CIVICS: Civil Liberties

INTRODUCTION

Civil liberties are *enumerated (written into the Constitution)* individual legal and constitutional protections against the government. Although Americans' civil liberties are established in the Bill of Rights, the courts determine what the Constitution actually means through the cases they decide. Disputes about civil liberties are frequent because the issues involved are complex and divisive.

THE BILL OF RIGHTS—THEN AND NOW

Political scientists have discovered that people are advocates of rights in theory, but their support wavers when it comes time to put those rights into practice. Cases become particularly difficult when liberties are in conflict—such as free press versus a fair trial or free speech versus public order—or where the facts and interpretations are subtle and ambiguous. The Bill of Rights is fundamental to Americans' freedom. All of the state constitutions had bills of rights by the time of the 1787 convention, and the issue of adding a bill of rights to the proposed national constitution had become a condition of ratification. The Bill of Rights was passed as a group by the First Congress in 1789; the first ten amendments were ratified and became part of the Constitution in 1791.

The **Bill of Rights** was written to restrict the powers of the new central government. The **First Amendment** establishes the four great liberties: freedom of the press, of speech, of religion, and of assembly. What happens, however, if a state passes a law violating one of the rights protected by the federal Bill of Rights and the state's constitution does not prohibit this abridgement of freedom? In 1833, the Supreme Court ruled that the Bill of Rights restrained only the national government and not states and cities. It was not until 1925 that the Court relied on the **Fourteenth Amendment** (which stated that states could not deny citizens their due process and equal protection rights) to find that a state government must respect some First Amendment rights by announcing that freedoms of speech and press "were fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states." The Supreme Court gradually applied most of the Bill of Rights to the states, particularly during the era of Chief Justice Earl Warren in the 1960s. This is known as the concept of the **incorporation doctrine**. At the present time, only the Third, and Seventh Amendments and the grand jury requirement of the Fifth Amendment have not been applied specifically to the states.

FREEDOM OF RELIGION

The First Amendment makes two basic statements about religion and government, commonly referred to as the **establishment clause** (no national endorsement of one religion) and the **free exercise clause** (can't prohibit people's religious practices.) Sometimes these freedoms conflict, but cases involving these clauses usually raise different kinds of conflicts.

Some people believe that the **establishment clause** meant only that the government could not favor one religion over another thus prohibiting it from establishing a "national religion." Thomas Jefferson argued that the First Amendment created a "wall of separation" between church and state that forbade any support for religion at all. However, debate has been especially intense over questions of aid to church-related schools and prayers or Bible-reading in the public schools. School prayer is possibly the most controversial religious issue. In 1962, (*Engel v. Vitale*) the Court ruled that voluntary recitations of prayers or Bible passages, when done as part of exercises in public schools, violated the establishment clause. A majority of the public has never favored the Court's decisions on school prayer. Some religious groups pushed for a constitutional amendment permitting school prayer, and many school districts simply

ignored the decision. In *Employment Division v. Smith* (1990), the Supreme Court ruled that states can prohibit certain religious practices, but not religion itself.

There has always been a fine line between aid to church-related schools that is permissible and aid that is not. In *Lemon v. Kurtzman,* 1971, the Supreme Court created the "**Lemon Test**" and declared that aid to church related schools A) must have a secular legislative purpose, B) cannot be used to advance or inhibit religion, and C) should avoid excessive government "entanglement" with religion. In a landmark decision in 2002, the Court in *Zelman v. Simmons-Harris* upheld a program that provided some families in Cleveland, Ohio, with vouchers that could be used to pay tuition at religious schools IF it meets the stipulations of the lemon test.

Conservative religious groups have had an impact on the political agenda. They devoted much of their time and energies in recent years to the issues of school prayer and creation science, and while they lost some battles (such as the battle over teaching creation science in the public schools), they have won others (for example, the Court decision that religious scenes could be set up on public property). Thus, in 1992, the Court ruled that a school-sponsored prayer at a public school graduation violated the constitutional separation of church and state. In 2000, the Court held that student-led prayer at football games was also unconstitutional.

The guarantee of free exercise of religion is also more complicated than it appears at first glance. The free exercise of religious beliefs sometimes clashes with society's other values and laws. The Supreme Court has consistently maintained that people have an absolute right to believe what they want, but the courts have been more cautious about the right to practice a belief.

FREEDOM OF SPEECH (EXPRESSION)

In various cases over the past century, the federal courts have expanded the definition of **freedom of speech** to include all sorts of *expression*. The courts have frequently wrestled with the question of whether freedom of expression (like freedom of conscience) is an absolute. The courts have often ruled that there are instances when speech needs to be controlled, especially when the First Amendment conflicts with other rights. In their attempts to draw the line separating permissible from impermissible speech, judges have had to balance freedom of expression against competing values like public order, national security, and the right to a fair trial.

The courts have also had to decide what kinds of activities constitute speech (or press) within the meaning of the First Amendment. Certain forms of nonverbal communication (like picketing) are considered symbolic speech and are protected under the First Amendment. Other forms of expression are considered to be action and are not protected. The Court has generally struck down **prior restraint** (prohibiting the publication of certain things the government finds "dangerous") but allows it for national security purposes during the time of war.

Crises such as war often bring government efforts to enforce censorship. In *Schenck v. United States (1919)*, Justice Oliver Wendell Holmes declared that government can limit speech if it provokes a clear and present danger of "substantive evils." Free speech advocates did little to stem the relentless persecution of McCarthyism during the "cold war" of the 1950s, when Senator Joseph McCarthy's unproven accusations that many public officials were Communists created an atmosphere in which the courts placed broad restrictions on freedom of expression. By the 1960s, the political climate had changed, and courts today are very supportive of the right to protest, pass out leaflets, or gather signatures on petitions (as long as it is done in public places).

Efforts to define obscenity have perplexed the courts for years. Although the Supreme Court has held that, "obscenity is not within the area of constitutionally protected speech or press" (*Roth v. United States,* 1957), it has proven difficult to determine what is legally obscene. The Court tried to clarify its doctrine by spelling out what could be classified as obscene and thus outside First Amendment protection in the 1973 case of *Miller v. California*. Known as the **"Miller Test,"** then, Chief Justice Warren Burger wrote that materials were obscene if, taken as a whole, A) they appealed "to a prurient interest in sex"; that B) they showed "patently offensive" sexual conduct that was specifically defined by an obscenity law; and that, taken as a whole, C) they lacked "serious literary, artistic, political, or scientific value." Advances in technology have created a new wrinkle in the obscenity issue. The Internet and the World Wide Web make it easier to distribute obscene material rapidly, and a number of online information services have taken advantage of this opportunity.

In 1996, Congress passed the Communications Decency Act, banning obscene material and criminalizing the transmission of indecent speech or images to anyone under 18 years of age. The new law made no exception for material that has serious literary, artistic, political, or scientific merit as outlined in *Miller v. California*. In 1997, the Supreme Court overturned this law as being overly broad and vague and a violation of free speech. In 2002, the Court overturned a law banning virtual child pornography on similar grounds. Apparently the Supreme Court views the Internet similarly to print media, with similar protections against government regulation.

Libel and slander also raise freedom of expression issues that involve competing values. If public debate is not free, there can be no democracy. Conversely, some reputations will be unfairly damaged in the process if there are not limitations. **Libel** (the publication of statements known to be false that tend to damage a person's reputation) and **slander** (spoken defamation) are not protected by the First Amendment, but the Court has held that statements about public figures are libelous only if made with malice and reckless disregard for the truth (New York Times v. Sullivan, 1964) The right to criticize the government (which the Supreme Court termed "the central meaning of the First Amendment") is not libel or slander.

Wearing an armband, burning a flag, and marching in a parade are examples of **symbolic speech**: actions that do not consist of speaking or writing but that express an opinion. When Gregory Johnson set a flag on fire at the 1984 Republican National Convention in Dallas to protest nuclear arms buildup, the Supreme Court decided that the state law prohibiting flag desecration violated the First Amendment (*Texas v. Johnson, 1989*).

COMMERCIAL SPEECH

Commercial speech (such as advertising) is more restricted than are expressions of opinion on religious, political, or other matters. Similarly, radio and television stations are subject to more restrictions than the print media (justified by the fact that only a limited number of broadcast frequencies are available). The **Federal Trade Commission (FTC**) decides what kinds of goods may be advertised on radio and television and regulates the content of such advertising. The FTC attempts to ensure that advertisers do no make false claims for their products, but "truth" in advertising does not prevent misleading promises. Nevertheless, commercial speech on the airwaves is regulated in ways that would clearly be impossible in the political or religious realm.

The **Federal Communications Commission (FCC)** regulates the content, nature, and very existence of radio and television broadcasting. Although newspapers do not need licenses, radio and television stations do. The state of Florida passed a law requiring newspapers in the state to provide space for political candidates to reply to newspaper criticisms. The Supreme Court, without hesitation, voided this law

(*Miami Herald Publishing Company v. Tornillo, 1974*). Earlier, in *Red Lion Broadcasting Company v. Federal Communications Commission (1969),* the Court upheld similar restrictions on radio and television stations, reasoning that such laws were justified because only a limited number of broadcast frequencies were available.

FREEDOM OF ASSEMBLY

There are two facets to freedom of assembly. The right to assemble involves the right to gather together in order to make a statement, while the right to associate is the freedom to associate with people who share a common interest. The Supreme Court has generally upheld the right of any group—no matter how controversial or offensive—to peaceably assemble on public property. The balance between freedom and order is tested when protest verges on harassment.

RIGHT TO BEAR ARMS

Gun control has been very controversial. Many national, state, and local laws have been passed to regulate firearms. The National Rifle Association has invested millions of dollars to fight gun control. Surprisingly, the Supreme Court has rarely dealt with the issue. In 2008, the Supreme Court ruled in *District of Columbia v. Heller* that the **Second Amendment** protects an individual right to possess a firearm unconnected with service in a militia. Despite this ruling, the Second Amendment is not unlimited. Regulations such as restrictions on concealed weapons, limiting possession by felons and the mentally ill, forbidding firearms in certain areas, and restricting use are permitted.

DEFENDANTS'RIGHTS

The First Amendment guarantees the freedoms of religion, speech, press, and assembly. Most of the remaining rights in the Bill of Rights concern the rights of people accused of crimes. These rights were originally intended to protect the accused in political arrests and trials. Today, the protections in the Fourth, Fifth, Sixth, and Eighth Amendments are primarily applied in criminal justice cases. Moreover, the Supreme Court's decisions have extended most provisions of the Bill of Rights to the states as part of the general process of incorporation.

The Bill of Rights covers every stage of the criminal justice system. The **Fourth Amendment** is quite specific in forbidding unreasonable searches and seizures. No court may issue a search warrant unless probable cause exists to believe that a crime has occurred or is about to occur, and warrants must describe the area to be searched and the material sought in the search. Since 1914, the courts have used the **exclusionary rule** to prevent illegally seized evidence from being introduced in federal courts. In 1961, the Supreme Court incorporated the exclusionary rule within the rights that restrict the states as well as the federal government (*Mapp v. Ohio*). A number of exceptions have since been made to the exclusionary rule, including the good-faith exception (*United States v. Leon, 1984*) which allows illegally obtained evidence to be used IF the court determines that the police acted in "good faith" despite errors in search protocol.

Additionally, the USA Patriot Act, passed just six weeks after the September 11, 2001, terrorist attacks, gave the government broad new powers for the wiretapping, surveillance, and investigation of terrorism suspects. The Patriot Act gave the federal government the power to examine a terrorist suspect's records held by third parties such as doctors, libraries, bookstores, universities, and Internet service providers. It also allowed searches of private property without probable cause and without notice to the owner until after the search has been executed.

Under the **Fifth Amendment** prohibition against forced self-incrimination, suspects cannot be compelled to provide evidence that can be used against them. The burden of proof rests on the police and the prosecutors, not the defendant. *Miranda v. Arizona (1966*) set guidelines for police questioning of suspects, whereby suspects must be informed of their constitutional rights (these have become know as **"Miranda Rights.**")

Although the Sixth Amendment has always ensured the right to counsel in federal courts, this right was not incorporated to state courts until recently. In 1932, for indigent defendants accused of a capital crime and in 1963, the Supreme Court ordered states to provide an attorney to everyone accused of a felony (*Gideon v. Wainwright)*. The Sixth Amendment also ensures the right to a speedy trial and an impartial jury, but most cases are settled through plea bargaining rather than through trial by jury. In recent times the Supreme Court has against judicial procedures enacted by the Bush administration used against "detainees" and others accused of terrorism.

The Eighth Amendment forbids cruel and unusual punishment, but it does not define the phrase. Most of the constitutional debate over cruel and unusual punishment has centered on the death penalty. In *Furman v. Georgia (1972)*, the Court first confronted the question of whether the death penalty is inherently cruel and unusual punishment. A divided Court overturned Georgia's **death penalty** law because its imposition was "freakish" and "random" in the way it was arbitrarily applied (particularly with regard to factors such as race and income). Thirty-five states passed new laws that were intended to be less arbitrary. In recent years, the Court has come down more clearly on the side of the death penalty. A divided Court rebuffed the last major challenge to the death penalty in *McCleskey v. Kemp (1987),* when it refused to rule that the penalty violated the equal protection of the law guaranteed by the Fourteenth Amendment. However, the number of death sentences issued has been sharply declining in the last decade due to DNA testing and public concerns about wrongful sentences.

THE RIGHT TO PRIVACY

Today's technologies raise key questions about ethics and the Constitution. Although the Constitution does not specifically mention a **right to privacy**, the Supreme Court has said that it is implied by several guarantees in the Bill of Rights. Questions involving a right to privacy have centered on such diverse issues as abortion rights, the drafting of state laws to define death, technological developments like in-vitro fertilization, and the right to die. Supporters of privacy rights argue that the Fourth Amendment was intended to protect privacy. Opponents claim that the Supreme Court was inventing protections not specified by the Constitution when it ruled on constitutionally protected "rights of privacy."

The Supreme Court first referred to the idea that the Constitution guarantees a right to privacy in a 1965 case involving a Connecticut law that forbade contraceptives (***Griswold v. Connecticut),*** saying that the Ninth Amendment provides a "penumbra" of rights for individuals including the presumption of privacy. But the most important application of privacy rights came in the area of abortion. Americans are deeply divided on abortion: the positions of "prochoice" and "pro-life" are irreconcilable.

Justice Harry Blackmun's majority opinion in ***Roe v. Wade (1973***) followed the practice of medical authorities in dividing pregnancy into three equal trimesters. Roe forbade any state control of abortions during the **first trimester**; permitted states to allow regulated abortions to protect the mother's health in the **second trimester**; and allowed the states to ban abortion during the **third trimester** except when the mother's life was in danger. In 1989, a clinic in St. Louis challenged the constitutionality of a Missouri law that forbade the use of state funds or state employees to perform abortions, but the Court upheld the law in *Webster v. Reproductive Health Services (1989*). In 1992, the Court changed its standard for evaluating restrictions on abortion from one of "strict scrutiny" of any restraints on a "fundamental right"

to one of "undue burden" that permits considerably more regulation (*Planned Parenthood v. Casey*). In 2000, the Court held in *Sternberg v. Carhart* that Nebraska's prohibition of "partial birth" abortions was unconstitutional because it placed an undue burden on women seeking an abortion by limiting their options to less safe procedures and because the law provided no exception for cases where the health of the mother was at risk. Beginning in 1994, the Supreme Court strengthened women's access to health clinics, while Congress passed the Freedom of Access to Clinic Entrances Act, which made it a federal crime to intimidate abortion providers or women seeking abortions.

UNDERSTANDING CIVIL LIBERTIES

American government is both democratic (because it is governed by officials elected by the people and answerable to them) and constitutional (because it has a fundamental organic law, the Constitution, that limits the things government can do). The democratic and constitutional components of government can produce conflicts, but they also reinforce one another. One task that government must perform is to resolve conflicts between rights. The rights guaranteed by the First Amendment are essential to a democracy. Likewise, the rights guaranteed by the Fourth, Fifth, Sixth, and Eighth Amendments protect all Americans, but they also make it harder to punish criminals. Ultimately, it is the courts that decide what constitutional guarantees mean in practice: although the federal courts are the branch of government least subject to majority rule, the courts enhance democracy by protecting liberty and equality from the excesses of majority rule.