

EDITION

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Essentials



CHAPTER 04

Civil Liberties

Chapter Goals

- Outline the founding debate about civil liberties and explain how civil liberties apply to the federal government and the states.
- Explain how the Supreme Court has interpreted freedom of religion through the establishment and free exercise clause.
- Explain how the Supreme Court has interpreted freedom of speech, assembly, petition and the press.
- Explain how the Supreme Court has interpreted the right to bear arms.
- Explain how the Supreme Court has interpreted the right to due process.
- Explain how the Supreme Court has identified and interpreted the right to privacy.

What Are Civil Liberties?

The *Founders* and the *Framers of the Constitution* were the product of the enlightenment age and believed in natural rights, that is rights are given by God, not by government, and as such can not be taken away by government. In essence governments exist to protect the rights of the people.

Since every state had its own constitution, it was the view of many of the delegates at the Constitutional Convention that the rights of citizens would be protected by the states.

This did not bode well for the Antifederalists who knew that the proposed constitution did not have sufficient safeguards to protect the liberties of the people.

What Are Civil Liberties?

Although there were few restrictions against the government in **Article 1 Section 9**, the antifederalist wanted more guaranteed protections from the newly empowered central government. Eventually, ten of the twelve amendments proposed by the Congress were ratified by the states.

These first ten amendments are commonly known as the *Bill of Rights*.

Knowing your civil liberties may not guarantee their protection; but will affirm your confidence to pursue your happiness without trampling on others' rights.

What Are Civil Liberties?

- **Civil liberties:** areas of personal freedom (life, Liberty, Property) that are constitutionally protected from government interference.

Substantive: limits on what the government can or cannot do

Procedural: rules regarding how the government must act

- The term civil liberties also refers to:
 - Rights in the Constitution. Some rights are identified in the body of the Constitution, and more rights are listed in the Bill of Rights.

What Are Civil Liberties?

- Civil liberties: a check on the majority in order to allow unpopular minorities to speak and act as they desire.

Note: Majority/Minorities has nothing to do with race or ethnicity, but rather political minorities being protected by political majorities. Reference Federalist No.51

- They are the national means to protecting the marketplace of ideas for a healthy democracy.
- Civil liberties allow people to live according to their preferences, of their own choosing.

What Are Civil Liberties?

- Article VI of Constitution bans religious qualifications for federal office.
- Article III, Sec. 2 guarantees jury trials in federal criminal cases
- Article I, Section 9 Prohibits:
 - ***Bills of Attainder*** (*legislative acts rather than judicial trials pronouncing specific persons guilty of crimes*)
 - ***Ex Post Facto*** (after the fact) laws (*legislative acts making some behavior illegal that was not illegal when it was done.*)
 - The Constitution also prohibits suspension of the **writ of *habeas corpus***, except during rebellion or invasion of the country.

Origins of the Bill of Rights

The Constitution did not originally include a bill of rights.

- Framers did not think traditional liberties needed specific protections because the Constitution already created limited government.
- The Federalists, led by Alexander Hamilton, argued that a bill of rights was unnecessary, because the national government was given only delegated powers and as such to declare that things shall not be done when there is no power to do is redundant.

Origins of the Bill of Rights

The Constitution did not originally include a bill of rights.

- The Antifederalists saw the potential for government abuse of power without a bill of rights.
- Ratification was an uncertainty, particularly in Virginia and New York.
- To win ratification, however, they had to promise to provide these rights explicitly.
- During the first Congress 12 amendments were sent to the states which ratified ten of them in 1791. Became known as the *Bill of Rights*.

Origins of the Bill of Rights

- *Bill of Rights*: The first 10 amendments to the U.S. Constitution
- Bill of Rights is an Antifederalist contribution.
- Nationalizing the Bill of Rights (Incorporation Theory)
 - Originally understood as applying only to the federal government.
 - Fourteenth Amendment incorporates the Bill of Rights to the states.
 - However, the Supreme Court did not interpret it that way for nearly 100 years.

The Bill of Rights

TABLE 4.1

| The Bill of Rights

Amendment I	Congress cannot make any law establishing a religion or abridging freedoms of religious exercise, speech, the press, assembly, or petition.
Amendments II, III, IV	No branch of government may infringe upon the right of the people to keep arms (II), cannot arbitrarily take houses for militia (III), and cannot search for or seize evidence without a court warrant swearing to the probable existence of a crime (IV).
Amendments V, VI, VII, VIII	The courts cannot hold trials for serious offenses without provision for a grand jury (V), a trial jury (VII), a speedy trial (VI), presentation of charges and confrontation by the accused of hostile witnesses (VI), and immunity from testimony against oneself and immunity from trial more than once for the same offense (V). Furthermore, neither bail nor punishment can be excessive (VIII), and no property can be taken without “just compensation” (V).
Amendments IX, X: Limits on the national government	Any rights not enumerated are reserved to the state or the people (X), and the enumeration of certain rights in the Constitution should not be interpreted to mean that those are the only rights the people have (IX).

Nationalizing the Bill of Rights

1833: *Barron v. Baltimore*

- The Bill of Rights was limited only to the actions of the federal government, not to the state governments

1897: The Supreme Court ruled the due process clause of the Fourteenth Amendment applied to the states.

- It prohibited states from taking property for public use without just compensation.

1925: The Supreme Court ruled that freedom of speech applied to the states.

- Freedom of speech was declared a “fundamental” personal right protected by the Fourteenth Amendment’s due process clause.

Nationalizing the Bill of Rights

In 1931 and 1939, Court rulings protected additional freedoms from impairment by the states.

- It ruled that freedom of the press and freedom of assembly and petitioning of the government also applied to the states.

A 1937 case established the principle of **selective incorporation**.

- Provisions of the Bill of Rights could be selectively applied as limits on the states through the Fourteenth Amendment.

Nationalizing the Bill of Rights

Today, only the Third and Seventh amendments remain unincorporated.

- It should be noted that almost every state voluntarily complies with the Seventh Amendment's requirement of jury trials.

States retain some ability to restrict individual freedoms.

- Example: the power of the government to require citizens to wear masks or submit to vaccinations.
- State governments can take emergency actions so long as they are not prohibited by the federal or state constitutions.

Incorporation of the Bill of the Rights into the Fourteenth Amendment

TABLE 4.2 | Incorporation of the Bill of Rights into the Fourteenth Amendment

SELECTED PROVISIONS AND AMENDMENTS	INCORPORATED	KEY CASES
Eminent domain (V)	1897	<i>Chicago, Burlington and Quincy R.R. v. Chicago</i>
Freedom of speech (I)	1925	<i>Gitlow v. New York</i>
Freedom of press (I)	1931	<i>Near v. Minnesota</i>
Free exercise of religion (I)	1934	<i>Hamilton v. Regents of the University of California</i>
Freedom of assembly (I) and freedom to petition the government for redress of grievances (I)	1937	<i>DeJonge v. Oregon</i>
Free exercise of religion (I)	1940	<i>Cantwell v. Connecticut</i>
Nonestablishment of state religion (I)	1947	<i>Everson v. Board of Education</i>
Freedom from warrantless search and seizure (IV) ("exclusionary rule")	1961	<i>Mapp v. Ohio</i>
Freedom from cruel and unusual punishment (VIII)	1962	<i>Robinson v. California</i>
Right to counsel in any criminal trial (VI)	1963	<i>Powell v. Alabama; Gideon v. Wainwright</i>
Right against self-incrimination and forced confessions (V)	1964	<i>Malloy v. Hogan</i>
Right to counsel (VI)	1964	<i>Escobedo v. Illinois</i>
Right to remain silent (V)	1966	<i>Miranda v. Arizona</i>
Right against double jeopardy (V)	1969	<i>Benton v. Maryland</i>
Right to bear arms (II)	2010	<i>McDonald v. Chicago</i>
Excessive fines prohibited (VIII)	2019	<i>Timbs v. Indiana</i>
Jury trial (VI)	2020	<i>Ramos v. Louisiana</i>

The Bill of Rights

The first Eight Amendments grant specific individual rights.

1. Freedom of Religion, Speech, Press, Assembly, and Petition.
2. Right to bear arms
3. No quartering of troops in your home.
4. No unreasonable search and seizures
5. Grand juries, double jeopardy, self-incrimination, due process of law, no taking of property.
6. Speedy trial by jury where crime occurred, informed of accusation, confront witness, call witness for defense, legal counsel.
7. Trial by jury in civil cases.
8. No excessive bail or fines, no cruel and unusual punishment.
9. States that the listing of these rights does not mean they are the only one's people have.
10. States that any powers not granted to the federal government are reserved for the state governments or to the people.

The Bill of Rights

- ❖ The Bill of Rights provides the “*thou shalt not*s” directed at the government.
- ❖ It provides rights for political, religious, or racial minorities against the majority, because government policy toward civil rights tends to reflect the views of the majority.

The First Amendment

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.

The First Amendment: Freedom of Religion

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

- The **establishment clause**
 - Freedom *from* the state imposing any particular religion.
- The **free exercise clause**
 - Freedom *to practice* the religion of your choice without state interference.

The First Amendment: The Establishment Clause

Establishment Clause

Prevents an official church

- Government can aid religious institutions as long as it does not favor some over others.
- Wall of Separation
 - Lemon test:
 1. government involvement must have a secular purpose;
 2. its effect is neither to advance nor to inhibit religion, and;
 3. it does not entangle government and religious institutions in each other's affairs.

The First Amendment: The Free Exercise Clause

Free Exercise Clause

- Can believe and practice religion of one's choice
- Can hold no religious beliefs without consequence
- As long as it does not harm others in the name of religion (or lack thereof), it is protected.

The First Amendment: The Free Exercise Clause

Free Exercise Clause

West Virginia State Board of Education v. Barnette (1943)

- The Court upheld the right of children of Jehovah's Witnesses to refuse to salute and pledge allegiance to the flag on grounds their religious faith does not permit it.

Burwell v. Hobby Lobby Stores (2014)

- The Court found that the government cannot compel a closely-held business to provide birth control for employees against the owners' religious beliefs.

The First Amendment: Wall of Separation

The Separation of Church and State:

- Government cannot breach the wall between church and state.
- Disagreement on over the height of the wall: Examples are prayer in school and public displays of religious symbols.
- **Not found in the constitution.**
- A phrase taken from a letter Thomas Jefferson wrote to the Danbury Baptist Association of Connecticut on January 1, 1802.
- Reasserts the belief that religion is a matter to be addressed by man and his god, and as such government should not interfere with that activity.
- First used by Justice Hugo Black in 1947 case of *Everson v. Board of education of the township of Ewing*

The First Amendment: Political Speech

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

- Democracy requires a marketplace of ideas.
- Political speech is the most consistently protected of all forms of speech.
- Freedom of speech is first and foremost -Political Speech.

Ref: Original Meaning: Freedom of Speech or of the Press from supplemental reading material in faculty website.

- But are there limits?
 - In short, the Court has said “yes,” but there is a lot of latitude.

The First Amendment: Political Speech

Political Speech

- *Highly* protected by strict scrutiny, legal standards
 - Must establish “compelling reasons” and narrowly defined to limit.
- Includes *actions* expressing political ideas
 - Ex: financial contributions to political causes, protests.
- Protected unless leads to immediate harm (clear and present danger)
- There are a few time and place limitations.
 - Ex: fire in theatre; yelling at night in a neighborhood

The First Amendment: Fighting Words and Hate Speech

- Fighting words are hard to ban because the target of them always has the option of ignoring them.
- Likewise, *hate speech* is difficult to ban because it is the expression of a political idea.
- When words leave the realm of *thought* and move into *direct and immediate action*, their speakers can be held accountable.
- Speech (including writing, Facebook and Twitter posts, and text messages) that threatens terrorist acts, mass shootings, and other mayhem are increasingly dealt with in terms of protecting the public, not free speech.
- This has been a particularly pressing issue on college campuses, where the needs of public safety are balanced against the rights of speakers to air controversial opinions.

The First Amendment: Commercial Speech

- Commercial speech is not nearly as protected as political speech.
- Advertisements have only partial First Amendment protections.
- Typically, a government need only have a rational reason to ban an advertisement. Cigarette advertisement
- False and misleading advertising is still subject to regulation.
- People can face consequences for perfectly *legal* speech if employers deem it problematic.
- Civil liberties protect the right to express views.
- There is NO right to be employed or supported by employer, public, or others who disagree.

The First Amendment: Symbolic Speech, Speech Plus, Assembly, and Petition

- The First Amendment protects a variety of other kinds of speech:
- First Amendment protects an individual right to peacefully assemble and to petition the government for a redress of grievances.
- Peaceable Assembly
 - Privately communicate with government officials.
 - Privately communicate with other citizens.
 - Freedom to join interest groups.
 - Allows municipalities to require permits, control traffic and prevent riots and destruction of private property.
- Symbolic speech—peaceful actions designed to send a political message (such as flag burning)—is protected.

The First Amendment: Freedom of the Press

- Freedom of the press is broad.
- Freedom of the press is a specific right the people have to criticize their government, public officials and public orders free from any sort of recrimination from the government.
- The government must exercise Prior restraint in its efforts to block publication of material it deems libelous or harmful. Can only be allowed in extraordinary circumstances. Ex. Military or diplomatic information.
- States have shield laws to protect journalistic sources.
 - Shield laws allow reporters to refuse to testify when asked to reveal their sources.
 - However, there are no shield laws at the federal level.

Freedom of the Press: The Print Media

Defamation in Writing

- The press can be sued for statements made in “reckless disregard of the truth” that are damaging to a victim because they are “malicious, scandalous, and defamatory.”
 - When written, such speech is **libel**; when spoken, it is **slander**.
 - Libel and Slander can defame a private citizen's character, reputation, business or property rights.
 - Hard to prove Libel and Slander against a public figure whose activities are in the public domain.
- The emergence of the internet has pushed courts to decide whether libel laws apply to internet content.
 - Federal courts have generally absolved internet service providers from lawsuits over content posted by others.

Obscenity and Pornography: Definitions

- Pornography and obscenity are difficult to define – Unprotected Speech
 - Pornography and obscenity are difficult to define, thus hard to regulate.
 - Must be kept out of reach or sight of children
 - Obviously, Internet is not especially compliant
 - Congress has passed the Communications Decency Act (1996) to try to clarify obscenity in the online world.
 - Child pornography is banned; harmful to children involved.
 - Involves several crimes unrelated to speech.
- Justice Potter Stewart wrote that pornography was impossible to define.
 - But he added, “I know it when I see it.”

The Second Amendment

2nd Amendment The Right to Bear Arms

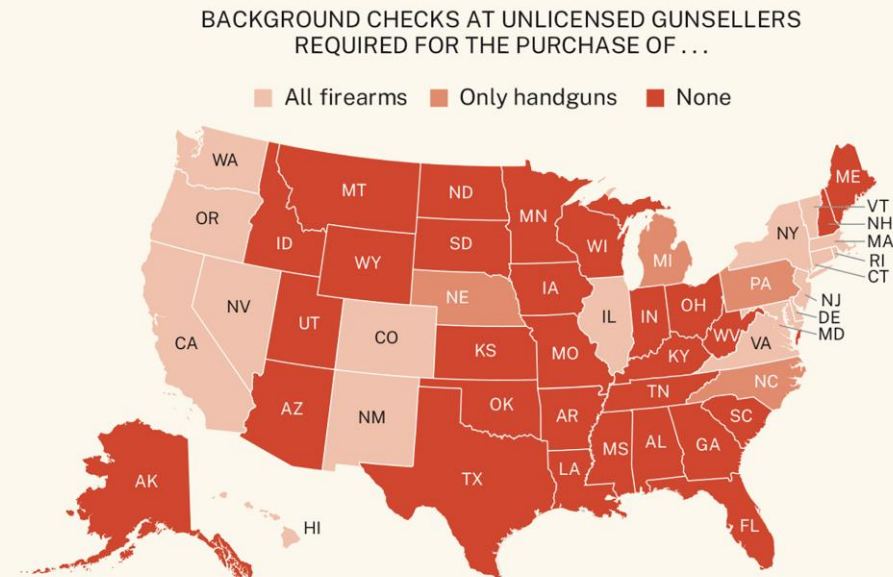
A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

- Applies to states and localities.
- Banning the possession of a firearm in the home is not possible.
- States and local governments can place different boundaries around waiting periods, registration, types of arms allowed, and other aspects related to access.
- Limited to common weapons carried by the common citizen capable of military service.

Gun Rights by State

FIGURE 4.1 | Gun Rights by State

Although state gun laws must conform to the Second Amendment as interpreted by the U.S. Supreme Court, laws concerning gun sales and ownership vary widely from state to state. While federal law requires background checks when purchasing a firearm from a licensed seller, only 21 states require them from unlicensed sellers as well. Should all states require unlicensed firearm sellers to perform background checks? Why or why not?



SOURCE: Background Checks, Gun Law Navigator, www.everytownresearch.org/ (accessed 1/24/22).

Rights of the Accused: Due Process

4th Amendment Rights of the Criminally Accused

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches 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.

Rights of the Accused: Due Process

4th Amendment Rights of the Criminally Accused

Due process: the right of every citizen against arbitrary action by national or state government

- Procedural safeguards intended to protect the innocent by guaranteeing a fair and just process
- Together, the Fourth, Fifth, Sixth, and Eighth amendments are the essence of the due process of law.

The Fourth Amendment: Unlawful Searches and Seizures

4th Amendment and search and seizure

- The Fourth Amendment guarantees the security of citizens against unreasonable (i.e., improper) searches and seizures.
- **Exclusionary rule:** the ability of courts to exclude illegally obtained evidence (*Mapp v. Ohio*, 1961).
 - *United States v. Jones* (2012)
 - The Court ruled that prosecutors could not attach a GPS device to a vehicle to secretly monitor a suspect.
 - Mandatory drug testing also falls under the Fourth Amendment (it is permitted in some cases), as does the use of drug-sniffing dogs (requires consent or a warrant).

The Fifth Amendment

The 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.

The Fifth Amendment: Rights of the Accused

The Fifth Amendment covers court-related rights.

- Right to a **grand jury**
 - The grand jury determines whether sufficient evidence is available to justify a trial; they do not rule on the accused's guilt or innocence.
- Protection against **double jeopardy**
 - This protects a person from being tried twice for the same crime.

The Fifth Amendment

The Fifth Amendment also includes:

- “Miranda rights” and the **Miranda rule** (*Miranda v. Arizona* 1966)
 - Persons who are under arrest must be informed prior to police interrogation of their rights to remain silent and to have the benefit of legal counsel.
 - Right to remain silent, right not to incriminate yourself, right to a lawyer, right to legal representation.
- Eminent domain
 - Government can take private property for public use but must show a public purpose.
 - Government must also make a fair payment.

Rights of the Accused: The Fifth Amendment

DEFENDANT	LOCATION
SPECIFIC WARNING REGARDING INTERROGATIONS	
1. YOU HAVE THE RIGHT TO REMAIN SILENT.	
2. ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.	
3. YOU HAVE THE RIGHT TO TALK TO A LAWYER AND HAVE HIM PRESENT WITH YOU WHILE YOU ARE BEING QUESTIONED.	
4. IF YOU CANNOT AFFORD TO HIRE A LAWYER ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONING, IF YOU WISH ONE.	
SIGNATURE OF DEFENDANT	DATE
WITNESS	TIME
<input type="checkbox"/> REFUSED SIGNATURE	
SAN FRANCISCO POLICE DEPARTMENT	
PR.9.1.4	

The Sixth Amendment

6th Amendment Rights of the Criminally Accused

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 previously 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 defense.

The Sixth Amendment

The Sixth Amendment is crucial for running fair trials. It includes:

- The right to a speedy trial.
- The right to confront witnesses before an impartial jury.
- The right to counsel
 - *Gideon v. Wainwright* (1963): Anyone facing imprisonment has the right to an attorney, even if they are unable to afford one (public defender).

The Eighth Amendment: Cruel and Unusual Punishment

8th Amendment Rights of the Criminally Accused

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

- Prohibits:
 - excessive bail
 - excessive fines
 - cruel and unusual punishment
- The death penalty is allowed, but it must follow due process carefully.
 - States decide whether to allow the death penalty.
 - If allowed, states determine execution method(s).

The Right to Privacy

- The **right to privacy** is the right to be left alone from government interference in personal areas.
- Right to privacy **is not** explicitly written in the Constitution, but has been interpreted in the Fourth Amendment, facilitated by the Ninth
 - Birth control
 - Abortion
 - Sexual orientation
 - The right to die
- States and legal scholars have debated whether state legislatures should create laws and decide the validity of those laws on other grounds since there is no explicit right.

Rights of the States and the People

9th Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

✓ *The Ninth Amendment says rights exist that are not explicitly delineated in the Constitution.*

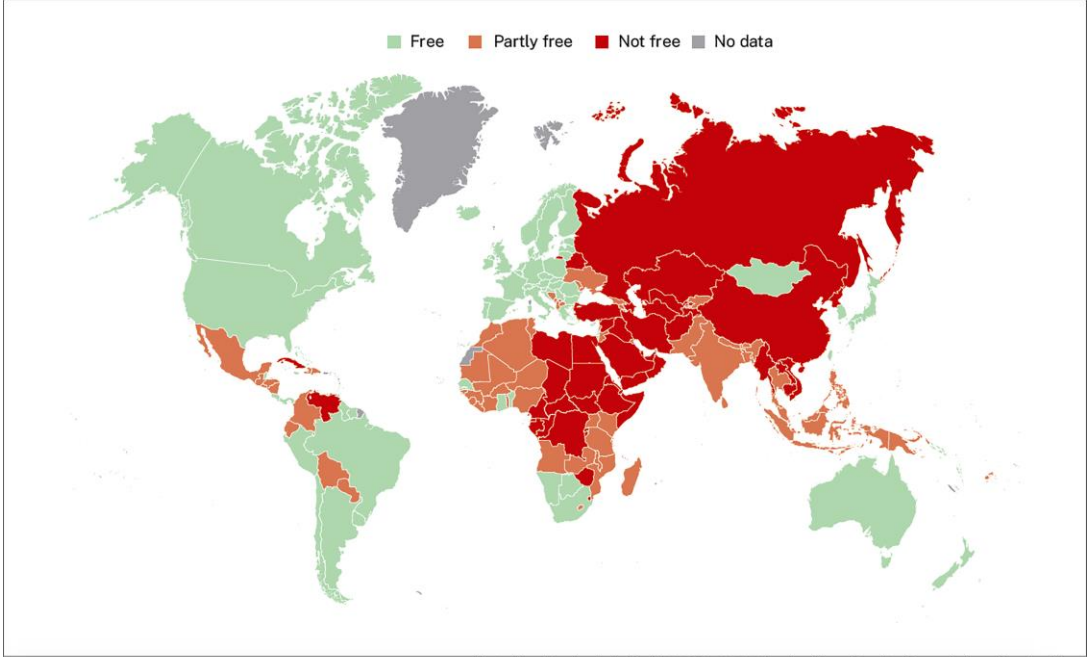
Rights of the States and the People

10th Amendment Right of the People

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

- ✓ *If the constitution is silent on an issue, then it falls within the purview of the states or to the people.*

America Side by Side



Adapted from Freedom in the World 2021 Map © 2021 Freedom House. Reprinted by permission of Freedom House

AMERICA | SIDE BY SIDE

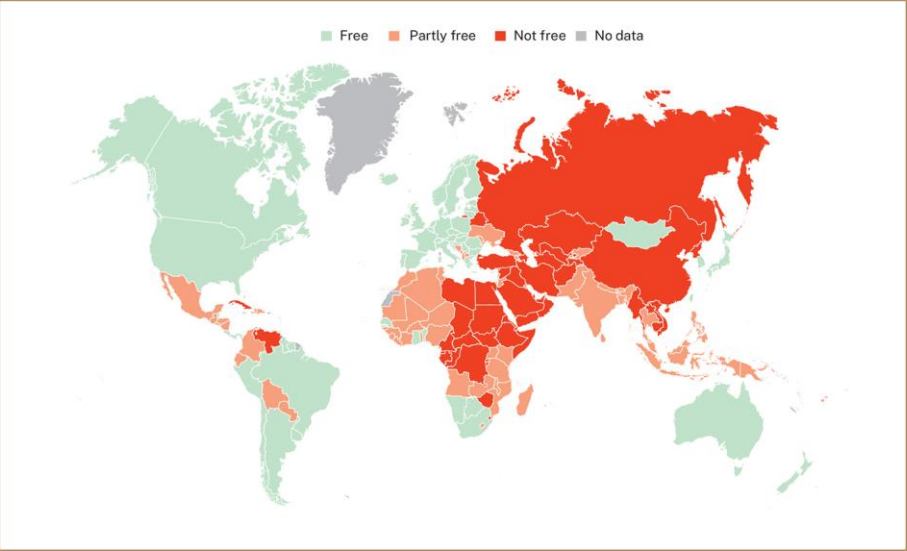
Civil Liberties in Global Perspective

Civil liberties cover a broad swath of rights, from freedom of expression to organizational rights to the functioning of the rule of law. The enshrinement of such protections varies tremendously worldwide, with citizens in some countries enjoying far stronger civil liberties safeguards than others. Freedom House releases an annual report that compiles a scale of civil liberties protections based on scores of 15 subcategories, ranging from freedom from surveillance to due process in civil and criminal matters.

1. Looking at the map, what geographic patterns do you see? Are there some areas that have stronger civil

liberties protections than others? Do countries seem to have levels of civil liberties protections similar to those of their neighbors?

2. What factors about a country do you think are likely to correlate with stronger or weaker protections of civil liberties? Why would a country be more or less likely to have protections for freedom of expression and the rule of law? Compare this map with the map in the America Side by Side graphic in Chapter 1. What commonalities and differences do you see?

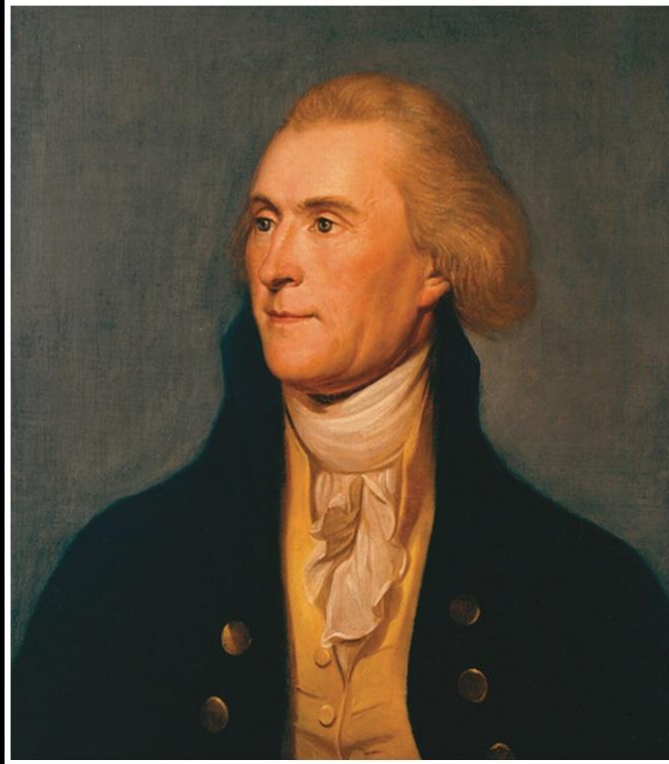


SOURCE: Freedom House, *Freedom in the World 2021 Report*, Civil Liberties scale, (accessed 10/22/21).

Readings From Faculty Website

- *The Constitution of the United States*
- *Original Meaning: Freedom of Speech or of the Press*
- *Meaning of the commerce clause*
- *Federalist No. 51 – Checks and Balance*
- *Letters between the Danbury Baptist and Thomas Jefferson*

Civil Liberties



RIGHTS

Can the liberties of a nation be thought secure if we have lost the only firm basis, a conviction in the minds of the people that these liberties are the gift of God?