assembly) was as important as other First Amendment rights and used the due process clause of the Fourteenth Amendment to apply freedom of assembly to the states.

The courts have generally ruled:

- ◆ That to protect public order, government may require groups wanting to parade or demonstrate to first obtain a permit.
- ◆ Certain public facilities (schools, airports, jails) not generally open to the public may be restricted from demonstrations.
- ◆ Restrictions on assembly must be worded precisely and must apply to all groups equally.
- ◆ The right to assemble does not allow groups to use private property for its own uses (creates buffer zones around abortion clinics).
- ◆ Police may disperse demonstrations in order to keep the peace or protect the public's safety (if demonstrations become violent or dangerous to public safety).

Property Rights

The due process clause of the Fifth and Fourteenth Amendments provide for the protection of private property by guaranteeing that the government cannot deprive a person of "life, liberty, or property, without due process of law." Although the Supreme Court has not defined the term due process, it has generally accepted the concept of government acting in a fair manner according to established rules. **Substantive due process** involves the policies of government or the subject matter of the laws, determining whether the law is fair or if it violates constitutional protections. **Procedural due process** is the method of government action or how the law is carried out, according to established rules and procedures. Although the due process clause has often been applied to those accused of crimes (the guarantee of a fair trial would be due process), due process has also been used to protect property rights. The Fifth Amendment states that government cannot take private property for public use without paying a fair price for it. This right of **eminent domain** allows government to take property for public use but also requires that government provide just compensation for that property.

Right to Privacy

The Constitution makes no mention of a "right to privacy." The Supreme Court, however, has interpreted several rights that might fall under the category of privacy.

- ◆ **Griswold v. Connecticut** (1965) - The Court ruled that the First, Third, Fourth, Ninth, and Fourteenth Amendments created "zones of privacy" and enhanced the concept of enumerated rights.
- ◆ **Roe v. Wade** (1973) - The outcome was a continuation of the recognition of a constitutional right of privacy for a woman to determine whether to terminate a pregnancy.

Rights of the Accused

Several amendments of the Bill of Rights address the rights of those accused of crimes. The Fourteenth Amendment extends those protections to apply to the states.

Fourth Amendment: Search and Seizure

- ◆ **Wolf v. Colorado** (1949) - The Court applied protections against unreasonable search and seizure to the states under the due process clause of the Fourteenth Amendment.
- ◆ **Mapp v. Ohio** (1961) - The Court ruled that evidence obtained without a search warrant was excluded from trial in state courts. *Mapp v. Ohio* involved the application of the exclusionary rule to the states. The exclusionary rule is the Court's effort to deter illegal police conduct by barring from court evidence that has been obtained in violation of the Fourth Amendment.
- ◆ **Terry v. Ohio** (1968) - The Court ruled that searches of criminal suspects are constitutional and police may search suspects for safety purposes.
- ◆ **Nix v. Williams** (1984) - The Court established the inevitable discovery rule, allowing evidence discovered as the result of an illegal search to be introduced if it can be shown that the evidence would have been found anyway.
- ◆ **United States v. Leon** (1984) - The Court established the good faith exception to the exclusionary rule.

Fifth Amendment: Self-Incrimination

- ◆ **Miranda v. Arizona** (1966) - The Court ruled that suspects in police custody have certain rights and that they must be informed of those rights (right to remain silent, right to an attorney).

Sixth Amendment: Right to an Attorney

- ◆ **Powell v. Alabama** (1932) - The Court established that the due process clause of the Fourteenth Amendment guarantees defendants in death penalty cases the right to an attorney.
- ◆ **Gideon v. Wainwright** (1963) - The Court ruled that in state trials, those who cannot afford an attorney will have one provided by the state, overturning *Betts v. Brady*.
- ◆ **Escobedo v. Illinois** (1964) - The Supreme Court extended the exclusionary rule to illegal confessions in state court cases. The Court also defined the "Escobedo rule," which stated that persons have the right to an attorney when an investigation begins "to focus on a particular suspect." If the suspect has been arrested, has requested an attorney, and has not been warned of his or her right to remain silent, the suspect has been "denied council in violation of the Sixth Amendment."

Eighth Amendment: Cruel and Unusual Punishment

- ◆ ***Furman v. Georgia*** (1972) - The Court ruled the death penalty unconstitutional under existing state law because it was imposed arbitrarily.
- ◆ ***Gregg v. Georgia*** (1976) - In this case, the death penalty was constitutional because it was imposed based on the circumstances of the case.

Civil Rights

Civil rights are guaranteed by the Equal Protection Clause of the Fourteenth Amendment, which was added to the Constitution after the Civil War to prevent states from discriminating against former slaves and to protect former slaves' rights. The courts recognize that some forms of discrimination may be valid (preventing those under 21 from consuming alcohol) and have therefore devised the rational basis test to determine if the discrimination has a legitimate purpose. The courts have also developed the strict scrutiny test, a much stricter standard. If the discrimination reflects prejudice, the courts automatically classify it as suspect and require the government to prove a compelling reason for the discrimination. For example, if a city had separate schools for different races, the city would have to prove how this serves a compelling public interest.

The Civil Rights Movement

After the Civil War three amendments were passed to ensure the rights of the former slaves.

- ◆ The **Thirteenth Amendment** abolished slavery.
- ◆ The **Fourteenth Amendment** defined citizenship to include the former slaves and provided for due process and equal protection, which were used by the Supreme Court to apply the Bill of Rights to the state and local governments.
- ◆ The **Fifteenth Amendment** provided that individuals could not be denied the right to vote based on race or the fact that they were once a slave.

Until the 1950s and 1960s states continued to use discriminatory practices to prevent African Americans from participating in the political processes.

- ◆ Black codes were state laws passed to keep former slaves in a state of political bondage. The laws included literacy tests, poll taxes, registration laws, and white primaries.
- ◆ The Civil Rights Act of 1875 outlawed racial discrimination in public places such as hotels, theaters, and railroads but required African Americans to take their cases to federal court, a time-consuming and costly endeavor. The act was ruled unconstitutional in 1883.
- ◆ **Jim Crow laws** were laws designed to segregate the races in schools, public transportation, and hotels.
- ◆ In ***Plessy v. Ferguson*** (1896) the Supreme Court upheld the Jim Crow laws by allowing separate facilities for the different races if those facilities were equal. This created the separate but equal doctrine.
- ◆ With Executive Order 8802 (1941) Franklin Roosevelt banned racial discrimination in the defense industry and government offices.
- ◆ With Executive Order 9981 (1948) Harry Truman ordered the desegregation of the armed forces.
- ◆ In ***Brown v. Board of Education*** (1954) the Supreme Court overturned the *Plessy* decision, ruling that separate but equal is unconstitutional.
- ◆ In ***Brown v. Board of Education II*** (1955) the Supreme Court ordered the desegregation of schools "with all deliberate speed."
- ◆ The Civil Rights Act of 1957 created the Civil Rights Division within the Justice Department and made it a crime to prevent a person from voting in federal elections.
- ◆ The Civil Rights Act of 1964 prohibited discrimination in employment and in places of public accommodation, outlawed bias in federally funded programs, and created the Equal Employment Opportunity Commission (EEOC).
- ◆ The **Twenty-fourth Amendment** (1964) outlawed poll taxes in federal elections.
- ◆ The **Voting Rights Act of 1965** allowed federal registrars to register voters and outlawed literacy tests and other discriminatory tests in voter registration.
- ◆ The Civil Rights Act of 1991 made it easier for job applicants and employees to bring suit against employers with discriminatory hiring practices.

Other Minorities

With the successes of the African American civil rights movement, other minorities have also pressed to end discrimination. Hispanics, American Indians, Asian Americans, women, and people with disabilities have all joined in the quest for protections from discriminatory actions.

Hispanic Americans

Hispanic Americans is a term often used to describe people in the United States who have a Spanish-speaking heritage, including Mexican Americans, Cuban Americans, Puerto Ricans, and Central and South Americans. Today, the Hispanic population is the fastest growing minority in America.

Although the number of Hispanics elected to public office has increased since the 1970s, their progress continues to be hampered by unequal educational opportunities and language barriers. Civil rights action on behalf of Hispanics has concentrated on health care for undocumented immigrants, affirmative action, admission of more Hispanic students to state colleges and universities, and redistricting plans that do not discriminate against Hispanic Americans.

Native Americans

More than two million Native Americans live on reservations in the United States. As a result of discrimination, poverty, unemployment, alcoholism, and drug abuse are common problems. Lack of organization has hampered Native American attempts to gain political power. With the formation of militant organizations (National Indian Youth Council and American Indian Movement) and protests (siege at Wounded Knee), Native Americans have brought attention to their concerns. A 1985 Supreme Court ruling upheld treaty rights of Native American tribes.

The Indian Gaming Regulatory Act (1988) allowed Native Americans to have gaming operations (casinos) on their reservations, creating an economic boom in many tribes. In 1990 Congress passed the Native American Languages Act, encouraging the continuation of native languages and culture.

Asian Americans

Discrimination against Asians arriving in the United States began almost immediately as Asian workers began competing for jobs. Beginning in 1882, the Chinese Exclusion Act (and other similar acts) limited the number of Asians permitted to enter the United States. After the bombing of Pearl Harbor, people of Japanese descent were forced into relocation camps. The Supreme Court upheld these actions until 1944, when they declared the internments to be illegal in *Korematsu v. US*. In 1988 Congress appropriated funds to compensate former camp detainees or their survivors.

The Women's Movement

Throughout much of American history, women have not been given the same rights as men.

- ◆ The **Nineteenth Amendment** (1920) gave women the right to vote.
- ◆ The Equal Pay Act (1963) made it illegal to base an employee's pay on race, gender, religion, or national origin. This also affected the African American civil rights movement.
- ◆ The Civil Rights Act of 1964 banned job discrimination on the basis of gender.
- ◆ The Equal Employment Opportunity Act (1972) prohibited gender discrimination in hiring, firing, promotions, pay, and working conditions.
- ◆ The **Omnibus Education Act** (1972) required schools to give all boys and girls an equal opportunity to participate in sports programs.
- ◆ The Equal Credit Opportunity Act (1974) prohibited discrimination against women seeking credit from banks, finance agencies, or the government and made it illegal to ask about a person's gender or marital status on a credit application.
- ◆ The Women's Equity in Employment Act (1991) required employers to justify gender discriminations in hiring and job performance.

People with Disabilities

- ◆ The Rehabilitation Act (1973) prohibited discrimination against people with disabilities in federal programs.
- ◆ The Education for All Handicapped Children Act (1975) guarantees that children with disabilities will receive an "appropriate" education.
- ◆ The **Americans with Disabilities Act** (1990) forbids employers and owners of public accommodations from discriminating against people with disabilities (must make facilities wheelchair accessible, etc.). The act created the Telecommunications Relay Service, which allows hearing and speech-impaired people access to telephone communications.

Homosexuals

Prior to the 1960s and 1970s few people were willing to discuss their sexual preferences in relation to same-sex relationships. After a riot following a police raid of a gay and lesbian bar in 1969, the gay power movement gained momentum. Organizations such as the Gay Activist Alliance and the Gay Liberation Front began exerting pressure and influence on state legislatures to repeal laws prohibiting homosexual conduct. As a result of the growth of the gay rights movement, the Democratic Party has included protection of gay rights as part of its platform, and several states have passed laws prohibiting discrimination against homosexuals in employment, housing, education, and public accommodations. In *Romer v. Evans* (1996) the Supreme Court ruled that a Colorado constitutional amendment invalidating state and local laws that protected homosexuals from discrimination was unconstitutional because it violated the equal protection clause of the Fourteenth Amendment.

The Elderly

Discrimination has also been an issue with the elderly. Job discrimination made it difficult for older people to find work. As a result, in 1967 Congress passed the Age Discrimination in Employment Act, prohibiting employers from discriminating against individuals over the age of 40 on the basis of age.

Affirmative Action

Affirmative action is a policy designed to correct the effects of past discrimination. Most issues of affirmative action are race or gender based. In 1978 the Supreme Court ruled in *Regents of the University of California v. Bakke* that the affirmative action quotas used by the University of California in their admissions policies were unconstitutional, and that Bakke had been denied equal protection because the university used race as the sole criterion for admissions. In the more recent *Hopwood v. Texas* (1996) the Court struck down the University of Texas Law School's admissions program, stating that race could not be used as a factor in deciding which applicants to admit to achieve student body diversity, to prevent a hostile environment at the law school, to counteract the law school's reputation among minorities, or to end the effects of past discrimination by institutions other than the law school. In 2003 the Supreme Court ruled that universities within the jurisdiction of the Fifth Circuit can use race as a factor in admissions as long as quotas are not used. In recent court decisions the court seems to be taking a more conservative view of affirmative action programs and many fear that affirmative action is on the decline.