

5.1: Bill of Rights

Chapter 5 – Bill of Rights and The Exclusionary Rule

Bill of Rights ^[84]

Learning Objectives

- What is the Bill of Rights?
- What historical periods were central to the evolution of civil liberties protections?
- What is the relationship of the Fourteenth Amendment to civil liberties?

Many of the aspects of our nation's laws and criminal justice systems have been molded by the United States' founding documents. The foundation of civil liberties is the Bill of Rights, the ten amendments added to the Constitution in 1791 to restrict what the national government may do.

The state conventions that ratified the Constitution obtained promises that the new Congress would consider adding a Bill of Rights. James Madison—the key figure in the Constitutional Convention and an exponent of the Constitution's logic in the Federalist papers—was elected to the first House of Representatives. Keeping a campaign promise, he surveyed suggestions from state-ratifying conventions and zeroed in on those most often recommended. He wrote the amendments not just as goals to pursue but as commands telling the national government what it must do or what it cannot do. Congress passed twelve amendments, but the Bill of Rights shrank to ten when the first two (concerning congressional apportionment and pay) were not ratified by the necessary nine states.



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The first eight amendments that were adopted address particular rights. The Ninth Amendment addressed the concern that listing some rights might undercut unspoken natural rights that preceded government. It states that the Bill of Rights does not “deny or disparage others retained by the people.” This allows for unnamed rights, such as the right to travel between states, to be recognized. We discussed the Tenth Amendment in module 2, as it has more to do with states' rights than individual rights.

The Rights

Even before the addition of the Bill of Rights, the Constitution did not ignore civil liberties entirely. It states that Congress cannot restrict one's right to request a writ of habeas corpus giving the reasons for one's arrest. It bars Congress and the states from enacting bills of attainder (laws punishing a named person without trial) or ex post facto laws (laws retrospectively making actions illegal). It specifies that persons accused by the national government of a crime have a right to trial by jury in the state where the offense is alleged to have occurred and that national and state officials cannot be subjected to a “religious test,” such as swearing allegiance to a particular denomination.

The Bill of Rights contains the bulk of civil liberties. Unlike the Constitution, with its emphasis on powers and structures, the Bill of Rights speaks of “the people,” and it outlines the rights that are central to individual freedom. ^[1]

The main amendments fall into several broad categories of protection, as follow:

1. Freedom of expression (I)
2. The right to “keep and bear arms” (II)
3. The protection of person and property (III, IV, V)
4. The right not to be “deprived of life, liberty, or property, without due process of law” (V)
5. The rights of the accused (V, VI, VII)
6. Assurances that the punishment fits the crime (VIII)
7. The right to privacy implicit in the Bill of Rights

The Bill of Rights and the National Government

Congress and the executive have relied on the Bill of Rights to craft public policies, often after public debate in newspapers. [2] Civil liberties expanded as federal activities grew.

The First Century of Civil Liberties



Figure 5.1 Frederick Douglass, c. 1847–52. The ex-slave Frederick Douglass, like many prominent abolitionists, published a newspaper. Much of the early debate over civil liberties in the United States revolved around the ability to suppress such radical statements. [85]

The first big dispute over civil liberties erupted when Congress passed the [Sedition Act](#) in 1798, amid tension with revolutionary France. The act made false and malicious criticisms of the government—including Federalist president John Adams and Congress—a crime. While printers could not be stopped from publishing, because of freedom of the press, they could be punished after publication. The Adams administration and Federalist judges used the act to threaten with arrest and imprisonment many Republican editors who opposed them. Republicans argued that freedom of the press, before or after publication, was crucial to giving the people the information they required in a republic. The Sedition Act was a key issue in the 1800 presidential election, which was won by the Republican Thomas Jefferson over Adams; the act expired at the end of Adams’s term. [3]

Debates over slavery also expanded civil liberties. By the mid-1830s, Northerners were publishing newspapers favoring slavery’s abolition. President Andrew Jackson proposed stopping the US Post Office from mailing such “incendiary publications” to the South. Congress, saying it had no power to restrain the press, rejected his idea. Southerners asked Northern state officials to suppress abolitionist newspapers, but they did not comply. [4]

World War I

As the federal government’s power grew, so too did concerns about civil liberties. When the United States entered the First World War in 1917, the government jailed many radicals and opponents of the war. Persecution of dissent caused Progressive reformers to found the [American Civil Liberties Union](#) (ACLU) in 1920. Today, the ACLU pursues civil liberties for both powerless and powerful litigants across the political spectrum. While it is often deemed a liberal group, it has defended reactionary organizations, such as the American Nazi Party and the Ku Klux Klan, and has joined powerful lobbies in opposing campaign finance reform as a restriction of speech.

The Bill of Rights and the States

Later we discuss the Fourteenth Amendment, added to the Constitution in 1868, and how its due process clause, which bars states from depriving persons of “life, liberty, or property, without due process of law,” is the basis of civil rights. The Fourteenth Amendment is crucial to civil liberties, too. The Bill of Rights restricts only the national government; the Fourteenth Amendment allows the Supreme Court to extend the Bill of Rights to the states.

The Supreme Court exercised its new power gradually. The Court followed selective incorporation: for the Bill of Rights to extend to the states, the justices had to find that the state law violated a principle of liberty and justice that is fundamental to the inalienable rights of a citizen. Table 1, “The Supreme Court’s Extension of the Bill of Rights to the States,” below, shows the years when many protections of the Bill of Rights were applied by the Supreme Court to the states; some have never been extended at all.

Table 5.1 The Supreme Court’s Extension of the Bill of Rights to the States

Date	Amendment	Right	Case
1897	Fifth	Just compensation for eminent domain	Chicago, Burlington & Quincy Railroad v. City of Chicago

1925	First	Freedom of speech	Gitlow v. New York
1931	First	Freedom of the press	Near v. Minnesota
1932	Fifth	Right to counsel	Powell v. Alabama (capital cases)
1937	First	Freedom of assembly	De Jonge v. Oregon
1940	First	Free exercise of religion	Cantwell v. Connecticut
1947	First	Non-establishment of religion	Everson v. Board of Education
1948	Sixth	Right to public trial	In Re Oliver
1949	Fourth	No unreasonable searches and seizures	Wolf v. Colorado
1958	First	Freedom of association	NAACP v. Alabama
1961	Fourth	Exclusionary rule excluding evidence obtained in violation of the amendment	Mapp v. Ohio
1962	Eighth	No cruel and unusual punishment	Robinson v. California
1963	First	Right to petition government	NAACP v. Button
1963	Fifth	Right to counsel (felony cases)	Gideon v. Wainwright
1964	Fifth	Immunity from self-incrimination	Mallory v. Hogan
1965	Sixth	Right to confront witnesses	Pointer v. Texas
1965	Fifth, Ninth, and others	Right to privacy	Griswold v. Connecticut
1966	Sixth	Right to an impartial jury	Parker v. Gladden
1967	Sixth	Right to a speedy trial	Klopfer v. N. Carolina
1969	Fifth	Immunity from double jeopardy	Benton v. Maryland
1972	Sixth	Right to counsel (all crimes involving jail terms)	Argersinger v. Hamlin
2010	Second	Right to keep and bear arms	McDonald v. Chicago
Rights not extended to the states			
Third	No quartering of soldiers in private dwellings		
Fifth	Right to grand jury indictment		
Seventh	Right to jury trial in civil cases under common law		
Eighth	No excessive bail		
Eighth	No excessive fines		

Interests, Institutions, and Civil Liberties

Many landmark Supreme Court civil-liberties cases were brought by unpopular litigants: members of radical organizations, publishers of anti-Semitic periodicals or of erotica, religious adherents to small sects, atheists and agnostics, or indigent criminal

defendants. This pattern promotes a media frame suggesting that civil liberties grow through the Supreme Court's staunch protection of the lowliest citizen's rights.

The finest example is the saga of Clarence Gideon in the book *Gideon's Trumpet* by Anthony Lewis, then the Supreme Court reporter for the New York Times . The indigent Gideon, sentenced to prison, protested the state's failure to provide him with a lawyer. Gideon made a series of handwritten appeals. The Court heard his case under a special procedure designed for paupers. Championed by altruistic civil-liberties experts, Gideon's case established a constitutional right to have a lawyer provided, at the state's expense, to all defendants accused of a felony. [5] Similar storylines often appear in news accounts of Supreme Court cases. For example, television journalists personalize these stories by interviewing the person who brought the suit and telling the touching individual tale behind the case. [6]

This mass-media frame of the lone individual appealing to the Supreme Court is only part of the story. Powerful interests also benefit from civil-liberties protections. Consider, for example, freedom of expression: Fat-cat campaign contributors rely on freedom of speech to protect their right to spend as much money as they want to in elections. Advertisers say that commercial speech should be granted the same protection as political speech. Huge media conglomerates rely on freedom of the press to become unregulated and more profitable. [7]

Many officials have to interpret the guarantees of civil liberties when making decisions and formulating policy. They sometimes have a broader awareness of civil liberties than do the courts. For example, the Supreme Court found in 1969 that two Arizona newspapers violated antitrust laws by sharing a physical plant while maintaining separate editorial operations. Congress and the president responded by enacting the Newspaper Preservation Act, saying that freedom of the press justified exempting such newspapers from antitrust laws.

Summary

In this section we defined civil liberties as individual rights and freedoms that government may not infringe on. They are listed primarily in the Bill of Rights, the ten amendments added in 1791 by the founders to address fears about the new federal government's potential to abuse power. Initially limited to the federal government, they now apply, though unevenly, to the states. What those liberties are and how far they extend are the focus of political conflict. They are shaped by the full range of people, processes, and institutions in American politics. Both unpopular minorities and powerful interests claim civil liberties protections to gain favorable outcomes.

The Fourteenth Amendment [86]

The Fourteenth Amendment (Amendment XIV) to the [United States Constitution](#) was adopted on July 9, 1868. It was one of the [Reconstruction Amendments](#) . The [amendment](#) discusses [citizenship](#) rights and [equal protection](#) of the [laws](#) . It was proposed in response to issues related to former [slaves](#) following the [American Civil War](#) . This amendment was bitterly contested. [Southern states](#) were forced to ratify it in order to regain representation in Congress. The Fourteenth Amendment is one of the most [litigated](#) parts of the Constitution. It forms the basis for [landmark decisions](#) such as [Roe v. Wade](#) (1972), and [Bush v. Gore](#) (2000). It remains the most important Constitutional amendment since the [Bill of Rights](#) was passed in 1791.

Summary

At the end of the Civil War, [Abraham Lincoln](#) freed the slaves. The problem was, he did not ask [Congress](#) . Congress had not passed a law to free slaves. Meanwhile, some states still had slavery. The [Thirteenth Amendment](#) freed the slaves. It became law in late 1865. Three years later the Fourteenth Amendment provided [civil rights](#) . [Republicans](#) controlled Congress during this period. They wanted to give full citizenship to freed slaves. But they also realized that giving civil rights to [blacks](#) , it opened the door for [women's suffrage](#) . It would lead to giving women the right to vote, which Congress did not want to do. If only section one was included in the amendment, the wording "all persons born or naturalized in the United States" would include women. For this reason, the word "male" was inserted in section two so the amendment would be approved by Congress.

Section one - citizenship

The first section of the Fourteenth Amendment gave citizenship to "all persons born or naturalized in the United States", and "subject to the jurisdiction thereof". The second clause, commonly called the Privileges and Immunities Clause , states that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This gave all [Americans](#) the protection of civil rights under the law. It forbids states from denying citizens their life, their liberty or their property without [due process](#) . States could not deny persons "equal protection of the laws." [5] It meant that for the first time all people would have the

same protection no matter what their color. The fact that states were mentioned makes them responsible for these protections the same as the [federal government](#) . The Fourteenth Amendment is cited more often in [lawsuits](#) than any other amendment.

Section two - apportionment

The second section changed a part of the original Constitution which counted slaves as [three-fifths](#) of a person. This was for the purpose of determining how many U.S. [congressmen](#) a state could have ([apportionment](#)). The second section established that every citizen would be counted as one person.

Sections three, four and five

The third section was intended to be strict with members of the [Confederacy](#) who fought against the United States. It required a two-thirds vote of Congress to allow leaders of the Confederacy to regain their citizenship or hold office. To be allowed to hold a federal office, former confederates had to swear an [oath](#) to uphold the constitution. Section four said the federal government would not repay Confederate debts. Section five means what it says, Congress will enforce the provisions of the 14th amendment.



Figure 5.2 Representative John A. Bingham of Ohio, the main framer of the Fourteenth Amendment ^[87]

The Exclusionary Rule ^[88]

The exclusionary rule holds that evidence collected in violation of the defendant's rights is sometimes inadmissible.

Learning Objective

- Describe the constitutional bases of the exclusionary rule

Key Points

- The [exclusionary rule](#) is grounded in the Fourth [Amendment](#) and is intended to protect citizens from illegal [searches and seizures](#) .
- The exclusionary rule is designed to provide disincentive to [prosecutors](#) and police who illegally gather evidence in violation of the Fifth Amendment of the [Bill of Rights](#) .
- The exclusionary rule is not applicable to aliens residing outside of U.S. borders. In *United States v. Alvarez-Machain*, 504 U.S. 655, the U.S. [Supreme Court](#) decided that property owned by aliens in a foreign country is admissible in court.



Pin It! Rights

[constitutional right](#) : Rights given to citizens by the constitution.

[right to counsel](#) : When a citizen accused has the right to be legally represented by a legal defense.

EXAMPLE:

- In 1914, the U.S. Supreme Court announced a strong version of the exclusionary rule in the case of *Weeks v. United States* under the Fourth Amendment prohibiting unreasonable searches and seizures. This decision, however, created the rule only on the federal level. The "Weeks Rule," which made an exception for cases at the state level, was adopted by numerous states during [prohibition](#) .

Background

The exclusionary rule is a legal principle in the United States holding that evidence collected or analyzed in violation of the [defendant's constitutional rights](#) is sometimes inadmissible for criminal prosecution. This may be considered an example of a prophylactic rule formulated by [the judiciary](#) in order to protect a constitutional right. However, in some circumstances, the exclusionary rule may also be considered to follow directly from the constitutional language. For example, the Fifth Amendment's command that no person "shall be deprived of life, liberty or property without [due process](#) of law. "

The exclusionary rule is grounded in the Fourth Amendment and is intended to protect citizens from illegal searches and seizures. The exclusionary rule is also designed to provide disincentive to prosecutors and police who illegally gather evidence in violation of the Fifth Amendment of the Bill of Rights. The exclusionary rule furthermore applies to violations of the Sixth Amendment, which guarantees the [right to counsel](#) .

Most states have their own exclusionary remedies for illegally obtained evidence under their state [constitutions](#) and/or statutes. This rule is occasionally referred to as a legal technicality because it allows defendants a defense that does not address whether the crime was actually committed. In this respect, it is similar to the explicit rule in the Fifth Amendment protecting people from double jeopardy. In strict cases, when an illegal action is used by police/prosecution to gain any incriminating result, all evidence whose recovery stemmed from the illegal action can be thrown out from a [jury](#) .

The exclusionary rule applies to all persons within the United States regardless of whether they are citizens, immigrants (legal or illegal), or visitors.

Limitations of the Rule

The exclusionary rule was passed in 1917, and does not apply in a civil case, a grand [jury proceeding](#) , or a parole revocation hearing.

Even in a criminal case, the exclusionary rule does not simply bar the introduction of all evidence obtained in violation of the Fourth, Fifth, or Sixth Amendments.

The exclusionary rule is not applicable to aliens residing outside of U.S. borders. In *United States v. Alvarez-Machain*, 504 U.S. 655, the Supreme Court decided that property owned by aliens in a foreign country is admissible in court. Prisoners, probationers, parolees and persons crossing U.S. borders are among those receiving limited protections. Corporations, by virtue of being, also have limited rights under the Fourth Amendment.

Criticism of the Rule

The exclusionary rule as it has developed in the U.S. has been long criticized, even by respected jurists and commentators. [Judge Benjamin Cardozo](#), generally considered one of the most influential American jurists, was strongly opposed to the rule, stating that under the rule, "The criminal is to go free because the constable has blundered. "

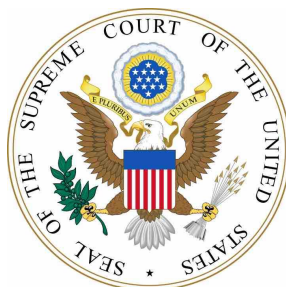
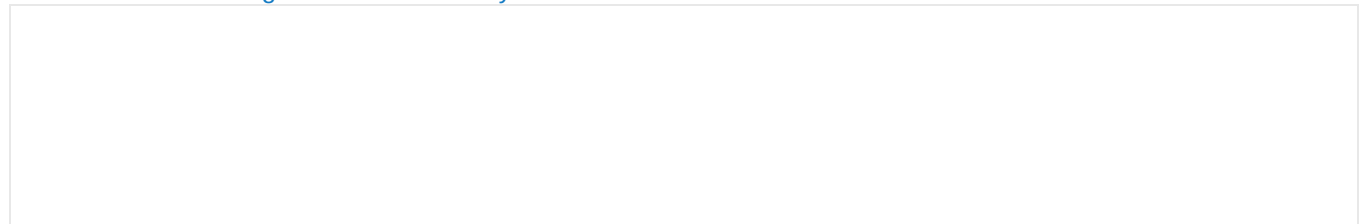


Figure 5.3 U.S. Supreme Court Seal. The Supreme Court of the United States is the highest court in the country. It has ultimate (but largely discretionary) appellate jurisdiction over all federal courts and over state court cases involving issues of federal law, and original jurisdiction over a small range of cases. ^[89]

Court Cases Pertaining to The Exclusionary Rule





Pin It! Map v Ohio

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