Chapter 8. Civil Rights and Liberties: Constitutional Protections That May Not Be Constitutionally Protected
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TEXT

I. Introduction: The Paradox of Our Constitutional Rights and Liberties

Eighteen year old Joseph Frederick skipped going to his Juneau, Alaska high school that morning. But he did show up on a public street outside the school and met his friends. They had been let out of school to see the passing of the Olympic torch on its way to the opening of the 2002 winter games. As the torch came by, Frederick unfurled a long paper banner showing the words "Bong Hits 4 Jesus." Television cameras caught a video of the banner and Frederick. The school principal rushed over and confiscated the banner. He then suspended Frederick for five days for allegedly promoting drugs at a school function. Frederick met with the principal and argued that Thomas Jefferson would support his expression as an exercise of free speech, which he thought was clearly protected by the first amendment. The principal rewarded this lesson in political history by increasing the suspension to ten days.

Frederick and his parents went to court. They argued that the suspension violated the first amendment. The school defended itself. It argued that advocating drugs at a school function is not protected speech because it is disruptive of the school's mission. After losing his case in the federal district court in Alaska, Frederick won his appeal in the U.S. Court of Appeals. The Appeals Court found that even though a school may limit speech in some situations, such as when it is sexually offensive, it could not limit speech concerning possible disagreement with a social policy.

Justice grinds slowly. Five years later, in 2007, the case went to the U.S. Supreme Court. Kenneth Starr, the famous special prosecutor who had pursued the Clintons for years in the Whitewater investigations, argued for the school. Interestingly, several justices had to be told what "bong hits" were. They did not know. A host of groups filed "amicus curiae," or friend of the court briefs, on both sides, including the American Civil Liberties Union on behalf of Frederick, and the School Boards Association and some Christian right groups on the side of the school. Do schools have the right to restrict speech if school officials interpret the speech as favoring drugs?

In a six to three decision, the Supreme Court ruled in favor of the school. On the majority side was a concurring opinion by Justice Clarence Thomas that students have no free speech rights in school at all—that the first amendment does not apply to schools. The majority was not willing to go that far. They concluded that even though the event was not on school grounds and even though Frederick had not gone to school that day, it was a school event, and the

school could reasonably interpret the banner as in support of illegal drugs, which was against school policy. Chief Justice Roberts, writing for the majority, saw the case as consistent with previous cases that do not give broad first amendment protections to students at school functions.

John Paul Stevens wrote the dissenting opinion for the other three justices. They saw the message as less clearly pro-illegal drugs, possibly promoting medical use of pot. They argued that allowing school officials to interpret it any way they want amounts to letting officials ban any speech with which they disagree. They saw the speech as constitutionally protected.

What does all this mean? Americans are fond of talking about their Constitutional rights and liberties. But exactly what rights and liberties are we talking about? You should know from the chapters on the Constitution and the judicial system that the words in the Constitution do not necessarily mean what we think they mean, even when the words seem perfectly clear. Thus we have the central paradox of this chapter: our constitutional rights and liberties are not necessarily constitutionally protected. Such was the case of Joseph Frederick. He thought the first amendment clearly protected his right to such speech. It did not.

Let me add another twist to the paradox. Most of the constitutional rights and liberties that we actually have did not come from the Constitution by itself. Rather they came from political struggles in which people fought for and sometime even died for an interpretation of the Constitution that recognized these rights and liberties. The interpretation counts more than the actual words. Of course, you should know that by now, having read the chapters on the Constitution, the judicial system, and having learned about the role of the Supreme Court.

That struggle is not over. Every generation faces forces that try to reduce or narrow rights, usually for quite appealing reasons. Local majorities and sometimes even national majorities are often eager to ignore the rights of minorities, especially if the minority is defined in some way that makes it unpopular or feared at some moment in history. You can certainly think of such groups that exist right now. If someone does not stand up and say “no!”, then rights are lost. If one group loses rights, then what is to keep authorities from restricting rights for other groups? You never know when or if you will become classified as a member of some group that people feel is dangerous, and therefore not deserving of protection.

In this chapter we will begin by defining what we mean by civil rights and liberties. Then we will look at what the Constitution seems to include in the way of rights and liberties. Next we will tell the story of how these rights and liberties have been partially applied to state governments—the idea of incorporation. We follow this by examining the struggle in claiming liberties in several key areas,

including rights of the accused and the expansion of rights for groups that have found their rights denied. Each area we examine has been characterized by controversy and political conflict. These conflicts will continue.

II. Review of Rights and Liberties in the Constitution

Some texts have separate chapters on civil rights and civil liberties. We are combining rights and liberties in this relatively short text. Most Americans could not tell the difference between these two terms. **Civil rights** refer to equal treatment and protection of members of groups. So when we are talking about the civil rights movement among African Americans or Hispanics or the women's rights movement, we are talking about civil rights. **Civil liberties** refer to individual protections against government actions, such as restrictions on speech or religion or treatment in legal proceedings. That seems simple enough, so why are we confused? The label we use for an important part of the Constitution may be the source of confusion. The **Bill of Rights**, which we apply to the first ten amendments, is where you will find most of the civil liberties that we have, such as free speech and so on. Things would have been simpler if it had been called the "Bill of Liberties." But no one consulted me on this! So let's move on.

As you may remember in the story of ratification of the Constitution, several states were not satisfied that the Constitution placed enough limits on the powers of the new, more powerful central government that was being proposed to replace the Articles of Confederation government. So these states added a call for additional safeguards to their ratification of the Constitution. Supporters of the new constitution agreed to this deal. As a result, the first Congress proposed a number of amendments. The states ratified ten of them in 1791, only two years after the new government began operation. We know them as the Bill of Rights.

Nevertheless, the main body of the Constitution does contain some rights and liberties, which the Founders had felt adequate when they drafted the document. For example, all the checks and balances built into the Constitution limited what any branch of government could do. The Founders considered this a limit on the power of the central government.

More specific protections are in Article I, Section 9. This section prohibits suspension of the "privilege of the **Writ of Habeas Corpus**" except "in Cases of Rebellion or Invasion." Habeas corpus refers to the requirement that government bring charges against anyone they hold in custody. To put it another way, the government is not supposed to arrest you and just imprison you without giving an explanation in terms of legal charges against you. Charges allow the courts to hold a trial to determine if the charges are true. In practice this depends on what government authorities consider to be an invasion or rebellion. Probably the worst abuse of this right was when Japanese American citizens were held in

detention camps for years during World War II. You might look this story up on the Web—a very sad chapter in American history.

That same section prohibits "**bills of Attainder**." A bill of attainder is a law that a legislature passes which declares that some act is a crime and that some specific person is also guilty of that crime without holding a trial to determine guilt.

The section also prohibits "**ex post facto Law**," or after-the-fact law. You are probably more familiar with that term. One cannot be tried for violating a law that was not in place when the act was committed. All of these things were concerns that the Founders had about past actions by the British government.

Article I, Section 9 contains a long list of other limits on the central government. The national government could only impose taxes that were in proportion to the populations of each state. This meant that taxes, based on income rather than population, were not allowed. In 1913 the Sixteenth Amendment changed this to allow an income tax. The national government could not tax exports from any state. It could show no preference for one state over another in regulating interstate commerce. Finally, the national government could grant "No Titles of Nobility."

Article III, Section 3 limits the ability of the central government to convict people of treason. It requires "the testimony of two Witnesses to the same overt Act, or on Confession in open Court."

Finally, Article VI guarantees that no religion will limit who can run for office or hold public employment. "…**no religious Tests** shall ever be required as a qualification to any Office or public Trust under the United States." Of course, you know today that many candidates for office parade their religious affiliations before voters as something that presumably qualifies them for office. Collectively we ignore Article VI.

But as you know, this was not enough to satisfy those who feared a strong central government. So the Bill of Rights included a great many other protections, and the amendments that came later in history added a great many more protections. For now, we will list the general areas amendment by amendment and make brief comments on some of the areas. Later we will go into greater detail in how some of these protections have been interpreted.

The most famous amendment is the First Amendment, which lists five or six protections, depending on how you read the clause about religion. The amendment begins with the five words "Congress shall make no law." As we shall see, "no law" does not really mean no law. Rather it means no unreasonable law. What is reasonable is a matter of endless debate—like schools prohibiting speech that school officials feel disagrees with existing drug

policy. With that in mind, the amendment says that Congress may pass “no law” in several areas: “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.” This last phrase means to contact government to ask them to address complaints. None of these restrictions on government action is absolute.

The Second Amendment is about what citizens like to think of as their right to “bear arms.” Make sure you spell that correctly—bare is different than bear! If you read it carefully, the first phrase refers to “A well regulated Militia, being necessary to the security of a free State….” So the Supreme Court has had to decide whether this right refers to private individuals, or to a collective right in militias.” We will get to that later in this chapter.

The Third Amendment is perhaps the least controversial because it has never been tested. It refers to a practice that Americans found horrid, that of British troops taking over private property to house their troops. So it prohibits this practice “in time of peace…without the consent of the Owner.”

In the Fourth Amendment you will find the famous protection against “unreasonable searches and seizures.” To search anyone’s property, the government must obtain a warrant, which will be issued “upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” This one is filled with words that the courts have had to interpret. Lots of searches have been judged to be reasonable, often without any formal warrant.

The Fifth Amendment continues in matters of criminal proceedings, giving a list of protections. These include the requirement of a Grand Jury indictment (a grand jury is a group of citizens who review evidence to see if it is sufficient to support bringing charges against someone) before anyone can be held (except for members of the military), prohibiting double jeopardy (“nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”), and protection against self-incrimination (“compelled…to be a witness against himself”). This is when someone refuses to testify in a legal proceeding. They claim this right by saying something similar to “upon advice of counsel, I am invoking my fifth amendment rights.”

Two more protections in the Fifth Amendment merit some additional comment. We start with the famous “due process” clause, which states that the government shall not take “life, liberty, or property, without due process of law.” This same phrase is also in the Fourteenth Amendment, which refers to state government actions.

Down through time the courts have defined exactly what is included under due process of law. Most generally due process includes two kinds of process. The first is **procedural due process**, referring to following the proper procedures.

The second kind of due process is **substantive due process**, which is far more controversial. Substantive due process requires the government to have a really good reason to take someone's life, liberty or property, even if the government follows the correct procedures. Of course this means that the courts end up deciding what reasons are good enough. Another way of thinking about substantive due process is to ask whether the outcome (as opposed to the procedure) is fair. Fairness depends on social notions of fairness. Again, the courts end up making qualitative judgments. This troubles those who want the courts to play a more objective role and leave questions of fairness to the political branches of government that write laws.

An example to distinguish procedural and substantive due process might help. For example, the government might charge two people with breaking drug laws, one for possession and use of powdered cocaine and the other for crack cocaine. Laws setting penalties for crimes involving crack cocaine have been much harsher. Authorities could treat both people the same in terms of procedure. But the outcomes in terms of the sentence have been greatly different. As society began to question the fairness of this, the legal question for someone with a long sentence based on a crack cocaine charge became one of violation of substantive due process. In fact, these sentencing disparities are being reduced under the idea of substantive due process.

While we can make a mental separation between procedural and substantive due process, in practice the two ideas get mixed together. Procedures that lead to unfair outcomes usually get questioned as violating due process protections.

The final clause in the Fifth Amendment is called the "**takings clause**," which says that no "private property (shall) be taken for public use, without just compensation." The clause has several terms in it that have been matters of legal interpretation. What does "taking" mean? Confiscating is an obvious form of taking. The power of government to take your land is called the power of "eminent domain." But what about restricting how the land is used through zoning or building codes and limits? This kind of action can reduce the value of the land, even though it is not literally taken. What counts as "public use?" Does that include just obvious uses like building roads or putting up power lines? Or does it also include giving the land to private developers so that it can be redeveloped to generate higher property tax revenues? In recent years many individuals and groups have challenged a wide range of government regulations—including environmental laws—that affect the value of their private property using the "takings clause." These challenges are called the **property rights movement.**

You can find a lot of cases on this by doing a Web search on either "takings clause" or "eminent domain." We will look at one very old case shortly.

The Sixth Amendment continues a list of protections afforded to those accused of any crime. They include the right to a "speedy and public trial," "to be informed of the nature and cause of the accusation," the right to "be confronted with the witnesses against him," the right to compel "witnesses in his favour" to testify," and finally "to have the Assistance of Counsel for his defence." (Note how some of the spellings have changed over history.) Again, each of these terms has had to be defined. How fast is speedy? Can judges make trials private if the judge feels that a public trial would result in some harm? At what point and for what crimes must counsel be provided? Must that counsel meet any minimum quality standards? The courts hear many cases that answer these questions, as well as other questions concerning criminal procedures—again, you can look them up.

The Seventh Amendment concerns legal matters in civil suits. The Seventh gives the right to a jury trial in lawsuits involving more than $20. At the time this was a significant amount of money, but of course it is trivial today. This level of specific detail is unusual for the Constitution. Constitutional scholars would argue that details like this are better left to statutory law passed by a legislative body. Had the amendment said "set at whatever level deemed appropriate by Congress," it would have given the courts more flexibility in limiting the number of jury trials. The result today is that all law suits in federal courts retain the right of jury trial.

The Seventh goes on to say that facts established by juries cannot be reexamined by any other court. But it adds the words "than according to the rules of common law." **Common law** is judge-made law, that is, principles of fairness that judges use in making rulings. For example, in the famous Charles Manson murder trial, the defendant turned to the jury and held up a newspaper with the headline "Nixon Declares Manson Guilty." Then Manson asked for a mistrial on the basis that the ill-tempered words of the President had biased the jury. The judge applied the common law principle that "no man should benefit from his own misdeeds" to deny a mistrial. Substantive due process, which we just discussed, is a basic principle of common law, so denial of substantive due process could allow courts to reexamine facts.

The Eighth Amendment goes back to criminal matters, guaranteeing bail and fines that are not "excessive" This does not guarantee that people will actually have any right to bail. If the courts find that a person is a flight risk, bail can be denied. What is excessive is also a highly subjective matter. For example, even a bail of $150 (not an unusual amount for minor crimes) can be excessive for someone who is homeless and/or without any financial resources. Someone who cannot get out on bail is pretty much stuck with accepting any deal that the prosecutors offer. Going to trial while in jail and not being gainfully employed

greatly increases the odds of being found guilty. And keeping people in jail awaiting trial, which can take a year, costs taxpayers a great deal of money. Electronic monitoring would be much cheaper and more humane, allowing people to continue working in many cases. So why do we continue a bail system that operates this way? It is because of the power of the bail bond industry that makes a great deal of money in the current system. The power of interest groups in our political system is the subject of another chapter.

The Eighth Amendment also protects those found guilty from "**cruel and unusual punishments**." What is "cruel and unusual" is also a subjective matter and has changed as common punishments and standards of cruelty have shifted. The most controversial area here is that of capital punishment. As of this writing, the United States is the only western industrial democracy that allows the death penalty. Those challenging the death penalty have in recent years attacked methods of execution as being cruel and have attacked standards of evidence used in imposing the penalty. They have argued that DNA evidence has been found that proves some of those condemned were in fact innocent. Many states have already banned the death penalty in state criminal proceedings. States in the South are more likely to still have the penalty and impose it more frequently. Of course this reflects the culture of the region, a culture that takes an "eye for an eye" approach to justice. Ironically, the states with the highest murder rates are those that are most likely to have the death penalty. Attacks on the penalty will continue, and in all probability some day the penalty will be banned. You might search the Web to see how many states still have the penalty and note where they are located.

The Ninth Amendment is perhaps the most interesting amendment because it leaves room for a range of other rights that could exist, but are not explicitly mentioned. It says that the listing of certain rights "shall not be construed to deny or disparage others retained by the people." This phrase seems to invite courts to discover additional rights that the people may have. It demands interpretation.

Those arguing for a narrow literal interpretation of the Constitution and the rights in the Constitution have a great problem with this amendment. This is because if they want to limit rights to the ones literally written in the Constitution, they must find a way to construe or interpret this amendment as meaning not what it literally says it means. They must find a way to say that this amendment means that no other rights exist. So ironically, a narrow literalist interpretation of the Constitution requires a broad interpretation of this particular amendment! Robert Bork, who was turned down for a seat on the Supreme Court by the Senate in 1987 in part because of his narrow views on the Constitution, evaded any interpretation of the Ninth Amendment by saying it means nothing. He called it an "inkblot" in the Constitution that must not be interpreted by judges because the meaning is no clearer than words under an inkblot.

Many of the rest of the amendments expand rights. The Thirteenth banned slavery. We have already mentioned the Fourteenth, which grants the right of citizenship to all those born in the United States and over time has protected rights from state actions. We will have much more to say about how this has come about later in the chapter.

The rest of the rights in the amendments concern voting. The Fifteenth (1870) presumably guaranteed the right to vote, though that took about a hundred years, another story we will discuss later. Amendment Seventeen (1913) gave the people the right to vote for U.S. Senators. Nineteen (1920) extended the right to vote to women. Twenty-three (1961) gave residents of the District of Columbia the right to choose presidential electors. Amendment twenty-four (1964) stopped states from using the poll tax to restrict the right to vote, although federal courts had already found poll tax laws to be unconstitutional. And finally, number twenty-six (1971) further expanded the right to vote to eighteen year old citizens.

The broad sweep of all these changes in the Constitution has been to expand rights and the groups to whom rights are guaranteed. In fact, we can only find one amendment that restricted rights, and that amendment was undone by a later amendment. The Eighteenth Amendment (1919) created **prohibition**, <u>a ban on the sale of alcohol</u>. This proved so difficult to enforce that fourteen years later, in 1933, the Twenty-first Amendment repealed the Eighteenth.

III. Incorporation of the Bill of Rights to Apply to the States

If you read the last section carefully, you know that the Bill of Rights was aimed at protecting citizens from actions of the <u>national</u> government. But what about actions by <u>state</u> governments? Does the Constitution protect us from state governments that may want to restrict speech or religious practice or deny us counsel when we are tried for crimes? You may remember the universal answer to nearly all political questions: it depends. That answer applies here. It depends on what time in history we are talking about and what right we are talking about. The answer involves a story with the same theme we saw in looking at amendments concerning the right to vote—the gradual slow and sometimes painful expansion of rights. It involves the paradox of seemingly obvious constitutional rights not being constitutionally protected.

A. Barron's Worthless Waterless Wharf (*Barron v. Baltimore*, 1833)

John Barron owned a wharf located on a navigable waterway that ran into Baltimore's harbor. His business involved offloading goods from ships anchored in the harbor, storing them, and then helping to distribute them. It was a good business. Then the City of Baltimore undertook a public works project that greatly

reduced the flow of water to the wharf and increased the sand surrounding the wharf. The result turned a profitable wharf into a worthless waterless wharf.

Barron looked at the "takings" clause in the Fifth Amendment in the Constitution. He felt that the government had taken his property, or at least it's value, for public use in pursuing the public works, and that he deserved "just compensation." So he sued the city. And he lost. He then appealed the case to the federal courts because it rested on words in the United States Constitution.

John Marshall was still Chief Justice when ***Barron v. Baltimore*** reached the Supreme Court. Without even hearing the City of Baltimore's arguments, Marshall authored a unanimous opinion that was logically based on the words in and history of the Bill of Rights. The Bill of Rights was specifically aimed at the national government, not the state governments. The City of Baltimore was chartered by the state of Maryland, so it was an agent of a state government. So any protections in the Bill of Rights did not apply to Baltimore. Barron's only relief would have to come from Maryland. Barron was stuck, both legally and literally in the sand--end of case!

B. Passage of the Fourteenth Amendment—Incorporation: does it apply the Bill of Rights to the states?

History moved on. The nation fought the Civil War, and the national government along with the northern states, concerned that states might deny rights to those freed from enslavement, passed the Fourteenth Amendment in 1868, thirty years after the *Barron* case. Here the wording is critical, so let's look carefully at the relevant phrase in Section 1: "No state shall abridge the privileges or immunities of citizens of the United States…."

What does that sound like it means to you? The way I read it is that states can't take away rights ("privileges or immunities") that you have as a U.S. citizen. And the rights you have as a U.S. citizen can be found in the Constitution, including the Bill of Rights. This idea is called the **incorporation theory**, meaning that the Fourteenth Amendment incorporates, or takes in, the Bill of Rights to apply to state as well as national actions. That seems pretty clear to me? Does it to you? But of course, what counts is not what we think the plain language says. What counts is what the Supreme Court says it means.

In the late 1800s the Supreme Court began to apply first amendment rights to state actions. Did that mean that all the other rights also could be applied?

C. *Palko v. Connecticut* (1937)—Is Your Life Essential for Liberty?

In 1935 Frank Palko was fleeing the scene of a crime. Police cornered him and he killed two police officers before being captured. The state of Connecticut

tried him for first degree murder, but the jury only found him guilty of second degree murder. He was sentenced to life imprisonment. Authorities in Connecticut were not satisfied and tried him again. This time the jury found him guilty of first degree murder and sentenced him to death.

Palko and his lawyers objected that this violated the Fifth Amendment protection against double jeopardy ("twice put in jeopardy of life or limb"). Moreover, now that the Fourteenth Amendment had been passed, Connecticut was bound to give Palko all the "privileges and immunities" he had as a U.S. citizen, including this one. Does this sound logical to you? To let the state continue to try someone with different juries until they get a verdict they liked would seem to offend any reasonable notion of fairness. Moreover, as we mentioned above, the Supreme Court had in earlier cases applied some parts of the Bill of Rights to state laws, for example freedom of speech.

Despite all this, Palko lost in an eight to one decision! The majority decision in ***Palko v. Connecticut*** said that the Court would only apply rights to states that were "essential to a fundamental scheme of ordered liberty." Personally, I cannot think of anything that is more fundamental to liberty than ones life. If government can try someone until they get a guilty verdict or a harsh penalty, can anyone have liberty? What do you think about this? Nevertheless, that is what the Court said—double jeopardy protection was just not important enough to be incorporated by the Fourteenth Amendment to apply to the states. Frank Palko was gassed to death in April of 1938.

In 1969 in *Benton v. Maryland*, the Supreme Court overturned the Palko precedent. It decided that double jeopardy was indeed important and used the Fourteenth Amendment to apply it to state criminal proceedings. That did not help Frank Palko.

D. Selective Incorporation—Almost There, But Not Quite

Despite what you and I may have seen as the plain wording and meaning in the Fourteenth Amendment, the Supreme Court has never had a majority ruling that all of the Bill of Rights is incorporated, or brought in, to apply to the states because of the Fourteenth Amendment. Some individual justices have made that argument, but never a majority in a ruling.

Gradually over time, case by case, right by right, the Court has applied most of the rights under the Bill of Rights to the states. The term that applies to this long process is "**selective incorporation**." You might search the Web under "selective incorporation" to see which rights have not yet been applied to the states.

IV. Some Key Areas of Rights and Liberties

Most American government texts go into a great deal of detail in discussing civil rights and liberties in a range of areas. The questions in all of these areas involve what the words of the Constitution mean when applied to very specific governmental actions or laws. Because new cases are being heard all the time that alter interpretations, textbooks need to be updated almost every year for some area of rights. This poses a problem in trying to write a text that is designed to minimize the need for updating. How can we talk about areas of rights without giving the latest cases?

Here is how I shall attempt to accomplish this difficult task. I will still cover several major areas (see the outline for this chapter). However, rather than give you the latest cases, I shall talk about a few very important cases in the past and the alternative ways in which the Supreme Court might interpret the Constitution in the future. If you want the latest case, simply search the Web under the right or liberty in question.

A. First Amendment Rights and Liberties

By now you should know what is in the First Amendment. Because it is the first one, the courts have tended to take these protections and limits on what government can do more seriously than some of the rights in other amendments. For example, as noted earlier the Court incorporated first amendment free speech rights in the early 1900s, well before it incorporated rights in criminal proceedings. For each of the rights in the First Amendment, the Court has devised rules to help it judge whether government action is or is not in violation of each right. Down through time these rules sometimes change. Let's discuss the rights in the First Amendment in the same order in which they are listed. So we will start with religion and end with assembly and petition.

1. Religion—Two Parts

As we noted earlier, the clause on religion has two parts, the establishment clause and the free exercise clause. The courts have treated them separately. So we shall do likewise.

a. Establishment

The First Amendment begins: "Congress shall make no law respecting an establishment of religion…" The critical word in this is "establishment." **Establishment of religion** might be interpreted two different ways. One interpretation is that all this prohibits is an official state religion. The Founders certainly did not want to have anything like the Church of England in the United States. Many people came to this country to escape religious persecution. However, some colonies, like the Massachusetts Bay Colony, had an official religion and banned all other religions. Later the state of Massachusetts allowed

taxes to be collected to subsidize religious organizations at the local level. So perhaps no official state church at the national level is all the Founders were thinking about.

If no official state church is all the establishment clause means, then government can get involved in aiding and helping religions as long as none are the official state religion. Teachers could lead students in prayer in public schools, government could grant scholarships to religious schools and help them build facilities, and officials could place religious displays on public grounds to promote religion.

If you think about all this, you might wonder whether these kinds of activities are really just another way of "establishing" a religion. That takes us to the second interpretation, the "wall of separation" interpretation of the establishment clause. Under this interpretation a clear wall of separation must exist between government and religious institutions. Any entanglement between government and religion would violate this interpretation.

Pretty good historical evidence exists that this kind of more complete separation is what at least some of the Founders may have wanted. Both Jefferson and Madison used the phrase "wall of separation" in talking about the relationship between government and religion in the context of the first amendment. In many decisions the Supreme Court also has used this phrase.

The trend in court rulings has been in the direction of "the wall of separation" interpretation. A number of Supreme Court rulings have prohibited public school teachers from leading students in prayer, or even students leading organized prayers at school functions, like football games. Does this mean that all prayer in public schools is banned? No. As the joke goes, prayer will always be in schools as long as schools have algebra tests. The joke captures an often overlooked aspect in the school prayer controversy, that private individual prayer is not prohibited.

However, this wall of separation has many gaps in it, some by way of court rulings and some by common practice in communities. Schools and students often skirt the impact of the ban on organized student-led prayer by having unorganized "spontaneous" student-led prayers, such as football teams gathering together before kickoff and bowing their heads. The Supreme Court has used the term "excessive entanglement" to prohibit some practices, but then allowed other practices, such as the government buying secular textbooks for religious schools. The Court reasoned that secular textbooks, unlike religious textbooks, do not involve "excessive entanglement." The Court allows religious displays if they are not designed to promote religion but are part of a larger historical display. So the intent of public officials may influence whether or not a specific practice violates the establishment clause.

How high should any wall of separation be? This is a complex question that will be debated as long as we exist as a society. If you are religious and a member of the dominant religion in your community, you may feel that the government is being anti-religion when it prohibits a religious Christmas pageant in your public elementary school. On the other hand, suppose you move to a community where you are suddenly a member of a tiny religious minority. Suppose the majority wants to have pageants that celebrate their beliefs. You might suddenly feel more warmly toward a higher wall of separation that keeps your children from being subjected to what you see as religious propaganda. As the old saying goes, where you stand depends on where you sit.

The Supreme Court is unable to help us with a clear set of general rules because they have been rather evenly divided in recent years. When they are evenly divided, we will see a lot of five to four rulings that turn on tiny details in what was done by whom for what purpose. You might do a Web search for the latest cases on separation of church and state or religious establishment in the U.S.

a. Free Exercise

While you are allowed to hold any religious belief you like, that does not mean that you can engage in any religious practice you like. As we have seen and will see, the literal wording of the first amendment does not help us much in understanding what we can and cannot do under the “free exercise” clause. It says that “Congress (and now the states by way of the Fourteenth Amendment) may pass no law…prohibiting the free exercise thereof” (referring to religion).

Interpretation of what these words mean is critical. For example, what counts as a religion? The Supreme Court has gradually expanded what counts as religion. While once religion had to involve belief in a supreme being and was restricted to religious groups that had long historical standing, any sincerely held belief system now has religious standing. Therefore, even an atheist can claim to have “religious” beliefs that would be violated if he or she was drafted to fight in a war. On the other hand, the courts have not recognized sham religions that people create to claim some benefit that the members want, like the legal right to smoke pot as a religious exercise or to have steak and beer as a regular part of a religiously required diet when in prison.

Interpretation is not the only problem. What happens when a religious practice conflicts with other laws? Suppose you believe that the only form of acceptable medicine is prayer. That is fine as long as you choose to turn down medicine that is prescribed for you. But what about medicine, vaccinations, or surgical procedures for your underage children? In these cases the courts generally side with the interest of society in protecting children over the religious beliefs of parents. But sometimes the courts side with the parents, especially if the practice in question does not pose a grave threat and has some strong

historical precedent. Amish parents are allowed to violate school truancy laws because of their long-standing practice of working in family enterprises at an early age.

A guideline that the courts seem to generally follow is sometimes called the "**secular regulation**" **rule**. The Court allows laws that may interfere with religious practices so long as those laws have a secular purpose. This means that the laws have a legitimate non-religious purpose, not a purpose that is aimed at restricting a religion.

The Court has gone back and forth on the secular regulation rule. In 1990 the rule was undermined by a case involving Native Americans using hallucinogenic drugs, peyote, as part of their religious practice (*Employment Division v. Smith*). This use had generally been protected before this case, but the new ruling ended that protection. In response to this ruling, Congress passed and President Clinton signed into law the **Religious Freedom Restoration Act**. This law attempted to turn the secular regulation test into law. The government would have to prove that any restriction of practice had a "compelling state interest" and the restriction pursued that interest in a way that least restricted religious practice. The Supreme Court responded by overturning part of that law, stating that Congress had gone too far in trying to impose an interpretation of the Constitution on the courts (*City of Boerne v. Flores*, 1997). This was clearly a checks and balances decision pitting one branch against the other two. But a few years later the Court quoted the compelling state interest idea again in ruling against government prosecution for using illegal drugs in a religious ceremony (*Gonzalez*, 2006).

2. Speech

The second phrase in the First Amendment, following the religion phrase, refers to speech: "Congress shall make no law…abridging the freedom of speech." But alas, Congress has passed many laws abridging speech. So clearly "no law" does not mean no law.

The Federalist-dominated Congress passed and Federalist President John Adams signed into law the **Alien and Sedition Act of 1798**. The administration was losing popularity and was under attack for its conflicts with our former ally, France. The new law allowed the government to expel any alien who criticized the government and fine and imprison any citizen who engaged in similar action.

> *…if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the*

President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute…

The government found citizens guilty under this law and imprisoned them. Thomas Jefferson and his political allies strongly opposed the law and thought it to be unconstitutional on a variety of grounds. After Jefferson became president, he released and pardoned all who were found guilty of violating this law, and Congress repealed most provisions of the law. But it was never ruled to be unconstitutional.

The Supreme Court has made many rulings about when speech is protected and when it is not. It has set up rules by which it judges the constitutionality of various kinds of speech. One of the most famous tests is the "**clear and present danger test**," which came out of a ruling in 1919 (*Schenck v. U.S.*). Schenck had been prosecuted under a law passed by Congress that forbade any expression that undermined the defense of the nation. The Supreme Court said that laws aimed at speech must show that the speech in question presents a "clear and present danger" to the nation. It found that the anti-draft leaflets distributed by Schenck did present such a danger, and it upheld his conviction. Remember, this was in the atmosphere of the world war that was taking place. Justice Oliver Wendell Holmes, who wrote the decision, used an analogy, saying that such speech was like yelling "fire in a crowded theater." The case had nothing to do with fire, but the point is that any law had to account for the context of the speech. The law would only be constitutional if it was aimed at speech in situations where some obvious and imminent danger was created.

Since that time the Court has gone back and forth on how much government can restrict speech. A few years after *Schenck*, the Court allowed more restrictions by moving to a rule that said laws could restrict speech if it created a "**bad tendency**." Government could restrict almost any speech under this rule as long as the expression could conceivably do some kind of harm. This was during a "red scare" when the nation was fearful of Communist uprisings.

Later during the early 1950s when another red scare was taking place across the nation, the Court redefined "clear and present danger" by saying that "present" did not really mean immediately present. The Court allowed restrictions on speech that posed some danger in the not so distant future.

As the scare passed, the Court moved back to give more protection to speech. It reinterpreted the clear and present danger test so that the government had to show that the "advocacy of the use of force or of law violation (could not be prohibited) except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (*Brandenburg v. Ohio*, 1969). Under this rule, sometimes called the "**grave and imminent danger**" **rule**, someone could advocate the overthrow of

government as a theory and even talk about it, so long as the speech was not likely to actually result in violent illegal actions.

Symbolic speech or actions are treated by the Supreme Court much the same as spoken or written words. But sometimes when actions come into conflict with other governmental obligations, the Court has allowed prohibitions to stand. For example, during the Vietnam War, protesters often burned their draft cards. The Court did not protect that symbolic speech because burning draft cards interfered with providing a national defense, an important responsibility of the government.

On the other hand, if the symbolic speech is merely offensive and has a political content, the Court has generally protected it. The Supreme Court has consistently struck down laws that prohibited the burning of the American flag. It overturned the arrest of a young person wearing the words “F__k the Draft” on his clothing. It even upheld the right of school children to wear black armbands to school in protest of the Vietnam War so long as school officials could not show that the armbands would be disruptive.

All of this involves political speech. But what about speech that is not political in nature? What if speech is simply thought to be obscene? **Obscenity** is not considered to be speech by the courts, so obscenity has no first amendment protection. That seems simple enough.

The problem is that we have to define obscenity and then decide what is and is not obscene. This is a problem that the courts have wrestled with for a long time. They have never found a simple objective definition. Perhaps obscenity is like beauty, in the eye of the beholder. In writing a concurring opinion that discussed the problem in defining obscenity, Supreme Court Justice Potter Stewart said “I know it when I see it.” He later said that if he could change one thing in his entire career on the Court, he would not have used that phrase, because that is the phrase for which he would be remembered. He would rather have been remembered for the weightier decisions he authored. But alas, his fears were well-founded, because this is the only time we will mention him in this text. Nevertheless, his point is valid in light of the failure of the Court to ever devise an acceptable, workable definition that gave clear guidance as to what material is and is not obscene. Not matter how hard the Court tried, it inevitably had to examine the material and see for itself! Supreme Court clerks would joke about “dirty movie day,” when the Court had to look at films in deciding whether or not they were obscene.

Two important decisions stand out in the last half century in the Supreme Court’s quest for a clear definition. In ***Roth v. U.S.*** **(1957)** and some cases that followed after that, the Court devised a three part test. The material had to appeal to the “prurient interest,” or an unhealthy sexual interest. Second, the material had to be “utterly without redeeming social value.” And third, restrictions

had to employ national standards of value, not just local standards. So the materials would have to be without value everywhere, not just in a small town or city that wanted to ban some material. This was a tough test, and the result was that government was not able to ban very much.

The second decision came later when the membership on the Supreme Court had become more conservative. In ***Miller v. California* (1973)**, the Court changed two of the tests that flowed from *Roth*. Local communities could decide for themselves rather than have national standards. And the material only had to lack "serious literary, artistic, political, or scientific value." The immediate result was that local communities began to ban all kinds of things. Publishers and producers faced a nightmare in knowing what they could or could not produce, and once again the Court had to look at a lot of questionable books and movies. Most were found to have serious value.

Today most places have pretty much given up trying to write laws that directly ban obscenity. The trend has been to try to control places that distribute such materials through zoning. However, these efforts are not very effective because the rise of the internet has made obscene materials from across the globe available to anyone with a computer and access to the Web.

Clearly obscene materials, such as child pornography, may still be prohibited by law. But what about the production or possession of child pornography by computer animation where no real children are involved? The courts threw out a section of a national law that extended the definition of child pornography to computer animation because no real harm to real children is involved and the government could not show a real connection between such material and illegal acts by pedophiles (*Ashcroft v. Free Speech Coalition*, 2002).

Free speech rights do not protect anyone from engaging in libel or slander against someone else. **Libel** refers to printed speech and **slander** to spoken speech that is false and harmful. However, in the interests of maximizing political speech, the courts have treated the people who may be harmed differently depending on whether they are private persons or public figures. If you are a private figure who is not running for office or who makes a living off celebrity status, all you must show to win a libel or slander suit is that the statements were false and they harmed you. On the other hand, if you are a public figure, you must also show that the person making the statements did so with **malice**, which means having the intent to harm you. That is hard to show in a court of law. The result is what you see at the grocery store checkout—all kinds of obviously false stories about well-known celebrities, usually concerning something about their bodies, offspring, or relationships with other peoples' bodies. This also means that politicians cannot stifle criticism by effectively threatening to sue whenever they get criticized. In effect, we put up with some falsehoods to have free and open political speech.

One last area that falls under speech is **loyalty oaths**. Can government require citizens to engage in speech that pledges loyalty or respect for the nation or its symbols? Can the government deny public employment to those who refuse to do so? Can they be denied access to public facilities, such as schools? As in other areas, the courts have shifted positions, generally allowing such oaths during the red scares in the period after WWII, but then moving in the direction of overturning most oaths since the 1960s.

Saying the Pledge of Allegiance and saluting the flag combines symbolic and spoken speech. In the years leading up to and into WWII, many schools required that students do both. Refusal was punishable by expulsion. The Supreme Court upheld this requirement in a 1940 case. But after some changes in the membership of the Court, the Court reexamined the question in 1943 (*Barnette v. West Virginia State Board of Education*). It overturned the expulsion of some Jehovah's Witness children who had refused to salute or pledge on religious freedom grounds because they saw the exercise as "bowing down to a graven image." The Court rested its majority decision on both speech and religious freedom grounds and expressed the opinion in rather strong words:

> *If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.*

3. Press

As in the case of speech, the phrase stating that "Congress shall pass no law…abridging the freedom of…the press" has not been interpreted literally by the government. "No law" does not mean no law. Many times throughout history the government has tried to prevent the press from publishing materials. The term that applies to any law that prohibits publication of material is "**prior restraint**." But the government has had less success in restraining the press than it has in restraining individual speech.

Two decisions are important here. In *Near v. Minnesota* (1931), the Supreme Court ruled that a Minnesota law that allowed the state to prevent a newspaper from printing racial attacks and slurs violated the First Amendment. The decision came pretty close to an absolute ban on what we might see as press censorship.

In the middle of the Vietnam War another case arose. In 1971, some people opposed to the war had leaked a set of papers called the **Pentagon Papers** to the *N.Y. Times*. These papers were a compilation of the history of decisions made and studies done by the government that led to our involvement in that war. The Secretary of Defense ordered this study in the late 1960s. Ironically, the leak came from someone who had worked in the Defense

Department in compiling the papers, Daniel Ellsberg. Ellsberg had turned against the war and felt that the papers clearly showed that the government was ignoring its own warnings about the war. President Nixon ordered the Justice Department to stop publication on the grounds that publication would endanger national security by revealing critical classified material. The Supreme Court examined the papers, concluded that the only danger was political embarrassment, and allowed publication. The government could still prosecute Ellsberg for leaking classified materials, but the materials could be published. The important principle that came from this case was that the government could use prior restraint to prevent publication, but only if it could demonstrate that such publication would harm national security. It failed to do so in this case. So the bottom line is that the government can restrict the press if national security is at stake.

4. Assembly and Petition

The right of assembly for the purpose of asking for political change, or what is sometime called “free association,” also has a rather spotted history of protection. Organizations considered communist were the targets of government bans. During the civil rights movement, southern state government targeted the NAACP. Alabama banned the NAACP, and South Carolina made NAACP membership by public school teachers grounds for firing. Most of the cases overlap with free speech cases, such as when one is a member of a group that uses speech to advocate a change in or overthrow of the government. The decisions that overturned these laws rested on protection of speech as well as association. So much of what we said in the section on free speech applies here as well.

B. Second Amendment—the Right to Bear Arms, Individual or Collective?

If you visit the National Rifle Association building in Washington, D.C., you will see part of the second amendment in large letters on the wall of the building: “the right of the people to keep and bear Arms shall not be infringed.” The beginning of the amendment is left out: “A well regulated Militia, being necessary to the security of a free State.”

These two phrases allow drastically different interpretations. Does the amendment apply only to arms owned by people in well-regulated militias? Or does it apply to private individuals, or to both?

Another question is what is meant by arms? To the Founders, arms would have included muskets, swords, and perhaps cannon. Weapons we have today go well beyond anything they could have imagined. Do people have the right to fully automatic weapons? Rockets or even missiles? Bombs? Where can government draw the line?

In the summer of 2008, the Supreme Court ruled on a case that challenged Washington D.C.'s total ban on handguns (*District of Columbia v. Heller).* In a 5 to 4 decision, the Court ruled that the second amendment does protect an individual right to weapons for hunting and self-defense. It also said that the right was not absolute and that reasonable regulations are allowed on the right and on the kinds of weapons people can have. Prior to this ruling, the courts had allowed bans on possession of artillery, bombs, and machine guns. For a time national law included an automatic or assault weapons ban, but that law expired and was not renewed.

You should be able to guess what will follow this ruling. Existing and new state and local government regulations on weapons will result in other cases to see what is "reasonable." You may want to search the Web for the latest rulings.

C. Criminal Justice and Rights of the Accused—Amendments IV, V, VI, and VIII

Sorting out all the rights and cases pertaining to our criminal justice system can be overwhelming. I will try to simplify all the rules created by the courts by thinking about them in terms of two different models of justice: a crime control model of justice and a due process model of justice. The question we shall ask about all the court rulings is which model of justice the court is moving toward in a particular ruling. Let's start by talking about the two models.

The **crime control model of justice** places the most emphasis on identifying, catching, and punishing anyone engaging in illegal behavior. To achieve this goal, the courts would give government a lot of powers and place few restrictions that might get in the way. The up side is that most lawbreakers will be caught and punished. The down side is that innocent people will often be inconvenienced and sometimes unjustly punished. But that is the price we would pay for maximizing the percentage of lawbreakers who are caught and punished.

The **due process model of justice** emphasizes making sure that we do not unjustly inconvenience or punish the innocent. So police and the rest of the criminal justice system are forced to follow very strict procedures to ensure that they do not harm innocent people, even if this means that some of the guilty get away. Inevitably some would. You see the tradeoff.

Ideally we would like to have it both ways. But that is not possible. Perhaps it would be possible if we had perfect police, prosecutors, and people running the courts. But we do not. So we have to decide how much we will go in one direction or the other. For each right and each case, we can see that the courts are moving in the direction of one model or the other. Put another way, we see where the courts are trying to move the balance point between these two models.

Let's start with the protection against "unreasonable searches and seizures" in the Fourth Amendment. If we wanted to catch as many lawbreakers as possible, we would let the police search any person or place at any time. We would not require warrants based on evidence and not even require police to identify themselves because that might allow lawbreakers to destroy evidence before police found it ("no-knock" searches). The courts have gone back and forth. The courts have not allowed federal investigators to use evidence that has been illegally obtained since the early 1900s. Not allowing government to use evidence that was improperly obtained is called **the exclusionary rule**. But up until the 1960s the courts placed few restrictions on how state authorities obtained evidence. And most criminal cases are at the state level. The liberal Supreme Court led by **Chief Justice Earl Warren** extended the exclusionary rule to the states in *Mapp v. Ohio* (1961). This is another example of selective incorporation, which we covered earlier in this chapter.

Other rulings by the Warren Court moved the criminal justice system in the due process model direction. The Court extended the right to counsel to all state felony cases in *Gideon v. Wainwright* (1963). The Supreme Court had not even required that states provide legal assistance in cases involving the death penalty until 1932 in the famous Scottsboro case (***Powell v. Alabama***). A few years after the Gideon case, the right was applied to any case involving potential jail time and even to police questioning before any charges were brought. Moreover, authorities had to tell people about their right to counsel (*Miranda v. Arizona*, 1966). This case resulted in the statement that all of you have heard police officers read on television dramas. The Supreme Court applied the prohibition on "cruel and unusual punishment" to the states in 1962 (*Robinson v. California*). It ruled the death penalty unconstitutional in Georgia in 1972 because the "freakish" pattern in how it was applied made the death penalty "unusual" (*Furman v. Georgia*). Other rights applied to states in this period included protection against self-incrimination, the right to confront witnesses, the right to a speedy trial, trial by jury, and the protection against double jeopardy.

In the decades that followed this move in the due process direction, several things happened. The police adjusted their practices, became more professional, and for the most part began to better protect rights. Of course, Hollywood focused on the exceptionally sensational and created dramas that pictured factually guilty people getting away on "technicalities." The public began to express a desire to give the police and prosecutors more power. Politicians campaigned against the "permissive courts" and vowed to get tougher on crime. Part of this toughness was to appoint judges and justices who took more of a crime control view of justice. Chief Justice Earl Warren and other liberal justices retired. They were replaced with a series of more conservative justices, led by Chief Justice Warren Burger (nominated by conservative President Richard Nixon in 1969), then William Rehnquist (originally nominated as an associate justice by Nixon and nominated as Chief Justice by conservative President

Ronald Reagan), and then John Roberts (nominated by conservative President George W. Bush).

A series of rulings since the 1980s have moved the balance back in the crime control direction. The Supreme Court has allowed exceptions to the exclusionary rule. If evidence was not legally obtained but would have been later discovered in a legally admissible way, it was allowed to be used under what is called the "**inevitable discovery**" **rule** (*Nix v. Williams*, 1984). Another ruling allowed police to use evidence when an unintentional error was made, the "**good faith**" **rule** (*United States v. Leon*, 1984). The Court has also ruled that the exclusionary rule does not apply to what it called "secondary evidence," that is, evidence that is found because of excluded primary evidence (*People v. Stith*, 1987), or to evidence obtained from third parties not being prosecuted. In a 2006 decision (*Hudson v. Michigan*), the Supreme Court came close to throwing out the exclusionary rule altogether. This case involved a "no-knock" search, which normally violates fourth amendment protections against unreasonable search. The Court concluded that the social costs of crime outweighed the protections against unreasonable search when the police had a reasonable fear that identifying themselves might allow evidence to be destroyed or even endanger their lives. In the area of the death penalty, the Court has allowed laws to impose the penalty when the sentencing phase of the trial is separated from the fact-finding portion of the trial.

Despite this movement toward the crime control model, the courts have made a number of rulings that fit changing public standards of acceptable punishment in the United States, standards that have been changing more slowly than standards in other western democracies. In 2002 the Supreme Court ended the practice of execution of the mentally retarded as "cruel and unusual" (*Atkins v. Virginia*). Three years later the Court prohibited the execution of juveniles on similar grounds (*Roper v. Simmons*, 2005). In more recent years the Supreme Court has been closely examining methods of execution on grounds of cruelty with respect to pain involved. In the summer of 2008 the Court banned execution for the crime of child rape, and strongly hinted in its decision that no executions could be constitutional unless a victim had been killed. These are other areas where you might search the Web for the latest rulings.

D. Ninth Amendment—Other Rights "Retained by the People"

At the beginning of this chapter we discussed the difficulty in interpreting this amendment, which refers vaguely to other rights that are "retained by the people." The Founders wrote the amendment because they feared that a listing of specific prohibitions in the previous amendments might be used to expand the national government power. They thought government might argue that it could do anything that was not specifically prohibited in the first eight amendments. So they added the amendment to prevent the Bill of Rights from having the opposite effect from what was intended.

But what about those “other” rights? Despite difficulties and controversies in interpretation, the Supreme Court has found at least one other right. And they may find others in the future.

1. Privacy—Sexual Matters and Abortion

The Supreme Court has found that a **right to privacy** exists within the Constitution, even though you will not find the word “privacy” in the document. Exactly where that right comes from is a matter of controversy and debate. But if you ask most Americans about a right to privacy, they will enthusiastically claim that they have such a right.

The first important case in which the Supreme Court “discovered” a right to privacy involved an 1879 Connecticut state law that outlawed the use of sexual contraceptive devices. The Catholic majority in the state legislature had taken the Catholic prohibition of all artificial means to prevent conception and turned it into state law. In ***Griswold v Connecticut* (1965),** the Supreme Court <u>overturned this ban on sexual contraceptives as unconstitutional, based on the right to privacy</u>. The Court was not entirely clear on the source of that right. The majority opinion referred to “emanations” from other constitutional protections. A concurring opinion referred to the Ninth Amendment.

The famous ***Roe v. Wade* (1973)** case <u>extended the right to privacy to a woman’s decision to have an abortion in consultation with her doctor</u>. However, the case did not make that right unlimited. At the point at which the fetus could survive outside the womb (called “viability”), the government could take some actions to protect its life. Since then the Court has approved a growing list of restrictions that government has placed on abortion. The <u>current rule for judging restrictions on abortions</u> is whether the restrictions place an “**undue burden**” on a woman’s right to abortion (*Planned Parenthood* v. Casey, 1992). Of course, this rule does nothing more than transfer the debate to the meaning of what is an “undue burden.” As states pass restrictions, the Court will have to review them one by one to see. Potter Stewart’s words on obscenity might be applied here: we cannot define an undue burden, but the Court will know it when it sees it.

The Court has applied the right to privacy to sexual relations among consenting adults. In 2003 the Supreme Court struck down **sodomy laws** in states on the grounds that these state laws violate personal liberty with an indirect reference to privacy rights (*Lawrence v. Texas*). The Court said that “no legitimate state interest (exists) which can justify its intrusion into the personal and private life of the individual.”

2. Emerging Rights—the Right to Death with Dignity

What other rights do we have? Anyone who has had a close relative or friend who has suffered a long and lingering death from an irreversible disease has almost certainly wondered if we treat our pets more humanely than our loved human friends and relations.

In 1994 the citizens of Oregon used a ballot initiative to pass a **Death with Dignity Act**. It allowed a mentally competent adult with less than six months to live to request a prescription for a lethal dose of medication. The request had to be witnessed by two adults with no family or personal ties to the person making the request.

State authorities at first tried to stop the law from being enforced. They forced a second ballot question to try to overturn the first one. Voters turned down this effort by 60%. Then the national government tried to step in and prevent the prescriptions from being filled on the grounds that the drugs served no legitimate medical purpose. The case went to the Supreme Court. This time the state government took the side defending the law. Although the Supreme Court had not granted that a right to death with dignity existed in previous opinions, in *Gonzalez v. Oregon* (2006), the Court allowed the law to stand. However, the ruling rested on narrow grounds concerning the question of whether otherwise legal drugs could be prohibited rather than any general grounds of a right to die with dignity. More cases are sure to follow in the years to come.

E. Civil Rights of Groups—Individualism Both Promotes and Limits Civil Rights

The political struggle for equality of all groups is long and complicated and as yet incomplete. The story differs depending on the group in question. Over history these groups have included African Americans, who have spent well over a century achieving the promise of full citizenship and voting rights after the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. The groups include women, who gained the right to vote in 1920, but still struggle to achieve full parity in the workplace or in the halls of government. They include gays and lesbians, who struggle for respect, physical protection from those who hate them, and the right to have legally recognized relationships so that partners could be covered in family health insurance plans or have inheritance rights. They include anyone who has even the faintest appearance of being Middle Eastern, who get stigmatized as a possible terrorist. They include those who appear Hispanic and find themselves treated as illegal aliens, even though their ancestors may have lived as full citizens in the United States for generations. I am sure you can think of other groups, including the elderly, those with disabilities, Native Americans, and so on. The list is almost endless.

To even scratch the surface of these many struggles is well beyond the scope of this course or the time and space we have in this brief text. Can we

think of an explanation to help us understand why so many groups have had so much trouble in securing full equality in a nation that supposedly rests on the legal and political equality of all people? I think so.

The explanation comes in the form of another paradox. The bedrock American value of individualism cuts in two directions. It undermines claims for advantage by historically dominant groups, for example males and white Anglo-Saxon Protestants. Individualism also limits civil rights programs to redress historical wrongs done to disadvantaged groups. Our devotion to individualism explains why affirmative action programs are faltering, and why reparation, whether it be to African Americans or to Native Americans, is a political nonstarter.

Let me explain. One of the most basic beliefs that all Americans share is that of **individualism**. We believe, at least in theory, that <u>each person should be judged as an unique person and succeed or fail on their own</u>. A major theme in Reverend Martin Luther King's "I Have a Dream" speech was that all "children would be judged on the content of their character rather than the color of their skin."

Reality has always fallen far short of this goal. Groups with advantages have found a multitude of ways to protect and defend those advantages, even when those advantages undermined the ideal of individual merit. Throughout American history, white males of Western European descent have justified their advantages on grounds of racial superiority, on interpretations of the Bible, on theories like Social Darwinism (look this one up on the Web), on the supposed superiority of Western European culture, and on grounds of freedom from government and even freedom from taxes. Why taxes? Taxes might be used to create government programs to provide equal opportunities to the less advantaged, whether it be in the area of education, childhood nutrition, or health care. But while some programs do exist, they all fall short of creating truly equal opportunity across society. You know this. You have all heard the saying, "It's not what you know, it's who you know." To the extent that this is true, we fall short of judging each person as an individual.

Yet if you consider the broad long-term trends in American history, despite the economic and political power of some groups, they are fighting a long-term losing battle. When group advantage comes into conflict with the bedrock value of individualism, individualism eventually wins out. It may take a very long time, generations of struggle, but individualism wins out. So even though the Founders almost certainly were thinking of white European males when they said that "all men are created equal" in the Declaration, males and females of all ethnicities eventually did claim the right of individual equality, though the battle is yet to be completely won.

The political system has passed a wide range of laws to move toward equality. African Americans were granted equal access to public facilities such as hotels and restaurants by the **Civil Rights Act of 1964**. The key limit here is "public." You should know that equal access laws do not apply to private groups, which may discriminate based on the first amendment right of free association. For example, the Court has allowed the Boy Scouts to deny membership to gays. Augusta National Golf Club legally denied membership to African Americans for most of its existence, only giving in after considerable public pressure, not legal pressure. It still denies membership to any women.

The **Voting Rights Act of 1965** finally enforced the right to vote that had been promised by the Fifteenth Amendment nearly a century before. Most schools were desegregated, though that task is still incomplete with white flight to private schools and to the less racially mixed suburbs.

Women can no longer be fired for being pregnant (the **Pregnancy Discrimination Act of 1978**). They must be given equal pay for doing the same jobs as men (the **Equal Pay Act of 1963**). **Sexual harassment** is prohibited by federal law (Title VII of the 1964 Civil Rights Act) and a series of court rulings, though "glass ceilings" and other informal practices still limit opportunities for females.

Anyone over the age of 40 cannot be fired for reasons related to age under the **Age Discrimination in Employment Act of 1967**. As baby boomers reach their senior years we can expect more activity to claim equal rights for the elderly.

The **American with Disabilities Act of 1990** opened up opportunities for those with disabilities to compete in the workplace and have equal access to any public facility. This has had a considerable cost for taxpayers and private employers. Rights are not always cheap.

And the list goes on. In each case, the disadvantaged group had to engage in long-term political struggle, but they eventually made significant progress when the goal was to allow them to compete as individuals against others.

However, when the goal was to compensate members of the group as members of a historically disadvantaged group rather than to enable individual competition, political success was more difficult. **Affirmative action programs** that began in the 1960s were designed to help traditionally disadvantaged groups, including minorities and females, achieve roughly proportional representation in education and employment. The idea was to take positive action to seek out and hire qualified people in disadvantaged groups to the extent that they would have about the same percentage in high level universities and jobs as they had in society.

I remember one commentator justifying these programs with an analogy involving the growth of trees. It went something like this. If you push a tree over for many years so it cannot grow straight, then to correct this you must push in the other direction for a number of years. Nice analogy, but it raises some difficult questions. How many years must you push back? What about individual trees that are not bent? Do you help the child from a successful family in a protected group over the child of a white millworker who also has disadvantages as a matter of luck of birth? At what point does trying to create equal opportunity to grow straight become preferential treatment so that some trees get helped to grow straight without any real effort on their own part? Programs that seem to create group rights come into conflict with the idea of judging each person as an individual.

As these programs grew and affected more people, politicians exploited resentment among those who did not benefit. In a political commercial you can find on the Web, North Carolina Republican Senator Jesse Helms pictured the hand of a white man crumpling a job rejection letter, saying that he really needed that job, but it went to a less qualified minority member. The ad worked, even though it distorted the way affirmative action programs worked.

These resentments are well captured in public opinion polls that consistently show Americans to be supportive of programs that ensure equal opportunity to go to school and compete for jobs, but show great opposition to programs that give preference to groups in actually getting jobs or places in high status schools. To put it another way, Americans believe in equality of opportunity, but not in equality of result. Because affirmative action programs seem to move from opportunity to result, they have had a hard time maintaining political support.

In reality, the line between opportunity and result is not at all clear. Is a place in a high status school something that provides opportunity or guarantees a result? Consider two people with good scores on entry tests. Is the one with a few more points better qualified even if that person had family advantages to help get that marginally higher score? You can see why Americans are ambivalent (that is, have mixed feelings) about these programs.

A series of Supreme Court rulings on affirmative action programs capture this ambivalence and move the balance away from affirmative action when it seems to guarantee some group benefit. In *Regents of the University of California v. Bakke* (1978), Alan Bakke argued that a racially based quota for admissions to medical school allowed someone with lower scores to be admitted while he was denied admission, violating his right to equal

protection. The Supreme Court ruled that quotas were unconstitutional, but that schools could still take into account race in admissions. Bakke was admitted, but affirmative action was still allowed.

Exactly how schools or businesses could take into account race or gender has been a matter of many later court rulings. A 1995 case, *Adarand Constructors, Inc. v. Pena*, undercut affirmative action programs that awarded government contracts to minority-owned firms on the presumption that they had experienced discrimination. A pair of University of Michigan cases that the Supreme Court considered together seemingly went in different directions on admissions policies to school. In *Grutter v. Bollinger* (2003), the Supreme Court ruled in a 5 to 4 decision that race could be taken into account in law school admissions on the grounds that it promoted a legitimate goal of promoting diversity in the student body. But in *Gratz v. Bollinger* (2003) the Court ruled in a 6 to 3 decision that extra points for minorities on admissions scores for undergraduate school went too far and was not constitutional. Interestingly, Justice Sandra Day O'Conner wrote both majority decisions. She noted that all affirmative action programs should be ended within the next 25 years.

In 2006 voters in Michigan passed a proposition to ban affirmative action programs except for those mandated by federal law. The joint effect of these rulings and actions strongly suggest that the time of pushing the bent tree back in the other direction is about over. Yet to the extent that programs can be portrayed as furthering individual opportunity, they still can gain popular support.

The struggles over civil rights and liberties will continue. You can see that what the Constitution seems to say helps very little. Each generation will have to fight to claim the protection of Constitutional rights and liberties for themselves in the face of new challenges and new fears.

KEY TERMS AND IDEAS

civil rights
civil liberties
Bill of Rights
writ of habeas corpus
bills of attainder
ex post facto law
no religious tests
procedural due process
substantive due process

takings clause
property rights movment
common law
cruel and unusual punishments
Prohibition
Barron v. Baltimore (1833)
incorporation theory
Palko v. Connecticut (1937)
selective Incorporation
establishment of religion
secular regulation rule
Religious Freedom Restoration Act
Alien and Sedition Act of 1798
clear and present danger test
bad tendency test
grave and imminent danger rule
symbolic speech
obscenity
Roth v. U.S. (1957)
Miller v. California (1973)
libel and slander
malice
loyalty oaths
prior restraint
The Pentagon Papers
crime control model of justice
due process model of justice
exclusionary rule
Chief Justice Earl Warren
Powell v. Alabama (1932)
inevitable discovery rule
good faith rule
right to privacy
Griswold v. Connecticut (1965)
Roe v. Wade (1973)
undue burden test
Sodomy laws
Death with Dignity Act
individualism
Civil Rights Act of 1964
Voting Rights Act of 1965
Pregnancy Discrimination Act of 1978
Equal Pay Act of 1963
sexual harassment
Age Discrimination in Employment Act of 1967
American with Disabilities Act of 1990

affirmative action programs

Possible Internet Exercises

1. Find out which states still impose the death penalty. Do you see any geographical pattern?

2. Listen to several stories on National Public Radio about how our bail bond system works and decide whether it is consistent with the spirit of the Constitutional guarantees concerning bail. See: http://www.npr.org/templates/story/story.php?storyId=122954677

3. Find out what constitutional rights have not yet been applied to the states through the process of selective incorporation?

4. Find the most recent Supreme Court case you can that involves the “no establishment” clause. In which direction does the decision go, the “high wall of separation” or the “no official state church” direction?

5. Find a recent court ruling that decides what kind of firearms regulations are allowed under the second amendment following the 2008 D.C. handgun case.

6. Find a recent Supreme Court decision involving rights of the accused. Is the decision more consistent with the “crime control” model of justice or the “due process” model of justice?