Chapter 4 – Civil Liberties and Civil Rights

AP Government
Civil Liberties vs. Civil Rights

• In the Constitution, civil liberties arise under the **due process clause**.
• In the Constitution, civil rights issues arise under the **equal protection clause**.
Substantive vs. Procedural Restraint

• The Amendment against government quartering troops in private homes without consent is an example of **substantive restraint**.
  – Put limits on what the government shall and shall not have the power to do.

• Amendment for “a person is presumed innocent until proven guilty” is an example of **procedural restraint**.
  – Deal with *how* the government is supposed to act
Bill of Rights

- Proposed during Constitutional Convention by Virginia delegate George Mason
- Turned down with little debate.
- Delegates in Philadelphia thought they were unnecessary
- Government delegated only limited powers.
- Federal government already told what must not do.
Guarantees provided in the Bill of Rights might better be understood as a *bill of liberties*.

Though popular throughout most of American history, the Bill of Rights were controversial at the time of the founding.
In *Federalist 84*, Alexander Hamilton (as Publius) objected to calls for a “bill of rights.”

1. Hamilton argued that the Constitution already contained sufficient protections of rights.
2. Hamilton further argued that “bills of rights” are appropriate in monarchies but are, at least, unnecessary in republics because in a republic, as he said, “the people surrender nothing” and “retain everything.”
3. Moreover, Hamilton argued that, by “enumerating” rights, the Bill of Rights would actually restrict the rights Americans enjoyed because

In partial response to Hamilton’s third criticism of the Bill of Rights, the Ninth Amendment was added to the Constitution.

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”
Like Alexander Hamilton, James Madison thought the main text of the Constitution, particularly the separation of powers and federalism, provided important protections of rights.
“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”

—James Madison (Publius), Federalist 51
Implicit in Madison’s “double security” for “the rights of the people” is the idea that the central government will protect the people from the states and vice versa.
Dual Citizenship and the Nationalization of the Bill of Rights

Throughout American history, the courts have wrestled with the question of whether the Bill of Rights restrains only the national government, or if its protections are applicable to the states.
Barron v. Baltimore (1833)

Barron sued Baltimore for rendering his wharf useless on that grounds that it had violated his Fifth Amendment rights by taking his property without “just compensation.”
The Supreme Court established “dual citizenship” by ruling that the Fifth Amendment and the Bill of Rights only protected citizens from the national government.
“The fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States.”

Chief Justice John Marshall,
Majority opinion,
Barron v. Baltimore (1833)
As a precedent, *Barron v. Baltimore* established doubt on future interpretations of rights protection.

Although subsequent cases re-affirmed the concept of “dual citizenship,” the adoption of the Fourteenth Amendment in 1868 seemed to challenge this concept.
The Fourteenth Amendment seemed to affirm the concept of “dual citizenship.”

“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 next line seems to indicate that the national government might now provide Madison’s “double security” and protect rights from state abuse.

“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 to any person within its jurisdiction the equal protection of laws.”
Despite this language in the 14th Amendment, the U.S. Supreme Court reaffirmed the *Barron* precedent in the *Slaughter House Cases* in 1873.

Pitted Louisiana butchers’ right-to-labor against the state’s “police power” to regulate public health

Speaking for the slim majority in the Court’s 5-4 decision, Justice Samuel F. Miller upheld the state’s actions as a fair use of its “police power.” Of much greater importance, however, was Miller’s finding that the 14th Amendment was intended exclusively as a means of protecting and redressing the suffering of former slaves. The result was a very restricted interpretation of the “privileges and immunities,” “due process,” and “equal protection” clauses of the new amendment. The Court refused to allow the broad terms of a single amendment to alter the existing balance of power between the states and the federal government.
Incorporation

• *Slaughter House’s* narrow interpretation of the Fourteenth Amendment set the stage for a process by which the Bill of Rights would be “selectively incorporated” into the Fourteenth Amendment.
Selectieve Incorporatie

Op basis van een geval-en-geval-basis, begon de Supreme Court te erkennen dat de federale overheid een rol had om de burgers te beschermen tegen de wetten van de staat.
Incorporation

• This gradual process (selective incorporation) of applying the Bill of Rights to the States
• By 1940’s, all provisions of the 1st Amendment – religion, speech, press, assembly, and petition applied to states.
• Through the 1960’s, the Supreme Court applied all others (incorporated) except 2nd, 3rd, 7th, and 10th.
A first “wave” of incorporation occurred in the 1920s and 1930s that applied key elements of the First Amendment to the states.

In the 1960s, a second “wave” of incorporation focused on applying and enforcing the rights of the criminally accused in the states.
Supreme Court had incorporated into the Fourteenth Amendment only the “eminent domain” clause of the Fifth Amendment.

1965 and 1973 the Court had incorporated the “penumbral” (or implied) right to privacy into the Fourteenth Amendment in *Griswold v. Connecticut* and *Roe v. Wade*.

Bill of Rights - ongoing evolution and interpretation by the courts today.
The Constitution and Religion

• Two clauses in the First Amendment protect freedom of religion
  – The “establishment” clause
  – The “free exercise” clause
Religion

• Thomas Jefferson’s formulation of the wall of separation between church and state is most closely associated with the establishment clause.
• “Separation of church and state” does not appear in 1st amendment or anywhere in the Constitution.
• Two reasons why separation:
  – To protect religion from being corrupted by the state
  – To protect good government from corruption caused by religious conflict.
Establishment Clause

- “Congress shall make no law respecting an establishment of religion.”
- Room for some mingling of the government and religion.
Prayers in Congress

Why do we have prayers during the formal sessions of the Congress?

- Tradition
- Legislators are Adults
- Attendance is voluntary at beginning of sessions
Religion

- The Supreme Court has been consistently strict in cases of school prayer and other separation of schools and religion issues in all of the following
  - Bible Readings
  - Moments of Silence
  - Nondenominational Prayers
Lemon Test

- Test whether to grant aid to religious schools
  - If it has a secular purpose
  - If its effect was to neither advance nor inhibit religion
  - If it did not entangle government and religious institutions in each others affairs.
Disagreement Over Establishment Clause

• **Broad** Interpretation – Prevents the government from providing any aid to any religion. No tax money.

• **Narrow** Interpretation – Government prohibited from giving one religious group preferential treatment.

• **Literal** Interpretation – First Amendment only prohibits the establishment of an official government religion. Not prohibit government participation in particular religious practices.
Free Exercise Clause

• The right to believe and practice whatever religion one chooses is known as the free exercise clause.
• 1st Amendment disallows any laws “prohibiting the free exercise of religion”

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...
Would you guarantee the right to practice the following religions.

• Mormon and Polygamy
• Use poisonous snakes in their religious rites
• Deny man unemployment benefits because violated drug law while taking peyote during religious ceremony.
• Withhold medical treatment of sick child if parents religious beliefs don’t want it.
• Religion requires human sacrifice
First Amendment protections of **freedom of speech and of the press** enjoy some of the strongest Constitutional protections.

Encroachments on these First Amendment rights often require that the government meet a **strict scrutiny** standard which requires the government to show that its action is Constitutional.
Alien and Sedition Acts

• Within seven years of the ratification of the Bill of Rights, Congress made it a crime to say or publish anything that might tend to defame or bring disrepute to the government of the United States.
Federal Espionage Act of 1917

- The Supreme Court upheld the act by refusing to protect the speech rights of the defendants on the grounds that their activities constituted a “clear and present danger” to security.
- First modern free speech case
- Government intervention or censorship is permitted.

Oliver Wendell Holmes
Three Types of Speech

• **Pure Speech**
  - verbal expression of thoughts and opinions before a voluntary audience.

• **Speech Plus**
  - Involves actions such as marching or demonstrating with speech. Safety is a factor in this type of speech restrictions.

• **Symbolic Speech**
  - Most controversial – technically involves no speech at all. Varied opinions by the Supreme Court.
Prior Restraint

• With the exception of the broadcast media, which is subject to federal regulation (FCC), freedom of the press is protected.
  – *Near v. Minnesota (1931)* - Court ruled a censorship law unconstitutional because it involved prior restraint or censorship of information before it is written or published.

• Exception, cases of National Security
Other Types of Speech

• Certain types of speech that fall outside the absolute guarantees of the First Amendment and therefore outside the realm of absolute protection include
  – Obscenity and pornography
    • Speech or writing that appeals to the “prurient interest” of the average person.
    • *Roth v. United States (1957)*
  – Fighting words
    • Direct incitement of damaging conduct.
  – Commercial speech
    • Newspaper and television advertising.
Regulating Speech in Constitution (Not Permitted)

- **Slander and Libel**
  - Speech that damages a person’s good name, character, or reputation.
- **Sedition**
  - Actions or language inciting rebellion against a lawful authority, especially advocating the overthrow of a government. May not involve an action against the government.
- **Treason**
  - the offense of acting to overthrow one's government or to harm or kill its sovereign.
Second Amendment

• The point and purpose of the Second Amendment is the provision for militias.

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”
Second Amendment

• A recent controversy has arisen because some citizens have sought to form private militias unconnected with the government.
Ambiguity and disagreement over the importance of the clause of the Second Amendment concerning a “well regulated Militia” has left Second Amendment protections problematic.

Advocates of Second Amendment rights generally adopt legislative strategies against gun control legislation rather than taking their cases to court.
Rights of the Criminally Accused

• The essence of due process is found in the Fourth, Fifth, Sixth and Eighth Amendments.

Fourth Amendment:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”
Exclusionary Rule

• Upholds the principle that evidence gathered illegally cannot be used in a trial.
  – *Mapp v. Ohio (1961)* established this precedent.

• Some judges don’t like it because releasing suspects due to sloppiness or mistakes is *not* helping the police or protecting the public.
Limiting the Exclusionary Rule

• *Nix v. Williams*
  – “Inevitable Discovery” – Evidence would have been discovered eventually by legal means

• *United States v. Leon*
  – “Good Faith” – Evidence seized on basis of mistakenly issued warrant can be used in court as long as police acted in “good faith.”
Search Warrant

• A search warrant is an order for a judge and based on probable cause, which means the search will provide evidence for a criminal case.

• It describes what is to be searched for and seized. May be searched if the occupant gives permission for the police to search.

• A person can be searched if they have been arrested.
Exceptions to Warrant Requirement

• The Automobile Exception
  Mainly because a car can move and it is not practical to wait.

• The Terry Exception
  *Terry v. Ohio (1968)* – allows brief investigatory stops and searches when the police have good reason to believe that a person has committed or is about to commit a crime.

• Limited to quick pat-down to check for weapons or contraband, determine identity of suspect, or allow time for questioning
• Searches following a Lawful Arrest
• Police may make a full search of arrested individuals. No general rummaging around though.

• Searches for Evidence
• Police may do so to preserve evidence

• Border Searches
• People and their possessions may be searched when they cross the border of the United States
• **Plain-view Searches**
  – Evidence in plain view of officer may be seized without a warrant. Forcing your way into an apartment and seeing drugs on the table is not a legal search.

• **Exigent Circumstances**
  – Urgent or critical situations such as the house is burning or a suspect may escape may allow for immediate searches.
Fifth Amendment:
“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Sixth Amendment:
“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”
Rules upholding Constitutional rights of the accused:

• The **exclusionary rule** excludes evidence obtained in violation of Fourth Amendment protections against warrantless searches and seizures.

• The **Miranda rule** ensures that arrested persons must be informed of their rights to “remain silent” and to have legal counsel.
Civil Liberties

• An important civil liberty that has not been incorporated by the Fourteenth Amendment and applied to state criminal prosecutions are grand juries.

• Only about half the states now use grand juries.
Eighth Amendment:
“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

How are the Fourth, Fifth, Sixth, and Eighth Amendments’ protections upheld in practice?
Private Property

• Fundamental rights in the Constitution – “life, liberty, and property.” According to the 5th and 14th Amendments

• Eminent Domain
  – the government’s right to take control of private property for public use.
Death Penalty

• State that performed the most executions between 1976 and 2000 - Texas

• Reasons against the death penalty
  — Expensive
  — Life sentence is worse
  — Racist
The Right to Privacy

In *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973), the Supreme Court held that American citizens enjoyed a “penumbral” (or implied) right to privacy.

In *Griswold*, Justice William O. Douglas argued that the Third, Fourth, and Fifth Amendments suggested a “zone of privacy.”
Opponents of abortion and other skeptics of a “right to privacy” argue that the Court inappropriately created this right.

Justice Arthur Goldberg, concurring with Douglas’s opinion, cited the Ninth Amendment as additional justification for the right to privacy.

**Ninth Amendment:**
“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”
The “privacy right” was forged in regard to birth control in the *Griswold* case.

It has subsequently been applied not only to abortion cases but also to cases involving gay rights.

In *Lawrence v. Texas* (2003), the Supreme Court argued that gays are “entitled to respect for their private lives” out of reach of the State.
Civil Rights

Coinciding with the increased rights protection via selective incorporation, the Supreme Court and the national government also began to expand civil rights protection for African Americans.
Civil rights are legal or moral claims for protection that citizens are entitled to make upon the government.

Whereas civil liberties concern those things that governments cannot do to citizens, civil rights involve citizens appealing to the government to protect them from other citizens, social actors, or some aspect of the government itself.
The “Civil War amendments” to the Constitution are an important legal basis for civil rights protection in the United States.

– The Thirteenth Amendment abolished slavery.
– The Fifteenth Amendment guaranteed voting rights for black men.

– Most directly, the Fourteenth Amendment provides the basis for national government protection of rights.
Just as the Fourteenth Amendment was the basis for the selective incorporation of the Bill of Rights, interpretations of its equal protection clause are the basis of many of the debates of civil rights.

Equal protection clause: “No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.”
Civil Rights Act of 1875

- Was declared unconstitutional on the grounds that it sought to protect blacks from discrimination by private businesses.
- Purpose of 14th Amendment was to prevent discriminatory acts by public officials of state and local governments.
Shelly v. Kraemer

• “Restrictive covenants” could not be judicially enforced.

• Restrictive covenant is where a seller of a home inserts a clause to the sales contract requiring buyers to agree not to sell their home to nonwhite, non-Christian, etc. people.
In its 1896 *Plessy v. Ferguson* ruling, the Supreme Court upheld the racial segregation system of Jim Crow, arguing that “separate but equal” train cars and other facilities did not violate the Fourteenth Amendment’s “equal protection” clause.
“Laws permitting, and even requiring, their separation [by race] ...do not necessarily imply the inferiority of either race to the other.”


Although the *Plessy* decision was a setback for the civil rights movement, the “separate but equal” ruling became an important institutional rule that they could use to argue in court cases like *Sweatt v. Painter* (1950).
Plessy’s “separate but equal” ruling held until it was overturned in *Brown v. Board of Education* in 1954, when the Court found that, in the words of Chief Justice Earl Warren, “*in the field of public education the doctrine of ‘separate but equal’ has no place.*”
In *Brown v. Board of Education*, the Supreme Court struck down the “separate but equal” doctrine and the practice of separation on the basis of race as “inherently unequal.” After *Brown*, states could no longer use race as a factor in discrimination in law, and the court would apply its **strict scrutiny** standard to any case related to racial discrimination.
Brown v. Board of Education

Sparked greater resolve for a growing civil rights movement that would use social protest to press for political change culminating in important congressional actions. The 1964 Civil Rights Act and the 1965 Voting Rights Act.
Desegregation

• One southern strategy used to delay desegregation was known as “pupil placement” laws.

• 1950’s in Virginia - Single state board with the power to assign all pupils to schools in the state.

• The placement act would maintain all students in their current schools unless their transfer was approved by the state board.
Desegregation

• 1990’s – school desegregation had a set back due to various Supreme Court rulings.
  – 1995 – *Missouri v. Jenkins* signaled to lower courts that they should “disengage from desegregation efforts.”

• Court differentiated between *de jure* racial segregation (segregation in law) vs. *de facto* (segregation in fact).

• Cities that deliberately segregated schools were illegal.
Discrimination in Employment

• Congress was able to ban discrimination by virtually any local employer thanks to the Supreme Court’s broad definition of the interstate commerce clause.

• Title VII of the Civil Rights Act of 1964 which outlawed job discrimination by all private and public employers that employ more than 15 workers.
Discrimination in Employment

• The first problem with Title VII is that the complaining party has to show deliberate discrimination was the cause of the failure to not get the job or training.

• Rarely does an employer explicitly admit discrimination on the basis of race, sex, or any other illegal reason.

• Courts now allowing employer’s hiring practices had the effect of exclusion.
Gender Discrimination

• The conservative Burger Court refused to treat gender discrimination as the equivalent of racial discrimination.

• It did make it easier for plaintiffs to file and win suits by letting them use intermediate scrutiny.

• This shifts the burden of proof partially onto the defendant rather than leaving it entirely on the plaintiff.
  
  – Traditional rules of evidence – burden of proof on the plaintiff
  – Strict scrutiny – defendant shows not only a particular classification is reasonable but that there is also a need or compelling reason.
Title IX


• Due to 1992 Supreme Court ruling, *Franklin v. Gwinnett County Public Schools*, more cases in the area of sexual harassment and equal treatment of women’s athletic programs were allowed.

• Monetary damages could be awarded.
Mexican Americans

• They were segregated and prevented from voting because of white primaries and the poll tax.
• Inspired by 1950’s and 60’s Civil Rights movement, began to mobilize.
• Launched a series of boycotts of high schools in Los Angeles, Denver, and San Antonio demanding
  – Bilingual education
  – Greater cultural recognition
  – An end to discrimination
Americans with Disabilities

- Greatest success for Americans with disabilities and handicaps was the passage of the **Americans with Disabilities Act** in 1990.
Affirmative Action

• A compensatory action to overcome the consequences of past discrimination and encourage greater diversity.

• Has been a prominent goal of the national government since the 1970’s.
Affirmative Action

• Allan Bakke, a white man, bought a suit against the University of California Medical School at Davis, claiming he was denied admission based on his race.

• He won and the Supreme Court permitted universities to use race as a factor but limited severely the use of quotas.

• More as a guideline for social diversity purposes.
Affirmative Action

• According to the Supreme Court case of Hopwood v. State of Texas, universities and colleges are **never** allowed to use race as a factor in admission.

• Effectively rolled back the ruling of the Bakke case.

• Ruling only applies to 5th district (Texas, Louisiana, Mississippi)

• Texas passed law that if in top 10% of class, automatic acceptance to state universities.
Affirmative Action

• 2003, the case *Grutter v. Bollinger* broke new ground

• White student sued for discrimination in rejection to Michigan Law School

• Ruling said that diversity on the campus is a compelling reason to consider race in the admission of certain students.

• Allowed a “highly individualized, holistic review of each applicant for each applicants file”.

Illustration by Taylor Jones for the Hoover Digest
Proposition 209

- California Civil Rights Initiative in 1996.
- Intended to prohibit state and local governments from using race or gender preferences.
- Outlaw affirmative action programs.
- Hiring, contracting, admission to universities.

- Referendum on measure passed with 54% of the vote.
  - 1997 vote in Houston kept affirmative action in place with 55% of vote
  - Michigan passed same type of amendment in 2006