

8 Civil Liberties and Civil Rights



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Learning Objectives

By the end of this chapter, you should be able to

- Define the concept of civil liberties and explain how civil liberties differ from civil rights.
- Outline basic civil liberties in the United States.
- Examine freedom of expression as a basic civil liberty.
- Explore the right to privacy as a basic civil liberty.
- Analyze how the Bill of Rights has been used to protect the rights of the accused.
- Trace the evolution of the American Civil Rights Movement from one of removing barriers to participation in areas such as voting and education to one of guaranteeing group-based equality.
- Examine the meaning of equal rights and equal treatment.

Following the attacks on the World Trade Center Towers and the Pentagon on September 11, 2001, President George W. Bush launched a “War on Terrorism.” This undeclared war, a police action authorized by Congress, took the U.S. military to Afghanistan and later Iraq. It also resulted in the creation of the Department of Homeland Security and, even more importantly, the passage of the USA PATRIOT Act of 2001. (USA PATRIOT stands for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.) As a wartime measure, the USA PATRIOT Act allowed federal authorities to arrest and hold suspected terrorists without filing formal charges. Individuals detained on suspicion of terrorism were not entitled to an attorney, nor, if an attorney inquired at the request of a family member, was the family member entitled to know why the suspect was being held. It also became federal policy that suspected terrorists who were charged would be tried in military, rather than civilian, courts. Immigrants from Middle Eastern countries, including those who had obtained U.S. citizenship, found themselves under greater scrutiny and at risk of detention and even deportation without being afforded the rights traditionally enjoyed by Americans.

One of the fundamental characteristics of the American political system is that the government is one of laws, and citizens have rights. At a minimum, citizens have the right, if accused of a crime, to due process: to know what the charges against them are and to face their accuser. Those charged are entitled to a trial where guilt has to be proven on the basis of evidence. The USA PATRIOT Act appeared to turn these fundamental rights on their head. For example, the USA PATRIOT Act, as written, provides that police do not need to show probable cause, guaranteed by the Fourth Amendment, to obtain information from telephone companies about numbers dialed to and from a specific telephone. All that the police need to do is assert that the information

is necessary for ongoing criminal investigations. Critics were quick to point out that not only was this a violation of basic civil liberties, but it made a mockery of the Bill of Rights. If the Constitution is stripped of its substance in the name of national security, then what exactly are Americans defending while waging a war? Proponents of the act suggest that civil liberties are never absolute but are balanced against the public interest, which in this case is a matter of national self-defense. If the nation falls apart, then the Constitution is rendered a meaningless document.

In this chapter, we explore the meaning of civil liberties and compare them to civil rights. We also trace the ways the Supreme Court has expanded these liberties and rights for Americans over the course of the nation’s history.



Associated Press/Ron Edmonds

President George W. Bush and members of Congress at the signing of the USA PATRIOT Act. The USA PATRIOT Act is intended to help the government employ terrorism-fighting tools that some say infringe on individual civil liberties.

8.1 The Meaning of Civil Liberties and Civil Rights

The concept of *civil liberties* is sometimes confused with that of civil rights. The term **civil liberties** refers to the personal freedoms and the rights of those accused of crimes that are enjoyed by citizens and non-citizens alike, while the term **civil rights** focuses on the rights of citizens to be protected from discrimination in both the public and the private sectors. Civil liberties are often referred to as negative rights, as they focus on what government cannot do, while civil rights are often referred to as positive rights because they focus on what government must do.

Civil liberties include those rights listed in the Bill of Rights that include freedom of speech, freedom of religious exercise, and the freedom to peaceably assemble. They also generally include the unstated right to privacy. These rights cannot be abridged by the federal government. Civil liberties also include the rights of the accused, such as due process, protection from cruel and unusual punishment, protection from unreasonable searches and seizures, and the protection from being forced to testify against oneself.

By contrast, civil rights pertain to the right to be free from discrimination due to membership in a group, such as discrimination based on gender, race, religion, ethnicity, or something else. Voting rights and equal access to public education are civil rights that have been fought for by different groups over the years. The 14th Amendment Equal Protection Clause and Due Process Clause and the Fifth Amendment Due Process Clause provide the constitutional basis for civil rights. These will be discussed in this chapter.

The U.S. Constitution's Bill of Rights guarantees some basic civil liberties, such as freedom of speech, freedom of religious exercise, protection against unlawful searches and seizures, and jury trials. In providing for the election of representatives to Congress, the Constitution even hints at the right to vote. But in the nation's early years, state governments were much more of a daily presence in Americans' lives than the federal government was. The Bill of Rights, as you may recall from Chapter 2, was intended to protect liberties that the Anti-Federalists were concerned *states* would lose if the U.S. Constitution were ratified without it. The Bill of Rights was designed to protect state sovereignty against encroaching national authority. It was not until 1868, following the Civil War, that the 14th Amendment was ratified as a vehicle for applying the protections in the Bill of Rights to the states.

To summarize, then, civil liberties involve protections against government actions that would interfere with individual freedoms, while civil rights are legal actions that government takes in order to provide equal conditions for individuals and groups. Further, civil liberties differ from civil rights in that civil liberties protect individuals while civil rights protect groups. When we speak of civil liberties, we are often talking about individuals' rights to freely practice religion or to have fair trials with legal representation. When we talk about civil rights, we are often talking about the rights of a group, such as the right of African Americans to vote or not to be discriminated against in workplaces, education, and accommodations. Arguably, the civil rights of a group begin with the civil liberties of an individual, in that if a group is being discriminated against, members of that group may be denied civil liberties.

Obligations of Government to Protect Citizens

Civil liberties need to be protected because they are essential to the workings of democratic governance. For example, if an individual's right to free speech, which includes the right to criticize government, is not protected, then government is not held accountable by the people. Democracy requires government accountability to the people.

Civil rights are often defined as government protections of the rights of citizenship. Issues of discrimination, however, are complicated. While government may not show preference for one group over another, private individuals and groups are not restricted in the same way unless they are receiving public monies or running establishments that serve the public, such as hotels or restaurants. A private college that does not want to allow female students to enroll in its football military leadership programs can control its own enrollment policy and refuse female students this right. However, the government then has the right to deny the school access to federal monies, including for research, student financial aid, and loan guarantees.

Unlike private institutions, public institutions must provide equal protections to citizens. A governmental obligation to protect a citizen's right to vote, for example, means that a citizen cannot be prevented from voting by either private individuals or public officials, and that each person's vote must be counted equally. The United States follows the principle of "one person, one vote." If the right to vote is defined as a basic civil right, and then one state attempts to erect barriers to voting, as many Southern states did against African Americans prior to the 1965 Voting Rights Act, government then has an obligation to remove those barriers. Moreover, if the government fails to do so, it is not treating its citizens equally. Voting rights is a difficult example because some politicians and private citizens argue that voting barriers protect elections from fraud, such as ineligible people voting, while others consider these barriers to be a type of civil rights violation. Contemporary debates over photo identification or state and local government requiring multiple forms of identification as a condition of voting are considered within their civil rights context.

The 14th Amendment's Definition of Citizenship and Equal Protection

The roots of civil liberties in the U.S. Constitution lie in the language of the Bill of Rights, but, as previously mentioned, they applied only to the national government. After all, the first word of the First Amendment is "Congress," the federal legislature, suggesting that the Bill of Rights protects the people from the federal government. The vehicle for applying the rights included in the Bill of Rights to the states lies in the 14th Amendment. The Supreme Court has used that amendment to incorporate the Bill of Rights and extend to the states what were originally limitations on the federal government.

The 14th Amendment was ratified as part of Reconstruction after the Civil War; at its core lies the definition of citizenship. Section 1 states, "*All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.*" The definition of citizenship was a direct response to the *Dred Scott* ruling, where the U.S. Supreme Court stated that slaves and their descendants could not be considered citizens. With the definition of citizenship in the 14th Amendment, a person born in the state of Alabama was to be considered a citizen of the United States, as was one born in

the state of Massachusetts. The 14th Amendment made citizenship a national right as well as a state right. The amendment goes on to say,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

There are two components to this statement. The first is referred to as the *Due Process Clause*, and the second is the *Equal Protection Clause*. The **Due Process Clause** requires that citizens be treated fairly in judicial processes, while the Equal Protection Clause means that states may not enact statutes that deny rights guaranteed to U.S. citizens.

The Due Process and Equal Protection clauses were used to decide a landmark same-sex marriage case in 2015. The U.S. Supreme Court decided, in *Obergefell v. Hodges* (2015), that the 14th Amendment's Equal Protection and Due Process clauses mean that states may not refuse to recognize same-sex marriages performed legally in other states. The Court decided that marriage cannot be denied to adults by any state simply because the two persons getting married are of the same sex.

The Equal Protection Clause actually reinforces the Due Process Clause. It requires that individuals be treated equally. The language typically used in how the U.S. Constitution approaches the law is that government may not create discriminatory and unfair groups of people. If, for example, Congress creates a public assistance program for poor people whose qualifications for assistance are based on need, Congress cannot deny assistance to Hispanic women who are otherwise eligible. That would, in effect, put Hispanic women into a category of being "other" or different from all the other women qualifying for assistance, which would be discriminatory and unfair. Once government does this, it is not treating people equally.



Associated Press/Pablo Martinez Monsivais

The U.S. Supreme Court's recognition of same-sex marriage as a civil right makes it fall under the protection of the Equal Protection Clause of the 14th Amendment; if marriage is guaranteed to all individuals, then it cannot be denied to one group of people.

The status of gay rights under these two clauses is one line of reasoning that was used to argue for the civil right of same-sex marriage. By reading the Equal Protection Clause alongside the Due Process Clause, the Supreme Court recognized same-sex marriage as a right, which means that the state of South Carolina cannot refuse to recognize the legitimacy of a marriage conducted in New York because doing so denies the couple who moves from New York to South Carolina equal protection under the law. As marriage is considered to be a basic right, regardless of one's sexual orientation, denying homosexuals the right to marry one another was deemed discriminatory and unfair.

Combining the Due Process Clause with the citizenship clause of the 14th Amendment makes a very powerful statement about individual liberties and, by extension, civil rights. These two clauses together mean that one born anywhere in the United States is considered a citizen and cannot lose that citizenship when traveling to a part of the country that chooses not to recognize it. This is critically important because the 14th Amendment follows the 13th Amendment, which abolished slavery. Together, these two amendments guaranteed that a former slave who was given freedom through the 13th Amendment would be a citizen of the United States.

The 14th Amendment also precedes the 15th Amendment, which states, “*The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.*” This means that a citizen of the United States cannot be denied the right to vote by any state on the basis of race, because doing so denies that person the equal protection of the law.

8.2 Freedom of Expression as a Basic Civil Liberty

Some Americans may take for granted the right to free speech, the right to exercise freedom of religion, and basic rights to due process. These are the core of Americans’ basic civil liberties. In addition, Americans often assume they have a basic right to privacy even though privacy rights are not specified in the Bill of Rights. All of Americans’ core civil liberties are stated or implicit in the Bill of Rights, and all are essential if the concept of human agency is to have any real meaning. But as was the case with the Supreme Court having to carve out a role for itself (as we discussed in Chapter 7), so too has the Court needed to define the nature of citizens’ civil liberties.

The First Amendment

The First Amendment reads,

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Many would agree that the right to freedom of speech is a fundamental civil liberty. The First Amendment makes it clear that Congress shall make no law abridging the right to freedom of speech. The First Amendment, as written, applies to only the federal government. The language of the 10th Amendment, which includes the powers reserved to the states, gives states the power to limit speech. But the 14th Amendment provides the vehicle to apply that limitation to the states on the basis of the Equal Protection Clause.

As important a right as freedom of speech is, it is by no means absolute. There are circumstances when limitations can be placed on speech, especially when it may cause harm to others. In his famous 1859 essay *On Liberty*, John Stuart Mill argued that the state could interfere

with individual liberty if a person's action in any way harmed him- or herself or others. Mill spent much of this work talking about the appropriateness of restricting speech. However, Mill also took the position that speech that hurts people's feelings or that some find offensive is not really harmful and should therefore be allowed. In fact, he argued that offensive speech is part of the free marketplace of ideas that sustains democratic government. If people are allowed to say things that are offensive, the truth will emerge.

Free speech is also critical to the concept of individuality. It supports the core American values of life, liberty, and the pursuit of happiness because the life that a person chooses to live is a form of free speech. If one is free to think about things as an expression of his or her individuality, it is only logical that he or she would be entitled to free speech as an extension of human agency.

However, freedom of speech must be tempered for the sake of the public interest. The notion that free speech can cause harm by causing dangerous actions only complicates the issue of free speech. By Mill's standard, for instance, members of the Ku Klux Klan marching in a heavily African American neighborhood and promoting hate speech might be considered simply offensive. But if the march leads to physical violence, then the speech extends beyond offensive to harmful.

Freedom of Religion

The First Amendment declares the free exercise of religion as a basic right. The Framers believed that religion was a matter of individual conscience and therefore an extension of human agency, which should be respected by government. In 1802, Thomas Jefferson described this concept as a separation of church and state. The First Amendment was meant as much to protect states that had established churches as to protect those that did not.

The **Establishment Clause** of the First Amendment declares that Congress shall not establish an official religion. The **Free Exercise Clause** of the First Amendment guarantees that individuals are free to practice their religion without government interference. Of the several rights and protections found in the First Amendment, the two concerning religion appear first, which suggests that religious freedom was important to supporters of the Bill of Rights. But what if one wants to have prayer in school? Does that violate the Establishment Clause because the school, if it is public, is an extension of the state? If the school does not allow prayer, is the school violating the right to free exercise? Partly because of these knotty questions, the issue of school prayer has proven to be very contentious. Civil libertarians often invoke the separation of church and state as the basis for opposing prayer in school, while proponents of school prayer often accuse civil libertarians of being against religion.

Engel v. Vitale (1962)

In *Engel v. Vitale*, the U.S. Supreme Court established that school prayer violates the First Amendment. The case involved a non-denominational prayer written by the New York Board of Regents to be recited in the public schools. Parents brought suit against the board of education. The New York courts upheld the "Regents' Prayer" so long as students were not forced to participate over their parents' or their own objections.

The Supreme Court disagreed. Writing for the Court, Justice Hugo Black made it clear that the fact that the prayer was nondenominational was really beside the point:

Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause. . . . When the power, prestige, and financial support of government are placed behind particular religious beliefs, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.



Associated Press/Ginger Perry

Students participate in See You at the Pole, a global day of student prayer. Since the 1962 case of *Engel v. Vitale*, mandatory recitation of prayer in school has been considered a violation of the First Amendment's Establishment Clause.

Pennsylvania and Rhode Island allowed parochial schools to be reimbursed for providing secular teaching services for courses found in a public school curriculum. Like the Rhode Island statute, the 1968 Pennsylvania Nonpublic Elementary and Secondary Education Act allowed reimbursement for math, modern foreign languages, physical science, and physical education courses while prohibiting reimbursement for "any subject matter expressing religious teaching, or morals or forms of worship of any sect." Alton Lemon, a public school parent, brought suit against Pennsylvania Superintendent of Public Instruction David Kurtzman for violating the Establishment and Free Exercise clauses. A three-judge federal court held that the law violated neither clause.

Again, the Supreme Court disagreed, developing what has been referred to as the **Lemon test**. Chief Justice Warren Burger stated that, under this test, a statute would have to meet three criteria to demonstrate that it does not violate either First Amendment religion clause. The statute must

- a) have a secular legislative purpose,
- b) neither advance nor inhibit religion,
- c) not foster "*an excessive government entanglement with religion.*"

Even a nondenominational prayer becomes corrupted when joined to the state. That students were free to exempt themselves from participation does not mean that they would not be vulnerable to social ostracism, which in itself is discriminatory.

Lemon v. Kurtzman (1971)

Lemon v. Kurtzman considered whether the state could support religion by providing subsidies to church-related schools. Various states passed legislation providing financial assistance to church-related K-12 schools that went beyond providing transportation or textbooks. Statutes enacted in

Subsidies of this nature, the Court concluded, violated the Establishment Clause if they had the effect of lowering the cost of sending children to parochial schools.

Zelman v. Simmons-Harris (2002)

Many thought that the *Lemon* test was too stringent and discriminated against those who wanted to send their children to religious schools. But what about a public voucher program that allows parents to choose their children's school? In recent years, reform efforts have allowed parents to receive vouchers from the local public school district if they want to send their children to a private school to offset the cost of tuition. Do vouchers amount to a subsidy for private education? Parents who send their children to private school often complain about paying property taxes for public schools their children do not use. Some argue that vouchers make the education market competitive by forcing public schools to offer a higher-quality education, while others claim that vouchers subsidize religious education because many of the private schools that parents opt for are parochial.

Ohio created a voucher program in the late 1990s that offered a \$2,250 tuition grant for each student from a low-income family enrolled in a private school, whether religious or non-religious. Doris Simmons-Harris and others sued Ohio Superintendent of Public Instruction Susan Tave Zelman on the grounds that the voucher program violated the Establishment Clause.

The Supreme Court took the view that the voucher program offered real choice and as such was constitutional. Unlike the *Lemon* case, this voucher program did not create an excessive entanglement between government and religion because its only intent was to offer parents the choice of a private school alternative to public education.

8.3 The Right to Privacy as a Basic Civil Liberty

The right to privacy is not specifically spelled out in the Constitution. Rather, it is inferred on the basis of both the Fourth and Ninth amendments. The Fourth Amendment safeguards against unreasonable searches and seizures. Individuals may not have their private houses, personal effects, papers, or other property searched or seized without probable cause, as expressed in a warrant. To the extent that there is a guarantee against such intrusion, there is an assumption of privacy. The Ninth Amendment reserves to the people those rights that had not been enumerated, or listed, in the Constitution. The issue of privacy has been a contentious one, especially with regard to abortion.

In *Roe v. Wade* (1973), the Supreme Court found that a woman's right to terminate a pregnancy was constitutional under her right to privacy. The Court's ruling invalidated a Texas statute criminalizing abortion for both the woman seeking an abortion and the doctor performing the procedure.

The Supreme Court could not point to a specific provision in the Constitution that actually granted a right to privacy that extended to abortion rights, so the Court staked its claims on *Griswold v. Connecticut* (1965), where it held that married couples had a right to privacy to

practice birth control. The Court also asserted that the Constitution contained a penumbra—a spirit—of privacy.

In *Roe v. Wade*, the Court held that women could terminate pregnancies under certain conditions. It left open the possibility for the state to regulate abortions if there were a compelling interest to do so. During the first trimester, a woman was presumed to have unlimited rights to terminate. But as the fetus attained viability, that is, the likelihood of survival outside the womb, there might be a compelling state interest to regulate and limit her choice to terminate. A state might place limitations on abortions during the second trimester and even ban them during the third unless the mother's life was at stake. One problem with this standard was that technological advances would allow fetal viability to be achieved earlier, thereby making stricter regulations more likely.

Roe v. Wade touched on religious freedom issues even though religious practice was not central to the abortion issue. Critics claimed the decision was contrary to religious beliefs holding that abortion is the murder of the unborn. The decision also touched on the issue of federalism. Prior to *Roe v. Wade*, abortion was an issue for states to decide. In making its ruling, the Court nationalized the issue and created a uniform standard by limiting whether, when, and how states regulated abortion. *Roe v. Wade* touched off a divisive culture war in the United States. Not only does the case ask when life begins, but for socially liberal individuals, the case raises issues about human agency, particularly within the context of the Declaration's promise of "life, liberty, and the pursuit of happiness."



Associated Press/Manuel Balce Ceneta

The Supreme Court's 1973 decision in *Roe v. Wade* remains one of the most controversial—and adversarial—decisions made by the Court.

8.4 The Rights of the Accused

Americans expect that if and when they are accused of crimes, certain due process rights will be protected. First, they will know what they are charged with and they will be informed of their rights. Second, their homes will not be illegally searched. And third, they will receive state-provided legal representation if they cannot afford it themselves. All three of these are essential ingredients for a fair trial. The premise is simple: If proper procedure is followed, then the outcome will be correct and just. If the state could search one's home without a warrant, what safeguard would there be to ensure that evidence was not planted by police? If, in prosecuting a case, the state can have people arguing in court who are knowledgeable about the law, then as a matter of fairness the accused should also have somebody knowledgeable

about the law representing him or her. If one could be questioned without an attorney present, it would be hard to verify that a confession was not coerced.

Unlawful Searches and Seizures

The Fourth Amendment states, “*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.*” It then says that warrants to search a home or one’s papers or even to arrest somebody will not be issued unless there is probable cause, but the warrant must clearly state where the search will take place, and who or what specifically may be seized. This means that if someone is hiding a gun that is believed to have been used in a murder in his or her home, it cannot be seized unless there is a warrant to search that person’s house. The suspicion that this person might have committed the crime would serve as probable cause to obtain the warrant. As part of due process, the police must explain to a judge why they need a warrant. This requirement creates a safeguard against the arbitrary exercise of authority. If it were not required, what would prevent the police from knocking on doors conducting fishing expeditions for anything illegal?

Does this Fourth Amendment protection also prevent evidence that was illegally obtained from being used against a defendant? This was the question addressed by the Supreme Court in *Mapp v. Ohio*, decided in 1961. Dollree Mapp was convicted of possessing obscene materials, but the police obtained the evidence illegally. Cleveland police forced their way into Mapp’s home searching for a bombing suspect without a search warrant. During their search, the police found obscene materials. The Ohio Supreme Court upheld Mapp’s conviction even though it acknowledged that the evidence was illegally obtained because the obscene materials were found while the police were looking for a bombing suspect and the materials were not in plain view. The Supreme Court overturned that decision.

This case incorporated the **exclusionary rule**, which stipulates that evidence obtained illegally cannot be used against the accused even if it would prove them guilty. Earlier precedents had already made illegally obtained evidence in federal trials exclusionary. The *Mapp* ruling made it clear that Fourth Amendment rights extend to the states through the 14th Amendment when it stated, “The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest” (*Mapp v. Ohio*, 1961).

The Right to Counsel

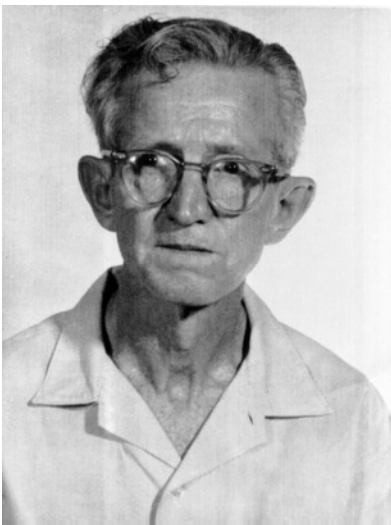
The Sixth Amendment establishes that one has the right to legal counsel in federal criminal trials. Yet the right to counsel may be understood as the right to be represented by an attorney in court only but does not extend to the government providing an attorney. As late as the 1940s, the Supreme Court held that the right to the government providing legal representation did not apply to the states.

In 1942, the Supreme Court held as constitutional, in *Betts v. Brady*, that the government did not have to provide indigent persons accused of state crimes with an attorney unless the accused person met special circumstances. A Maryland court denied Smith Betts’s request

for counsel upon being indicted for robbery. Forced to represent himself, he was convicted. He filed petitions for habeas corpus, claiming that he was denied his right to counsel, and the local and state courts rejected his case, after which the U.S. Supreme Court agreed to hear it.

The Court upheld *Betts's* conviction and denied that the right to counsel obligated states to provide poor people with attorneys. Four years earlier, in *Johnson v. Zerbst*, the Court held that poor defendants were guaranteed counsel in federal trials, and in *Powell v. Alabama* in 1932, the Court held that states had to provide attorneys to poor defendants in **capital cases**, where the death penalty was a possible conviction. *Powell v. Alabama* involved the “Scottsboro Boys” case, where Ozzie Powell and several Black youths were charged with raping two White girls in Alabama. They were found guilty and sentenced to death. The issues before the Supreme Court included the absence of a fair, impartial, and deliberate trial; the denial of counsel at trial; and the exclusion of Blacks from the jury. The Court majority asserted that even an intelligent person would be at a disadvantage without counsel:

Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. (*Powell v. Alabama*, 1932)



Associated Press

Clarence Earl Gideon's 1961 appeal to the U.S. Supreme Court led the Court to rule that persons charged in criminal cases must be represented by counsel in all states.

In *Betts*, however, the Supreme Court said that the right to counsel did not extend to all cases, because it did not follow that just because one was poor he or she was more likely to be convicted. The issue was not poverty; it was ignorance of the law that put one at a disadvantage at trial. In his dissent, Justice Hugo Black made it clear that the denial of counsel to poor people did indeed increase the likelihood of conviction, which in his view represented a violation of the Equal Protection Clause.

The *Betts* case was overturned in *Gideon v. Wainwright* (1963). Clarence Earl Gideon was convicted in Florida for petty theft and sentenced to 5 years in a Florida prison. He was forced to defend himself because the Florida court maintained that it could appoint counsel only in capital cases. Gideon read some law books in the prison library and handwrote a petition to the U.S. Supreme Court seeking to overturn his conviction. In its ruling, the Supreme Court maintained, in a 9–0 decision, that a person accused of a felony could not be guaranteed a fair trial without the assistance of legal counsel. The effect of being forced to defend himself was to not only violate

equal protection but to strip the poor person of his basic rights to due process, as he would not know how or have the resources to adequately respond to his accuser.

The Accused Must Know Their Rights

We are all familiar with the famous line on any number of police shows, such as *Law & Order*, that, when arrested, individuals have the right to remain silent and the right to an attorney and that, if they cannot afford one, an attorney will be appointed for them. These are the **Miranda Rights**, and they come from the 1966 *Miranda v. Arizona* decision. Ernesto Miranda confessed to a crime during police interrogation without requesting the assistance of counsel. Speaking for the Court, Chief Justice Earl Warren wrote,

It is obvious that . . . an interrogation environment is created for no purpose other than to subjugate the individual to the will of the examiner. . . . The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed . . . no statement obtained from the defendant can truly be the product of free choice.

Put differently, without minimal safeguards, there is no way to know that the confession was not coerced. Unless proper procedures are followed, the outcome cannot be said to be fair and just. In sum, the *Miranda* and *Mapp* cases have long been viewed by law and order conservatives as examples of judicial activism whereby the rights of criminal defendants were protected at the expense of the public interest.

Summary of Civil Liberties

What the various civil liberties cases have in common is that individual liberties are to be respected, but they are by no means absolute. In matters of privacy, as well as matters of religion and speech, there is to be a presumption favoring individual rights unless there is a compelling societal interest to restrict those rights. To establish the interest as compelling, government would need to demonstrate that regulation is needed to prevent incitement and irreparable harm to society.

However, when it comes to the rights of the accused, the bar would appear to be even higher. Here the Court indicates that because the state can deprive persons of their life and liberty, it must be absolutely clear that proper procedures have been followed so that the outcome is just. Thus, one cannot be compelled to make confessions, nor can due process or legal counsel be denied even as the nation is fighting a war on terrorism. In short, basic civil liberties must be protected to ensure not only that Americans may enjoy freedom, but also that the government remains accountable to the public. See *Timeline: Evolution of civil liberties* for a brief summary of civil liberties in the United States.

Timeline: Evolution of civil liberties



1859

The essay "On Liberty" is published, which argued that the state could interfere with individual liberty if a person's actions harmed him- or herself or others.

1791

Bill of Rights is added to the U.S. Constitution.



1868

The 14th Amendment is added to the U.S. Constitution.



1919

The *Schenck v. U.S.* decision established that free speech is not protected if it violates the "clear and present danger" test.

1961

The *Mapp v. Ohio* decision established the "exclusionary rule."

1963

The *Gideon v. Wainwright* decision established that persons charged in criminal cases must be represented by counsel in all states if they are too poor to provide their own.

1965

U.S. Supreme Court decides *Griswold v. Connecticut*, which establishes that specific amendments in the Bill of Rights protect the right to privacy.

1966

The *Miranda v. Arizona* decision established that persons accused of crimes must be notified of their Fifth and Sixth Amendment rights.



1973

The *Roe v. Wade* decision established that personal privacy rights include the right for women to choose to have an abortion under broad circumstances.



2001

Congress enacts the USA PATRIOT Act.

2015

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8.5 The Quest for Civil Rights

Civil rights differ from civil liberties in that civil rights speak to the desire of groups to be treated the same as other groups, while civil liberties address individual legal and procedural protections. Core civil rights concerns address discrimination based on race, inequality of education, and obstacles to voting. Political and economic inequalities have resulted from these civil rights violations.

The Right to Vote

The U.S. Constitution does not guarantee voting rights. States could decide who was eligible to vote and whether other requirements needed to be met, such as property qualifications or registration.

Initially, states limited voting rights to individuals who were adult White males who owned property. In the 1820s, the states extended the right to vote to all adult White males, regardless of whether they owned property. Many Western states allowed women to vote in the 19th century, but women were not guaranteed that right nationally until the 19th Amendment was ratified in 1920. In 1971, the 26th Amendment extended the right to vote to 18-year-olds in the wake of anti-Vietnam protests.

Despite these constitutional protections, for many Americans the fight for voting rights continued. In particular, while the 15th Amendment, ratified in 1870, prohibited states from denying the right to vote on the basis of race, many Southern states still found ways to deny voting rights to African Americans. In the Jim Crow South, where barriers were constructed to prevent African Americans from voting, a “grandfather clause” meant that one had to pass a literacy test and a “good citizenship” test or fulfill an “understanding requirement” if one’s grandfather had not been able to vote, which, if he had been a slave, he would not have. Those who could not read were effectively disfranchised from the system.

Recently freed slaves who had not received an education were thus barred. Other barriers to voting included poll taxes, which kept poor people, both Black and White, away from the polls. In other areas, Black voters would be discouraged by racial violence and intimidation, including lynching.



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Women’s suffrage supporters rally in Chicago in 1916. The right to vote was not guaranteed to all adult persons until well into the 20th century. Women, for example, did not win universal voting rights until the 19th Amendment was ratified in 1920.

The Civil Rights Movement

The Civil Rights Movement, which culminated with the Civil Rights Act of 1964 and the Voting Rights Act of 1965, was a grassroots protest that sought to end racial discrimination in public accommodations, education, voting, and employment. Among the practices that were most protested during this era were the inability to vote, the forced separation of Blacks in schools and public transportation, and public and private discrimination in services including hotels, restaurants, and drinking fountains.

8.6 The Meaning of Equal Rights and Equal Treatment

Most Americans take it as a given that equal treatment is a basic civil right. If, for example, John is given greater protections and liberties by the state than Susan is, Susan can rightfully claim that she is not receiving equal treatment. If Susan is not being treated equally because of her gender, she can claim discrimination. Such cases of discrimination may appear to be simple enough, but in practice they often become quite complicated. Suppose, for example, that both John and Susan apply for a job and only one can be hired. By definition, the one who is not hired has been discriminated against. The employer made a choice and stated a preference. Can we still say that both John and Susan received equal treatment?

The concept of equal protection has meant different things at different times. From about 1890 until the 1950s, the reigning approach to race-based treatment was **separate but equal**. For example, a school system did not have to educate White and Black students in the same classrooms, as there could be separate schools for Black and White students as long as the schools claimed that they were “equal.” It was these types of segregated facilities, including separate water fountains and movie entrances for Blacks and Whites in the South, that would come to symbolize the Civil Rights Era of the 1950s and 1960s. Today, it is often taken for granted that to be afforded equal treatment means that facilities will be racially integrated.



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The infamous segregated water fountains of the 1950s were indicative of the era’s “separate but equal” doctrine, established by the U.S. Supreme Court in the 1890s.

Plessy v. Ferguson (1896)

For most of the period between the Civil War and the cultural revolution that began in the 1960s, Blacks and Whites were held to the separate but equal doctrine in the United States. The doctrine was upheld by the Supreme Court beginning in the 1896 case of *Plessy*

v. Ferguson, which revolved around a Louisiana statute requiring separate railway cars for Whites and Blacks. Homer A. Plessy, who was one-eighth Black, was arrested for sitting in a railway car reserved for Whites. Plessy appeared White; however, he sat in the White-only car and informed the train conductor that he was Black in order to get arrested so that he could sue on the basis of the 14th Amendment. Convicted in a Louisiana court, he appealed the order of the judge, John Ferguson.

The Supreme Court did not consider the statute to violate the 13th Amendment, which abolished involuntary servitude, nor the 14th Amendment, which established citizenship and equal protection. At issue for the Court was whether the Louisiana statute was reasonable. As the Court stated:

In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable.

The Court also made it clear that social equality would have to occur naturally; the U.S. Constitution could not order it. In other words, individuals could not be forced to abandon their prejudices because of a clause in the 14th Amendment, nor could that clause force people to accept others as their social equals.

Brown v. Board of Education (1954)

The Supreme Court reversed one aspect of *Plessy v. Ferguson* in *Brown v. Board of Education*, the 1954 school desegregation decision where the Court concluded that separate was not equal in public schools. Linda Brown was prohibited from attending a White public school in Topeka, Kansas, near her home. Seven students' parents, including Linda Brown's, sued on the grounds that separate schools violated their right to equal protection. Their case was helped by events in the larger world. Coming on the heels of World War II, where the consequences of hatred and bigotry in Nazi Germany were clear, coupled with the fact that Black soldiers had fought valiantly for the country, the Court was inclined to reconsider its earlier precedent.

Another factor influencing the Court's willingness to reconsider precedent, which perhaps was a factor in the larger Civil Rights Movement, was the United States' image during the Cold War. The Eisenhower Justice Department filed a brief in the *Brown* case in part because the inequality among the races was a detriment in the eyes of the Soviet Union and the Third World.

Writing for the unanimous Court, Chief Justice Earl Warren made it clear that education was the very foundation of citizenship:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most

basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Based on the testimony of psychologists and various social scientists, the Court concluded that segregation had a detrimental effect on students. Separate school facilities were not equal.

Brown v. Board of Education proved to be extremely controversial. Critics accused the Court of judicial activism. They argued that segregated school systems reflected the democratic will of the majority in the communities where they were located. Who was the Supreme Court to defy democracy? There were even calls to strip the Supreme Court of its authority. Even President Eisenhower, who had appointed Chief Justice Warren, wondered if he had made a mistake.

Evolving Civil Rights

Over the years, several cases arguing for equal rights and equal treatment would come before the Supreme Court, and civil rights in the United States evolved from an initial quest to remove barriers to access and participation to policies aimed at achieving equal opportunity. (See *Timeline: Evolution of civil rights* for a brief summary of civil rights in the United States.) The educational cases dealing with segregation in schools were about obtaining equality in educational opportunity because unequal education would result in group disadvantage, thereby exacerbating economic inequality, which in turn would affect various groups' ability to participate in the political process on an equal basis. As these barriers were removed, national policy turned to the attainment of equality through programs including affirmative action, which were designed to advance groups that were historically discriminated against so that they could be on an even plane with others. As much as the Supreme Court was willing to allow these programs in principle on the grounds that they furthered a social interest, it was not willing to allow them to be designed in such a way that the effect would be to discriminate against Whites.



Associated Press

George E. C. Hayes (left), future Supreme Court Justice Thurgood Marshall (center), and James M. Nabrit (right) join hands outside the Supreme Court after it ruled in *Brown v. Board of Education* (1954) that racial segregation in public schools was unconstitutional.

Timeline: Evolution of civil rights

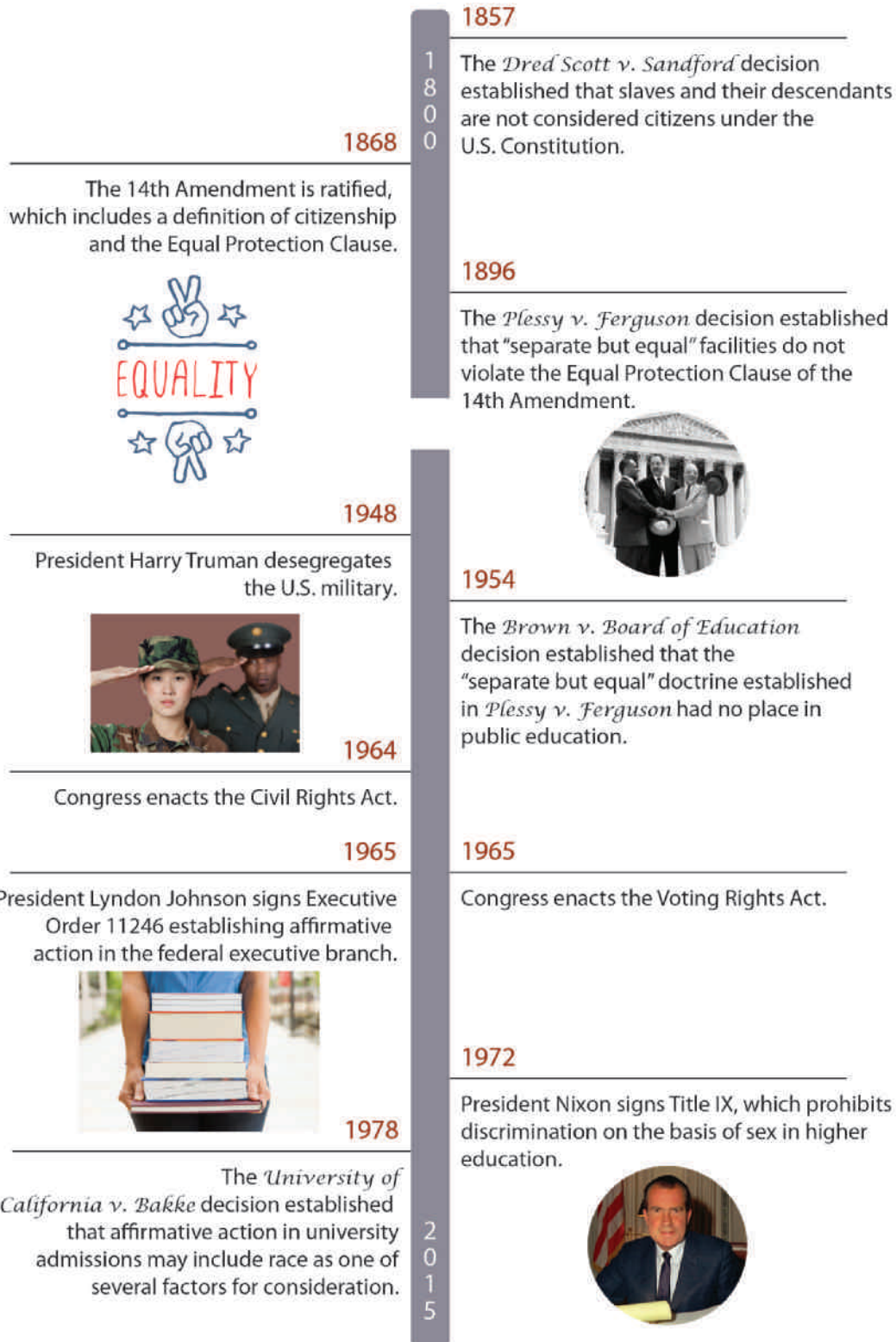


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Summary and Resources

Chapter Summary

One distinctive feature of American life is that citizens take their basic civil liberties very seriously. They often take for granted that they have the right to vote, to express themselves freely, to practice their faith unhindered by government interference, and to do as they please in private. Arguably, that was why the Anti-Federalists insisted on a separate Bill of Rights. It was not until 1868, following the Civil War, that the 14th Amendment was ratified as a vehicle for applying the protections in the Bill of Rights to the states. The most important clause in the 14th Amendment is the Equal Protection Clause, which, when joined with the definition of citizenship, means that individuals cannot be treated unequally. Government, whether state or federal, must afford citizens equal treatment. To provide less is to effectively engage in discrimination.

Both civil liberties and civil rights in the United States have expanded dramatically since the days of the nation's founding, which has reflected an evolving notion of the concept of natural rights. Among the key expansions is the right to vote. Also, because a core American value is equal opportunity, the quest for civil rights in the United States has entailed removing barriers to access. To this end, with regard to civil rights, education—which greatly affects one's access and ability to succeed in life—must be provided on an equal basis. The earlier doctrine of separate but equal no longer has a place in American society.

Finally, over the years the Supreme Court has defined the concept of privacy, especially in defining a woman's right to choose to have an abortion. Still, as much as American civil liberties have expanded, they have never been absolute. There has always been a basis for interfering with them if the state has a compelling interest to do so. The Supreme Court has often echoed John Stuart Mill's harm principle—that although there is to be a presumption in favor of individual liberty, the state may restrict that liberty to prevent harm to one's self or others. As we have seen, government can regulate free speech when it creates a "clear and present danger," but it must be done according to exacting standards. Further, the state may restrict a woman's right to choose when there is a compelling state interest, which is usually defined at the point of fetal viability. Key to these discussions is that civil rights and liberties must be balanced against the larger public interest.

Key Ideas to Remember

- The concepts of civil liberties and civil rights have evolved over American history.
- Civil liberties often refer to the rights of individuals to express themselves, to practice their faith freely, and, when accused of crimes, to have access to basic protections, such as due process and counsel. The right to privacy, while not explicitly stated in the Constitution, is also considered a basic liberty.
- Civil rights often refer to the rights of groups to be treated on an equal basis with other groups, which requires removing barriers to equal access, education, and participation in political affairs resulting in discrimination.
- The Civil Rights Movement was a quest for equality and represented the efforts of disadvantaged minorities to assert themselves.

- Free speech is not considered an absolute right, but the Court's position has evolved to one whereby, unless one's speech is so dangerous as to create harm to society, there must be a presumption favoring individual freedoms.
- On matters of privacy, especially with regard to rights to have an abortion, the Supreme Court has upheld the core principle of a woman's right to choose despite its recognition of states' rights to pass laws restricting abortions.
- Initially, the Civil Rights Movement focused on removing barriers to equal education and voting, but over time it manifested itself in efforts to achieve group results through policies of affirmative action. Despite the Court's position that racial quotas and point systems violate the Equal Protection Clause of the 14th Amendment, the Court has nonetheless affirmed the principle that government may have a compelling interest in pursuing affirmative action.

Questions to Consider

1. What is the obligation of government to protect its citizens?
2. What does it mean to provide equal protection under the law?
3. How does the 14th Amendment work to nationalize the Bill of Rights?
4. Why is it important for poor people to have publicly provided attorneys to represent them?
5. How does protecting the rights of the accused protect all citizens?
6. Why is free speech critical to civil liberties?
7. What are the limits to free speech?
8. Given the separation of church and state, can a student lead a prayer group in an empty classroom during lunchtime in a public school?
9. What is the basis for a right to privacy in the Constitution?

Key Terms

capital cases Cases involving the death penalty.

civil liberties Rights that individuals enjoy, usually referring to personal freedoms.

civil rights Usually pertain to the rights of groups to enjoy the liberties otherwise enjoyed by individuals free of discrimination.

Due Process Clause A clause in the 14th and 15th amendments that safeguards the right of the accused to receive fair treatment in the judicial process.

Establishment Clause The clause in the First Amendment that prohibits the establishment of a state-sponsored religion.

exclusionary rule Illegally obtained evidence cannot be used against the accused to convict him or her.

Free Exercise Clause The clause in the First Amendment that guarantees individuals the right to practice their religion freely.

Lemon test The criteria that must be met if governments are to provide services to church-related schools.

Miranda rights The right to remain silent, to have legal counsel, and to have counsel appointed if one cannot afford it; read upon arrest to all individuals suspected of committing a crime.

separate but equal The idea that there could be separate facilities for racial groups as long as they are equal.

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