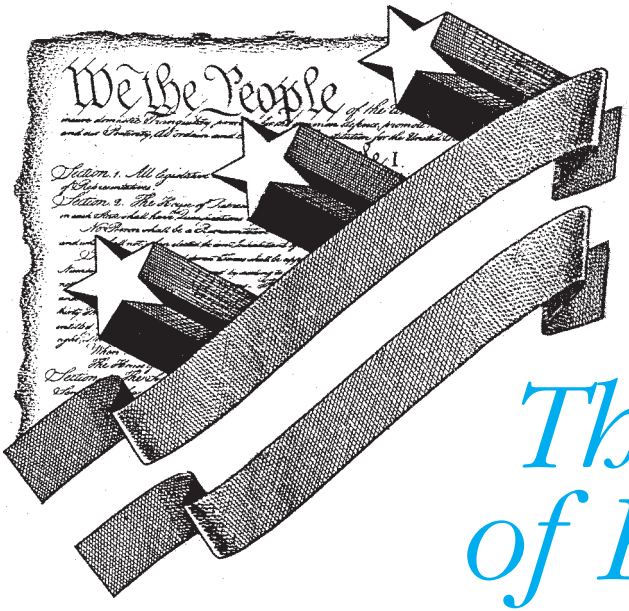

The Bill of Rights

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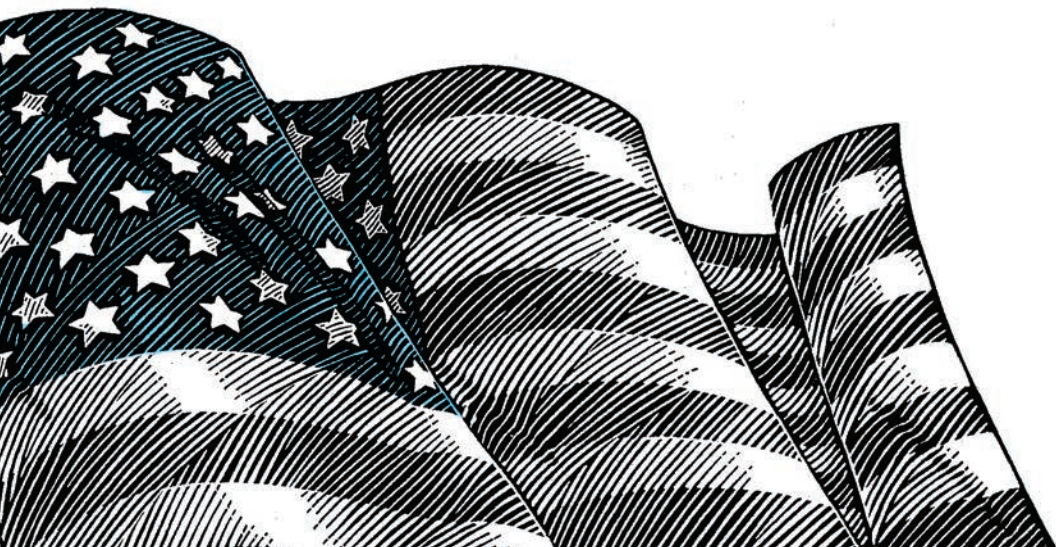
Preface

On December 15, 1791, Virginia became the eleventh state to ratify the 10 amendments that 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 learning about this historic event. It is designed for use by schools and other organizations, in the classroom, public forums and other media. We hope that thorough discussion of the Bill of Rights will bring not only a better understanding of the Bill of Rights, but also 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 formally recognizes that the national government exercises only powers granted to it under the Constitution.[1]

Today, because of the adoption of the Fourteenth Amendment in 1868, most provisions of the Bill of Rights also limit state and local governments. The Bill of Rights limits the power of the government unless the Constitution of the United States is amended.[2] Because the Constitution is the highest form of legal authority, ordinary laws cannot 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Amendment, that speech may not be punished by government unless the First Amendment is reinterpreted by the courts, repealed, or modified by another part of the Constitution.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, computers, cell phones, automobiles, aircraft, and surveillance devices 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 either by 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 therefore 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 that the national government should honor.

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

Because the Constitution granted only specific powers, many supporters of the Constitution argued that a Bill of Rights was unnecessary. Therefore, to list rights that government should protect implied that government had the power to abridge interests not included in the list.[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 cannot 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 a widespread belief among critics of the Constitution that fundamental rights existed which no government could lawfully violate.

☆ Fundamental Rights

The individual constitutions 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 Virginia Bill of Rights 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 "contrary 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 European traditions. These traditions are mostly the product of struggles of the English with their kings: a history known to Americans. The promises extracted from monarchs, 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 that 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 protection 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. Further, neither the Bill of Rights nor the Constitution focused 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 and the national government, be prohibited from infringing on rights of religion, speech, and the press. The Senate rejected this proposal because members 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 required 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 Fourth Amendment's guarantees against unreasonable searches and seizures applied to the states just as they applied to the national government.[11] Similarly, the Court held in 1969 that the double jeopardy guarantees of the Fifth Amendment applied to the states.[12]

Today, most 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 although 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 greater limits on governmental power than required by the United States Constitution. States may grant rights in addition 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 interpretations are recorded in reported decisions that not only decide the specific legal case before the Court, but also serve as precedent that lower courts must follow in future cases. Many decisions are controversial, and the justices frequently decide by a one-vote margin, i.e. by 5 votes to 4 when all 9 justices participate in the decision. Sometimes the views of a dissenting justice are adopted by the full Court at a later time.

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 the following:

> *"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. Therefore, 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 Torcasco 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 is 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 practice was unacceptable. Beyond this prohibition 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. Because religious beliefs and the idea that government should encourage religion were widely shared, the purpose was not to prevent government from encouraging religious activity. 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 as follows 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 native Virginia in a successful effort to prevent the state from levying taxes to support the churches. Jefferson expressed his views strongly in the Virginia Bill for Religious Liberty, which the Supreme Court of the United States has cited as consistent with the First Amendment. Jefferson wrote as follows:

> *"...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 to 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 and has allowed government money for instructional equipment (audio-visual devices) for parochial schools, provided that these benefits are also made avail-

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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, 472 U.S. 38 (1985). The case was subsequently bifurcated and realigned with defendant-interveners Smith et. al. as parties plaintiff in light of the relief they requested.

able for secular schools.[20] If public schools supply meeting rooms for 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. 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, however, it may violate the Constitution.[22]

☆ Testing Government Actions Under the Establishment Clause

The Supreme Court said in 1971 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] Subsequently, this rule has been modified in the context of aid to private schools; the court considers whether the government program constitutes religious indoctrination, whether it has a religious test or definition for recipients, and whether it excessively entangles government and religion. Subsequently, this rule has been modified in the context of aid to private schools; the court considers whether the government program constitutes religions indoctrination, whether it has a religious test or definition for recipients, and whether it excessively entangles government and religion. [24]

Courts make close distinctions in interpreting the "establishment clause." Churches and other religious properties for example, can be given property tax exemptions only if other charitable organizations also receive that privilege.[25] If all charitable groups are treated equally, this practice does not violate the Constitution.

☆ 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 against the argument that religious liberty rendered the law invalid.[26]

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20 See Mueller v. Allen, 463 U.S. 388 (1983) (tax deductions); Mitchell v. Helms, 530 U.S. 793 (2000) (educational equipment and materials). 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.

21 Widmar v. Vincent, 454 U.S. 263 (1981); and Board of Education v. Mergens, 496 U.S. 226 (1990).

22 County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

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

24 Agostiai v. Felton, 521 U.S. 203 (1997).

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

26 Reynolds v. United States, 98 U.S. 145 (1879). Although the courts have subsequently replaced the objective, content-based approach to define religious beliefs used in Reynolds with a more subjective definition of religion, the sincerity of religious belief often must yield to the societal interest advanced by a specific law.

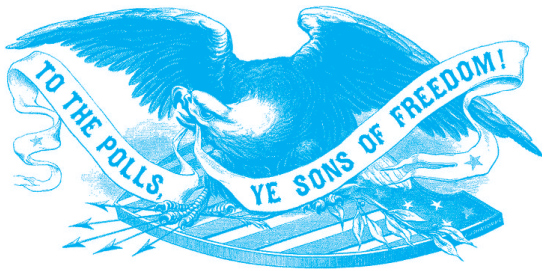
In 1943, however, the Supreme Court held that the Free Exercise Clause forbade a state from requiring members of the Jehovah's Witnesses to salute the American flag. The flag salute, noted the Court, offended the religious beliefs of the defendants and violated their right to refuse to salute.[27] Similarly 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 that penalized persons 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.

Federal legislation protects the free exercise of religions by requiring employers to accommodate, in reasonable ways that do not cause undue hardship to the employer, the religious practices of employees.[31]

☆ Belief is Protected but Conduct is Not

Religious beliefs are protected, but religious conduct has less protection. Laws of general application that 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,[32] and laws requiring stores to close on Sunday are generally valid[33] (laws regarding store closures have been challenged by shopkeepers who claim that it affects people unequally on the basis of religious practices, but the courts have generally ruled that a common day of rest was justified). In their impact, these laws do not affect religion uniquely, and they do achieve generally-approved societal goals.



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

28 Wooley v. Maynard, 430 U.S. 705 (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, 494 U.S. 872 (1990). The majority held that the free exercise clause does not immunize a person from complying with a "valid and neutral law of general applicability." Some states have laws that exempt religious ceremonies from state regulations. Employment Division v. Smith was later superseded by Congress enacting the Religious Freedom Restoration Act (RFRA), 42 USCS § 2000bb-1. Among other things, the RFRA prohibits the Federal Government from substantially burdening a person's exercise of religion "even if the burden results from a rule of general applicability," except when the government can demonstrate that application of the burden to the person 1) furthers a compelling government interest; and 2) is the least restrictive means of furthering that interest.

31 Trans World Airlines v. Hardison, 432 U.S. 63 (1977) (interpreting 1864 Civil Rights Act).

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

33 See, e.g., McGowan v. Maryland, 366 U.S. 420 (1961); Home Depot, Inc. v. Guste, 773 F.2d 616 (5th Cir. 1985).

The Freedom of Speech

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 and treasonous words were commonly punished. In the early 19th Century, several American states prohibited vocal opposition to slavery. Laws against libelous publications and against obscenity were commonplace.

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 inclusions in the British Bill of Rights of 1689 of guarantees of free speech in legislative sessions. The Speech or Debate Clause of Article I, section 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.[34]

☆ 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.

34 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.

"...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 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."[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 as follows:

"...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.

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

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."

☆ 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 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 supported a literal interpretation of the First Amendment's language that "Congress shall make no 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, "fighting words," or words that imperil national security. Speech that is merely hateful is protected. Thus when a group of American Nazis sought to carry their message, including the loathsome swastika symbol, 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 decisions apply a balancing test. Speech may, in some circumstances, be prohibited when a vital societal interest justifies suppression and there is no other feasible alternative. Critics of the balancing test say that it jeopardizes free speech, because the government argument for suppression will often on balance prevail.

Apart from the controversy about what test should be applied, the Supreme Court of the United States has often ruled in favor of free speech. 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, in a 1987 decision, a police department employee who expressed hope that an assassin might shoot the President was protected from discipline.[40] The Court rejected the argument that because "those who play with the cops must not cheer for the robbers," discipline was proper. The employee's words did not produce any disorder, and in the circumstances they were protected speech.

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

38 Texas v. Johnson, 491 U.S. 397 (1989), and United States v. Eichman, 496 U.S. 310 (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).

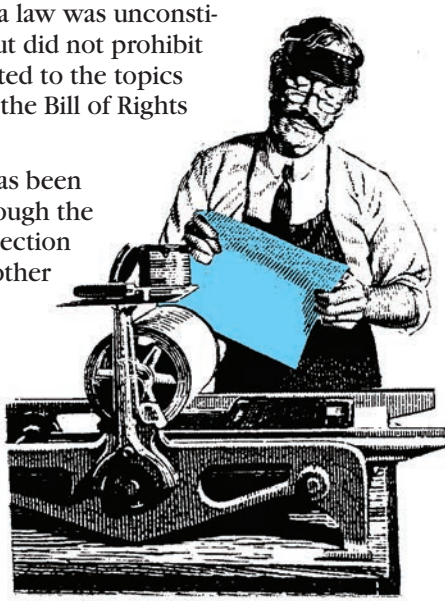
☆ Speech in Schools

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 Vietnam conflict when the conduct was not 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 protect the privacy interests of other students by censoring a school newspaper published by a journalism class.[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 cannot be punished, even if they inflict emotional harm.[44] However, "fighting words" (i. e. words 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. However, the Supreme Court has ruled that a Minnesota law was unconstitutional when it prohibited racial slurs, but did not prohibit other "fighting words" (that were not related to the topics listed in the law).[46] 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.



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.

46 R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

Freedom of the Press

The Press Clause recognizes the value of a free press, but it is unclear whether it adds to the protections already conferred by the free-speech clause. 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.

☆ 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 law meant that government might prosecute speech after publication, but government could not impose licenses or other types of censorship before 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," unjustified except in the most- unusual circumstances.

Exceptional circumstances could not 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 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 remains for legitimate argument about the scope of the free speech guarantee. It is clear, however, that free speech enjoys a high degree of protection within the United States. It surely is a "preferred right."

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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).

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 often repeated. The English Bill of Rights of 1689 confirmed the 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. The Declaration of Independence of 1776 contains a list of those grievances. 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 it 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, with interests of motorists in traffic safety, or with the public interest 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.[51] A licensing system must be fair, however. It should not be a disguise allowing excessive administrative discretion. Too much discretion can be abused, thus, threatening speech and assembly rights.

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

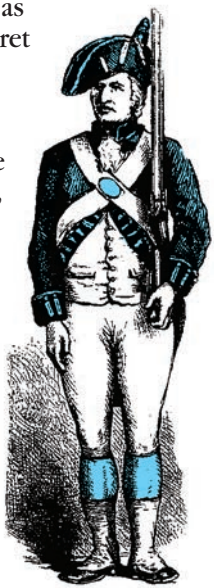
The Second Amendment

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 allowed 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. In 1791, it was generally believed that carrying arms was a fundamental right. But until 2008, because civilians are not part of a "well regulated militia," it was unclear whether the government should prohibit them from bearing arms. In 2008, the Supreme Court ruled unconstitutional a law prohibiting possession of an operable handgun in one's home. Although the court recognized that some restrictions on the possession and use of firearms are permissible, it found the blanket ban contrary to the Second Amendment.[52]



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] Much of the debate on the meaning of the Second Amendment takes place in state and local legislatures.

52 District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

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 Mich. 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 common for British commanders in the American colonies to require the civilian population to share their homes with their troops. This practice was one of the grievances listed in the 1776 Declaration of Independence. The Third Amendment stems from Americans' intense dislike of this use of their homes. 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 separate parts, the first forbidding "unreasonable searches and seizures." The second part requires that warrants be supported by "probable cause." A warrant is a document issued by a judge, authorizing 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 common 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 that 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 cannot 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 rule 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 when probable cause exists, including the following:

1. When an emergency makes it difficult to secure a warrant and the crime is significant, not minor;[56]
2. When the search is of an automobile or other movable vehicle;
3. When there is little or nothing for a magistrate to decide, i.e. an inventory search of an impounded vehicle when there are no particular facts for a magistrate to evaluate;[57]
4. When consent to the search is obtained (even without probable cause);
5. When the search is incidental to a lawful arrest;
6. When the items seized are in plain view.[58]

☆ "Unreasonable" Searches and Seizures 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 as well as residents and citizens. 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 operating outside the United States.[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, 476 U.S. 207 (1986) and Florida v. Riley, 488 U.S. 445 (1989) involving aerial surveillance.

59 United States v. Verdugo-Urquidez, 494 U.S. 259 (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. Two examples are as follows:

1. Two men walk up and down the street in front of a store - frequently looking at the store and lingering at the store's entrance. A policeman approaches and suspects that the men might be contemplating a robbery. The Court decides that the policeman may stop, question, and pat down the men to determine whether or not they are carrying weapons. This action is a reasonable "stop and frisk," which 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 looking for cigarettes. The teacher found cigarettes and 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 were, on balance, reasonable, and therefore legal.[61]

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 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 of a planned robbery if the men were seen walking past the store only one or two times.

☆ Consequences of an Illegal Search and Seizure

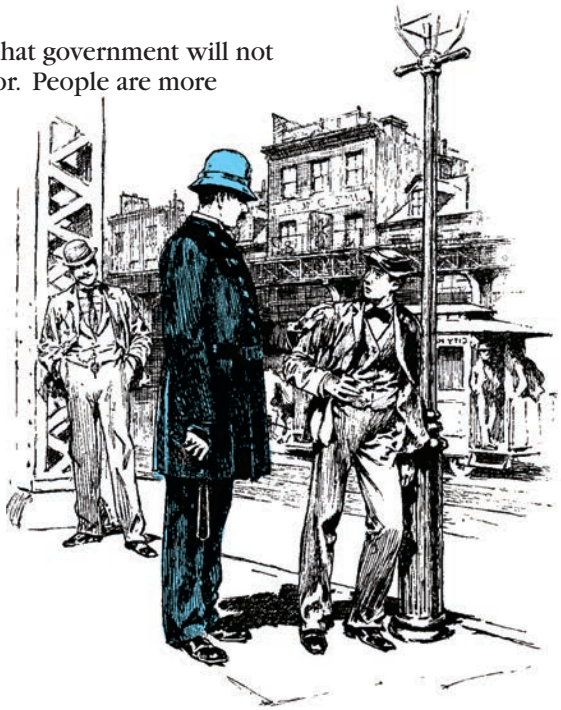
The Supreme Court has held that, in most circumstances, evidence secured as a result of an illegal search and seizure should not be used in a criminal proceeding against the target of the search. This rule is the controversial "exclusionary rule." Whether the rule is required by the Fourth Amendment, 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 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. However, given the public pressure to apprehend and punish lawbreakers, the exclusionary rule is arguably a necessary means to discourage illegal investigative practices.



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. However, police sometimes arrest or seize items as a punitive sanction or for other reasons, 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 in state courts.

The roots of the "Grand Jury" Clause lie in the history of England. Two reasons support 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 might 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 a formal charge should be made. Grand juries have the power to order people to appear and testify; they also have the 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 the same 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 will eventually be found guilty.[64]

The Supreme Court has held that the double jeopardy clause does not forbid a state from prosecuting, convicting, and punishing a defendant for multiple crimes arising from the same conduct. The crimes are considered separate if each one requires the prosecutor to prove a legal element not contained in the definition of the other crime. For example, the prosecution could charge a drunken driver with homicide after that driver had been convicted for drunken driving for the same incident.[65]

Frequently a criminal act violates both a state law, and a federal statute. When this situation occurs, the defendant may 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. Because the laws of two different jurisdictions are violated, each may bring charges without violating the protection against double-jeopardy.[66]

☆ The Privilege Against Self-incrimination

This right protects not only freedom from confessions induced by torture, but also freedom from being required to testify, under oath, when truthful answers could result in criminal penalties.

The right applies in criminal proceedings. The right now includes prohibiting prosecutors and judges from commenting upon a criminal defendant's failure to testify. Judges tell juries that they should not conclude that a failure to testify means that the defendant was guilty, or that the defendant had some information to hide. Nonetheless, it is impossible to be sure that all jurors are able to disregard the defendant's choice not to testify.

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 the following:

1. That the suspect has a right to remain silent;
2. That anything the suspect says may be used in court against him or her;

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

65 United States v. Dixon, 509 U.S. 688 (1993).

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.

3. That the suspect has a right to consult with a lawyer; and,
4. 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 Amendment rights. It applies to prosecutions in state courts by virtue of the 14th Amendment's due process clause.

In cases decided after *Miranda*, the courts have recognized or applied exceptions to 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 at trial inconsistently with the contents of the statement.[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 dates back to the Magna Carta of 1215. The specific meaning of "due process" evolved in thousands of judicial decisions. Today, there are two primary interpretations of the meaning of "due process." Justice Scalia, for example, has interpreted its meaning as confined by its history. Justice Brennan, on the other hand, regarded 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 may be taken. These rules include the right to a fair, impartial hearing and the right to fair and proper notice of what the law means. Procedural due process means that there is a fair decision-making system to guarantee procedural rights before government takes some action that impairs a person's life, liberty, or property.

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." United States v. Dickerson, 530 U.S. 428 (2000), later held that Miranda v. Arizona was a constitutional rule that could not be superseded by any congressional legislation.

68 Harris v. New York, 401 U.S. 222 (1971).

69 The debate between Justices Scalia and Brennan is renewed in Burnham v. Superior Court, 495 U.S. 604 (1990).

☆ Substantive Due Process

People debate whether some rights are so important that they cannot be taken away even with fair procedure. A woman's "right" to have an abortion, which the Supreme Court recognized in 1973, rests on a theory of substantive due process.[70] In a different context, the Supreme Court has held that a zoning law defining a family as composed of parents and children could not prevent a grandmother from sharing her home with two grandchildren.[71] The grandmother had a "right" to provide a home for the children.

Some substantive (as distinguished from procedural) rights are specifically guaranteed by the Constitution. State governments may not "impair" contracts.[72] Property cannot be taken by the government without just compensation, and the freedom of speech cannot be abridged even if government follows fair procedures. Similarly, double jeopardy cannot 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) that diminishes the value of property, but does not require compensation, and a "taking" that does. To decide whether compensation is necessary, 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.[74] These factors 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). While Roe v. Wade has not been expressly overruled by the Supreme Court, Gonzales v. Carhart, 550 U.S. 124 (2007), held that the congressionally created Partial-Birth Abortion Ban Act of 2003 was not unconstitutional, thereby allowing limitations to the procedures a woman could have for a second trimester abortion.

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).

74 74 Penn Central Trans. Co. v. City of New York, 438 U.S. 104 (1978).

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. It also helps an accused person because witnesses and evidence may disappear and be unavailable for a defense. Although the constitutional right protects the defendant in a criminal case, the Supreme Court has also described the public's interest in a speedy trial as follows:

> *"... 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."*[75]

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 that provide time limits for the criminal trial process.

75 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."[76] Thus, 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," a state may not decide to deny jury trials to criminal defendants charged with an offense punishable by more than six months in jail.[77]

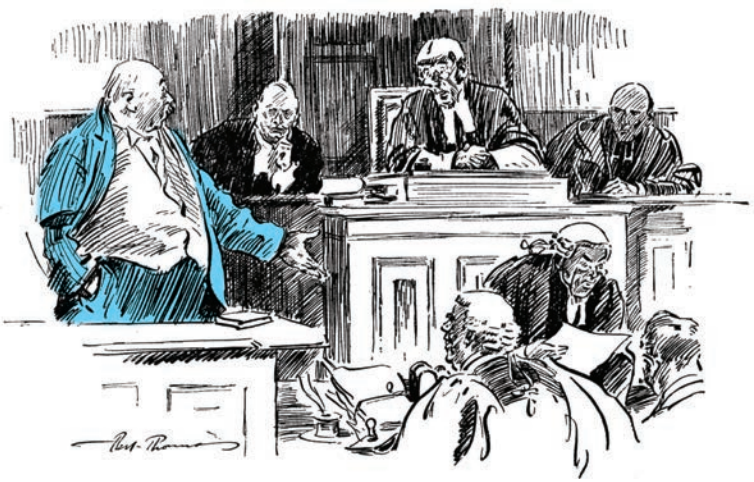
An impartial jury is a jury that is "a truly representative" selection from the community. A system that prevents women, minority members, or other discrete members of a community from jury service denies Sixth Amendment rights.

In federal trials, juries of 12 are required. However, states are permitted to allow criminal convictions if a jury of six unanimously agrees[78] or if ten out of 12 on the jury agree.[79] A one or two person jury, therefore, would not be allowed.

☆ Notice of Charges

The Court has stated as follows:

> *"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."*[80]



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

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

78 Williams v. Florida, 399 U.S. 78 (1970). The Wisconsin Constitution, however, guarantees the right to a jury of 12 in a misdemeanor case. State v. Hansford, 219 Wis. 2d 226, 580 N.W.2d 171 (1998).

79 Apodaca v. Oregon, 406 U.S. 404 (1972). The Wisconsin Constitution, however, requires a unanimous jury verdict before a criminal defendant can be found guilty. State v. Koput, 142 Wis. 2d 370, 418 N.W.2d 804 (1988).

80 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 that a defendant has a right to see witnesses face-to-face. For example, a defendant's right to confrontation was violated when two young girls, victims of a sexual assault, testified that they had been assaulted by the defendant. Because the girls' testimony was in front of a one-way mirror and, therefore, the accused could see the girls, but the girls could not see the accused, the Court held that rights to "confront" witnesses were violated.*[81] *The meaning of "confrontation" meant a real face-to-face presence.*

However, if a court finds it necessary to protect a child witness from severe suffering that might occur if the child saw the defendant, the child may testify through closed-circuit television.[82]

☆ 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. Because criminal defendants should have a fair opportunity to present a defense, they 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,[83] the court held that a poor defendant has a right to counsel paid by the government. Wisconsin had previously recognized the importance of a right to counsel for poor defendants under the Wisconsin Constitution in 1859.[84]

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

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81 Coy v. Iowa, 487 U.S. 1012 (1988). Two years later, the Supreme Court held that the face-to-face requirement was not absolute. See footnote 82.

82 Maryland v. Craig, 497 U.S. 836 (1990).

83 372 U.S. 335 (1963). A great book on the case is Lewis, Gideon's Trumpet (New York Random House 1964).

84 Carpenter v. County of Dane, 9 Wis. 274 (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 functions of a judge and of a jury. A right to a jury trial in criminal cases is already guaranteed in Article III, section 2 of the Constitution; therefore, the Seventh Amendment applies only to civil trials in federal courts.

The Seventh Amendment neither tells us when a jury is required, nor defines 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 before 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.[85]

85 Palko v. Connecticut, 302 U.S. 319, 324 (1937). This case has subsequently been overruled on other grounds by Benton v. Maryland, 395 U.S. 784 (1969).

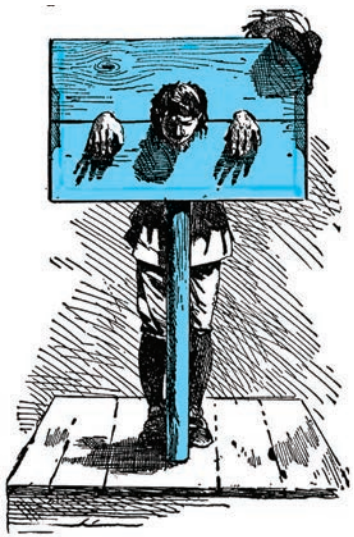
The Eighth Amendment

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 that it was excessive and unconstitutional to imprison a person from 12 to 20 years for making a false statement in a public record.[86] Imprisonment merely because a person has a mental illness also violates the 8th Amendment.[87]

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.[88]



☆ Cruel and Unusual Punishment

The Court has said that "evolving standards" of decency must be used in interpreting the meaning of the 8th Amendment. Some justices have said 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 authorizes it as a penalty for homicide. Many restrictions are placed on its imposition.

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

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

88 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 amendment is the only part of the Bill of Rights that tells us how to interpret the other amendments. It does so by telling us how not to interpret the Constitution. The purpose of the Ninth Amendment was to clarify that the listing of certain rights in the Constitution does not mean that the list is a complete list of all protected rights.

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.[89] Justice Goldberg then said that the Court should rely upon "the traditions and conscience" of the nation to determine what values were protected.

Other justices, however, have denied that any natural law is included within the Constitution's protections unless specifically stated in the Bill of Rights. The Courts, according to this interpretation, should not rely upon the Ninth Amendment to create new rights.

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

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 that 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, however, limits neither the power of the United States government to make treaties on matters of common interest[90] nor its power to regulate the wages and hours of state government employees.[91]

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

91 Garcia v. San Antonio Metro Transit, 469 U.S. 528 (1985). The Supreme Court held that the overtime provisions of the Fair Labor Standards Act (FLSA) applied to the employees of state and local governments. Congress subsequently amended the FLSA to afford state and local government employers some relief from the burden of paying cash overtime compensation to their covered employees, thus effectively superseding the Supreme Court's holding in Garcia v. San Antonio Metro Transit. This case has subsequently been overruled on other grounds by Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

Conclusion

The Bill of Rights is a hollow shell without our collective devotion. An effective Bill of Rights requires the labor of men and women doing the work of government. However, government depends deeply on the support of the governed. A Bill of Rights is meaningful only if all Americans share a common belief that the liberties guaranteed by the Bill of Rights deserve our support and are 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 described the spirit of liberty that 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]

Americans, collectively and individually, can savor, nurture, and preserve the ideal of liberty, that is guarded and protected by the Bill of Rights. We should resist attempts to encroach upon those rights, so that they may remain 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.

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