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What Rights Does the Constitution Protect?

> "The First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."
>
> —Justice Hugo L. Black,
> majority opinion in
> Bridges v. California (1941)

Newspapers have gained possession of highly classified government documents that shed an unfavorable light on an ongoing war. Should they be allowed to publish what they found? A poor man has been arrested on a criminal charge but cannot afford a lawyer. Should he stand trial without the benefit of legal counsel? Facing reapportionment, the representatives of rural districts in a state legislature argue that because their districts cover so much more territory than city districts, it should not matter that they have fewer residents than the urban districts. Is that fair to the city dwellers? Home owners confront a local government that requires them to sell their property and move to make way for economic development. Do the needs of the community outweigh those of the individual property owners? These are real issues that involve fundamental constitutional rights. The decisions made in these and many other cases of human rights, liberty, and equality have significantly affected the lives of every American citizen.

Yet, surveys show that alarming numbers of Americans are unaware of the full extent of their constitutional rights. Some people readily admit that they do not know what rights are included in the Constitution and its first ten amendments, the Bill of Rights. Other Americans have expressed the opinion that the Constitution went too far in granting such rights as free speech and free press and that society should be able to restrict opinions and behavior with which the majority disapproves. These are perilous attitudes, because those who remain unaware or unappreciative of their rights run the risk of losing them.

In reading the original U.S. Constitution, one finds very few specific rights mentioned, and those that are deal primarily with legal practices. Article I, section 9 protects the right of "habeas corpus" (a Latin term meaning "you may have the body"). To keep suspects from lingering indefinitely in prison, habeas corpus literally commands a jailer to produce the person jailed. This means that a prisoner has the right to challenge wrongful imprisonment, and the right to a speedy trial before a civilian court. The same section of the Constitution outlaws "bills of attainder," the practice by which some governments convict citizens using legislation rather than a jury trial. It forbids "ex

"The Constitution is a charter of negative liberties; it tells the federal government or the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order."

— Judge Richard A. Posner, Bowers v. DeVito (1982)

post facto" laws (Latin for "after the fact"), making something a crime after an action had been committed. It also bans any religious requirements for candidates for public office. Beyond these few prohibitions, the Constitution of 1787 remained silent on citizens' specific rights.

When the Constitution was submitted to the states, the absence of a bill of rights generated more controversy than any other aspect of the document and nearly derailed its ratification. Most of the delegates to the Constitutional Convention felt it was unnecessary to spell out people's rights in the national Constitution. They argued that the state constitutions already protected those rights. A few dissenters among the delegates refused to sign the document because it lacked a guarantee of individual rights. When James Madison campaigned for the Constitution's ratification in Virginia, he encountered such intense popular dismay over the missing bill of rights that he pledged to support amendments to the Constitution as soon as the new government got under way. Elected to the House of Representatives, he kept his word.

Madison studied all of the two hundred amendments the states proposed during their debates over ratification of the Constitution. He pared these down to nineteen, which he introduced in the new Congress in 1789. Some of the other members protested that it seemed too soon to change the new Constitution, which had barely gotten started and had yet to prove itself. Yet, Madison felt committed to honoring the pledges that he and other supporters of the Constitution had made during the ratification campaign.

The House and Senate remolded Madison's proposals into twelve amendments. The states swiftly ratified ten but allowed the other two to languish. Two centuries later, in response to public complaints over a large pay increase that Congress voted for itself, the states revived and ratified one of Madison's amendments not included in the Bill of Rights. This amendment prohibits any raise in congressional salaries from going into effect until after the next election, giving the voters a chance to express their approval or disapproval at the polls. That left only one of the original twelve amendments unratified. This one would have pegged the number of people in a congressional district at fifty thousand. If that amendment had been approved, the U.S. House of Representatives would now contain several thousand members, rather than 435. The national population has grown far greater than the first members of Congress ever anticipated.

Ratified in 1791, the first ten amendments are collectively known as the Bill of Rights. Some of their provisions date back to the English Bill of Rights of 1689, which included freedom to petition the government and freedom of assembly, as well as prohibitions against cruel and unusual punishment and against taxation without representation. Having long considered themselves British subjects, Americans claimed all the rights of "freeborn Englishmen." The first state constitutions limited government from performing arbitrary acts that would deprive people of their freedom of speech, their freedom of religion, their right to bear arms, and their right to assemble peacefully and to petition Madison thought that the greatest danger to individual liberties came from the states, so he originally drafted the First Amendment to read: "No state shall violate . . ." In its final version it became: "Congress shall make no law . . ." For many years, the courts interpreted the Bill of Rights as applying only to the federal government, not to the states. Added just after the Civil the Fourteenth Amendment seemed to extend the Bill of Rights to the states by prohibiting the states from abridging people's "privileges or immunities" or depriving them of

life, liberty, or property without due process of law. It further guaranteed "equal protection of the laws." But, for decades after the Fourteenth Amendment was ratified in 1868, the federal courts interpreted it narrowly. Not until the 1920s did the courts begin to apply the provisions of the Bill of Rights, one by one, to the states. (Although, it has not yet been used to apply the Second and the Seventh Amendments.) Liberal justices have argued that the Fourteenth Amendment "incorporates" the Bill of Rights, or extends the rights guaranteed to the state level. Conservative justices have been more skeptical of this argument and more restrained in their application of the Bill of Rights to the states.

The most sweeping provisions of the Bill of Rights are contained in the First Amendment. It embodies a host of fundamental rights, from freedom of religion, speech, and the press, to the right to assemble and to petition the government with complaints. In just a few words the First Amendment captures the essence of being an American. The First Amendment bars the federal government from formally recognizing any religion as the official state religion, no matter how many citizens follow that faith. At the same time, it guarantees all citizens the right to exercise their individual religious beliefs.When the first state governments were established, some tried to recognize a particular church or Protestant Christianity in general as an established religion, and barred non-Christians from holding public office. Some states taxed religious minorities differently than others. The First Amendment followed Thomas Jefferson's advice that a "wall of separation" be erected between church and state. Jefferson believed that the separation of church and state would protect government and organized religion from each other. Under the First Amendment, the government cannot favor one religion over others, aid any religions, or stop people from exercising their religious beliefs.

To improve morality, various groups have frequently advocated religious practices in the public sphere. For instance, some states required that all public school students begin the day by reciting a prayer. The New York State legislature drafted what it considered a neutral prayer that made no references to any specific religion, but in the 1962 case of Engel v. Vitale the Supreme Court struck down the practice on the grounds that it was not "part of the business of government to compose official prayers." Similar disputes later developed over the placing of the Ten Commandments in courtrooms and on other public property. In two narrow decisions in 2005 the Supreme Court split the difference, concluding that displaying the Ten Commandments on government property was only unconstitutional if it seemed that government was promoting religion. The Court ruled against displaying the Commandments in a Kentucky courthouse, where their religious content was emphasized, but let a monument to the Commandments stand on the grounds of the Texas capitol as an acceptable tribute to the nation's religious history.

The right of free speech has been just as controversial as the separation of church and state, because it involves freedom of expression, freedom of thought, and freedom to criticize the government. One person's free speech may be offensive to another. The government has acted to restrict speech in radio and television broadcasting if it involves obscenity. During wartime, the government has also suppressed speech that it considers subversive, such as urging citizens to refuse to be drafted into military service. During the First World War, the Supreme Court concluded that the government could restrict such speech if it demonstrated that the speech posed a "clear and present danger" to the na-

tion. In his opinion in *Schenck v. United States* (1919), Justice Oliver Wendell Holmes Jr. used the example of someone falsely crying "fire" in a crowded theater—simply to cause a panic and injure people—as an example of speech not protected by the Constitution.

Free speech sometimes involves symbolic action. The courts ruled that when protesters burn an American flag, the act is a legitimate extension of their right of free speech, no matter how much it offends people's patriotism. In the case of Buckley v. Valeo (1976) the Supreme Court also extended the concept of "speech" to political campaign contributions. It ruled out any limit on the amount of money that candidates can contribute to their own campaigns as an infringement of their right to free speech.

An important corollary to free expression is freedom of the press. Newspapers have fiercely criticized government leaders and their policies since the Presidency of George Washington. The news media has developed into an unofficial "fourth branch of the government" that provides additional checks and balances by scrutinizing what government is doing and exposing corruption. One significant restraint on reporting for many years was the threat of libel suits brought by the public officials whom the media criticized. Then, in the case of *New York Times Co. v. Sullivan* (1964), the Supreme Court ruled that the media could not be convicted of libeling public officials, unless their accusers could prove malicious intent, not simply criticism or inaccuracies. This ruling substantially reduced the media's liability for libel, which enabled reporters to question and criticize government officials more freely.

During the Vietnam War the New York Times, Washington Post, and other newspapers obtained and published still classified government documents, known as the Pentagon Papers. These documents detailed the history of how the United States entered the war. President Richard Nixon asked the courts to issue injunctions to stop the papers from publishing any more of these documents, an action called prior restraint. The Nixon administration argued that release of the documents would gravely harm national security. Yet, when the administration cited specific examples of such vital secrets, the newspapers were able to demonstrate that the information was already publicly available through other sources. The most damaging revelation in the Pentagon Papers was not classified information but evidence of the government's poor decisionmaking. Through the course of the trial, it became apparent that the administration's primary motivation for suppressing publication was to avoid the perception of weakness in allowing the material to leak out. In the case of *New York Times v. United States* (1971), the Supreme Court ruled in favor of the newspapers, responding that the government had failed to show a "compelling interest" in restricting the right of a free press. "The press was to serve the governed, not the governors," wrote Justice Hugo Black for the majority of the Court.

The First Amendment also protects people's freedom to gather peacefully and to petition the government with their requests. These rights permitted the picketing and other protests during the civil rights and antiwar movements of the 1950s and 1960s, so long as they remained nonviolent. Americans have also made much use of the right to sign petitions. In the nineteenth century, antislavery groups sent Congress countless petitions demanding an end to the slave trade, and to other aspects of human slavery.Women's groups also used petitions as a tactic in their long campaign to win the right to vote.

The Second Amendment guarantees the rights of citizens to "bear arms," or

TAKING THE FIFTH

During the Cold War, when congressional investigators were trying to root out subversives in the government, many witnesses refused to answer their questions, citing their rights under the Fifth Amendment. Some people suggested repealing the amendment but Harvard law professor (and later solicitor general of the United States) Erwin Griswold reminded them of the necessity of the amendment in a 1955 booklet called "The 5th Amendment Today."

I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized.. . .The establishment of the privilege is closely linked historically with the abolition of torture. Now we look upon torture with abhorrence. But torture was once used by honest and conscientious public servants as a means of obtaining information about crimes which could not otherwise be disclosed.We want none of that today, I am sure. For a very similar reasons, we do not make even the most hardened criminal sign his own death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands.We have through the course of history developed a considerable feeling of the dignity and intrinsic importance of the individual man. Even the evil man is a human being. If a man has done wrong, he should be punished. But the evidence against him should be produced, and evaluated by a proper court in a fair trial. Neither torture nor an oath nor the threat of punishment should be used to compel him to provide the evidence to accuse or to convict himself.

own guns.Writing in *The Federalist*, Madison assured Americans that they need not fear the new government because of "the advantage of being armed, which you possess over the people of almost every other nation." The amendment couples the right of individuals to own guns with the responsibility of forming state militias, to be called on in times of emergency. Today these militias are known as the National Guard. Congress and the courts have reasoned that the Second Amendment does not limit the federal government from enacting certain forms of gun control, such as requiring registration and a waiting period when purchasing firearms, prohibiting children and convicts from owning guns, or declaring certain weapons illegal.

The next six amendments in the Bill of Rights deal with legal rights. They protect one's home from being taken over by the military—outlawing a practice that the British had employed during the American Revolution, when they quartered military troops in private homes. They further protect people's homes, as well as their persons, papers, and other property, against unreasonable search and seizure by the authorities. The Fourth Amendment requires that police first obtain search warrants when hunting for incriminating evidence. It does not define "unreasonable," however, and left the term for the courts to determine. In the twentieth century, electronic eavesdropping was deemed a violation of the Fourth Amendment, so that authorities must obtain legal permission to conduct wiretapping in criminal investigations. The Fourth Amendment assumes that people have a right to privacy and has been cited in many instances where people believe their privacy has been violated.

The Fifth Amendment safeguards the rights of anyone accused of a crime. It prohibits defendants from being tried again twice for the same crime if they have already been acquitted (a practice called "double jeopardy"). Nor can people be forced to give damaging testimony against themselves ("self-incrimination"). Such rights protect the innocent as well as the guilty, and some critics have complained that they hamper law enforcement. In the 1940s and 1950s, when congressional committees conducted investigations into Communist subversion and espionage, many witnesses "took the Fifth." They refused to testify whether they had been members of the Communist Party or to name others who might have been involved. Government employees, including teachers, were fired from their jobs if they cited the Fifth Amendment when they declined to answer questions. The Supreme Court later in *Watkins v. United States* (1957) ruled that witnesses before congressional committees retained all their constitutional protections, including that against self-incrimination.

The *Watkins* ruling came too late for the popular writer Dashiell Hammett, whose crime novels included *The Maltese Falcon* (1930) and *The Thin Man* (1934). During the Great Depression, in 1937, Hammett had joined the Communist Party and was the trustee of a bail fund established by the Civil Rights Congress, later identified as a Communist dominated organization. Called to testify before the House UnAmerican Activities Committee in 1947, Hammett was asked to "name names" of those who had contributed money to the fund. He refused to provide information that might jeopardize people's reputations and careers. Despite his prominence, Hammett was convicted of contempt of Congress for not answering these questions, and spent six months in a federal prison in 1951.

The Sixth Amendment upholds a defendant's right to a speedy and fair trial. The Seventh ensures that in civil cases (those not involving criminal charges)

both the plaintiff (who makes the charges) and the defendant have the right to a trial by jury, so long as one side demands it. The Eighth Amendment requires that bail and fines should not be set excessively high, and that "cruel and unusual" punishment not be inflicted on those found guilty. This amendment has given rise to a debate as to whether the death penalty can be considered cruel and unusual punishment.

Following this list of specific prohibitions, the Ninth and Tenth Amendments added some broad generalizations. One reason why James Madison had initially opposed a Bill of Rights was his concern that not all rights could be anticipated and enumerated. The Ninth Amendment maintains that the people have other rights that cannot be suppressed simply because they are not mentioned in the Bill of Rights. For many years the Ninth Amendment went essentially unused. It was revived in the 1965 case of *Griswold v. Connecticut*, when the Supreme Court struck down a state law banning contraceptives. The justices cited the Bill of Rights collectively in asserting people's right to privacy in marital relations, and noted that the Ninth Amendment protected rights not specifically guaranteed in the Constitution. As Louis D. Brandeis wrote in an 1890 Harvard Law Review article (before he joined the Supreme Court), "the right to life has come to mean the right to enjoy life—the right to be let alone."

The Tenth Amendment stated that those powers not delegated to the U.S. government belonged to the states. Those who advocate a "strict construction" of the Constitution—that is, applying exactly what is written in it and no more—insist that the federal government may not perform any functions that are not specifically enumerated in the Constitution. Defenders of states rights complain that the growth of the federal government consumed many responsibilities that should have been left to the states. Yet, Chief Justice John Marshall reasoned in the case of *McCulloch v. Maryland* (1819) that the Constitution could not an-

A CONSUMER ADVOCATE DEFENDS THE RIGHT OF TRIAL BY JURY

Consumer advocate Ralph Nader described the value of jury trials in civil cases in his article "The Individual as Citizen," which was published in 1992 in The United States Constitution: Roots, Rights, and Responsibilities.

The Seventh Amendment to the federal Constitution preserves the right of trial by jury "in suits at common law." In recent years, that amendment has extended some remarkable benefits to the public. It was a worker sickened by asbestos who began the massive litigation that exposed the product's health risks as well as the lengthy and very extensive cover-up of those risks by certain of its manufacturers. In this case one man succeeded in humbling a large corporation into disclosing its illegal practices and compensating its victims. Also alerted into action and precaution were the long-indifferent regulatory agencies and society at large. But the litigant would not have had a chance had he been unable to secure his right to jury trial. Juries are instruments of law that reduce the disparity of power between the haves and the have-nots. At present, a mounting attack on juries and the jury system in civil liability cases is being waged by insurance companies, trade associations, and other corporations. Recently one of their lobbies offered legislation to Congress that would preempt or limit various decisions made by juries in state courts. This lobby is testing the waters, for it has a long history of favoring replacement of the jury system with compensation boards operated by political appointees. The core word they use is "predictability"; the real word is "controllability."

ticipate all the powers that the national government would need to meet future circumstances, and that therefore the provision that Congress could make all laws "necessary and proper" to carry out its responsibilities implies additional powers.

Tensions between these two positions reappear throughout American history. For instance, when the federal government tried to prohibit child labor, the

Supreme Court in *Hammer v. Dagenhart* (1918), struck down these efforts as something that was more proper for the states to determine. A generation later, the Fair Labor Standards Act of 1938 again abolished child labor, and this time the courts accepted the law as constitutional.

Wartime fears have often strained the guarantees of the Bill of Rights. Responding to emergency situations, the government has argued for limiting individual rights to protect the national security. During the Civil War,President Abraham Lincoln suspended the right of habeas corpus to hold Confederate sympathizers without trial. By this method he prevented Maryland legislators from voting to secede, which would have isolated the capital of Washington, D.C., from the North. Lincoln explained that it was necessary for him to stretch the Constitution in order to save it. Not until after the war had been won did the Supreme Court uphold habeas corpus in the 1866 case of *Ex Parte Milligan*. During the First World War, the government prosecuted those who made public speeches against the war and the draft. During the Second World War, it sent thousands of Japanese Americans on the West Coast to inland internment centers. The Supreme Court ruled the internment camps unconstitutional in 1994. In 1990, the U.S. government formally apologized and paid reparations to the surviving internment camp prisoners. Following the terrorist attacks on September 11, 2001, Congress quickly passed the U.S.A. Patriot Act, which among other provisions vastly expanded the government's access to private records, from medical records to books that people check out of libraries.

The Bill of Rights protects people's civil liberties, which allow them to live their own lives according to their own consciences. Civil rights, by contrast to liberties, generally refer to matters of equality. Just before the Civil War, in the 1857 case of *Dred Scott v. Sandford* the Supreme Court had ruled that slaves were not citizens and, therefore, had no constitutional rights. Following the war, the Thirteenth, Fourteenth, and Fifteenth Amendments outlawed slavery, forbade racial discrimination in voting, and guaranteed all citizens equal protection of the laws. Yet the civil rights embodied in these amendments went largely unenforced for the next century. When the southern states adopted racial segregation, the Supreme Court upheld the notion of "separate but equal" in the 1896 case of *Plessy v. Ferguson*. Later in *Brown v. Board of Education* (1954) the Court concluded that in education, separate was not equal. Congress further struck down racial segregation with the Civil Rights Act of 1964.

The argument then switched when affirmative action programs offered racial minorities an advantage in college enrollment, government contracts, and other areas. Critics complained that these programs amounted to "reverse discrimination." In *Regents of the University of California v. Bakke* (1978) the Supreme Court ruled in favor of a white student who had not been admitted into medical school despite having higher test scores than some of the minorities who had been accepted. The Court did not strike down all affirmative action plans, but said that universities could not set fixed enrollment quotas specifically for minority students. Otherwise, the Supreme Court has recognized that diver-

sity in education is constitutionally permissible, and that race can be considered as a factor in admissions.

An important right not guaranteed by the Bill of Rights was the right to vote. At the time that the first ten amendments were ratified, most of the states limited voting to white men who owned property. The states eventually dropped property requirements for voting, but it took several constitutional amendments to extend voting privileges to African Americans, women, and those between the ages of eighteen and twenty-one. In a democracy, the right to vote is as critical as any others guaranteed in the Constitution, and the responsibility of every citizen to exercise.