The Bill of Rights

An Introduction

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Preface

On December 15, 1791, Virginia became the eleventh state to ratify the 10 amendments which make up the Bill of Rights, which then became part of the United States Constitution. It had taken two years, and long debates, for these amendments to be adopted by the necessary three-fourths of the states.

This booklet is intended to assist in celebrating the bicentennial of this historic event. It is designed for use by schools and other organizations, in the classroom, public forums and other media. We hope thorough discussion of the Bill of Rights during the 1991 bicentennial year will bring not only a better understanding of the Bill of Rights but an appreciation of what the rights have meant, and the role they have played, in the life of this nation.

The Impact of the Bill of Rights

The first eight amendments limit the power of government by specifying a list of rights and liberties. The Ninth Amendment suggests that rights other than those listed may also exist. The Tenth Amendment underlines the fact that the national government exercises only powers granted to it under the Constitution.[1]

Today, because of the Fourteenth Amendment of 1868, most provisions of the Bill of Rights also limit state and local governments. The Bill of Rights cannot lawfully be violated by the government unless the Constitution of the United States is amended.[2] Ordinary laws, therefore, can not amend the Bill of Rights. If speech is protected by the First Amendment, that speech may not be punished by government unless the First Amendment is reinterpreted, repealed, or modified by another part of the Constitution.

☆ Who interprets the Bill of Rights?

The Bill of Rights is a legal document containing majestic, but vague, words and phrases. Phrases such as "freedom of speech" and "due process of law" have roots deep in our history. Courts, police, public officials, administrators, and legislatures interpret the Bill of Rights every day. We live today with inventions, radio, automobiles, aircraft, and telephones that create problems the drafters of the Bill of Rights could not anticipate.

☆ Rights and Duties

The existence of a right implies the existence of a duty. For example, if you have a "right" to free speech, then governments have a "duty" to honor that right. Interpretation of the Bill of Rights involves defining the rights and corresponding duties. A private individual has no obligation under the Bill of Rights unless that private person is found to be acting on behalf of government.

1 The national government has only the powers granted to it under the Constitution. State governments, however, have all power unless forbidden by either the state constitution, or by the national constitution.

2 Several amendments to the Constitution were enacted to reverse constitutional interpretations made by the courts, including the Eleventh Amendment, the Fourteenth Amendment, the Nineteenth Amendment and the Twenty-sixth Amendment.

☆ Factors Leading to the Bill of Rights

Three factors contributed to the adoption of the Bill of Rights in 1791.

I Many supporters of the new Constitution of the United States feared that the new national government might abuse its powers.

II. Many people believed that there were fundamental rights that no government should abuse. Supporters of a bill of rights decided that some of those rights could be, and should be, identified in a written document. The idea of expressing fundamental rights in a written document was familiar to Americans in 1791.

III. Americans inherited a tradition of expressing and recording firm limits on government power growing out of the English struggles against their monarchs. That tradition was voiced in the laws and constitutions of the several states before 1791.

☆ Fear of National Governmental Power

Thomas Jefferson who represented the United States in France, and hence did not attend the Constitutional Convention in Philadelphia, was a leading critic of the new Constitution. He and others faulted the original Constitution for its failure to identify fundamental rights which the national government should not abridge.

Eight of the 13 states ratified the Constitution with an understanding that a Bill of Rights would be added. After all,we fought the American Revolution because we suffered under an abusive government. We should be certain, they said, that the new Constitution did not create another instrument of tyranny.

✩ Rights Protected by the Constitution before the Bill of Rights

Many supporters of the Constitution argued that a Bill of Rights was unnecessary because the Constitution only granted specific powers. Therefore to list rights which government should protect, implied power to abridge interests not limited.[3]

Furthermore, the Constitution, even without amendments, contains several important limits on governmental power designed to protect the liberty of individuals. For example, the national government can not suspend the writ of habeas corpus except in grave emergencies (the "writ" is a court order requiring that persons holding custody of a person justify the detention);[4] Congress may not enact retroactive criminal laws;[5] and the right of trial by jury in federal trials is secured.[6] The Privileges and Immunities Clause of Article IV guarantees freedom of interstate travel.

These protections were not enough to satisfy critics of the Constitution partly because of a widespread belief that fundamental rights existed which no government could lawfully violate.

✩ Fundamental Rights

The Constitution of eleven of the States in 1788 reflected a belief that rights exist simply because of the nature and structure of society. This view was widely accepted in the 18th Century.[7] The Declaration of Independence of 1776 includes references to "natural law."

> *"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...."*

The original thirteen states adopted either separate bills (or declarations) of rights, or placed guarantees of individual liberty within the state constitutions. The Bill of Rights of the State of Virginia was particularly influential in supplying James Madison with a model of how to express the rights of individuals.

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3 Alexander Hamilton made this argument in Federalist No. 84.

4 Art I •9 cl. 2.

5 Art I •9 cl.3.

6 Art. III •2 cl. 3.

7 Whether or not the Courts are empowered to enforce "natural rights" was debated by Supreme Court Justices in 1798 in Calder v. Bull, 3 U.S. (3 Dall.) 386. Justice Iredell argued that courts can't pronounce a law to be void merely because "it is, in their judgement, contrary to the principles of natural justice." Justice Chase, on the other hand, argued that law "contary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority...."

☆ Inherited Traditions

Guarantees of liberty within state constitutions are traced to traditions brought to this continent by European settlers. These traditions are mostly the product of struggles of the English with their kings; a history known to Americans. The promises extracted from monarchs, and the rights thus gained supplied useful examples of how government power might be limited, and how individual rights might be secured by law.

☆ Madison's Draft

President Washington and the First Congress in 1789 agreed on the need for amendments, and young James Madison of Virginia was called upon to draft proposals. He had been elected to Congress after promising his constituents that he would advocate amendments to the Constitution. Madison believed that the amendments would be enforced by the courts, and that courts would become "an impenetrable bulwark against every assumption of power in the legislative or executive [branches]."

Much of James Madison's draft of the Bill of Rights is traceable to demands which English kings were forced to honor. The due process clause of the Fifth Amendment, for example, is rooted in the Magna Carta of 1215, extracted from King John; rights to jury trial are traceable to even earlier English practices, and to the Petition of Right of 1628, directed against King Charles I (who was subsequently executed). The British Bill of Rights of 1689, which King William and Queen Mary promised to obey, contains provisions relating to free speech, impartial juries, and rights against cruel and unusual punishment.

☆ Our Imperfect Constitution

Slavery was protected under the Constitution of 1787.[8] Tension between the institution of slavery and belief in individual liberty was not resolved legally until the 13th Amendment abolished slavery in 1866. Neither did the Bill of Rights or the Constitution focus on the rights of women. The right of women to vote, for example, was not guaranteed as a matter of national law until the adoption of the Nineteenth Amendment in 1920.

☆ Extending the Bill of Rights to Limit State Governments

Madison's draft proposed that states, as well as the national government, be prohibited from infringing on rights of religion, speech and the press. The Senate rejected this proposal because they believed that states might properly limit those freedoms in ways that the national government should not. After the 14th Amendment was adopted in 1868 it was argued that the limitations imposed on the national government by the Bill of Rights ought to be similarly imposed on the states. That argument continued for nearly 100 years.

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8 Today the original Constitution is criticized for other defects. It did not guarantee the right to vote in federal elections, presidents are elected by electors not by popular vote, and the Senate is selected without regard to population.

The extension of most of the Bill of Rights to limit state and local governments was a long, complex, and sharply debated process. In 1925 the Supreme Court said states were also obliged to guarantee freedom of speech and of the press, because they were included within the due process clause of the 14th Amendment.[9] In 1940 freedom of religion was added to the limits placed on state governments.[10] In 1961 the Supreme Court held that the guarantees against unreasonable searches and seizures, found in the Fourth Amendment, applied to the states as they did to the national government.[11] Similarly in 1969 the Court held that the double jeopardy guarantees of the Fifth Amendment applied to the states.[12]

Today, most but not all, of the specific commands of the Bill of Rights apply equally to limit state government power. Exceptions include the command that the federal courts must, under the Seventh Amendment, give a right to a trial by jury in all civil suits. Also states need not begin criminal prosecutions by using grand juries.

☆ Additional Rights under State Law

All state constitutions include provisions to protect individual liberty.[13] Sometimes courts conclude that while a particular state's behavior does not violate the Bill of Rights (applicable to the state because of the 14th Amendment), that behavior may nevertheless violate the state's own constitution or laws. States may impose more severe limits on governmental power than required by the United States Constitution. States may grant rights additional to those listed in the Bill of Rights. For example, some states confer a right to public education.

☆ The Bill of Rights and the Supreme Court

Interpretations by the Supreme Court of the United States are usually considered the most important. These are recorded in nearly 500 volumes of reported decisions. Many decisions are controversial, and the Justices frequently decide by a one vote margin, i.e. by 5 votes to 4. Sometimes the views of a dissenting Justice are adopted by the full Court at a later time.

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9 Gitlow v. New York, 268 U.S. 652 (1925). Over the dissents of Holmes and Brandeis the Court upheld convictions for criminal anarchy, but the majority recognized that the Fourteenth Amendment required some protections for speech and press.

10 Cantwell v. Connecticut, 310 U.S. 296 (1940) struck down the breach of the peace conviction of a person distributing religious materials.

11 Mapp v. Ohio, 367 U.S. 643 (1961).

12 Benton v. Maryland, 395 U.S. 784 (1969) holding that the double jeopardy principles binding the national government applied also to the states.

13 Article I •1 of Wisconsin's Constitution entitled "Declaration of Rights" includes language adopted from the Declaration of Independence of 1776.

The First Amendment

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.

Courts have interpreted the First Amendment to limit states, local governments, and others who act as agents or representatives of government.

☆ The Bill of Rights and Religion

Settlers in Massachusetts, Connecticut, Rhode Island, Pennsylvania and Maryland sought to escape religious oppression. Religious freedom was valued by Puritans, Pilgrims, Baptists, Congregationalists, Episcopalians and Catholics, as well as by other sects.

The colonists' desire for religious freedom is recorded in colonial (later state) laws and in early constitutions. The Virginia Bill of Rights of 1776 declared:

> *"That religion, or the duty which we owe to our Creator... can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience...."*[14]

Many of the early settlers came here to escape religious test oaths and to worship in their own way. Hence, the Constitution directs that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[15] This ban against religious tests was applied in 1961 when the Court struck down a Maryland law requiring office holders to swear to a belief in God before taking office.[16]

14 Art. 16, Virginia Bill of Rights (1776).

15 Article VI, cl. 3.

16 Torcaso v. Watkins, 367 U.S. 488 (1961). In McDaniel v. Paty, 435 U.S. 618 (1978) the Court struck down a state law forbidding clergy from holding elective office.

☆ Two Views of the Establishment Clause

What's meant by prohibiting the "establishment of a religion?" James Madison, chief draftsman of the Bill of Rights, feared that Congress might appropriate money to pay the clergy. This was unacceptable. Beyond this the meaning of the "establishment clause" remains debatable today. Modern judicial decisions reveal at least two views.

One view is that the purpose of the religion clauses was only to prevent Congress from taking positions on the rivalries among Christian sects. The purpose was not to prevent government from encouraging religious activity, because religious beliefs and the idea that government should encourage religion was widely shared. Thus the Northwest Ordinance of 1787, passed by the Continental Congress during the sessions of the Constitutional Convention, decreed that *"religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged."*

A second view, was expressed by Justice Black who wrote for the Supreme Court in a 1947 opinion.

"The 'establishment of religion' clause ... means at least this: Neither a state nor the Federal Government ... can pass laws which aid one religion, aid all religions, or prefer one religion over another."[17]

Proponents of this broad view rely heavily on the writings of Jefferson and Madison who led their state of Virginia in a successful effort to prevent the state from levying taxes to support the churches. Jefferson's views were strongly stated in the Virginia Bill for Religious Liberty which he wrote, and which the Supreme Court of the United States has cited as consistent with the First Amendment. Jefferson wrote:

"...no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened [sic], in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief...."

The Supreme Court's interpretations of the "establishment clause" support much of Jefferson's idea, but government is not anti-religious.

The Supreme Court permits legislatures to employ chaplains and open their sessions with prayer,[18] but forbids prayers in classrooms.[19] It has allowed states to give tax deductions to persons sending children to religious schools, but has forbidden governments from supplying money for instructional equipment (audio-visual devices) for parochial schools.[20] If public schools supply meeting rooms for

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17 Everson v. Board of Education, 330 U.S. 1 (1947) where the majority allowed the state to supply buses to transport children to public, private and parochial schools. Four Justices sharply disagreed that government should be allowed to supply this important aid to parochial schools.

18 Marsh v. Chambers, 463 U.S. 783 (1983).

19 Wallace v. Jafree, 86 L.Ed.2d 29 (1985).

20 See Wolman v. Walter, 433 U.S. 229 (1977). The Court could not agree on a simple formula, but the result is that government can supply secular books, but not maps or other equipment that "might" be used for religious purposes.

extracurricular student activities generally they cannot deny meeting rooms for students intending to worship.[21]

When governments celebrate religious holidays they encounter "establishment clause" problems because the Supreme Court has failed to supply a guiding rule. This much is clear. Governments can display Christmas trees without religious trimmings (as Wisconsin does in the Capitol's rotunda). If a religious symbol such as the nativity scene is attached to the display it may, however, violate the Constitution.[22]

✩ Testing Government Actions under the Establishment Clause

The Supreme Court has said that a law helping religion is unconstitutional unless the legislation has a secular purpose, has a primarily secular effect, and does not entangle government with religion.[23] Recently Justices Kennedy and O'Connor have suggested different rules. Justice O'Connor says that the "establishment clause" is violated if a reasonable observer perceives that government is endorsing religion. Justice Kennedy urges a more hospitable view of government actions that assist religion. He says that the test is whether or not government engages in coercion on behalf of religion. The direct expenditure of tax funds is coercion or an endorsement.

Courts make close distinctions in interpreting the "establishment clause." For example, governments can supply a mobile classroom to a religious school if it is parked on a public street, but the appearance of government assistance makes it improper to park the mobile classroom on a parochial school's parking lot.[24] Churches and other religious properties, however, can be given property tax exemptions only if other charitable organizations also receive that privilege.[25] This does not violate the Constitution because all charitable groups are treated equally.

✩ The Free Exercise Clause

Courts have difficulty in giving a consistent meaning to the "free exercise" clause. In 1879 the Supreme Court upheld the conviction for bigamy of a man who claimed that the doctrine of his church allowed him to take two or more wives. Plural marriages were forbidden by the law of the territory, and the Supreme Court upheld that law and rejected the defense of religious liberty.[26]

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21 Widmar v. Vincent, 454 U.S. 263 (1981); and Board of Educations v. Mergens, ___ U.S.___, 58 U.S.L.W. 4720, June 4, 1990.

22 Allegheny County v. American Civil Liberties Union...,___ U.S. ___, 109 S.Ct. 633 (1989).

23 Lemon v. Kurtzman, 403 U.S. 602 (1971). The three factor test is sometimes called "the Lemon test."

24 Paulido v. Cavazos, 58 U.S.L.W. 2425 (D.C. W.Dist. Mo. 1989).

25 Waltz v. Tax Commission, 397 U.S. 664 (1970).

26 Reynolds v. United States, 98 U.S. 145 (1879).

In 1943, however, the Supreme Court held that the Free Exercise Clause forbade a state from requiring members of the Jehovah's Witnesses to salute the American flag. The flag salute, noted the Court, offended the religious beliefs of the defendants, and their right to refuse ought to be protected.[27] Similarly the Court held that government could not force people whose religion was offended to display the motto "Live Free or Die" which was affixed to the auto license plates of the State of New Hampshire.[28] The Supreme Court in 1972 held that the Amish did not have to obey the Wisconsin law that required children to attend school beyond the age of fourteen. Their religious belief forbade public education beyond that age. Wisconsin's interest in requiring compulsory schooling was subordinate to the religious interests of the Amish.[29]

In 1990, however, the Court upheld an Oregon law which penalized those whose religion required them to take the drug peyote as part of their religious practices.[30] Taking drugs is an action that is not protected by the First Amendment.

☆ Belief is Protected but Conduct is Not

Clearly religious beliefs are protected, but religious conduct has less protection. Laws of general application which have only an incidental impact on the exercise of religious belief are likely to be upheld. Thus laws requiring the payment of an income tax, laws requiring one to hold a social security number,[31] and laws requiring stores owned by people who celebrated the Sabbath on Friday to close on Sunday are generally valid (a common day of rest was justified). In their impact these laws do not hit religion specifically, and do achieve generally approved societal goals.

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27 West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

28 Wooley v. Maynard, 430 U.S. 795 (1977).

29 Wisconsin v. Yoder, 406 U.S. 205 (1970). The Yoder case did not involve a child who sought to attend school and a parent who prevented attendance; thus the Court was not confronted with the question whether the child might have a protected right to choose a public school.

30 Employment Division v. Smith, ___ U.S. ___, 58 U.S.L.W. 4433, April 17, 1990. The majority held that the free exercise clause does not immunize a persons from complying with a "valid and neutral law of general applicability." Some states have laws that exempt religious ceremonies from state regulations.

31 United States v. Lee, 455 U.S. 252 (1982).

The idea that speech and thought are so fundamental that no government should punish them, except in unusual circumstances, was not a deeply rooted idea in 1791. Anti-religious speech was often punished and treasonous words were commonly punished. In the early 19th Century vocal opposition to slavery was prohibited by several American states. Laws against libelous publications were commonplace, and laws against obscenity were enacted.

The Constitution refers to "the" freedom of speech. It does not say "government may not abridge speech." Because all speech is not protected, we must identify "the freedom of speech." Courts distinguish protected from unprotected speech.

☆ The Origins of "THE FREE SPEECH"

The struggles for free speech in England were well known to informed Americans. Occasions in which members of the British Parliament were persecuted led to guarantees of free speech in legislative sessions in the British Bill of Rights of 1689. The Speech or Debate Clause of Article I, •6 in the American Constitution follows that model.

In 1798 Congress enacted the Alien and Sedition Acts which punished those who criticized the President and the government of the United States. These laws were widely attacked as impinging on free speech, and they were repealed in 1801 before any test in the Supreme Court. Not until 1964 did the Supreme Court plainly and unambiguously say that the Sedition Act of 1798 violated the First Amendment.[32]

☆ Speech that Causes Harm

Justice Oliver Wendell Holmes was the first Justice to observe that the Constitution protected damaging speech, even speech that we hate. The first cases challenging federal laws affecting speech on constitutional grounds involved the Espionage Act of 1917 which was designed to further the war effort by punishing speech that harmed recruiting for the armed services. Words were protected, Holmes said, unless the government could establish that the speech constituted "a clear and present danger." Whether speech is protected depends on the setting.

> *"... the character of every act depends upon the circumstances in which it is done.... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. ... The question in every case is whether the words used are used in such circumstances and are*

32 New York Times v. Sullivan, 376 U.S. 254 (1964) held for the first time that the First (and Fourteenth) Amendments forbade damages for libel against a public figure unless the statements were malicious or reckless.

of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to protect."[33]

Others advanced different tests. Judge Learned Hand, a great jurist who sat on a federal appeals court, urged that words could be punished only if they were a direct incitement to violence.[34] He said that the "clear and present danger" test was too subjective and unpredictable.

A more relative test for protected speech was offered by the Supreme Court in 1951, namely:

"In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[35]

Even greater protection of speech is found in a 1969 Supreme Court decision invalidating the conviction of a Klu Klux Klan leader whose racist speech was prosecuted. The Court stated:

"...the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[36]

Thus speech is protected unless it can be shown that the words are both intended to produce immediate harm, and are likely to produce that harm. In this decision Justices Black and Douglas added that they would reject the "clear and present danger" test as insufficiently protective of free speech values.

☆ Speech Distinguished from Conduct

Sometimes courts reject free speech claims on the ground that it is not "speech" but "conduct" which is punishable. When a protestor burned his draft card to

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33 Schenck v. United States, 249 U.S. 47 (1919).

34 Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917) was decided before Holmes wrote the Schenck decision.

35 Dennis v. United States, 341 U.S. 494 (1951) where the Court affirmed the conviction of leaders of the American Communist Party for urging the overthrow of the government by force and violence.

36 Brandenburg v. Ohio, 395 U.S. 444 (1969). The speech was passionate but was not directed at a particular person. The audience was not disturbed by the message, so in context they were not "fighting words."

protest the Vietnam draft the government prosecuted under a statute requiring a person to have the card in his possession. A conviction was upheld.[37] On the other hand a conviction for flag burning was struck down because the statute was framed in terms of punishing "actions offensive to others." A closely divided Supreme Court has twice ruled that free speech values were violated by laws forbidding flag desecration.[38]

Justice Black claimed that when the First Amendment states that "Congress shall make no law ..." it means just that, Congress can make <u>no</u> law abridging freedom of speech. This absolute view, however, has never been adopted by a majority of the Supreme Court. The freedom of speech does not protect obscene speech or "fighting words," or words which imperil national security. Speech that is merely hateful is protected. Thus when a group of American Nazi's sought to carry their message, including the loathsome symbol, the swastika, through the streets of Skokie, Illinois, where many Jews and other refugees from Nazi Germany lived, courts held that the demonstration was protected by the First Amendment.[39]

☆ Balancing Interests

A majority of the Supreme Court urge a balancing test. Speech may, in some circumstances, be prohibited where a vital societal interest justifies suppression and there is no other feasible alternative. Critics of the balancing test say that it risks free speech values, because the government argument for suppression will often on balance prevail.

Apart from the controversy about what test should be applied, it is clear that the Supreme Court of the United States has generously ruled in favor of free speech claims. Political speech, even of low value, enjoys broad protection as the Klu Klux Klan decision, cited above, reveals. In other contexts the speech of public employees is protected. For example, a police department employee who expressed hope that an assassin might shoot the President was protected from discipline in a 1987 decision.[40] The Court rejected the argument that discipline was proper because "those who play with the cops must not cheer for the robbers." The employee's words did not produce any disorder, and in the circumstances they were protected speech.

☆ Speech in Schools

Disruptive activities can be regulated. School children, the Court held in 1969, could not be forbidden from wearing black armbands to publicize opposition to the

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37 United States v. O'Brien, 391 U.S. 367 (1968).

38 Texas v. Johnson, ___ U.S. ___, 109 S.Ct. 2533 (1989), and United States v. Eichman, ___ U.S. ___, 58 U.S.L.W. 4744, June 11, 1990.

39 Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978); cert. denied 439 U>S> 916 (1978) (Blackmun, J., and White, J. dissented).

40 Rankin v. McPherson, 483 U.S. 378 (1987).

Vietnam conflict because in that setting they were not being disruptive.[41] However, school officials were permitted to discipline a student who delivered a vulgar speech in a school event,[42] and a principal was permitted to censor a school newspaper published by a journalism class because he believed the paper invaded the privacy interests of other students.[43] These activities tended to interfere with the school's mission and were not protected by the Constitution.

☆ Inflicting Emotional Harm

Vulgar parodies of public figures can't be punished, even if they inflict emotional harm.[44] However, "fighting words" (ie. words which are likely to provoke likely and immediate violent response) may be punished.[45] The scope of the "fighting words" exception is not clear, however. Can government, for example, punish those uttering racial slurs? The argument that racial slurs are not protected speech is that the racial remarks can be punished if their purpose and intended impact is to deprive the victim of legal rights. The courts will, in due course, give us further guidance. Thus the meaning of the Bill of Rights evolves with time and experience.

In recent years the First Amendment has been extended to commercial advertising, although the public interest in assuring consumer protection allows some regulations not allowed for other types of speech.

Freedom of the Press

People disagree on whether the Press Clause adds to the protections already conferred by the free speech clause.[46] The Press Clause does not mean that newspaper editors have more free speech rights than others, and most decisions upholding newspapers and other media can be explained by the free speech clause alone. The Press Clause confirms the importance that influential 18th Century Americans including Thomas Jefferson placed upon newspapers. It was natural in 1791 to make particular mention of the press in the First Amendment because newspapers in England had been punished for supporting American revolutionaries.

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41 Tinker v. Des Moines School District, 393 U.S. 503 (1969).

42 Bethel School District v. Fraser, 478 U.S. 675 (1986).

43 Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

44 Hustler Magazine v. Falwell, 485 U.S. 46 (1988) held that the Reverend Falwell could not recover damages for emotional distress caused by a vulgar parody in Hustler magazine.

45 Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The words were spoken to a policeman. The Court did not consider the argument that police should tolerate some vulgar expressions.

☆ Prior Restraints

Laws requiring that printing be licensed were fiercely resisted in England. By 1776 it was evident that the customary law of England forbade government from imposing "prior restraints" on the press. This meant that government might prosecute speech after publication, but government could not impose licenses or other types of censorship prior to publication.

The Press Clause underlines the importance we attach to the news gathering business. In 1931 the Supreme Court struck down a Minnesota law allowing a prosecutor to forbid the publication of "malicious, scandalous and defamatory newspapers."[47] The prohibition, said the Court, was a "prior restraint," and hence unjustified except in the most unusual circumstances.

Exceptional circumstances couldn't be shown in 1971 when the United States Government sought to prevent the publication in the New York Times of a classified history of the Vietnam conflict. Even though some damage to national security was assumed, the Supreme Court by a 6 –3 vote held that the paper could publish the material taken (presumably illegally) from government files.[48] In a Wisconsin case that never went to an appellate court, however, it was held that the Progressive Magazine could be forbidden from publishing what the Government described as the "secret" for making the hydrogen bomb.[49]

The Court has given newspapers protection beyond that of free speech. Taxation so framed as to hurt large newspapers more than smaller ones has been struck down on First Amendment grounds.[50]

☆ A Summary of Free Speech

All speech is not protected by the First Amendment. Societal values may be of such importance that they will sometimes, in exceptional settings, prevail. Thus ample room for legitimate argument on the scope of the free speech guarantee remains. It is only clear that free speech enjoys a high degree of protection within the United States. It surely is a "preferred right."

Freedom of Assembly and Petition

Americans inherited from England a tradition honoring the right of people to petition for the redress of grievances against government. That right was asserted by the barons against King John in the English Magna Carta of 1215, and repeated on many occasions afterwards. The English Bill of Rights of 1689 confirmed the

46 First National Bank of Boston v. Bellotti, 435 U.S. 765, 798 (Burger, C.J., concurring) (1978).

47 Near v. Minnesota, 283 U.S. 697 (1931).

48 New York Times v. United States, (The Pentagon Papers Case), 403 U.S. 713 (1971).

49 Progressive Magazine v. United States, 467 F.Supp. 990 (W.D. Wis. 1979). The Government claimed, and the District Judge agreed, that the article "contains concepts that are not found in the public realm, concepts that are vital to the operation of the bomb." The case was dismissed before it could be heard on appeal after publication of the "secrets" in other publications. Thus the information was in the public domain and could not be suppressed.

50 Minneapolis Star & Tribune v. Minnesota, 460 U.S. 575 (1983).

right to petition the King. The American Revolution was caused, in part, because of the failure of the English Crown to respond to the grievances of the American colonies. A list of those grievances is contained in the Declaration of Independence of 1776. The First Amendment was adopted in the light of the importance of allowing people to protest against, and complain about, government.

The Supreme Court links the right of free speech with the right of free assembly, and has expressly recognized a specific right of association. However, rights to associate should not extend to protecting an association of bank robbers. Rights to assemble may clash with interests of property owners, or with interests in traffic safety, or in the orderly use of streets, parks, and other public places.

Thus the courts sustain convictions for conspiracy to rob banks. Courts have also upheld a licensing system for parades on public streets if the purpose is to prevent traffic congestion, and gives public authorities sufficient time to provide police and other supervision.[51] A licensing system must be fair, however. It should not be a disguise allowing too much administrative discretion. Too much discretion can be abused, and would then threaten speech and assembly rights.

51 Cox v. New Hampshire, 312 U.S. 569 (1941).

The Second Amendment

A WELL REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE RIGHT OF THE PEOPLE TO KEEP AND BEAR ARMS SHALL NOT BE INFRINGED.

This amendment rests on the Framers' fear of permanent, or standing armies. Armies, it was argued, were potential threats to representative government. Americans feared a repeat of the unhappy history of England in which a standing army virtually took over the English government in the 1650's. The Constitution, therefore, forbade army appropriations for more than two years at a time, but allows for state militias.

Drafters of the Second Amendment believed that militias, (amateurs called for service when needed), would supply most of the assistance required of any army. Hence, the Second Amendment's initial clause underscores the importance of the amateur soldier. It means, at the very least, that states should not be forbidden from establishing militias.

Against this background some read the Second Amendment as supporting the right of individuals to bear arms. Others interpret the Amendment as only protecting the rights of states to keep militias. Clearly in 1791 it was generally believed that carrying arms was a fundamental right. But today it is argued that the government does not have a duty to allow everyone to bear arms because a private individual is not part of the "well regulated militia."

A few years ago the Village of Morton Grove, Illinois, enacted a total ban on handguns. The United States Court of Appeals for the Seventh Circuit upheld that ban.[52] The Supreme Court declined to review that decision.

Federal laws limiting the right to transport certain kinds of weapons are valid.[53] Courts have also held that the limits of the Second Amendment are not limitations on state authority to regulate the carrying of arms.[54] Most of the debate on the meaning of the Second Amendment takes place in state and local legislatures.

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52 Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982). The Supreme Court denied review, 464 U.S. 863 (1983).

53 United States v. Miller, 307 U.S. 174 (1939).

54 A scholarly article reviewing the constitutional argument against gun control legislation is Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," 82 Michigan L. Rev. 204 (1983).

The Third Amendment

NO SOLDIER SHALL, IN TIME OF PEACE BE QUARTERED IN ANY HOUSE, WITHOUT THE CONSENT OF THE OWNER, NOR IN TIME OF WAR, BUT IN A MANNER TO BE PRESCRIBED BY LAW.

In the 18th Century it was not uncommon for British commanders in the American colonies to require the civilian population to share their homes with their troops. This was one of the grievances listed in the 1776 Declaration of Independence. Americans wanted no more of it, hence the Third Amendment. The Amendment is seldom invoked today, although it emphasizes the importance we place on the sanctity of a person's home.

An imaginative lawyer successfully invoked the Third Amendment when his clients, prison guards who were required to rent living quarters within a prison complex, went on strike and were evicted. They were evicted by state government order to make way for state national guard personnel who were employed as temporary prison guards. A lower court held that this displacement showed a possible violation of the Third Amendment because troops were quartered in the homes of the prison guards.[55]

55 Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982).

The Fourth Amendment

THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES SHALL NOT BE VIOLATED, AND NO WARRANT SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSONS OR THINGS TO BE SEIZED.

A rich and bitter history underlies the Fourth Amendment. Its importance as a protection against tyrannical government is self-evident. It has two parts, the first forbidding "unreasonable searches and seizures." The second part, requiring that warrants be supported by "probable cause," is separate and distinct. A warrant is a document issued by a judge, which empowers police to arrest a person, or to search for and seize property described in the warrant.

✩ Origin of the Warrant Clause

The origins of the Fourth Amendment are found in some of the grievances the American colonies had against their British rulers. It was not uncommon for judges to issue orders (called "writs of assistance") permitting general searches for evidence of tax evasion, as well as for evidence of treason. The case of John Wilkes, an English editor and also a member of Parliament, was well known to Americans at the time of our Revolution. Wilkes had written articles criticizing the British Government. He did not sign them and the British Government suspected a number of people. The Government issued warrants which authorized the arrest and the search of the homes of some 49 people. Many, including Wilkes, were jailed, but Wilkes was freed because he was a member of Parliament. Wilkes then filed a suit against the government claiming an abuse of his, and others', rights. The English courts upheld Wilkes, and eventually Parliament passed legislation limiting the right to issue such general warrants on mere suspicion.

In Boston similar writs of assistance were issued allowing customs officials to enter houses and ships. James Otis argued that such writs were unlawful, and his eloquent arguments influenced James Madison. The Fourth Amendment's warrant clause embodies the core of the Wilkes-Otis claims.

☆ Warrants require "Probable Cause"

The Supreme Court has held that warrants can only be issued by "neutral and impartial" magistrates or judges. Prosecutors and police officers can not issue warrants. A warrant authorizing a search, or an arrest, can be issued only if the judge is reasonably convinced, on the basis of evidence presented by the prosecutor (or police) that "probable cause" for the search or arrest exists. Normally this means that those seeking a warrant must explain in some detail, almost always in a sworn statement, why the warrant should be issued. This explanation can then be reviewed later to determine whether or not the judge correctly found probable cause.

Warrantless searches and seizures have been sustained in a variety of circumstances where probable cause exists, including:

1. where an emergency makes it difficult to secure a warrant and the crime is significant, not minor;[56]

2. where the search is of an automobile or other subject which is movable and impoundment would be a greater burden on the victim;

3. where there is little or nothing for a magistrate to decide, i.e. an inventory search of an impounded vehicle where there are no particular facts for a magistrate to evaluate;[57]

4. where consent to the search is obtained (even without probable cause);

5. where the search is incidental to a lawful arrest;

6. where the items seized are in plain view.[58]

☆ "Unreasonable" Searches and Seizure are Forbidden

The Fourth Amendment, like other sections in the Bill of Rights, protects all "people," not just citizens. Thus foreigners within the United States are protected by this provision just as are residents and citizens. Recently several Justices of the Supreme Court, but not a majority, have suggested that the protections of the 4th Amendment do not apply to the actions of American law enforcement personnel who are operating outside the United States, in Mexico, for example.[59]

The Fourth Amendment protects the interests that people have in their "persons, houses, papers and effects." Sometimes that interest is generally described as a "right to privacy." To the extent that a seizure is "unreasonable," privacy is protected.

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56 Schmerber v. Calif., 384 U.S. 757 (1966) (allowing a withdrawal of blood from a drunk driver about to undergo medical procedures). But even an emergency did not justify a warrantless entry into the home where the basic offense was minor, Welch v. Wisconsin, 466 U.S. 740 (1984).

57 South Dakota v. Opperman, 428 U.S. 364 (1976).

58 U.S. v. Dunn, 480 U.S. 294 (1987), California v. Ciraolo, 480 U.S. 294 (1987) and Florida v. Riley, 109 S.Ct. 693 (1989) involving aerial surveillance.

59 United States v. Verdug-Urquidez, ___ U.S. ___, 58 U.S.L.W. 4263, February 28, 1990.

☆ Reasonable Searches and Seizures

The critical issue is whether a seizure is "reasonable" under particular circumstances, and the courts have reviewed thousands of seizures in varying circumstances. For example:

1. Late at night a poorly dressed man walks up and down an unlighted street in front of a liquor store – he frequently looks at the store and lingers at the store's entrance. A policeman approaches and suspects that the man might be contemplating breaking in by picking the lock. The Court decides that the policeman may stop, question and pat down the man to determine whether or not he's carrying a weapon. This is a reasonable "stop and frisk" and does not violate the Fourth Amendment.[60]

2. A high school teacher, who had reason to believe that a student was violating the school's rules against smoking, searched the student's purse in the school looking for cigarettes. The teacher found cigarettes, and also rolling paper which the teacher believed might be used for illegal drugs. The teacher searched the purse more carefully and found marijuana. The Supreme Court ruled that this search and seizure was, on balance, reasonable, and hence legal.[61]

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60 Terry v. Ohio, 392 U.S. 1 (1968).

61 New Jersey v. T.L.O., 469 U.S. 325 (1985).

☆ Balancing "Privacy" and "Societal Needs"

The balance between societal needs and privacy depends upon balancing the particular facts. Thus in the examples above, the teacher would not have been authorized to search the student's purse outside the school, and the policeman might not have had a reasonable suspicion if the suspect were seen walking on the street in broad daylight.

☆ Consequences of an Illegal Search and Seizure

The Supreme Court has held that, in most circumstances, evidence secured as a result of an illegal search and seizure should not be used in a criminal proceeding against the target of the search. This is the controversial "exclusionary rule." Whether the rule is required by the Fourth Amendment, or is simply a procedural device used by the Court to enforce the Fourth Amendment, is not clear. Whatever its basis, the exclusionary rule was not applied by the Supreme Court to state criminal proceedings until 1961.[62]

The exclusionary rule serves three purposes. One purpose is to deter unreasonable searches and seizures by removing any police incentive to engage in this illegality.

A second purpose is "the imperative of judicial integrity." Courts should not become accomplices in any willful disobedience of a constitutional command.

A third purpose is to assure that government will not profit from its unlawful behavior. People are more likely to trust their government if they have assurance that government will abide by the rules.

It is debatable whether or not the application of the exclusionary rule serves those purposes well.[63] A well-trained police force, educated in the need to respect civil liberties, may be the best guarantee that the Fourth Amendment will be honored.

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62 Mapp v. Ohio, 367 U.S. 643 (1961).

63 The deterrent value of the rule is questioned by a leading scholar, Oaks, "Studying the Exclusionary Rule," 37 U. Chi. L. Rev. 665 (1970). The rule assumes a fact – that police will not arrest, search or seize, unless they are interested in prosecuting. The fact is that police sometimes arrest or seize as a punitive sanction, such as arresting an intoxicated person to protect him, arresting for the purpose of controlling gambling, prostitution, etc.

The Fifth Amendment

NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER, NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB, NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW, NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION.

☆ Grand Jury Indictments

The requirement that persons held for crimes be first charged by a Grand Jury applies only to criminal proceedings in federal courts; it does not apply to criminal proceedings brought in state courts.

The roots of the "Grand Jury" Clause lie in the history of England. Two reasons lie behind it. First, the Crown was concerned that powerful people in the community might be lawbreakers and that the culprits might be too influential to be charged with crime. To meet that concern the Crown sought the assistance of knowledgeable people in the community who would be courageous enough to make the charge.

Second, to guard against the risk that persons be improperly charged with a crime, laws required that the charge be reviewed first by a group of knowledgeable people in the community.

Thus the grand jury helped sort out the law breakers from law abiders. Today grand juries are required in the federal system, unless a criminal suspect agrees to waive the right to indictment by grand jury. Prosecutors (usually United States Attorneys) present the evidence, usually secretly. The grand jury considers that evidence and decides whether or not a formal charge should, or should not, be made. Grand juries have power to order people to appear and testify, and authority to require searches and further investigation.

Some states use grand juries. Other states, including Wisconsin, seldom use them to determine whether or not criminal charges should be brought. The Constitution does not require that grand juries be used in the military justice system.

☆ The Prohibition Against Double Jeopardy

The idea that no person should be tried twice for the same offense rests on notions of fairness. The underlying idea is that the prosecutors should not be allowed to make repeated attempts to convict an individual for an alleged offense. Repeated prosecutions would subject the individual to embarrassment, expense and ordeal. It would force the individual to live in a continuing state of anxiety and insecurity. Furthermore, repeated prosecution might increase the possibility that an innocent person might eventually be found guilty.[64]

In May 1990 the Supreme Court held that the double jeopardy clause forbade a state from charging a drunken driver with homicide after that driver had been convicted for drunken driving.[65]

Frequently a criminal act violates both a state law, and a federal statute. When this happens the criminal can be charged with offenses by both state and federal officials. The Supreme Court has held that both charges can be brought and that two convictions do not violate the double jeopardy clause. It is not "double" jeopardy because the laws of two different sovereigns are violated.[66]

☆ The Privilege Against Self-incrimination

This right involves more than merely freedom from confessions induced by torture, although that is one of the objectives the privilege seeks to promote. Another objective was to forbid judges from requiring accused persons to swear, under oath, in answer to accusations.

The right applies in criminal proceedings. The right now includes prohibiting prosecutors and judges from commenting upon a criminal defendant's failure to testify. Juries may draw their own conclusions if a defendant fails to testify, but judges tell juries that they should not conclude that a failure to testify means that the defendant was guilty, or had some information to hide.

Forced confessions are always illegal, but determining whether or not a confession was forced is difficult. To enforce this part of the Fifth Amendment the Supreme Court in 1966 ordered what is now known as the Miranda rule, namely that a person in police custody may not be questioned before that person is told:

1. that the suspect has a right to remain silent;

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64 Green v. U.S. 355 U.S. 184 (1957).

65 Grady v. Corbin, ___ U.S. ___, 58 U.S.L.W. 4599, May 29, 1990 was decided on a close, 5 – 4, vote of the Justices.

66 Bartkus v. Illinois, 359 U.S. 121 (1959), and Abbate v. United States, 359 U.S. 187 (1959). An underlying reason for the two sovereign rule is a fear that a state might acquit a guilty person in order to frustrate a federal prosecution. Prosecution by state and federal authorities for the same general conduct is, however, rare, and usually requires approval by the Attorney General of the United States.

2. that the suspect has a right to consult with a lawyer; and,

3. that a lawyer will be appointed for the suspect if the suspect is too poor to hire a lawyer.[67]

The Miranda rule protects Fifth, as well as Sixth (and Fourteenth) Amendment rights.

A complex cluster of rules apply, or refuse to apply, the Miranda rule in different settings. For example, a statement, otherwise voluntary, obtained by the police who failed to give a warning, can be brought out on cross examination if the accused decides to testify, and the accused makes statements at trial inconsistent with what was voluntarily told to the police.[68]

☆ The Due Process Clause

The idea behind the "due process clause," which is found in both the Fifth and Fourteenth Amendments, can be traced back many hundreds of years into the history of England.

The notion that persons can't be deprived of their life, liberty or property unless the law is followed is found in the Magna Carta of 1215, and in subsequent repetitions of that promise by the King of England. The specific meaning of "due process" has been revealed in thousands of judicial decisions since. Today we hear two arguments on the meaning of "due process." Justice Scalia, for example, claims that its meaning is confined by its history. Justice Brennan, on the other hand, regards the clause as inviting courts to consider contemporary values.[69]

☆ Procedural Due Process

The due process clause requires that government follow difficult and detailed rules of procedure before anyone's life, liberty or property be taken. These rules include the right to a fair and impartial hearing, and rights to fair and proper notice of what the law means. Procedural due process means that there is a fair decision-making system in existence that will guarantee procedural rights before government takes some action that impairs a person's life, liberty, or property.

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67 Miranda v. Arizona, 384 U.S. 436 (1966). It is important to note that the rule does not apply to a suspect who is not "in custody."

68 Harris v. New York, 401 N.Y. 222 (1971).

69 The debate between Justices Scalia and Brennan is renewed in Burnham v. Superior Court, ___ U.S. ___, 58 U.S.L.W. 4629, May 29, 1990.

☆ Substantive Due Process

People debate whether there are some rights which are so important that they can not be taken away even with fair procedure. The "right" to an abortion, which the Supreme Court said in 1973 was held by a woman rests on a theory of substantive due process.[70] In a different context the Supreme Court, without issuing an opinion in which a majority joined, has held that government by defining a family as composed of parents and children in a zoning ordinance, could not prevent a grandmother from sharing her home with two grandchildren (the grandchildren were first cousins).[71] The grandmother had a "right" to provide a home for the children. Four members of the Court ruled that the law offended a tradition favoring families living together.

Some substantive (as distinguished from procedural) rights are specifically guaranteed by the Constitution. State governments may not "impair" contracts.[72] Property can not be taken by the government without just compensation, and the freedom of speech can not be abridged even if government follows fair procedures. Similarly, double jeopardy can't be authorized, even if the procedure by which it is impaired is fair.

☆ The Property Clause

The Framers' protection of private property from government seizure without compensation is an important part of the Fifth Amendment. In order to build roads, dams, public buildings, or parks it is sometimes necessary to take over private property. When private property is "taken," appropriate (i.e. "just") compensation must be paid. A taking, even if temporary, must be paid for by the government.[73]

It is sometimes hard to distinguish between a regulation (such as a zoning ordinance) which diminishes the value of property, but does not require compensation, and a "taking" which does. To draw the line between uncompensable regulations and compensable takings the courts engage in a balancing of interests. The courts consider the economic impact, the extent to which government has interfered with the expectations of the owner, and the nature of the government action. These are factors which are evaluated and balanced.

Generally the courts have held that zoning rules, health regulations, and safety laws are valid even when their application to property hurts its value.

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70 Roe v. Wade, 410 U.S. 113 (1973).

71 Moore v. City of East Cleveland, 431 U.S. 494 (1977).

72 Art I, •10.

73 First English Evangelical Church v. Los Angeles, 482 U.S. 304 (1987).

The Sixth Amendment

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

This Amendment supplements the Fifth Amendment's "due process" clause by guaranteeing important procedural rights in criminal trials.

☆ Speedy Trial

The right to a speedy trial is important because it helps to prevent unreasonable imprisonment prior to trial, and it helps an accused person because witnesses and evidence may disappear and be unavailable for a defense. The Supreme Court states:

> *"... there is a societal interest in providing a speedy trial.... The inability of courts to provide a prompt trial has contributed to a large backlog of cases... which ... enables defendants to negotiate more effectively for pleas of guilt to lesser offenses.... /T/he longer an accused is free awaiting trial, the more tempting becomes his opportunities to jump bail and escape. ...[D]elay between arrest and punishment may have a detrimental effect on rehabilitation."*[74]

A national statute enforces the right to a speedy trial in federal courts by imposing time requirements (normally 70 days) for the trial of criminal cases. Most states also have statutes or court rules which speed up the criminal trial process.

74 Barker v. Wingo, 407 U.S. 514 (1972).

☆ Impartial Jury

A criminal defendant is entitled to a jury trial when "it is necessary to an Anglo-American regime of ordered liberty."[75] Thus a state may not decide to deny jury trials to criminal defendants charged with an offense punishable by more than six months in jail because "crimes triable without a jury in the American States since the late 19th century were generally punishable by no more than a six-month prison term."[76]

An impartial jury is a jury that is "a truly representative" selection from the community. A system that prevents women, minority members, or other discrete members of a community from jury service denies Sixth Amendment rights.

In federal trials juries of 12 are required. However, states are permitted to allow criminal convictions if a jury of six unanimously agrees,[77] or by a jury of 12 if ten out of 12 on the jury agree.[78] A one, or two person jury, therefore would not be allowed.

☆ Notice of Charges

The Court has stated:

"No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."[79]

75 Duncan v. Louisiana, 391 U.S. 145 (1968) struck down a Louisiana law denying jury trials for criminal offenses punishable by two years imprisonment.

76 Baldwin v. New York, 399 U.S. 66 (1970).

77 Williams v. Florida, 399 U.S. 78 (1970).

78 Apodaca v. Oregon, 406 U.S. 404 (1972).

79 Cole v. Arkansas, 333 U.S. 196 (1948).

☆ Confrontation of Witnesses

In all but the most exceptional cases a criminal defendant must be able to cross-examine any witness who testifies for the prosecution. This right is important, but not absolute – exceptions exist.

" Confrontation" usually means a defendant has a right to see witnesses face-to-face. For example, a defendant's right to confront was violated in a case where two young girls, victims of a sexual assault, testified that they'd been assaulted by the defendant. Because the girls' testimony was in front of a one-way mirror and hence the accused could see the girls, but the girls could not see the accused, the Court held that rights to "confront" witnesses were violated.[80] The meaning of "confront" meant a real face-to-face presence.

However, if a court finds it necessary to protect a child witness from severe suffering which might occur if the child saw the defendant, the child may testify through closed circuit television.[81]

☆ Compulsory Process

A fair criminal trial is unlikely if the accused is unable to require favorable witnesses to appear and testify on the accused's behalf. Criminal defendants should have a fair opportunity to present a defense, hence the rule that defendants must be able to summon witnesses.

☆ Right to Counsel

It was not until 1963 that the right to counsel in all criminal cases was firmly established by the Supreme Court. In the famous case of Gideon v. Wainwright[82] the court held that a poor defendant has a right to counsel paid by the government. Wisconsin recognized the importance of a right to counsel for poor defendants under the Wisconsin Constitution in 1859.[83]

Lawyers are often necessary. In a criminal case questions of what evidence is legal, what defenses are available, and what procedures are proper are difficult to answer. Criminal defendants seldom have the knowledge or ability to address difficult questions of law, hence the right to counsel is important for justice.

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80 Coy v. Iowa, 487 U.S. ___, 108 S.Ct. 2798 (1988).

81 Maryland v. Craig, ___ U.S. ___, 58 U.S.L.W. 5044, June 27, 1990.

82 372 U.S. 335 (1963). A great book on the case is Lewis, Gideon's Trumpet (New York Random House 1964).

83 Carpenter v. Dane County, 9 Wis 249 (1859).

The Seventh Amendment

IN SUITS AT COMMON LAW, WHERE THE VALUE IN CONTROVERSY SHALL EXCEED TWENTY DOLLARS, THE RIGHT OF TRIAL BY JURY SHALL BE PRESERVED, AND NO FACT TRIED BY A JURY, SHALL BE OTHERWISE REEXAMINED IN ANY COURT OF THE UNITED STATES, THAN ACCORDING TO THE RULES OF THE COMMON LAW.

Today the value of twenty 1790 dollars is more than $1,000. The basic purpose of the Seventh Amendment is to preserve the historic division between the function of a judge, and the function of a jury. A right to a jury trial in criminal cases is already guaranteed in Article III, •2 of the Constitution, hence the Seventh Amendment only applies to civil trials in federal courts.

The Seventh Amendment does not tell us when a jury is required, nor does it define the powers and duties of juries. The Supreme Court has held that federal juries are required only in disputes that were customarily decided by juries under the laws of England prior to the American Revolution. States, however, can adopt different procedures. The Supreme Court has said that states can entirely abolish juries in civil cases if they wish.[84]

84 Palko v. Connecticut, 302 U.S. 319, 324 (1937).

The Eighth Amendment

EXCESSIVE BAIL SHALL NOT BE REQUIRED, NOR EXCESSIVE FINES IMPOSED, NOR CRUEL AND UNUSUAL PUNISHMENT INFLICTED.

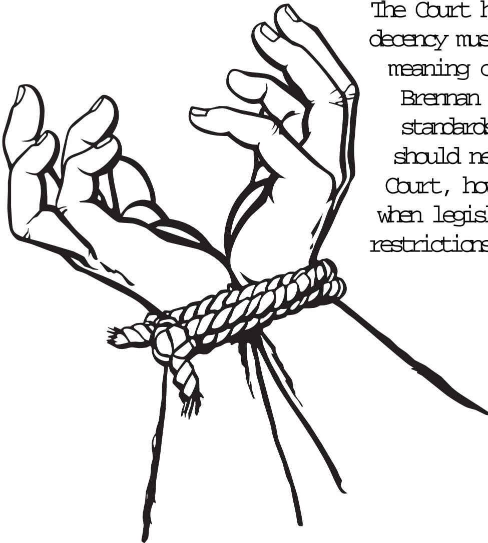
✩ Excessive Punishment and Bail

Punishment should be proportionate to the offense, the Supreme Court has told us. Illustrative is a 1910 decision holding it was excessive and unconstitutional to imprison a person from 12 to 20 years for making a false statement in a public record.[85] Imprisonment merely because a person has a mental illness also violates the 8th Amendment.[86]

Punishments that are "degrading," or are "wantonly imposed" are forbidden. The Court has, nevertheless, upheld a state law that allowed teachers to punish students with spankings.[87]

✩ Cruel and Unusual Punishment

The Court has said that "evolving standards" of decency must be used in interpreting the meaning of the 8th Amendment. Justices Brennan and Marshall say that these evolving standards require that the death penalty should never be imposed. A majority of the Court, however, has upheld the death penalty when legislation explicitly directs. Many restrictions are placed on its imposition.



85 Weems v. United States, 217 U.S. 349 (1910)

86 Robinson v. California, 370 U.S. 660 (1962).

87 Ingraham v. Wright, 430 U.S. 651 (1977).

The Ninth Amendment

THE ENUMERATION IN THE CONSTITUTION, OF CERTAIN RIGHTS, SHALL NOT BE CONSTRUED TO DENY OR DISPARAGE OTHER RIGHTS RETAINED BY THE PEOPLE.

This is the only part of the Bill of Rights that tells us how to interpret the amendments. It does so by telling us how not to interpret. The purpose of the Ninth Amendment was to prevent people from arguing that the listing of certain rights in the Constitution implied that no other rights existed.

Only a few judges have relied upon the Ninth Amendment. Justice Goldberg in 1965 said, for himself alone, that the Ninth Amendment authorized the Supreme Court to identify, and then protect, rights not specified in the Bill of Rights.[88] Justice Goldberg then said that the Court should rely upon "the traditions and conscience" of the nation to determine what values were protected.

Some Justices have stated that the Ninth Amendment directs the Court to consider "natural law,"[89] Other Justices, particularly the late Justice Black, have denied that any natural law is included within the Constitution's protections unless specifically stated in the Bill of Rights. The Courts, he said, should not create new rights.

88 Griswold v. Connecticut, 381 U.S. 479 (1965) (Goldberg, J. concurring).

89 Justice John Marshall Harlan in Griswold v. Connecticut, 381 U.S. 479, 499 (1965).

The Tenth Amendment

THE POWERS NOT DELEGATED TO THE UNITED STATES BY THE CONSTITUTION, NOR PROHIBITED BY IT TO THE STATES, ARE RESERVED TO THE STATES RESPECTIVELY, OR TO THE PEOPLE.

This amendment confirms the basic premise of the Constitution. The government of the United States has only the powers delegated to it. State governments are different. Each state government has all power which is not forbidden either by the Constitution of the United States, or by the state's own constitution. In contrast the government of the United States has only the power delegated to it by the Constitution itself.

The Tenth Amendment does not limit the power of the United States to make treaties on matters of common interest,[90] nor does it limit the power of the United States to regulate the wages and hours of state government employees.[91]

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90 Missouri v. Holland, 252 U.S. 416 (1920).

91 Garcia v. San Antonio Metro Transit, 469 U.S. 528 (1985).

Conclusion

The Bill of Rights without our collective devotion is a hollow shell. An effective Bill of Rights requires the labor of men and women doing the work of government. But government depends more deeply on the support of the governed. A Bill of Rights is meaningful only if all in America share a common belief that achieving the liberties guaranteed by the Bill of Rights deserves our support and is worth our toil.

The Bill of Rights records a hope and a promise. A hope that we can create a government of law, and a promise that government will foster and inspire liberty, not suppress it.

Judge Learned Hand describes the spirit of liberty which underlies the Bill of Rights:

> *"Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; ... While it lies there it needs no constitution, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. This is the denial of liberty, and leads to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few...."*[92]

It is for us to savor, nurture and preserve the ideal of liberty, guarded and protected by the Bill of Rights. We should resist attempts to encroach upon those rights so that they may be maintained as a bulwark of our free society.

We must, at the same time, understand that the Bill of Rights is only words and phrases unless we all harbor within us that spirit of liberty.

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92 Hand, The Spirit of Liberty, (N.Y. 1952) p. 190.