

# The Idea of Rights and Liberties

No rights are absolute. The **social contract** means giving up absolute rights, that is, voluntarily limiting rights, in order to create a society that regulates behavior for the benefit of the community.

The social contract means that you CANNOT do whatever you want. You give up absolute freedom because it is a good bargain. Your rights are more secure within community.

An **inalienable right** cannot be taken away from you, but that right can most certainly be qualified, limited, and regulated by the community.

The community is self-governing, and the people have popular sovereignty, which means that any qualification, limitation, or regulation of rights has been self-imposed.

# Bill of Rights and Civil Liberties

The states had bills of rights to protect various individual and communal liberties. The Framers at the Constitutional Convention thought that the national government's power was so limited that a federal bill of rights was *not necessary*.

The Anti-Federalists, concerned about **state power**, insisted that a federal bill of rights be added to the U.S. Constitution.

The Bill of Rights, however, only applied to the *federal government*.

State governments could pass laws that the federal government could not as long as their state bill of rights didn't prevent it.

It is important to understand the subtle difference between how we discuss civil liberties and civil rights: the **preservation of liberties** involve *protections against* government, while the **maintenance of rights** often involve *actions by* government.

# Incorporation Doctrine

The Supreme Court has used the **14<sup>th</sup> Amendment** to effectively ***incorporate*** most of the Bill of Rights, that is, apply it to the states. In other words: “nationalize” the Bill of Rights.

The 14<sup>th</sup> Amendment, ratified in 1868, says that no *state* shall “deprive any person of life, liberty, or property without due process of law” and that no state shall “deny to any person within its jurisdiction the equal protection of the laws”

The process of “**selective incorporation**” has applied some, but not all, of the federal Bill of Rights to the states.

Today, the federal Bill of Rights guarantees individual freedoms against infringement by national, state, and local government.

# First Amendment

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”*

# Freedom of Religion

## ***Engel v. Vitale (1962)***

The state of New York passed a law allowing for the recitation of a voluntary, non-denominational prayer at the beginning of the school day.

Jewish parents and other organizations opposed to the policy challenged the prayer as a violation of the First Amendment's Establishment Clause.

Prayer: *"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country. Amen."*

**Constitutional Question:** Does this prayer constitute an establishment of religion by New York state? Does it violate the First Amendment's **Establishment Clause**?

# Freedom of Religion

**Decision:** Warren Court ruled 6 – 1 that the prayer was inconsistent with the Establishment Clause.

*Engel v. Vitale* incorporated the Establishment Clause (applied it to the states) and invalidated prayer in public schools.

Some critics believed strongly that taking prayer out of public schools would have an extremely negative impact on society and public morality.

Some even argued that the case represented a larger push to “secularize” society and diminish the role that religion (meaning: Christianity...) plays in society.

Supporters of the ruling were happy that students of non-Christian backgrounds would no longer feel obligated to participate.

# Freedom of Religion

## ***Wisconsin v. Yoder (1972)***

The state of Wisconsin required school attendance until the age of 16 and prosecuted Yoder and other Amish parents for violating the law by keeping their children from attending school beyond 8<sup>th</sup> grade.

**Constitutional Question:** Does the Wisconsin law violate the First Amendment's **Free Exercise Clause**? Is the religious liberty of the Amish community being violated? Should the Amish receive a religious exemption from the law?

**Decision:** Burger Court ruled 7 – 0 that the Wisconsin law did violate the Free Exercise Clause and that the Amish should receive an exemption.

# First Amendment

*“...or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.”*

# Freedom of Speech

Should people be able to promote the overthrow of the government? What if they believe the government is no longer protecting their individual liberties, has undermined the Constitution, or is otherwise tyrannical?

Do we actually have the *right* to rebel? Some people misinterpret the 2<sup>nd</sup> Amendment as providing the means to resist tyranny, but would the government ever protect a citizen's "right" to take up arms against it?

To what extent can citizens promote peaceful or violent resistance?

# Freedom of Speech

## ***Tinker v. Des Moines ISD (1969)***

Tinker and other students planned to protest the Vietnam War by wearing black armbands to school, but the principal implemented a policy forbidding such acts of symbolic speech. The students were subsequently suspended from school for wearing armbands and then sued the school.

**Constitutional Question:** Is the school policy forbidding armbands a violation of the First Amendment's free speech protection?

# Freedom of Speech

**Decision:** Warren Court ruled 7 – 2 in favor of Tinker and other students that their freedom of speech had been violated.

*Tinker v. Des Moines ISD* was a pivotal case protecting symbolic speech under the First Amendment. The majority opinion argued that students do not lose their freedom of speech when they go to school and that symbolic speech that was otherwise not disruptive to the learning environment could not be infringed.

A concurring opinion stated that students do not enjoy full freedom of speech at school and that there is a difference between words and actions.

# Freedom of Speech

## ***Schenck v. United States (1919)***

Socialists Charles Schenck and Elizabeth Baer distributed leaflets expressing the opinion that the military draft violated the 13<sup>th</sup> Amendment and that people should peacefully resist military service. Schenck was charged for violating the Espionage Act of 1917 for promoting insubordination within the military. Schenck insisted that his freedom of speech had been violated.

**Constitutional Question:** Did Schenck's conviction under the Espionage Act violate his freedom of speech? Is a person's public opposition to the war protected by the First Amendment? To what extent?

# Freedom of Speech

**Decision:** White Court ruled 9-0 to uphold the Espionage Act. Meaning: the court ruled against Schenck that his freedom of speech had been violated.

The majority ruled that freedom of speech could reasonably be limited during wartime and formulated the “clear and present danger” test to determine when speech could be limited.

Does the speech in question pose a “clear and present danger” to society? If so, then the speech can be restricted.

Does Schenck’s distribution of anti-war leaflets pose a “clear and present danger” to society? The court says, yes.

**Precedent: Clear and Present Danger Test**

# Freedom of Speech

What is the significance of the Clear and Present Danger Test?

Does it limit free speech? Why or why not?

Is it the best test?

## ***Brandenburg v. Ohio (1969)***

Brandenburg, a leader in the Ku Klux Klan, was charged for violating a state law that criminalized speech that advocated sabotage, violence, or unlawful terrorism as a means to accomplish political goals.

**Constitutional Question:** Does the Ohio law and Brandenburg's conviction violate his freedom of speech?

# Freedom of Speech

**Decision:** The Court ruled 9-0 in favor of Brandenburg that his freedom of speech had been violated.

The majority formulated the Direct Incitement Test as a way to establish whether speech posed a clear and present danger to society.

## **Precedent: Direct Incitement Test**

The Direct Incitement Test asked whether or not the speech in question directly incited violence or lawlessness. If not, then the speech was likely protected under the First Amendment.

# Freedom of Speech

Religious liberty, freedom of speech, and symbolic speech:

Should people be able to picket and/or protest military funerals?

## ***Snyder v. Phelps* (2011)**

The Westboro “Baptist” “Church” believes that God actively judges the United States for its acceptance of homosexuality by killing American soldiers overseas. In other words, when a soldier dies from IED (improvised explosive device) it is because God wanted to punish the U.S.

To express this interpretation of current events, members of Westboro picket/protest military funerals and hold signs expressing their views.

The Snyder family, whose son died, sued the Westboro “congregation” for emotional distress.

**Decision:** The Roberts Court voted 8 – 1 to uphold the free speech rights of Westboro Baptist Church.



Westboro Baptist Church is NOT affiliated with mainstream Baptist denominations. It is widely considered a cult and the federal government monitors them as a hate group.

Church (cult) members picket the funerals of soldiers to promote their beliefs.

Child abuse? Should government take the kids?



# Freedom of Speech

## ***New York Times v. United States (1971)***

The Nixon Administration attempted to prevent the New York Times and Washington Post from publishing information contained in a classified Defense Department study of the Vietnam War. The information became known as “The Pentagon Papers” and proved that the Johnson Administration had been actively misleading the American people about the war effort. The Nixon Administration insisted that “prior restraint” was justified on national security grounds.

**Constitutional Question:** Would the Nixon Administration’s use of **prior restraint (censorship)** violate the First Amendment’s protection of a free press? Is the New York Times protected against censorship?

# Freedom of Speech

**Decision:** The Court ruled 9 – 0 that the government was not justified in using prior restraint.

Precedent: This case upholds and affirms the precedent that the press is protected against prior restraint (censorship).

If the press breaks the law to obtain information then they can be prosecuted for their illegal actions, but they are still protected against censorship.

Recent example: **Edward Snowden**, the NSA employee who broke federal law when he stole classified documents about government surveillance, was charged for violating the Espionage Act of 1917.

However, any classified documents that he leaks to the press *can* be published.

# Freedom of Speech

## ***Citizens United v. Federal Election Commission (2010)***

The 2002 Bipartisan Campaign Reform Act, referred to as the **McCain-Feingold Act**, limited the political advertising that labor unions and corporations could fund prior to elections.

In 2008, a conservative political action committee called Citizens United sought to broadcast TV ads promoting a documentary film critical of presidential candidate Hillary Clinton, but doing so violated the McCain-Feingold Act.

Citizens United then sued the Federal Election Commission, responsible for enforcing McCain-Feingold, for violating their freedom of speech.

District ruled in favor of the FEC because a previous decision, *McConnell v. FEC* (2003) had already upheld the McCain-Feingold Act after a similar challenge.

**Constitutional Question:** Does the McCain-Feingold Act violate the free speech rights of corporations by regulating political advocacy.

# Freedom of Speech

**Decision:** The Court ruled 5 – 4 that McCain-Feingold’s restriction of independent political spending by corporations and unions (through political action committees PACs) was unconstitutional, and overturned long-standing precedent allowing the government to regulate such spending.

The Court’s majority argued that regulating independent political spending limited freedom of speech protected by the First Amendment, and that the First Amendment protects the act of speech itself, regardless of the speaker (corporation or union). They assume that the ruling will *increase* our access to information.

The Court’s minority argued that regulating independent political spending is necessary to prevent corruption and the appearance of corruption, and that the First Amendment only protects *individual* speech, not speech by groups. They assume that the ruling will *decrease* our access to information.

**I refuse  
to believe  
corporations  
are people  
until Texas  
executes one.**

## Second Amendment

*“A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.”*



You have a right to “bear arms”!

# Gun Rights

In 1934, Congress passed the **National Firearms Act** in response to the growth of organized crime. The act imposed new taxes and registration requirements on automatic weapons and others used in organized crime.

The Court, in ***U.S. v. Miller (1939)***, unanimously upheld the constitutionality of the act, stating that the Second Amendment was intended to protect a citizen's right to own "ordinary weapons."

The District of Columbia passed new gun regulations that restricted residents from owning handguns, and required rifles and shotguns to be *disassembled* within the home.

The Court ruled, in ***District of Columbia v. Heller (2008)***, that the Second Amendment protects an individual's right to possess a firearm *unconnected* with service in a militia and affirmed (for the first time) an individual's right to the use of firearms for *self-defense* within the home.

# Gun Rights

## ***McDonald v. Chicago (2010)***

**Decision:** In 2010, the Supreme Court incorporated the Second Amendment's protection of an individual's right to bear arms for self-defense.

Gun rights interest groups such as the National Rifle Association argue that gun rights are under attack, but in terms of constitutional law gun rights have significantly expanded in the last decade with the incorporation of the *Heller* decision.

Gun rights, like others, can be regulated by the community and the level of regulation remains very controversial and subject to debate.

# Fifth Amendment

*“...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...”*

# Self-Incrimination

## ***Miranda v. Arizona (1966)***

Ernesto Miranda confessed to a kidnapping and rape after a two hour interrogation in which his right to not provide evidence of his guilt was not explained to him.

Constitutional Question: Does the Fifth Amendment's protection against self-incrimination apply to police interrogations?

Decision: The Court ruled 5 – 4 that a defendant's right to not self-incriminate must be explained by law enforcement prior to questioning. The notification of this right is referred to as the "Miranda reading."

# Sixth Amendment

The Constitution's protection against the suspension of *habeas corpus*, and the Sixth Amendment's guarantee that the "...*accused shall enjoy the right to a speedy and public trial, by an impartial jury...*" constitutes "due process" rights.

# Right to Counsel

## ***Gideon v. Wainwright*** (1963)

Clarence Gideon was denied an attorney in Florida state court and was convicted. From prison, Gideon submitted a hand-written petition to the U.S. Supreme Court appealing his sentence on the grounds that his Sixth Amendment right to counsel had been violated.

**Constitutional Question:** Does the right to counsel extend to state governments due to the 14<sup>th</sup> Amendment's Due Process Clause?

**Decision:** The Court agreed to his case and ruled unanimously in favor of Gideon. The right to counsel was incorporated.

Recent example: The right to counsel came up during the War on Terror because detainees at Guantanamo Bay prison in Cuba were indefinitely detained without legal counsel. The Supreme Court ruled in ***Hamdan v. Rumsfeld*** (2006) that detainees had the right to counsel.

# Right to Privacy

According to the Supreme Court, the **right to privacy** is an *implied* right found within many of the protections outlined in the Bill of Rights.

The 1<sup>st</sup> Amendment (practicing religion) and 4<sup>th</sup> Amendment (security in home) indicate that the Framers expected aspects of an individual's private life to be off limits.

The Court first ruled on the right to privacy in 1965. ***Griswold v. Connecticut (1965)*** involved a challenge to the constitutionality of an 1879 Connecticut law prohibiting the dissemination of information about and/or the sale of contraception.

In *Griswold*, the Court voted 7 – 2 that various portions of the Bill of Rights (1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 9<sup>th</sup>) implied the unstated liberty of personal privacy. The right to privacy was “read into” the Constitution rather than “found” within it. Critics argued that the Supreme Court was “inventing” protections not found in the Bill of Rights.

# Right to Privacy

Initially, the right to contraception was understood as a matter of *marital* privacy. Soon, the right to contraception was extended to individuals, married or unmarried.

The Court argued: “If the right to privacy means anything, it is the right of an individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.”

The right to privacy later became the basis for the right to secure an abortion, which became one of the most controversial issues in American politics.

# Right to Privacy

Background: In 1900, abortion was a felony in every state, but abortions were still available and occurred regularly. Hundreds of thousands of abortions were performed illegally every year.

In the early 1960s, the increasing medical safety of abortions and the growing women's rights movement put pressure on the political institutions and medical establishments to support laws guaranteeing a woman's access to a safe and legal abortion. In 1967, Colorado became the first state to legalize abortion and by 1972 the procedure was legal in 20 states.

Women's rights activists argued that the decision of whether or not to carry a pregnancy to term was a woman's fundamental right.

# Right to Privacy

## ***Roe v. Wade*** (1973)

A woman in Texas sought to terminate her pregnancy by abortion, but Texas law prohibited abortion except to save the life of the mother. “Jane Roe” was the pseudonym of the woman who challenged the constitutionality of the ban. Henry Wade was the district attorney for Dallas County tasked with enforcing the ban.

**Constitutional Question:** Does the right to privacy established in *Griswold* extend abortion?

**Decision:** The Court ruled 7 – 2 that a woman has complete autonomy during the first trimester to terminate her pregnancy free from state interference. The Court ruled that abortion could only be outlawed at the point of viability (when the fetus can or is likely to survive outside of the womb). In 1973, medical opinion located viability at 26-28 weeks. Overall, the decision overturned state laws that outlawed access to abortion and created a **trimester framework** to regulate future abortion laws. The decision was one of the most divisive in American politics and remains a polarizing issue today.

# Right to Privacy

The Pro-Life Movement began efforts to pass a constitutional amendment to overturn *Roe*, attack the right to privacy, and prohibit public funding of abortion. The goal of appointing pro-life judges to federal courts and electing pro-life legislators became a long-term priority. State governments passed new restrictions such as 24-hour waiting periods and parental consent requirements.

In ***Planned Parenthood of Southern Pennsylvania v. Casey (1992)***, the Court ruled that Pennsylvania's state government *could* regulate abortion as long as its regulations did not pose “**an undue burden**” on pregnant women.

## **Precedent: Undue Burden Test**

The *Casey* decision did not overturn *Roe*, but clearly limited its scope by replacing the trimester framework with the Undue Burden Test. In other words, it made regulating abortion *easier*. The Court has to interpret on a case-by-case basis whether a given regulation creates an “undue burden” or not.

Recent example: Texas legislature passed a law that would have closed most abortion clinics in the state, but the law was overturned for creating the “undue burden” of requiring women to travel long distances to access the procedure.