CIVIL LIBERTIES

Basic rights that Americans take for granted were not specifically included in the Constitution as ratified. Although trial by jury was guaranteed, and neither the federal government nor the states could revoke habeas corpus, state constitutions didn't mention freedom of religion, speech, or the press. The Antifederalists were quick to point this out, and supporters of the Constitution agreed to remedy the situation through the amendment process as the price for ratification. The terms "civil liberties" and "civil rights" are often used interchangeably, but to do so is incorrect because their definitions are different. **Civil liberties** are individual protections against actions by the government guaranteed to every citizen by the Bill of Rights and the due process clause of the Fourteenth Amendment. **Civil rights**, on the other hand, deal with the protection of individuals against discrimination, and is based on the equal protection clause of the Fourteenth Amendment, subsequent amendments, and laws enacted by Congress.

Perspectives on the Bill of Rights

The first ten amendments to the Constitution ratified in 1791 are the Bill of Rights. You should understand, however, that only the first eight pertain to individual rights such as freedom of religion, protection against unreasonable search and seizure, and the right to counsel. The Ninth Amendment holds out the prospect that there may be other rights not included in the Constitution, and the Supreme Court has found a right to privacy in this language. The Tenth Amendment, on the other hand, does not deal with individual liberties at all but with reserved powers of the states. It became the basis for states' rights arguments, and is more relevant to civil rights issues than civil liberties.

The clear purpose of the Bill of Rights was to prevent the abuse of power by the federal government. The First Amendment does not say, "No law shall be made . . . abridging the freedom of speech or of the press. . . ." Instead, it states very specifically that "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ." The Court rejected the notion that the Bill of Rights also applied to the states in *Barron v. Baltimore* (1833), and held to this position throughout most of the nineteenth century. In its landmark decision in *Gitlow v. New York* (1925), the freedom of speech and press protections of the First Amendment were extended to the states. In a series of cases that followed, the Court held that most, but not all, of the provisions of the Bill of Rights limit municipalities and states as well as the federal government through the Fourteenth Amendment. This is known as the **incorporation doctrine**. The parts of the Bill of Rights not incorporated are the Second and Third Amendments, and indictment by grand jury (Fifth Amendment), trial by jury in civil cases (Seventh Amendment), and excessive bail and fines (Eighth Amendment).

Even through selective incorporation, the Court has considerably expanded the role of the federal government in protecting individual civil liberties.

The First Amendment: Freedom of Religion

The First Amendment spells out what Americans consider their fundamental rights: freedom of religion, speech and the press (sometimes combined into freedom of expression), the right to assemble, and the right to petition the government. For more than two centuries, the Supreme Court has made it very clear that these rights are not without their restrictions. An individual cannot do anything he/she wants and claim the protection of freedom of religion; a person cannot say anything that comes to mind under the guise of free speech. There are limits, and the history of the First Amendment is determining what those limits are.

There are two aspects to freedom of religion:

- **The establishment clause** that pertains to the separation of church and state
- **The free exercise clause** that prohibits the government from interfering in the way in which religion is practiced

Under the establishment clause, the Court has rather consistently ruled that prayer in the public schools is, in effect, state-sponsored prayer and is thereby unconstitutional (*Engel v. Vitale*, 1962). The fact that the prayers were non-denominational or were said at a graduation ceremony is not relevant. At the same time, the Court recognized that interaction between the government and religion is inevitable. In *Lemon v. Kurtzman* (1971), the Court held that a law or state action regarding religion was constitutional if it met three criteria:

- There must be a secular purpose
- The primary effect is not to advance/inhibit religion
- Government is not excessively entangled with religion

The criteria are known as the **Lemon Test**. In recent years, the Court has moved closer toward accommodation. Use of school facilities cannot be denied to religious clubs or groups if available to other school or community organizations. Public school teachers providing remedial services to disadvantaged students in parochial schools is not an "excessive entanglement" with religion (*Agostini v. Felton*, 1997). In *Zelman v. Simmons-Harris* (2002), the Supreme Court upheld an Ohio school voucher program, recognizing that the government may provide financial aid to parents who want to send their children to private schools that may be religious or secular.

Regarding the free exercise clause, there are limits the government can put on the right of individuals to worship as they wish. For example, judges routinely order autopsies even if a family is opposed on religious grounds when there is a compelling state interest to do so. The need to gather evidence of a crime or to protect the public health are two more instances of compelling state interest. In *Employment Division v. Smith* (1990), the Supreme Court upheld an Oregon law that made using illegal drugs in a religious ceremony a crime. The Court pointed out that the free exercise clause only protects against laws intended to disadvantage religion. Many religious groups felt the ruling weakened the First Amendment protections of religious practices, and worked to reverse the decision in Congress. But the Court found the Religious Freedom Restoration Act unconstitutional as well.

First Amendment: Freedom of Speech and the Press

The basic question is what type of expression, either in terms of speech or press, is *not* protected under the First Amendment. The Supreme Court has generally found that obscenity, libel, and words that incite are not protected. In *Schenck v. United States* (1919), the **clear and present danger test** was established; a person cannot yell "fire" in a crowded theater. The emphasis has shifted over the years to direct connection, the proximity, of the words to the danger. "Fighting words" that lead to "an immediate breach of the peace" are an example the Court noted in *Chaplinsky v. New Hampshire* (1942). The Court has long considered obscene materials as outside free speech protection. Courts now face the challenge of determining what is obscene. As outlined in *Miller v. California* (1973), a work is obscene if:

- It appeals to purient interests based on contemporary community standards
- It depicts sexual activity in a patently offensive manner
- It does not have "literary, artistic, political, or scientific value" (the so-called **LAPS Test)**

While the government cannot establish rules on what we can or cannot publish (meaning there is nothing to prevent the publication of obscene materials), which courts consider as **prior restraint** or censorship, the courts can impose punishment after the fact. The same is true for statements that are false or libelous where the intent is to defame the character of an individual.

The most notable case on prior restraint is *New York Times v. United States* (1971) where the Court refused to block printing of the Pentagon Papers, a collection of classified Department of Defense documents on the history of the Vietnam War. In another case involving the *New York Times*, the Court made it more difficult for public officials to sue for libel (defamatory material in print) or slander (defamatory speech). The public officials have to show malice — that an editor, for example, knew the information in the story was false but published it anyway, showing a "reckless disregard for the truth" (*New York Times v. Sullivan*, 1964). This is a higher standard of proof than the courts require of an average person.

Actions are sometimes considered speech that fall under the First Amendment. The right of students to wear black armbands to protest the Vietnam War was upheld as symbolic speech (*Tinker v. Des Moines Independent Community School District*, 1969). Burning an American flag during a demonstration against the policies of the Reagan Administration was also protected the Court held in *Texas v. Johnson* (1989).

In the wake of the latter decision, Congress passed the Federal Flag Protection Act that made desecrating the flag a federal offense. The law was struck down as a violation of free speech, and attempts to get a constitutional amendment on flag burning through Congress have failed.

There are a number of other issues that come up under freedom of expression. Often a conflict arises between First Amendment rights and other rights. Reporters have claimed that the constitutional guarantees of a free press do not require them to turn over information about confidential sources to a court even though that information may be essential to a fair trial. Courts have

consistently ruled against this interpretation, but a number of states have enacted **shield laws** to give journalists a limited degree of protection against the disclosure of sources. Commercial speech is the most regulated form of expression. The First Amendment does not protect false or misleading advertising, however, it does permit the ads that ban cigarettes and other tobacco products. Television and radio programming falls under the jurisdiction of the Federal Communications Commission, which controls the time of day when a station can air "indecent speech." During the 1990s, colleges across the country banned offensive speech against racial/ethnic groups, women, and homosexuals on the grounds that it created an intimidating or hostile atmosphere. The courts found many of the codes against **hate speech** unconstitutional.

The Rights of Criminal Defendants

The Fourth, Fifth, Sixth, and Eighth Amendments pertain to procedural issues involving suspects in a crime and criminal defendants. They cover search warrants and right to counsel, as well as protection against self-incrimination, and cruel and unusual punishment.

The Fourth Amendment protects individuals against "unreasonable search and seizure," and states quite clearly the requirements for obtaining a search warrant. Under the **exclusionary rule**, evidence that is seized illegally is not admissible in court (*Mapp v. Ohio*, 1961). Further, if authorities discover additional evidence by relying on the illegal search, then authorities cannot use that evidence at trial; it is the **fruit of the poisonous tree**. In an attempt to balance individual rights with the needs of society, courts have allowed warrantless searches in a variety of instances. The police can search a person who they arrest, and can take into evidence items that are in plain sight at the time of the arrest. Evidence that authorities obtain through an improper search warrant may be admissible under the **good faith exception**—if the police believed the information they used to establish probable cause was valid but it was not. The Supreme Court has allowed questionable evidence to be used if it "ultimately" would have been found by legal means. This is known as **inevitable discovery.** There is also an **automobile exception.** Authorities can search a car and its passenger if there is a valid reason to stop the car in the first place.

A key provision of the Fifth Amendment is the provision against self-incrimination; authorities cannot compel a person "to be a witness against himself" in a criminal case. There is a close relationship between this protection and the Sixth Amendment right to counsel. Two landmark cases in the 1960s bear this out. In *Escobedo v. Illinois* (1964), the Court ruled that a confession cannot be used against a suspect who asked for but was refused access to an attorney. The justices expanded the rights of criminal defendants two years latter in *Miranda v. Arizona* (1966) by requiring the police to inform an individual at the time of arrest of his/her right against self-incrimination and to an attorney. The Court even outlined the essential elements of what became known as the **Miranda warning**:

- Right to remain silent
- Any statements given can be used as evidence
- Right to have an attorney present during questioning
- An attorney is appointed by the court if the suspect cannot afford one

Miranda not only expanded on *Escobedo*, but incorporated the finding in *Gideon v. Wainwright* (1963) that legal counsel is indispensable to a fair trial, and that the state must provide an attorney to poor defendants in criminal cases. Today, this right is required in any case where a prison term is possible.

Cases involving the Eighth Amendment ban on "cruel and unusual punishment" center on the death penalty. The Supreme Court struck down all state death penalty statutes in *Furman v. Georgia* (1972) because the laws were so unevenly applied. It was much more likely for a poor or an African American defendant convicted of a capital crime to face execution than it was for a white person. New legislation was enacted to address the Court's concerns. In *Gregg v. Georgia* (1976), the Court affirmed the constitutionality of the death penalty per se. In a recent ruling in *Atkins v. Virginia* (2002), the Court held that the execution of mentally retarded criminals is cruel and unusual punishment, and violates the Eighth Amendment.

Constitutional questions are also raised about the effectiveness of counsel in death penalty cases and the number of recent instances where DNA evidence has either resulted in the release of death row inmates or new trials.

The Right of Privacy

A right of privacy is not mentioned in the Constitution. The Supreme Court, as it did with judicial review, found that such a right was implied. In *Griswold v. Connecticut* (1965), which struck down a state law that prohibited birth control counseling and made the use of contraceptives by married couples illegal, the Court maintained that privacy was constitutionally protected through the First, Third, Fourth, Fifth, and Ninth Amendments. Several controversial issues failed under the right to privacy — abortion and the right to die.

A woman's right to an abortion was recognized in *Roe v. Wade* (1973). While the right is absolute in the first three months of pregnancy, the states can regulate when, where, and how doctors can perform abortions in the second trimester; states can ban abortions in the third trimester except when the health or life of the mother is at stake. The Court has heard numerous abortion cases since *Roe*, imposing additional limits on the procedure. It upheld the ban Congress imposed on the use of Medicare funds for abortion. States can now prohibit abortions in public hospitals or other medical facilities, again with the health of the mother exception (*Webster v. Reproductive Health Services*, 1989). States can impose other type of restrictions that do not impose an "undue burden" on women seeking an abortion. These include a mandatory 24-hour waiting period and parental consent from a minor seeking an abortion (*Planned Parenthood v. Casey*, 1992). Attempts to get around *Roe* through a constitutional amendment have gotten nowhere in Congress, but pro-choice groups are concerned that a change in the composition of the Court could lead to a reversal of the decision.

Advances in medical technology have impacted the abortion debate — for example, fetal viability tests in the second trimester — and have raised the constitutional question of the right to die. The fact is that technology can keep a person "alive" on various life-support systems indefinitely. To avoid such an end or the agony that can accompany a terminal illness, many people

have living wills or sign Do Not Resuscitate orders, stating that no extraordinary measures should be taken to prolong their lives. The key case on the right to die is *Cruzan v. Director, Missouri Department of Heath* in 1990. While refusing to allow the parents of a comatose patient to remove a feeding tube, the Court did indicate that competent individuals could refuse medical treatment though a living will or a similar document such as a Do Not Resuscitate (DNR) order. On the other hand, laws that prohibit physician-assisted suicide are constitutional because there is a difference between refusing treatment and intervening to bring about a person's death (*Vacco v. Quill*, 1997).

Sample Multiple-Choice Questions

1. Which of the following Supreme Court decisions dealt with the issue of prior restraint?

   A. *New York Times v. Sullivan*
   B. *United States v. Nixon*
   C. *New York Times v. United States*
   D. *Miller v. California*
   E. *Near v. Minnesota*

2. The recent trend of the courts with respect to the rights of criminal defendants can be best described by which of the following?

   A. Police and prosecutors have greater flexibility in collecting evidence.
   B. Courts are reluctant to grant warrants because of police corruption.
   C. The police are permitted to ignore the Fourth Amendment.
   D. The use of confidential informants by the police is unconstitutional.
   E. Individuals placed under arrest no longer have to be given the Miranda warning.

3. The Religious Freedom Restoration Act was intended to

   A. restore prayer to the public schools
   B. weaken the application of the Lemon Test
   C. approve Sunday closing laws in several states
   D. make sure courts use the compelling state interest test
   E. allow public schools to be used by religious groups

4. Which of the following basic liberties was NOT protected by the Constitution before the adoption of the Bill of Rights?

   A. There can be no religious test for holding elected office.
   B. Trial by jury was guaranteed in criminal cases.
   C. The right to vote was recognized for all citizens.
   D. Neither Congress nor the states could enact ex post facto laws.
   E. The right of habeas corpus was protected.